

**THE UNITED STATES MILITARY AND ITS
ANTI-GAY DISCRIMINATORY POLICIES:
IMPACT ON THE ELDERLY LGBT
COMMUNITY**

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Gay and lesbian service members and veterans are disadvantaged as they age compared with their heterosexual counterparts because of anti-gay discrimination in the military. Through the combination of pervasive prejudicial treatment since the beginning of military service in the United States and more recent statutes such as Don't Ask, Don't Tell and the Defense of Marriage Act, being gay has been a punishable offense in the military and has often led to less than honorable discharge, loss of benefits, and a lasting stigma attached to the discharged service member.

This Note proposes a solution to end the anti-gay discrimination in military service and give some form of redress to the elderly gay and lesbian service members and veterans who have already suffered under the discriminatory practices. Ms. Myott first discusses the history of anti-gay sentiment in the military, as well as the benefits offered to military veterans and their surviving spouses. Next, Ms. Myott discusses the impact of these practices on elderly gay and lesbian veterans and the constitutionality of legislation that enabled present-day anti-gay discrimination.

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The author would like to thank her family, in particular her parents and nana, for always believing in, supporting, and encouraging her. The author dedicates this Note to her brother, who has taught her not only what it means to live a life of purpose, but also the importance of believing in herself.

Finally, Ms. Myott suggests a multi-faceted solution to end the discrimination by treating gays and lesbians and heterosexuals in the military equally, repealing the discriminatory legislation, requiring the military to extend survivors' benefits to domestic partners in states that do not allow same-sex marriage, and implementing an appeals procedure for those service members who were discharged based on sexual orientation.

I. Introduction

On June 11, 1992, the Washington National Guard discharged fifty-five-year-old Colonel Margarethe Cammermeyer from her position as Chief of Nursing due to her sexual orientation.¹ When she was a young woman, Cammermeyer joined the United States military as a nurse in an effort to repay the country that rescued her Norwegian family from Nazi conquest and provided them a home.² Throughout her twenty-seven years of noble military service, she acquired a doctorate in nursing, a Bronze Star, and the utmost adoration from her commanding officers.³ Yet despite her many achievements, Colonel Cammermeyer became one of the highest-ranking officers the military discharged for sexual orientation.⁴

The question of whether Cammermeyer was a lesbian arose during a security clearance interview.⁵ Cammermeyer attempted to increase her security clearance to top secret to qualify for appointment as the next national Chief Nurse of the National Guard.⁶ Although she could have lied and preserved her chances for promotion, Cammermeyer lived her life according to the motto of "duty, honor, and integrity."⁷ Therefore, when the interviewer asked her about her sexual orientation, Cammermeyer replied, "I am a lesbian."⁸ Those four words resulted in an investigation into Cammermeyer's sexuality, ul-

1. NATHANIEL FRANK, UNFRIENDLY FIRE: HOW THE GAY BAN UNDERMINES THE MILITARY AND WEAKENS AMERICA 23-24 (2009).

2. MARGARETHE CAMMERMEYER WITH CHRIS FISHER, SERVING IN SILENCE 38-39 (1994). Cammermeyer and her family lived in Nazi-occupied Norway during World War II, directly across the street from Nazi headquarters. *Id.* at 11. In 1945, the Allies (primarily American) liberated Norway, and in 1951 the Cammermeyer family immigrated to America. *Id.* at 14, 18. Cammermeyer achieved American citizenship in 1960, and in 1961 she joined the Army. *Id.* at 39.

3. FRANK, *supra* note 1, at 24.

4. *Id.* at 23.

5. *Id.* at 24.

6. CAMMERMEYER, *supra* note 2, at 2.

7. *Id.* at 5.

8. *Id.* at 3.

timately leading the military to discharge her after almost three decades of service.⁹ Following her discharge, Cammermeyer sued the United States Armed Forces for its discriminatory policies against gays and lesbians.¹⁰

The LGBT community's relationship with the military historically has been tenuous, especially considering "the persistent presence of gays within the military and the equally persistent hostility toward them."¹¹ Since the American Revolution, the armed forces have discriminated against gay and lesbian service members.¹² Initially, the military discharged individuals for same-sex conduct only; however, as medical and social understandings of homosexuality developed, the military discharged individuals for sexual orientation as well.¹³ Thus, the military eventually found it sufficient to discharge service members with a gay or lesbian *status*, even if they had never engaged in same-sex *acts*.¹⁴

Historically, individuals targeted by the military's anti-gay discriminatory policies often received a less than honorable discharge.¹⁵ Thus, the immediate impact of military discrimination is clear; it is less clear how those policies have impacted the LGBT community in a more lasting manner. Even as society continues to debate the political, social, and moral issues surrounding the military's discriminatory treatment of its gay and lesbian service members, Americans give minimal attention to the enduring effects of that mistreatment on those discharged under less than honorable conditions, as well as the lasting effects on LGBT veterans who escaped detection and received

9. *Id.* at 3–5.

10. FRANK, *supra* note 1, at 23.

11. RANDY SHILTS, CONDUCT UNBECOMING: LESBIANS AND GAYS IN THE U.S. MILITARY 3 (1993). Although this Note does not discuss specifically the military's treatment of bisexual and transgendered individuals, it uses the common phrase "Lesbian, Gay, Bisexual and Transgender" or "LGBT" to refer to the gay and lesbian community.

12. *Id.* at 7.

13. See Timothy Haggerty, *History Repeating Itself: A Historical Overview of Gay Men and Lesbians in the Military Before "Don't Ask, Don't Tell,"* in DON'T ASK, DON'T TELL: DEBATING THE GAY BAN IN THE MILITARY 9, 10–13 (Aaron Belkin & Geoffrey Bateman eds., 2003). "As policy evolved, however, and the homosexual 'personality type' was increasingly recognized as inherently disruptive to the morale and cohesion of troop discipline and order, the armed forces systematically began initiating separation procedures against individuals who may not have committed any disorderly acts." *Id.* at 12.

14. *Id.* at 17.

15. Nancy J. Knauer, *LGBT Elder Law: Toward Equity in Aging*, 32 HARV. J.L. & GENDER 1, 17 (2009).

honorable discharges. Most Americans give minimal attention to those former service members who cannot receive veterans' benefits due to their sexual orientation.¹⁶ Most Americans give minimal attention to those surviving spouses and domestic partners of service members or veterans who cannot enjoy the federal spousal benefits available to heterosexual surviving spouses.¹⁷

This Note studies how the United States military's anti-gay discriminatory policies affect gay and lesbian ex-service members, veterans, and their families. In particular, it focuses on how the elderly subset of the LGBT population suffers as a result of those policies. Part II of the Note examines the history of the relationship between the military and gays and lesbians, as well as the benefits the federal government offers to military veterans and their surviving spouses and often denies to LGBT Americans. Part III analyzes the detrimental consequences that the military's anti-gay policies have had on LGBT elders. Further, it discusses current and former governmental policies that most negatively affect LGBT elders—Don't Ask, Don't Tell (DADT) and the Defense of Marriage Act (DOMA)—and the increasing vulnerability of those policies in an evolving society and political climate.

Finally, Part IV recommends a multi-faceted solution to the issue. First, the government must ensure that the repeal of DADT does not simply shift anti-gay discrimination from de jure to de facto and that the United States military actually treats its gay and lesbian service members equally to their heterosexual counterparts. Second, Congress needs to repeal DOMA or the Supreme Court needs to find it unconstitutional so that persons in same-sex marriages may enjoy the same federal spousal benefits available to those in opposite-sex marriages. Third, until the federal government or all fifty states legalize same-sex marriage, the military needs to extend survivors' benefits to domestic partners in those states that do not allow same-sex marriage. Finally, the federal government needs to implement an appeals procedure whereby service members discharged on account of same-

16. See Major Sherilyn A. Bunn, *Straight Talk: The Implications of Repealing "Don't Ask, Don't Tell" and the Rationale for Preserving Aspects of the Current Policy*, 203 MIL. L. REV. 207, 227 (2010).

17. See Annick Persinger, Note, *Still Pioneers: Special Social and Economic Hardships for Elderly Gays and Lesbians*, 21 HASTINGS WOMEN'S L.J. 137, 144 (2010) ("As the federal government does not recognize state-approved same-sex marriages, these couples may not avail themselves to the more than 1,135 federal rights and benefits afforded to their heterosexual counterparts.").

sex conduct or status can petition to have their veterans' benefits reinstated and, in egregious circumstances, can seek punitive damages.

II. Background

A. History of the Military's Anti-Gay Policies and Practices

Despite the military's proscription against homosexuality, gays and lesbians have served since the country's founding, becoming some of the United States' most prized military heroes.¹⁸ History reflects a gradual transformation in the military's treatment of its LGBT service members, from punishing same-sex conduct to punishing same-sex status, and from finding homosexuality per se incompatible with military service to allowing gays to serve so long as they remain closeted.¹⁹ During the American Revolution, the United States Army punished sodomy as a perverted or unnatural act that one succumbed to in times of moral weakness.²⁰ The first recorded instance of the army discharging a soldier for same-sex conduct occurred in 1778 when the army found Lieutenant Gotthold Frederick Enslin guilty of sodomy, or "unnatural" sexual penetration, with a male private.²¹ The presence of gays in the military grew in the ensuing generations, with documentation clearly proving that they served during the Civil War.²² The military did not codify its sodomy ban until World War I when the revisions of the 1916 Articles of War criminalized sodomy when committed as part of an assault.²³ The revised 1920 Articles of War made consensual sodomy a crime in and of itself.²⁴

Partially in response to public outrage when the United States Navy purged gay sailors through the use of entrapment in 1919, the

18. SHILTS, *supra* note 11, at 12. Ironically, history suggests that without the vital aid of General Frederick von Steuben, a man known to be gay, the United States might never have emerged victoriously from the American Revolution as a country. *Id.* at 7. In fact, "historians have counted Steuben, along with General Washington, as one of only two men whose services were 'indispensable' to the success of the Revolution." *Id.* at 10-11.

