

WHY GAYS SHOULD NOT SERVE IN THE UNITED
STATES ARMED FORCES: A GAY LIBERATIONIST
STATEMENT OF PRINCIPLE

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If, by our example of how we . . . have reclaimed our own very UN-Hetero values of self-love, self-esteem, and self-affirmation, we can inspire the Spiritually STILL-indentured Colonialized Minority Communities to invent similar ways to rise from their . . . servitude to stand once more . . . —no longer in the values and symbols of the dominators, but in terms of what they, as Separate Cultures, have to contribute to the betterment of everybody—what a triumph of the Human Spirit that could be!

—Harry Hay¹

The romance of treason never occurred to us for the brutally simple reason that you can't betray a country you don't have. (Think about it).

—James Baldwin²

INTRODUCTION

The question of whether Gays should be allowed to serve in the armed services—that is, the generally accepted question of whether Gays should be permitted to serve—is actually divisible into two questions. The first question is the more often addressed: whether

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1. Harry Hay, *What Gay Consciousness Brings, and Has Brought, to the Hetero Left!*, in *RADICALLY GAY: GAY LIBERATION IN THE WORDS OF ITS FOUNDER* 284, 291 (Will Roscoe ed., 1996).

2. JAMES BALDWIN, *THE PRICE OF THE TICKET: COLLECTED NONFICTION 1948–1985*, at xv–xvi (1985).

Gays have an equality-based right to serve in the military. I believe the answer is “yes.” This first question is the question to which most scholarship has been devoted, especially since “Don’t Ask, Don’t Tell”³ actually created a problem that did not exist prior to its enactment. The baiting of Gay service members through a sense of false security resulted in a purge of Gay service members that was unprecedented.⁴ This first question was and is, in fact, extremely important, because the arguments for excluding openly Gay people from the military are perhaps stronger than any argument for the exclusion of Gays in any other area. Consequently, if those arguments fail with respect to the military—if they are ultimately unpersuasive in this “special” environment—then they should be unpersuasive elsewhere, where such “special” concerns are not present; thus, the possibility of comprehensive nondiscrimination protections is strengthened.⁵

There is a second, closely related equality question, however, that has gone largely unexamined. The equality dimensions of this question are, in my view, even stronger—that is, if equality is viewed with an eye toward its substance and not merely its form. This second question might be stated thusly: conceding that Gays have a formal equality right—a legal/constitutional right—to serve, should they serve? Or, to put it another way: should participation in the military be a goal of Gay civil rights organizing? Does it, in fact, raise the equality quotient for Gay men and women in other than merely arithmetic ways? One could say that the first question is a descriptive

3. “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” policy is codified at 10 U.S.C. § 654 (1993).

4. This is not to suggest that the military had a good track record before Don’t Ask, Don’t Tell. Prior to DADT, Gays, even those who were closeted, were banned from the military and civil service, and purges periodically took place. *See, e.g.*, Gregory B. Lewis, *Lifting the Ban on Gays in the Civil Service: Federal Policy Toward Gay and Lesbian Employees since the Cold War*, 57 PUB. ADMIN. REV. 387, 390 (1997) (detailing the effort by the Civil Service Commission and the FBI in the 1950s “to purge homosexual employees” due to “political demands”).

5. For a discussion of the defense of Don’t Ask, Don’t Tell on the ground that the military is a special environment in which antidiscrimination protections cannot be expected to apply (at least with regard to Gays)—what I call the “Defense is Different” rationale, see Shannon Gilreath, *Sexually Speaking: “Don’t Ask, Don’t Tell” and the First Amendment After Lawrence v. Texas*, 14 DUKE J. GENDER L. & POL’Y, 953, 962–67 (2007) [hereinafter Gilreath, *Sexually Speaking*].

The “Defense is Different” argument is essentially a rationale for allowing government actions that would otherwise be blatantly unconstitutional, on the grounds that (1) the military is a very special environment requiring an especial surrender of personal liberty and (2) military officials have superior expertise to determine how the proper balance between uniformity and personal liberty is struck.

Id. (citation omitted).

question, asking what rights all Americans should possess by virtue of their citizenship, while the second question is a normative one, considering what majoritarian institutions an oppressed people should seek to enter—that is, what, strategically, should be the goals of civil rights organizing for an oppressed people? This question is an entrée for a more comprehensive critique of the civil rights organizing that led to the repeal of Don't Ask, Don't Tell, as well as the closely related marriage agenda currently pursued by the “gay rights” movement.⁶ It is this second question, and the Gay liberation answer to it, to which I will devote my brief contribution to this Special Issue.

When I was contacted by the Pentagon's Comprehensive Review Working Group for Don't Ask, Don't Tell and asked to give them advice on some of the issues they were facing, I thought, “Well, here's a chance to do something for Gay people.” And, anyway, I thought many of the issues, for example, whether having openly Gay people in the military would somehow infringe upon the “rights” of chaplains of certain denominations if they had to “minister” to Gays, were so absurd that I couldn't not answer them. I am fully aware that Gays' access to the military, as out Gay people, is an equality issue. I care about equality and I care about Gay people; how could I not respond? I am glad that I could contribute, however peripherally, to the repeal of a draconian policy, the very name of which has become an inelegant (but pinpoint accurate) tagline for straight supremacy—a translation of Alfred Douglas's “love that dare not speak its name” into the base English of impoverished contemporary discourse.⁷ The non-being of Gay being Douglas so aptly named has survived (*plus ça change, plus c'est la même chose*) and was codified with cruel precision, thanks to President Clinton's political ineptitude, in a policy that, unlike most congressional edicts, thoroughly saturated the American idiom.⁸ Don't Ask, Don't Tell existed as a bald, heterocratic statement that Gay people should not exist. This is an era that I am glad to see end.

But having gotten to where we are—to a place at which the law no longer bars Gays' entry into the armed services,⁹ the question of

6. For an expanded analysis of the “like-straight” philosophy driving the larger “gay rights” agenda, see SHANNON GILREATH, *THE END OF STRAIGHT SUPREMACY: REALIZING GAY LIBERATION* 210, 222, 229 (2011) [hereinafter GILREATH, *END OF STRAIGHT SUPREMACY*] (noting that the current focus of the gay rights movement is on “marriage as a status,” which is fueled by this “like-straight” philosophy).

7. Alfred Douglas, *Two Loves*, *THE CHAMELEON*, Dec. 1894, at 28.

8. For a lucid summary of the political wrangling that produced Don't Ask, Don't Tell, see JANET E. HALLEY, *DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY* 19–26 (1999) (describing the “five versions of military anti-gay policy” that occurred during the first year of President Clinton's administration).

9. On December 22, 2010, President Obama signed the Don't Ask, Don't Tell Repeal Act of 2010. Jesse Lee, *The President Signs Repeal of “Don't Ask, Don't Tell”*: “Out of Many,

whether Gays *should* serve stands out in bold relief. This is, at bottom, a question of priorities. The modern “gay rights” movement, at least since the 1970s when the Gay Activists Alliance split from the Gay Liberation Front, has been governed by a politics that values only that which is paradigmatically straight. Accordingly, it has striven mightily to get Gays into the two institutions through which most of the world’s violence is accomplished—the state-sanctioned home and the military—without much critical analysis of how participation in these institutions actually affects Gay people.¹⁰

I. CONTEXT

Access to the military as a goal of civil rights organizing is, of course, in no way unusual. It has been a part of every civil rights movement, figuring prominently in the movements for African-American rights and women’s equality.¹¹ More recently, the patriarchalists, most notably in legal circles represented by Justice Scalia, got riled up when women wanted into the Virginia Military Institute (VMI).¹² Predictable patriarchal panic ensued.¹³ But I wanted to know “why?”—why would women want into VMI? The place sounds just dreadful.¹⁴ No one really asked the women why they wanted in. And

We Are One,” THE WHITE HOUSE BLOG (Dec. 22, 2010, 12:35 PM), <http://whitehouse.gov/blog/2010/12/22/president-signs-repeal-dont-ask-dont-tell-out-many-we-are-one>.

10. See GILREATH, *END OF STRAIGHT SUPREMACY*, *supra* note 6, at 215.

11. DEP’T OF DEF., REPORT OF THE COMPREHENSIVE REVIEW OF THE ISSUES ASSOCIATED WITH A REPEAL OF “DON’T ASK, DON’T TELL” 81–88 (2010), [http://www.defense.gov/home/features/2010/0610_dadt/DADTRReport_FINAL_20101130\(secure-hires\).pdf](http://www.defense.gov/home/features/2010/0610_dadt/DADTRReport_FINAL_20101130(secure-hires).pdf) [hereinafter COMPREHENSIVE REVIEW] (giving a short history of the integration of African Americans and women into the United States armed forces and explaining the similarities and differences between those integrations and the integration of Gays in the military).

12. *United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) (“Today [the Court] enshrines the notion that no substantial educational value is to be served by an all-men’s military academy—so that the decision by the people of Virginia to maintain such an institution denies equal protection to women who cannot attend that institution but can attend others.”).

13. For the story behind *United States v. Virginia*, see Katherine T. Bartlett, *Unconstitutionally Male?: The Story of United States v. Virginia*, in *WOMEN AND THE LAW STORIES* 166–67 (Elizabeth M. Schneider & Stephanie M. Wildman eds., 2011) (describing the hearing that took place after the decision, looking into the privatization of VMI, in an effort to keep the all-male institution female free).

