

**“BUT SOME OF [THEM] ARE BRAVE”: IDENTITY PERFORMANCE, THE
MILITARY, AND THE DANGERS OF AN INTEGRATION SUCCESS STORY**

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INTRODUCTION

*It is hereby declared to be the policy of the President that there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin. This policy shall be put into effect as rapidly as possible, having due regard to the time required to effectuate any necessary changes without impairing efficiency or morale.*¹

With the issuance of Executive Order 9981 on July 26, 1948, President Harry Truman, in his role as Commander-in-Chief of the United States Armed Forces, effectively signaled the racial integration of the United States military.² While this blow to racial segregation was not without enemies,³ the Order was ultimately followed without crippling, defiant opposition, and it became a harbinger for increased civil rights for people of color, inside and outside the military.⁴

1. Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948) (requiring the integration of Blacks into the Armed Forces).

2. While Blacks served in the military prior to 1948, they were segregated from Whites, and they were limited in their enlistment numbers and the job fields they could enter. See MARTIN BINKIN ET AL., *BLACKS AND THE MILITARY* 18 (1982) (noting that in the years that followed World War I, Blacks were not allowed to enlist in the Marine Corps and Air Corps, were limited to a quota equal to their population number in the Army, and were limited to serving as messmen (stewards) in the Navy).

3. At the time the Order was issued, Gen. Dwight D. Eisenhower opined, "I do believe that . . . by passing a lot of laws to force someone to like someone, we will get into trouble . . . [because racism is an] incontrovertible fact." Gary Bass, *Their Words: Discrimination, 1948 and 1993*, THE NEW REPUBLIC, Feb. 22, 1993, at 15. In March 1949, the Secretary of the Army testified before Congress that the equality of treatment and opportunity would fail because black troops were less capable than white troops. Peter J. Gomes, *Going Back In the Military Closet: Generals Carried the Day by Harnessing Fears of Change*, MINNEAPOLIS/ST. PAUL STAR TRIBUNE, June 1, 1993, at 13A (discussing also the point that integration of the military constituted an insult to Southern Whites, who would not accept Blacks as their equals). See also Kenneth Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 520-21 (1991) (discussing Pres. Truman's military integration Order and describing the Army as resistant to the policy); Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 17 (1998) (noting that the successful integration of the military with regard to gender and race was achieved largely through civilian initiatives over military objections); RAND NATIONAL DEFENSE RESEARCH INSTITUTE, *Chapter 1: Sexual Orientation and U.S. Military Personnel Policy: Policy Options and Assessment*, in POTENTIAL INSIGHTS FROM ANALOGOUS SITUATIONS: INTEGRATING BLACKS INTO THE U.S. MILITARY 166-70 (1993), available at http://www.rand.org/pubs/monograph_reports/MR323/mr323.ch1.pdf [hereinafter RAND SEXUAL ORIENTATION STUDY] (indicating that while the decision was unpopular, Pres. Truman had the support of key civilian and military personnel including: Sec. of the Navy (and later Sec. of Defense), James Forrestal; Chief of Naval Operations, Admiral Ernest King; the Deputy Chief of Staff for the Air Force, Lt. Gen. Idwal Edwards; and the Sec. of the Air Force, Stuart Symington).

4. As one court has stated: "Before *Brown v. Board of Education* and in the days of Jim Crow segregation, in the early 1950's, the military instituted relatively successful integration throughout its ranks. This success helped to support national integration policies in later years." *Hill v. Berkman*, 635 F. Supp. 1228, 1237 (E.D.N.Y. 1986) (citing JACK GREENBERG, *RACE RELATIONS AND THE AMERICAN LAW* 369 (1950), and J. SLONAKER, *THE U.S. ARMY AND THE NEGRO* vi (1971)).

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With regard to race, and increasingly with regard to gender, the military experiment in social engineering has been heralded generally as a great success.⁵ The central point of this Article is to question whether the praise afforded this success story is truly warranted and to explore a disjuncture that may exist between this positive narrative and the lived experiences of service members. Given the number of minorities, in particular African Americans, who have used the military to improve their life conditions,⁶ it is with some reluctance that this Article criticizes the praise that has been accorded the organization for its success at including minorities.⁷ This Article will suggest, however, that although the Armed Forces have done much to alleviate the effects of racial discrimination and subordination within the Services, some important work remains to be done with regard to managing opportunities for service members across myriad identities. In particular, attention needs to be paid to the unique challenges that face service members disadvantaged along multiple dimensions of difference,⁸ such as women of color. Consequently, this Article seeks to interrogate the continued viability of an integration success narrative where there exists disconfirming evidence and in an environment where the most significant challenges to minorities are related neither to bare inclusion nor mere elimination of instances of overt discrimination.

Specifically, this Article argues that the military services, like many

5. See Charles Moskos, *How Do They Do It?: The Army's Integration Success Story*, THE NEW REPUBLIC, Aug. 5, 1991, at 16–20. For the fiscal year ending September 30, 2005, the race statistics for the military active duty and Coast Guard force of 1,413,182 were as follows: Whites, 64.4% (910,783); Blacks, 17.4% (246,255); Hispanics, 9.0% (127,052); Asian-American and Pacific Islanders, 4.6% (64,844); American Indian/Alaskan, 1.8% (24,737); and Multi-racial/Unknown, 2.8% (39,541). ANNUAL DEMOGRAPHIC PROFILE OF THE DEPARTMENT OF DEFENSE AND U.S. COAST GUARD FY 2005, at 2 [hereinafter ANNUAL DEMOGRAPHIC PROFILE].

