

William & Mary Journal of Race, Gender, and Social Justice

Volume 18 (2011-2012)

Issue 1 *William & Mary Journal of Women and the Law: 2011 Special Issue: The Repeal of "Don't Ask, Don't Tell"*

Article 2

December 2011

Introduction

Jayne W. Barnard

William & Mary Law School, jwbarn@wm.edu

Follow this and additional works at: <https://scholarship.law.wm.edu/wmjowl>



Part of the [Civil Rights and Discrimination Commons](#)

Repository Citation

Jayne W. Barnard, *Introduction*, 18 *Wm. & Mary J. Women & L.* 1 (2011), <https://scholarship.law.wm.edu/wmjowl/vol18/iss1/2>

Copyright c 2011 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmjowl>

INTRODUCTION

JAYNE W. BARNARD*

On September 20, 2011, the United States military policy known as “Don’t Ask, Don’t Tell” (DADT) glided into history.¹ Many critics lamented the acceptance of openly gay, lesbian, and bisexual service members in the U.S. armed forces.² On the other hand, supporters of the repeal of DADT celebrated in the streets, in officers’ clubs, on Army bases, and on board ships.³ Many service members gleefully “came out” in uniform on You Tube.⁴ Some former service members, driven out by DADT, enthusiastically re-enlisted.⁵

It was foreseeable in the year leading up to the repeal date that DADT would be repealed. The question, primarily, was when. The United States Congress, in December 2010, had authorized the end of DADT conditioned upon the certification of the President, Secretary of Defense and Chairman of the Joint Chiefs of Staff that eliminating DADT would not impair military readiness.⁶ Throughout 2010 and 2011, the Department of Defense conducted surveys and focus groups to secure the information necessary to support the required certification.⁷ Military leaders who were quizzed on their views lent credence to the proposition that repeal of DADT would do no harm

* James Goold Cutler Professor of Law and Kelly Chair for Teaching Excellence 2009–2012. Professor Barnard is the Faculty Advisor for the *Journal of Women and the Law*.

1. Aliyah Shahid, *‘Don’t Ask, Don’t Tell’ Repealed, Gay Military Personnel Can Now Serve Openly in the Armed Services*, N.Y. DAILY NEWS, Sept. 20, 2011, http://articles.nydailynews.com/2011-09-20/news/30202235_1_gay-military-personnel-gay-soldiers-dadt.

2. See, e.g., Chris Johnson, *Santorum to Gay Soldier: ‘Don’t Ask’ Repeal is ‘Tragic,’* WASH. BLADE, Sept. 22, 2011, <http://www.washingtonblade.com/2011/09/22/santorum-to-gay-soldier-dont-ask-repeal-is-tragic/> (“What we’re doing is social experimentation. That’s tragic.” (quoting Presidential candidate and former U.S. Sen. Rick Santorum) (internal quotation marks omitted)).

3. See, e.g., Thomas Francis, *On Base, ‘Don’t Ask, Don’t Tell’ Demise Is Cause for Celebrated* (Sept. 21, 2011, 10:42 AM), http://msnbc.msn.com/id/44607673/ns/us_news-life/ (recounting the celebration held by retired Rear Adm. Alan S. Steinman, the highest-ranking military member to identify himself as gay); Trady Ring, *DADT Repeal: Time to Celebrate!*, ADVOCATE.COM (Sept. 19, 2011, 9:15 PM), http://www.advocate.com/News/Daily_News/2011/09/20/DADT_Repeal_Time_to_Celebrate/ (detailing various celebrations held across the country).

4. *After ‘Don’t Ask, Don’t Tell,’ Coming Out on the Web*, N.Y. TIMES, Oct. 16, 2011, at ST1.

5. Ryan Haggerty, *Gay Veteran Who Fought ‘Don’t Ask, Don’t Tell’ Will Re-enlist for Military Service*, CHI. TRIB., Oct. 24, 2011, http://articles.chicagotribune.com/2011-10-24/news/ct-met-dont-ask-dont-tell-1024-20111024_1_lee-reinhart-gay-veteran-sexual-orientation.

6. Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010).

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

to the fighting power of the United States.⁸ Public opinion surveys showed overwhelming public support for the end of DADT.⁹

In the midst of these developments, in the spring of 2011, the Editorial Board of the *Journal of Women and the Law* commissioned this Special Issue, focusing on some of the legal and policy issues raised by the rise and fall of DADT in the United States.

Consistent with the *Journal's* mission of "stimulating an open discussion encompassing a variety of viewpoints" on gender-related issues,¹⁰ the Board invited a number of scholars and others with expertise on military law and policy, workplace discrimination against gay, lesbian, bisexual and transgendered persons, constitutional law, and cultural studies to participate in this virtual symposium.

The Board's objectives in creating this Special Issue were (1) to capture, as a "first draft of history," informed commentary about the history and impact of DADT as the policy was in its death throes; (2) to elicit and memorialize the views of experts who, one way or another, cared passionately about the military's DADT policy; and (3) to set out a variety of carefully considered viewpoints that might not otherwise be apparent from the daily media coverage of DADT and its impact on individual members of the military services.

This Special Issue confirms the Board's instinct that DADT was a topic worthy of intense scrutiny at this moment in history. It is a powerful testament to the role of law journals in adding diverse voices to policy debates and to employing the tools of scholarship to shape and document important social and cultural, as well as legal, developments.

The authors whose work appears in this Special Issue are lawyers and non-lawyers, women and men, and proponents and opponents of the repeal of DADT.

The first article, by law professor Shannon Gilreath, raises a provocative and perhaps surprising question. Should gay, lesbian, and bisexual (GLB) people be happy about the demise of Don't Ask, Don't Tell? Or should GLB people reject service in United States military because of its pervasive culture of "masculinized violence"¹¹

8. Perhaps the most powerful testimony came from Admiral Mike Mullen, the Chairman of the Joint Chiefs of Staff, who told the Senate Armed Service Committee: "No matter how I look at the issue, I cannot escape being troubled by the fact that we have in place a policy which forces young men and women to lie about who they are in order to defend their fellow citizens." Elisabeth Bumiller, *A Call to Topple Policy for Gays in Armed Forces*, N.Y. TIMES, Feb. 3, 2010, at A1.

9. Lyman Morales, *In U.S., 67% Support Repealing "Don't Ask, Don't Tell,"* GALLUP (Dec. 9, 2010), <http://www.gallup.com/poll/145130/support-repealing-don-t-ask-don-t-tell.aspx>.

10. *Mission Statement*, J. WOMEN & L., <http://wmpeople.wm.edu/site/page/wmjowl/missionstatement> (last visited Nov. 2, 2011).

11. Shannon Gilreath, *Why Gays Should Not Serve in the United States Armed Forces: A Gay Liberationist Statement of Principle*, 18 WM & MARY J. WOMEN & L. 7, 19 (2011).

and its support of repressive countries including Saudi Arabia, Egypt, Kuwait, and Iraq? Professor Gilreath suggests lesbians, especially, should reject the prospect of military service. Our Middle Eastern allies consistently discriminate against women and gay men and yet the United States looks the other way. “Gay people owe themselves and other Gay people a critical analysis of the world they are helping to make,” says Gilreath.¹² Importantly, international law so far has failed to address the rights of GLB people. And military intervention inevitably results in worse, rather than better, conditions for GLB people in occupied countries. So why would anyone want to enlist?

The second article is by Michelle Benecke, an influential organizer and founder of the Servicemembers Legal Defense Network (SLDN), which, from 1993 to 2010, lobbied tirelessly for the end of DADT.¹³ Benecke focuses on some early turning points in SLDN’s efforts to persuade the American public and their members of Congress that many, many GLB service members were ably serving their country—even as highly placed officers. Sexual orientation did not interfere with outstanding military performance.

Benecke’s stage-setter is both personal and powerful in capturing the early days of DADT, the organizing strategies that ultimately led to Congressional action, and the individual service members and their family members who stepped into the media’s spotlight to help make the case for others who would follow them. Benecke’s article not only reveals an important slice of history, it also provides a template for high stakes, high profile legislative advocacy.

