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FAMILIAR STORIES: AN INTERNATIONAL SUGGESTION FOR LGB FAMILY MILITARY BENEFITS AFTER THE REPEAL OF “DON’T ASK, DON’T TELL”

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Abstract:

This Article advocates for Congress to make benefits available to the families of lesbian, gay, and bisexual (LGB) servicemembers after the repeal of Don’t Ask, Don’t Tell, by passing an amended version of the Domestic Partnership Benefits and Obligations Act of 2009 (DPBOA). Don’t Ask, Don’t Tell is only one element of the quandary of laws preventing LGB servicemembers from receiving military family benefits equal to those of their heterosexual peers. The federal Defense of Marriage Act (DOMA) limits the federal definition of a marriage to opposite-sex couples and explicitly bars same-sex couples from receiving federal recognition, regardless of the benefits and obligations conferred upon the pair by state law. DOMA also allows states to determine what rights and obligations the state may extend to same-sex couples; and gives states the ability to deny the relationship status granted to same-sex couples in other jurisdictions. This legislation paved the way for inconsistent state laws. Repealing Don’t Ask, Don’t Tell will not generate equality in the United States Armed Forces’ (Armed Forces) policies on family benefits without additional action.

To begin, this Article will discuss the myriad of benefits that are currently unavailable, and will continue to be unavailable absent additional legislation, to the families of LGB servicemembers. Part I introduces the benefits available for legally recognized military families. Part II analyzes the federal DOMA and state laws preventing the legal recognition of same-sex relationships, the DoD’s definition of dependents eligible for benefits, and why the repeal of Don’t Ask, Don’t Tell will not alter the status quo without additional legislation. Part III takes on three tasks: first, it examines how the United States’ similarly situated allies that permit open service – Australia, Canada, Israel, and the United Kingdom – handle family benefits; second, it advocates for the United States to adopt policies similar to those nations, using the DPBOA as a vehicle, to implement a policy of equal benefits for all military families; and third, it addresses a potential criticism of extending benefits to the families of LGB servicemembers, the cost, and explains why this proposed legislation is a cost effective and socially necessary change.
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"Abroad, America’s greatest source of strength has always been our ideals. The
same is true at home. We find unity in our incredible diversity, drawing on the
promise enshrined in our Constitution: the notion that we are all created equal,
that no matter who you are or what you look like, if you abide by the law you
should be protected by it; that if you adhere to our common values you should be
treated no different than anyone else."

- President Barack Obama

INTRODUCTION

This Article calls for the United States to make benefits available to the families of
lesbian, gay, and bisexual (LGB) servicemembers after the repeal of Don’t Ask, Don’t Tell. After the repeal, other laws will prevent LGB military families from receiving benefits equal to
their heterosexual peers based solely on their sexual orientation. To achieve equality, Congress
should pass legislation to change the United States’ military benefits policies to include both
LGB and heterosexual families. This legislation should reflect the wisdom and experience of the
United States’ allies who permit open service – Australia, Canada, Israel, and the United
Kingdom – while respecting the unique values of the United States.

Don’t Ask, Don’t Tell is only one element of the quandary of laws preventing LGB
servicemembers from receiving military family benefits equal to those of their heterosexual
peers. The federal Defense of Marriage Act (DOMA) limits the federal definition of marriage to

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* I wish to thank Professor Jackie Gardina of Vermont Law School for her guidance and patience. Most
importantly, I want to thank the men and women of the Armed Forces – especially the lesbian, gay, and bisexual
servicemembers who must serve in silence – and their families.

1 Pres. Barack Obama, Remarks by the President in State of the Union Address, THE WHITE HOUSE OFFICE
OF COMMUNICATIONS, Jan. 27, 2010 available at 2010 WL 301960.

(codified at 10 U.S.C. § 654 (1993)) (Don’t Ask, Don’t Tell); see also National Defense Authorization Act for
Authorization Act for Fiscal Year 2011 to repeal Don’t Ask, Don’t Tell after (1) “the Pentagon’s Comprehensive
Review Working Group on how to repeal [Don’t Ask, Don’t Tell]” recommendations are received and
(2) “certification by the Secretary of Defense, Chairman of the Joint Chiefs and the President . . . ”). Because most
available data on military family benefits only includes lesbians, gay men, and bisexual persons, this Article’s scope
is limited to discussing family benefits for LGB servicemembers. This does not mean that transgender military
issues are any less important than LGB military issues, but to use the phrase LGBT when the available research does
not reflect transgender issues would be improper.

3 “Open service” means allowing servicemembers to speak of their sexual orientation without repercussion.
opposite-sex couples and explicitly bars same-sex couples from receiving federal recognition, regardless of the benefits and obligations conferred upon the pair by state law.\textsuperscript{4} DOMA also permits states to determine what rights and obligations the state may extend to same-sex couples, and gives states the ability to deny the relationship status granted to same-sex couples in other jurisdictions.\textsuperscript{5} This legislation paved the way for inconsistent state laws.\textsuperscript{6} Repealing Don’t Ask, Don’t Tell will not generate equality in the United States Armed Forces’ (Armed Forces) policies on family benefits without additional action.\textsuperscript{7} Congress must promulgate legislation that repeals DOMA, or at least waives its application to military benefits. This legislation must also preempt conflicting state laws.

This Article advocates for Congress to pass an amended version of the Domestic Partnership Benefits and Obligations Act of 2009 (DPBOA) to expressly allow servicemembers and their same-sex partners to enroll in a federal domestic partnership recognition program.\textsuperscript{8} If the DPBOA is amended to include members of the Armed Forces in the definition of an employee, then DOMA’s application would, at a minimum, be waived for military benefits.\textsuperscript{9} This uniform federal program would provide an efficient solution to the problem of inconsistent state recognition of same-sex relationships,\textsuperscript{10} and it would parallel similar policies in Australia,\textsuperscript{11}

\begin{footnotesize}
\begin{enumerate}
\item Defense of Marriage Act, supra note 4, at 28 U.S.C. § 1738C.
\item Seeinfra Part II.a.
\item Seeinfra Parts II.c, III.b.
\item Domestic Partnership Benefits and Obligations Act of 2009, S. 1102, 111th Cong. (2009). As currently drafted, this legislation will not allow servicemembers to enroll in the program. Id. at § 2(g)(3)(b). This Article proposes to amend § 2(g)(3)(b) to allow servicemembers and their partners to enroll to receive family benefits. Id.
\item See Domestic Partnership Benefits and Obligations Act of 2009, supra note 8, at §2(g)(3)(b) (defining a federal employee eligible to enroll his or her domestic partner for family benefits to explicitly not include servicemembers).
\item See Domestic Partnership Benefits and Obligations Act of 2009, supra note 8.
\item See infra Part III.a.1; see also Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Act of 2008, No. 134 (2008) [hereinafter Superannuation Act].
\end{enumerate}
\end{footnotesize}
Canada, and the United Kingdom. After the amended DPBOA is signed into law, Congress and the Department of Defense (DoD) must alter the statutory and DoD definitions of a “dependent” eligible for military benefits to include same-sex partners of servicemembers who registered their domestic partnership pursuant to the DPBOA.