14. *United States v. Virginia*, 518 U.S. at 522 (“VMI produces its ‘citizen-soldiers’ through ‘an adversative, or doubting, model of education’ which features ‘[p]hysical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values.’ . . . VMI cadets live in spartan barracks where surveillance is constant and privacy nonexistent; they wear uniforms, eat together in the mess hall, and regularly participate in drills. Entering students are incessantly exposed to the rat line, ‘an extreme form of the adversative model,’ comparable in intensity to Marine Corps boot camp.” (internal citations omitted)).

no one bothered to observe, as I have elsewhere, that “there is nothing remotely revolutionary about wanting . . . to be shot at in ‘defense’ of a country that routinely denies you political rights and basic human dignity.”¹⁵ The military industrial complex’s most recent justification for perpetuating itself—terrorism—makes this absurdity even more apparent, considering that women face a state of existence that is nothing short of domestic terrorism daily in the United States.¹⁶

I suppose a likely reason for fighting to get into the military is that people generally want to go where they are not wanted. It is one of the great perversities of human nature. Or perhaps, from a perspective more or less feminist, it is because for the entirety of patriarchal history, men have treated women as something to be bred, and when not being bred, to be poked, tormented, abused, and killed.¹⁷ Maybe women wanted into the military in parity with men because it gave them access to the flagship killing machine of the patriarchalists who run things. I see no reason that it should be insulting to label this a power grab. It was an imminently reasonable one under the circumstances. Of course, one can only speculate over women’s motives for muscling into the military, but I think there can be no doubting that the meaning of such access for women’s status was not lost on the patriarchalists, who resisted feverishly.¹⁸

On a deeper but no less true level, I think that some women wanted into the military and into VMI simply because it is their right to be there. Despite the best efforts of the patriarchalists, some women have become conversant with the Constitution and have decided, quite rightly, that in a country supposedly not neutral on the question of equality, they have the right to be where they want to be. A free country is a free country, after all, even if it always has been free more in theory than in fact. Unfortunately for women so disposed, Germaine Greer was right when she stated so pithily the factual basis for most

15. GILREATH, *END OF STRAIGHT SUPREMACY*, *supra* note 6, at 228.

16. *See, e.g.*, Andrea Dworkin, *Pornography: The New Terrorism*, in *LETTERS FROM A WAR ZONE: WRITINGS 1976–1989*, 197, 200 (1988) (“Women are a degraded and terrorized people. Women are degraded and terrorized by men. Rape is terrorism. Wife-beating is terrorism. Medical butchering is terrorism. Sexual abuse in its hundred million forms is terrorism.”); Catharine A. MacKinnon, *Women’s September 11th: Rethinking the International Law of Conflict*, 47 *HARV. INT’L L.J.* 1, 14, 18–19 (2006) (“Violence against women is imagined to be nonstate, culturally specific, expressive acts of bad apple individuals all over the world that is so hard to stop. Terrorism, which is all of these, is said to be so serious, there is no choice but to stop it, while seriously addressing threats to women’s security is apparently nothing but a choice, since it has barely begun.”); Amy E. Ray, *The Shame of It: Gender-Based Terrorism in the Former Yugoslavia and the Failure of International Human Rights Law to Comprehend the Injuries*, 46 *AM. U. L. REV.* 793, 799–801 (1997) (describing the rape of women in Yugoslavia as “sexual terrorism”).

17. Dworkin, *supra* note 16, at 200.

18. *See* *COMPREHENSIVE REVIEW*, *supra* note 11, at 86.

of what we call “history”—heterosexual men hate women¹⁹—and since the heterosexed male is most himself when he is part of an armed mob, however regimented, women in the military have found themselves submerged in masculine violence.²⁰ Women in the military have a better chance of being raped by their fellow male service members than being killed by enemy fire.²¹ The Department of Defense estimated a whopping 19,000 rapes and sexual assaults in 2010, and this with a report rate of only 13.5%.²² Despite eighteen separate reports commissioned by the military on the issue of sexual assault, nothing much has changed.²³ In one military study, two out of every three military women reported being sexually harassed.²⁴ A lawsuit filed in 2011 against the Department of Defense alleges a culture that encourages rape and sexual assault of female service members and intentional mishandling of reported cases.²⁵ Some women who do report are discharged for “psychological” reasons, which some believe is retaliation for breaking the silence that engulfs them.²⁶ Military psychologists apparently believe that when a woman refuses to shut up and take it, she must be “crazy.”

In the wake of all of this generally unreported, and certainly seldom-reported-on, misery, Gays went knocking at the military’s door. Politics aside—and it is a big aside—I think most Gays want into the military for reasons not more or less noble than the reasons women wanted in: namely, they want in to serve their country, to protect our freedoms.²⁷ But I wonder, frankly, whether any Gay soldier has ever lived in the America he or she represents while in uniform. In reality, that America for the Gay person is little more than a fiction. The Gay person in the uniform of the U.S. Armed Services stands for a contradiction: the preservation of a nation (if we accept the

19. GERMAINE GREER, *THE FEMALE EUNUCH* 279 (2002) (“Women have very little idea of how much men hate them.”).

20. See COMPREHENSIVE REVIEW, *supra* note 11, at 87.

21. Jackie Speier, *Rapes of Women in Military ‘A National Disgrace,’* S.F. CHRON., Apr. 17, 2011, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2011/04/16/INS91J05RF.DTL>.

22. *Id.*

23. *Id.*

24. Eric Schmitt, *2 Out of 3 Women in Military Study Report Sexual Harassment Incidents*, N.Y. TIMES, Sept. 12, 1990, at A22.

25. Ashley Parker, *Lawsuit Says Military is Rife with Sexual Abuse*, N.Y. TIMES, Feb. 16, 2011, at A18.

26. See, e.g., Yochi J. Dreazen, *Rate of Sexual Assault in Army Prompts an Effort at Prevention*, WALL ST. J., Oct. 3, 2008, at A17 (describing how Ellen Wainwright was involuntarily discharged from the military after giving a sworn affidavit that she was sexually assaulted by a high-ranking soldier repeatedly).

27. See, e.g., Eve Conant, *Do Ask, Do Tell*, NEWSWEEK, Sept. 27, 2010, <http://www.the-dailybeast.com/newsweek/2010/09/27/gay-vets-who-want-to-return-to-the-military.html> (quoting a gay serviceman discharged for his homosexuality who still desires to serve in the U.S. military: “You never lose that sense of duty and service and love for country.”).

propaganda) from which he or she is always excluded. This uniform represents the straight man's America—and how could it not? The straight man has invented both the uniform and the country, and each is still firmly within his iron grip. We—Gay people—of course know this. Having lived a Gay life in the United States of America, we are not naïve and we certainly are not innocent; those of us remaining so for too long wind up dead. Instead, Gays go into the military standing on principle—the principle that this is indeed the land of the free, that it's worth defending, and that its ideals are worth propagating.²⁸ The tremendous sadness of it all is that the distance between this principle and the reality most Gays experience at home and abroad is measured in heartbreak.

II. THE GLOBAL EMERGENCY

Whatever one may have thought about Gay involvement in the U.S. military before, that is, specifically, whatever a Gay liberation analysis might have looked like in years past, United States intervention in the Arab regimes in the Middle East and now North Africa necessitates a specific and serious analysis. The newest phase of U.S. interventionism was sparked by September 11th.²⁹ Two wars have been launched in its name.³⁰ Debate about the efficacy of the U.S. response aside, what's interesting about September 11th for a Gay liberation analysis is that it has meant that humanitarian calamities caused by nonstate actors have been treated as a source of action invoking the response of war.³¹ Although no parallels are acknowledged, and consequently no war waged, Gays too, in this country and abroad, are facing armed attack at the hands of nonstate actors.³² It is an armed conflict, and, by most accounts, Gays are losing.³³ Yet no

28. See, e.g., *id.* (describing how many former Gay service men simply want the chance to serve their country again).

29. CATHERINE A. MACKINNON, ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES 260 (2006).

30. See Gilbert Cruz, *The Death of Osama Bin Laden*, TIME (May 2, 2011), http://www.time.com/time/specials/packages/article/0,28804,2068862_206886_2068865,00.html.

31. On September 11th, private actors attacked (mostly) private people-civilians. See, e.g., Pres. George Bush, Remarks at The White House, (Sept. 6, 2006) (transcript available at <http://www.cnn.com/2006/POLITICS/09/06/bush.transcript/index.html?iref=allsearch>) (describing the events of the September 11th attacks and the parties involved).

32. See, e.g., G.A. Res 62/152, ¶ 16, 18, U.N. Doc. A/65/223 (Aug. 4, 2010) (noting that community leaders, faith-based groups and newspapers have all attacked those defending Gay rights).

33. See, e.g., James Kirchick, *Gays Abroad Need Our Help*, INDEP. GAY F. (Jun. 11, 2004), <http://igfculturewatch.com/2004/06/11/gays-abroad-need-our-help> (describing examples of the treatment of homosexuals in other countries: imprisoning them, beheading them, and labeling them “worse than pigs” (quoting Robert Mugabe, dictator of Zimbabwe)).

humanitarian crisis is acknowledged. One begins to wonder whether there is one standard for human dignity or not. Or, put another way, what makes a humanitarian crisis? What does it take? When Gay people who care about Gay people look at the world now, it is harder than ever not to wonder whether “humanitarian crisis” isn’t some kind of code for the likelihood that sufficient numbers of *straight* men are getting killed or injured. The same could be said for the prevailing international understanding of “terrorism.”³⁴ In fact, if not in theory, September 11th was a massive assault on civilians by other civilians that prompted a massive response by the United States and by governments around the world.³⁵ Despite mass-scale violence occurring against Gays and Lesbians—a violence which is discernibly increasing³⁶—the world has not been similarly turned upside down. Before any Gay soldier with anything resembling a Gay consciousness marches off to the fray, I think it’s fair that she or he asks why.

At the level of surface observation, of course, the September 11th attacks do not appear to have much to do with sex or sexuality. We know that victims were male and female, straight and Gay.³⁷ We know that those who risked, and sadly some who lost, their lives trying to help in the rescue efforts were likewise gender and sexuality diverse.³⁸ There were straight heroes and Gay heroes.³⁹ But, just below the surface, heterosexuality lurks in full-scale operation, both as the dominant ethos of the “foreign” perpetrators⁴⁰ and in the grossly unfair

34. As Catharine MacKinnon has noted, September 11th showed what governments, and the U.S. government in particular, can do about abuse “when they want to.” MACKINNON, *supra* note 29, at 260.

35. *Id.*

36. See, e.g., Paul Harris, *US Shaken by Sudden Surge of Violence Against Gay People*, OBSERVER (London), Oct. 17, 2010, <http://www.guardian.co.uk/world/2010/oct/17/increase-homophobia-violence-new-york> (describing a series of brutal attacks aimed against Gays in New York).

37. See MACKINNON, *supra* note 29, at 260; Margie Mason, *Gay Hero Emerges From Hijacking*, WASH. POST, Oct. 22, 2001, http://www.washingtonpost.com/wp-srv/aponline/20011022/aponline150457_000.htm.

38. See SUSAN HAGEN & MARY CAROUBA, *WOMEN AT GROUND ZERO: STORIES OF COURAGE AND COMPASSION* (2002); MACKINNON, *supra* note 29, at 260; Mason, *supra* note 37.

39. See, e.g., Charisse Jones, *The Making of St. Mychal*, U.S.A. TODAY, Feb. 20, 2003, at A01 (exploring the cult that has developed around Fr. Mychal Judge, a New York Fire Department chaplain, rumored to be Gay, who was September 11th’s first official victim); Mason, *supra* note 37 (detailing the story of Mark Bingham, a Gay man thought to be part of a group of passengers who fought with hijackers on Flight 93, crashing the plane in a Pennsylvania field before it could reach its apparent target in Washington).

