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“It’s a Kākou Thing”*: The DADT Repeal and a New Vocabulary of Anti-Subordination

Kim D. Chanbonpin**

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* “There’s a saying in Hawai‘i . . . ‘It’s a [kākou] thing.’ This saying speaks about how people unite together to get things done” ‘Ao ‘ao O Na Loko I‘a O Maui, *It’s a Kakou Thing*, MAUI FISH POND, <http://www.mauifishpond.com/kakou.php> (last visited Mar. 14, 2013).

** Associate Professor, The John Marshall Law School (JMLS). Mahalo to Marie Neilson and Professor Williamson B.C. Chang for reviewing and providing insightful comments on this Article. I also thank the student leaders of UC Irvine School of Law’s Asian Pacific American Law Students Association, the *UC Irvine Law Review* editorial staff, and Professor Stephen Lee for arranging for my participation in the symposium program. Final thanks go to Raizel Liebler and the library research fellows at JMLS for providing excellent research assistance.

INTRODUCTION

Under the gun. Deadlines. Bullet points. Our everyday jargon is saturated with violent imagery, but there is also a growing movement toward more conscientious word usage.¹ Activists and scholars have increasingly called for mindfulness regarding the vocabulary we use. For example, during the opening ceremony for the Twenty-Seventh Annual Empowering Women of Color Conference held at the University of California, Berkeley in March 2012, Chinese American radical activist Grace Lee Boggs urged the audience “to re-imagine everything.”² She noted:

We are at the point of a cultural revolution in ourselves and in our institutions that is as far reaching as the transition from hunting and gathering to agriculture 11000 years ago and from agriculture to industry a few hundred years ago. How do we re-imagine education? How do we reimagine [sic] community? How do we re-imagine family? How do we re-imagine sexual identity? How do we re-imagine everything, in the light of a change that is so far reaching and that is our responsibility to make? We can't expect them to make it. We have to do the re-imagining ourselves. We have to think beyond capitalist categories. We have to reimagine [sic].³

In a similar vein, University of Buffalo law professor Athena D. Mutua has asked legal scholars to reimagine the term “anti-subordination.” Anti-subordination represents one of two primary approaches to the social problem of inequality. The other is non-discrimination, also known as difference-blindness, or in the race context, color-blindness. Non-discrimination posits that inequality is the result of differential treatment based on inherently suspect group-based classifications.⁴ Under the non-discrimination model, the solution to racial inequality in housing, for example, is to eliminate race from the set of considerations from which a decision maker may take account. In other words, the law should not permit discrimination based on a list of suspect classes. Anti-

1. Kevin Sack, *Nuns, a 'Dying Breed,' Fade from Leadership Roles at Catholic Hospitals*, N.Y. TIMES, Aug. 21, 2011, at A12. During the twenty-five years that she was the chief executive officer of SSM Health Care, a multi-billion dollar health care organization, Mary Jean Ryan directed her employees to avoid careless word choice. A stickler for grammar and a member of the Franciscan Order of the Sisters of Mary, Sister Mary Jean refused to describe photographs used during office presentations as “blown up,” referring to them, more accurately, as “enlargements.” *Id.*

2. *On Revolution: A Conversation Between Grace Lee Boggs and Angela Davis*, NAT'L RADIO PROJECT (Mar. 2, 2012), <http://www.radioproject.org/2012/02/grace-lee-boggs-berkeley> [hereinafter *On Revolution*] (“We have to re-imagine revolution and get beyond protest—we have to re-imagine revolution and think not only about the change not only in our institutions but the changes in ourselves.”); see also GRACE LEE BOGGS, *THE NEXT AMERICAN REVOLUTION: SUSTAINABLE ACTIVISM FOR THE TWENTY-FIRST CENTURY* 28–51 (2011) (advocating Boggs’s notion of visionary organizing and “growing your soul”).

3. *On Revolution*, *supra* note 2.

4. Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1005–06 (1986).

subordination, by contrast, allows consideration of characteristics such as race, gender, and sexual orientation, and moreover, encourages positive differential treatment in order to improve conditions of substantive equality for these groups.⁵ Non-discrimination, on the other hand, is satisfied with ensuring individual access to formal equality under the law.

At a 2011 conference, Professor Mutua challenged a room of scholar-activists to dream of a new vocabulary to capture the meaning of the word “anti-subordination,” without having to describe the principle in the negative (as in its current iteration).⁶ The word “anti-subordination,” or even “post-subordination,”⁷ acknowledges the problem of *subordination*,⁸ but in doing so, privileges the name of the problem without suggesting a solution. Instead, Mutua is searching for a word that precisely, but affirmatively, conveys a commitment to substantive equality and progressive social change. In the same way that the word “anti-essentialism” has been reformulated as “intersectionality” or “multi-dimensionality,” Mutua asserted, so must we also reconstruct the notion of anti-subordination in a way that defines positively “what we are for” rather than what we are against.⁹ In her talk, Mutua considered the African concept of “ubuntu,” which means something like “I am because we are.”¹⁰ In this Article I offer *kākou*. The discussion of clusivity¹¹ and the Native Hawaiian notion of *kākou* contained here is a response to Mutua’s call for a new anti-subordination vocabulary. As a way of grounding the theoretical discussion about *kākou*, this Article examines the popular claim that the repeal of “Don’t Ask, Don’t Tell” (DADT) is a victory for equality.¹²

Two recent events present the opportunity to reflect on the meaning of

5. *Id.*

6. Athena Mutua, Professor, SUNY Buffalo Law School, Keynote Address at the Seventh Annual Jerome McCristal Culp Lecture, at the LatCrit Annual Conference (Oct. 25, 2011), available at <http://www.youtube.com/watch?v=Fm4gPmungBo>.

7. Steven W. Bender & Keith Aoki, *Seekin’ the Cause: Social Justice Movements and LatCrit Community*, 81 OR. L. REV. 595, 619 (2002) (describing LatCrit as a movement “that aims to mobilize and build community around those willing to address Latina/o issues in imagining a *post-subordination* future” (emphasis added)).

8. RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY* 173 (2d ed. 2012) (defining subordination as a “[p]rocess of holding or rendering of lesser importance, as through racial discrimination, patriarchy, or classism”).

9. Mutua, *supra* note 6 (“I want us to revisit the term, not the concept, of ‘anti-subordination.’ This is a big term. I love this term. I think it is quite precise . . . but I want to reconstruct, I want to reveal. I want us to put our energies in ‘what we are for,’ not ‘we are against.’ I suspect we should simply be turning away from the things we against.”).

10. MICHAEL BATTLE, *UBUNTU: I IN YOU AND YOU IN ME* 36 (2009) (quoting John Mbiti).

11. *See infra* Part III.

12. *See, e.g.*, Eugene Robinson, *Obama’s Victory Lap*, WASH. POST, Dec. 21, 2010, at A19; Tyrone C. Marshall Jr., *Defense Leaders Laud Repeal, Return of ‘Equality,’* AM. FORCES PRESS SERVICE (Sept. 20, 2011), <http://www.defense.gov/news/newsarticle.aspx?id=65390> (quoting Defense Secretary Leon E. Panetta) (“Thanks to this change, I believe we move closer to achieving the goal at the foundation of the values that America’s all about—equality, equal opportunity and dignity for all Americans.”).

equality and civil rights in the twenty-first century and the value of the anti-subordination principle—what I will later reformulate as *kākou*—in guiding the goal of substantive equality in the coming decades.¹³ These two events are (1) the repeal of the exclusionary ban on lesbian, gay, and bisexual (LGB) service members in the U.S. military,¹⁴ otherwise known as the DADT law and (2) the publication of the Military Leadership Diversity Commission’s (MLDC’s) report entitled *From Representation to Inclusion: Diversity Leadership for the 21st-Century Military*.¹⁵ The repeal of DADT represents the triumph of non-discrimination rhetoric, while the MLDC’s report stands for a renewed effort to expand the military’s affirmative action policies for the benefit of people of color and women: two historically subordinated groups in the U.S. military. It is at this juncture that I intervene with my proposal for using the notion of *kākou* as a new approach to anti-subordination theory and practice.

The repeal of DADT may have purchased equality for LGB service members, but at a premium. In my view, the price of that sale has been the promise of substantive equality. Transgender people are still barred from military service, and LGB service members still do not have the same rights and privileges as their straight counterparts.¹⁶ The strategic decision to rally around the non-discrimination model, I argue in this Article, will reinforce the continued subordination of LGB service members.¹⁷ As an alternative, I propose the

13. Other progressive goals such as peace and anti-imperialism are on my mind, even as I write about anti-subordination policies for the benefit of uniformed warriors. See AARON BELKIN, *HOW WE WON* (2011) (considering the costs of the Palm Center’s advocacy related to the DADT repeal).

14. In this Article, I use the acronym LGBTQ (lesbian, gay, bisexual, transgender, and queer) to refer to the sexual orientation and gender identity community writ large. The Department of Defense (DoD) considers transgender identity a psychiatric condition that disqualifies an individual from military service. See Department of Defense Directive 6130.03, at 4.29(r) (2010); see also *infra* Part V. This DoD regulation remains unaffected by the Don’t Ask Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, § 2(f)(1)(A), 124 Stat. 3516. Therefore, the repeal of DADT has no impact on the continuing ban against transgender service members, so when discussing the repeal, I will use the shorter acronym, LGB (lesbian, gay, bisexual) to more accurately describe the limited population that is impacted.

15. MILITARY LEADERSHIP DIVERSITY COMM’N, *FROM REPRESENTATION TO INCLUSION* 3 (2011) [hereinafter MLDC, FINAL REPORT], available at <http://www.hsdl.org/?view&did=11390>.

16. See *infra* Part IV (citing Am. Bar Ass’n Comm’n on Sexual Orientation & Gender Identity, *LGBT Service Members and the Armed Forces One Year After “Don’t Ask, Don’t Tell”*, AM. B. ASS’N 3 (Aug. 3, 2012) [hereinafter ABA Report], http://www.americanbar.org/content/dam/aba/administrative/sexual_orientation/2012_sogi_cle_book.authcheckdam.pdf). Among the numerous family support benefits not available to LGB service members:

[S]ame-sex spouses are not eligible for insurance coverage through TriCare, the military’s expansive insurance program; the service member cannot receive an increased housing allowance, to account for the reality that the service member is supporting a family instead of just himself or herself; in the event of a service members [sic] death, there are a substantial amount [sic] of death benefits that the surviving spouse cannot receive.

Id.

17. See *infra* Part IV.

application of *kākou* principles to military policies and programs for integrating LGB service members.

Kākou, in the Hawaiian language, literally means “us” or “we.”¹⁸ According to the study of clusivity in the field of linguistics, language and word choice can be deployed to communicate either exclusion or inclusion.¹⁹ The first-person plural pronoun can be either exclusive (exclude the addressee) or inclusive (include the addressee).²⁰ *Kākou* means “we” in the inclusive sense. More figuratively, *kākou* signifies collective action to address a social problem. Therefore, when one says, “it’s a *kākou* thing” to describe an event, the speaker means that everyone is invited to participate. On a deeper level, “it’s a *kākou* thing” also means that everyone’s participation is required to make the event a success. If exclusion is a primary means of subordination, as I will argue in this Article, then the notion of inclusion as manifested in the value of *kākou* provides a new way of re-imagining anti-subordination justice work. In comparison to the dominant non-discrimination model promoted during the DADT repeal movement, *kākou* is concerned with substantive equality and requires an awareness of difference for the purpose of gaining collective strength based on individual differences.

The history of the DADT repeal²¹ exposes the consequences of vocabulary and word choice in progressive social change advocacy. To achieve the goal of repeal, mainstream DADT repeal advocates successfully utilized the narrative of non-discrimination and formal equality—that is, gay soldiers are no different than straight soldiers, according to the rhetoric of the repeal movement, and therefore they should be treated similarly.²² During the continuing public debate about DADT, repeal advocates consistently maintained that “nothing would have to change” after repeal.²³ They argued, for example, against training sessions for military leadership on the grounds that these special sessions would draw unnecessary attention to LGB service members and could engender resentment from the rank and file. Their arguments prevailed, and President Barack Obama signed the Repeal Act.²⁴ Now that the repeal has taken effect, LGB service members will no longer be discharged solely for “homosexual acts.”²⁵ But under the terms of the repeal, the military will not consider sexual orientation or the

18. MARY KAWENA PŪKUI & SAMUEL H. ELBERT, *NEW POCKET HAWAIIAN DICTIONARY* 48 (2d ed. 1992).

19. *See infra* Part III.

20. *See infra* Part III.

21. Don’t Ask Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, § 2(f)(1)(A), 124 Stat. 3516.

22. *See infra* Part IV.

23. *See, e.g.*, Daryl Lindsey, *Should Gays Serve? A Salon Panel Debates the Ban on Homosexuals in the Military*, SALON (June 9, 2000), http://www.salon.com/2000/06/09/gays_3 (quoting retired Col. Grethe Cammermeyer, who successfully battled her discharge from the Army in the courts and wrote about it in her memoir, *Serving in Silence*).

24. Robinson, *supra* note 12.

25. *See* 10 U.S.C. § 654 (b)(1) (2006) (repealed 2011).

history of LGB subordination to be relevant factors in recruitment, retention, promotion, or other personnel decision making. In achieving the repeal under these terms, LGB service members have been deprived of access to and benefits from the military's equal opportunity (EO) and diversity programs. As a result of the strategic deployment of the non-discrimination narrative by repeal advocates, sexual orientation and gender identity has been completely eliminated from the military's discourse about diversity.

Part I provides factual background by chronicling the U.S. military's history of unequal treatment of marginalized groups—namely, people of color, women, and LGBTQ people. Part II introduces a new conceptual framework for understanding the harms resulting from the military's historical subjugation of these groups. Borrowing from the field of linguistics, Part II uses the notion of clusivity to describe laws and policies banning or restricting certain groups from military service as exclusionary and, by contrast, describes redress efforts such as affirmative action as inclusive. More specifically, Part II proposes the use of the Native Hawaiian value of *kākou* as a way to reimagine anti-subordination scholarship and activism. Utilizing the *kākou* paradigm, Part III describes the military's efforts at remedying the subordination of marginalized groups. Part IV sets forth my proposal that the military should adopt, as it does in the context of affirmative action programs for people of color and women, *kākou*-imbued programs to repair the historical subordination of LGB service members.

I. BACKGROUND: GROUP-BASED EXCLUSION IN THE U.S. MILITARY

That the U.S. military is one of the most racially diverse workforces in the United States can be credited in large part to the Department of Defense's (DoD's) commitment to diversity.²⁶ The importance of a broad and inclusive definition of diversity in the armed services is consistently affirmed in official policy across the service branches.²⁷ Strategic plans from the U.S. Coast Guard and other service branches²⁸ extend the notion of diversity to include equal

26. Jim Parco et al., *Intolerable Tolerance: The Problem with Diversity Training in the Military*, ARMED FORCES J., July 2008, at 37, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1161921. But see Mario L. Barnes, "But Some of [Them] Are Brave": Identity Performance, the Military, and the Dangers of an Integration Success Story, 14 DUKE J. GENDER L. & POL'Y 693, 714–19 (2007) (cautioning against easy acceptance of the military's integration success narrative).