To begin, this Article will discuss the myriad of benefits that are currently unavailable, and will continue to be unavailable absent additional legislation, to the families of LGB servicemembers. Part I introduces the benefits available for legally recognized military families. Part II analyzes the federal DOMA and state laws preventing the legal recognition of same-sex relationships, the DoD’s definition of dependents eligible for benefits, and why the repeal of Don’t Ask, Don’t Tell will not alter the status quo without additional legislation. Part III takes on three tasks: first, it examines how the United States’ similarly situated allies that permit open service – Australia, Canada, Israel, and the United Kingdom – handle family benefits; second, it advocates for the United States to adopt policies similar to those nations, using the DPBOA as a vehicle, to implement a policy of equal benefits for all military families; and third, it addresses a potential criticism of extending benefits to the families of LGB servicemembers, the cost, and explains why this proposed legislation is a cost effective and socially necessary change.

I. SUPPORTING OUR TROOPS: MILITARY FAMILY BENEFITS

This section discusses benefits currently available to heterosexual married couples and their children: medical, dental, and psychiatric care; housing allowances and pay; and pensions and survivor benefits. The valid dependents of servicemembers qualify for medical and dental

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12 See infra Part III.a.2; see e.g., Civil Marriage Act (CMA), S.C. 2005, c. 33 (2005).
13 See infra Part III.a.4; see also Civil Partnership Act, 2004, c. 33.
14 See Domestic Partnership Benefits and Obligations Act of 2009, supra note 8, at § 2(b); see discussion infra Part II.b.
15 The definition of a valid dependent is limited to heterosexual married couples and children. See infra Part II.b.
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care from the military through TRICARE.\textsuperscript{16} TRICARE combines military health care facilities with civilian health care resources to ensure the physical and mental health of servicemembers and their families.\textsuperscript{17} These benefits, including dental,\textsuperscript{18} extend to any dependent of a servicemember, even if the servicemember retires,\textsuperscript{19} or after the servicemember dies.\textsuperscript{20} Furthermore, servicemembers are protected from incurring large medical bills for themselves or their dependents by an out-of-pocket expense cap of $3,000.\textsuperscript{21} Psychiatric counseling will be provided for servicemembers and their dependants who receive a referral from a physician.\textsuperscript{22}

Servicemembers with dependents receive increased housing allowances because housing allowances are based partly on whether a servicemember has dependents.\textsuperscript{23} If a servicemember dies, his or her family still qualifies for housing assistance.\textsuperscript{24} DoD provides housing assistance to the surviving families of a deceased servicemember for up to one year after the

\begin{itemize}
\item \textsuperscript{16} 10 U.S.C. § 1076(a)(1)-(17) (2000) (listing medical care provided for dependents of military personnel). Servicemembers and their dependents are eligible for inpatient medical care in either a military facility or in a facility that contracts with the DoD. See id. § 1080(a); id. § 1076a(1); id. § 1076a (TRICARE dental program). For a listing of what services are and are not covered for dependents of servicemembers, see id. § 1077.
\item \textsuperscript{17} What is TRICARE?, TRICARE, Dec. 2009, http://www.tricare.mil/mybenefit/home/overview/WhatIsTRICARE.
\item \textsuperscript{18} 10 U.S.C. § 1076c (2000); id. § 1078a(e); id. § 1086.
\item \textsuperscript{19} 10 U.S.C. § 1076c(b)(1)-(5).
\item \textsuperscript{20} Id. § 1076(a)(2); id. § 1086. Dependents retain eligibility for TRICARE benefits up to three years after their supporting servicemember dies. Id. § 1079(g)(2).
\item \textsuperscript{21} Id. § 1086(b)(4).
\item \textsuperscript{22} Id. § 1079(a)(8).
\item \textsuperscript{24} Virginia P. Reno, Anita Cardwell, & Joni Lavery, Survivor Benefits for Families of Deceased Servicemembers and Overseas Contract Workers, SOCIAL SECURITY BRIEF, NATIONAL ACADEMY OF SOCIAL INSURANCE No. 23, 8 (Oct. 2006) [hereinafter Social Security Brief].
\end{itemize}
servicemember’s death, including assistance for a single move.\(^{25}\) When a servicemember is deployed, their dependents receive a monthly Family Separation Allowance.\(^{26}\)

The Armed Forces offer two primary forms of life insurance:\(^{27}\) Servicemembers Group Life Insurance (SGLI) and the Survivor Benefit Plan (SBP).\(^{28}\) SGLI is a death gratuity paid by the Department of Veterans’ Affairs.\(^{29}\) Servicemembers may select anyone as a beneficiary under SGLI, and coverage is automatic.\(^{30}\) If no beneficiary is specified, SGLI will automatically payout to the servicemember’s “insurable dependent[.\(^{31}\)]” Such dependents are defined as the servicemember’s spouse,\(^{32}\) child,\(^{33}\) or stillborn child.\(^{34}\)

The SBP is a “long-term financial security . . . insurance plan that pays a monthly annuity to the surviving spouse or child of a [servicemember] . . . if a [servicemember] dies.”\(^{35}\) There are six categories of beneficiaries servicemembers may choose from, ranging from only their spouse to someone with an “insurable interest[.\(^{36}\)]” including “business partners[.\(^{37}\)]” Upon the servicemember’s death, the SBP will payout to statutorily specified beneficiaries if the servicemember

\(^{25}\) Id.; DoD 7000.14-R FMR, supra note 23 (assistance for a single move).
\(^{27}\) Dependency and Indemnity Compensation is available to the surviving spouses and children of servicemembers killed by willful misconduct. See Social Security Brief, supra note 24, at 5.
\(^{29}\) Social Security Brief, supra note 24, at 4-5 (SGLI can be paid in one lump sum over a period of three years). Under SGLI, servicemembers are insured for $400,000; spouses for $100,000; and children for $10,000. 38 U.S.C.A. § 1967(a)(3)(A) (West 2008).
\(^{30}\) 38 U.S.C.A. §§ 1967, 1970; see also Wescott & Sawyer, supra note 23 at 1126 n.21 (“Service members [sic] are covered up to $400,000. Service members [sic] may also enroll their spouses for individual coverage under SGLI . . . and dependent children . . . .”) (internal citations omitted). Under Don’t Ask, Don’t Tell, servicemembers could not safely enroll their same-sex partners for survivor benefits because listing a same-sex non-relative on an official military document could trigger an investigation. Wescott & Sawyer, supra note 23 at 1126-27 (internal citation omitted).
\(^{32}\) Id. § 1965(10)(a).
\(^{33}\) Id. § 1965(10)(b).
\(^{34}\) Id. § 1965(10)(c).
\(^{35}\) Wescott & Sawyer, supra note 23, at 1126.
\(^{36}\) Social Security Brief, supra note 24, at 7.
\(^{37}\) 10 U.S.C. § 1448 (2000); Wescott & Sawyer, supra note 23, at 1126 (internal citation omitted). Same-sex partners of servicemembers technically qualify for SBP enrollment, but could not claim the benefit under Don’t Ask, Don’t Tell without “ outing” themselves. Id. (internal citation omitted).
servicemember did not identify intended beneficiaries.\(^{38}\) Surviving spouses,\(^ {39}\) former spouses,\(^ {40}\) and dependent children are statutorily specified beneficiaries under SBP.\(^ {41}\)

II. RANK AND FILE: THE NATIONAL POLICY OF INEQUALITY

After the repeal of Don’t Ask, Don’t Tell, several federal and state laws, constitutional amendments, and regulations will amalgamate to prevent the families of LGB servicemembers from receiving military benefits. This Part begins by discussing the federal DOMA and inconsistent state laws that surfaced in the wake of the federal ban on the recognition of same-sex relationships. Second, this Part introduces the military definition of a dependent and who qualifies to receive military family benefits. Third, this Part explains why the repeal of Don’t Ask, Don’t Tell will not grant the families of LGB servicemembers access to military benefits without additional legislative action.