19. See FRANK, *supra* note 1, at 6-7.

20. *Id.* at 1-2.

21. *Id.* at 1. Enslin was drummed out of the army, meaning that an officer's sword was broken in half over his head, a sentence that General Washington approved with "Abhorrence and Detestation of such Infamous Crimes." SHILTS, *supra* note 11, at 12.

22. *Id.* at 14.

23. FRANK, *supra* note 1, at 5.

24. *Id.*

military began to move from punishing same-sex conduct to punishing sexual orientation or same-sex status.²⁵ Policies during World War II systematized the military's discrimination by preempting gays and lesbians from serving based on the classification of homosexuality as a mental illness.²⁶ By the end of World War II, the military officially banned gays, even in the absence of same-sex conduct.²⁷ LGBT service members did not fare better during the Cold War. In 1949, the Department of Defense issued a policy statement that "[h]omosexual personnel, irrespective of sex, should not be permitted to serve in any branch of the Armed Forces in any capacity, and prompt separation of known homosexuals from the Armed Forces is mandatory."²⁸ In 1950, Congress passed the Uniform Code of Military Justice (UCMJ), which criminalized "unnatural carnal copulation," defined as anal or oral sex, and punished it with five years of hard labor and a dishonorable discharge without pay.²⁹

In 1981, the Carter administration implemented a service-wide ban on gays in uniform under the theory that "homosexuality is incompatible with military service."³⁰ During this time period, investigations and hearings of purported gays and lesbians became particularly ruthless, resulting in many LGBT service members leaving quietly so as to avoid the inquisition.³¹ Finally, in response to the navy's purge of suspected lesbians at Parris Island, South Carolina in 1988, advocacy for the rights of gays serving in the military increased.³² Treatment of LGBT service members seemed to improve during the 1991 Gulf War, as the armed forces sent many into battle; however, this amelioration of conditions was short-lived, for in the six

25. *Id.* at 6. In Newport, Rhode Island, the Navy used enlisted sailors to entrap gay soldiers by soliciting and having sex with them. *Id.* at 5. The investigation itself and the portrayal of the sailors who volunteered to participate in it as victims may ultimately have given birth to the military's increasingly discriminatory policy toward LGBT service members. *Id.* at 6; *see also* Haggerty, *supra* note 13, at 13.

26. FRANK, *supra* note 1, at 7–8. A homosexual was considered one with "tendencies" or "proclivities" toward homosexual conduct. *Id.* at 8. In screening out gays, examiners relied on stereotypes, in particular singling out effeminate men. *Id.*

27. *Id.* at 9.

28. *Id.*

29. *Id.* at 9–10.

30. *Id.* at 10 (internal citations omitted).

31. SHILTS, *supra* note 11, at 4.

32. FRANK, *supra* note 1, at 11–12.

months immediately following the conflict's conclusion, the military fired over a thousand gays.³³

During the 1992 presidential campaign, Bill Clinton promised to lift the ban on gays in the military upon election.³⁴ In an attempt to fulfill his campaign promise, President Clinton enacted an interim compromise to end sexual orientation discrimination in the military in early 1993, giving the Department of Defense and Congress an opportunity to research the issue.³⁵ In July 1993, Clinton announced his "don't ask, don't tell, don't pursue" policy, under which the Department of Defense would not question military applicants about their sexual orientation.³⁶ This policy had significant shortcomings, however, as "individuals would be required to either keep their homosexual orientation to themselves, or, if they did not, they would be discharged if already in the service or denied enlistment/appointment if seeking to join the service."³⁷ Despite the fact that the official title of DADT included the phrase "don't pursue," the military actively continued to discriminate against and discharge gays and lesbians on the basis of sexual orientation.³⁸ President Barack Obama signed legislation to repeal DADT on December 22, 2010, and that repeal was enacted on September 20, 2011.³⁹

33. *Id.* at 12.

34. DAVID F. BURRELLI & JODY FEDER, CONG. RESEARCH SERV., RL 30113, HOMOSEXUALS AND THE U.S. MILITARY: CURRENT ISSUES 1 (2009), available at <http://www.fas.org/sgp/crs/natsec/RL30113.pdf>.

35. *Id.*

36. 10 U.S.C. § 654 (2006); see BURRELLI & FEDER, *supra* note 34, at 1–2.

37. BURRELLI & FEDER, *supra* note 34, at 1. Though Clinton named his policy on homosexuals in the military "don't ask, don't tell, don't pursue," he left out the "don't pursue" portion when announcing the policy. *Id.* at 2. It is unclear why Clinton made this omission. On the one hand, "don't pursue" suggests that the military will not investigate, as advocated by gay rights groups; yet on the other hand, "don't pursue" would seem to contradict the military's ability to implement and enforce DADT. *Id.*

38. *Id.* at 5.

39. Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (to be codified at 10 U.S.C. § 654); Elisabeth Bumiller, *Obama Ends 'Don't Ask, Don't Tell' Policy*, N.Y. TIMES, July 22, 2011, http://www.nytimes.com/2011/07/23/us/23military.html?_r=1; Sheryl Gay Stolberg, *Obama Signs Away 'Don't Ask, Don't Tell'*, N.Y. TIMES, Dec. 22, 2010, <http://www.nytimes.com/2010/12/23/us/politics/23military.html>. When signing the legislation repealing DADT, Obama acknowledged the real threat the policy posed to gay and lesbian service members, saying, "No longer will tens of thousands of Americans in uniform be asked to live a lie or look over their shoulder." *Id.*

B. Benefits the Military Offers to Veterans and Surviving Spouses

The United States Department of Veterans Affairs (VA) honors its former military service members with numerous veterans' benefits. For example, the VA offers a pension to wartime veterans with limited income who are permanently disabled or sixty-five years or older.⁴⁰ In addition, veterans who incurred disabilities or had them aggravated as the result of military service may be entitled to disability compensation.⁴¹ Veterans who are enrolled in the VA's Health Care System have access to a variety of health care services, including treatments directed at conditions arising from military experience.⁴² Veterans also may avail themselves of education and training benefits, vocational rehabilitation and employment services, reemployment rights if they wish to return to a job they left when activated to duty, and limited unemployment compensation.⁴³ Veterans with qualifying military service are entitled to certain home loan services.⁴⁴ Finally, the VA offers many life insurance options to its veterans, such as the Veterans' Group Life Insurance—a lifetime renewable term life insurance with a premium dependent upon age.⁴⁵

In addition to benefits for the veterans themselves, the VA offers benefits to the survivors of veterans, generally limited to spouses who have not remarried and dependent children.⁴⁶ For example, the VA covers certain burial expenses for eligible veterans, including an allowance to offset the cost of the funeral and burial; a free burial in a national cemetery for the veteran, spouse, and dependent children; a plot allowance if the veteran chooses not to be buried in a national cemetery; a headstone or marker; a flag; and a presidential memorial

40. *Benefits Fact Sheets*, U.S. DEP'T VETERANS AFFS. (July 19, 2011), <http://www.vba.va.gov/vba/benefits/factsheets/>. The VA Pension constitutes the difference between a veteran's countable family income and a yearly income limit set by the VA. *Id.*

41. U.S. DEP'T OF VETERANS AFFAIRS, VETERANS BENEFITS TIMETABLE 1 (2009), available at <http://www.vba.va.gov/pubs/forms/VBA-21-0501-ARE.pdf>.

42. *Id.*

43. *Id.* at 1–2.

44. *Id.* at 1. Such home loan services may include a loan to purchase, build, repair, or improve a home, as well as a grant to disabled veterans to make their home accessible to them. *Id.*

45. *Id.* at 2.

46. See U.S. DEP'T OF VETERANS AFFAIRS, PAMPHLET NO. 21-03-1, VA BENEFITS FOR SURVIVORS (2010), available at <http://www.vba.va.gov/VBA/benefits/factsheets/survivors/VAP21-03-1.pdf>.

certificate.⁴⁷ Survivors also may be entitled to dependency and indemnity compensation or a death pension paid monthly.⁴⁸ Further, survivors of veterans can receive education and training benefits in addition to a guaranteed loan to purchase a house or to refinance an existing mortgage.⁴⁹ Finally, survivors may be entitled to health care through the Civilian Health and Medical Program of the Department of Veterans Affairs, as well as the proceeds from the veteran's life insurance policy with the VA.⁵⁰

III. Analysis

A. Consequences of the Military's Discrimination on LGBT Elders

1. SIGNIFICANCE OF THE CLASS OF LGBT ELDERLY VETERANS

Statistics have yet to capture the precise number of LGBT elders today who have suffered due to the military's anti-gay discriminatory policies, but various figures suggest that the size of the group affected is substantial. Studies estimate that between now and the height of the aging boom, two million to nearly seven million LGBT elders will reside in the United States.⁵¹ "The growth of the elderly population in general, combined with the proliferation of same-sex households, indicates that gay and lesbian elders make up an increasingly substantial group."⁵²

The United States Census Bureau recently conducted a survey in which it determined that in the year 2009, approximately 9,195,000

47. *Id.* For many of the survivors' benefits offered by the VA, the veteran must have died of a service-connected disability; been in receipt of compensation, pension, or retired pay; or died in a VA facility. *Id.*

48. *Id.* For a survivor to qualify for Dependency and Indemnity Compensation, the veteran either must have died as the result of a service-related disability or was receiving or entitled to VA compensation for such a disability that was considered totally disabling. *Id.* A survivor may receive a death pension when the veteran did not die due to a service-related disability; however, receipt of the pension is dependent upon qualifying income limits. *Id.*

49. *Id.*

50. *Id.*

51. JAMIE M. GRANT, NAT'L GAY & LESBIAN TASK FORCE POL'Y INST., OUTING AGE 2010: PUBLIC POLICY ISSUES AFFECTING LESBIAN, GAY, BISEXUAL AND TRANSGENDER ELDERS 26, available at http://www.thetaskforce.org/downloads/reports/reports/outingage_final.pdf.