27. See, e.g., ANTHONY D. REYES, JOINT CTR. FOR POLITICAL & ECON. STUDIES, STRATEGIC OPTIONS FOR MANAGING DIVERSITY IN THE U.S. ARMY 1 (2006), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA493839>.

28. See, e.g., U.S. COAST GUARD, U.S. COAST GUARD DIVERSITY STRATEGIC PLAN: RECOGNIZING DIVERSITY AS A MISSION READINESS ISSUE 5 (2011), available at http://www.uscg.mil/diversity/docs/DSP/Diversity_Plan2011_Web.pdf; U.S. ARMY, 2012 ARMY STRATEGIC PLANNING GUIDANCE 13 (2012), available at <http://usarmy.vo.llnwd.net/e2/c/downloads/243816.pdf>.

opportunities for women, people with disabilities, and immigrants, for example.²⁹ The literature produced by the military's various task forces on diversity regularly refers to the goal of achieving representation reflective of broader U.S. society.³⁰ These efforts have yielded high numbers of recruits of color, in some cases in numbers over-representative compared to numbers in the eligible recruiting pool.³¹

This was not always the case, however. Although African American men had served in combat roles since the Revolutionary War,³² the U.S. military was segregated by race until 1948. Today, the military's combat troops remain segregated by sex,³³ and only recently did Congress repeal the statutory ban on openly LGB service members. The exclusion of these groups is both an act (subordinating) and a result (subordination). That is, these groups were excluded from the military precisely because they were devalued, and the exclusion of these groups resulted in their further subordination. Part I identifies people of color, women, and LGBTQ people as members of subordinated groups within the power structure of the U.S. military.³⁴ It provides a brief historical overview of the

29. Legal permanent residents (immigrants with "green cards") have long been permitted to join the armed forces. See 10 U.S.C. § 504(b)(B) (2012). Military recruitment programs target non-citizens, offering a fast track to naturalization in exchange for military service. See Julia Preston, *U.S. Military Will Offer Path to Citizenship*, N.Y. TIMES, Feb. 15, 2009, at A1. The Military Accessions Vital to the National Interest (MAVNI) program was introduced to recruit non-citizens into the U.S. Army. Recruits who are licensed health care professionals or who speak any of thirty-five critical foreign languages are eligible under the MAVNI program. MLDC, FINAL REPORT, *supra* note 15, at 50–51.

30. DEP'T OF THE NAVY, 2010 ANNUAL REPORT ON DIVERSITY 6 (2010), http://www.med.navy.mil/diversity/Documents/Diversity_DONreport2010.pdf ("For the Navy to be relevant to our Nation, credible to the world, and attractive as a potential and ongoing employer, we must reflect the face of the Nation at all levels.").

31. Rhonda Evans, *A History of the Service of Ethnic Minorities in the U.S. Armed Forces*, PALM CENTER 48 (June 26, 2003), http://www.palmcenter.org/files/active/0/Evans_MinorityInt_200306.pdf ("African Americans, Latinos, Asian/Pacific Island and Native American soldiers comprised nearly 40% of the armed forces in 2002."). In representational diversity terms, the Navy has equal representation (or over-representation, in some instances) of every racial or ethnic group category. MLDC, FINAL REPORT, *supra* note 15, at 55–56. The remaining Services each "had one or more racial/ethnic minority group that was underrepresented compared to its representation in the eligible recruiting pool." *Id.* at 55. Women, fifty-one percent of the total U.S. population, were underrepresented in all services. *Id.* at 56. Note, however, the greater lack of representation of people of color at the officer levels. *Id.*

32. See CHARLES BLATCHER III, *OF THEE I SING* (1997). Crispus Attucks, a Black man and former slave, is believed to be among the first casualties of the Boston Massacre. *Id.* at 68. Prince Estabrook, a slave, was injured during the Battle of Lexington while fighting as a colonial Minuteman. ALICE HINKLE, *PRINCE ESTABROOK: SLAVE AND SOLDIER* 25–30 (2001).

33. On January 23, 2013, the DoD announced that Secretary Leon Panetta had decided to rescind DoD rules excluding women from most forms of active combat service. Elisabeth Bumiller & Thom Shanker, *Equality at the Front Line: Pentagon Is Set to Lift Ban on Women in Combat Roles*, N.Y. TIMES, Jan. 24, 2013, at A1. The changes will not be implemented immediately, however. The DoD is allowing up until January 2016 for the services to make final decisions. *Id.*

34. Although Part I considers the impact of subordination on these single axes

military's exclusionary and unequal treatment of these groups, before Part III examines programs under the policy of deliberate inclusion designed to remedy these wrongs.

A. People of Color

A history of exclusion and the resulting struggle for inclusion within the U.S. polity is part of the shared experience of African Americans, Asian Americans, and other people of color. Throughout U.S. history, service in the military was a vehicle for people of color to prove their loyalty and worth to the country, as well as a means to stake claim to all the benefits and obligations of U.S. citizenship.³⁵ Although they were U.S. citizens by birth, African Americans were treated as second-class citizens in civilian life and in the military.³⁶ Nevertheless, leaders in the African American community encouraged their constituents to enlist, hoping that valorous individual military service might later be exchanged for "first-class citizenship" for the group.³⁷

Like African Americans before them, Asian Americans were attracted to military service in part because of the promise it offered regarding access to "first-class citizenship."³⁸ Whereas African Americans sought to achieve the full social

(race/ethnicity, gender, and sexual orientation), the impact of overlapping axes of subordination multiply burden certain service members (for example, bisexual Asian American women).

35. Lucy E. Salyer, *Baptism by Fire: Race, Military Service, and U.S. Citizenship Policy, 1918–1935*, 91 J. AM. HIST. 847, 850 (2004) ("The government infused military service with such importance that it became a path to citizenship for those, whatever their race, who were willing to play for high stakes."); Evans, *supra* note 31, at 35 ("Once the war began, African American leaders viewed 'military service as an exchange for first-class citizenship' and counseled African Americans to set aside grievances in support of the [second world] war.").

36. Salyer, *supra* note 35, at 850, 855; Evans, *supra* note 31, at 35; Jason Shaffer, *African Americans and the United States Military: A Brief History*, BRADY SERIES (2010), http://www.usna.edu/BradySeries/_files/documents/Defiance-Shaffer.pdf ("This condition of being both a patriot and, in many cases, at best a second-class citizen marks the experience of many African Americans in uniform until the integration of US armed forces under President Truman.").

37. Evans, *supra* note 31, at 35 (internal citations omitted); see also Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523–24 (1980) (framing the public school desegregation case as an instance of interest convergence); Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 61–120 (1988) (providing archival research supporting Bell's interest-convergence theory). The U.S. Department of Justice intervened in the *Brown* litigation as a direct response to classified diplomatic memoranda that encouraged that course of action as a political strategy to burnish the image of the United States in the international arena. Bell, *supra*, at 111–12.

38. Evans, *supra* note 31, at 35. Frederick Douglass acknowledged the strategic value of military service in the African American struggle for equal rights during the Civil War: "[L]et [an African American man] get an eagle on his button, and a musket on his shoulder and bullets in his pocket, there is no power on earth which can deny that he has earned the right to citizenship in the United States." *Id.* at 12; see also Salyer, *supra* note 35, at 850 (citing JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP* 1–3, 7–9 (1991); James Burk, *Citizenship Status and Military Service: The Quest for Inclusion by Minorities and Conscientious Objectors*, 21 ARMED FORCES & SOC'Y 503, 503–29 (1995)).

Asian men's hopes that military service would lead to inclusion in the American polity were encouraged by Japanese immigrant newspapers which, according to Harry N. Naka,

and cultural aspects of citizenship, their Asian American counterparts confronted exclusionary laws that barred their eligibility for citizenship altogether. Asian Americans were generally excluded from both juridical citizenship and military service, but the race confusion created by the black-white dichotomy occasionally created opportunities for Asian Americans to subvert racial segregation laws.³⁹

After serving in the U.S. military during World War I, foreign-born Asian soldiers applied to naturalize as their European peers had, only to be told that the Bureau of Naturalization considered all Asians ineligible for U.S. citizenship.⁴⁰ Upon receiving this news, Sergeant-Major Tokutaro Nishimura Slocum, an Army veteran and war hero who had been born in Japan, reportedly “burst into tears” and cried, “I may be yellow in face, but I am not yellow at heart.”⁴¹ Yet, Asian Americans maintained their pursuit of the inclusion that citizenship symbolized, perhaps most poignantly during World War II as members of the 442nd Regimental Combat Team and the 1st Filipino Infantry Regiment.⁴²

The ideal of full inclusion for Asian Americans in the military was tested again in 1989, when Bruce Yamashita enrolled in the U.S. Marine Corps Officer Candidate School (OCS) in Quantico, Virginia.⁴³ At the end of the ten-week course, his commanding officer called Yamashita into his office and informed him that, like three other officer candidates of color, he had been disenrolled from the program.⁴⁴ During the nine weeks that preceded his disenrollment, Yamashita had been the target of constant racial and ethnic slurs lobbed at him by his training officers and drill sergeants.⁴⁵ When Yamashita protested this treatment, the Marine Corps asserted that the racial taunts to which he had been subjected were legitimate tests of his mettle and leadership.⁴⁶ Yamashita challenged his disenrollment, and eventually won a five-year struggle to obtain his commission as a captain.⁴⁷ To do so, he proved to the Navy Discharge Review Board that the

“popularly heralded that enlistment in the armed forces of the United States would be an open ‘sesame’ to all privileges of citizenship regardless of race restrictions.”

Salyer, *supra* note 35, at 855.

39. See generally Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924*, 86 J. AM. HIST. 67, 69 (1999) (arguing that immigration laws in the 1920s “encoded,” “generated,” and obscured the social construction of race and citizenship during this historical period); Salyer, *supra* note 35, at 850.

40. Salyer, *supra* note 35, at 847.

41. *Id.*

42. See, e.g., DAWN B. MABALON & RICO REYES, *FILIPINOS IN STOCKTON 7–8* (2008) (regarding the 1st Filipino Infantry Regiment); RONALD TAKAKI, *DOUBLE VICTORY: A MULTICULTURAL HISTORY OF AMERICA IN WORLD WAR II* 120–24, 157–79 (2000).

43. BRUCE I. YAMASHITA, *FIGHTING TRADITION 1–2* (2003); *A Most Unlikely Hero* (PBS television broadcast May 23, 2004).

44. Melissa Healy, *Asian-American Cites Bias, Pushes for Officer Commission*, L.A. TIMES, Nov. 20, 1992, at A4.

45. See, e.g., YAMASHITA, *supra* note 43, at 61–63 (asserting that ethnic slurs included, “Why didn’t you just join the Japanese Army?,” “Yamashitee!,” and “Kamikaze Man”).

46. *Id.* at 152.

47. *Id.* at 234–37.

Marine Corps had engaged in a “pervasive and consistent pattern of discrimination against racial and ethnic minorities.”⁴⁸ In response to Yamashita’s case, the Marine Corps revised its OCS training manual, making explicit the prohibition against “statements, gestures and any actions that could be interpreted as racial, gender or ethnic prejudice or bias.”⁴⁹

The history of Asian Americans in the U.S. military is long and complicated by race and citizenship and has gone by largely unexamined.⁵⁰ Notable figures such as Rear Admiral Connie Mariano,⁵¹ General Eric Shinseki,⁵² Major General Antonio Taguba,⁵³ and Lieutenant Colonel Tammy Duckworth⁵⁴ benefitted directly from Captain Yamashita’s court battles to make the officer corps more diverse and inclusive. Yet there remain sullen reminders that anti-Asian American racism persists; for example, Private Danny Chen’s suicide in Afghanistan in October 2011, after he had been subjected to months of race-based physical and psychological harassment by his Army peers.⁵⁵

B. Women

In 2012, women comprised more than fourteen percent of the total 1.43 million active component military personnel in the armed forces.⁵⁶ In January

48. Healy, *supra* note 44 (“Using Marine Corps statistics, [Yamashita’s legal team] discovered that in the eight-year period, minority candidates were flunked out of classes at a rate of almost 50%. By contrast, only one white officer candidate in three was disenrolled.”). In Yamashita’s class, 60% of candidates of color had been disenrolled, as compared to 28% of white candidates. YAMASHITA, *supra* note 43, at 170.

49. Editorial, *Landing on a Beach of Prejudice: Marines Admit Errors in the Outrageous Case of Bruce Yamashita*, L.A. TIMES, Jan. 7, 1994, at B6.

50. The majority of scholarly writing on the topic of Asian American U.S. military history deals with the contributions of the all-Nisei 442nd Regimental Unit during World War II.

51. Rear Admiral Connie Mariano (ret.) served as White House physician to Presidents Bill Clinton and George W. Bush.

52. General Eric Shinseki (ret.) currently serves as the Secretary for Veterans Affairs in the Obama administration. Shinseki is a retired four-star general in the U.S. Army. While serving as the Army Chief of Staff in 2003, Shinseki publicly contradicted then-Secretary of Defense Donald Rumsfeld’s estimates regarding the number of ground troops required in Iraq after the planned U.S. invasion of that country. See *Eric K. Shinseki*, TIMES TOPICS (Jan. 20, 2009), http://topics.nytimes.com/top/reference/timestopics/people/s/eric_k_shinseki/index.html.

53. Major General Antonio Taguba (ret.) famously authored an internal report for the U.S. Army assessing the Abu Ghraib prison torture scandal. See DEP’T. OF DEF., ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE 6 (2004), available at http://www.npr.org/iraq/2004/prison_abuse_report.pdf.

54. Lieutenant Colonel Tammy Duckworth is currently the U.S. Representative for the Eighth District in the State of Illinois. She previously served in the Office of Veterans Affairs as the Assistant Secretary for Public and Intergovernmental Affairs.

55. Kirk Semple, *Army Private Talked of Suicide Because of Hazing, Fellow Soldier Testifies in Court-Martial*, N.Y. TIMES, July 26, 2012, at A19.

56. About 200,000 women serve in the active duty force. DEP’T. OF DEF., REPORT TO CONGRESS ON THE REVIEW OF LAWS, POLICIES, AND REGULATIONS RESTRICTING THE SERVICE OF FEMALE MEMBERS IN THE U.S. ARMED FORCES 3 (2012) [hereinafter DEP’T OF DEF., 2012 REPORT], available at www.defense.gov/news/WISR_Report_to_Congress.pdf.

2013, the DoD announced⁵⁷ that it planned to rescind rules barring women from performing active combat duties.⁵⁸ The announcement followed earlier moves by the DoD and the Army to open select positions at the battalion level to women.