40. See MACKINNON, *supra* note 29, at 260 (“Animated by a male-dominant ethos, this one in the guise of religion—a particular fundamentalist extremism that has silenced women, subordinated them in private, and excluded them from public life—these men bound for glory and pleasure, some for virgins in a martyr’s paradise, exterminated people by the thousands to make a point. . . . [T]his aggression, these atrocities, this propaganda by deed, made September 11th an exemplary day of male violence.” (citation omitted)).

targeting of Gays by “domestic” powers. The motivating force behind the September 11th attacks was an undeniably, paradigmatically heterosexual religious/political dynamic.⁴¹ In the context of Gay liberation specifically, Harry Hay explicated many years ago the concept of “spiritual slavery” and adroitly observed that “[a]mong the really first-class facilities” for maintaining domination one must rank organized religions at the top.⁴² Hay included Islam in his discussion because Islam is thoroughly heterosexual; indeed, those men who successfully murdered thousands of “infidels” on September 11th had as their promised reward nothing short of a heterosexual male paradise: eternal life among female virgins.⁴³

Exposing the minute degree of separation between the Islamic theocracy the hijackers hoped to establish and the Christian theocracy at work in the United States was Jerry Falwell and Pat Robertson’s performance, just days after the twin towers crumbled, blaming Gays for the calamity.⁴⁴ These prominent spokesmen for Christian terror were as certain in their attacks as the Islamists were in theirs, claiming the same divine revelation that animated September 11th. During an appearance on Robertson’s television show, Falwell said, “God continues to lift the curtain and allow the enemies of America to give us probably what we deserve. . . . [G]ays and . . . lesbians . . . —I point the finger in their face and say, ‘You helped this happen.’”⁴⁵

The same Christian theocratic principles that animated Robertson and Falwell dictated official treatment of the surviving same-sex partners of those killed in the disaster.⁴⁶ Because same-sex partners are not considered “family” under federal law, survivors had difficulties obtaining information from airline officials, as well as the \$25,000 in compensation the airlines paid to spouses and families of victims.⁴⁷ In addition, the survivors of same-sex partnerships faced special hurdles in claiming monies set aside by the Victims Compensation Fund,

41. *Id.*

42. Hay, *supra* note 1, at 290.

43. Norman Mailer said that murder “is never unsexual.” NORMAN MAILER, AN AMERICAN DREAM 8 (1987). For the September 11th hijackers, murder and the religious ethos with which it was intertwined were explicitly sexual. See MACKINNON, *supra* note 29, at 260. Excerpts from various documents left behind by the 9/11 hijackers were reprinted by the New York Times shortly after the attacks; the papers contained promises that “the women of paradise are waiting” for the “champions.” *Notes Found After the Hijackings*, N.Y. TIMES, Sept. 29, 2001, at B3.

44. John F. Harris, *God Gave U.S. ‘What We Deserve,’ Falwell Says*, WASH. POST, Sept. 14, 2001, at C3.

45. *Id.* (internal quotation marks omitted).

46. See, e.g., Kathleen Burge, *Sept. 11 Leaves Same-Sex Partners Adrift: Law Bars Benefits, Even Recognition*, BOSTON GLOBE, Mar. 18, 2002, at B1 (describing the difficulties faced by surviving same-sex partners in the wake of September 11th).

47. *Id.*

problems compounded by the discrimination inherent in many hetero-centric state inheritance laws.⁴⁸

Having been made largely invisible as September 11th's victims and survivors, Gays, still made invisible by statute as members of the U.S. military, were then used in the armed response to September 11th—the “war on terror.”⁴⁹ This “war,” one which the international law of war centered on state actors and theaters had never contemplated, was always characterized as humanitarian in nature—first as a war of defense and later specifically as a response to humanitarian crises, particularly in Iraq.⁵⁰ More recently, similar justifications are offered for U.S. policy in Egypt and for U.S. armed intervention in Libya.⁵¹ If Gay people, as members of the U.S. military, are going to be involved in interventionist campaigns explicitly based in human rights—or at least justified by human rights rhetoric, then Gay people owe themselves and other Gay people a critical analysis of the world they are helping to make. There is mounting evidence that the world

48. In addition to the compensation funds, other problems, like the inheritance of a shared home when a partner killed on 9/11 died intestate, or the right to renew car registrations—problems faced by many Gay couples daily in this country—were made more poignant in 9/11's wake. *See id.*

49. I am not merely talking about the participation of those Gays who, in accord with regulations, didn't “tell.” The Bush administration's pursuit of a “hot preemption” strategy meant that soldiers were in greater demand, and the military has admitted sending admitted homosexual soldiers to war, “the homosexual issue [being] postponed until they return to the U.S. and the unit is demobilized.” *See* Press Release, Pentagon Acknowledges Sending Openly Gay Service Members to War (Sept. 23, 2005), available at http://www.palmcenter.org/press/dadt/releases/pentagon_acknowledges_sending_openly_gay_service_members_to_war_acknowledgment_follows_discovery_of_regulat; *see also* Gilreath, *Sexually Speaking*, *supra* note 5, at 973 (noting the military's history of keeping Gays enlisted during times of war). What generally happens to these Gay service members is that upon their demobilization they are treated badly, dishonorably discharged, and cheated out of military benefits. This use-and-toss-away approach has been the way the military has handled Gays for some time. *See, e.g.*, *Watkins v. United States*, 875 F.2d 699, 701–03 (9th Cir. 1989). *Watkins*, an openly Gay soldier serving in Vietnam, was allowed to reenlist multiple times only to be proceeded against with separation charges just shy of his retirement eligibility. *Id.* The Ninth Circuit ruled *en banc* that the army was estopped from this procedural trickery. *Id.* at 711.

50. CONGRESSIONAL RESEARCH SERVICE, REPORT FOR CONGRESS—IRAQ WAR: BACKGROUND AND ISSUES OVERVIEW 1–3, 6 (2003).

51. *See, e.g.*, Robert Kagan, *An Imperfect Triumph in Libya*, WASH. POST, Aug. 28, 2011, http://www.washingtonpost.com/opinions/an-imperfect-triumph-in-libya/2011/08/26/gIQA5gC9gJ_story.html (illustrating the reasons the U.S. got involved in Libya); Leon Wieseltier, *American Liberals and the Streets of Cairo*, THE NEW REPUBLIC, Jan. 29, 2011, <http://www.tnr.com/article/world/82435/egypt-riots-american-liberals-cairo> (questioning President Obama's assurance that U.S. policy has been to look out for the rights of Egyptian people). In these instances, as with Iraq, the intervention has been against state and nonstate actors. *See* U.S. DEPT OF STATE, OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, COUNTRY REPORTS: MIDDLE EAST AND NORTH AFRICA OVERVIEW (2011), available at <http://www.state.gov/s/ct/rls/crt/2010/170257.htm> (explaining the current conditions of the countries and the possible terrorist factions located inside Egypt, Libya, and Iraq).

they are helping to make is measurably worse for Gays.⁵² For Gays, the message appears to be that the human in “humanitarianism” does not include us.

In Iraq, for example, conditions are grim.⁵³ In 2009, Human Rights Watch published a report detailing a sweeping campaign of kidnappings, torture, and executions of Gay Iraqi men.⁵⁴ One such documented killing was that of the partner of a man called “Hamid.”⁵⁵ Hamid’s partner was extracted from his family’s home by an armed gang.⁵⁶ His mutilated body was found the next day; his genitals had been cut off and a portion of his throat had been ripped out.⁵⁷ Iraqi doctors told Human Rights Watch about men executed by having glue injected up their anuses.⁵⁸ The murderers sometimes make pornography of the gruesome torture deaths of their victims,⁵⁹ and even when they are not murdered, Gay men are beaten, raped, and tortured.⁶⁰

When, usually through plain luck, targets escape, the sick religious fervor that produces the violence ensures that families turn their sons away once they are exposed as Gay.⁶¹ Most are left with no place to go and little aid for escape.⁶² No one knows, of course, precisely how many men have been killed by Iraq’s roving death squads, but in a matter of months during 2009 officials estimated the number to be in the hundreds.⁶³ What is clear, however, is that the killings are targeted predominately at Gay men.⁶⁴ While not for

52. See, e.g., Cara Buckley, *Gays Living in Shadows of New Iraq: Violence Replaces Tacit Acceptance*, N.Y. TIMES, Dec. 18, 2007, at A8 (noting the American invasion of Iraq was expected to bring better times but that conditions have worsened for Gays living in Iraq since the invasion).

53. *Id.*

54. HUMAN RIGHTS WATCH, “THEY WANT US EXTERMINATED”: MURDER, TORTURE, SEXUAL ORIENTATION AND GENDER IN IRAQ 2 (2009).

55. *Id.* at 1.

56. *Id.*

57. *Id.*

58. *Id.* at 2.

59. See *id.* at 12, 21 (providing examples of attacks recorded on video).

60. See HUMAN RIGHTS WATCH, *supra* note 54, at 19, 23, 24.

61. One man escaped when the Mahdi Army death squad came for him because the group mistakenly kidnapped the wrong man, who happened to have the same name of the actual target. *Id.* at 15–16. When kidnappers discovered their error, they released the young man. *Id.* at 15. He returned to his neighborhood looking “like a roast chicken,” because he had been tortured by electrocution. *Id.* When the young man conveyed that the attackers had actually been after his neighbor with the same name, the Gay man’s family turned him out. *Id.* at 16.

62. *Id.* at 53.

63. *Id.* at 2. It is important to note that Kurdistan is only marginally better. In Kurdistan during 2008 a doctor was sentenced to six months in prison simply for writing about Gay men’s health issues; he was later pardoned by the Kurdish president. *Id.* at 28.