The third article, by Suzanna Danuta Walters, shifts the terrain again.¹⁴ Walters, who specializes in gender studies, cautions that progress toward equality for GLBT people is, at best, a “half-finished project.”¹⁵ Homophobia still runs strong among a large minority of American citizens and the United States is still a country of “heteronormativity.”¹⁶ Further, rather than having achieved “liberation” or societal transformation through the repeal of DADT, GLBT people have settled for “tolerance” and “acceptance.”¹⁷ Just as Professor Gilreath laments that the gay rights movement has embraced “straight priorities” (like marriage and access to military service) at the expense of gay liberation,¹⁸ Professor Walters laments

12. *Id.* at 16.

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

14. Suzanna Danuta Walters, *The Few, the Proud, the Gays: Don’t Ask, Don’t Tell and the Trap of Tolerance*, 18 WM & MARY J. WOMEN & L. 87 (2011).

15. *Id.* at 88.

16. *Id.* at 108.

17. *Id.* at 92.

18. See Gilreath, *supra* note 11, at 33–34 & n.164.

that gay service members have bought “into soldiering, . . . killing, . . . male bonding, and . . . brotherhood.”¹⁹ For her, the repeal of DADT represents “the death knell of a more vibrant gay sensibility.”²⁰

The fourth article is by Herbert W. Titus, former dean of Regent Law School and a constitutional law professor for more than 20 years.²¹ Titus’s claim is straightforward—the Don’t Ask, Don’t Tell Repeal Act of 2010, which was tacked onto a bill which originally was intended to promote small business innovation, violates the requirement of the House of Representatives Rules that amendments be “germane” to the original bill and, indeed, violates the constitution because the revised bill was not referred to the House and Senate Armed Services Committees. Titus also castigates Congress for its delegation of authority to the Executive Branch which, he argues, is a violation of the principle of separation of powers. In short, he calls the repeal of DADT a “lawless process.”²² In walking the reader through the applicable statutory provisions, Titus reminds us of the importance of adherence to procedural rules to ensure that legislation commands public support and confidence.

There is a fascinating circularity in the articles in this Special Issue. Professor Gilreath asks why any gay, lesbian, or bisexual person would want to serve in the U.S. military, while Dean Titus points out that the repeal of DADT is likely to lead to the targeted recruitment of GLB service members just as there has been of African Americans, Latinos, and women.²³

Will this occur? Will increased numbers of GLB service members make the United States military stronger? Will it enhance the prospects of GLB service members for high status, prestige, and leadership opportunities outside the military context?

Will the repeal of DADT enhance the lives of GLB service members and other GLB citizens or will it further consign them to “heteronormative” roles? Will it move the American public from an attitude of “tolerance” to full assimilation of GLB people? Might it even foster an environment conducive to a richer array of human sexual expression? Perhaps another Special Issue a decade from now will begin to answer those questions.

Let me add a note here about the students who conceived, designed, and executed the assembly of this Special Issue. Senior

19. See Walters, *supra* note 14, at 110 & n.150.

20. *Id.* at 113.

21. Herbert W. Titus, *The Don’t Ask, Don’t Tell Repeal Act: Breaching the Constitutional Ramparts*, 18 WM & MARY J. WOMEN & L. 115 (2011).

22. *Id.* at 133.

23. See *id.* at 129 & n.113.

Articles Editor Brandon Waterman, '11, headed up the effort to identify and invite participants. The *Journal's* editorial board in the class of 2012 received, organized, and edited the articles submitted by our experts and performed all the thankless tasks of producing a finished scholarly book. They include: Lillian McManus, Alyson Drake, Jean Folsom, Nicole Sonia, Jamel Rowe, Madelyn Buckley, Susan Motley, Michael Bagel, Laura Brymer, Karen Gillespie, Jessica Jeanty, and Frances Polifione.

Thanks to all of them and other staff members of the *Journal of Women and the Law*. Next year's Special Issue will explore Women and Children in Post-Conflict Situations.