In February 2012, the DoD submitted a report to Congress in which it concluded that “there is no compelling reason for continuing the portion of the [combat exclusion] policy that precludes female Service members from being assigned to units or positions that are doctrinally required to physically collocate and remain with direct ground combat units.”⁵⁹ In its report, the DoD also notified Congress of its intent to allow women in “open occupational specialties” to serve in “select units and positions at the battalion level (for Army, Navy, and Marine Corps) whose primary mission is to engage in direct combat on the ground.”⁶⁰

In response to the DoD report, a new Army policy approving a limited exception to its combat exclusion rule appeared in May 2012.⁶¹ The exception “permit[s] the assignment of female Soldiers serving in specialties open to women to positions in the battalion headquarters and headquarter companies of maneuver battalions in select units.”⁶² According to the Associated Press, this change would open 14,000 jobs to women that were previously out of reach because of the combat exclusion policy.⁶³ The Army’s new rule was salutary, but incomplete; women were still banned from performing 250,000 other occupations.⁶⁴

After the Army’s May 2012 policy was announced, two women in the U.S. Army Reserve filed an equal protection lawsuit against the Secretary of Defense

57. Bumiller & Shanker, *supra* note 33; Leon E. Panetta, Sec’y of Def., Statement on Women in Service Delivered in the Pentagon Press Briefing Room, Jan. 24, 2013, <http://www.defense.gov/speeches/speech.aspx?speechid=1746>.

58. The DoD’s current direct ground combat assignment rule provides:

A. Rule. Service members are eligible to be assigned to all positions for which they are qualified, except that women shall be excluded from assignment to units below the brigade level whose primary mission is to engage in direct combat on the ground, as defined below.

B. Definition. Direct ground combat is engaging an enemy on the ground with individual or crew served weapons, while being exposed to hostile fire and to a high probability of direct physical contact with the hostile force’s personnel. Direct ground combat takes place well forward on the battlefield while locating and closing with the enemy to defeat them by fire, maneuver, or shock effect.

Memorandum from Les Aspin, Sec’y of Def., Regarding the Direct Ground Combat Definition and Assignment Rule 1–2 (Jan. 13, 1994) (emphasis added).

59. DEP’T OF DEF., 2012 REPORT, *supra* note 56, at 3.

60. *Id.* at 15.

61. Memorandum from John M. McHugh, Sec’y of the Army, for SEE Distribution 1 (May 7, 2012).

62. *Id.*

63. Assoc. Press, *2 Reservists Sue over Army’s Ban on Women in Combat*, N.Y. TIMES, May 27, 2012, at A18.

64. *Id.*

and the Secretary of the Army.⁶⁵ The Baldwin complaint framed the combat exclusion policies as structural barriers that prevent women from acceding to senior leadership ranks in the military.⁶⁶ Specifically, the plaintiffs asserted: “continued enforcement of the DoD Policy and the Army Policy further ingrains and validates discrimination against women and the stigmatization of women as inferior, which has deprived and continues to deprive Plaintiffs of their constitutional rights.”⁶⁷

Although the military had traditionally considered women unfit for combat assignments, women had already been engaged in direct ground combat in Iraq and Afghanistan. A March 2011 report commissioned by the Departments of Defense and Homeland Security observed that women in “Iraq and Afghanistan have already been engaged in activities that would be considered combat related, including being collocated with combat units and engaging in direct combat for self-defense.”⁶⁸ The Army has “attached” women to Army and Marine Corps ground combat units in Iraq through the Lioness Program.⁶⁹ Women are also recruited and assigned to the Army’s Cultural Support Teams, where women “serve as enablers supporting Army special-operations combat forces in and around secured objective areas.”⁷⁰ These attachment and enabler duties effectively place female service members in direct ground combat. In Operation Enduring Freedom (Afghanistan) and Operation Iraqi Freedom (Iraq), over 800 women have been wounded and over 130 have been killed.⁷¹ But because these programs were used on an ad hoc basis, the women serving in them did not receive the combat recognition they deserve.⁷² Nor, in many cases, did these women receive adequate ground combat training to prepare them for these roles.⁷³ Lifting the combat ban on women will be the first step in remedying these wrongs.

65. Complaint at 1, *Baldwin v. Panetta*, No. 1:12-cv-00832-RMC (D.D.C. May 23, 2012) [hereinafter *Baldwin Complaint*].

66. *Id.* at 62.

67. *Id.* at 63.

68. MLDC, FINAL REPORT, *supra* note 15, at 72. “[W]omen are currently engaged in direct combat, even when it is not part of their formally assigned role.” *Id.* at 73.

69. Felicia R. Lee, *Battleground: Female Soldiers in the Line of Fire*, N.Y. TIMES, Nov. 5, 2008, at C1.

70. *About the Cultural Support Program*, U.S. ARMY, <http://www.soc.mil/swcs/cst/about.html> (last visited Mar. 14, 2013).

71. DAVID F. BURRELLI, CONG. RESEARCH SERV., R 42075, WOMEN IN COMBAT: ISSUES FOR CONGRESS 1 (2012).

72. Kate Kovarovic, *I Am Woman, Watch Me War: The Implications of Eradicating Combat Exclusion Policies for Women* 6 (SSRN Elec. Library, Working Paper No. 1971331, 2011), available at <http://ssrn.com/abstract=1971331> (citing Jennifer C. Schingle, *A Disparate Impact on Female Veterans: The Unintended Consequences of Veterans Affairs Regulations Governing the Burdens of Proof for Post-Traumatic Stress Disorder Due to Combat and Military Sexual Trauma*, 16 WM. & MARY J. WOMEN & L. 155, 160 (2009)). *But see id.* at 14–15 (citing Martha McSally, *Women in Combat: Is the Current Policy Obsolete?*, 14 DUKE J. GENDER L. & POLY 1011, 1017 (2007) (listing the medals for valor in combat received by women serving in the U.S. Army)).

73. *See* Complaint at 12, *Hegar v. Panetta*, No. 3:12-cv-06005-EMC (N.D. Cal. Nov. 27, 2012)

The DoD plans to give the service branches up to three years—until January 2016—to come to final decisions regarding the new policy.⁷⁴ In the meantime, each service will author an implementation plan for fully integrating women into the combat arms.⁷⁵

C. Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) People

Service members have been subject to exclusion based solely on their sexual orientation since 1778, when Lieutenant Gotthold Frederick Enslin was charged with sodomy and thereafter separated from the Continental Army during the Revolutionary War.⁷⁶ Since that time and prior to the 1993 DADT law, the generally applicable sodomy provisions of military law as well as service-specific personnel regulations have worked in concert to exclude LGBTQ individuals from service.⁷⁷

At one point, the military employed an index of physical characteristics proffered by then-current “scientific” theories to uncover the presence of gay men among its potential recruits. “In 1921, for example, the Army’s ‘stigmata of degeneration’ included men who appeared overly feminine, with sloping shoulders, broad hips, and an absence of secondary sex characteristics, including facial and body hair.”⁷⁸ Men matching this generalized description were marked as unfit for military service based solely on their presumed gay sexual orientation. In 1949, the DoD issued a memorandum that unified military policy across the service branches: “Homosexual personnel, irrespective of sex, should not be permitted to serve in any branch of the Armed Services in any capacity, and prompt separation of known homosexuals from the Armed Forces be made mandatory.”⁷⁹

On January 16, 1981, the DoD further refined its exclusionary policy against LGBTQ service members when it released Directive 1332.14.⁸⁰ The memorandum

[hereinafter Hegar Complaint] (“The combat exclusion policy . . . deprives women of combat training opportunities or the benefits of such training.”).

74. Bumiller & Shanker, *supra* note 33.

75. *Id.*

76. RANDY SHILTS, CONDUCT UNBECOMING: GAYS & LESBIANS IN THE U.S. MILITARY 11 (1994).

77. RAND CORP., SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY 3 (1993) [hereinafter RAND CORP., 1993 STUDY] (“Sodomy was defined as anal or oral sex between men or between a man and a woman. At the end of World War II, the legal definition was changed to include sexual relations between women as well.”). Article 125 of the Uniform Code of Military Justice (UCMJ), which criminalizes sodomy, remains in place after the repeal of DADT. *See* UCMJ art. 125; 10 U.S.C. § 925 (2012).

78. RAND CORP., 1993 STUDY, *supra* note 77, at 4.

79. *See* Memorandum from Dep’t of Def. to Sec’y of Army, Navy, & Air Force 1 (Oct. 11, 1949).

80. RAND CORP., 1993 STUDY, *supra* note 77, at 8.

accompanying Directive 1332.14 also provided a unit cohesion rationale for the ban:

The presence of such [LGBTQ] members adversely affects the ability of the armed forces to maintain discipline, good order, and morale; to foster mutual trust and confidence among service members; to insure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of service members who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the armed forces; to maintain the public acceptability of military service; and to prevent breaches of security.⁸¹

Although it was later discredited,⁸² the unit cohesion argument for the exclusionary ban against LGBTQ service members became the primary rationale used by military officials during the public debates in the early 1990s over what would become the DADT law.⁸³

In 1992, the murder of a sailor brought national attention to the pervasive anti-gay culture in the U.S. armed forces. Believing he was gay, fellow sailors brutally beat and killed Navy Seaman Allen Schindler.⁸⁴ Schindler's murder occurred during the presidential election season and prompted then-candidate Bill Clinton to make a campaign promise to end the ban on openly gay military service.⁸⁵ Once he was elected, however, President Clinton faced organized resistance from congressional and military leaders to his plan to end the ban.⁸⁶ Chairman of the Joint Chiefs of Staff Colin Powell, for example, publicly stated that the presence of openly gay service members would undermine military order and discipline, echoing the dubious unit cohesion rationale.⁸⁷

President Clinton had considered repealing the exclusionary ban by Executive Order, but, in the face of this resistance, eventually announced a

81. Memorandum from Graham Claytor, Deputy Sec'y of Def. (accompanying the 1981 version of Department of Defense Directive 1332.14). This memorandum mandated discharge upon an investigative finding that a service member "engaged in, has attempted to engage in, or has solicited another to engage in a homosexual act." *Id.*

82. See BELKIN, *supra* note 13, at 18–24 (demonstrating that the unit cohesion rationale was a false front for the actual reason for the exclusionary ban on LGB service members—animus towards gays).

83. Policy Concerning Homosexuality in the Armed Forces, 10 U.S.C. § 654 (a)(7) (2006) (repealed 2011) (regarding unit cohesion); see also 10 U.S.C. § 654 (a)(15) (2006) (repealed 2011) ("The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.").

84. See Anthony S. Winer, *Hate Crimes, Homosexuals, and the Constitution*, 29 HARV. C.R.-C.L. L. REV. 387, 411–12 (1994).

85. Eric Schmitt, *Marine Corps Chaplain Says Homosexuals Threaten Military*, N.Y. TIMES, Aug. 26, 1992, at A16.

86. Eric Schmitt, *Pentagon Chief Warns Clinton on Gay Policy*, N.Y. TIMES, Jan. 25, 1993, at A1.

87. Eric Schmitt, *Joint Chiefs Fighting Clinton Plan to Allow Homosexuals in Military*, N.Y. TIMES, Jan. 23, 1993, at A1.

political compromise in the form of “Don’t Ask, Don’t Tell.”⁸⁸ Congress thereafter included a section in the National Defense Authorization Act for Fiscal Year 1994 codifying existing policy against LGBTQ military service.⁸⁹ When President Clinton signed the Act in November 1993, DADT became the first statutory articulation of the exclusionary ban against LGBTQ service members.⁹⁰

DADT was designed to provide cover for active duty LGB service members who, under prior policies, would have been automatically disqualified from military service because of their status or identity. By ostensibly prohibiting questions about a service member’s sexual orientation, DADT purported to be directed instead towards regulating a service member’s “homosexual conduct.”⁹¹ DADT was a failure. Despite the prohibition against “asking,” witch hunts were common. Military commanders continued to interrogate, in subtle and overt ways, service members, their friends, and their families about their sexual orientation.⁹² Because LGBTQ service members feared separation from service, many of them were forced to lie or mislead their colleagues, thereby actually undermining unit cohesion.

Service members who are marked by race and gender, in addition to their sexual orientation, experience subordination along multiple axes of their identities. Approximately 14,500 service members were separated from the military under DADT, disproportionately affecting women and people of color.⁹³ Lesbian baiting was a common occurrence during the eighteen years the law remained in force.⁹⁴

88. Thomas L. Friedman, *Compromise Near on Military’s Ban on Homosexuals*, N.Y. TIMES, Jan. 29, 1993, at A12.

89. 10 U.S.C. § 654 (2006) (repealed 2011).

90. The DoD’s existing exclusionary policy was codified at 10 U.S.C. § 654. In December 1993, the DoD, at the direction of the White House, released a series of directives that interpreted § 654. See Department of Defense Directive 1304.26 (1993); Department of Defense Directive 1332.14 (1993). Nevertheless, it is common to refer to § 654 as the equivalent of DADT.

91. See Department of Defense Directive 1304.26 (2007); Department of Defense Instruction 1332.14 (2008); Department of Defense Instruction 1332.30 (2008) (defining “homosexual conduct” as “[a] homosexual act, a statement by the Service member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage”).

92. SERVICEMEMBERS LEGAL DEF. NETWORK, SURVIVAL GUIDE: A COMPREHENSIVE GUIDE TO “DON’T ASK, DON’T TELL” AND RELATED MILITARY POLICIES 8 (5th ed. 2007), available at http://sldn.3cdn.net/48ee19f69cf2e4d028_54m6bri8u.pdf (“Some commanders, inquiry officers and investigators continue to officially ask service members about their sexual orientation, despite rules to the contrary.”).

93. DEP’T OF DEF., REPORT OF THE COMPREHENSIVE REVIEW OF THE ISSUES ASSOCIATED WITH A REPEAL OF “DON’T ASK, DON’T TELL” 23–24 (2010) [hereinafter DEP’T OF DEF., FINAL DADT REPEAL REPORT]; see also Thom Shanker, “Don’t Ask Don’t Tell” Hits Women Much More, N.Y. TIMES, June 23, 2008, at A14; Gary J. Gates, *Discharges Under the Don’t Ask, Don’t Tell Policy*, WILLIAMS INST. 3 (Sept. 2010), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Discharges2009-Military-Sept-2010.pdf>.

94. Christin M. Damiano, *Lesbian Baiting in the Military: Institutionalized Sexual Harassment Under “Don’t Ask, Don’t Tell, Don’t Pursue,”* 7 AM. U. J. GENDER SOC. POL’Y & L. 499, 501 n.12 (1999) (explaining the terms “lesbian baiting” and “witch hunts”).

Although women comprised only 15% of the U.S. military in 2008, they accounted for 34% of DADT-related discharges.⁹⁵ Likewise, only 29.4% of the U.S. armed forces in 2008 were people of color, but this group counted for 45% of DADT discharges.⁹⁶

II. EXCLUSION, INCLUSION, AND KĀKOU

The subordination practices that prevented people of color, women, and LGB people from serving in the military are broadly exclusionary. Exclusionary policies prevented these groups from entry into and full participation in the armed forces, and the operation of exclusion has been multifaceted. One way of understanding the harm of exclusion is that particular groups were and continue to be marginalized by these policies. In this way, exclusion effects the removal of an individual and targeted groups from the collective of the polity. Exclusion also has material consequences, including pay disparities (tied to rank and seniority), other economic damages associated with lost income and pension, access to benefits such as education and citizenship, and the mental, emotional, and sometimes physical injuries that result from this type of marginalization.⁹⁷ This Part introduces clusivity studies as a new conceptual framework for understanding the harms of exclusion resulting from the military's subordination of people of color, women, and LGBTQ people. More specifically, this Part proposes the use of the Native Hawaiian value of *kākou* as a way to reimagine anti-subordination scholarship and activism.