6. In one discussion of the benefits of military service, the following representative claim has been made: "The mechanisms by which military service can alter the status of young [B]lacks who have been isolated from the mainstream of American life are part of a 'bridging environment,' in which the individual acquires new skills and abilities to help him in his civilian career." BINKIN ET AL., *supra* note 2, at 72 (footnote omitted; alteration added); Moskos, *supra* note 5, at 20. In the interest of full disclosure, I would have to include myself within the group of individuals described here. The United States Navy, through an NROTC scholarship, substantially contributed to my undergraduate education and paid, through its Law Education Program, nearly the entire cost of my law school education.

7. Throughout the remainder of the Article this predominant narrative of the military's success at racial inclusion is referred to as an "integration success story." Notably, variants of this specific phrase have been used in the work of other scholars to describe the Army's integration record. See Moskos, *supra* note 5; CHARLES MOSKOS & JOHN SIBLEY BUTLER, *Success Story—With Caveats*, in ALL THAT YOU CAN BE: BLACK LEADERSHIP AND RACIAL INTEGRATION THE ARMY WAY 1, 1–2 (1996).

8. For the foundational analyses of the structural and legal consequences of inhabiting multiple identity categories, see Kimberlé W. Crenshaw, *Demarginalizing the Intersection of Race and Sex, A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (discussing the concept of intersectionality—that multiple bases for subordination intersect in formulations of an individual's identity and experiences) [hereinafter Crenshaw, *Demarginalizing the Intersection*]; Kimberlé W. Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) [hereinafter Crenshaw, *Mapping the Margins*].

institutions, must grapple with problems related to unconscious bias,⁹ which Professor Lu-In Wang has recently described as “unconscious cognitive and motivational biases that lead us reflexively to categorize, perceive, interpret the behavior of, remember, and interact with people of different groups differently.”¹⁰ Belief in the continued veracity of an unchanging narrative of successful integration undermines a commitment to uncovering and solving such problems. By dislodging the story and acknowledging the effects of unconscious bias, the Armed Forces will be better able to address the ways in which some use identity—race in particular—as a tool to stigmatize, dishonor, and disfavor group members based on their perceived characteristics.¹¹ As it currently stands, the operation of unconscious biases interacts with Armed Forces’ institutional policy choices—such as a commitment to formal equality achieved through race- and gender-neutral regulations—and organizational social norms to negatively shape the work “performance”¹² of women and minority service members. Performance, then, which serves the dual function of measuring skills competence and reflecting assimilative conduct, becomes the basis to limit the promotion and retention prospects of these same groups.

This Article critiques the current state of integration within the military through an analysis of the ways in which identity markers such as race and gender still matter. To that end, the Article applies theories related to the social construction of identity,¹³ to explore and reveal how women and people of color

9. See, e.g., Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (noting that individuals acquire and use racial attitudes and stereotypes without knowing it); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005) (analyzing psychology studies indicating that subjects performed tasks with unconscious racial bias); Linda Hamilton Kreiger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1203 (1995) (noting that once individuals rely upon stereotypes to explain societal differences, the stereotypes become an unacknowledged but engrained part of their cognitive processes).

10. LU-IN WANG, DISCRIMINATION BY DEFAULT: HOW RACISM BECOMES ROUTINE 9 (2006). Prof. Wang further offers, “These unconscious biases, in turn, can lead us to treat people differently based on irrelevant characteristics without intending to or even being aware that we are doing so.” *Id.*

11. See R. A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 809–10 (2004) (analyzing the work of Erving Goffman and Glen Loury in her proposal that racial stigma is a “problem of negative social meanings”).

12. Here, performance pertains both to job- or service-specific conduct and the concept of performing one’s identity. See Angela P. Harris, *Love and Architecture: Race, Nation, and Gender Performances Inside and Outside the State*, 52 CLEV. ST. L. REV. 121 (2005) (discussing Devon Carbado and Mitu Gulati’s scholarship on performance identity, and variations of the concept); John O. Calmore, *Whiteness as Audition and Blackness as Performance: Status Protest from the Margin*, 18 WASH. U. J.L. & POL’Y 101 (2005) (discussing the performative aspects of race and describing race as “sets of behaviors that [one] could choose to act out, as expectations they had of themselves and others, as physical difference and as ethnicity and subculture.”) (alteration added). Identity performance in the military is discussed in Part III.A, *infra*.