64. Women suspected of homosexuality are, however, also targeted. See, e.g., David France, *Dying to Come Out: The War on Gays in Iraq*, GQ, Jan. 2007, <http://www.gq.com>

their anti-Gay tactics specifically, Human Rights Watch points out that the same “militias” behind the murder campaign have been tacitly supported by the powers-that-be of the U.S. occupation, and Iraqi police and security forces have turned a blind eye.⁶⁵ Some reports suggest that the Iraqi police and security forces are directly involved in the killings and abuse.⁶⁶ Reports by Iraqi LGBT, a Gay advocacy group, and Amnesty International reported some 128 men on Iraq’s “death row,” some of whom, according to Iraqi LGBT, had been convicted of nothing more than “homosexuality.”⁶⁷ At the least, the Iraqi security apparatus has been implicated in wide-spread extortion and protection racketing activities.⁶⁸

While these unqualified observations would be disturbing enough, it is important to remember, especially in the context of my analysis here, that American military interventionism and occupation, especially in Iraq, have made things worse for Gay people.⁶⁹ This is a big statement, but I do not make it without evidence. Before the first American invasion, the Persian Gulf War, things were very different in Iraq. A thriving Gay subculture was available to Iraqi Gays, with nightclubs and cafés that catered to Gay clientele.⁷⁰ Gay men were, for the most part, allowed to flout gender conventions without repercussions.⁷¹ Even though Saddam attempted to consolidate his power over religious elements after the first invasion by permitting sporadic legal persecution of Gays, homosexuality was still largely tolerated, if confined to the private sphere.⁷² The BBC documentary *Gay Life After*

/news-politics/big-issues/200701/ali-hili-gay-iraqi-spy (describing the horrific death of a transsexual, who was burned to death while observers cheered); Timothy Williams, *Iraq’s Newly Open Gays Face Scorn and Murder*, N.Y. TIMES, Apr. 7, 2009, <http://www.nytimes.com/2009/04/08/world/middleeast/08gay.html> (noting specifically that both men and women are target by death squads).

65. HUMAN RIGHTS WATCH, *supra* note 54, at 3, 4.

66. *Id.* at 4, 28.

67. *Stop Executions of Gay Iraqis: Members of Iraqi LGBT Group on Death Row, Action Needed to Halt Judicial Executions*, IRAQI LGBT BLOG, (Mar. 27, 2009, 4:43 PM), <http://iraqilgbtuk.blogspot.com/2009/03/stop-executions-of-gay-iraqis.html>.

68. *See, e.g.*, HUMAN RIGHTS WATCH, *supra* note 54, at 29–33 (telling the story of Nuri, a Gay man who was kidnapped by Iraqi Ministry of the Interior officials and tortured and nearly killed, all the while being asked to pay bribes, because he acted as an agent of Iraqi LGBT, a Gay Iraqi exile group that operates safe houses for Gays in Iraq). Nuri reports that he was tortured inside the Ministry of the Interior and that his assailants were Interior agents. *Id.* at 31. He also reports seeing the bodies of Gay men these same agents told him they had killed for being Gay. *Id.* at 29.

69. Buckley, *supra* note 52, at A8.

70. *See, e.g., id.* (detailing the Gay subculture that existed in Iraq from the mid-1980s to early 1990s).

71. *Id.* (noting the ability of Gay men wearing makeup during that time to walk through the streets without interference).

72. *Id.* One has to put the Iraq of the 1990s in perspective. It was, in fact, not much different than a considerable portion of the United States, in which homosexuality was

Saddam reported that “[a]ll the LGBT Iraqis interviewed . . . maintained that [Gay] life was easier for them when Saddam Hussein was in power, from 1979 to 2003.”⁷³ There is even evidence that the U.S. military has played an active part in the growing persecution, taunting Gay Iraqis and spreading word of their status or whereabouts in a society where a growing power vacuum turns this kind of adolescent teasing into a death sentence.⁷⁴ This, too, ought to give Gay service members pause, because in my view it is merely a reflection of a military culture in which to harass, belittle, and humiliate in the name of gender and/or sexuality is simply a part of the climate that makes the perpetrator of this kind of heterocratic violence a good soldier, a good American, or just one of the boys.⁷⁵ It is a climate of masculinized violence rendering the military an acutely unsafe place to be if you are Gay.⁷⁶

Terrorization of Gay people has been a longstanding tradition of Islamist governments the U.S. opposes, those it has used as puppets, and those it has established in occupied countries.⁷⁷ In Iran, an

punishable by multi-year prison terms until the decision in *Lawrence v. Texas* in 2003. See *Lawrence v. Texas*, 539 U.S. 558 (2003) (overruling the State Court of Appeals decision which held a statute forbidding certain same-sex sexual conduct was not unconstitutional). In Iraq and the United States, something called privacy (read: secrecy) was the key to evading criminal condemnation, of no less religious origin in one jurisdiction than the other. See, e.g., Buckley, *supra* note 52, at A8 (describing one Iraqi Gay man’s practice of moving frequently to avoid suspicious neighbors).

73. *Saddam’s Rule ‘Better’ for Gay Iraqis*, BBC NEWS (July 6, 2009, 8:00 AM), http://news.bbc.co.uk/2/hi/middle_east/8133639.stm.

74. See, e.g., Buckley, *supra* note 52, at A8 (describing how, after American soldiers entered one Gay man’s apartment looking for insurgents and proceeded to mock the man, word of his homosexuality spread to his neighbors).

75. See, e.g., Jesse Ellison, *The Military’s Secret Shame*, NEWSWEEK, Apr. 11, 2011, at 42 (explaining how the military environment, like most predominately male atmospheres is “motivated . . . by . . . power, intimidation, and domination”); *Reports Clears Army in Gay Soldier’s Death*, ABC NEWS (July 19, 2011), <http://www.abcnews.go.com/US/story?id=96466&page=1> [hereinafter *Report Clears Army*] (reporting that an investigation at Fort Campbell, Kentucky, where a Gay soldier was beaten to death, revealed “that the 101st Airborne as a whole ha[d] no unusual degree of homophobia”). Maybe it is the usualness of it that should trouble us. Pvt. Calvin Glover beat Pfc. Barry Winchell to death with a baseball bat with the aid of Winchell’s roommate, Spc. Justin R. Fisher. *Report Clears Army*, *supra*. At Glover’s trial, soldiers testified to a pervasive climate of anti-Gay slurs and baiting leading up to Winchell’s slaying. *Id.* See also COMPREHENSIVE REVIEW, *supra* note 11, at 53–54 (listing concerns of some service members about standards of conduct that might result if Gays were allowed to serve openly in the military: “Some will be flamboyant; they might get a beating”; “There’s the possibility of beating up gays . . .”; and “I don’t like flamboyant queers” (citations omitted)).

76. See, e.g., Ellison, *supra* note 75, at 40 (explaining that when a Russian-American soldier, referred to as “a commie faggot,” reported that he was gang-raped by other soldiers at Fort Benning, his commanding officer told him, “It must have been your fault. You must have provoked them.”).

77. See *UN Group Backs Gay Rights for the First Time*, MSNBC (June 17, 2011, 6:59 PM), http://www.msnbc.msn.com/id/43443853/ns/world_news-europe/t/un-group-backs

arch-nemesis of the United States,⁷⁸ atrocities are committed against Gay people regularly.⁷⁹ The penalty for consensual homosexual relations is death, and there are regular executions.⁸⁰ The morbid and psychopathic emphasis on gender identity as part of Islam provides some “escape.”⁸¹ The Iranian government subsidizes the cost of gender reassignment surgery, in which Gay men can “become” women, thus removing the possibility of homosexuality.⁸² When Iran’s president made his now infamous statement at Columbia University that there are no Gay people in Iran,⁸³ he could mean it. Yet, even governments the U.S. (which “stands up for” universal human rights) has promoted, like the Egyptian government of Hosni Mubarak, have routinely harassed, tortured, and murdered their Gay citizens.⁸⁴ In the power vacuum created by the transitional government after Mubarak was toppled, as various Islamist factions vie for power, there has been an uptick in anti-Gay rhetoric, scapegoating, and violence.⁸⁵ When President Obama speaks of “universal” human rights of the Egyptian people,⁸⁶ one has to wonder who qualifies. When the President condemned the Mubarak regime’s violent reaction against Egyptians in

-gay-rights-first-time/# (stating that homosexuality is seen as a violation of religious and cultural values in Islamic states).

78. Jeffrey M. Jones, *Americans Continue to Rate Iran as Greatest U.S. Enemy*, GALLUP (Feb. 18, 2011), <http://www.gallup.com/poll/146165/americans-continue-rate-iran-greatest-enemy.aspx>.

79. See *Iran: Two More Executions for Homosexual Conduct*, HUM. RTS. WATCH (Nov. 21, 2005), <http://www.hrw.org/en/news/2005/11/21/iran-two-more-executions-homosexual-conduct> (describing arrests, torture, and executions of Gay people in Iran).

80. See EDDIE BRUCE-JONES & LUCAS PAOLI ITABORAHY, *THE INT’L LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASS’N, STATE-SPONSORED HOMOPHOBIA: A WORLD SURVEY OF LAWS CRIMINALISING SAME-SEX SEXUAL ACTS BETWEEN CONSENTING ADULTS* 38 (2011) (detailing the punishments in Iran for consensual homosexual relations); *Iran: Two More Executions for Homosexual Conduct*, *supra* note 79 (discussing the frequent use of executions as punishment for consensual homosexual relations).

81. See *Sexuality, Gender and Islam: Gender Identity and Islam*, SAFRA PROJECT, <http://www.safraproject.org/sgi-genderidentity.htm> (last visited Nov. 2, 2011) (explaining the roles of gender identity in Islam and the focus on gender reassignment surgery for certain members of Islamic societies).

82. Vanessa Barford, *Iran’s ‘Diagnosed Transsexuals,’* BBC NEWS (Feb. 25, 2008, 10:55 AM), http://news.bbc.co.uk/go/pr/fr/-/2/hi/middle_east/7259057.stm.

83. See Helene Cooper, *Ahmadinejad, at Columbia, Parries and Puzzles*, N.Y. TIMES, Sept. 25, 2007, at A1.

84. See Mubarak Dahir, *More Fallout from the War*, ADVOCATE, Nov. 20, 2001, at 28; Hassan El Menyawi, *Opinion: Will Egypt’s Revolution be in Vain?*, AOL NEWS (Feb. 25, 2011), <http://news.aol.co.uk/2011/02/25/opinion-will-egypts-revolution-be-in-vain/> (describing arrest and torture of a Gay activist in a Mubarak regime prison).

85. Telephone Interview with Hassan El Menyawi, Gay Middle-East activist (July 20, 2011).

86. Press Release, President Barack Obama, Remarks by the President on the Situation in Egypt (Jan. 28, 2011), <http://www.whitehouse.gov/the-press-office/2011/01/28/remarks-president-situation-egypt>.