A. Clusivity Studies

Subordination requires the assignment of one (or more) in-group(s) to a privileged position in relation to another subjugated out-group(s). When this dynamic occurs in spoken language, linguistics scholars use the term “clusivity” to describe the phenomenon. Clusivity describes the features in language that make use of a verbal distinction between exclusive first-person pronouns and inclusive first-person pronouns.⁹⁸ As Dr. Elena Filimonova explains: “The terms ‘inclusive’ and ‘exclusive’ are traditionally used to denote forms of personal pronouns which distinguish whether an addressee (or addressees) are included in or excluded from the set of referents which also contains the speaker.”⁹⁹ This distinction is more

95. Brittany L. Stalsburg, *Lesbian, Gay, Bisexual, and Transgender (LGBT) Women in the Military*, SERVICE WOMEN'S ACTION NETWORK 2 (Mar. 2010), <http://servicewomen.org/wp-content/uploads/2012/10/Final-DADT-Fact-Sheet-10.4.12.pdf>.

96. *Id.*

97. See, e.g., Hegar Complaint, *supra* note 73, at 11–14; Baldwin Complaint, *supra* note 65, at 16–19.

98. See Elena Filimonova, *Introduction to CLUSIVITY: TYPOLOGIES AND CASE STUDIES OF THE INCLUSIVE-EXCLUSIVE DISTINCTION*, at iv (Elena Filimonova ed., 2005) [hereinafter CLUSIVITY].

99. *Id.*

commonly understood as the difference between the exclusive-we and the inclusive-we. For instance, if, during a symposium panel, were I to say, “we are presenting our papers on constructing Asian American identity through law,” the audience would understand implicitly that when I use the word “we,” I would mean us on the dais; that is, I would mean to exclude the addressees in the audience, from the “we” mentioned. On the other hand, when I say, “we will all be going to Kimera Restaurant tonight to celebrate the success of the law review symposium,” I mean to include the addressee within the scope of my use of the word “we.”¹⁰⁰ As this example demonstrates, the clusivity factor can be explicit, as through a word-signifier, or implied, as through context or other nonverbal cues.¹⁰¹

Using clusivity as a model for understanding power dynamics reveals that subordination excludes from the polity while anti-subordination, by contrast, provides opportunities for inclusion. The clusivity model helps describe what power looks like; it identifies which group(s) maintain a superior position vis-à-vis others by delineating where the line is drawn between in-groups and out-groups. At the center of this clusivity model is the speaker. Here, the American body politic is the speaker, as represented by the nation’s founding document, the Constitution, when it proclaims: “We the People of the United States of America.” As an institution of the state, the U.S. armed forces operate in the public sphere as another representative of the polity. The Army’s official motto, for example, is “This We’ll Defend.” “We” in both contexts, however, has always excluded certain groups. Clusivity provides a descriptive model for conceptualizing these power dynamics.

Exclusion from or inclusion in the American body politic is imposed and maintained through law.¹⁰² For example, prior to the 1952 Walter-McCarran Act,¹⁰³ Asian Americans were generally excluded from the American polity; as a group, they were not eligible to join the military, nor were they eligible for

100. The English language does not have different words for the inclusive versus exclusive form of the first-person plural. The meaning of the word “we” is determined by context. In contrast, languages such as Tagalog have separate words for inclusive-we (“kami”) and for the exclusive-we (“tayo”). Kearsy Cormier, *Exclusive Pronouns in American Sign Language*, in CLUSIVITY, *supra* note 98, at 231, 232.

101. It appears that, in most languages utilizing the clusivity distinction for first-person plural pronouns, the inclusive version is typically the neutral or unmarked signifier. *Id.* at 49. Significantly, however, in American Sign Language, it is the exclusive form that is unmarked. *Id.* at 251.

102. Other scholars have convincingly demonstrated how the law maintains existing power structures. See, e.g., MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW *passim* (1990) (examining the processes by which law perpetuates inequality by reinforcing socially constructed notions of difference); Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L. J. 95 (2011) (exposing the purposeful exclusion of agricultural and domestic workers from the collective bargaining rights provided by section 152(3) of the National Labor Relations Board Act as “a racially discriminatory act motivated by racial animus”).

103. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163.

citizenship.¹⁰⁴ This exclusion was effected by and enforced through the power and operation of the law.¹⁰⁵ Similarly, the 1993 DADT law identified and defined the class of “homosexuals” whose participation in the armed forces could undermine military readiness.¹⁰⁶ DADT purported to draw distinctions between the status of LGBTQ service members and their “homosexual conduct,” but the manner in which the law was enforced confirms that its purpose was simply to exclude LGBTQ individuals from the military altogether.

B. *A Kākou Model of Anti-Subordination*

As a remedy to these exclusionary policies, I offer the notion of inclusion as represented by the Native Hawaiian value of kākou. In this Article, kākou refers to an ongoing process of redressing the wrongs of exclusion, beginning with ending the exclusionary DADT ban, but one that continues by acknowledging the special problems that LGB service members have endured during the decades-long statutory ban and will continue to face post-repeal. In my view, the notion of kākou is a potent re-imagining of anti-subordination theory and practice. Equality discourse in this country is currently dominated by the norm of non-discrimination, which is incapable of adequately addressing the harms of subordination. The non-discrimination principle limits options for state actors to craft policies to remedy the subordination of marginalized groups.¹⁰⁷ As other scholars have noted, however, courts have not always privileged the non-discrimination model. Early civil rights cases utilized an anti-subordination approach to resolve questions about equality.¹⁰⁸ In that tradition, kākou provides a holistic model of inclusion that provides an alternative to the exclusionary harms of subordination.¹⁰⁹

The Hawaiian language, like most Australasian languages,¹¹⁰ utilizes a

104. See generally Ngai, *supra* note 39, at 69; Salyer, *supra* note 35, at 850.

105. See, e.g., Immigration Act of 1917 (Asiatic Barred Zone Act), 39 Stat. 874 (1917); Chinese Exclusion Act of 1882, 22 Stat. 58 (1882); Burlingame Treaty of 1868, U.S.-China, July 28, 1868, 6 U.S.T. 680; *United States v. Thind*, 261 U.S. 204 (1923); *Ozawa v. United States*, 260 U.S. 178 (1922); see also Barnes, *supra* note 26, at 730–39 (presenting “promotions statistics . . . to expose the shaky truth of the integration narratives and to support a return to identity-conscious promotion processes”).

106. See *supra* note 83.

107. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. Croson*, 488 U.S. 469 (1989); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

108. Colker, *supra* note 4, at 1016–17; Owen Fiss, *Another Equality*, 2 ISSUES LEGAL SCHOLARSHIP 1 (2004), http://www.law.yale.edu/documents/pdf/Faculty/Fiss_AnotherEquality.pdf (revisiting Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976), and using the term “group-disadvantaging principle” as a predecessor to the term “anti-subordination”); Rebecca E. Zietlow, *Free at Last!: Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. REV. 255 (2010).

109. See *infra* Part V.

110. “[I]nclusive-exclusive oppositions are not comparably frequent everywhere: they are

clusivity distinction.¹¹¹ Kākou signifies the word “we,” but has a deeper meaning also. The notion of kākou captures the distinctions marked by the clusivity model, but rather than taking a neutral, descriptive stance, kākou affirmatively declares its inclusive intent.¹¹² Kākou means “we” in the inclusive sense—that is, all of us, including the speaker. In remedying the harms of exclusion, a kākou approach signals that we are all being addressed; we are all being included. For example, ‘Ao‘ao O Na Loko I‘a O Maui (the Association of the Fishponds of Maui) hosts bimonthly community work days to restore the Ko‘ie‘ie Fishpond.¹¹³ The Association’s invitation to participate in the restoration is framed in the language and the values of kākou. Of the fishpond restoration project, the Association’s website proclaims: “It’s a kākou thing!”¹¹⁴ The phrase “it’s a kākou thing” simultaneously communicates an invitation to participate and an expectation that the invitee will actively participate in the project at hand. Kākou, therefore, is about the privileges as well as the burdens of inclusion.

A Hawai‘i-based writer describes the deeper meaning of kākou:

Kākou is about inclusiveness. At its elemental core, the spirit of Kākou acknowledges that we are not on this Earth alone, and as the human race we seem to survive better—we thrive—in each other’s company, sharing the ups and downs of our day-to-day existence. . . . Kākou promotes sharing, and making the effort to promote the well-being that is felt with inclusiveness.¹¹⁵

The sense of inclusion described by kākou has proved to be a powerful force in other contexts. For example, in her emic research on Native Hawaiian women and medical intervention programs, Dr. Lana Sue I. Ka‘opua found that her subjects turned to religious practices informed by indigenous Hawaiian values to cope with breast cancer diagnoses and their accompanying treatment plans.¹¹⁶

common in the Americas, near-universal in Australia, common in eastern Asia, rare in the rest of Eurasia, fairly rare in Africa.” Balthazar Bickel & Johanna Nichols, *Inclusive-Exclusive as Person vs. Number Categories Worldwide*, in CLUSIVITY, *supra* note 98, at 49.

111. “Mākou” is the exclusive first-person plural pronoun and “kākou” is the inclusive-we. The use of the clusivity distinction in language is pervasive. In a 1953 study of seventy-one languages, forty-five were found to utilize this distinction. Cormier, *supra* note 100, at 233 (citing P. FORCHHEIMER, *THE CATEGORY OF PERSON IN LANGUAGE* (1953)). None of these forty-five languages mark the exclusive form without also marking the inclusive. *Id.* at 235.

112. As when a speaker greets her audience with the words: “Aloha mai kākou.”

113. ‘Ao‘ao O Na Loko I‘a O Maui, *supra* note *.

114. *Id.*

115. Rosa Say, *Kākou; Communication Begets Collaboration*, TALKING STORY (Nov. 23, 2008), <http://www.talkingstory.org/2008/11/your-aloha-has-created-sunday-koa-kakou> (originally published on the HONOLULU ADVERTISER blog (now defunct)).

116. Dr. Ka‘opua concluded that, because of the prevalence of kākou as a cultural value, breast cancer intervention programs for Native Hawaiian women must make provision for the collectivist orientation.

Although the over 30 distinct cultural and linguistic groups that comprise Asian and Pacific Islander Americans are each unique in history and cultural heritage, a growing body of research suggests that these cultures as a whole tend to display more collectivist or group-

When describing methods of coping with cancer-related challenges, each of her subjects noted the centrality of *kākou* in their recovery.¹¹⁷ The Native Hawaiian women in Dr. Ka'opua's study relied on their families for support during treatment.¹¹⁸ Notably, in Hawaiian culture, the notion of family is expansive and includes not only the nuclear family but also a diffuse set of biological and nonbiological kinship ties.¹¹⁹ The community as represented by the extended family unit was a critical component in these women's support systems during medical treatment. In the words of one study participant: "Kakou—it's not about me; it's about us."¹²⁰

Kākou is about more than the individual drawing on community resources, however. The collectivist orientation to health embodied by *kākou* also means that breast cancer is not an individual diagnosis; the illness impacts the entirety of the family unit.¹²¹ In Hawaiian culture, an individual's health is understood to be the manifestation of a balance between three integrated life forces, conceptualized as sides of an equilateral triangle: the spiritual world, the physical world, and human relationship.¹²² Failure to take virtuous action in any one of these interconnected areas may lead to a physical ailment. Therefore, healing the physical ailment requires more than individual medical therapy; healing requires identifying the source of imbalance in the triangle.¹²³ For Native Hawaiians, a present illness may be a symptom of a past transgression.¹²⁴ The source of imbalance may originate generations back in the misdeeds of an ancestor.¹²⁵ The transgressor may not have been the patient herself, but could have been an ancient relative of the patient. When viewed from this epistemological viewpoint, a physical illness may represent the manifestation of some prior wrong. "The family feels as though they need to search back into what was done in the past, how that affects the present, [and] what needs to be done to set the situation right."¹²⁶ Healing the illness, then,

oriented tendencies vis a vis individualist tendencies . . . [F]indings from this study may be useful for social work practitioners in assisting clients with a collectivist orientation in coping with cancer, as well as possibly other major health concerns.

Lana Sue I. Ka'opua et al., *Coping with Breast Cancer at the Nexus of Religiosity and Hawaiian Culture: Perspectives of Native Hawaiian Survivors and Family Members*, 27 J. RELIGION & SPIRITUALITY SOC. WORK: SOC. THOUGHT 275, 291 (2008) (internal citations omitted).

117. *Id.* at 283.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 290.

122. *Id.* at 278 (citing WILLIAM C. REZENTES, KA LAMA KUKUI HAWAIIAN PSYCHOLOGY (1996)).

123. *Id.* (citing R. Kekuni Blaisdell, *Historical and Cultural Aspects of Native Hawaiian Health*, 32 SOC. PROCESS HAWAI'I: HEALTH OF NATIVE HAWAIIANS 1 (1989)).

124. *Id.* at 278, 285.

125. *Id.*

126. *Id.* at 285 (quoting a Native Hawaiian religious minister).

requires a collective attempt to reflect on the family's history to discover the bygone wrongdoing and to take affirmative steps to rectify it.¹²⁷

A *kākou* approach, therefore, contains at least three interdependent dimensions. First, *kākou* asserts an inclusive posture. “We” means all of us. Second, a *kākou* approach assumes that problems of group-based exclusion and subordination are collective problems. “It’s a *kākou* thing,” then, to find solutions. Third, a *kākou* approach looks both backwards to identify the source of an injury and forwards toward healing the harm.

As a principle of collective action, *kākou* is consonant with the guiding values of the armed services. The U.S. Air Force, for example, promotes the motto “Service Before Self” as one of its core values.¹²⁸ In the words of one Air Force colonel, “Service Before Self” . . . is a mindset that the team is greater than the individual and the mission is dependent on every team member doing his or her job.”¹²⁹ Tammy Duckworth was one of the first women to fly U.S. Army helicopters on combat missions in Iraq. When she tells her the story of her war injuries, she is describing *kākou*:

On November 12th, 2004, I was co-piloting my Blackhawk north of Baghdad when we started taking enemy fire. A rocket-propelled grenade hit our helicopter, exploding in my lap, ripping off one leg, crushing the other and tearing my right arm apart. But I kept trying to fly until I passed out. In that moment, my survival and the survival of my entire crew depended on all of us pulling together. And even though they were wounded themselves and insurgents were nearby, they refused to leave a fallen comrade behind.¹³⁰

The idea of collective effort and selfless service is one that resonates through each of the military branches.

An inclusionary approach imbued with *kākou* would recognize that the harms of subordination impact not only the targeted group but all of us. The public harms associated with DADT are legion. In a six-year period (2004 to 2009), the DoD spent over \$193 million in administering discharges and replacing discharged service members.¹³¹ During a time when they were most needed,

127. *Id.* (“[T]his burden might be construed as an intergenerational issue and could prompt a search to rectify the past actions of deceased family members.”).

128. See Martin Whelan, *What Does Service Before Self Really Mean?*, MINOT AIR FORCE BASE (Nov. 16, 2006), <http://www.minot.af.mil/news/story.asp?id=123032058>.