13. With regard to the social construction of identity categories, see KWAME A. APPIAH, THE ETHICS OF IDENTITY 21–23, 65–71 (2005) (noting that identity is formed through individual and collective dimensions, which serve to label or identify groups whose behaviors then are filtered through social conceptions, such as stereotypes); Kwame A. Appiah, *Stereotypes and the Shaping of Identity*, in PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW 55, 68 (Robert C. Post et al. eds., 2001) (“For a social identity is, among other things, a set of normative

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must still manage the effects of identity stereotypes, even within an organization that has been heralded as a model for successful inclusion. The Article suggests how, without an organizational commitment to meaningful identity-conscious policies, the essentially *required* identity performances of women, people of color, and gays and lesbians prove to be unsatisfying practices to ensure their success within the military. These circumstances thereby undermine the strength of any true integration story. Further, it argues that individuals who inhabit multiple identity categories must engage in greater feats of assimilative conduct to fit in and might, therefore, be at the most significant disadvantage in terms of promotion and retention within the military.¹⁴ In essence, with regard to the effects of "working" their identities,¹⁵ this Article contends that these individuals must negotiate a contemporary version of a "double bind,"¹⁶ where their differences make it difficult to fit in along white and male social norms,¹⁷ but where assimilative conduct may provide inconsequential relief.¹⁸

Part I of this Article presents the predominant story of military integration success for race. Part II, however, suggests the various ways that this success story is problematic. First, Part II.A asserts that the military's integration success generally appears more suspect when analysis is expanded to include gender integration. While great strides have been made to include women, formal policies such as the combat exclusion and the existence of informal behavioral norms tied to masculinity remain barriers to true equality. Shifting from a discussion of the lesser-included to the totally excluded, Part II.B questions whether, given the military's treatment of gays and lesbians, any positive integration narrative(s) should be regarded as credible. This discussion is

scripts for shaping your behavior, your plans, your life."). On the concept of race and gender as socially constructed, see D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 GEO. L.J. 437, 439–40 (1993) ("But race, for all its rhetorical power, is an incoherent fiction. . . . Racial categories are neither objective nor natural, but ideological and constructed.") and JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990) (decoupling gender from sex and describing gender not as innate, but as socially negotiated and constructed through language).

14. Analysis of some promotion data, suggesting how little attention is paid to tracking the promotion opportunities of women of color, is presented in Part III.B, *infra*.

15. Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1279–1308 (2000) (describing how persons of color and women "work" or modify presentations of identity to undermine or emphasize stereotypes in the workplace).

16. See Michele Goodwin, *Assisted Reproductive Technology and The Double Bind: The Illusory Choice of Motherhood*, 9 J. GENDER RACE & JUST. 1, 7–16 (2005) (discussing the double bind as a heightened "Catch-22," or situation always fraught with paradox and advancing a place for the use of double bind theory within legal theory).

17. These norms are discussed in Part III.A, *infra*. See also Billie Mitchell, *The Creation of Army Officers and the Gender Lie: Betty Grable or Frankenstein*, in IT'S OUR MILITARY, TOO!: WOMEN IN THE U.S. MILITARY 35, 37 (Judith Hicks Steihm ed., 1996) [hereinafter IT'S OUR MILITARY TOO!] ("Astonishingly, military women voluntarily put up with a subculture . . . of misogyny [that] routinely manifests itself in harassment, if not physical violence, toward women.") (alteration added).

18. This is the position in which plaintiff, Ann Hopkins, famously found herself with regard to her job performance at Price Waterhouse. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion) ("An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not.").

concluded in Part II.C, where it is argued that the success reported in the integration narratives of race, and to a lesser extent gender, may be waning largely because of the various Armed Forces gravitating toward color- and gender-blind approaches to promotion and retention. These approaches came in to prominent use as a result of a set of reverse discrimination cases. Adopting these approaches not only undermines the success story, but also contributes to the conditions that create the need for extra identity work for service members inhabiting multiple identity categories.

Part III seeks to explicate with greater nuance the dangers of accepting the prevailing positive narrative for the current state of military identity inclusion. This Part argues that greater focus should be placed on rooting out behavioral barriers to promotion and retention, rather than measuring success based merely on entry statistics. In Part III.A, given the military's current embrace of gender- and race-neutrality, theories of unconscious bias and identity performance are advanced to explore the individual challenges that face women and minority service members. In particular, it is argued that in the absence of meaningful race- and gender-conscious regulations, people of color and women face difficulties in managing identity against the backdrop of the unspoken requirements of the military's unique work culture. Using primarily the work of legal scholars Kenji Yoshino, Devon Carbado, and Mitu Gulati, it is argued that minorities are largely reduced to "covering" (downplaying)¹⁹ and "working"²⁰ their identities in order to limit the effects of white and male social norms and the greater challenges unique to the military. In theory, to the extent these assimilative plays undermine negative race and gender stereotypes, they should lead to some measure of success. Part III.A asserts, however, that within the military, in the absence of a true commitment to assessing the cost of difference, assimilative conduct is not an effective solution for overcoming debilitated status identity. This is especially true for those considered multiply deviant, and for whom the amount of difference that must be mitigated creates a greater burden. For all, however, in an environment that lawfully limits opportunities based on gender and sexuality, it is doubtful that behavioral norms will be confronted, where they merely reinforce stereotypical understandings of identity.

Part III.B shifts from considering individual to institutional conduct and queries whether the previous story of inclusiveness based upon race continues to be persuasive in light of recent data detailing minority promotion opportunities. Unlike studies that focus on the current membership numbers for women and people of color within the military to measure integration success,²¹

19. Kenji Yoshino, *Covering*, 111 YALE L. J. 769 (2002).

20. Carbado & Gulati, *supra* note 15, at 1268-70.

21. Many persons who comment on the race and gender integration of the military do so in terms of the numbers of minorities and women within the enlisted and officer ranks of the various services. See, e.g., Mary F. Katzenstein & Judith Reppy, *Introduction: Rethinking Military Culture*, in *BEYOND ZERO TOLERANCE: DISCRIMINATION IN MILITARY CULTURE* 1, 10 (Mary F. Katzenstein & Judith Reppy eds., 1999) [hereinafter *BEYOND ZERO*] (noting that 1998 Department of Defense (DoD) and Defense Equal Opportunity Management Institute (DEOMI) statistics indicate a steady increase of black officers over the past twenty-five years).