52. Persinger, *supra* note 17, at 138.

veterans were sixty-five years of age or older.⁵³ This Note is concerned in part with the overlap between the group of LGBT elders and the group of elderly veterans. This overlap represents gays and lesbians who were not discharged under the military's anti-gay policies, but who may nevertheless suffer as a result of their sexual orientation. When one considers these figures in conjunction with the number of persons discharged due to same-sex conduct or status,⁵⁴ a picture begins to emerge as to just how pervasively the military's anti-gay policies have discriminated against the LGBT elderly community.

2. NUMBER OF DISCHARGES DUE TO SAME-SEX CONDUCT OR STATUS

The military's anti-gay policies and its history of discrimination against LGBT service members have resulted in a sizeable portion of the armed forces receiving less than honorable discharge for same-sex conduct or status. Incomplete data and poor recordkeeping, however, make it difficult to calculate the precise number of discharges.⁵⁵ Therefore, the numbers provided below—especially for the earlier years—do not reflect the total number of LGBT service members that the military discharged with complete accuracy, nor do they account for the same-sex spouses and partners who cannot enjoy survivors' benefits. Also, many gays and lesbians served successfully in the military and received honorable discharge.⁵⁶ There is no definitive way of determining the precise number of LGBT veterans, nor how many now have same-sex spouses or domestic partners who cannot receive survivors' benefits.⁵⁷

Estimates suggest that the military's anti-gay policies have resulted in the discharge of a considerable number of gays and lesbians. From 1947 to 1950, the armed forces separated approximately 4,380 service members for reasons related to homosexuality.⁵⁸ A study con-

53. *National Security & Veterans Affairs*, in STATISTICAL ABSTRACT OF THE UNITED STATES: 2011 340 tbl.519 (U.S. Census Bureau ed., 2011), available at <http://www.census.gov/prod/2011pubs/11statab/defense.pdf>.

54. See *infra* Part III.A.2.

55. COLIN J. WILLIAMS & MARTIN S. WEINBERG, *HOMOSEXUALS AND THE MILITARY: A STUDY OF LESS THAN HONORABLE DISCHARGE* 51 (1971).

56. GRANT, *supra* note 51, at 59; see *supra* Part III.A.1.

57. SHILTS, *supra* note 11, at 6. The military is not concerned so much with having LGBT service members, but rather with having the public think that they are serving, which is particularly evident from the DADT policy. *Id.* The military makes exceptions for service members it may know are gay or lesbian but whom it needs. *Id.*

58. See Haggerty, *supra* note 13, at 20.

ducted from incomplete data estimates that for the period from 1950 to 1965, the military discharged between two thousand and three thousand service members each year due to sexual orientation.⁵⁹ Those numbers persisted into the 1970s, with reports of around 2,700 discharges annually.⁶⁰ Between 1980 and 2008, the military discharged a staggering 32,050 service members for same-sex conduct and status.⁶¹ Approximately sixty-five thousand LGBT Americans currently serve in a military of nearly three million service members.⁶² Despite the recent repeal of DADT, they operate amidst a culture of fear and a history of discrimination against gays and lesbians.

3. FINANCIAL CONSEQUENCES

Those whom the military has discharged due to same-sex conduct or status have often been denied veterans' benefits.⁶³ An inability to receive veterans' benefits may prove particularly burdensome on the ever-growing class of LGBT elders.⁶⁴ Similar to their heterosexual counterparts, LGBT elders face money problems unique to their age group: they must save for retirement, prepare for estate distribution and possible incompetence, and obtain services and resources to address issues associated with aging.⁶⁵ Like all elders, aging LGBT individuals often must rely upon every available dollar, as well as state or federal benefits for survival. Yet unlike their heterosexual counterparts, LGBT elders struggle financially because of their sexual orientation.

59. WILLIAMS & WEINBERG, *supra* note 55, at 53. In their study, Williams and Weinberg use numbers provided by each branch of the armed forces as to the different types of discharges, as well as limited and often incomplete data concerning how many less than honorable discharges were for reasons related to sexual orientation, to estimate the number of such discharges total for each year in the 1950 to 1965 period. *See id.* at 38–53.

60. *See* SHILTS, *supra* note 11, at 163.

61. *See* BURRELLI & FEDER, *supra* note 34, at 9–10 tbl.1. The numbers show that the percentage of discharges for homosexuality fell from 1982 to 1994, rose from 1994 to 2001, and began to decline then level off from 2001 to 2008. *Id.* at 9.

62. FRANK, *supra* note 1, at 3. In particular, the estimated proportion of lesbian service members is 5.2%, which is nearly twice that of lesbians in the general population. *Id.*

63. *Federal Benefits for Veterans, Dependents & Survivors: Chapter 1 VA Health Care Benefits*, U.S. DEP'T VETERANS AFFS. (June 17, 2011), http://www.va.gov/opa/publications/benefits_book/benefits_chap01.asp; *see* SUZANNE METTLER, *SOLDIERS TO CITIZENS: THE G.I. BILL AND THE MAKING OF THE GREATEST GENERATION* 65–66 (2005).

64. *See* GRANT, *supra* note 51, at 26.

65. Persinger, *supra* note 17, at 139.

By virtue of being gay and old, LGBT elders face burdens unique to their class. Those without the resources to afford LGBT-friendly retirement homes may have to live in a retirement community dominated by a culture of heterosexism.⁶⁶ The prejudices of the staff and residents of such environments often force LGBT inhabitants to closet themselves, which in turn results in isolation.⁶⁷ Additionally, gays and lesbians face certain financial hardships due to their nontraditional family structures. Not only do they have lower average incomes than their heterosexual counterparts, but since they are unable to enjoy federal spousal benefits, they also have greater difficulties keeping their earnings.⁶⁸ Given the costs associated with aging, sexuality-based financial inequalities become especially burdensome for the elderly sub-group of the LGBT population. Add to these inequities the fact that gays and lesbians whom the military discharged for same-sex conduct or status do not always enjoy veterans' benefits available to honorably discharged heterosexuals, and the financial landscape for LGBT elders becomes even bleaker.

4. LEGAL CONSEQUENCES

Historically, the military overtly discriminated against gays and lesbians, and under DADT it required its LGBT service members to remain closeted while on active duty; however, the military has never required its veterans to closet themselves.⁶⁹ Veterans who received honorable discharges and owed no further commitment to the military could not suffer legally under DADT.⁷⁰ In fact, LGBT veterans

66. *Id.* Many LGBT elders find themselves living in a heterosexist environment, which is

an ideological system that denies, denigrates and stigmatizes any non-heterosexual form of behavior, identity, relationship, or community; reinforces lesbian and gay elder alienation and increases the likelihood these elders will not seek needed medical services, potentially increasing the risk of mortality and decreasing quality of life for elderly gays and lesbians.

Id. at 140 (quoting Gregory M. Herek, *The Social Context of Hate Crimes: Notes on Cultural Heterosexism*, in *HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN* 89, 89 (Gregory M. Herek & Kevin T. Berril, eds., 1992)).

67. *Id.* at 139.

68. *See id.* Federal spousal benefits that aid many elders financially but are unavailable to the LGBT community include tax-free 401(k) payments for beneficiaries, tax-free health insurance for spouses, and spousal Social Security benefits. *Id.*

69. SERVICEMEMBERS LEGAL DEFENSE NETWORK, *COMING OUT AS AN LGBT VETERAN*, available at http://sldn.3cdn.net/b764f7baaa6bf26c27_k5m6bnjl0.pdf.

70. *Id.*

spoke against the military's anti-gay discriminatory policies without experiencing any repercussions.⁷¹ Yet despite these statistics, many gay and lesbian elderly veterans feared legal ramifications under DADT should they choose not to closet themselves any longer.⁷² Their worries were not insignificant, especially considering the size of their class: the United States is home to approximately one million gay veterans.⁷³ Considering "the high rate of military service among seniors, it is likely that a disproportionate number of LGBT veterans are seniors."⁷⁴

Theoretically, retired LGBT service members faced legal ramifications under DADT, as the military could still recall them to duty; however, the risk of recall for military retirees is small.⁷⁵ Further, even if the military had recalled LGBT retirees to active duty then discharged them under DADT, the discharge would have been unlikely to affect retiree status and benefits.⁷⁶ Yet even with the lack of precedent for the military punishing retirees for their sexual orientation under DADT and its recent repeal, LGBT retirees still fear prosecution under the Uniform Code of Military Justice, which continues to criminalize sodomy.⁷⁷ Currently, however, there are no reported instances of the military prosecuting a retiree under the Uniform Code of Military Justice upon learning he or she was gay.⁷⁸

5. MEDICAL CONSEQUENCES

The military's anti-gay discriminatory policies, including DADT, have also affected the health of elderly LGBT veterans.⁷⁹ DADT mandated that service members remain closeted to escape a less than honorable discharge and the subsequent loss of veterans' benefits.⁸⁰ One of the perks of an honorable discharge from the military is the enjoyment of health benefits broader than those offered under Medicare or

71. *Id.*

72. *Id.*

73. *Id.*

74. Knauer, *supra* note 15, at 53.

75. SERVICEMEMBERS LEGAL DEFENSE NETWORK, *supra* note 69.

76. *Id.*

77. *Id.*

78. *Id.* Practice shows that the military generally only recalls a retiree to active duty to prosecute under the UCMJ in situations where the retiree is charged with criminal misconduct that occurred during active duty and which publicly humiliated the military. *Id.*

79. Knauer, *supra* note 15, at 52-54.

80. *Id.* at 52.