129. *Id.*

130. Tammy Duckworth, Remarks at the Democratic National Convention (Sept. 4, 2012) (transcript available at <http://foxnewsinsider.com/2012/09/04/video-watch-tammy-duckworths-dnc-speech>).

131. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-170, MILITARY PERSONNEL: PERSONNEL AND COST DATA ASSOCIATED WITH IMPLEMENTING DOD'S HOMOSEXUAL CONDUCT POLICY 18 (2011), <http://www.gao.gov/new.items/d11170.pdf> [hereinafter GAO, MILITARY PERSONNEL]; Crosby Burns, *What DADT Cost Us*, CENTER FOR AM. PROGRESS (Sept. 20, 2011), <http://www.americanprogress.org/issues/military/news/2011/09/20/10399/what-dadt>

service members with special skills (for example, Arabic linguists) were involuntarily separated from the military.¹³² An inclusive, *kākou* approach would also require that we as a society must all participate, with corresponding benefits and burdens, to repair these harms.

III. APPLYING THE KĀKOU MODEL TO MILITARY DIVERSITY PRACTICES

Kākou can also be used to describe the ways in which the military has confronted its history of exclusionary practices and the methods it has used to remedy those harms. The military's affirmative action policies are based in a policy of "deliberate inclusion" that dates back to President Harry S. Truman's 1948 integration order.¹³³ In implementing its policy of deliberate inclusion toward people of color and women, the DoD has pursued a *kākou* or anti-subordination approach. In dealing with the transition to a military inclusive of LGB people, however, the DoD has instead chosen a difference-blind, non-discrimination approach.

A. A Kākou Policy of Deliberate Inclusion Towards People of Color and Women

Announced after President Truman's 1948 integration order, the military's policy of "deliberate inclusion" is an example of *kākou* in practice.¹³⁴ Like a family searching through its collective history to uncover misdeeds in order to rectify them, the military's EO and diversity programs are affirmative responses to its treatment of historically subordinated groups. Deliberate inclusion exists because of the military's institutional willingness to repair its past for the benefit of all moving forward. The DoD's instructions regarding deliberate inclusion programming defines an affirmative action plan as "a management tool intended to assist in overcoming the effects of discriminatory treatment as it affects equal opportunity, upward mobility, and the quality of life for military personnel."¹³⁵ In the experience of the military, non-discrimination has been ineffective in meeting the diversity recruitment and retention goals,¹³⁶ particularly when it comes to diversity in the higher ranks. The MLDC's 2011 report reaffirms the military's commitment to diversity through race-, gender-, and other difference-conscious

-cost-us (calculating that, during the first ten years of DADT, the government spent \$363.8 million administering discharges).

132. Forty percent of the service members discharged under DADT during the years 2004 to 2009 "held skills in a critical occupation, an important language, or both." GAO, MILITARY PERSONNEL, *supra* note 131, at 9.

133. See MLDC, FINAL REPORT, *supra* note 15, at vii.

134. *Id.* But see Barnes, *supra* note 26, at 718–30 (arguing that, while the military has been more successful at achieving racial integration than other institutions, people of color, women, and LGBT people experience continuing subordination in the form of pressure to assimilate to the military's "white, male, heterosexual, and middle class" norm).

135. Department of Defense Directive 1350.3 (1988).

136. See Barnes, *supra* note 26, at 714–19.

anti-subordination programs.¹³⁷ Today, the military's affirmative action programs benefit racial minorities, religious minorities, persons with disabilities, and women. These difference-conscious policies stand in sharp contrast, however, to the military's difference-blind approach to LGB service members after the repeal of DADT.

The MLDC was preceded by two other presidential commissions similarly tasked with assessing diversity and inclusion practices in the military.¹³⁸ Acknowledging that racial integration would require comprehensive institutional change in the military, President Truman's 1948 executive order also created an advisory committee called the President's Committee on Equality of Treatment and Opportunity in the Armed Services,¹³⁹ which was led by former Solicitor General Charles Fahy.¹⁴⁰ During its tenure, the Fahy Committee enjoyed support from the White House but faced stiff resistance from the DoD and, in particular, the Secretary of the Army.¹⁴¹ The Army's official position was that racial desegregation in the military should occur only after it had been achieved in civil society.¹⁴² When its mandate ended in 1950, the Fahy Committee presented an independent analysis demonstrating that racial integration would not adversely

137. See generally MLDC, FINAL REPORT, *supra* note 15.

138. *Id.* at 4 (citing the President's Committee on Equality of Treatment and Opportunity in the Armed Services and the President's Committee on Equality of Opportunity in the Armed Forces).

139. Exec. Order No. 9981 ("The Committee is authorized on behalf of the President to examine into the rules, procedures and practices of the Armed Services in order to determine in what respect such rules, procedures and practices may be altered or improved with a view to carrying out the policy of this order. The Committee shall confer and advise the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, and the Secretary of the Air Force, and shall make such recommendations to the President and to said Secretaries as in the judgment of the Committee will effectuate the policy hereof.").

140. Charles Fahy served as Solicitor General of the United States in 1944, and therefore represented the United States in *Korematsu v. United States*, 323 U.S. 214 (1944). In 2011, Acting Solicitor General Neal Katyal issued a confession of error on behalf of his office, conceding that Fahy did not act "with full candor to the Court" by failing to disclose important evidence that would have undermined the government's arguments supporting President Franklin D. Roosevelt's Executive Order 9066, which excluded all Japanese Americans from the West Coast and forced them into internment camps. Full candor would have revealed that these actions were not supported by military necessity. Neal Katyal, *Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases*, JUST. BLOG (May 20, 2011), <http://blogs.justice.gov/main/archives/1346>.

141. In comparison to the Army, the Air Force and Navy were more supportive of racial integration efforts. See, e.g., MORRIS J. MACGREGOR, JR., *INTEGRATION OF THE ARMED FORCES 1940-1965*, at 350-51 (1981).

142. Omar Bradley, the Secretary of the Army testified:

I consider that a unit has high morale when the men have confidence in themselves, confidence [i]n their fellow members of their unit, and confidence in their leaders. If we [try] to force integration on the Army before the country is ready to accept these customs we may have difficulty attaining high morale along the lines I have mentioned.

Id. at 351 n.38.

impact military readiness or troop morale.¹⁴³ The Committee also convinced the Army to eliminate its use of racial quotas.¹⁴⁴ Despite these achievements, however, the complete racial desegregation of the military was not accomplished until four years after the Fahy Committee disbanded.¹⁴⁵

The second presidential committee, the President's Committee on Equality of Opportunity in the Armed Forces (known as the Gesell Committee) was established by President John F. Kennedy in 1962.¹⁴⁶ Although the formal separation of the races in the military had been eliminated under President Truman, Jim Crow enflamed racial tensions in civilian society and these tensions permeated the military ranks.¹⁴⁷ At this time, the United States was also becoming increasingly involved in the Vietnam War. African Americans were disproportionately represented at the frontlines in Vietnam and accounted for a larger share of the war's casualties.¹⁴⁸ Amid this social and historical context, President Kennedy charged the Gesell Committee with identifying measures to improve equality of treatment and opportunity for African Americans in the military and to report these to the Secretary of Defense.¹⁴⁹ The Gesell Committee found that racial discrimination both on and off base prevented African Americans from obtaining career-enhancing assignments and promotions.¹⁵⁰ It recommended that DoD should establish a department-wide system for monitoring "race relations" and should include "handling of racial matters" in the evaluation of commanders.¹⁵¹ Then-Secretary of Defense Robert McNamara largely ignored the 1964 report of the Gesell Committee, however.¹⁵²

Though he disregarded the Gesell Committee's recommendation to implement an institution-wide race relations and equal opportunity monitoring

143. See Fahy Comm., *Freedom to Serve: Equality of Treatment and Opportunity in the Armed Services, a Report by the President's Committee*, HARRY S. TRUMAN LIBRARY & MUSEUM (May 22, 1950), <http://www.trumanlibrary.org/civilrights/freeserv.htm>.

144. Evans, *supra* note 31, at 40.

145. MLDC, FINAL REPORT, *supra* note 15, at 5.

146. *Id.* at 5–6 (explaining President John F. Kennedy's effort to expand opportunities for racial/ethnic minorities in the military by establishing an investigative body, named after its chair, Gerhard Gesell).

147. See Evans, *supra* note 31, at 43–45.

148. *Id.* at 45 ("During the [Vietnam] war, 23% of combat soldiers were African American, more than twice their representative numbers in the general population, and minority men in general were more likely to enter the military, see duty in Vietnam and directly participate in combat than their white counterparts.")

149. MLDC, FINAL REPORT, *supra* note 15, at 5–6.

150. GESELL COMM., FINAL REPORT: MILITARY PERSONNEL STATIONED OVERSEAS AND MEMBERSHIP AND PARTICIPATION IN THE NATIONAL GUARD 3–4 (1964).

151. MLDC, FINAL REPORT, *supra* note 15, at 5.

152. The MLDC was critical of Secretary McNamara's failure to adopt the recommendations of the Gesell Committee. *Id.* at 6. "DoD's failure to implement the Gesell Committee's recommendations had high costs. Inequities persisted at all levels of the military, particularly in the leadership ranks." *Id.* (citing amicus curiae brief in support of respondent (Feb. 19, 2003), *Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Grutter v. Bollinger*, 539 U.S. 306 (2003)).

and evaluation system, Secretary McNamara issued a directive providing, “[e]very military commander has the responsibility to oppose discriminatory practices affecting his men and their dependents and to foster equal opportunity for them, not only in areas under his immediate control, but also in nearby communities where they may live or gather in off-duty hours.”¹⁵³ This directive was the first in a series of policy changes by the DoD, and was instituted with the aim towards improving race relations both on and off military installations.

The DoD thereafter began implementing affirmative efforts to recruit and retain people of color. In 1971, the DoD established the Race Relations Education Board, whose task was to develop policy and educational programs regarding race relations.¹⁵⁴ The Defense Race Relations Institute (DRRI), established in the same year, was charged to promote “command responsibility in civil rights matters” by providing a mandatory curriculum on race relations for all service members.¹⁵⁵ In 1979, the DRRI was renamed the Defense Equal Opportunity Management Institute (DEOMI).¹⁵⁶ The role of the DEOMI is described in one of its 2002 publications: “The definitive message is that the military must not be discriminatory; it must be *actively* anti-discriminatory to protect the Constitutional rights of all citizens.”¹⁵⁷

Between 1979 and 2011, various commissions and task forces were charged with addressing the nagging problem of low promotion rates amongst service members of color. In 1991, the chair of the United States Commission on Civil Rights visited a number of military installations and found that racial discrimination continued to play a role in the lack of service members of color in the senior leadership ranks in the Army.¹⁵⁸ A Defense Equal Opportunity Council report from 1995 similarly concluded: “discrimination against black military personnel has not gone away.”¹⁵⁹

153. Department of Defense Directive 5120.36 I.C. (1963).

154. Air Force Major General Lucius Theus chaired an inter-service task force ordered to study the “causes and possible cures” of racial unrest in the military. Upon the task force’s recommendation in 1970, the DoD created the Race Relations Education Board. Department of Defense Directive 1322.11 (1971); Evans, *supra* note 31, at 46.

155. Margot Canaday, *U.S. Military Integration of Religious, Ethnic, and Racial Minorities in the Twentieth Century*, PALM CENTER (May 1, 2001), http://www.palmcenter.org/files/active/0/Military_Integration_of_Minorities.pdf; Evans, *supra* note 31, at 46.

156. Canaday, *supra* note 155.

157. Evans, *supra* note 31, at 48 (citing DEOMI, Directorate of Research, Historical Overview of Racism in the Military (Feb. 2002) (Special Series Pamphlet 02-1)) (emphasis added).

158. See REYES, *supra* note 27, at 12; see also 1 DEF. EQUAL OPPORTUNITY COUNCIL, REPORT OF THE TASK FORCE ON DISCRIMINATION AND SEXUAL HARASSMENT 6 nn. 15–16 (1995) [hereinafter DEOC, 1995 REPORT], available at www.dic.mil/dtfs/doc_research/p18_9.pdf (describing the travels of Arthur Fletcher, who was then chair of the U.S. Commission on Civil Rights, to military bases in Europe and the Pacific).

159. See REYES, *supra* note 27, at 12 (citing DEOC, 1995 REPORT, *supra* note 158, at 6); see also Barnes, *supra* note 26, at 715–18 (describing how the military “moved away from explicit

The most recent report on military policy relating to diversity is found in the 2011 work of the MLDC. Congress had charged the MLDC to present an assessment of leadership opportunities for “minority members of the Armed Forces.”¹⁶⁰ According to the MLDC, although accession statistics for nearly all the service branches were indicative of a relatively high degree of diversity, the number of people of color and of women in the officer corps of each of the services was disproportionately low.¹⁶¹ While diversity-focused recruitment efforts had achieved some measure of success, the comparatively small number of people of color and women serving in senior leadership roles suggested that retention and promotion policies needed to be revisited.

Under its mandate, the MLDC therefore proposed a series of twenty recommendations to the President and Congress.¹⁶² Among the most significant and groundbreaking were the following: the adoption a uniform definition of “diversity” to be used across the services,¹⁶³ the elimination of combat exclusion policies directed at women,¹⁶⁴ and an amendment to the U.S. Code for the inclusion of a mandate requiring the Secretary of Defense to conduct annual reports ensuring that all qualified people of color and women were considered for each available three- and four-star officer positions.¹⁶⁵

Significantly, the MLDC’s recommendations echoed past approaches to military diversity practices in that they advocate a proactive and *kākou* stance in achieving inclusion goals. The MLDC’s report specifically rejects the color-blind fallacy that dominates equal protection jurisprudence in the civilian world in favor of a *kākou* approach. The MLDC’s 2011 report states:

[A]lthough good diversity management rests on a foundation of fair treatment, it is not about treating everyone the same. This can be a difficult concept to grasp, especially for leaders who grew up with the EO-inspired mandate to be both color and gender blind. Blindness to difference, however, can lead to a culture of assimilation in which differences are suppressed rather than leveraged. Cultural assimilation, a

considerations of how race and gender have historically been used to discriminate against minorities” in response to so-called reverse discrimination lawsuits filed in the 1980s and 1990s).

160. MLDC, FINAL REPORT, *supra* note 15, at xiii (citing Pub. L. No. 110-417, § 596, 122 Stat. 4356 (2008)).

161. *Id.* at 55–56 (describing how the U.S. Navy, “which had roughly equal or overrepresentation of every nonwhite race/ethnicity group,” fared the best among the services in terms of diversity).

162. *Id.* at 119 app. A (The MLDC Charter).

163. *Id.* at 11–18 (Recommendation 1). The MLDC recommended: “DoD shall adopt the following definition: Diversity is all the different [characteristics] and attributes of individuals that are consistent with the Department of Defense core values, integral to overall readiness and mission accomplishment, and reflective of the Nation we serve.” *Id.* at 125.

164. *Id.* at 71–74 (Recommendation 9).