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the focus here is placed on selected promotion statistics. For racial minorities and women, these statistics reveal a sporadically troubling landscape with regard to opportunities for success. While the data cannot be used to make broad empirical claims, they do help to expose a problem that was instrumental to the genesis of this Article: the problem that for certain persons for whom there are multiple bases to discriminate, statistics are not maintained. For instance, that the promotion board statistics considered do not present one with an opportunity even to assess the specific success of women of color is symptomatic of a type of problem that is referenced in the title of this Article. The phrase, “But Some of [Them] Are Brave” is a reference to a well-known Black Women’s Studies text, which emphasizes how the specific issues of women of color are often obscured by greater focus being placed on men of color and white women.²² Moreover, while the data do not definitively prove the utter falseness of military integration success, they do suggest—in the least—that it may be premature to shift institutional policies toward colorblindness.²³

Finally, Part IV discusses a return to regulations and guidance that more concretely consider the ways race and gender factor into promotions and retention. It locates the potential availability of such considerations in the case law considering military equal opportunity initiatives, the deference the courts historically have afforded to the military, and the Supreme Court’s specific endorsement of the diversity rationale in education as a means to keep the military integrated. A return to identity-consciousness is needed because currently it is individuals who largely bear the burden of mitigating the consequences of difference within the military. A more progressive military—one committed to substantive equality and integration premised upon success rather than access—should, however, also bear a portion of this burden. Ultimately, this Article concludes that an organization that turns a blind eye to these types of constraints and demands on identity must either give up its claims with regard to the success of its program of integration or move toward

22. ALL THE WOMEN ARE WHITE, THE BLACKS ARE ALL MEN, BUT SOME OF US ARE BRAVE: BLACK WOMEN’S STUDIES xxi (Gloria Hull, Patricia Bell Scott & Barbara Smith eds., 1982) [hereinafter ALL THE WOMEN]. This phenomenon is criticized in the scholarship on intersectionality. See generally Crenshaw, *Demarginalizing the Intersection*, *supra* note 8; Crenshaw, *Mapping the Margins*, *supra* note 8. For an example of an article questioning the applicability of intersectional theories and analysis to the military, see Gwendolyn M. Hall, *Intersectionality: A Necessary Consideration for Women of Color in the Military?*, in BEYOND ZERO, *supra* note 21, at 143–61. The phrase, “But Some of [Them] are Brave,” however, seemed an appropriate title for multiple reasons. Not only does it capture the notion that the concerns of women of color may be overlooked within the military, but it also serves as an effective criticism of the combat exclusion policies, which limit the service of women who wish to be fully integrated into the Armed Forces. These policies are discussed in detail in Part II.A, *infra*.

23. While colorblindness in this context refers to the choice not to consider or “see” race when making institutional decisions, this practice has been criticized as problematic. See Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162, 166–69 (1994) (criticizing jurisprudence claiming colorblindness is a moral imperative, and opining that instead it is a policy choice for maintaining a hierarchical “racial status quo”); Gary Peller, *A Critique of “Our Constitution Is Color-Blind,”* 44 STAN. L. REV. 1, 3 (1991) (noting that, in a system marked by racial subordination, “[a] color-blind interpretation of the constitution legitimates, and thereby maintains, the social, economic, and political advantages that [W]hites hold over other Americans”) (alteration added).

policies that disavow the muted weight of difference that still exists for some within the ranks.

I. RACIAL INCLUSION AND THE FORMATION OF AN "INTEGRATION SUCCESS STORY"

As recently as 2003, in the U.S. Supreme Court's decision in *Grutter v. Bollinger*,²⁴ we have seen national recognition extended to the military's successful integration of its forces with regard to race.²⁵ In fact, the Court's decision to allow public colleges and universities to continue to consider racial diversity in admissions was based in part on the vital role such admissions play in producing a pool from which to draw military officer candidates. In an amicus brief, military leaders claimed that maintaining a racially diverse officer corps was not merely preferred but vital to national security.²⁶ The *Grutter* case reveals the ultimate power of law—and of society accepting the military as an integration success. As a precursor to analyzing the dangers of accepting the narrative as accurate, this Part of the Article considers how this success narrative emerged. It does so by looking at the history of military race relations and marking the military's transformation from an organization that practiced explicit racial exclusion to one understood to be a model for racial inclusiveness.

While the government's motives may not have been pure,²⁷ from the time President Truman issued Executive Order 9981,²⁸ the decision to open the military to African Americans has had far reaching implications within society.²⁹ Still, the road toward solidifying the racial integration mandated in the Executive Order was long and winding. In addition to requiring integration, the Order created the President's Committee on Equality of Treatment and Opportunity (the Fahy Committee),³⁰ which worked to encourage full

24. 539 U.S. 306 (2003).

25. For a claim that the military is an institution that defines values for the country, including values pertaining to race relations, see Diane H. Mazur, *Why Progressives Lost the War When they Lost the Draft*, 32 HOFSTRA L. REV. 553, 563–64 (2003).