Medicaid, including prescription drug coverage and nursing home care.⁸¹ LGBT service members discharged as a result of their sexual orientation cannot enjoy those benefits. Also, LGBT veterans may be deterred from availing themselves of such benefits, because the VA runs the veterans' health care system that dispenses the benefits.⁸² Thus, DADT may have locked the closet door on elderly gay and lesbian veterans.

Fear triggered by DADT may have compelled elderly LGBT veterans not to discuss health issues related to sexual orientation or gender identity with their physicians; it also may have compelled them not to include their same-sex spouses and partners in medical discussions.⁸³ Regarding the distribution of health benefits to LGBT veterans, DADT "reinforce[d] and condone[d] homophobic or discriminatory opinions held by the administrators, health care providers, and staff."⁸⁴ In doing so, it discriminated against LGBT veterans in the receipt of healthcare benefits, thereby causing medical consequences. Though DADT has been repealed, it may take time for the ingrained fear of discussing one's sexuality with doctors to dissipate.

6. CONSEQUENCES ON MENTAL AND EMOTIONAL WELL-BEING

Not only do the military's anti-gay discriminatory policies have financial, legal, and medical consequences for gay and lesbian elderly veterans and ex-service members, but they also may affect mental and emotional well-being. The armed forces' historical relationship with sexual orientation sends a message to service members and to the American public as a whole that the presence of lesbians and gays in the military is somehow dangerous to the safety of others,⁸⁵ a message that does not disappear simply with the repeal of DADT. The military "create[s] an ambience in which discrimination, harassment, and even violence against lesbians and gays is tolerated and to some extent encouraged."⁸⁶ This environment suggests there is something about being gay that is incompatible with military service and that makes gays and lesbians unsuited to serve their country. Thus, the logic follows that the military must prevent gays and lesbians from joining its

81. *Id.* at 53.

82. *Id.*

83. *Id.* at 53–54.

84. *Id.* at 54.

85. SHILTS, *supra* note 11, at 4.

86. *Id.*

ranks, as allowing them to serve could detrimentally affect service members' safety, which in turn could affect the safety of the United States.

Until recently, in defending its continued enforcement of DADT, the military rationalized that the policy was necessary to protect unit cohesion.⁸⁷ The military based this argument on the idea that openly LGBT service members would dismantle unit cohesion by their sexual orientation and that the resulting fragmented unit would be weak and vulnerable.⁸⁸ Rather than strengthen unit cohesion by encouraging honesty and openness among service members, it slammed the closet door on gays and lesbians. LGBT service members and veterans may suffer long-term mental and emotional anguish because the military defended DADT with a unit cohesion argument. They may internalize the military's negative perceptions of homosexuality and feel uneasy about their service, as though they did not belong in the unit, or that they negatively affected the safety of their fellow service members.⁸⁹ In attempting to protect unit cohesion through DADT, the military may have reached the opposite result—it may have destabilized unit cohesion.

Closeting is a common practice for gays and lesbians and one that could have lasting consequences on their emotional well-being. Studies show that concealing and disclosing sexual orientation are "strategies that LGBT persons use to manage their identities in the face of cultural and organizational stigma against homosexuality."⁹⁰ Evidence also suggests that the more LGBT individuals conceal their orientation, the more stressful their work environments and lives may become.⁹¹ Concealment can lead to social isolation, which in turn can lead to reduced work commitment and performance.⁹² In addition, the effects of sexuality-based workplace harassment have manifested themselves in gays and lesbians through both physical and psychological symptoms.⁹³ Members of the LGBT community may seek to avoid such adverse consequences through closeting. The urge to clos-

87. See Bonnie Moradi, *Sexual Orientation Disclosure, Concealment, Harassment, and Military Cohesion: Perceptions of LGBT Military Veterans*, 21 MIL. PSYCHOL. 513, 513–14 (2009).

88. *See id.*

89. *Id.* at 515.

90. *Id.*

91. *See id.*

92. *Id.*

93. *Id.* at 516.

et is likely very strong in an institution that, until September 2011, used the legal system to blatantly discriminate against gays and lesbians, forbade them altogether, or forced them into the closet.

A recent study shows that by requiring only gay and lesbian service members to conceal their sexual orientation through DADT, the military undermined its stated interest in protecting unit cohesion.⁹⁴ The study found that allowing service members to disclose their sexual orientation may have positive effects on unit cohesion.⁹⁵ The participants in this study were veterans as opposed to active members of the military.⁹⁶ Thus, the responses came from those who had time to process their experience in the military, including their memories of military service and how the detrimental effects of concealment impacted their emotional and mental well-being.

The reasons why some LGBT veterans joined the military may further exacerbate the effects of military service on their mental and emotional well-being. Many gay veterans, in particular those who served during the Vietnam War, joined the military during wartime to demonstrate their manhood, an effort that often proved futile.⁹⁷ Proving one's manhood is often a motivating factor in going to war, but that need becomes more prominent for those who think they have the most to prove, such as gay men.⁹⁸ In the case of the Vietnam War, the LGBT soldiers felt shame and embarrassment about their sexual orientation, believing that this one aspect of their personhood could "hu-

94. *Id.* at 515–16. In determining whether DADT's emphasis on unit cohesion is displaced, Moradi conducted an empirical study using military units that had LGBT service members. *Id.* at 514. She used the perceptions of LGBT veterans to assess correlations between unit cohesion and sexual orientation concealment, sexual orientation disclosure, and sexual orientation-based harassment. *Id.* at 514, 517–20.

95. *Id.* at 526. "Importantly, the direct and indirect positive relations of sexual orientation disclosure with social and task cohesion in the present data were significant when they were considered along with the roles of general job satisfaction, sexual orientation concealment behaviors, and reported sexual orientation-based harassment experiences." *Id.*

96. *Id.* at 517.

97. SHILTS, *supra* note 11, at 32. Gay men enlisting in the military believed that their gayness somehow deprived them of manhood. *Id.* at 34. "Their psychic syllogisms were simple. Soldiers are real men. Queers are not real men. Therefore, a soldier cannot be a queer." *Id.*

98. *Id.* at 32. Shilts argues, however, that the concept of manhood is a fluid concept that has changed over the years and that the trials of war do not establish manhood so much as personhood. *Id.* at 33. War challenges one's ability to perform under pressure, demands courage in the face of fear, creates self-confidence, and bonds one to his or her country. *Id.* "Participation in war, therefore, can cause one resolutely to shed childhood insecurities and can create a place for the individual in the broader network of community, nation, and even God." *Id.*

miliate their families, threaten their community, be subversive to their nation, and prove an abomination to their God.”⁹⁹ Thus, they went to war and were willing to sacrifice their lives in the hope that doing so would perhaps hide the fact that they were gay, make the fact that they were gay okay, or even scare them straight.¹⁰⁰

Some LGBT service members joined the military as an escape from the collective revulsion of their country; essentially, they went to war in the hope of dying.¹⁰¹ Ironically, these LGBT soldiers fought and were willing to give their lives in service to a country whose fight against them provided the very reason for their service. For the veterans who served their country, not for the sake of service but rather as a means to prove their manhood or to escape their country’s disapproval, the lasting scars of service may be emotional as well as physical.¹⁰² For them, military service may represent their struggle for acceptance. Their successes on the battlefield may be tainted by their reasons for going to war in the first place. Yet by going to war as a remedy to their disgust with life, some of these surviving veterans discovered their personhood.¹⁰³

7. SURVIVORS’ BENEFITS

Not only do the military’s policies against homosexuality affect the service members who receive less than honorable discharges, but the federal government’s approach to same-sex marriages negatively impacts survivors of LGBT veterans as well. In response to, and in anticipation of, the increasing amount of rights that the states were granting to same-sex couples,¹⁰⁴ Congress passed the Defense of Mar-

99. *Id.* at 34.

100. *See id.* at 28–36.

101. *Id.* at 34.

102. *See id.* at 35–36.

103. *Id.* at 35. According to Shilts:

[S]ome of them would emerge as central players in the movement that grew out of their pain. And the new movement they helped create would call into question not only the place of homosexuals in the United States and what it meant to be a man, but the entire culture’s carefully defined structures of male and female roles.

Id.

104. *See generally* Baehr v. Miike, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. 1996) (finding that the government’s rationale of the public interest in the well-being of children and families, or the development of children, was insufficient to prove that same-sex marriage should not be recognized); Baker v. Vermont, 744 A.2d 864 (Vt. 1999) (holding that while the plaintiffs—three same-sex couples—were not entitled to marriage licenses, they were entitled to the same rights and benefits that their heterosexual counterparts enjoyed).

riage Act in 1996. DOMA defines a marriage as “a legal union between *one man and one woman* as husband and wife” and a spouse as “a *person of the opposite sex* who is a husband or wife.”¹⁰⁵ A state typically recognizes a marriage that occurred in another state, so long as recognition does not violate public policy, pursuant to the celebration rule.¹⁰⁶ DOMA, however, overrides the celebration rule by saying that one state is not obligated to recognize the judicial decisions and public acts of another state concerning a same-sex relationship or its equivalent that is recognized as a marriage.¹⁰⁷

DOMA has resulted in numerous negative consequences for gays and lesbians, the most detrimental of which is that same-sex partners cannot avail themselves of the more than 1,135 federal rights and benefits available to married couples.¹⁰⁸ Veterans’ benefits are included in that package of marriage-based federal rights and benefits.¹⁰⁹ While some states, counties, and municipalities have recognized same-sex relationships and afford such persons the same local and state benefits as their heterosexual counterparts, DOMA legally precludes those married same-sex couples from enjoying any federal spousal benefits.¹¹⁰ In addition, given DOMA’s effect on interstate recognition of same-sex marriage, same-sex couples legally married in one state may find themselves limited to a select number of locations in which to live, since those states not offering same-sex marriage need not recognize their marriage.¹¹¹

DOMA’s exclusion of same-sex couples from the right to enjoy federal spousal benefits negatively impacts the elderly subset of that population in particular. Elderly same-sex couples cannot enjoy federal spousal benefits at a period in their financial lives when such benefits are especially important.¹¹² Just as the elderly community as a whole faces more financial and health challenges than do younger

105. Defense of Marriage Act, 1 U.S.C. § 7 (2006) (emphases added). In response to DOMA, a majority of states amended their constitutions to recognize only those marriages between opposite-sex couples. Persinger, *supra* note 17, at 144.