a. Federal Marriage Inequality and the Assortment of State Laws

DOMA is the federal statute that defines federal civil marriage and grants states the authority to determine whether they will recognize same-sex relationships, including marriages or partnerships, formed within their borders or in other jurisdictions.\(^ {42}\) DOMA defines marriage as “between one man and one woman as husband and wife[,]”\(^ {43}\) and it defines a spouse as “a person of the opposite sex who is a husband or a wife[.]”\(^ {44}\) In the realm of federal benefits, DOMA completely bars same-sex couples – whether married, partnered, or otherwise – from applying for and receiving federal employment benefits that similarly situated married

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\(^{38}\) 10 U.S.C § 1448.
\(^{39}\) Id. at (7)-(9); see also Defense of Marriage Act, supra note 4, at 1 U.S.C. § 7 (opposite-sex spousal definition).
\(^{40}\) 10 U.S.C § 1448(10); see also Defense of Marriage Act, supra note 4, at 1 U.S.C. § 7.
\(^{41}\) 10 U.S.C § 1448(11).
\(^{42}\) Defense of Marriage Act, supra note 4.
\(^{43}\) Id. at 1 U.S.C. § 7.
\(^{44}\) Id.
heterosexual couples would receive.\textsuperscript{45} Because military benefits are a form of federal employee benefits, DOMA will prevent the spouses or partners of LGB servicemembers from applying for military benefits after the repeal of Don’t Ask, Don’t Tell.\textsuperscript{46}

In the United States, individual state jurisdictions authorize four types of same-sex relationships: same-sex marriage, domestic partnerships,\textsuperscript{47} reciprocal beneficiaries,\textsuperscript{48} or no relationship recognition.\textsuperscript{49} Only five states plus the District of Columbia grant marriage licenses to same-sex couples, and approximately eighteen thousand same-sex couples married in

\begin{footnotesize}
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\item \textsuperscript{45} See id.
\item \textsuperscript{46} See id.
\item \textsuperscript{47} Some states grant civil unions or domestic partnerships to same-sex couples in lieu of marriage licenses. \textit{Lambda Legal: Status of Same-Sex Relationships Nationwide}, LAMBDA LEGAL, Feb. 16, 2010 http://www.Lambdalegal.org/publications/articles/nationwide-status-same-sex-relationships.html [hereinafter Lambda Legal Relationships Status] (California, Nevada, New Jersey, Oregon, Washington). These legal relationships, if properly formed, will grant all of the rights and responsibilities of marriage with a different, and arguably inferior, title. \textit{Id.; see e.g.}, Domestic Partners and Partnership Establishment, CAL. FAM. CODE §§ 297-297.5 (2005) (defining California’s domestic partnerships and establishing that only same-sex couples are eligible for domestic partnership enrollment; also mandating that “[r]egistered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses”). The relationship status created by a civil union or a domestic partnership is not considered a spousal relationship, but rather, it is a partnership. \textit{See e.g.}, CAL. FAM. CODE § 297 (2005). Because this status is not spousal, the repeal or waiver of DOMA will not permit these partners to receive military benefits. \textit{See Defense of Marriage Act, supra note 4.; see also discussion infra Parts II.b, II.c.}
\item \textsuperscript{48} A third type of legally recognized same-sex relationship grants some, but not all, of the rights and responsibilities of marriage. \textit{See e.g.} HAW. REV. STAT. § 572C-6 (1997) (Hawaii’s “reciprocal beneficiaries shall not have the same rights and obligations under the law that are conferred through marriage . . . ”). These relationships are sometimes also referred to as domestic partnerships, but may also be called a reciprocal beneficiary relationship or other title. \textit{Lambda Legal Relationships Status, supra note 47; e.g., HAW. REV. STAT. §§ 572c-1-572C-7 (1997) (Hawaii’s reciprocal beneficiary statutes). Four states currently grant these limited rights relationships. Lambda Legal Relationships Status, supra note 47 (Colorado, Hawaii, Maine, and Wisconsin). Like the civil unions and domestic partnerships that are near-equals to marriage, these inferior relationships will not earn military benefits after the repeal of Don’t Ask, Don’t Tell and DOMA without additional legislative action. \textit{See infra Part II.c.}
\item \textsuperscript{49} The remaining thirty-seven states have no legal recognition of same-sex relationships, though some will recognize relationships formed in other states. \textit{E.g., Letter from Douglas F. Gansler, Maryland Attorney General, to Hon. Richard S. Madaleno, Jr., Maryland Senator, Marriage – Whether Out-of-State Same-Sex Marriage That Is Valid in the State of Celebration May Be Recognized in Maryland, OPINION OF THE MARYLAND ATTORNEY GENERAL 95 Op. Att’y Gen 3 (2010) (on file with the author) [hereinafter OPINION OF THE MARYLAND ATTORNEY GENERAL] (the Maryland Attorney General’s opinion that validly formed out-of-state same-sex marriages are valid in Maryland). Of the jurisdictions that recognize out-of-state same-sex marriages, five of them do not allow same-sex marriages to be performed in the state. \textit{Lambda Legal Relationships Status, supra note 47} (New Jersey [treats out-of-state same-sex marriages as civil unions], New Mexico, New York, Rhode Island [does not recognize out-of-state same-sex marriages for divorce purposes], and California [during the time it was legal for same-sex couples to marry in that jurisdiction]); \textit{see also OPINION OF THE MARYLAND ATTORNEY GENERAL, supra.}
\end{itemize}
\end{footnotesize}
California when it was legal in that state.\textsuperscript{50} Although these marriages are valid in some states,\textsuperscript{51} DOMA bars their federal recognition and the same-sex spouses of federal employees and servicemembers are ineligible for federal or military benefits.\textsuperscript{52} Furthermore, forty-four states have statutory or constitutional bans on same-sex marriage (mini-DOMAs).\textsuperscript{53}

DOMA presents a large part of the problem for LGB military families seeking equal benefits after the repeal of Don’t Ask, Don’t Tell. However, it should be emphasized that DOMA is just that: a part of the problem. Indeed, the repeal of Don’t Ask, Don’t Tell could intensify the legal quagmire of inconsistent same-sex relationship recognition throughout the United States.\textsuperscript{54} Notwithstanding DOMA, only a spouse may receive military benefits because the DoD only recognizes the married spouse of a servicemember as a dependent eligible for

\textsuperscript{50} Lambda Legal Relationships Status, supra note 47 (listing Connecticut, Iowa, Massachusetts, New Hampshire, and Vermont as five states with marriage equality; and California although same-sex marriages are no longer performed there, but approximately 18,000 couples validly married); Ian Urbina, Gay Marriage Is Legal in U.S. Capital, THE NEW YORK TIMES, March 3, 2010 available at http://www.nytimes.com/2010/03/04/us/04marriage.html.

\textsuperscript{51} Lambda Legal Relationships Status, supra note 47 (Connecticut, Iowa, Massachusetts, New Hampshire, Vermont, District of Columbia, New Jersey, New Mexico, New York, and Rhode Island recognize out-of-state same-sex marriages; California recognizes out-of-state same-sex marriages performed when same-sex marriages were legal).

\textsuperscript{52} See supra notes 42-46 and accompanying text.