26. *Grutter*, 539 U.S. at 331.

27. At the time he issued Executive Order 9981, President Truman was under significant pressure from black leaders and civil rights organizations, and had the forces not been integrated, they would have experienced logistical and tactical difficulties maintaining segregated forces during the Korean War. *Black Participation in American Society*, in A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 50, 70 (Gerald Jaynes & Robin M. Williams, Jr. eds., 1989) [hereinafter A COMMON DESTINY]. See also Mazur, *supra* note 25, at 586 ("The military's success, relative to the civilian world, in fostering healthy race relations deserves credit. However, it should also be noted that the military failed to make a moral commitment to better race relations until the need for minority volunteers after the end of the draft made racial inclusiveness a functional imperative, not just a moral imperative."); RAND SEXUAL ORIENTATION STUDY, *supra* note 3, at 169 (discussing how Korean War personnel shortages forced the Army to move forward with meaningful integration).

28. See *supra* note 1 and accompanying text.

29. A COMMON DESTINY, *supra* note 27, at 71 ("The military by 1965 was in front of the private sector in many of the changes it had made. . . . The military prefigured later changes being fought for on the civilian front."); Karst, *supra* note 3, at 522 ("The racial integration of the services, however, is only part of a much larger story The larger story is the way myriad black men and women over the past half century have claimed their places as equal citizens.")

30. BINKIN ET AL., *supra* note 2, at 26. It was the Fahy Committee, in 1950, which worked with the services and the Department of Defense to reach an agreement, "at least in principle, on plans for

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integration, even as the President informally agreed to allow Service Secretaries to continue to limit enlistments by race.³¹ The Fahy Committee was followed in 1962 by the President’s Committee on Equal Opportunity in the Armed Forces (the Gesell Committee).³² It was the circumstances described in the Gesell Committee report,³³ along with a history of race and gender integration problems, which created an environment in need of race-conscious policies.

According to military historian Charles Moskos, racial tensions came to a head during the Vietnam Era:

Throughout the Vietnam War race relations were terrible. By the early 1970s race riots were rampant, an outcome of both perceived and real discrimination against [B]lacks in the military along with spillover from the racial and political turmoil in society at large. Racial conflict did not disappear with the all-volunteer Army, instituted in 1973. Fights between black and white soldiers were endemic in the 1970s, an era that is now called “the time of troubles.”³⁴

Following the unrest in this era, the military made a significant commitment to fixing its race problem.³⁵ It did so by creating race-conscious structural mechanisms to ensure equality.³⁶ Race, then, became a consideration for admitting officers into the service academies and Reserve Officer Training Corps (ROTC) programs.³⁷ Through the creation of the Defense Equal

eliminating the formal, legal structure of racial segregation and enabling the mixing of [B]lacks and [W]hites in the same military units.” RAND SEXUAL ORIENTATION STUDY, *supra* note 3, at 164 (citation omitted; alterations added).

31. BINKIN ET AL., *supra* note 2, at 27.

32. *Id.* at 31.

33. The Gesell Committee discovered “an unbalanced grade distribution of [B]lacks in the services, segregation (or only token integration) and exclusionary practices in the National Guard and the reserves, and racial discrimination on military installations and in surrounding communities.” *Id.* at 31–32 (alteration added).

34. Moskos, *supra* note 5, at 16 (alteration added). *See also* BINKIN, ET AL., *supra* note 2, at 35–38 (noting that the Vietnam era was marked by claims of institutional racism and incidents with racial overtones); Karst, *supra* note 3, at 521 (“Racial tensions ran high during the Vietnam War, especially in the Army, which had few black officers and was suffering a general decline in discipline and morale.”); RAND SEXUAL ORIENTATION STUDY, *supra* note 3, at 180 (“Between 1968 and 1972, all the Armed Forces experienced numerous outbreaks of racial hostility and violence in a worldwide pattern that nearly matched the strife that had existed during World War II.”).

35. *See* Consolidated Brief of Lt. Gen. Julius W. Becton, Jr., et al. as Amici Curiae Supporting Respondents at 5, *Grueter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) [hereinafter Consolidated Brief], 2003 WL 1787554.

36. For an overview of the affirmative action architecture required by the DoD and applied by the Army, see Capt. Donovan R. Bigelow, *Equal but Separate, Can the Army’s Affirmative Action Program Survive Judicial Scrutiny After Croson*, 131 MIL. L. REV. 147, 157–61 (1991). One example of a race-conscious policy was the Navy’s “Enhanced Opportunities for Minorities Initiative” of the mid-1990s which set a goal to reach an accession level in the Navy and Marine Corps Officer corps of twelve percent Blacks, twelve percent Hispanics, and five percent other minorities by the year 2005. *See* Dep’t of the Navy, 1997 Posture Statement (Feb. 16, 2006), available at <http://www.navy.mil/navydata/policy/fromsea/pos97/pos-pg04.html>.

37. Consolidated Brief, *supra* note 35, at 18–24 (discussing the identity-conscious policies—including targets and goals—used to ensure opportunities for women and minorities at the service academies); *id.* at 25–27 (discussing the same policies for ROTC programs).