165. *Id.* at 115 (Recommendation 20).

key to military effectiveness in the past, will be challenged as inclusion becomes, and needs to become, the norm.¹⁶⁶

In fact, the military has developed robust affirmative action policies that directly address concerns about parity in retention, promotion, and other career opportunities. As the historian Rhonda Evans has observed: “As with civilian society, the official embrace of desegregation in the military was not sufficient to ensure equal opportunities for African Americans and other racial minorities in job placement and career advancement; more work beyond desegregation remained to fulfill the promise of inclusion at all levels of the military.”¹⁶⁷ In response to executive orders, litigation, evolving social norms, and practical needs, the military has attempted to repair the impact of its past practices by implementing aggressive affirmative action policies that provide diversity training for all service members as well as programs to recruit, retain, and promote people of color and women in the armed services.

Each service has developed its own service-specific diversity initiatives. The Navy, for example, has required the appointment of a special assistant for minority matters in every command.¹⁶⁸ For outreach and recruitment purposes, it set aside ten percent of its NROTC units for historically Black colleges and universities.¹⁶⁹ The Navy further engaged in important symbolic acts such as naming ships after iconic African American figures.¹⁷⁰ In April 2010, the Navy announced that women would be allowed to serve on submarines and selected nineteen women, including officers, to serve on those vessels.¹⁷¹

For its part, the Army began a research program in 1974 to redress institutional racial discrimination through its Army Research Institute (ARI).¹⁷² The ARI developed a definition of discrimination and then researched the effects of discrimination on the Army environment. Instead of focusing on the hard-to-identify subjective intent of military leaders, the ARI’s research focused on the disparate impacts that institutional racism had on people of color serving in the Army. “The effects, rather than the intent, of discrimination would be studied; rather than trying to determine the cause of differential retention and promotion rates, the military would take the existence of differential rates as prima facie evidence of institutional discrimination.”¹⁷³ This approach also allowed the Army

166. *Id.* at 18 (citing David A. Thomas & Robin J. Ely, *Making Differences Matter: A New Paradigm for Managing Diversity*, HARV. BUS. REV., Sept.–Oct. 1996, at 79, 79–90).

167. Evans, *supra* note 31, at 38.

168. *Id.* at 47.

169. *Id.*

170. *Id.*

171. DEP’T OF THE NAVY, *supra* note 30, at 6.

172. U.S. ARMY RESEARCH INSTITUTE, <http://www.hqda.army.mil/ari/index.shtml> (last visited Mar. 14, 2013).

173. Evans, *supra* note 31, at 47. In the civilian context, by contrast, the United States Supreme Court decided long ago that the 14th Amendment’s Equal Protection Clause does not

to develop affirmative action programs designed to increase the numbers of enlisted service members and officers in the senior leadership ranks.

Tasked with conducting “a comprehensive evaluation and assessment of policies that provide opportunities for the advancement of minority members of the Armed Forces,”¹⁷⁴ the MLDC provided recommendations specifically targeted at increasing the numbers of people of color and of women in the senior leadership ranks. But the MLDC also suggested that the military’s future approach should be broader and more inclusive: “The words ‘all the different characteristics and attributes of individuals’ in the [new] definition [of diversity] refer not only to characteristics and attributes legally protected by EO laws but to any and all characteristics and attributes that can benefit the Services, including thinking style, occupational background, and skill sets.”¹⁷⁵ Despite all its lofty rhetoric about inclusion, however, the MLDC did not discuss sexual orientation diversity at all.¹⁷⁶ The MLDC’s report on diversity disclaimed any authority to make policy statements regarding the status of LGBTQ members of the armed forces.¹⁷⁷ The MLDC noted: “Although the ‘Don’t Ask, Don’t Tell’ policy certainly pertains to diversity and diversity leadership, a comprehensive examination of the issue was already in progress by the DoD Comprehensive Review Working Group,”¹⁷⁸ and therefore, the MLDC eliminated any discussion of LGB service members from its report on diversity in the twenty-first century.

B. Non-Discrimination for LGB Service Members

In stark contrast to the policy of deliberate inclusion that characterizes the military’s approach to racial and gender diversity, the category of sexual orientation is now simply non-existent in military equal opportunity literature. This Section describes how, during the repeal campaign, pro-repeal advocates successfully utilized a narrative about sameness. They argued that ending the exclusionary ban would not require any special treatment for LGB service members.¹⁷⁹ In doing so, they fell into the trap of non-discrimination and formal equality and ignored the experience of our allied militaries in the United Kingdom and Canada.

protect against racially disparate impacts, only racially discriminatory intent. *Washington v. Davis*, 426 U.S. 229 (1976).

174. Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 596(d)(1), 122 Stat. 4356 (2008).

175. MLDC, FINAL REPORT, *supra* note 15, at 13.

176. *Id.* at 89–91.

177. *Id.* at 9. The Report referenced two other sources as having “addressed that issue [DADT] in detail.” *Id.* (citing DEP’T OF DEF., FINAL DADT REPEAL REPORT, *supra* note 93, and NAT’L DEF. RESEARCH INST., SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: AN UPDATE OF RAND’S 1993 STUDY (2010)).

178. MLDC, FINAL REPORT, *supra* note 15, at 9.

179. See *infra* notes 203 to 209 and accompanying text.

During the public debate, repeal advocates consistently maintained that “nothing would have to change” after repeal.¹⁸⁰ The Palm Center argued that there was no need for additional training of service members in the post-DADT repeal era.¹⁸¹ The Human Rights Campaign supported DoD’s decision to remove consideration of a service member’s sexual orientation from the personnel decision-making process.¹⁸² The non-discrimination model of equality assured policymakers that the repeal would have absolutely no impact on the institutional policies and practices of the military. Gay soldiers are no different than straight soldiers and therefore should be treated similarly. This is the narrative that prevailed and was incorporated into the DoD’s November 2010 comprehensive report, recommendations, and proposed implementation plan in anticipation of the repeal.¹⁸³ The report concluded that special training sessions for the military rank-and-file were unnecessary and even dangerous because special sessions would draw unnecessary attention to LGB service members and could engender resentment.¹⁸⁴

As a result of the prevailing non-discrimination narrative, sexual orientation has been eliminated from the discourse about diversity in the military. The DoD’s website provides: “Sexual orientation will *not* be considered along with race, color, religion, sex, and national origin as a class under the Military Equal Opportunity (MEO) program and will *not* be dealt with through the MEO complaint process.”¹⁸⁵ Also: “It remains the policy of the Department of Defense that sexual orientation is a personal and private matter, to treat all members with dignity and respect, and to ensure maintenance of good order and discipline.”¹⁸⁶ These non-discrimination policies ignore the history of exclusion and subordination that LGB service members have faced and, in fact, continue to confront. In an August 2012 interview with a blogger for the *New York Times*—a year after the DADT repeal—an anonymous gay U.S. Marine Corps corporal serving in the infantry confided his fear that his colleagues in the combat arms would not accept him if he came out.¹⁸⁷ “I’m all alone,” the corporal said. “Being gay doesn’t fall into others views

180. See note 23 and accompanying text.

181. See Aaron Freed, *Military Training Can Be Accomplished Quickly*, PALM CENTER (Dec. 19, 2010), http://www.palmcenter.org/files/TrainingQuickly_0.pdf.

182. *Beyond “Don’t Ask, Don’t Tell” Repeal*, HUM. RTS. CAMPAIGN 2–3, <http://www.hrc.org/files/assets/resources/BeyondDADTRepeal.pdf> (last visited Mar. 14, 2013).

183. See DEP’T OF DEF., FINAL DADT REPEAL REPORT, *supra* note 93.

184. *Id.* at 137–38.

185. *Repeal of “Don’t Ask, Don’t Tell” (DADT)*, DEP’T DEF. 1 (Oct. 28, 2011), http://www.defense.gov/home/features/2010/0610_dadt/Quick_Reference_Guide_Repeal_of_DADT_APPROVED.pdf (emphases added).

186. Memorandum from Clifford L. Stanley, U.S. Undersecretary of Def., to Sec’y of the Military Dep’ts (Jan. 28, 2011), *available at* http://www.defense.gov/home/features/2010/0610_dadt/USD-PR-DADT_28Jan11.pdf.

187. Thomas J. Brennan, *A Year On, Marines Divided on Repeal of “Don’t Ask, Don’t Tell,”* N.Y. TIMES (Aug. 6, 2012, 11:33 AM), <http://atwar.blogs.nytimes.com/2012/08/06/a-year-on-marines-divided-on-repeal-of-dont-ask-dont-tell>.

of the corps' warrior ethos. I don't want to be the one to pave the way."¹⁸⁸ His fears have altered his daily routines; he shuns contact with gay friends, fearing that his military colleagues will deem him guilty by association.¹⁸⁹

In repealing its ban against openly gay service, the United States followed the lead of its military allies. Prior to the DADT repeal, the DoD's Working Group studied how the armed forces of the United Kingdom, Canada, and Australia became inclusive of LGB service members.¹⁹⁰ The Palm Center also commissioned a number of studies to assess the impact of openly LGB service policies on the military readiness and unit cohesion of international militaries.¹⁹¹ Canada has applied a non-discrimination approach to integrating LGB service members, while the United Kingdom¹⁹² has instead embraced policies imbued with *kākou*.

Like the United States, in ending its exclusionary ban, Canada's Department of National Defence (DND) elected to take a difference-blind approach toward its service members. Canada's high court had previously determined that the DND's exclusionary ban violated the national Charter of Rights and Freedoms,¹⁹³ so, in 1992, Chief of Defence Staff General John de Chastelain perfunctorily announced

188. *Id.* (recounting Brennan's interviews with twenty active-duty Marines, twelve of whom support LGB service members and eight who "were strongly against gays serving openly").

189. *Id.*; see also David L. Alderton et al., *Navy Results from the Don't Ask, Don't Tell (DADT) Survey: Importance of the Contact Hypothesis*, in CELEBRATING THE HISTORY & FUTURE OF HUMAN RELATIONS RESEARCH 9 (2012), available at <http://www.deomi.org/EOEEOResources/symposium.cfm>; Veronica Macias, *Soldier Says 1 Year After 'Don't Ask Don't Tell' Gays Still Harassed*, KFOXTV (Oct. 7, 2012, 6:16 PM), <http://www.kfoxtv.com/news/news/soldier-says-1-year-after-dont-ask-dont-tell-gays-nSXHP>; Ian Stokell, *In Afghanistan, Unit Greets Gay Marine with Threats to Life*, LGBT WEEKLY (Nov. 14, 2011), <http://lgbtweekly.com/2011/11/14/in-afghanistan-unit-greets-gay-marine-with-threats-to-life>.

190. DEP'T OF DEF., FINAL DADT REPEAL REPORT, *supra* note 93, at 89–92. These three countries were selected because "they are in many ways culturally similar to the United States, and their militaries are, like the U.S. military, all-volunteer forces and of similar size proportionate to their national populations. These nations also work closely with U.S. forces in international operations." *Id.* at 89.

191. See, e.g., MELISSA SHERIDAN EMBSEY-HERBERT, THE U.S. MILITARY'S "DON'T ASK, DON'T TELL" POLICY (2007); Aaron Belkin & Margot Canady, *Assessing the Integration of Gays & Lesbians: Into the South African National Defence Force*, 38 SCIENTIA MILITARIA: S. AFRICAN J. MIL. STUD. 1 (2010); Aaron Belkin & Jason McNichol, *Effects of the 1992 Lifting of Restrictions on Gay and Lesbian Service in the Canadian Forces*, PALM CENTER (Apr. 1, 2000) [hereinafter Belkin & McNichol, *Canada*], <http://www.palmcenter.org/files/active/0/Canada5.pdf>; Aaron Belkin & Jason McNichol, *Effects of Including Gay and Lesbian Soldiers in the Australian Defence Forces*, PALM CENTER (Sept. 1, 2000), http://www.palmcenter.org/files/active/0/Australia_Final_Report.pdf; Aaron Belkin & R.L. Evans, *The Effects of Including Gay and Lesbian Soldiers in the British Armed Forces*, PALM CENTER (Nov. 2000), <http://www.palmcenter.org/files/active/0/Britain1.pdf>; Nathaniel Frank et al., *Gays in Foreign Militaries 2010*, PALM CENTER (Feb. 23, 2010), http://www.palmcenter.org/files/FOREIGN_MILITARIESPRIMER2010FINAL.pdf; Danny Kaplan & Amir Rosenmann, *Presence of Openly Gay Soldiers in IDF Does Not Undermine Unit Social Cohesion*, PALM CENTER (June 2010), http://www.palmcenter.org/files/KaplanRosenmann_IDFSurveyReport.pdf.

192. See *infra* Part IV.C.1 (Recruitment).

193. Belkin & McNichol, *Canada*, *supra* note 191, at 8.

that the DND had ended its exclusionary ban against LGB people.¹⁹⁴ General de Chastelain declared that the DND would no longer make distinctions between its LGB or straight soldiers and emphasized that its conduct policies were applicable to all “members of the forces, whether heterosexual or homosexual.”¹⁹⁵ In the aftermath, official government reports, journalists’ inquiries, and anecdotal evidence all supported the conclusion that, in Canada, the non-discrimination policy had been a success.¹⁹⁶ One officer said of his experience after the new policy was instituted: “Morale on the base is the same. No one’s quit, no one’s complained, no one has been harassed, no one has come out of the closet. There’s been absolutely no difference.”¹⁹⁷

Yet, the conclusion that there has been “no difference” has been difficult to accurately measure. LGB soldiers have essentially become invisible in the Canadian Forces (CF). Longitudinal studies measuring the participation of LGB service members in the CF are not possible because of the DND’s non-discrimination stance.¹⁹⁸ The official response to this lack of empirical evidence was equivocal: “Because very little of note actually occurred, there was not much to study.”¹⁹⁹ Ignoring sexual orientation identity may have allowed lifting of the gay ban to be a nonissue, but it has also discouraged open communication about differences.²⁰⁰ When interviewed, LGB service members in Canada share the belief that there would be no institutional support if harassment or discrimination incidents were to arise. “Most queer people do not believe that going through the harassment complaint process is anything but a way of painting a big rainbow target on our heads,” an anonymous Canadian service member reported.²⁰¹ In sum, by erasing the actual and real differences between LGB and straight service members, the CF has eliminated mechanisms for addressing anti-gay harassment or discrimination.²⁰²

Unfortunately, repeal advocates in the United States seem to have had uncritically adopted the non-discrimination narrative utilized in Canada. In a 2010 study commissioned by The Palm Center, Dr. Nathaniel Frank concluded: “Research has uniformly shown that transitions to policies of equal treatment without regard to sexual orientation have been highly successful and have had no

194. *Id.* at 9.

195. *Id.*

196. *Id.* at 21.

197. *Id.* at 19–20 (quoting Major Donald Oulette).

198. *Id.* at 21.

199. *Id.*

200. Frank et al., *supra* note 191, at 66.

201. *Id.* (quoting an anonymous Canadian service member).