\textsuperscript{54} Kevin Whitelaw, What Would It Take to End ‘Don’t Ask, Don’t Tell’?, NATIONAL PUBLIC RADIO, Feb. 5, 2010 available at http://www.npr.org/templates/story/story.php?storyld=123412229 (quoting David Segal, Director, University of Maryland Center for Research on Military Organization). DOMA turns family relocation, a comparatively straightforward situation for a heterosexual couple, into a mess of legal recognition problems for a same-sex couple who may lose all, or at least some, of the rights and responsibilities created by their relationship status in one jurisdiction by crossing state lines. See Defense of Marriage Act, supra note 4. This strikes a heavy blow on military families because servicemembers are often ordered to relocate. Cf. Beverly D. Roman, Smooth Moves For Children, MILITARY FAMILY NETWORK, available at http://www.emilitary.org/relocation.html (last visited Apr. 18, 2010) (discussing frequent relocations of servicemembers and their children).
benefits. Therefore, if DOMA is repealed or waived, a same-sex military couple’s eligibility for benefits will depend on the state where the couple is domiciled, absent a legislative change to the statutory and DoD definitions.

b. Couples and Children Who Qualify For Benefits

To receive benefits, a servicemember must enroll his or her dependents in the DoD’s Defense Enrollment Eligibility Reporting System (DEERS). Only a statutorily defined “dependent” of a servicemember is eligible for military benefits. This Article focuses on two types of recognized dependent relationships: committed couples and children of military families.

Eligibility for spousal benefits is limited to married heterosexual couples because a dependent is defined, in relevant part, as: “(A) the spouse; (B) the unremarried widow; (C) the unremarried widower; . . . [or] (F) the unremarried former spouse of a member or former member . . . ” DOMA’s federal definition of a spouse as “a person of the opposite sex who is a husband or a wife” currently prevents LGB servicemembers from claiming their same-sex spouses as dependents, regardless of the marriage laws of that state.

The children of opposite-sex parents qualify for benefits under the law. The definition of a dependent child includes one who is under the age of twenty-one, or under the age of twenty-three and a full-time student, or “incapable of self-support” due to mental or physical disability. The definition of a dependent child requires the dependent be related to the servicemember as a

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55 See discussion infra Parts II.b, II.c.
57 See infra notes 58-63 and accompanying text.
59 Defense of Marriage Act, supra note 4.
60 See id.; see also discussion supra Part II.a.
legitimate child, an adopted child, or a stepchild. Under Don’t Ask, Don’t Tell, when a servicemember declared a child that was co-parented with a partner of the same-sex, the servicemember risked “outing” themselves on an official military document. Therefore, the children of same-sex partners were de facto ineligible for benefits under Don’t Ask, Don’t Tell. Only time will tell whether the repeal of Don’t Ask, Don’t Tell will extend eligibility for benefits to the children of same-sex parents.

c. The Non-Event of Repealing of Don’t Ask, Don’t Tell

Existing laws and policies will prevent the families of LGB servicemembers from receiving military benefits equal to their heterosexual counterparts after the repeal of Don’t Ask, Don’t Tell. After the repeal, only some benefits will become available to the families of LGB servicemembers. LGB servicemembers will likely be able to enroll their spouses or partners as beneficiaries in SGLI and SBP without repercussion. The children of LGB servicemembers should be eligible for health and dental benefits through DEERS. However, many of the spousal benefits available to heterosexual married couples will not be available to same-sex couples after the repeal. This is because the definition of a military dependent is limited to opposite-sex marital spouses. If the military’s definition of a dependent is changed to include same-sex couples, that legislation will be thwarted by DOMA’s explicit denial of federal

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62 Id. at (6).
63 Because servicemembers must present adoption certificates in order to register their children as dependents, an adoption certificate with two same-sex names listed as parents could spark an investigation under Don’t Ask, Don’t Tell. Service Members Legal Defense Network Survival Guide 2007 35 (5th ed. 2007); See Uniform Code of Military Justice, Chapter 47, Subchapter 10, Article 134 10 U.S.C. § 934 (1956) (“all disorders and neglects to the prejudice of good order and discipline in the armed forces, . . .”); See also Uniform Code of Military Justice Chapter 47, Subchapter 10, Article 92, 10 U.S.C. § 892 (1956) (“failure to obey order or regulation”).
64 See discussion supra Part II.b.
65 See discussion supra notes 27-41 and accompanying text.
66 See discussion supra Part I; see also discussion supra notes 61-63 and accompanying text.
67 See discussion supra Part II.a; see also supra notes 58-60 and accompanying text.
recognition of same-sex relationships. Even a married same-sex couple will remain ineligible for benefits due to DOMA’s opposite-sex marital definition.

Until Congress acts, spouses and partners of LGB servicemembers will not be eligible for health and dental care. LGB servicemembers will not receive increased housing allowances to support their families. These spouses and partners will not be automatic beneficiaries of SGLI or SBP. Thus, if an LGB servicemember fails to specify his or her spouse or partner as an intended beneficiary, then his or her loved one will not receive compensation if the servicemember dies.

III. FAMILIAR STORIES: RECOMMENDATIONS

To achieve equality, the United States should adopt policies similar to its allies that permit open service. The impact of open service on foreign militaries is used by social scientists to examine other alleged issues stemming from lifting the ban, including the impact on “cohesion, readiness, morale, [and] recruiting.” A similar comparison can be used to examine the impact on LGB servicemembers’ families and methods to implement benefits. First, this Part discusses how foreign militaries integrated family benefits for LGB servicemembers into their laws. Second, this Part analyzes how legislation modeled after our allies, combined with the repeal of DOMA, could solve the problem of unequal benefits in the Armed Forces. Third, this Part addresses and rebuts a potential criticism of this proposal: the cost of extending benefits to the families of LGB servicemembers.

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68 See discussion supra Part II.a; Defense of Marriage Act, supra note 4, at 1 U.S.C. § 7.
69 See discussion supra Part II.a; Defense of Marriage Act, supra note 4, at 1 U.S.C. § 7.
70 See discussion supra Part I.
71 See id.
72 See id.
73 See discussion supra notes 31-34, 38-41 and accompanying text.
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a. How Foreign Nations that Permit Open Service Treat LGB Families

Four nations that allow open service provide an “imperfect . . . analogy” to the United States’ Armed Forces: Australia, Canada, Israel, and the United Kingdom. Although each of these nations have different combat experiences, benefits policies, and relationships with the United States, they all grant similar – and most grant equal – benefits to the families of LGB and heterosexual servicemembers. Generally, the four nations’ application of benefits to LGB servicemembers reflects each country’s benefit systems for other government jobs.

1. Australia

Australia’s ban on open service ended in 1992 when Prime Minister Paul Keating voted to “integrate a number of international human rights conventions into [Australia’s] domestic laws and codes.” The policy against homosexuality was replaced with a sexual orientation-neutral “sexual misconduct policy.” Approximately sixteen years later, one statute, the Same-Sex Relationships (Equal Treatment in Commonwealth Laws — Superannuation) Act 2008 (Superannuation Act), established a nationwide system of same-sex partnership recognition, protections against discrimination, and equal family benefits for same-sex partners in the public sector.

75 Aaron Belkin, Don’t Ask, Don’t Tell: Is the Gay Ban Based on Military Necessity?, PARAMETERS, Summer 2003 at 109. For clarity, this Article will use the name “United Kingdom” to represent both the United Kingdom and Great Britain.