Opportunity Management Institute (DEOMI)—the Defense Department’s institute for equal opportunity training and data collection—the forces began to track the conditions for minorities in myriad contexts, including promotions.³⁸ They issued directives that not only required the assessment of equal opportunity at critical junctures,³⁹ but facilitated the development of tools to ensure equal opportunity in other areas, such as assignments.⁴⁰ These policies were so effective that by the time of the first Persian Gulf War, there were no significant racial incidents reported during the conflict.⁴¹ This is not to say that anyone believed the military services had entirely eliminated segregation and discrimination,⁴² but that unlike other institutions, they had placed a great deal of effort behind meaningful integration. This has resulted in military scholars referring to the military—the Army in particular—as an organization that: (1) “contradicts the prevailing race paradigm”⁴³; (2) is “unmatched in its level of racial integration”⁴⁴; and (3) stands out “even among governmental agencies, as an organization in which [B]lacks often do better than their white counterparts.”⁴⁵ Professor Kenneth Karst restates what is now a common belief in the following manner: “No one today claims the services are free from the effects of racism, but on this score it is hard to find any other institution in

38. See Dep’t of Defense Instr. 1350.3, Affirmative Action and Planning and Assessment Process, § 4 & encl. 2 (1988) (requiring the services to track equal opportunity statistics for categories such as: recruiting/accessions, composition, promotions, professional military education, and assignments), available at <http://www.dtic.mil/whs/directives/corres/pdf/135003p.pdf>. Congress has mandated that the “Secretary of Defense shall carry out an annual survey to measure the state of racial, ethnic, and gender issues and discrimination among members of the Armed Forces serving on active duty” 10 U.S.C. § 481 (2000). The individual services have also created bureaus and initiatives separate from DEOMI. For instance, the Army initiated the Commission on Officer Diversity and Advancement (CODA) to study the underrepresentation of black officers. See LT. COL. ANTHONY D. REYES, JOINT CENTER FOR POLITICAL AND ECONOMIC STUDIES, MILITARY FELLOW RESEARCH REPORT, STRATEGIC OPTIONS FOR MANAGING DIVERSITY IN THE U.S. ARMY x (June 2006), available at <http://www.jointcenter.org/publications1/publication-PDFs/TonyReyes.pdf>. The Navy has formed the Diversity Directorate within the office of the Chief of Naval Operations, to promulgate the Navy’s policies on diversity. *Id.* at 21.

39. Pursuant to policies such as those cited *supra* at notes 36 and 38, the Services have developed tools for tracking race and gender numbers for accessions, augmentation/retention, and separation.

40. See Dep’t of Defense Directive No. 1315.7, Military Personnel Assignments, § 4.1 (2005) (“Assignments shall be made for all Service members without regard to their color, race, religious preference (except chaplains), ethnic background, national origin, age, marital status (except for military couples), or gender (except where prohibited by statute and limitation of facilities) consistent with requirements for physical capabilities.”), available at <http://www.dtic.mil/whs/directives/corres/pdf/131507p.pdf>.

41. Moskos, *supra* note 5, at 16.

42. REYES, *supra* note 38, at 12 (“[I]n 1991, the United States Commission on Civil Rights . . . found that discrimination still existed in the Army . . . based on low promotion rates among [B]lacks and apparent problems in the administration of justice.”) (alteration added).

43. MOSKOS & BUTLER, *supra* note 7, at 1–2 (acknowledging that the Army is not a racial utopia, but favorably compares to most nonmilitary institutions with regard to racial integration).

44. *Id.* at 2.

45. *Id.* at 5–6 (alteration added).

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American society that has done better."⁴⁶

So strong was the belief in the military as a model for effective inclusion that in his speech encouraging the society to accept a mend to, rather than the end of, affirmative action within the federal government, President Clinton stated:

The model used by the military, the army in particular . . . that model has been especially successful because it emphasizes education and training, ensuring that it has a wide pool of qualified candidates for every level of promotion. That approach has given us the most racially diverse and the best qualified military in history. There are more opportunities for women and minorities there than ever before.⁴⁷

Ultimately, it was the military's reputation for success at integration through race-conscious means that affected the Court's decision in *Grutter*.⁴⁸ In that case, the consolidated amicus brief filed by general officers, senators, and former secretaries of defense, through historical analysis and data on inclusion, emphatically proclaimed the truth of the military integration success narrative.⁴⁹ Moreover, the amici sought the Court's assistance in preserving the diverse officer candidate pool necessary to maintain that success. The military's concern did, in fact, become a central factor in the Court maintaining diversity as a rationale capable of supporting the consideration of race in post-secondary admissions. Specifically, the Court relied heavily upon the consolidated amicus brief and indicated: "What is more, high-ranking retired officers and civilian leaders of the United States military assert that, '[b]ased on [their] decades of experience,' a 'highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security."⁵⁰ The Court went on to adopt the military's claims that it could not produce a qualified and diverse officer corps without using "limited race-conscious recruiting and admissions policies" for the service academies and collegiate ROTC programs.⁵¹ Significantly, the Court agreed with the conclusion reached in the amicus brief that "the country's other most selective institutions must remain both diverse and selective."⁵² Essentially, the Court used the brief to suggest that integration fuels the success of the organization. Given that this success can only be maintained through a race-conscious accession process, then it must be okay to also use some version of this type of selection policy for

46. Karst, *supra* note 3, at 521.

47. President William Clinton, Mend It Don't End It, Address at the National Archives on Affirmative Actions Programs (July 1995) (noting also that he had ordered a complete review of all federal affirmative action programs and using as an example of the success of such programs the "over fifty generals and admirals who are Hispanic, Asian-, or African-American") (transcript available at <http://web.utk.edu/~mfitzge1/docs/374/MDE1995.pdf>).