106. Michael E. Solimine, *Competitive Federalism and Interstate Recognition of Marriage*, 32 CREIGHTON L. REV. 83, 94–96 (1998).

107. 28 U.S.C. § 1738C.

108. See Persinger, *supra* note 17, at 144.

109. See generally U.S. DEP’T OF VETERANS AFFAIRS, OMB APPROVED NO. 2900-0043, DECLARATION OF STATUS OF DEPENDENTS (2009), available at <http://www.vba.va.gov/pubs/forms/VBA-21-686C-ARE.pdf>.

110. See Persinger, *supra* note 17, at 146–48.

111. See *id.* at 144.

112. *Id.* at 148.

persons, so too do members of the LGBT community face harsher economic realities than their heterosexual counterparts, as they are burdened by their inability to enjoy federal spousal benefits. Thus, the elderly same-sex couple is dually afflicted by its affiliation with two financially disadvantaged groups. Elderly LGBT veterans must expend resources to protect their spouses or partners that they would otherwise be able to keep were they not discriminated against under DOMA. Although LGBT service members who serve their country and receive an honorable discharge may have escaped the wrath of same-sex discrimination from the military, they have not escaped the wrath of same-sex discrimination—embodied in DOMA—from the country that they were willing to give their lives to protect.

B. Constitutionality of Anti-Gay Discrimination and Its Persistence in the Military Following a Repeal of DADT

History, anecdotal evidence, research, and statistics show that gay and lesbian service members have suffered extensively as a result of the military's policies toward homosexuality.¹¹³ The elderly subset of the LGBT community, in particular, has faced a myriad of issues due to this anti-gay discrimination.¹¹⁴ In analyzing the issue, however, one must focus on gays and lesbians as a whole and how the military's policies affect that group. The struggle of the gay or lesbian elderly veteran or ex-service member results from the broader struggle of the LGBT community. It is only when the military and this country treat the LGBT community equally that the gay or lesbian elderly veteran or ex-service member in particular will begin to experience an amelioration of discrimination.

1. EVOLUTION OF THE RIGHT TO PRIVACY

The United States Constitution does not guarantee its citizens an explicit right to privacy in their personal lives.¹¹⁵ Through its decisions, however, the Supreme Court has gradually recognized Americans' right to privacy, beginning in the early twentieth century with cases granting parents the authority to control the upbringing of their

113. See *supra* Parts II.A, III.A.

114. See *supra* Part III.A.

115. See *generally* U.S. CONST.

children.¹¹⁶ The Supreme Court expanded the individual's right to privacy in *Griswold v. Connecticut* by granting married couples the right to purchase and use contraceptive materials.¹¹⁷ In *Griswold*, the Court found that the right to privacy embodied in the marital relationship is sacred and "older than the Bill of Rights" itself.¹¹⁸ In overturning a statute preventing the purchase or use of contraceptives as applied to married persons, the Court said that by "seek[ing] to achieve its goals by means having a maximum destructive impact upon that relationship," the state had engaged in acts "repulsive to the notions of privacy surrounding the marriage relationship."¹¹⁹ Although the justices in *Griswold* could not agree as to where to locate the right to privacy in the Constitution, a majority agreed that the right exists.¹²⁰

Eisenstadt v. Baird expanded the right to privacy recognized in *Griswold* to allow unmarried as well as married persons to purchase and use contraceptive materials.¹²¹ The Supreme Court said, "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion

116. In *Meyer v. Nebraska*, the Supreme Court held that a state law preventing schools from teaching children foreign languages was unconstitutional under the "liberty" component of the due process clause of the Fourteenth Amendment, which protects:

the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Meyer v. Nebraska, 262 U.S. 390, 399, 403 (1923). The Supreme Court further recognized that liberty interest in *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925), finding that a state law requiring children to attend public schools "interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."

117. *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965). Appellants opened and operated a Planned Parenthood clinic for ten days, giving information concerning contraception to married persons only. *Id.* at 480. They were arrested and convicted as accessories under a state statute criminalizing the use of contraceptives for the purpose of preventing conception. *Id.*

118. *Id.* at 486.

119. *Id.* at 485-86.

120. *See id.* at 486-507.

121. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). Appellant was arrested for exhibiting contraceptive articles to university students during a lecture on contraception, as well as for giving a woman vaginal foam at the end of his lecture. *Id.* at 440. The law under which he was ultimately convicted allowed anyone to receive contraceptives for preventing disease but only allowed married persons to receive them for preventing pregnancy from a doctor or physician with a prescription. *Id.* at 440-42.

into matters so fundamentally affecting a person as the decision to bear or beget a child.”¹²² In reaching this result, the Court relied upon the rational basis standard inherent in the equal protection clause of the Fourteenth (and Fifth) Amendment; namely, that when a law classifies persons, the classification must be rationally related to a legitimate government purpose.¹²³ “[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.”¹²⁴ The Court found that a statute allowing married but not unmarried persons to enjoy a right failed to meet rational basis.¹²⁵ It said that the right to privacy attaches not to the married couple as a single entity but rather to the individuals who comprise that entity.¹²⁶

2. *LAWRENCE V. TEXAS: A LIBERTY INTEREST IN INTIMACY*

As previously discussed, the Supreme Court recognizes an individual’s right to privacy in certain areas relating to family, marriage, and procreation,¹²⁷ but it also has placed limits upon that right.¹²⁸ Specifically, in *Bowers v. Hardwick* the Court held that the right to privacy does not encompass a fundamental right for gays and lesbians to engage in same-sex sodomy.¹²⁹ In *Lawrence v. Texas*, the Supreme Court overruled the decision in *Bowers v. Hardwick*, and in doing so found a vital liberty interest (but not a fundamental right) for gays and lesbians.¹³⁰ The Court held that “adults may choose to enter upon

122. *Id.* at 453 (emphasis added).

123. *Id.* at 446–47.

124. *Id.* at 454 (quoting *Ry. Express Agency v. New York*, 336 U.S. 106, 112–13 (1949) (Jackson, J., concurring)).

125. *Id.* at 453.

126. *Id.*

127. *See supra* Part III.B.1.

128. *See, e.g., Bowers v. Hardwick*, 478 U.S. 186, 190–91 (1986) (finding no fundamental right to engage in same-sex sodomy). *Hardwick* engaged in sodomy with another adult male and was charged with violating a Georgia statute that criminalized sodomy. *Id.* at 187–88. The Court upheld the validity of the statute, saying that “the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable” was sufficient to satisfy rational basis review. *Id.* at 196.

129. *Id.* at 192.

130. *Lawrence v. Texas*, 539 U.S. 558 (2003). Upon responding to a weapons disturbance report, police officers observed John Geddes Lawrence and Tyron Garner engaging in a sexual act. *Id.* at 562–63. The police arrested the men, who were charged and convicted under Tex. Penal Code Ann. § 21.06 (2003), which held that “[a] person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.” *Id.* at 563. The petitioners chal-

[a sexual] relationship in the confines of their homes and their own private lives and still retain their dignity as free persons."¹³¹ It further stated that sexual expression is but one aspect of a deeper relationship, and that the "liberty protected by the Constitution allows homosexual persons the right to make this choice."¹³²

The liberty interest the Court identifies in *Lawrence* is not in the sex act itself but in the more generalized "formation of intimate personal relationships, whether homosexual or heterosexual."¹³³ In making such a determination, the Court illustrates the importance it places on the individual's right to an intimate relationship and how that right translates into a larger context. By overturning the same-sex sodomy ban, the Court did not simply say an individual has an interest to engage in sodomy; rather, it found that an individual (regardless of sexual orientation) has a broader liberty interest in an intimate relationship, one component of which may be the sex act. As a sodomy ban prevents the individual from forming those intimate personal relationships, it does not comport with the liberty interest identified in *Lawrence*.¹³⁴ Thus, the Supreme Court's holding in *Lawrence* has far-reaching consequences for advocacy on issues relating to sexual orientation discrimination, as litigants can use it to refute bans on same-sex sodomy in particular as well as broader discrimination based on same-sex status in general.

One area in which advocates might find the holding of *Lawrence* especially useful is in the United States military's treatment of gays and lesbians. If the Constitution grants service members a liberty interest in forming and enjoying intimate relationships, then the Constitution should also preclude the military from punishing gay and lesbian service members who enter intimate relationships with persons of the same sex. Whether the military discharges a service member for engaging in same-sex conduct or for being gay is irrelevant; in either situation, the military has intruded upon that individual's liberty interest in intimacy.

lenged the conviction under the equal protection and due process clauses of the Fourteenth Amendment. *Id.*

131. *Id.* at 567.