Tahrir Square in January 2011, expressing that his “first concern [was] preventing injury or loss of life,” even a Gay liberationist with a strong stomach begins to feel a little queasy.⁸⁷ Where was the condemnation of the ongoing anti-Gay violence? Can it be true that Gay is not a suitable referent for “human” in U.S. foreign policy? From Libya, too, there are reports of escalating anti-Gay scapegoating by the Gaddafi loyalists and by the rebels.⁸⁸

Yet the human rights talk sounds most like hypocrisy to me when our presidents—our Commanders-in-Chief—talk about our good friends, the Saudis.⁸⁹ Iran is bad: it is oppressive to its people.⁹⁰ Syria is bad: it is oppressive to its people.⁹¹ Egypt was bad.⁹² Iraq and Afghanistan, and now Libya, are so bad that they must be invaded or bombed in order to stop the human rights abuses taking place in these bad places.⁹³ Saudi Arabia is our long-term ally.⁹⁴ This kind of selective blindness is not so surprising, I suppose, in all cases. In the case of Ronald Reagan, for example, Reagan’s support of apartheid as U.S. foreign policy makes it unsurprising that he would be willing to overlook Saudi abuses.⁹⁵ Yet, how do we explain presidents like

87. *Id.*

88. See, e.g., BRUCE-JONES & ITABORAHY, *supra* note 80, at 25 (describing the punishment for private homosexual acts between consenting adults in Libya as up to five years imprisonment).

89. See Joshua E. Keating, *America’s Other Most Embarrassing Allies*, FOREIGN POL’Y (Jan. 31, 2011), http://www.foreignpolicy.com/articles/2011/01/31/americas_other_most_embarrassing_allies?page=0,0 (describing American presidents’ relationship with the leadership of Saudi Arabia).

90. See Brian Knowlton & Nazila Fathi, *U.S. Report Describes Worsening Human Rights in Iran and China*, N.Y. TIMES, Mar. 11, 2010, <http://www.nytimes.com/2010/03/12/world/12rights.html> (describing murders of election protestors as well as “politically motivated torture, beatings, and rape” as human rights abuses that occur in Iran).

91. See Colum Lynch, *U.N. Blasts Syrian Leaders on Human Rights*, WASH. POST, Aug. 18, 2011, http://www.washingtonpost.com/blogs/checkpoint-washington/post/un-blasts-syrian-leaders-on-human-rights/2011/08/18/gIQAvduBOJ_blog.html (remarking on the four-month Syrian crackdown that has led to almost 2,000 dead protestors).

92. See *Egypt/US: Obama Should Press Mubarak on Rights*, HUM. RTS. WATCH (June 2, 2009), <http://www.hrw.org/news/2009/06/01/egyptus-obama-should-press-mubarak-rights> (describing some of the human rights violations that took place while Mubarak was in power in Egypt).

93. See Knowlton & Fathi, *supra* note 90 (highlighting “extrajudicial killings, torture, poor prison conditions, restrictions on freedom of expression and discrimination against women” as prevalent human rights abuses in Afghanistan, and “arbitrary killings, disappearances, torture, poor prison conditions, arbitrary arrests and inadequate protection for refugees” as some of the many human rights violations in Iraq); see also Peter Biles, *Libya Rights Abuses: Evidence Assessed*, BBC NEWS (Aug. 30, 2011, 1:13 PM), <http://www.bbc.co.uk/news/world-africa-14723137> (describing human rights atrocities committed by the Gaddafi regime, including mass killings that the Gaddafi government acknowledged dating back to 1996).

94. Keating, *supra* note 89.

95. See William J. Foltz, Editorial, *Reagan Forced South Africa Sanctions Issue*, N.Y. TIMES, May 26, 1994, at A22 (“[T]hey in effect conveyed to South African civilian and

Jimmy Carter, or Bill Clinton, or a self-proclaimed liberator like George W. Bush,⁹⁶ or even the Libyan savior, Barack Obama? What do these men, ostensibly concerned with human rights, have to say even for the treatment of women in Saudi Arabia? What of the fact that in Saudi Arabia contraceptive use is a crime⁹⁷ and women are effectively forced to breed babies?⁹⁸ Of course, if you are of the view of Reagan or the Bushes that women should be forced to breed babies, then this looks less hypocritical.⁹⁹ Yet if you are Obama, and you say you believe that women should have the “right to choose” an abortion,¹⁰⁰ then how do you overlook the treatment of women in Saudi Arabia? What about the fact that women, for no reason other than they are women, are not allowed to drive a car in Saudi Arabia?¹⁰¹ Is there a single standard of human dignity or not? If there is, do we allow opt-outs for oppressors who call their oppression—quite sincerely—religion?¹⁰²

Of course, politicians, even Republicans, must now at least give lip service to women’s equal humanity (or something approaching it). Not so for Gays’ humanity. Some are willing to go further than others.¹⁰³ But Gays, at least, should pay attention. How can Gays be

military leaders the impression that whatever might be said in public, when the chips were down, Ronald Reagan’s America would stand by white South Africa.”); Editorial, *The Anti-Apartheid Rumble*, NAT’L REV., Aug. 15, 1986, at 13; Editorial, *The Reagan Legacy*, NATION, June 28, 2004, at 3–4.

96. Jennifer Parker, *Bush on His Legacy: I ‘Liberated’ Iraqis*, ABC NEWS (Nov. 28, 2008), <http://abcnews.go.com/Politics/story?id=6353033&page=1>.

97. Andrea Dworkin, *A Feminist Looks at Saudi Arabia*, in LETTERS FROM A WAR ZONE: WRITINGS 1976–1989, *supra* note 16, at 97, 98.

98. *Id.*

99. If one were simply to confine one’s self to military women alone as examples of Republican policy concerning reproductive freedom, the record is abysmal. *See* Editorial, *Respect for Women in Uniform*, N.Y. TIMES, Feb. 15, 2010, at A20. Not until 2010, despite longstanding reporting on rapes and sexual assaults, did the Pentagon allow military pharmacies to carry the morning-after pill. *Id.* It had been proposed in 2002, but George W. Bush’s administration blocked it and continued to do so even after the drug went over the counter in 2006. *Id.* Women soldiers may only have abortions performed on base in cases of rape, incest, and when their lives are endangered. *Id.* For cases of pregnancy through rape or incest, the woman must pay for the abortion out of her own pocket. *Id.*

100. *Amid Protests, Obama Backs ‘Right to Choose’ on Roe Anniversary*, CNN, (Jan. 22, 2009), http://articles.cnn.com/2009-01-22/politics/obama.abortion_1_anti-abortion-international-family-planning-groups-mexico-city-policy?_s=PM:POLITICS.

101. *See* Keating, *supra* note 89.

102. Then again, this is a view not very unlike the direction too many American “liberals” are taking. *See* Shannon Gilreath, *Not A Moral Issue: Same-Sex Marriage and Religious Liberty*, 2010 U. ILL. L. REV. 205, 211–12 (criticizing a group of legal scholars, including Douglas Laycock and Robin Wilson, who lobby vociferously for special opt-outs from antidiscrimination laws for religionist employees (public and private) who oppose same-sex marriage and take actions on that basis that would otherwise violate generally applicable law).

103. The Obama Administration has made significant strides, including pursuing a repeal of Don’t Ask, Don’t Tell, culminating in the Administration’s decision to cease

part of a foreign policy that supports, in fact enables, the kind of oppression Gays face at the hands of Saudi despots? In Saudi Arabia, Gays are rounded up and publicly executed.¹⁰⁴ Likewise Kuwait, another “ally,” notably one we saved from Saddam’s megalomania, has actually amended its criminal code to enact severer punishments for Gays.¹⁰⁵ Gays live in fear.¹⁰⁶ As Gay people, shouldn’t we care? Shouldn’t we at least acknowledge a shared, transnational identity, the common link of which is oppression at the hands of straight supremacy, whether it is called Don’t Ask, Don’t Tell or Islam?¹⁰⁷ These, mind you, are not rhetorical questions.

These observations raise an extremely important query: what is “terror,” and why is it that what is done to Gay people does not count as terror? One barrier to having Gay experiences taken seriously in American humanitarian interventionism is that the legal bases for

defending the constitutionality of the Defense of Marriage Act. See Brian Montopoli, *Obama Certifies “Don’t Ask, Don’t Tell” Repeal*, CBS NEWS, (July 22, 2011, 4:50 PM), http://www.cbsnews.com/8301-503544_162-20082196-503544.html?tag=contentMain;contentBody; Valerie Richardson, *Obama Gets Out of Way of Gay Marriage*, WASH. TIMES, Feb. 23, 2011, <http://www.washingtontimes.com/news/2011/feb/23/obama-administration-ends-its-defense-doma/>.

104. This practice seems to have waned in recent years, leading some to speculate, without foundation in my opinion, that things really are not that bad for many Gay Saudis. The “It’s Easier to be Gay than Straight in Saudi Arabia” tagline of a piece in THE ATLANTIC is representative of this doublethink. See Nadya Labi, *The Kingdom in the Closet*, ATLANTIC, May 2007, <http://www.theatlantic.com/magazine/archive/2007/05/the-kingdom-in-the-closet/5774/>. The penalty, however, remains, and Saudi Gay men are executed, as for example the public beheading of three men from the town of Abha in 2002, who were suspected of being Gay. Paul Varnell, *Helping Islamic Gays*, CHI. FREE PRESS, Feb. 6, 2002, available at <http://igfculturewatch.com/2002/02/06/helping-islamic-gays>. Increasingly, though, Gays are rounded up and subjected to whippings or arbitrary jail terms of many years for simply appearing effeminate or attending Gay parties. Labi, *supra* note 104. I am not downplaying the important existential difference between being jailed and being dead, except to say that ten years in a Saudi prison might feel like death—if you make it out alive. In any event, this type of mass arrest as an alternative to execution should hardly be proof that “gay life flourishes” in Saudi Arabia even for liberals intent on a revisionist look at the kingdom. *Id.* It evidently does not seem that way to many Gay Saudis, including those for whom wealth might ordinarily act as a buffer to the law. In September 2010, a high-ranking Saudi diplomat in the United States applied for asylum because he had been exposed as Gay and feared for his life if he returned to Saudi Arabia. Michael Isikoff, *Saudi Diplomat Seeking Asylum: ‘My Life is in Danger,’* MSNBC NEWS (Sept. 11, 2010, 6:15 PM), http://today.msnbc.msn.com/id/39118941/ns/world_news-mideast_africa/t/saudi-diplomat-seeking-asylum-my-life-danger/.

105. See Brian Whitaker, *Boys Will be Boys—Or Else*, GUARDIAN (London), Jan. 23, 2008, <http://www.guardian.co.uk/commentisfree/2008/jan/23/boysmustbeboys> (describing the new punishment for people in Kuwait who “imitat[e] the appearance of a member of the opposite sex” (quoting the Kuwaiti penal code)).