48. 539 U.S. 306 (2003).

49. Consolidated Brief, *supra* note 35, at 5.

50. *Grutter*, 539 U.S. at 331 (O'Connor, J.) (quoting Consolidated Brief, *supra* note 35, at 27) (alteration added).

51. *Id.* (quoting Consolidated Brief, *supra* note 35, at 5).

52. *Id.*

university admissions.

II. INTERROGATING INTEGRATION SUCCESS NARRATIVES

Despite the public's embrace of the military as a model for integration success, there remain serious flaws within the model. While, on the one hand, the Armed Forces have worked hard to create and maintain diversity within their ranks, they have, on the other hand, explicitly and unabashedly limited the quality of that service for some members (women) and completely excluded others (gays and lesbians) from open service. Even if diversity is generally viewed as imperative to the Services, this Part argues that the disparate treatment afforded across identity groups creates questions about the extent of integration success and whether the narrative can be maintained. The limits of this success story are first tested by looking at how the inclusion of Blacks failed to spur the successful integration of other minority groups. Based on the improved opportunities now available to women in the Armed Forces, Part II.A argues that some support exists for claiming that, with regard to gender, the military may trumpet another integration success narrative. The strength of this claim is challenged, however, by exploring the key policies that operate as longstanding barriers to the equal participation of women—limits on combat assignments. In Part II.B, the viability of integration success narratives is challenged by exploring the effects of the continued exclusion of gays and lesbians from openly serving. Part II.C will explicate how the success narrative has also been undermined due to policy changes during the Clinton administration that mandated a move toward colorblindness in officer promotions. These policy changes were precipitated by attacks on affirmative action that came through reverse-discrimination lawsuits brought both outside of,⁵³ and from within,⁵⁴ the military. Ultimately, these lawsuits resulted in guidance that provided extremely watered-down versions of equal opportunity statements to military promotion boards. As opposed to previous statements, the current statements substantially prevent the military from considering its history of race and gender discrimination in promotions and assignments.⁵⁵

53. *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989), signaled the beginning of the significant curtailment of affirmative action programs; the Court held that state and local affirmative action programs were subject to strict scrutiny and that race-based remedial efforts should be used to address a present issue, rather than prior history of government discrimination. Shortly thereafter, in *Adarand Constructors v. Peña*, 515 U.S. 200 (1995), the Court indicated that federal affirmative action programs would also be subject to strict scrutiny. This ruling prompted President Clinton to instruct all federal agencies to evaluate all race-conscious programs.

54. Even though some government programs were able to continue to consider race and gender in some decisions after *Adarand*, a federal district court specifically limited the ways race and gender could be considered by military promotion boards. See *Saunders v. White*, 191 F. Supp. 2d 95 (D.D.C. 2002) (holding that the written equal opportunity guidance the U.S. Army provided to its 1996 and 1997 Judge Advocate General's (JAG) Corps Colonel promotion boards was unconstitutional). See also *Christian v. United States*, 46 Fed. Cl. 793 (2000) (ending racial preferences in the way the Army conducted mandatory retirement boards); *Berkley v. United States*, 287 F.3d 1076 (Fed. Cir. 2002) (ruling on the same matter for Air Force retirement boards), *settlement approved by* 59 Fed. Cl. 675 (2004).

55. For a discussion of the discrimination that persisted for Blacks, prior to and after

A. Gender Integration: A Success Story?

While the primary purpose of this Article is to interrogate the strength of the military’s racial integration success story, some attention must also be paid to gender, given that later analysis pertains to understanding the effects of overlapping systems of subordination on military members. Specifically, the claim is advanced that in the military too little attention is paid to the difficulties that face individuals marked by both race and gender differences.⁵⁶ As such, it is understood that to describe a gender story as separate from the story of race (or sexuality) is to participate somewhat in the very practice criticized herein.⁵⁷ With regard to that gender story, alone, much of the present emphasis is placed on the current numbers for women in the military,⁵⁸ the many opportunities available to some women of color,⁵⁹ and the improving picture with regard to the availability of combat billets for all women.⁶⁰ The history of integrating women into the military services, however, has not been so rosy. The story of gender integration has traveled along a similar but modified arc of inclusion when compared to the story of race⁶¹—or, as one commenter has opined: “By contrast, equal opportunity for women is also a stated principle, but the role of women

integration, see BINKIN ET AL., *supra* note 2, at 18–38 (discussing institutional racism in the Forces during World War II, the Korean Conflict and the Vietnam Conflict); Karst, *supra* note 3, at 516–21; RAND SEXUAL ORIENTATION STUDY, *supra* note 3, at 186–87.