202. See, e.g., Matthew P. Cashdollar, *Not Yes or No, But What If: Implications of Open Homosexuality in the Military*, in ATTITUDES AREN’T FREE: THINKING DEEPLY ABOUT DIVERSITY IN THE MILITARY 161, 165 (James E. Parco & David A. Levy eds., 2010) (“Current information on the effects of lifting the ban in the Canadian military is incomplete. The DND has not conducted any follow-up studies.”).

negative impact on morale, recruitment, retention, readiness or overall combat effectiveness.”²⁰³ Dr. Frank’s statement was not isolated, but rather represented a consistent refrain in the repeal movement. Aaron Belkin, the head of The Palm Center, argued that post-repeal policies, including sexual harassment policies, should be written without reference to sexual orientation.²⁰⁴ Similarly, the Servicemembers Legal Defense Network (SLDN),²⁰⁵ the leading LGBTQ legal services organization for service members explained in a September 2010 position paper on implementing the repeal: “it is not necessary . . . for the armed services to add sexual orientation to their existing affirmative action reporting requirements.”²⁰⁶

These difference-blind, non-discrimination stances were thereafter adopted into the DoD’s November 2010 Support Plan²⁰⁷ as evidenced by the following two recommendations in the Working Group’s report: (1) “Focus on military readiness, cohesion, and effectiveness and keep sexual orientation a private matter as much as possible”²⁰⁸ and (2) “Focus on standards of behavior and not attitudes. Policies and standards should be sexual orientation-neutral, clearly worded, and equally enforced. The goal is equitable treatment for all without endorsing any particular point of view or belief system.”²⁰⁹

While DADT existed, countless studies documented the witch hunts, death threats, and other forms of violent and nonviolent harassment of service members who were LGBTQ or perceived as LGBTQ,²¹⁰ so it is alarming that so many mainstream LGBTQ rights organizations took the position that the repeal could be implemented with only cosmetic changes to existing military policies. That the prevalence of the non-discrimination model will have a paralyzing effect on any efforts to remedy the harms of the military’s past subordination practices against LGB service members can now be seen in the government’s position in the

203. Frank et al., *supra* note 191, at 2.

204. Aaron Belkin et al., *How to End “Don’t Ask, Don’t Tell,”* PALM CENTER 20 (May 11, 2009), <http://www.palmcenter.org/files/active/0/Executive%20Order%20on%20Gay%20Troops%20-%20final.pdf> (“The new policy should apply a single standard of conduct to all personnel, regardless of their sexual orientation.”).

205. SLDN is now known as OutServe-SLDN, after combining the two organizations. Prior to the DADT Repeal Act, OutServe was an underground social and support network for LGBTQ service members. *OutServe, SLDN Vote to Finalize Historic Combination*, OUTSERVE (Oct. 27, 2012), <http://www.sldn.org/news/archives/outserve-sldn-vote-to-finalize-historic-combination>.

206. *Implementation of the Repeal of Section 654*, SERVICEMEMBERS LEGAL DEF. NETWORK 7 (Sept. 3, 2010), http://sldn.3cdn.net/4ad9c43d1035ce584d_gsm6b5bzzr.pdf (citing Department of Defense Directive 1350.3 (1988)).

207. DEP’T OF DEF., FINAL DADT REPEAL REPORT, *supra* note 93, at 10–12.

208. *Id.* at 12.

209. *Id.*

210. *See, e.g.*, Stacy L. Sobel et al., *Conduct Unbecoming*, SERVICEMEMBERS LEGAL DEF. NETWORK (Mar. 9, 2000), http://sldn.3cdn.net/bc84613306fbdcf69d_gkm6iyfnf.pdf.

ongoing litigation regarding promotions, back pay, allowances, and other benefits for former service members who were involuntary separated because of DADT.²¹¹

IV. PROPOSALS: A KĀKOU APPROACH TO INEQUALITY IN THE MILITARY

LGB service members do not enjoy equal treatment under the law, even after the DADT repeal. The federal Defense of Marriage Act (DOMA)²¹² and internal DoD regulations still prevent LGB service members—solely on the basis of their sexual orientation—from obtaining and enjoying benefits associated with military service. Recognizing that the repeal alone will not bring equal treatment to, or completely end discrimination and harassment against LGBTQ service members, this Part employs the *kākou* model, which requires looking back to move forward and proposes a series of sexual orientation-conscious programs and policies designed to redress the harms of exclusion, to improve the status of LGB service members, and to prevent retrenchment in this area.

First, this Part addresses unresolved issues regarding the transgender community. The issues facing transgender service members and transgender candidates for military service highlight ongoing concerns for the entire LGBTQ community. Next, this Part considers which remedies should be made available to service members who were discharged under the DADT policy, including reinstatement and credit towards retirement. Finally, this Part proposes new programs designed to redress the history of LGBTQ exclusion by providing support to service members throughout the military personnel life cycle, beginning at recruitment and continuing after separation.

A. Protection for Transgender Service Members

The repeal of DADT did not alter the military's exclusionary ban against transgender men and women. The DoD considers transgender identity to be a disqualifying "psychiatric condition" and conflates transgender identity with "transsexualism" and "transvestism" in its regulations.²¹³ Through the physical examination process, the military also excludes any potential service members who have had genital surgery under a disqualification for "major abnormalities and

211. See, e.g., Federal Defendants' Reply in Support of Motion to Transfer Action to United States Court of Federal Claims, or, in the Alternative, to Dismiss Action, *Almy v. Dep't of Def.*, No. 3:10-cv-5627-RS (N.D. Cal. Apr. 21, 2011).

212. This Article was completed prior to the Supreme Court's June 26, 2013, decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), in which the Court ruled section 3 of the Federal Defense of Marriage Act unconstitutional. Section 3 of DOMA had defined "marriage" as "a legal union between one man and one woman as husband and wife." Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419, 2419 (1996), *invalidated by* *United States v. Windsor*, 133 S. Ct. 2675 (2013). On August 14, 2013, the DoD announced a new policy making spousal and family benefits available "regardless of sexual orientation." See *DOD Announces Same-Sex Spouse Benefits*, U.S. DEP'T OF DEFENSE (Aug. 14, 2013), <http://www.defense.gov/releases/release.aspx?releaseid=16203>.

213. Department of Defense Directive 6130.03 at E4.29(r) (2010).

defects of the genitalia.”²¹⁴ These same disqualifying conditions also apply to transgender service members who later “come out” during their military service.²¹⁵

First and foremost, the continuing exclusionary ban against transgender service members must be abolished. Employing kākou in the post-DADT military means seeking equality for the entire sexual orientation and gender identity community, including transgender people. The DoD should rescind regulations that classify transgender identity as a psychiatric disorder or disqualify a candidate who has had genital surgery. Those regulations are based, in part, on the American Psychiatric Association’s (APA’s) classification of gender identity disorder (GID) as a mental illness in the Diagnostic and Statistical Manual of Mental Disorders, fifth edition (DSM-5), which was last updated this year.²¹⁶ When considering the issue in 2008, the American Medical Association concluded that GID is and should be treated as a medical condition.²¹⁷ Just as the APA eventually removed “homosexuality” from the DSM, it will inevitably do the same with GID.²¹⁸

B. Remedying Discharges Under DADT

1. Upgrades to Discharge Papers

Under DADT, over 14,500 service members were separated from military service on the basis of sexual orientation,²¹⁹ and many of them received “other than honorable” discharges.²²⁰ The existence of an “aggravating factor” related to

214. *Id.* at E4.14(f), E4.15(t).

215. Karl Bryant & Kristen Schilt, *Transgender People in the U.S. Military*, PALM CENTER 3 (Aug. 20, 2008), <http://www.palmcenter.org/system/files/TGPeopleUSMilitary.pdf>.

216. See DSM-5 Implementation and Support, APA DSM-5, <http://dsm5.org/pages/default.aspx> (last visited Dec. 21, 2013).

217. In recognition of the fact that the American Medical Association supports insurance coverage for gender reassignment surgeries if medically indicated, a growing number of Fortune 500 companies have expanded their medical insurance policies to cover these procedures. Lisa Leff, *Transgender Surgery Covered by Growing Number of U.S. Companies*, HUFFINGTON POST (Feb. 21, 2011, 1:31 PM), http://www.huffingtonpost.com/2011/02/22/transgender-surgery-cover_n_826385.html. Municipal governments, including San Francisco and Portland, also provide similar health care benefits for their employees. Tracy Loew, *Cities Expand Transgender Health Coverage*, USA TODAY (July 7, 2011), http://usatoday30.usatoday.com/news/usaedition/2011-07-12-transgender-healthcare_st_u.htm. In some cases, Canada’s Department of National Defence also pays for gender reassignment surgeries. Bryant & Schilt, *supra* note 215, at 9.

218. Francisco Valdes, *Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CALIF. L. REV. 1, 84 (1995). DSM-5 eliminates the label of “disorder” for transgender people by replacing the term “gender identity disorder” with “gender dysphoria.” Wynne Parry, *Gender Dysphoria: DSM-5 Reflects Shift in Perspective on Gender Identity*, HUFFINGTON POST (June 4, 2013, 3:00 PM) http://www.huffingtonpost.com/2013/06/04/gender-dysphoria-dsm-5_n_3385287.html.

219. DEP’T OF DEF., FINAL DADT REPEAL REPORT, *supra* note 93, at 23–24. It is estimated that, between 1940 and 1993, an additional 80,000 service members were discharged under regulatory bans. *Id.*

220. *Freedom to Serve: The Definitive Guide to LGBT Military Service*, SERVICEMEMBERS LEGAL DEF. NETWORK 31 (July 27, 2011), http://sldn.3cdn.net/5d4dd958a62981cff8_v5m6bw1gx.pdf.

“homosexual acts” was one reason for an “other than honorable” discharge designation. Under DADT, aggravating factors included “homosexual acts” committed in public view, on base or on post.²²¹ Other discharges included negative reentry codes that identify the veteran as unfit for military service, a code typically reserved for those whose discharge was related to misconduct, such as drugs or alcohol.²²² Discharge papers like these can have long-term impacts, including limited access to veterans’ benefits such as education through the GI Bill, medical services at Veteran’s Administration (VA) hospitals, and military burial privileges.²²³

Transgender veterans face similar struggles related to discharge paperwork. Discharge papers list the transgender veteran’s legal name, which may be discrepant with the individual’s expressed gender identity.²²⁴ Furthermore, because separations from service based on “sexual gender and identity disorders” are classified as administrative discharges, SLDN explains: “transgender service members may be faced with lack of access to VA health facilities.”²²⁵

The DADT repeal and its accompanying regulations provide a process for veterans who received less than honorable discharges to apply for amended discharge paperwork.²²⁶ The application process, however, must be initiated by the veteran and could require the assistance of legal counsel.²²⁷ These burdens could dissuade eligible veterans from seeking a change of their discharge paperwork. Jeremy Johnson, a reservist in the U.S. Navy, has proposed a mechanism for automatic discharge paper upgrades for those who return to service after a DADT-related discharge.²²⁸ At the very least, the existing procedures DADT-related discharge upgrades should be streamlined.

2. Reinstatement

Service members who were discharged under DADT can now apply to re-join the military. According to the DoD, however, these service members are not

221. *Id.* at 31 (these aggravating factors punished public acts such as holding hands at a restaurant).

222. *Id.* at 32.

223. ABA Report, *supra* note 16, at 6.

224. *Freedom to Serve*, *supra* note 220, at 31.

225. *Id.* at 30.

226. *Id.* at 32 (describing the competencies of discharge review boards and boards of correction for military records).

227. For example, SLDN is offering legal services to veterans discharged under DADT. *Id.* at 33–34, 37–38 (listing legal services organizations).

228. Compare Jeremy Johnson, *Challenges: Returning to Life in Uniform as a DADT Discharged Vet*, PALM CENTER (May 8, 2012, 7:39 PM), http://www.palmcenter.org/blog/challenges_returning_life_uniform_dadt_discharged_vet (advocating automatic DD-214 upgrades), with Jeremy Johnson, *Gay Discharge Dilemma*, PALM CENTER (May 23, 2012, 9:14 AM), http://www.palmcenter.org/blog/gay_discharge_dilemma (electing to make the personal decision not to upgrade his DD-214 discharge papers).

entitled to re-accession.²²⁹ A veteran discharged under DADT who would like to re-join must begin the recruitment process from scratch and is subject to service assessments for physical fitness and age, which, depending on when the applicant's discharge occurred and other intervening events, could prove to be insurmountable barriers to reentry.²³⁰ Even those who meet the eligibility criteria to re-join are not entitled to return to their former occupations upon reentry.²³¹ Nor are they entitled to retirement credit for the time that they would have served but for the DADT-related discharge.²³²

In December 2010, the SLDN filed a complaint in the United States District Court for the Northern District of California on behalf of three service members who had been discharged under DADT. The complaint in *Almy v. United States* asserted that DADT was unconstitutional and requested reinstatement into active duty and credit towards retirement for the time each plaintiff would have served had they not been discharged.²³³ Two of the plaintiffs—U.S. Navy Petty Officer 2nd Class Jase Daniels²³⁴ and U.S. Coast Guard Staff Sergeant Anthony Loverde—have been reinstated; that is, beyond a mere reentry into the services they left, both have been reinstated into the positions they held prior to their discharges.²³⁵ The final plaintiff, former U.S. Air Force Major Mike Almy, had received a recommendation for promotion to Lieutenant Colonel during pendency of his discharge proceedings, but has not yet been reinstated.²³⁶

The Navy and Coast Guard have sabbatical programs that allow a service member to take a hiatus from active duty for a prescribed time period, after which time the service member is reinstated to the same rank held prior to the sabbatical.²³⁷ These programs were developed to raise retention rates by allowing for greater career flexibility, and are particularly useful for female service members

229. Memorandum from Clifford L. Stanley, U.S. Undersecretary of Def., to Sec'y of the Military Dep'ts Attachment 1, at 2 (Jan. 28, 2011), available at http://www.defense.gov/home/features/2010/0610_dadt/USD-PR-DADT_28Jan11.pdf.

230. *Freedom to Serve*, *supra* note 220, at 32.

231. *Id.* at 33.

232. *Id.*

233. Complaint, *Almy v. Dep't of Defense*, No. 3:10-cv-05627-RS (N.D. Cal. Apr. 21, 2011).

234. Although the SLDN website refers to Jase Daniels as one of the three *Almy* plaintiffs, the complaint itself lists the third plaintiff as "Jason Knight." *Id.* at 1. Daniels was born Jason Knight but later changed his name to Jase Daniels. Tony Perry, *Navy Reinstates Gay Sailor*, L.A. TIMES (Dec. 12, 2011, 2:08 PM), <http://latimesblogs.latimes.com/lanow/2011/12/gay-sailor-reinstated-navy.html>.

235. *SLDN Client to Be Reinstated to Active Duty in Air Force*, SERVICEMEMBERS LEGAL DEF. NETWORK (Apr. 17, 2012), <http://www.sldn.org/news/archives/sldn-client-to-be-reinstated-to-active-duty-in-air-force>.

236. Complaint, *supra* note 233, at ¶ 33.

237. The Navy's sabbatical program allows up to three years of time off from active duty. MLDC, FINAL REPORT, *supra* note 15, at 87–88. The *MLDC Final Report* discusses two of the Coast Guard's temporary leave programs: (1) Care for Newborn Children, and (2) Temporary Separation Program. *Id.* The Coast Guard's programs allow for up to two years. *Id.* During this time, the service member does not receive any military pay or benefits, but is eligible to reinstate at the same rank as long as she or he meets the physical fitness requirements upon reentry. *Id.*

who might otherwise have to make a choice between having a family and a career in the military.²³⁸ Treating a discharge period as an involuntary sabbatical period could also provide relief to LGB service members who were discharged under DADT.