76 See infra Parts III.a.1, III.a.2, III.a.3, III.a.4.


78 Belkin, supra note 75, at 110.

and private sector.\textsuperscript{80} Under the Superannuation Act, couples, whether of the same- or opposite-sex, will become \textit{de facto partners},\textsuperscript{81} and receive equal benefits to married couples when certain criteria are met.\textsuperscript{82} A couple will be considered \textit{de facto partners} and eligible for benefits if they are not legally married to one another, are not relatives, and live together as a couple.\textsuperscript{83} The liberal definition of \textit{de facto partners} permits two individuals to become \textit{de facto partners} when one or both are married or in a \textit{de facto partnership} with another person.\textsuperscript{84} The crux of the status determination is whether the couple lives together.\textsuperscript{85} Like the United States, Australia does not recognize same-sex marriage.\textsuperscript{86}

The Superannuation Act ensures equal treatment of same-sex relationships by amending eighty-four laws,\textsuperscript{87} including laws impacting the Australian Defence Force (ADF) and military benefits.\textsuperscript{88} The Superannuation Act defines a valid dependent to include married couples, unmarried “couple[s,]”\textsuperscript{89} and “partner[s,]” regardless of whether they are a same-sex or opposite-sex couple.\textsuperscript{90} The Superannuation Act also defines a dependent child to include the child, whether adopted or natural, of any same- or opposite-sex couple.\textsuperscript{91}

\begin{footnotesize}
\begin{enumerate}
\item Superannuation Act, supra note 11.
\item Superannuation Act, supra note 11.
\item Id.; see also \textit{De Facto Relationships}, supra note 81.
\item See sources cited supra note 83.
\item Id.
\item Superannuation Act, supra note 11.
\item Id.
\item Id.
\item Id.
\end{enumerate}
\end{footnotesize}
The Superannuation Act allows same-sex partners of Australian LGB servicemembers to receive benefits equal to those a heterosexual spouse would receive.92 The available benefits range from death benefits for same-sex partners to home acquisition assistance.93 This broad legislation also grants rights to unmarried heterosexual couples.94

i. How These Policies Provide a Blueprint for the United States

Australia provides a useful comparison for the United States because Australia, in addition to being one of the United States’ allies, refuses to recognize same-sex marriage at a national level.95 The United States and Australia also share a similar British colonial history.96

Australia, with one sweeping statute, implemented a program whereby same-sex couples receive equal benefits to married heterosexual couples.97 However, the Australian statute may be too broad for the United States because the Australian statute permits unmarried heterosexual couples to receive benefits as *de facto partners*, and it may promote polygamy by allowing one person to have more than one *de facto partner*.98 Congress can avoid this problem by drafting legislation that only allows couples consisting of two persons of the same-sex to enroll as domestic partners. This could be achieved by amending the DPBOA – which as currently

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92 *Id.*
93 *Same-Sex Reforms, supra* note 87.
94 *Supernannuation Act, supra* note 11.
97 See *Supernannuation Act, supra* note 11.
98 See *discussion supra* notes 83-84 and accompanying text.
drafted will limit federal domestic partner employee benefits to two persons of the same-sex – to include servicemembers.\textsuperscript{99}

2. \textit{Canada}

In 1992, the Canadian courts ordered the military to lift the ban on LGB service because the law “violated Canada’s Charter of Rights and Freedoms.”\textsuperscript{100} Four years later in 1996, “a Canadian federal human rights tribunal ordered the federal government and federally regulated companies to provide the same medical, dental and other benefits to gay and lesbian couples as heterosexual common-law couples.”\textsuperscript{101} That order extended military benefits to the same-sex partners of servicemembers.\textsuperscript{102} In 2005, Canada began granting marriage licenses equally to same- and opposite-sex couples after passing the Canadian Civil Marriage Act (CMA).\textsuperscript{103} Canada’s marriage equality legislation reinforces that nation’s commitment to provide equal benefits for same-sex couples in both the public and private sector.\textsuperscript{104}

\begin{footnotes}
\item[99] Domestic Partnership Benefits and Obligations Act of 2009, supra note 8, at § 2(b)(5), § 2(g)(3); see discussion infra Part III.b.
\item[100] Belkin, supra note 75, at 110; Rosemary E. Park, \textit{Opening the Canadian Forces to Gays and Lesbians: An Inevitable Decision but Improbable Reconfiguration}, in GAYS AND LESBIANS IN THE MILITARY: ISSUES, CONCERNS, AND CONTRASTS 165, 172 (Wilbur J. Scott & Sandra Carson Stanley eds., 1994). Before Canada lifted the ban, some troops claimed they “would refuse to share showers, undress, or sleep in the same room as a gay soldier.” Id., at 174; Belkin, supra note 75, at 110 (45% of soldiers interviewed “would refuse to work with gays”). However, time proved these claims as false. Belkin & McNichol, supra note 79.
\item[101] Belkin & McNichol, supra note 79, at 13 (internal footnote omitted).
\item[102] See Id.
\item[103] Civil Marriage Act, supra note 12 (defining marriage as “the lawful union of two persons to the exclusion of all others”). The CMA was the legislative response to \textit{Reference re Same-Sex Marriage} in 2004, in which the Canadian Supreme Court held \textit{inter alia} that same-sex marriage was required to comply with the Canadian Charter of Rights and Freedoms (the equivalent to the United States’ Bill of Rights). \textit{Reference re Same-Sex Marriage}, [2004] 3 S.C.R. 698, 2004 SCC 79 (Can.). The Reference process “allows the federal government and the federal government alone, to publicly seek the opinion of the Supreme Court of Canada on a theoretical question.” See Douglas Elliott, \textit{The Canadian Earthquake: Same-Sex Marriage in Canada}, 38 NEW ENG. L. REV. 591, 614-15 (2004); Constitution Act, 1982, P. I (Charter of Rights and Freedoms). The Court held the proposed legislation to permit same-sex marriage “was consistent with (and indeed flowed from) the Charter.” Wade K. Wright, \textit{The Tide in Favour of Equality: Same-Sex Marriage in Canada and England and Whales}, 20 INT’L J.L. & POL’Y & FAM. 249, 257 (2006). The core provision of the statute states that “[m]arriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.” Civil Marriage Act, supra note 12.
\item[104] See Civil Marriage Act, supra note 12.
\end{footnotes}
Contrary to popular belief, Canada’s government-sponsored health care does not cover all medical expenses. The Canadian Defence Force offers a more comprehensive health and dental plan for servicemembers and their families, including same-sex spouses. The Canadian Defence Force also helps offset the financial difficulties families face when the servicemember is deployed with a program called Family Care Assistance (FCA). FCA provides families with minor children a per diem non-taxable allowance. The Canadian Defence Forces will provide childcare services, regardless of whether the parents are a same-sex or opposite-sex couple. Military families, including same-sex spouses, are also eligible for Deployment Support Groups: a combination of services to help a servicemember’s family during deployment.

Survivor benefits are available to same-sex or opposite-sex spouses of Canadian servicemembers, and individuals who are unmarried but maintained conjugal cohabitation with a servicemember for over one year. A surviving spouse, regardless of whether the spouse is of the same- or opposite-sex, is eligible for supplementary benefits. Veterans’ benefits are also available to surviving same-sex spouses of former servicemembers. These benefits include

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107 Id. at 66. This resembles the United States Armed Forces Family Separation Allowance. See supra, note 34.  
108 CANADIAN DEFENCE FORCES FAMILY HANDBOOK, supra note 106, at 66.  
110 CANADIAN DEFENCE FORCES FAMILY HANDBOOK, supra note 106, at 29.  
111 Superannuation, Benefits Payable to Survivors, Children and Other Beneficiaries, R.S.C., ch. C-15, s. 25.1 (2003).  
112 Supplementary Death Benefits, R.S.C., ch. C-17, s. 67 (2003).  
113 Veterans, Survivors and Orphans, R.S.C., ch. W-3, s. 4 (2009).
special veteran health insurance, and are applicable to any spouse (regardless of whether the spouse is of the same- or opposite-sex), a child, or a common-law partner.\textsuperscript{114}

i. How These Policies Provide a Blueprint for the United States

Comparison to the Canadian military is useful for the United States due to the close proximity of the two nations, the fact that they frequently fight alongside one another as NATO allies, and because the two countries share a similar colonial history.\textsuperscript{115}