132. *Id.*

133. Evangelos Kostoulas, *Ask, Tell, and Be Merry: The Constitutionality of "Don't Ask, Don't Tell" Following Lawrence v. Texas and United States v. Marcum*, 9 U. PA. J. CONST. L. 565, 572 (2007). The dissent in *Lawrence* noted that "sodomy does not meet the requirements for a fundamental right." *Id.* However, forming intimate personal relationships does satisfy the requirements. *Id.*

134. *See id.*

The violation of the individual's right to intimacy in the military context is particularly egregious in that its effects extend considerably beyond the immediate discharge. When the military discharges based on homosexuality, it devastates those discharged service members financially, legally, medically, and emotionally for the rest of their lives.¹³⁵ By mandating that its gay and lesbian service members closet themselves and by preventing them from enjoying their liberty interest in an intimate relationship, the military negatively affects these individuals mentally and emotionally into their veteran (and elderly) years.¹³⁶ Finally, both the military and federal government under DOMA violate the liberty interests of the same-sex spouses or domestic partners of LGBT discharged service members and veterans, as the military prevents them from enjoying veterans' spousal benefits.¹³⁷

Although the holding in *Lawrence* strongly undermines the legality and constitutionality of the military's discriminatory treatment of gays and lesbians, its effectiveness as a tool for activism remains limited. The Supreme Court in *Lawrence* found a liberty interest to enter into an intimate relationship;¹³⁸ it did not find, however, an explicit fundamental right to engage in same-sex sodomy.¹³⁹ Even if one argues that by finding a "liberty interest" the Court in essence found a "fundamental right," the Court did not apply the appropriate standard—strict scrutiny—for analyzing the deprivation of a fundamental right.¹⁴⁰ Rather, it used a new form of rational basis, which the dissenting Justice Scalia said "will have far-reaching implications beyond this case."¹⁴¹ Scalia predicted that same-sex activists will use *Lawrence* as a means of obtaining legal recognition for same-sex relationships.¹⁴² Such a prediction only bolsters the argument that the military's anti-gay policies are unconstitutional. Yet the Court never explicitly found a fundamental right in its strongly-worded opinion, which displays *Lawrence's* weakness as precedent, and it indicates that the holding in *Lawrence* is insufficient by itself to compel the government to pursue equality in the military on the basis of sexual orientation.

135. See *supra* Part III.A.1–5.

136. See *supra* Part III.A.6.

137. See *supra* Part III.A.7.

138. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

139. *Id.* at 586 (Scalia, J., dissenting).

140. *Id.* at 594.

141. *Id.* at 586.

142. *Id.* at 604.

3. CONTINUED DISCRIMINATION FOLLOWING THE REPEAL OF DADT

By signing the repeal of DADT, President Obama made significant strides on behalf of the LGBT community's fight for equality with regard to military service.¹⁴³ According to the language of the legislation repealing DADT, the military will no longer be allowed to discriminate against its gay and lesbian service members and veterans on the basis of their sexual orientation.¹⁴⁴ However, the battle for equality in the military persists. Before the repeal could take effect, President Obama, Secretary of Defense Robert Gates, and Chairman of the Joint Chiefs of Staff Admiral Mike Mullen had to certify that allowing LGBT persons to serve openly in the military would not be detrimental to unit readiness.¹⁴⁵

Prior to completion of the certification process, LGBT service members and veterans continued to endure the hostile and tense policies, practices, and environment born of the DADT era.¹⁴⁶ As a result, groups like the Servicemembers Legal Defense Network (SLDN), a non-partisan organization devoted to ending the military's anti-gay policies under DADT,¹⁴⁷ continued to advocate on behalf of wronged gays and lesbians.¹⁴⁸ In fact, the SLDN reported that 135 service members and veterans had contacted its help hotline shortly after President Obama signed the repeal, suggesting that the battle for equality is anything but won.¹⁴⁹

Even though President Obama signed legislation to repeal DADT that became effective as of September 20, 2011, the federal government and activists still have much work to do before the full effects of that repeal can be realized by LGBT service members and elderly veterans. They must work to ensure once and for all that the military

143. See Stolberg, *supra* note 39.

144. See Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (to be codified at 10 U.S.C. § 654).

145. Stolberg, *supra* note 39.

146. *Id.*

147. *About the Servicemembers Legal Defense Network*, SERVICEMEMBERS LEGAL DEF. NETWORK, <http://www.sldn.org/pages/about-sldn> (last visited Feb. 3, 2012). SLDN "work[s] to end DADT, to ensure parity for LGBT service members, and to provide free, confidential legal services to all those impacted by DADT and related discrimination." *Id.* It has served more than 10,000 requests since DADT's birth in 1993. *Id.*

148. See *id.*

149. Aubrey Sarvis, *The Job Is Not Done*, SERVICEMEMBERS LEGAL DEF. NETWORK, <http://www.sldn.org/pages/the-job-is-not-done> (last visited Feb. 3, 2012).

treats its gay and lesbian members equally. “Gay leaders acknowledge they face several more years of work to ensure that gay men and lesbians in uniform eventually earn the same rights and protections afforded to other troops and civilian federal employees.”¹⁵⁰

As a result, the SLDN and other advocacy groups have created checklists containing conditions necessary to achieving equality.¹⁵¹ For example, the SLDN has demanded that following certification of the DADT repeal, President Obama issue an executive order barring any future discrimination based on sexual orientation.¹⁵² Other advocacy groups are demanding that Defense Secretary Gates remove any mention of homosexuality from the discharge papers of those former LGBT service members whom the military discharged under DADT.¹⁵³ In addition, the SLDN is working to ensure that all LGBT military families receive the spousal and dependent benefits available to their heterosexual counterparts.¹⁵⁴ Finally, the SLDN plans to advocate on behalf of those discharged under DADT—namely, to accelerate the reinstatement of those willing and able and to seek redress in the form of veterans’ benefits for the others.¹⁵⁵

C. Vulnerability of the Defense of Marriage Act

1. PUBLIC OPINION

Despite Congress passing it a mere fifteen years ago, DOMA seems to be nearing its end, evidenced by increasing support for legal

150. Ed O’Keefe, *Fight for Gays in the Military Isn’t Ending Anytime Soon*, WASH. POST, Feb. 10, 2011, http://voices.washingtonpost.com/federal-eye/2011/02/fight_for_gays_in_the_military.html.

151. Sarvis, *supra* note 149.

152. *Id.* In addition, the SLDN plans to advocate for swift certification, as well as to “insist the spirit and letter of the law are enforced and that all LGBT Service-members actually receive equal treatment for the same selfless service.” *Id.* Such non-discriminatory documents are already available to other gay federal workers. O’Keefe, *supra* note 150. The Pentagon, however, has drafted a policy “set to take effect once the ban is lifted that states all troops are ‘entitled to an environment free from personal, social, or institutional barriers’ preventing promotion, and that ‘harassment or abuse based on sexual orientation is unacceptable.’” *Id.* (internal citations omitted).

153. *Id.*

154. Sarvis, *supra* note 149.

155. *Id.*; see also James Dao, *Discharged for Being Gay, Veterans Seek to Re-enlist*, N.Y. TIMES, Sept. 4, 2011, http://www.nytimes.com/2011/09/05/us/05reenlist.html?_r=1&hpw=&pagewanted=all. Many gay and lesbian ex-service members who were discharged under DADT have expressed a desire to rejoin the service, drawn either by the military life or by the stable pay and benefits not present in civilian life. *Id.*

recognition of same-sex relationships as well as legal and political opinions proclaiming DOMA unconstitutional.¹⁵⁶ Public opinions concerning same-sex issues have fluctuated throughout the years.¹⁵⁷ According to a 2011 Gallup poll, however, a majority of Americans (fifty-three percent) now agree that same-sex marriage should be legal with all the rights afforded those in opposite-sex marriages.¹⁵⁸ Support for gay rights has increased as Americans' attitudes toward egalitarianism, emphasis on moral traditionalism, and feelings toward gays have shifted.¹⁵⁹

2. LEGAL DECISIONS

A recent federal district court decision has generated additional ammunition to combat the constitutionality of DOMA.¹⁶⁰ In *Gill v. Office of Personnel Management*, same-sex couples married in Massachusetts challenged the portion of DOMA that denies federal spousal benefits to same-sex couples.¹⁶¹ The plaintiffs argued that the provision denied them equal protection under the due process clause of the Fifth Amendment.¹⁶² The court agreed and granted their motion for summary judgment.¹⁶³ The court addressed the constitutionality and legality of DOMA in its opinion. It said that the state alone possesses the authority to define familial relationships, authority upon which the federal government intrudes with DOMA.¹⁶⁴

Further, the court found the government's interest in consistency in the distribution of federal same-sex spousal benefits is unpersuasive and that DOMA does not further this interest by banning same-sex couples from receiving spousal benefits.¹⁶⁵ It concluded that the

156. Press Release, U.S. Dep't of Justice, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html>.

157. Michael Klarman, *Is Public Opinion on Gay Marriage Ahead of the Supreme Court's?*, L.A. TIMES, Aug. 15, 2010, <http://articles.latimes.com/2010/aug/15/opinion/la-oe-klarman-gay-marriage-20100815>.

158. Frank Newport, *For First Time, Majority of Americans Favor Legal Gay Marriage*, GALLUP (May 20, 2011), <http://www.gallup.com/poll/147662/first-time-majority-americans-favor-legal-gay-marriage.aspx>.

159. Paul R. Brewer, *The Shifting Foundations of Public Opinion About Gay Rights*, 65 J. Pol. 1208, 1214–15 (2003).

160. See *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010).

161. *Id.* at 376–77.

162. *Id.*

163. *Id.* at 377.

164. *Id.* at 393.

165. *Id.* at 394. The court goes on to say, "It strains credulity to suggest that Congress might have created such a sweeping status-based enactment, touching

government's rationales are implausible and that "when the proffered rationales for a law are clearly and manifestly implausible' a reviewing court may infer that animus is the only explicable interest."¹⁶⁶ As animus is an insufficient justification, DOMA fails rational basis. DOMA classifies on the basis of sexual orientation, and there is no relevant distinction between a same-sex and opposite-sex marriage to rationalize a difference in the availability of benefits.¹⁶⁷

Gill is not the only recent court case to challenge the constitutionality of DOMA. Similar complaints were filed in November 2010 in the District of Connecticut and the Southern District of New York.¹⁶⁸ In *Pedersen v. Office of Personnel Management*, married same-sex couples are challenging, among other things, the "federal government's denial of marriage-related protections in the areas of federal Family Medical Leave Act benefits, federal laws for private pension plans, federal laws concerning state pension plans . . ."¹⁶⁹ In *Windsor v. United States*, the surviving spouse of a lesbian couple not only is seeking a refund of the estate tax she had to pay upon her wife's death, but also is challenging the constitutionality of DOMA under the equal protection clause.¹⁷⁰

3. POLITICAL ACTIONS

In addition to shifting public opinion and the current legal tide, recent actions by President Obama are chipping away at the vitality of DOMA. In 2010, President Obama issued a presidential memorandum ordering federal agencies to extend certain benefits to same-sex domestic partners of federal employees.¹⁷¹ When issuing the order,

every single federal provision that includes the word marriage or spouse, simply in order to further the discrete goal of consistency in the distribution of federal marriage-based pecuniary benefits." *Id.* at 396. The deferential rational basis test "nonetheless demands some *reasonable* relation between the classification in question and the purpose it purportedly serves." *Id.*

166. *Id.* (quoting *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 377 F.3d 1275, 1280 (11th Cir. 2004) (Birch, J., specially concurring)).