Developing a reaccession program that mimics the military's existing sabbatical programs would facilitate the reinstatement of LGB service members with recent DADT-related discharges. This approach would balance the military's need for an effective fighting force with its need for a fairer resolution for those service members who were discharged under DADT that would like to and are able to reenter at the occupation they held prior to discharge. This proposal does not address compensation for lost wages during the discharge period—a remedy that the *Almy* plaintiffs did not seek²³⁹—but it would provide a mechanism for giving a reinstated service member credit towards retirement and a military pension.

*C. Providing Support for LGB Service Members at Every Stage
in the Military Personnel Life Cycle*

Unlike private and other government sector employers, the military develops and promotes leaders only from inside its closed organization.²⁴⁰ The military's diversity initiatives and EO programs are therefore critical in maintaining a diverse force at all levels of service—particularly in the senior ranks. The MLDC acknowledged this unique dynamic to the military's career advancement process and concluded that a number of policy and programmatic changes were required in order to create more recruitment, retention, and promotion opportunities available to women and to people of color.²⁴¹ The recommendations made by the MLDC are just as relevant for ensuring the inclusion of LGB service members in the post-DADT military era.

1. Recruitment

The services have proved to be quite savvy and creative in developing outreach and recruitment campaigns to target potential recruits. The Army, for example, developed a role-playing video game that provides players with guns designed to be accurate representations of the actual weapons used by service members.²⁴² The free game, downloadable on the Internet, is tremendously

238. *Id.* at 88 (recommending that the Defense Advisory Committee on Women in the Services study sabbatical or leave programs to assess their impact on retention of female service members).

239. Complaint, *supra* note 233, at ¶ 35 (“Mr. Almy does not seek lost wages.”).

240. MLDC, FINAL REPORT, *supra* note 15, at 39.

241. *Id.* at 44–46.

242. Brian Kennedy, *Uncle Sam Wants You (to Play This Game)*, N.Y. TIMES, July 11, 2002, at G6 (describing the America's Army video game developed by Lt. Col. Casey Wardynski at West Point).

popular with the target audience and has also been quite successful at helping the Army meet recruitment goals.²⁴³ To attract racially diverse recruits, the services use media outlets such as Telemundo and Black Entertainment Television to air recruitment advertisements.²⁴⁴ Military recruiters are also present at the annual conferences of affinity groups such as the National Society of Black Engineers, the Society of Advancement of Chicanos, and Native Americans in Science.²⁴⁵ The services should extend their existing outreach and recruitment programs to attract LGB candidates, and the experience of the British Ministry of Defence (MOD) provides some guidance.

In 2006, after Great Britain lifted its ban on gay military service, the Royal Air Force (RAF) teamed with Stonewall, Britain's largest gay rights organization, to improve recruitment efforts in the LGB community.²⁴⁶ When the RAF later announced that it would provide survivor benefits for same-sex partners, Stonewall placed the RAF on its list of Top 100 Employers for Gays and Lesbians.²⁴⁷ Both the RAF and Royal Navy currently appear on Stonewall's 2012 Top 100 Employers List of most gay-friendly employers.²⁴⁸ The inclusive environment promoted by the RAF likely attracted both LGB and straight recruits, as demonstrated by the RAF's recruitment gains after this time.²⁴⁹ Prior to its collaboration with Stonewall, the RAF had suffered recruitment shortfalls, but afterward, it met or exceeded its recruitment goals.²⁵⁰

Stonewall now lists the RAF, Royal Navy, and the British Army as "Diversity Champions."²⁵¹ Designation as a Diversity Champion means that these service branches are annually assessed against Stonewall's Workplace Equality Index and are entitled to brand themselves as a "Proud Employer."²⁵² Participation in this

243. Josh White, *It's a Video Game, and an Army Recruiter*, WASH. POST (May 27, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/05/26/AR2005052601505.html>.

244. MLDC, FINAL REPORT, *supra* note 15, at 53.

245. *Id.*

246. Frank et al., *supra* note 191, at 37 (citing Sean Rayment, *Air Force Enlists Stonewall in Drive for Gay Recruits*, SUNDAY TELEGRAPH (Chatham), Dec. 31, 2006). In 2006, the Royal Navy first allowed uniformed sailors to march in the Gay Pride parade. The RAF followed in 2007, and the Army in 2008. *Id.* at 40 (citing Tom Coghlan, *The Fuss of Ten Years Ago Seems Somewhat Bizarre*, TIMES (UK) (Jan. 16, 2010, 1:01 AM), <http://www.thetimes.co.uk/tto/life/courtsocial/article1819624.ece>).

247. *Id.* at 37.

248. *Stonewall Top 100 Employers 2012*, STONEWALL 5 (2012), <http://www.stonewall.org.uk/other/startdownload.asp?openType=forced&documentID=2939> (listing the RAF at number fifty-six, and the Royal Navy at number seventy-seven).

249. Frank et al., *supra* note 191, at 38.

250. *Id.* at 37–39.

251. *Id.* at 47 (citing correspondence from Commander Whittingham, Joint Equality and Diversity Training Ctr., 2009); *Diversity Champions*, STONEWALL, http://www.stonewall.org.uk/at_work/diversity_champions_programme/diversity_champions_members/default.asp (last visited Mar. 14, 2013).

252. *Benefits*, STONEWALL, http://www.stonewall.org.uk/at_work/diversity_champions_programme/4732.asp (last visited Mar. 14, 2013).

program also means that the service branches appear in print and online employment resource guides for the LGBTQ community.²⁵³

The U.S. military could follow the MOD's lead in developing recruitment campaigns for the LGB community. The Human Rights Campaign (HRC), a U.S.-based LGBTQ organization, publishes an annual Corporate Employment Index (CEI), similar to Stonewall's Workplace Equality Index.²⁵⁴ Although the CEI measures only private businesses, it is the primary source of data for the HRC's Foundation Employer Search, which includes both private and public sector employers.²⁵⁵ Recruiting a diverse pool of eligible applicants, including people of color, women, and LGBTQ people, is the first stage in the military personnel life cycle. The more diverse this initial pool is, the greater the likelihood that senior leaders, who are promoted through the military ranks, will also reflect the broad diversity of U.S. society.

2. Promotion and Retention

Promotion and retention are important influences on service members at the middle and end stages of their careers. A service member's career development will impact whether that person decides to remain in the military or to seek other opportunities in civilian life. Career development, in turn, is a function of career choices, which, in the military, are determined largely by the type of duty assignments selected by the service member. High-quality mentoring guides service members into career fields that will lead more directly to promotions to senior leadership ranks. To retain a diverse workforce that includes LGB service members at senior leadership ranks, the military has to compete with the civilian sector by making long-term military careers more attractive.

Successful military careers can be directly attributed to close relationships with good mentors who provide knowledgeable and supportive career counseling.²⁵⁶ According to the MLDC's 2011 report, "mentored individuals tend to be more highly compensated, to receive more promotions, to be more satisfied with their career, to have greater expectations for advancement, to be more committed to their career, and to be more satisfied with their job."²⁵⁷ The

253. See, e.g., STARTING OUT: LESBIAN, GAY & BISEXUAL CAREER GUIDE, <http://www.startingoutguide.org.uk> (last visited Mar. 14, 2013); PROUD EMPLOYERS: JOBS WITH GAY-FRIENDLY EMPLOYERS, <http://www.proudemployers.org.uk> (last visited Mar. 14, 2013).

254. See *Corporate Equality Index*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/resources/entry/corporate-equality-index> (last visited Mar. 14, 2013).

255. *Corporate Equality Index 2012: Rating American Workplaces on Lesbian, Gay, Bisexual, and Transgender Equality*, HUM. RTS. CAMPAIGN 10 (2011), http://asp.hrc.org/documents/CorporateEqualityIndex_2012.pdf.

256. REYES, *supra* note 27, at 9.

257. MLDC, FINAL REPORT, *supra* note 15, at 69 (citing T.D. Allen et al., *Career Benefits Associated with Mentoring for Protégés: A Meta-Analysis*, 89 J. APPLIED PSYCHOL. 127 (2004)).

mentoring relationship is crucial for career development in the armed forces, because the promotion process in each service is remarkably byzantine.²⁵⁸

As the MLDC's report noted, women and people of color are underrepresented in candidate pools for command assignments.²⁵⁹ Because women had been generally barred from choosing careers in the tactical and operational fields, they are less likely to obtain command assignments.²⁶⁰ Command assignments are the primary means of advancing in the military ranks. In the Army, for example, eighty percent of general officers come from combat arms occupations.²⁶¹

Service members of color also tend to select military careers in nontactical or nonoperational fields because of a perception that the skills learned in those occupations will better transfer to civilian employment.²⁶² This is a perfectly sensible way to plan a military career, but many make those decisions without knowing that they will be less likely to advance to senior leadership²⁶³ because promotion to the flag or general officer ranks occurs most frequently from personnel who have previously served in tactical and/or operational posts.²⁶⁴ Good mentors can bridge this information gap. Quality mentorship can assist service members in making more informed decisions about their careers by providing guidance and "knowledge of the force structure, knowledge of the promotion system, and the geographic distribution of billets that could affect career decisions."²⁶⁵

LGB service members may experience similar barriers to career advancement in the military. DADT interrupted the career trajectories of many LGB service members. Career counseling tailored to service members who have reentered after DADT-related discharges would be crucial to repairing those careers. LGB service members who enter the military after the DADT repeal are likely to face personal and professional challenges that are distinct from their straight colleagues. Well-developed relationships with mentors could help alleviate stressors and provide

258. *See id.* at 79.

259. *Id.* at 66.

260. *Id.* at 67.

261. Kovarovic, *supra* note 72, at 16 (citing MLDC, FINAL REPORT, *supra* note 15, at 67).

262. MLDC, FINAL REPORT, *supra* note 15, at 68. The MLDC *Final Report* also discusses additional barriers to entering tactical or operational career fields, namely structural barriers that prevent women from joining the combat arms and perceptual barriers (such as the belief that elite teams like the Army Green Berets are racist) that discourage service members of color from choosing these career paths. *Id.* at 66–68.

263. *Id.* at 68; *see also* REYES, *supra* note 27, at 32 (describing the significance of career-enhancing opportunities in the operational field).

264. MLDC, FINAL REPORT, *supra* note 15, at 63–64.

265. *Id.* at 70.

support from more senior individuals in the service.²⁶⁶ But there have been no studies inquiring into the career development and work satisfaction amongst LGB service members because the DoD considers sexual orientation “a personal and private matter.”²⁶⁷ The lack of information and access to this type of information is another reason to include sexual orientation within the MEO.

A 2007 study concluded that but for DADT, the armed forces could have retained an average of four thousand LGB service members each year.²⁶⁸ This number included both those discharged under DADT as well as those LGB service members who left because of the looming threat of DADT.²⁶⁹ In general, retention of service members depends on a variety of different factors, but workplace satisfaction is one factor within the military’s ability to control.²⁷⁰ Many in military service, including LGB service members, leave because of better offers in civilian life.²⁷¹ One way to achieve desirable levels of retention is to communicate the message that the military wants and values the contributions of its LGB service members.

CONCLUSION

The preceding is my contribution to the discussion about the vocabulary of anti-subordination. In this Article, I have presented the Native Hawaiian concept of *kākou* as one way to reimagine anti-subordination theory and practice. Besides “aloha” and “mahalo,” many words that North American English-speakers use in everyday speech are borrowed from Hawaiian, for example: *wiki*, *kahuna*, and *hapa*. Some have even argued that, “because of its simple sound system, its simple grammar, its rich vocabulary, and its receptivity to incorporation of loan words, Hawaiian would be preferable to Esperanto or English as a world language.”²⁷² Yet I am not convinced that other words from other cultures could not also serve the purpose of re-imagining the language we use to describe anti-subordination principles. The Akan word *sankofa* is another example. *Sankofa* means “we cannot go forward without first going back to our past to understand how it is that we got [here]”²⁷³ and communicates a compelling approach to justice and substantive

266. See REYES, *supra* note 27, at 25 (“Mentors serve two purposes: 1) to assimilate new employees into the organizational culture; and 2) to accept protégées and introduce them to new and more challenging aspects of the organization”).

267. See *supra* note 186 and accompanying text.

268. Gary J. Gates, *Effects of “Don’t Ask, Don’t Tell” on Retention among Lesbian, Gay, and Bisexual Military Personnel*, WILLIAMS INST. (Mar. 2007), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-EffectsOfDontAskDontTellOnRetention-Mar-2007.pdf>.

269. *Id.*

270. REYES, *supra* note 27, at 29.

271. *Id.* at 34.

272. Paul F. Nahoia Lucas, *E Ola Mau Kākou I Ka ‘Ōlelo Makuabine: Hawaiian Language Policy and the Courts*, 34 HAWAIIAN J. HIST. 1, 1 (2000) (quoting Samuel H. Elbert, *Hawaiian and Its Many Kin* 30 (unpublished manuscript) (on file with the Hawaiian Studies Institute, Kamehameha Schools)).

273. JEREMIAH A. WRIGHT, JR., *A SANKOFA MOMENT* 17 (2010).

equality. The Mayan notion of *In Lak'ech*, which means “you are my other me,” is another viable option.²⁷⁴ Like *kākou*, *sankofa*, *In Lak'ech*, and *ubuntu* (described in the Introduction) share a vision of inclusion, collective purpose, and a commitment to redressing past wrongs in order to move forward for the good of the larger group. Regardless of the chosen word(s), the point of this Article has been to begin to reimagine a new way of speaking about anti-subordination.

On the occasion of the DADT repeal, this Article has used the notion of *kākou* to critique the prevailing non-discrimination approach to inequality as inadequate. Unlike *kākou*, non-discrimination attempts to remedy the wrongs of historical exclusion by ignoring the past and by neutralizing facial differences. Non-discrimination is the approach the U.S. military has chosen in integrating LGB service members after the DADT repeal. Eliding differences between groups, however, serves only to reinforce the existing power structures and is thus an impediment to substantive equality. This Article has observed that the U.S. military has long-implemented *kākou* to improve the status of people of color and of women in its ranks, and the 2011 MLDC Final Report includes recommendations to further strengthen those programs. As affirmative action in the civilian world continues to face attacks, the military's renewed commitment to *kākou* is heartening. But, this Article has argued, the military's existing EO and diversity programs ought to be extended in order to adequately redress the historical and ongoing subordination of LGBTQ service members.

In 2013, people are still fighting for civil rights in the United States. The “new” movements for civil rights are being led by immigrants and by LGBTQ activists, drawing inspiration and lessons from the African American Civil Rights Movement and the Feminist Movement. In mobilizing around the ideals of justice and equality, today's civil rights activists, like those that preceded them, face a choice between two strategic approaches: non-discrimination and *kākou*. This Article has considered both options with the benefit of history and experience and has advocated for the latter.

²⁷⁴ See Luis Valdez & Domingo Martínez Paredes, *In Lak'ech: You are my Other Me*, VOICES IN URBAN EDUCATION (Apr. 30, 2013, 10:30 AM), <http://vue.annenberginstitute.org/perspectives/lak%E2%80%99ech-you-are-my-other>.