Canada grants marriage licenses equally to same-sex and opposite-sex couples.\textsuperscript{116} Because the United States does not federally recognize same-sex marriage, an exact replica of Canada’s laws would not achieve equality in the United States because (notwithstanding DOMA) only couples in jurisdictions that recognize marriage equality could apply for benefits.\textsuperscript{117} However, Canada demonstrates how the federal recognition of same-sex relationships creates a smooth integration of equal military family benefits. The United States should repeal DOMA and establish a national domestic partnership recognition program, such as a modified version of the DPBOA.\textsuperscript{118} If the DPBOA is amended to include servicemembers,\textsuperscript{119} it will enable the same-sex partners of servicemembers to enroll in DEERS and other military benefit programs, granted that various statutory and DoD definitions are corrected to include same-sex partners.\textsuperscript{120} Like Australia, critics will argue that Canada’s recognition of conjugal

\textsuperscript{114} Veterans Insurance Act, R.S.C., ch. V-3, s. 3, 6 (2000).
\textsuperscript{116} See Civil Marriage Act, supra note 12.
\textsuperscript{117} See discussion supra Part II.
\textsuperscript{118} Domestic Partnership Benefits and Obligations Act of 2009, supra note 8.
\textsuperscript{119} See id.; see also discussion infra Part III.b.
\textsuperscript{120} DEERS, supra note 58; 10 U.S.C. § 1076 (2000); see Domestic Partnership Benefits and Obligations Act of 2009, supra note 8; see discussion infra Part III.b.
cohabitants for certain military benefits distinguishes Canada from the United States. However, this Article does not advocate for the United States to recognize and grant benefits to unmarried heterosexual couples.

3. Israel

The Israeli military lifted their ban on open service on June 10, 1993, when the Knesset, the Israeli equivalent of a Parliament, established a secular law of non-discrimination. Israel does not issue marriage licenses to same-sex couples, nor does Israel recognize domestic partnerships or civil unions. Instead, same-sex Israeli couples may qualify as “reputed spouses[,]” or extra-marital cohabitants. Rights and obligations have “gradually extended” to “same-sex reputed spouses.” Same-sex couples who marry in countries that permit same-sex marriage and subsequently move to Israel will be recognized by Israeli law.

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121 Reuven Gal, Gays in the Military: Policy and Practice in the Israeli Defense Forces, in GAYS AND LESBIANS IN THE MILITARY: ISSUES, CONCERNS, AND CONTRASTS 181, 184, 185 (Wilbur J. Scott & Sandra Carson Stanley eds., 1994); see also Aaron Belkin, Homosexuality and the Israeli Defense Forces: Did Lifting the Gay Ban Undermine Military Performance?, 27 ARMED FORCES & SOC’Y 4 (manuscript at 2) (2001) (on file with the author). Before 1993, any Israeli recruit who claimed to be a homosexual, or “[was] suspected of it[,]” was forced to undergo a psychiatric evaluation “to determine if they posed security risks.” Ethan Bronner, Israeli Army Move to end Gay Bias Hailed; Proponent Says US Helped Debate, THE BOSTON GLOBE, Jun. 12, 1993, at 2; see also Gal, supra at 185 (“Indeed, under the former regulations, some homosexual conscripts were exempted from the draft service if their psychological assessment revealed personality disturbances relating . . . to their homosexuality. . . . [T]hose who identified themselves as homosexuals were required, under the 1993 regulation, to undergo additional psychological testing.”). Ironically, as the United States introduced its discriminatory Don’t Ask, Don’t Tell policy, the Israeli government cited President Clinton’s expressed desire for the equal treatment of LGB servicemembers as inspiration for lifting the Israeli ban. Jay Bushinsky, Gays in Israeli Military Take U.S. Cue; Stand by Clinton Helps Prompt Debate, CHICAGO SUN-TIMES, Feb. 8, 1993, at 19 (“An Israeli Cabinet minister on Sunday said President Clinton’s support for homosexuals in the military is helping efforts to push for ending discrimination against gays and lesbians in Israel’s armed forces.”); see also Gal, supra at 185-86 (“Interestingly, it was noted by many . . . that the radical changed occurred in Israel in the midst of the public and political debate developing in the United States . . . . Apparently the transitions evolving in America, as well as the growing awareness of civil rights in Israel, have directly contributed to the change in the [Israeli Defense Forces] policy regarding homosexual soldiers.”).

122 Talia Einhorn, Same-Sex Family Unions in Israeli Law, 4 UtreCHT L. REV. 222, 222-24 (2008).

123 Id. at 225.

124 Id. at 225.

125 Id. at 227 (citing Yossi Ben-Ari v. Commissioner of Population Registry, Ministry of the Interior, HCJ 3045/05 (21.11.2006), tak-supreme 2006(4), 1725). This Article posits that same-sex couples who marry in a foreign country receive equal benefits to heterosexual spouses in Israel; however, there is a lack of data to prove that theory.
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Same-sex reputed spouses may collect pensions and social security benefits in the same manner as married spouses.\[^{126}\] Although they have received survivor benefits since 1997,\[^{127}\] a same-sex survivor will not receive as much financial compensation as a married widow or widower of a heterosexual servicemember.\[^{128}\] A same-sex partner of a servicemember in the Israeli Defense Forces is considered valid next-of-kin and will be notified upon death or injury of their loved one.\[^{129}\] Servicemembers may bring their same-sex partners to military ceremonies.\[^{130}\]

i. How These Policies Provide a Blueprint for the United States

A comparison of the Israeli military to the United States military is useful because the Israeli Defense Forces are combat-tested.\[^{131}\] However, unlike the United States military, the Israeli Defense Forces enlist troops by an involuntary draft.\[^{132}\] This recruitment structure may explain why Israel offers fewer benefits than the other allies examined in this Article.

Israel, although it imposes an involuntary draft, provides benefits for the reputed spouses of LGB servicemembers.\[^{133}\] Despite the lack of available data on the Israeli Defense Forces’ treatment of family benefits, it is known that the Israeli Defense Forces offer survivor benefits to

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\[^{127}\] A legal challenge in a Tel Aviv District Court “ordered the army to recognize Adir Stein as the commonlaw [sic] spouse of the late Col. Doron Maisel and grant to him benefits as an IDF widower[,]” thus extending some survivor benefits to same-sex reputed spouses of Israeli servicemembers. Homosexuality in Israel: Two Legal Challenges, JEWISH VIRTUAL LIBRARY (1997), http://www.jewishvirtuallibrary.org/jsource/Society_&_Culture/homocase.html.


\[^{130}\] Id.; Belkin & Levitt, supra note 128; see also NATHANIEL FRANK ET AL., PALM CENTER, GAYS IN FOREIGN MILITARIES 2010: A GLOBAL PRIMER (2010) [hereinafter PALM CENTER PRIMER].

\[^{131}\] See Belkin, supra note 75, at 109 (“researchers focused on [this country] . . . ; because the Israel Defense Forces are among the most combat-tested militaries in the world . . . .”).

\[^{132}\] Gal, supra note 121, at 184-85, 188.

\[^{133}\] See discussion supra notes 126-130 and accompanying text.
the reputed spouses of deceased servicemembers. If an involuntary draft force in a small country can provide survivor benefits to LGB servicemembers’ families, then perhaps the United States should consider this _de minimus_ standard as the first phase in a piecemeal approach towards equality if Congress cannot enact more comprehensive legislation.