167. *Id.* at 396.

168. See *Pedersen v. Office of Pers. Mgmt.*, No. 10-01750 (D. Conn. filed Nov. 9, 2010); *Windsor v. United States*, No. 10-8435 (S.D.N.Y. filed Nov. 9, 2010).

169. GAY & LESBIAN ADVOCATES & DEFENDERS, *PEDERSEN ET AL. V. OFFICE OF PERSONNEL MANAGEMENT ET AL.: FREQUENTLY ASKED QUESTIONS 1* (2010), available at <http://www.glad.org/uploads/docs/publications/pedersen-v-opm-faq.pdf>.

170. *Windsor v. United States: Edie Windsor Challenges DOMA*, AM. CIV. LIBERTIES UNION, <http://www.aclu.org/lgbt-rights/windsor-v-united-states-thea-edie-doma> (last visited Feb. 3, 2012).

171. Extension of Benefits to Same-Sex Domestic Partners of Federal Employees, 75 Fed. Reg. 32247, 32247 (June 8, 2010). Some fringe benefits that federal

however, President Obama acknowledged that it was insufficient, that “legislative action is necessary to provide full equality to LGBT Federal employees”¹⁷² Moreover, the presidential memorandum did not address veterans’ benefits for gay service members, and certainly did not administer full health care and housing benefits to same-sex partners.¹⁷³ The Obama administration has championed same-sex rights further by labeling DOMA unconstitutional and ordering the Justice Department not to defend it in court.¹⁷⁴

On February 23, 2011, Attorney General Eric Holder addressed Congress concerning President Obama’s decision not to enforce DOMA in *Pedersen v. Office of Personnel Management* and *Windsor v. United States*.¹⁷⁵ In his letter, he argues that courts should analyze classifications based on sexual orientation under a heightened standard of review.¹⁷⁶ Holder further argues that when one reviews DOMA under a heightened scrutiny standard, the statute fails.¹⁷⁷ Although President Obama instructed the Justice Department not to defend DOMA in *Pedersen* and *Windsor*, the Executive Department must continue to enforce it until Congress repeals it or the Supreme Court finds it unconstitutional.¹⁷⁸

Despite concerted attempts to erode its effectiveness, DOMA continues to prevent same-sex couples from enjoying the federal bene-

agencies now provide to gay couples include relocation benefits, access to day care center and gyms, and leave to care for ill partners. O’Keefe, *supra* note 150.

172. Extension of Benefits to Same-Sex Domestic Partners of Federal Employees, 75 Fed. Reg. at 32247.

173. O’Keefe, *supra* note 150.

174. Charlie Savage & Sheryl Gay Stolberg, *In Shift, U.S. Says Marriage Act Blocks Gay Rights*, N.Y. TIMES, Feb. 24, 2011, http://www.nytimes.com/2011/02/24/us/24marriage.html?_r=1&pagewanted=211.

175. Letter from Eric H. Holder, Att’y Gen., Dep’t of Justice, to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), *available at* <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> (last visited Feb. 3, 2012). Holder said, “After careful consideration, including review of a recommendation from me, the President of the United States has made the determination that . . . [DOMA], as applied to same-sex couples who are legally married under state law, violates the equal protection component of the Fifth Amendment.” *Id.*

176. *Id.* The President based his conclusion on a number of factors, among them a documented history of discrimination against gays and lesbians. *Id.*

177. *Id.* Holder references the Executive Department’s “longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense.” *Id.* He also says, however, that the Department has failed to defend some statutes despite “professionally responsible arguments,” as not all professionally responsible arguments are reasonable. *Id.*

178. *Id.*

fits available to their heterosexual counterparts on a national scale.¹⁷⁹ The inability to enjoy such benefits has particularly significant financial consequences—such as the exemption from survivors' benefits offered by the VA—for the elderly subset of the LGBT community.¹⁸⁰ Public acceptance of same-sex rights, recent federal district court cases challenging the constitutionality of DOMA, and President Obama's order to federal agencies to extend spousal benefits, as well as the decision not to defend the statute in the courts, suggest the increasing vulnerability of DOMA. Further, by finding a liberty interest in intimacy and overruling a same-sex sodomy ban, the Supreme Court in *Lawrence* moved the battle against DOMA one step closer to victory.¹⁸¹ Finally, the repeal of DADT could impact the effectiveness of DOMA and lead the federal government to recognize same-sex relationships and extend survivors' benefits to the same-sex partners and spouses of LGBT service members and veterans.¹⁸²

IV. Recommendation

A. End of Same-Sex Discrimination in the Military After Repeal of DADT

To end the discrimination that LGBT elders experience due to the military's discriminatory practices concerning homosexuality and to remedy past discrimination, several actions must be taken. First, the government needs to take an active role in ensuring that the repeal of DADT does not simply cause a shift in anti-gay discrimination from de jure to de facto. The first step to achieving this result is swift certification of the DADT repeal, which was achieved when the repeal be-

179. Defense of Marriage Act, 1 U.S.C. § 7 (2006); see Persinger, *supra* note 17, at 144. The White House says that President Obama continues to favor civil unions over same-sex marriage; however, many same-sex marriage advocates see President Obama's renouncement of DOMA as a step toward federal recognition of same-sex marriage. See Savage & Stolberg, *supra* note 174.

180. See *supra* Part III.A.2, 6.

181. See *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

182. Bob Witeck, *Repeal of 'Don't Ask, Don't Tell' Changes Everything in Corporate America*, CNBC GUEST BLOG (Feb. 8, 2011, 3:31 P.M.), <http://www.cnbc.com/id/41478306>. Advocacy groups are urging the Pentagon to extend health care and housing benefits to LGBT service members. Ed O'Keefe, *Ending 'Don't Ask, Don't Tell' Doesn't End Problems Facing Gay Service Members*, WASH. POST, Feb. 13, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/13/AR2011021302780.html>.

came effective on September 20, 2011.¹⁸³ President Obama has shown his dedication to same-sex equality in the military through reiteration of his campaign promise to repeal DADT.¹⁸⁴ A Pentagon report conducted prior to the repeal of DADT concluded that “while a repeal of Don’t Ask, Don’t Tell will likely, in the short term, bring about some limited and isolated disruption to unit cohesion and retention, we do not believe this disruption will be widespread or long-lasting.”¹⁸⁵ In conducting its research, the Pentagon observed that “approximately 70% of [115,000 surveyed active-duty and reserve service members] predict that repeal will have mixed, positive or no effects on their unit’s ability to ‘work together to get the job done.’”¹⁸⁶

Yet a repeal of DADT by itself will be insufficient to achieve true equality between heterosexual and LGBT service members and veterans. The United States Armed Force’s discriminatory treatment of gays and lesbians dates back to the American Revolution, and repealing DADT will not erase that culture of discrimination. Thus, unless the federal government mandates reforms and takes active measures, the de jure culture of LGBT discrimination in the military will simply morph into one of de facto discrimination. The Pentagon has already recommended a number of necessary measures for the military to take, the most important ones being strong leadership, reminding troops of their commitment to professionalism and respect for fellow service members, and proactive training and education.¹⁸⁷ Strong leadership is vital to sexuality-based equality; regardless of personal beliefs, high-ranking officers must demonstrate that the military will not tolerate discrimination. A message to troops, however, is unlikely to change firmly rooted values and beliefs. Hopefully, as pro-equality

183. Elisabeth Bumiller, *Out and Proud to Serve*, N.Y. TIMES, Sept. 20, 2011, <http://www.nytimes.com/2011/09/20/us/after-toiling-in-shadows-to-end-dont-ask-dont-tell-1st-lt-josh-seefried-greets-a-new-era.html?hp>.

184. Michael D. Shear, *Promise to Repeal Gay Ban Faces Filibuster*, N.Y. TIMES, Sept. 21, 2010, <http://thecaucus.blogs.nytimes.com/2010/09/21/senate-democrats-dont-filibuster-gay-service-ban/>. Expressing his opposition to DADT, President Obama called it a “law that denies gay Americans the right to serve the country they love because of who they are.” *Id.* (internal citations omitted). Further, he said that repealing it is “the right thing to do.” *Id.* (internal citations omitted).

185. DEP’T OF DEFENSE, REPORT OF THE COMPREHENSIVE REVIEW OF THE ISSUES ASSOCIATED WITH A REPEAL OF “DON’T ASK, DON’T TELL” 119 (2010), available at [http://www.defense.gov/home/features/2010/0610_dadt/DADTReport_FINAL_20101130\(secur-hires\).pdf](http://www.defense.gov/home/features/2010/0610_dadt/DADTReport_FINAL_20101130(secur-hires).pdf).

186. *Id.* (internal citations omitted).

187. *Id.* at 132.

attitudes trickle down from the top through the ranks, training and education will encourage service members to change their mindset toward homosexuality.