106. See Labi, *supra* note 104.

107. See MARTIN F. MANALANSAN IV, *GLOBAL DIVAS: FILIPINO GAY MEN IN THE DIASPORA* viii–xi (2003) (chronicling a growing Gay diaspora, Gays fleeing oppression and resettling in search for freedom).

intervention, however arguable, have been sketched with war—with armed conflict—in mind.¹⁰⁸ Mostly what is done to Gay people is made to seem random, not systematic or systemic, as it in fact is.¹⁰⁹ Consequently, it does not look like any war we have known or named. Additionally, “war” or “armed conflict”—at least those conditions sufficient to constitute these terms from the perspective of international law—has always been defined in distinctly masculine or heterocratic terms, with war being generally regarded as a distinct period in which *heterosexual men* are killing *each other* for some *overtly political* purpose.¹¹⁰ Everything else is called peacetime,¹¹¹ no matter how many of us without the uniquely straight male access to the power of naming or to the machinery of war are injured or killed in the course of a usual day or year. Thus, Common Article 3 of the Geneva Conventions, providing protections for civilians during conflicts that are not among nations—protections thought to be the floor of what is due civilians engulfed by armed conflict—is not operable for most of what Gays suffer in epochs denominated, however briefly, as peacetime.¹¹² Common Article 3 provides, by letter anyway, much of what Gay people need, including prohibitions on violence to the person—particularly torture, cruelty, humiliation, degradation, and murder.¹¹³ As such, the law of war technically provides for Gays in zones of combat the basic protections of human dignity that the laws of many “peacetime” regimes do not. In peacetime and in wartime, Gays are under attack. Gays are not usually armed, and the ways in which Gays are systematically killed—the methods of destruction employed—often do not match the ordinary definition of “arms” or almost certainly of “armed conflict.”¹¹⁴ Interestingly, the new hate crimes prevention law in the United States requires that assaults

108. See Gareth Evans & Mohamed Sahnoun, *The Responsibility to Protect*, 81 FOREIGN AFF. 99, 99–102 (2002) (analyzing the debate about foreign intervention for humanitarian purposes).

109. See GREGORY M. HEREK & KEVIN T. BERRILL, HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN 127–30 (1992) (chronicling the systematic violence against Gays and Lesbians in the United States).

110. See Kayla Webley, *Brief History of Gays in the Military*, TIME, Feb. 2, 2010, <http://www.time.com/time/magazine/article/0,9171,1960257,00.html> (highlighting the strict exclusion of Gays from the military during the largest mobilization of U.S. troops in history).

111. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 75 U.N.T.S. 287, available at <http://www.unhcr.org/refworld/docid/3ae6b36d2.html>.

112. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 287, available at <http://www.unhcr.org/refworld/docid/3ae6b36d2.html>.

113. *Id.*

114. See Natasha Balendra, *Defining Armed Conflict*, 29 CARDOZO L. REV. 2461, 2469–70 (2008) (describing what an armed conflict is under international law).

be armed assaults in order for the maiming and murder that they do to be cognizable under the act.¹¹⁵

Still, the law usually finds a way to go where it wants. The relatively recent horrors of Somalia, Bosnia, Rwanda, and Kosovo in the early 1990s caused a shift in thinking about international humanitarian interventionism—specifically with regard to coercive interference in a state by other states in order to protect people from serious harm.¹¹⁶ This idea came to be known as the “responsibility to protect.”¹¹⁷ The responsibility to protect marked a sizable shift in political thought, in that it shifted emphasis away from the raw power of the state to act on its people to the duty of the state to act to secure for those people within its borders certain basic human rights.¹¹⁸ As it was eventually implemented by the United Nations, the “responsibility to protect” emphasizes “the responsibility [of each State] to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means.”¹¹⁹ Of course, the “responsibility to protect” has never been invoked in the name of Gay lives qua Gay lives.¹²⁰

If the Geneva Conventions set no limits and the “responsibility to protect” is set aside, the abuses to which Gays are subject most closely fit the definition of another category that is frequently invoked to describe crimes against humanity (as in Bosnia, Kosovo, and Rwanda), but has never been used to describe what is happening to Gay people: genocide.¹²¹ Terrorism may be difficult to define and international humanitarian law may be largely unimplemented, but the definition of genocide is a well-settled international law concept.¹²²

115. The Shepard-Byrd Act requires, in relevant part, that “the defendant employs a firearm, dangerous weapon, explosive or incendiary device, or other weapon that has traveled in interstate or foreign commerce.” 18 U.S.C.A § 249 (B)(iii) (West 2011).

116. Evans & Sahnoun, *supra* note 108, at 99.

117. An excellent explanation of the theoretical underpinnings of the “responsibility to protect” is provided by Gareth Evans and Mohamed Sahnoun in *The Responsibility to Protect*. *Id.* at 99–101.

118. *Id.* at 101–02.

119. U.N. Secretary-General, *Report of the Secretary-General on Implementing the Responsibility to Protect*, ¶ 1, U.N. Doc. A/63/677 (Jan. 12, 2009).

120. See William Magnuson, *The Responsibility to Protect and the Decline of Sovereignty: Free Speech Protection Under International Law*, 43 VAND. J. TRANSNAT’LL. 255, 258–61, 273 (2010) (discussing the history and origins of the responsibility to protect and the documented cases of humanitarian intervention applying the doctrine).

121. See ADAM JONES, GENOCIDE: A COMPREHENSIVE INTRODUCTION 476 (2d ed. 2011) (detailing the murders of Gays and Lesbians in South America and Africa, and concluding that the annual toll of such killings can be regarded as genocide).

122. Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1949, 78 U.N.T.S. 277, available at <http://www2.ohchr.org/english/law/genocide.htm>.

The Convention for the Prevention and Punishment of the Crime of Genocide defines “genocide, whether committed in time of peace or in time of war,” as acts “inten[ded] to destroy, in whole or in part, a national, ethnical, racial or religious group” by any of the following relevant ways: “(a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part”¹²³ Not only does the prohibition against genocide not take a war to make it applicable, it does not require state action; it reaches private individuals as well as rulers and public officials.¹²⁴

The omission of Gays as such from the list of protected categories, however, underlines that Gays must become cognizable, from the perspective of people in power, as a group—as a part of humanity in a way that recognizes a Gay identity beyond mere performativity—before Gays’ destruction on the basis of their group-based reality is cognizable as such.¹²⁵ I do not think it is unfair to say that that moment has not come, not in the United States or anywhere under the sun. International law has not addressed the war on Gays, as terrorism or genocide or as a harm triggering the responsibility to protect, because it does not want to. Period. It is mostly said that international law should not address the concerns I have highlighted because to do so would infringe on religious or cultural (often the same thing) traditions that mark homosexuality for opprobrium, making of the interveners imperialists or colonialists.¹²⁶ It is curious, especially in our post–September 11th world, that the systematic intrusion on the “human rights” of some men eventually makes for a politics worthy of international support along the way to vindication of rights that we all supposedly share.¹²⁷ Yet when Gays and women are degraded, violated, physically intruded upon, it is, as Catharine MacKinnon has noted, “still called culture, the latest cover for standing by”¹²⁸—with the common feature of this relativist cover underlining the link

123. Convention on the Prevention and Punishment of the Crime of Genocide art. 1, 2, Dec. 9, 1949, 78 U.N.T.S. 277, available at <http://www2.ohchr.org/english/law/genocide.htm>.

124. Convention on the Prevention and Punishment of the Crime of Genocide art. 4, Dec. 9, 1949, 78 U.N.T.S. 277, available at <http://www2.ohchr.org/english/law/genocide.htm>.

125. See EVAN GERSTMANN, *THE CONSTITUTIONAL UNDERCLASS: GAYS, LESBIANS, AND THE FAILURE OF CLASS-BASED EQUAL PROTECTION* 61, 96, 107 (1999) (illustrating the lack of constitutional protections afforded Gays and Lesbians).

126. See, e.g., Neil Macfarquhar, *In a First, Gay Rights Are Pressed at the U.N.*, N.Y. TIMES, Dec. 19, 2008, <http://www.nytimes.com/2008/12/19/world/19nations.html> (noting the religious and traditional values involved in laws against homosexuality).

127. This is a supposition in which people can maintain faith only if they have the temerity to believe that “human” really does include them.

128. MACKINNON, *supra* note 29, at 268.

between gender and sexuality-based violence and the impunity for both in the law, that which Andrea Dworkin once called women and Gay men's "uni[on] in their queerness."¹²⁹

III. CONNECTIONS

Although I think that the post–September 11th climate is probably the number one reason that Gay people should eschew military service—specifically, our cooperation in an imperialism that is, in fact, making things worse for our brothers and sisters—there is reason enough at home to make a Gay person think twice before enlisting. In his provocative 2006 essay entitled *Murder and hypocrisy*, Patrick Moore notes that one cannot critique the hypocrisy inherent in the claim made by the United States that it is cultivating human rights on the international stage without seeing the hypocrisy at home, and asks whether the U.S. can claim moral authority abroad—even were it inclined to—on the Gay question, when so much cruelty is visited on Gays at home.¹³⁰ To put it another way following on the discussion of international responses above, even if it were possible to get people in power to reconceptualize international law in a way that might be responsive to Gay people's needs, would we have the moral authority to make it meaningful to the rest of the world?

Gay people in the United States are the victims of violent crimes in staggering numbers.¹³¹ While William Rubenstein explains that so-called hate crime statistics are far from reliable, and for more systemic reasons that the understandable underreporting¹³² that we know is the case for hate crimes generally,¹³³ the numbers themselves are shocking. Statistically, Gay people report an exponentially higher rate of crimes against the person than does any other minority group.

129. ANDREA DWORKIN, *WOMAN HATING* 90 (1974).

130. Patrick Moore, *Murder and Hypocrisy*, *ADVOCATE*, Jan. 31, 2006, at 37.

131. William B. Rubenstein, *The Real Story of U.S. Hate Crimes Statistics: An Empirical Analysis*, 78 *TUL. L. REV.* 1213, 1232–33 (2004).

132. *Id.* at 1218–22. There is a general consensus that hate crimes are underreported by every target demographic. *See, e.g., id.* at 1219 (listing various reasons a victim might have for failing to report a crime). In particular, Gay people are reluctant to report these crimes because doing so would subject them to the stigma of public identification as a homosexual. Additionally, there is the fear of possible harassment by bigoted police, as well as the ultimate frustration and humiliation by a system where prosecutors and juries routinely refuse to convict the defendant when the target is a Gay person. *Id.*

133. Rubenstein cites Lu-in Wang, *The Complexities of "Hate,"* 60 *OHIO ST. L.J.* 799 (1999), for the proposition that Gays, especially "[G]ay men 'are particularly susceptible to certain categories of property crimes,' including 'shakedowns' or 'fairy shaking,' blackmail, and robbery. Rubenstein, *supra* note 131, at 1218–19 n.16. These crimes, often accompanied by "fag-bashing," are inappropriately designated as "property" crimes and likely are under-represented in reporting statistics either because they are unreported or because they are misclassified. *Id.* (citation omitted).