4. United Kingdom

The United Kingdom did not lift their ban until 1999, when “the European High Court of Human Rights ruled that Britain’s gay ban violated the right to privacy guaranteed in the European Convention of Human Rights[.]” Persuaded by this decision, the United Kingdom ended the ban in the first weeks of 2000. The United Kingdom permits civil partnerships through the Civil Partnership Act of 2004 (CPA), which grants rights and obligations that are similar to a civil marriage. Two of the CPA’s goals are (1) to grant same-sex couples “equal respect with heterosexual” couples, and (2) “to remove the practical difficulties faced by same-sex couples as a result of the lack of legal recognition of their relationship.” The United Kingdom does not recognize same-sex marriage, however, civil partnerships in the United Kingdom are considered roughly equivalent with marriage.

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134 See discussion supra notes 126-128 and accompanying text.
135 Belkin, supra note 75, at 110. The court held that the “investigations conducted into the applicants’ sexual orientation, together with their discharge from the armed forces, constituted especially grave interferences with their private lives.” Smith v. United Kingdom, 29 Eur. Ct. H. R. 493 (1999) available at 1999 WL 478154 (holding that, despite the justification of unit cohesion and morale, the United Kingdom was not justified to invade the private lives of servicemembers by investigating and discharging LGB servicemembers based on sexual orientation); Rachel Donnelly & Patrick Smyth, _Britain to Act After Ruling On Gays in Military: the British Government Immediately Promised Consultations With the Military After Its Ban on Homosexuals Was Overturned by Strasbourg_, IRISH TIMES, Sept. 28, 1999 at 10.
136 Belkin, supra note 75, at 110.
137 Civil Partnership Act, supra note 13.
138 Wright, supra note 103, at 250 ("The CPA allows same-sex couples . . . to obtain legal recognition of their relationships, . . . to access most of the legal rights and responsibilities offered to married (heterosexual) couples.").
139 Id. at 259 (citing Joint Committee on Human Rights, Civil Partnership Bill 15th Report (Jul. 7, 2004)).
140 Id. (citing Joint Committee on Human Rights, Civil Partnership Bill 15th Report (Jul. 7, 2004)).
141 Id. (citing Joint Committee on Human Rights, Civil Partnership Bill 15th Report (Jul. 7, 2004)).
Pursuant to the CPA, same-sex civil partners are treated equally to heterosexual married couples in the United Kingdom generally and in the military. The dependents of LGB servicemembers, including civil partners and children, qualify for health benefits through the Army Welfare Support Service. Families who are stationed in the United Kingdom are eligible to receive National Health Service health care, covering both medical and dental needs.

The United Kingdom provides furnished housing for servicemembers and their dependents within ten miles of their station through the Service Families’ Accommodation (SFA). The SFA is available for those who are married, partnered, or who were once married or partnered and have dependent children from that relationship. In the event of a civil partnership dissolution, the parties have ninety-three days to move out of army housing.

Under the new Armed Forces Pension Scheme, same-sex partners qualify for benefits so long as they are registered, or will register, as civil partners. Pension and survivor benefits are available to civil partners upon the death of the servicemember.

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146 Id.

147 MOVING OUT OF FAMILY SERVICE ACCOMMODATION, D-5 (Dec. 2009).


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i. How These Policies Provide a Blueprint for the United States

The United Kingdom provides a useful comparison for the United States because the two nations are NATO allies,\(^{150}\) and they share a strong bond since the United States was founded as a collection of British colonies.\(^{151}\) Furthermore, the United Kingdom’s treatment of LGB servicemembers provided a frequent basis for opponents of open service in the United States during the 1993 debate.\(^{152}\) The United Kingdom also refuses to recognize same-sex marriage.\(^{153}\)

Although they do not recognize same-sex marriage, the United Kingdom permits servicemembers to enroll their same-sex partners in military benefit programs.\(^{154}\) The treatment of benefits for the same-sex partners of servicemembers is equal to that of heterosexual married spouses under the CPA.\(^{155}\) Therefore, the United Kingdom’s treatment of LGB servicemember equality provides an excellent template from which the United States can draft equality legislation and DoD directives and instructions.\(^{156}\) If the DPBOA is amended to include military benefits, the legislation would be similar to the United Kingdom’s CPA: a statute that successfully implemented equal benefits in the United Kingdom’s military by allowing servicemembers and their partners to enroll in a national domestic partnership system.\(^{157}\)

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\(^{150}\) See generally, e.g., *NATO Member Countries*, supra note 115.


\(^{152}\) In 1993 when the United States government was debating whether to legislate the Don’t Ask, Don’t Tell policy, supporters of Don’t Ask, Don’t Tell compared the United States to the United Kingdom, which at that time did not permit LGB service. Sobel, *supra* note 53, at 204; Belkin, *supra* note 75, at 109.

\(^{153}\) See discussion *supra* notes 137-141 and accompanying text.

\(^{154}\) See discussion *supra* notes 142-149 and accompanying text.

\(^{155}\) See *supra* note 142 and accompanying text; *see also* Civil Partnership Act, *supra* note 13.

\(^{156}\) Civil Partnership Act, *supra* note 13; *see Domestic Partnership Benefits and Obligations Act of 2009, supra* note 8; *see 10 U.S.C. § 1076 (2000).*

\(^{157}\) *See Domestic Partnership Benefits and Obligations Act of 2009, supra* note 8, at § 2(g)(3)(b); *see also* Civil Partnership Act, *supra* note 13.
b. **Recommendation for the United States’ Treatment of LGB Military Families Post-Repeal**

This Article advocates for Congress to legislate for equal military family benefits after the repeal of Don’t Ask, Don’t Tell using our allies’ successful policies as a guide. A legislative vehicle to achieve this goal already exists: the DPBOA.\(^{158}\) If passed, the DPBOA will establish a federal domestic partnership enrollment system to extend eligibility for federal family benefits to the same-sex partners or spouses of LGB federal employees.\(^{159}\) However, as currently drafted, this legislation explicitly denies domestic partnership enrollment to LGB servicemembers and their families.\(^{160}\) If Congress amends the DPBOA to include members of the Armed Forces in the federal definition of an “employee,” and if the DPBOA includes express language to repeal DOMA and preempt conflicting state laws, then the lion’s share of the problem of equal military benefits will be resolved.\(^{161}\) The remainder of the problem can be solved by altering the military’s definition of a dependent eligible for benefits to include those couples who follow the requirements of the DPBOA to register for federal (and military) benefits.\(^{162}\)

An amended DPBOA would synthesize the policies of the United States’ allies to implement equal family benefits in the Armed Forces. Australia implemented one comprehensive statute, the Superannuation Act, that recognized same-sex relationships and granted equal military family benefits (and all other family benefits in both the public and private sector) to couples who qualify as *de facto partners*.\(^{163}\) The DPBOA, with an amendment to the definition of an “employee” to include servicemembers, would parallel the Superannuation Act by recognizing same-sex couples, granting them family benefits, repealing DOMA (or at least

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\(^{158}\) *Id.*

\(^{159}\) *Id.*

\(^{160}\) *Id.* (employee “shall not include a member of the uniformed services”).

\(^{161}\) *Id.*; Defense of Marriage Act, *supra* note 4.