To achieve equality, the military must update its standards of conduct. The Pentagon has stated that “it is not necessary to set forth an extensive set of new or revised standards of conduct in the event of repeal” because the military has existing standards of conduct that “prescribe appropriate attire and personal appearance, prohibit unprofessional relationships, address various forms of harassment and related unprofessional behavior, and provide guidelines on public displays of affection.”¹⁸⁸ As long as the military has lived by these standards of conduct, however, it has operated under an anti-gay discriminatory policy. The Pentagon observed objections to homosexuality on religious and moral grounds in its research, which suggests that the military climate will be somewhat tumultuous following the repeal of DADT.¹⁸⁹ Strong leadership and training can only accomplish so much. Service members need a standard of conduct requiring respect for the differences of fellow service members.

The Pentagon also recommends that LGBT service members be treated equally under the Military Equal Opportunity Program.¹⁹⁰ To achieve this end, the military must train and educate active and incoming service members on operating in an equal military environment. In addition, it must create disciplinary procedures for those who do not honor the standards of equality.

The military must approach its newfound commitment to equality with the strength and perseverance it would dedicate to any mission. Officers must have methods to discipline service members who discriminate against their gay and lesbian colleagues. LGBT service members must have forums to report sexual orientation discrimination and to seek redress. Further, the military should provide counseling following the DADT repeal, both to heterosexual and LGBT service members, as well as to LGBT veterans and gays and lesbians discharged under DADT. It is only once the military achieves equality that the effects will start to trickle down to LGBT veterans and ex-service members.

188. *Id.* at 133–34.

189. *Id.* at 134.

190. *Id.* at 136.

B. Repeal of DOMA

The second recommendation of this Note—a complete repeal of DOMA—would allow same-sex spouses of service members and veterans to receive survivors' benefits from the VA. A repeal would have far-reaching consequences apart from the receipt of survivors' benefits, as it would allow same-sex spouses to enjoy all federal spousal benefits. A repeal of DOMA can only be effected by the federal government. Therefore, activists need to lobby Congress to overturn DOMA. Simultaneously, activists need to continue attacking the courts with complaints questioning the constitutionality of DOMA and using targeted-impact litigation to reach the Supreme Court. Until Congress repeals DOMA or until the Supreme Court finds it unconstitutional, the statute will continue to deny federal spousal benefits to same-sex couples, thus treating gays and lesbians like second-class citizens.

C. Extension of Survivors' Benefits to Domestic Partners

Even if the federal government were to repeal DOMA, most same-sex couples would still be unable to marry. DOMA currently prevents same-sex couples from enjoying federal spousal benefits and allows states to refuse to recognize same-sex marriages or unions effected in other states.¹⁹¹ If Congress or the Supreme Court overturned DOMA, the federal government would no longer have DOMA's permission to deny federal spousal benefits to same-sex married couples and states could no longer refuse to recognize other states' same-sex unions. Many same-sex couples would still be unable to marry, however, as most states do not permit same-sex marriages.¹⁹² Because

191. *Id.* at 143.

192. Currently, Washington, D.C., Connecticut, Iowa, Massachusetts, New Hampshire, New York, and Vermont are the only places that issue same-sex marriage licenses. *Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, N.Y. TIMES, Mar. 4, 2011, http://topics.nytimes.com/top/reference/timestopics/subjects/s/same_sex_marriage/index.html (last visited Feb. 3, 2012); Michael Barbaro, *After Long Wait, Same-Sex Couples Marry in New York*, N.Y. TIMES, July 24, 2011, <http://www.nytimes.com/2011/07/25/nyregion/after-long-wait-same-sex-couples-marry-in-new-york.htm?pagewanted=all> (last visited Feb. 3, 2012).

On February 7, 2012, the United States Court of Appeals for the Ninth Circuit overturned Proposition 8, a voter-approved ban on same-sex marriages passed in California in 2008. Adam Nagourney, *Court Strikes Down Ban on Gay Marriage in California*, N.Y. TIMES, Feb. 7, 2012, <http://www.nytimes.com/2012/02/08/us/marriage-ban-violates-constitution-court-rules.html>. Proposition 8 was passed in response to the California Supreme Court's holding in *In re Marriage Cases* extending the right to marry to same-sex couples. Jon Davidson, *Prop 8: One*

many same-sex couples would be unable to marry, many domestic partners of veterans would be unable to enjoy survivors' benefits available to opposite-sex spouses of veterans. Although gays and lesbians could travel to a state that recognizes same-sex marriage, such a solution is costly and unrealistic for some couples, especially considering the financial difficulties that LGBT couples experience.¹⁹³

Because many gay and lesbian veterans are unable to marry, this Note recommends that the VA remedy its method of distributing survivors' benefits. Specifically, the VA should extend survivors' benefits to the domestic partners of LGBT veterans in those states that do not allow same-sex marriage. It should not offer survivors' benefits to domestic partners in states where same-sex marriage is legal, however, unless it also extends the benefits to opposite-sex qualifying couples. This policy would preserve the state's interest in the marital relationship, as well as ensure that the federal government does not turn its discrimination onto opposite-sex couples.

In expanding the group of persons eligible to receive veterans' benefits, the VA should create its own standard to determine who qualifies as a domestic partner for ease of administration, as opposed to relying on the differing state rules. Creating a federal standard would allow qualifying couples to receive benefits in those states where domestic partnerships are not recognized. A federal standard for domestic partnerships should consider such factors as cohabitation, commingling of assets, holding out as a couple, and acknowledgment of a commitment to one another.

D. Appeals Procedure for Wrongly Discharged LGBT Service Members

Finally, the military needs to implement an appeals procedure to remedy the past wrongs it inflicted on its gay and lesbian service members. The appeals process would enable LGBT veterans who were discharged under less than honorable conditions due to their

Landmark Decision Begets Another, HUFFINGTON POST, Feb. 10, 2012, http://www.huffingtonpost.com/jon-davidson/prop-8-one-landmark-decis_b_1268556.html. Depending on whether the case is appealed, same-sex marriage may become a reality in California again soon. On February 13, 2012, the governor of Washington signed a bill legalizing same-sex marriage. *Washington Governor Signs Gay Marriage Bill*, N.Y. Times, Feb. 13, 2012, <http://www.nytimes.com/aponline/2012/02/13/us/AP-US-Washington-Gay-Marriage.html>. The law will take effect on June 7, 2012. *Id.*

193. See *supra* Part III.A.3.

sexual orientation to seek redress in the form of access to veterans' benefits. The military would need to construct the procedure carefully so as to prevent plaintiffs from abusing the system. That is, the procedure should require complaining plaintiffs to establish that the military indeed discharged them on the basis of their sexual orientation and that they otherwise would have served out their terms and left the armed forces under honorable conditions.

To ensure that plaintiffs do not overwhelm the appeals process with frivolous claims, the military should place the initial burden of proof on plaintiffs and require them to prove by a preponderance of the evidence the following three elements to succeed in such a claim. First, the complaining plaintiff must prove that he or she in fact identified as gay or lesbian at the time of the discharge. This requirement will eliminate claims from discharged heterosexuals who may try to take advantage of the appeals procedure to receive veterans' benefits. It will also weed out claims from individuals who now identify as gay or lesbian but did not do so at the time of their discharge and may likewise try to take advantage of the procedure. Alternatively, a plaintiff should be allowed to show that even though he or she has never identified as gay or lesbian or engaged in same-sex conduct, the military nevertheless perceived him or her to be gay or lesbian or to have engaged in same-sex acts at the time of the discharge.

To receive veterans' benefits, however, it should not be enough that the complaining plaintiff can prove that he or she identified as gay or lesbian at the time of the discharge. Otherwise, discharged LGBT ex-service members could abuse the process to have their veterans' benefits unjustly reinstated. Under the second element, the complaining plaintiff must show that the military knew of his or her same-sex status or conduct at the time of discharge. Third, the complaining plaintiff must show that his or her sexual orientation was in fact the cause of the discharge. The second and third requirements will protect the military in those instances where it discharged the LGBT service member for a suitable reason and where the individual's sexual orientation did not form the basis for the discharge.

When a complaining plaintiff has established the elements of his or her claim, the burden should shift to the military to prove that the reason for the discharge was unrelated to same-sex status or conduct. Even if the military can establish a non-discriminatory reason, the plaintiff should still have an opportunity to show that the reason giv-

en by the military was simply a pretext for sexual orientation discrimination. Although the complaining plaintiff initially bears the burden of proof and persuasion, once he or she has met that burden it should be exceedingly difficult for the military to prove otherwise.

Finally, not only to alleviate costs to the military, but also taking into account the fact that federal legislation supported and even mandated sexual orientation discrimination, complaining plaintiffs should not typically be allowed to recover damages above and beyond veterans' benefits as the result of their discharges. The federal court system should, however, recognize an exception for those circumstances where a discharged gay or lesbian service member suffered particularly egregious discrimination from the military. For example, people like Colonel Margarethe Cammermeyer, who underwent a traumatizing DADT investigation despite a pristine and exemplary military record,¹⁹⁴ should have a valid claim for damages against the armed forces and federal government. In determining an appropriate damages award in such cases, the courts should look at the totality of the circumstances regarding the discharge, including how many years the plaintiff served prior to it, his or her rank at the time of the discharge, and his or her remaining time commitment to the military had the discharge not occurred.

V. Conclusion

The relationship between the United States Armed Forces and its gay and lesbian service members and veterans dates back to the country's founding and since then has been strained at best. Over the years, the military's policies toward homosexuality have changed; yet, their inherently discriminatory nature has remained constant. The LGBT community has suffered as a result of these policies, with the elderly subset of that population bearing a significant portion of the negative consequences. The Obama administration's steps to overturn DADT and DOMA, as well as the additional recommendations of this Note, will help to remedy past discrimination and protect against future discrimination. Yet even if all such measures were implemented and successful, nothing can erase the history of anti-gay discrimination or the scars endured by LGBT ex-service members and veterans.

194. See CAMMERMEYER, *supra* note 2, at 3–5.