Gays “are about two and one-half times more likely to report a hate-based attack on their selves than are members of other minority groups—and of course many, many times more likely than the general population.”¹³⁴ We know, of course, that women and men are killed for being Gay because occasionally the media departs from the norm and reports on anti-Gay murders.¹³⁵ Yet, the hermetic precision of Heteroarchy¹³⁶ as a system of governance ensures that we may never know the truth about the frequency or horror of these crimes.¹³⁷ If the real facts, including the numbers, were known, no one (at least no Gay one) would sleep at night.

A closely related and equally underreported aspect of this humanitarian crisis in the United States is the epidemic of Gay suicide, particularly among Gay youth.¹³⁸ Numerous studies have shown a direct correlation between perceived homosexuality in youth and

134. *Id.* at 1232.

135. See, e.g., *8 Arrested in String of Anti-Gay Hate Crimes in New York*, CNN (Oct. 9, 2010), http://articles.cnn.com/2010-10-09/justice/new.york.hate.crimes.arrest_1_anti-gay-bias-vacant-apartment-unoccupied-apartment?_s=PM:CRIME (reporting the arrest of an eighth suspect for violent crimes against four Gay men); Jeffrey Gettleman, *Ugandan Who Spoke Up for Gays Is Beaten to Death*, N.Y. TIMES, Jan. 27, 2011, <http://www.nytimes.com/2011/01/28/world/africa/28uganda.html?r=1> (describing the murder of a Gay rights advocate in Uganda); Annie Kelly, *Raped and Killed for Being a Lesbian: South Africa Ignores ‘Corrective’ Attacks*, GUARDIAN (London), Mar. 12, 2009, <http://www.guardian.co.uk/world/2009/mar/12/eudy-simelane-corrective-rape-south-africa> (describing the brutal murder of Eudy Simelane, one of the first women living openly as a lesbian in Kwa Thema, South Africa); *New Details Emerge in Matthew Shepard Murder*, ABC NEWS (Nov. 26, 2004), <http://abcnews.go.com/2020/story?id=277685&page=1> (relaying the story of Matthew Shepard’s murder).

136. See GILREATH, *END OF STRAIGHT SUPREMACY*, *supra* note 6, at 2 n.2. I define “Heteroarchy” as

the system of straight over Gay domination. It is an administrative system that exerts control over sex and controls through sex. It is thoroughly sexual. It is based on the religious myth of straight male supremacy; patriarchy is its religion. Its politics is the politics of gender. Its script is the script of male-female relation in the patriarchal model. It creates pseudo-norms of sexuality, which it says are natural, and enacts them into law. Its laws regulate Gay sexuality, identity, creativity, and imagination. Its laws do not regulate the systematic terrorization, capture, and mass murder of Gays. Its aim is the planned, systematic destruction of Gays: *gaynocide*.

Id. (emphasis in original).

137. Still, reported cases give us glimpses of the brutality of anti-Gay murders. See, e.g., Jen Christensen, *Scotty’s Last Moments*, ADVOCATE, Sept. 28, 2004, at 30–32 (detailing the gruesome murder of eighteen-year-old Scotty Joe Weaver, who was tied to a chair in his trailer, beaten, tortured, and partially decapitated over a period of several hours before his body was taken to nearby woods and set on fire); SMALL TOWN GAY BAR (Genius Entertainment 2007) (same); see also Michael Wilson & Al Baker, *Lured into a Trap, Then Tortured for Being Gay*, N.Y. TIMES, Oct. 8, 2010, <http://www.nytimes.com/2010/10/09/nyregion/09bias.html?pagewanted=all> (detailing the kidnapping and torture of a Gay man by a group of men in the Bronx).

138. See *National LGBT Community Reeling From 4th Teen Suicide In A Month*, WASH. BLADE, Oct. 1, 2010, <http://www.washingtonblade.com/2010/10/01/national-lgbt-community-reeling-from-4th-teen-suicide-in-a-month/>.

suicidality, with bullying, shaming, and peer ostracization mediating this relationship.¹³⁹ A 2005 study by the University of Pittsburgh School of Social Work revealed that, in addition to a greater likelihood of bullying, “[G]ay adolescents are more likely than heterosexual youth to be threatened or injured with a weapon at school and [to] miss school due to feeling unsafe.”¹⁴⁰ The same study found a direct relationship to suicide among Gay youth.¹⁴¹ Another study shows that Gay youth who are subject to verbal harassment and isolation from peers and family members “are two to three times more likely to attempt suicide than their heterosexual peers and may account for 30% of suicides among youth annually.”¹⁴² A study by the National Gay and Lesbian Task Force recounts

that 45% of the gay men and 20% of the lesbians surveyed were victims of verbal and physical assaults in secondary schools. . . . 54% [of school counselors] agreed that students often degrade fellow students whom they discover are homosexual, and 67% strongly agreed that homosexual students are more likely than others to feel isolated and rejected. . . . 28% of homosexual youth were dropping out of secondary school because of discomfort and fear.¹⁴³

Additionally, Gay youth experiencing isolation and degradation persisted in other patterns of high-risk behavior, including risky sex, exposing them to higher probabilities of HIV infection.¹⁴⁴ Other risky behaviors occur at much higher percentages for Gay youth than their straight counterparts: roughly thirty-three percent of Gay youth report being threatened at school with a weapon, compared to just 7.1% of straight youth; 68.1% of Gay youth are involved in physical altercations, compared to 38% of straight youth; 25% of Gay youths miss school out of fear, compared to 5% of straight youth; and 35.3% of Gay youth attempt suicide, compared to 9.9% of straight youth.¹⁴⁵

139. See *infra* notes 140–149 and accompanying text.

140. Mark S. Friedman et al., *The Impact of Gender-Role Nonconforming Behavior, Bullying, and Social Support on Suicidality Among Gay Male Youth*, 38 J. ADOLESCENT HEALTH 621, 621 (2006).

141. *Id.* at 622 (“Those who reported higher levels of femininity during middle school also reported higher levels of suicidality.”).

142. Robert Garofalo et al., *The Association Between Health Risk Behaviors and Sexual Orientation Among a School-based Sample of Adolescents*, 101 PEDIATRICS 895, 895 (1998).

143. *Id.* at 895–96 (internal citations omitted).

144. *Id.* at 896 (noting that death from AIDS is often “attributable to infection occurring during adolescence”).

145. *Id.* at 898. Figures vary for the percentage of Lesbian and Gay youths who have attempted suicide, but all published reports have suggested disproportionately high rates among Gay youth. See, e.g., Paul Gibson, *Gay Male and Lesbian Youth Suicide*, in 3

In addition to being more likely to be victimized, the psychological consequences of victimization may be more severe for Gay youth. In addition to suicidality, Gay youth demonstrate “substantially more health risk behavior” than their straight counterparts and are more likely to smoke and use alcohol and drugs.¹⁴⁶ Other studies directly link “the debilitating effects of growing up in a homophobic society” to increased suicide attempts, running away from home, and school truancy.¹⁴⁷ Additionally, one study reported that the average GPA of harassed Gay youth was “half a grade lower than that of LGBT students experiencing less harassment (2.6 versus 3.1).”¹⁴⁸ The same study noted that frequently harassed LGBT students “were more likely to report that they did not plan to go to college.”¹⁴⁹

As horrible as reality is for Gays in the United States, we are lucky that those who would like to see us destroyed are still slightly more constrained by the rule of law than are those who would kill and otherwise abuse Gays in many Islamist countries. In many Islamist countries, Gays are in a struggle for mere survival, and the struggle is on an epic scale.¹⁵⁰ How long can we go on pretending not to notice?

REPORT OF THE SECRETARY'S TASK FORCE ON YOUTH SUICIDE 110, 111 (Marcia R. Feinleib ed., 1989) (reporting a 20–35% suicide attempt rate among Gay youths interviewed); Scott L. Hershberger & Anthony R. D'Augelli, *The Impact of Victimization on the Mental Health and Suicidality of Lesbian, Gay, and Bisexual Youths*, 31 DEVELOPMENTAL PSYCHOL. 65, 66 (1995) (reporting a 42% suicide attempt rate); A. Damien Martin & Ernen S. Hetrick, *The Stigmatization of the Gay and Lesbian Adolescent*, 15 J. HOMOSEXUALITY 163, 172 (1988) (reporting a 20% suicide attempt rate). The statistics should be compared to corresponding rates among straight youth, which range from 8% to 13%. See Hershberger & D'Augelli, *supra*, at 66 (citations omitted).

146. Daniel E. Bontempo & Anthony R. D'Augelli, *Effects of At-School Victimization and Sexual Orientation on Lesbian, Gay, or Bisexual Youths' Health Risk Behavior*, 30 J. ADOLESCENT HEALTH 364, 371–72 (2002).

147. Ritch C. Savin-Williams, *Verbal and Physical Abuse as Stressors in the Lives of Lesbian, Gay Male, and Bisexual Youths: Associations with School Problems, Running Away, Substance Abuse, Prostitution, and Suicide*, 62 J. CONSULTING & CLINICAL PSYCHOL. 261, 264, 266 (1994) (noting that one study reports that 6% of all runaways identify as Gay or Lesbian and that nearly half of Gay youths have reported that they have run away at least once, and that another study reported that nearly 40% of Gay youth were truant).

148. *GLSEN's 2005 National School Climate Survey Sheds New Light on Experiences of Lesbian, Gay, Bisexual and Transgender (LGBT) Students*, GAY, LESBIAN, AND STRAIGHT EDUC. NETWORK (Apr. 26, 2006), <http://www.glsen.org/cgi-bin/iowa/all/news/record/1927.html>.