\(^{163}\) Superannuation Act, *supra* note 11.
waiving DOMA’s application to military benefits), and preempting discriminatory state law.164 Before Canada legislated marriage equality with the CMA,165 Canada granted benefits to the same-sex partners of LGB servicemembers.166 The United States could take a cue from Canada and establish a national recognition program for same-sex relationships, such as an amended DPBOA,167 thus repealing DOMA and mini-DOMAs.168 The amended DPBOA would differ from the Canadian policy because it would not go so far as to grant federal marriage equality, but the DPBOA’s federal domestic partnership enrollment program would be more formal than the Canadian policy before the CMA.169 The amended DPBOA would be similar to the United Kingdom’s CPA by limiting marriage to opposite-sex couples while extending benefits to, same-sex couples.170 At a minimum, the United States should follow Israel’s lead and make SGLI and SBP automatically payout to the surviving same-sex partners of LGB servicemembers.171
c. Potential Criticism of Implementing an Amended DPBOA

The cost of granting equal benefits to the partners and spouses of LGB servicemembers is arguably sufficient to justify not implementing an equal benefits program. However, any additional funds required to extend equal benefits to the partners, spouses, and dependents of LGB servicemembers will be offset by the number of new recruits that the United States will attract with an open service and equal benefits policy. The Williams Institute estimates that

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164 See Domestic Partnership Benefits and Obligations Act of 2009, supra note 8, at § 2(g)(3)(b); see supra Part III.a.1 (Australian military benefits); see also Defense of Marriage Act, supra note 4; see supra Part II.a.
165 Civil Marriage Act, supra note 12.
166 See supra notes 101-102 and accompanying text.
168 See supra Part III.a.2 (Canadian military benefits); see also supra Part II.a (DOMA).
169 See Domestic Partnership Benefits and Obligations Act of 2009, supra note 8; see Civil Marriage Act, supra note 12; see also supra notes 101-102 and accompanying text.
170 See Civil Partnership Act, supra note 13; see also discussion supra Part III.a.4.
171 See supra Part III.a.3.i.
approximately 36,700 persons will enlist after the repeal of Don’t Ask, Don’t Tell.\footnote{Gary J. Gates, The Williams Institute, Lesbian, Gay, and Bisexual Men and Women in the US Military: Updated Estimates 2 (January 2010) (on file with the author).} Lifting the ban may also have a positive impact on recruitment at a minimal cost by creating new avenues for advertising. Australia, Canada, and the United Kingdom allow soldiers to participate in Pride festivities to attract new recruits.\footnote{Crary, supra note 129.} Indeed, the United Kingdom’s Royal Air Force pays an LGBT organization called Stonewall to promote recruiting.\footnote{Sean Rayment, Air Force Enlists Stonewall in Drive for Gay Recruits, DAILY TELEGRAPH, Dec. 31, 2006, at 12.} Stonewall now lists the Royal Air Force as one of their “Diversity Champions,” or organizations that “promote [LGB] equality in the workplace.”\footnote{Id. (internal quotation marks omitted).} After repeal, the United States can utilize these recruiting opportunities.

The DoD will save money by eliminating the investigation and discharge process required to implement Don’t Ask, Don’t Tell, thus offsetting some costs of extending benefits to LGB servicemembers’ families. In their 2004 report, the researchers at the Government Accountability Office (GAO) could not accurately estimate the total costs of discharging soldiers under Don’t Ask, Don’t Tell\footnote{Report to Congressional Requesters - Military Personnel – Financial Costs and Loss of Critical Skills Due to DOD’s Homosexual Conduct Policy Cannot Be Completely Estimated, UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, GAO-05-299 (Feb. 2005).} because the “[DoD] does not collect relevant cost data on inquiries and investigations, counseling and pastoral care, separation functions, and discharge reviews.”\footnote{Id. at 3.} The GAO could only estimate the cost of training new recruits to replace those lost under Don’t Ask, Don’t Tell between 1994 and 2003: approximately $95 million (“in constant fiscal year 2004 dollars”).\footnote{Id. at 3.} The Williams Institute updated that estimate.\footnote{See Gates, supra note 172, at 1.} Their 2010 report estimates the United States lost between $290 million to over $555 million (in constant fiscal

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\textsuperscript{172} Gary J. Gates, The Williams Institute, Lesbian, Gay, and Bisexual Men and Women in the US Military: Updated Estimates 2 (January 2010) (on file with the author). \\
\textsuperscript{173} Crary, supra note 129. \\
\textsuperscript{174} Sean Rayment, Air Force Enlists Stonewall in Drive for Gay Recruits, DAILY TELEGRAPH, Dec. 31, 2006, at 12. \\
\textsuperscript{175} Id. (internal quotation marks omitted). \\
\textsuperscript{176} Report to Congressional Requesters - Military Personnel – Financial Costs and Loss of Critical Skills Due to DOD’s Homosexual Conduct Policy Cannot Be Completely Estimated, UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, GAO-05-299 (Feb. 2005). \\
\textsuperscript{177} Id. at 3. \\
\textsuperscript{178} Id. at 3. \\
\textsuperscript{179} See Gates, supra note 172, at 1.
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year 2009 dollars) to train replacement soldiers under the policy from its implementation in 1994 through 2008. An end to Don’t Ask, Don’t Tell means an end to these expensive procedures.

Lifting the ban on open service and providing equal military benefits to the families of heterosexual servicemembers and LGB servicemembers is a socially necessary change. Each of our servicemembers, regardless of sexual orientation, makes a daily sacrifice for the United States. Their significant others, whether they are opposite-sex spouses, same-sex spouses, or same-sex partners, should at least receive family benefits to help offset the difficulties and perils faced by every military family. The same-sex partner or spouse of an LGB servicemember is no less likely to experience emotional and financial loss due to the death or disability of a loved one than a heterosexual spouse. To claim that the United States should not grant equal military benefits to these families due to the cost of the program is misstating the issue. The issue of open service is not a financial one. Rather, it is a matter of equality.

CONCLUSION

Congress and President Obama have called for the repeal of Don’t Ask, Don’t Tell. To achieve equality after the repeal, Congress must legislate to implement family benefits for LGB servicemembers. Other laws, such as DOMA and conflicting state laws, must be repealed, waived, or preempted by new legislation to ensure that our brave soldiers’ families receive equal

180 See id. at 3.
181 As demonstrated by the three of the nations examined in this Article, granting equal benefits to the spouses or partners of LGB servicemembers is a matter of civil rights and equality, not finances. See Superannuation Act, supra note 11; BELKIN & McNICHOL, supra note 79, at 13 (internal footnote omitted); Civil Partnership Act, supra note 13. Israel, although it does not grant equal benefits to the families of both LGB and heterosexual servicemembers, does allow reputed spouses of the same-sex to collect pensions and survivor benefits. See supra notes 121-130 and accompanying text.
182 See supra note 181.
183 Id.
184 See National Defense Authorization Act for Fiscal Year 2011, supra note 2; see also Obama, supra note 1.
benefits for their sacrifices.  

This Article advocates for Congress to consider how the United States’ allies implemented same-sex family benefits for their servicemembers, and to adopt an amended version of the DPBOA to reflect the experiences of those allies while respecting the United States’ values.  

Each of the four allies discussed in this Article – Australia, Canada, Israel, and the United Kingdom – enacted benefits policies to ensure the families of LGB servicemembers receive the support they need.  

The United States should proudly support our troops, every single soldier, regardless of their sexual orientation.  “It’s the right thing to do.”

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185 See discussion supra Part II, III.b.

186 See Domestic Partnership Benefits and Obligations Act of 2009, supra note 8; see also discussion supra Part III.

187 See discussion supra Part III.a.

188 Obama, supra note 1 (“This year, I will work with Congress and our military to finally repeal the law that denies gay Americans the right to serve the country they love because of who they are. It’s the right thing to do.”).