149. *Id.* Furthermore, “[o]verall, LGBT students were twice as likely as the general population of students to report they were not planning to pursue any post-secondary education.” *Id.*

150. See, e.g., Donald G. McNeil, Jr., *Epidemics: AIDS Cases Increasing in Muslim Countries*, N.Y. TIMES, Aug. 8, 2011, <http://www.nytimes.com/2011/08/09/health/09global.html> (“AIDS is on the rise in many Muslim countries, driven by men having sex with other men in secret because of homophobia, religious intolerance and fear of being jailed or executed”); Andrew Osborn, *Muslim Alliance Derails UN's Gay Rights Resolution*, GUARDIAN (London), Apr. 25, 2003, <http://www.guardian.co.uk/world/2003/apr/25/gayrights.andrewosborn> (noting how five Muslim countries came together to hold off a U.N. vote on

How long can Gay advocates, those of us who know the facts, go on celebrating the repeal of Don't Ask, Don't Tell without facing up to what is actually happening in a part of the world we are simultaneously colonizing and courting? To their credit, both the Bush and Obama administrations have promoted respect for women's rights as a part of the policy agenda the United States hopes to pursue with emerging democracies in the Arab world.¹⁵¹ Women and the particular problems they face in Muslim nations certainly need the attention.¹⁵² The United States' willingness to address women's issues shows that our leaders are, in fact, willing to challenge religious belief when they believe it is sufficiently important to do so. No one, however, certainly not our presidents—not even President Obama, in whom so many Gay hopes were placed—is willing to address the harassment, general maltreatment, and impudent murder of Gays in the Muslim world.¹⁵³ I do not believe that any Gay American should be part of a foreign policy that refuses to acknowledge the exigency of the circumstances of our sisters and brothers abroad. I agree with Patrick Moore that American Gays need to force our way into our country's foreign policy agenda through the “direct action and media savvy” for which he calls.¹⁵⁴ We need to speak out. We need to force the President to see how hypocritical it is for him to admit that Gays are a suspect class here at home¹⁵⁵ but to refuse even to mention our brothers and sisters

homosexual human rights).

151. *See, e.g.*, Press Release, President Barack Obama, Remarks by the President on a New Beginning, Cairo University (June 4, 2009). In this speech, President Obama listed women's rights as one of the seven major issues he believed the U.S. and its Arab allies had to address. *Id.* Neither Gay people nor their suffering, nor the broader issue of personal autonomy with regard to sexual expression, was mentioned by President Obama. This was the strongest signal yet that U.S. foreign policy is not concerned with Gay people or terrorism against them. *See also* Terence Hunt, *Bush Lectures Arab World on Political Reform, Women's Rights*, USA TODAY, May 19, 2008, http://www.usatoday.com/news/top_stories/2008-05-18-372164343_x.htm (“[Bush] urged an expansion of women's rights as ‘a matter of morality and basic math.’”).

152. *See, e.g.*, *Iran: Stop Undermining Women's Rights*, HUM. RTS. WATCH (Mar. 7, 2010), <http://www.hrw.org/news/2010/03/05/iran-stop-undermining-women-s-rights> (recognizing the gender-based discrimination in Iran); *Saudi Arabia: Women's Rights Promises Broken*, HUM. RTS. WATCH (July 8, 2009), <http://www.hrw.org/news/2009/07/08/saudi-arabia-women-s-rights-promises-broken> (noting how Saudi Arabian women need permission from their male guardians to “carry out a host of day-to-day activities, such as education, employment, travel, opening a bank account, or receiving medical care”); *Turkey: Women Left Unprotected From Violence*, HUM. RTS. WATCH (May 4, 2011), <http://www.hrw.org/news/2011/05/04/turkey-women-left-unprotected-violence> (detailing how Turkish women are subjected regularly to physical and psychological abuse).

153. *See, e.g.*, McNeil, *supra* note 150 and accompanying text; Osborn, *supra* note 150 and accompanying text.

154. Moore, *supra* note 130, at 37.

155. Press Release, Attorney General, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html> (“[T]he President has concluded that given a number of

who are dying at staggering rates in the countries we call our allies and our friends.¹⁵⁶ But the military is assuredly not the place from which to voice these concerns; it is not known to be welcoming (or forgiving) of dissent.¹⁵⁷ Military service members are locked into deployment and locked out of meaningful input into foreign policy debate.¹⁵⁸ This is not the place for us; we should resist. And resistance is easier because, for now, military service is voluntary.¹⁵⁹

CONCLUSION

These observations will doubtlessly strike some readers as bitterness. But they are actually the product of something far simpler: sadness. In many ways, the Gay civil rights movement in the United States is following the paths of the other civil rights movements to which it is most frequently analogized: the women's movement and the African-American civil rights movement.¹⁶⁰ Each movement—at least in their “mainstream” incarnations—has unfortunately ended up at a place where individual exceptionality is too often the measure

factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a more heightened standard of scrutiny.”).

156. See, e.g., *Saudi Arabia: The Situation of Homosexuals, Including Treatment by Authorities and Legal Penalties*, IMMIGRATION AND REFUGEE BOARD OF CANADA (Aug. 16, 2002), available at <http://www.unhcr.org/refworld/country,,IRBC,,SAU,,3f7d4e1238,0.html> (noting that homosexual acts are illegal and punishable by death in Saudi Arabia).

157. See, e.g., *Parker v. Levy*, 417 U.S. 733, 736–37 (1974) (providing an example of an officer who was subject to three years hard labor for criticizing the military). The officer had made the following statement:

The United States is wrong in being involved in the Viet Nam War. I would refuse to go to Viet Nam if ordered to do so. I don't see why any colored soldier would go to Viet Nam: they should refuse to go to Viet Nam and if sent should refuse to fight because they are discriminated against and denied their freedom in the United States, and they are sacrificed and discriminated against in Viet Nam by being given all the hazardous duty and they are suffering the majority of casualties.

Id. (quoting Appellee Howard Levy); see also ANN WRIGHT & SUSAN DIXON, *DISSENT: VOICES OF CONSCIENCE: GOVERNMENT INSIDERS SPEAK OUT AGAINST THE WAR IN IRAQ*, at viii–x (Arnie Kotler, ed. 2008) (praising those who speak out, including examples such as John Brady Kiesling, the first U.S. diplomat to resign in protest of the Iraq War, and Katherine Gun, the British civil servant who released an incriminating classified document before the war); Gilreath, *Sexually Speaking*, *supra* note 5, at 965 (discussing *Parker v. Levy*).

158. For instance, deployed servicemen have encountered obstacles voting. See, e.g., The Honorable John Cornyn, Lecture at the Heritage Foundation: An Author's Assessment of the Effectiveness of the MOVE Act (Aug. 12, 2011) (transcript available at <http://origin.heritage.org/research/lecture/2011/08/an-authors-assessment-of-the-effectiveness-of-the-move-act>) (transcribing a letter from one serviceman who did not receive his absentee ballot for the 2008 election).

159. CTR. FOR DELIBERATIVE DEMOCRACY, *Serving One's Country*, <http://cdd.stanford.edu/docs/2007/btp/w3-serving.html>.

160. See COMPREHENSIVE REVIEW, *supra* note 11, at 81–87.

of progress, and is the basis on which those at the top can claim progress while those at the bottom are left in bad shape. To be clear, I am not ignoring the advances in both women's rights and African-American rights. I celebrated right along with everyone else (at least with those inclined to celebrate) four years ago when choice between Democratic presidential nominees was the quite remarkable choice between the first serious Black contender and the first serious female contender. And I celebrated when the United States elected its first Black president (even as I acknowledged the undying misogyny that I strongly suspected would ensure we had a Black *male* president before we had a female president of any color). In some respects, we are quite a long way from Seneca Falls and from *Brown*.¹⁶¹ This is worth remembering. In many ways, however, we are not so very far, and this is worth remembering too.

My sadness stems from my hope that Gay Rights would be different, that it would stand for more than what "gay rights" has come to. Instead, "gay rights" has amounted to a devaluing of Gay liberation following straight priorities.¹⁶² As Harry Hay observed,

After Stonewall, *Gay liberation* was indeed a rebellion against the Hetero-male-oriented systems of Laws—but the Rebellion itself developed in terms of Hetero-male-oriented cultural values. Within five years the dominant Gay Assimilationist Culture had gutted it just as they had gutted the Homophile Movement twenty years before.¹⁶³

The fetish for military service is, in my view, the penultimate expression of that which Hay named the "dominant Gay Assimilationist Culture."¹⁶⁴ In admonishing Gays to embrace the long-ignored, positive aspects of perceiving equality in "un-Hetero" ways, Hay quoted another of my heroes, Frederick Douglass, for the proposition that Gays need to rediscover our own way to rise "the immeasurable distance from [our] knees to [our] feet."¹⁶⁵ I think, at least, we should

161. See *Civil Rights Chronology*, LEADERSHIP CONF. ON CIV. AND HUM. RTS. (2011), <http://www.civilrights.org/resources/civilrights101/chronology.html> (last visited Nov. 2, 2011). Seneca Falls was the location of the First Women's Rights Convention in 1848 where Elizabeth Cady Stanton proposed an amendment to give women the right to vote. *Id.* *Brown* refers to the landmark 1954 Supreme Court case *Brown v. Board of Education* that abolished deliberate racial segregation in public schools. *Id.*

162. See GILREATH, *END OF STRAIGHT SUPREMACY*, *supra* note 6, at 210–12.

163. See Hay, *supra* note 1, at 289–90 (emphasis in original).

164. See *id.* Marriage, in my view, is the ultimate expression of this assimilationism. GILREATH, *END OF STRAIGHT SUPREMACY*, *supra* note 6, at 210–12.

165. Hay, *supra* note 1, at 289.

acknowledge that our participation in the U.S. military under present conditions is, albeit with varying degrees of directness, keeping many other Gays around the globe on their knees. That result might sit perfectly well with “gay rights” priorities, but it cannot be countenanced by Gay Liberation.¹⁶⁶ I am still clinging to my hope in the latter and to my belief that people can change—and to my concomitant hope that our social movement might prioritize something as simple and yet as revolutionary as human compassion in law and in life. Doing so, however, will require great existential courage, for “[t]he romance of treason” seldom occurs to Gay people—in fact, is not possible—because, as James Baldwin once observed, “you can’t betray a country you don’t have.”¹⁶⁷

166. For an example of such “gay rights” priority views, see Verena Dobnik, *DADT Repeal Marks Milestone in Fight for Gay Rights*, HUFFINGTON POST (Dec. 19, 2010, 10:52 AM), http://www.huffingtonpost.com/2010/12/19/dadt-repeal-_n_798764.html (seeing the repeal as a “milestone” for Gays and Lesbians).

167. BALDWIN, *supra* note 2, at xv–xvi (1985). Indeed, we are “[a] nation within a nation” (the phrase used by James Baldwin reflecting on the death of his older brother during World War II—in Baldwin’s mind a waste, because Blacks were barely a part of the nation for which they fought). *Id.* (emphasis in original). The “nation within a nation,” admittedly a puzzle to Baldwin then, is understood by Dennis Altman today, even if, perhaps, from a different perspective. See Dennis Altman, *Rupture or Continuity? The Internationalization of Gay Identities*, in POSTCOLONIAL, QUEER 19, 35 (John C. Hawley ed., 2001) (concluding that there may well be a global Gay identity disregarding national boundaries).