56. See *infra* Part III.B.

57. This practice not only ignores identity intersections but also inadvertently embraces an essentialist perspective—that gender and race categories suffice to capture the myriad experiences of the various diverse members within those groups. For an astute analysis of race and gender essentialism, see Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

58. At the end of Fiscal Year 2005, women comprised greater than fourteen percent of the Armed Forces (205,054 women officers and enlisted members of 1,414,182 total personnel); the percentage of female officers by service and race were as follows: Army 6.1% (58.8% White; 24.6% Black; 5.9% Hispanic; 0.6% American Indian/Alaskan; 6.5% Asian-American/Pacific Islander; 3.5% Multi-racial/Unknown); Navy 3.8% (72.9% White; 12.0% Black; 5.6% Hispanic; 0.9% American Indian/Alaskan; 6.4% Asian-American/Pacific Islander; 2.1% Multi-racial/Unknown); Air Force 6.6% (71.6% White; 12.1% Black; 4.0% Hispanic; 0.7% American Indian/Alaskan; 5.5% Asian-American/Pacific Islander; 6.1% Multi-racial/Unknown); Marine Corps 0.5% (64.5% White; 10.0% Black; 9.4% Hispanic; 1.0% American Indian/Alaskan; 4.3% Asian-American/Pacific Islander; 9.9% Multi-racial/Unknown); and Coast Guard 0.5% (78.4% White; 7.5% Black; 6.3% Hispanic; 1.2% American Indian/Alaskan; 0.2% Asian-American/Pacific Islander; 6.4% Multi-racial/Unknown). ANNUAL DEMOGRAPHIC PROFILE, *supra* note 5, at 2, 8.

59. African-American women make up 28.3% and 9.4% of the enlisted and officer ranks of the military, respectively. *Id.* at 10. On the story of the overrepresentation of African American women, see Brenda L. Moore, *From Underrepresentation to Overrepresentation: African American Women, in IT’S OUR MILITARY TOO!*, *supra* note 17, at 132.

60. See *infra* notes 71–74 and accompanying text.

61. See Katzenstein & Reppy, *supra* note 21, at 5 (discussing the similarities in the race and gender integration stories: both groups saw their entrance into the services facilitated through manpower needs associated with war, and each saw their lots improved through performance and shifting social norms). *Cf. id.* at 16 (discussing work that points out differences in the race and gender integration stories but surmising, at bottom, whether the stories will be equally successful will depend on whether the “constructed identity of the masculine warrior is open to amendment in response to changes in the broader society”).

continues to be a rolling source of contention.”⁶²

Due to personnel shortages related to the exigencies of war, women were first allowed to enter the Armed Forces during World War II, as members of the Women’s Army Auxiliary Corps (WAAC), which was later transformed into the Women’s Army Corps (WAC).⁶³ The Navy followed in short order, creating the Women Accepted for Voluntary Emergency Service (WAVES),⁶⁴ and the Air Force formed Women in the Air Force (WAF). Even after these initially segregated organizations were abandoned pursuant to the installation of a formal policy of full integration of all of the Services,⁶⁵ women faced obstacles to military service. For example, until the late 1960s, women constituted only one percent of the military,⁶⁶ and legal challenges had to be asserted to achieve equal benefits.⁶⁷ Even as women’s numbers within the forces began to improve throughout the next decade,⁶⁸ at least two types of challenges to full integration remained that will be discussed in this Article: (1) that women of color—and African Americans in particular—have faced and continue to confront additional obstacles related to race,⁶⁹ and (2) that the story of gender integration cannot be argued as a complete success, due to the military’s continued policy

62. Moskos, *supra* note 5, at 17; RAND SEXUAL ORIENTATION STUDY, *supra* note 3, at 158 (“Unlike the experience with racial integration . . . the policy message about women has been ambiguous”). The following description captures the difficult ascendance of women within the all volunteer force:

The history of women in the military reveals the institutional resistance to integrating women into this powerful male preserve. For women, the doors have been reluctantly “pried open” largely as a result of the need for more troops during times of war and following the adoption of an all-volunteer force.

Valorie K. Vojdik, *Beyond Stereotyping in Equal Protection Doctrine: Reframing the Exclusion of Women from Combat*, 57 ALA. L. REV. 303, 325 (2005) (citations omitted).

63. Moore, *supra* note 59, at 116.

64. *Id.* at 117.

65. Formal integration was achieved through the Women’s Armed Services Integration Act (1948). Pub. L. No. 80-625, 62 Stat. 356 (1948). The Act was by no means designed to ensure equal participation. See Vojdik, *supra* note 62, at 325 (“The Act capped the number of women in the military to [two percent] of all enlisted troops. It barred women from serving on aircraft or ships engaged in combat missions . . . [it] also barred women from serving in a command position; women could not hold the rank of general or hold permanent rank above lieutenant colonel.”) (citations omitted; alterations added). Additionally, for years after they were formally integrated, the Services were permitted to treat women differently from men in enlistment, discharge, dependency benefits, promotions, and assignment to combat units. See Lucinda Joy Peach, *Women in Combat*, in IT’S OUR MILITARY TOO!, *supra* note 17, at 158 [hereinafter Peach, *Women in Combat*]; Lucinda J. Peach, *Women At War: The Ethics of Women in Combat*, 15 HAMLINE J. PUB. L. & POL’Y 199, 201-02 (1994) [hereinafter Peach, *Women at War*]. The two percent cap was finally removed through Public Law 90-130 (1967); Brenda L. Moore, *Reflections of Society: The Intersection of Race and Gender in the U.S. Army in World War II*, in BEYOND ZERO, *supra* note 21, at 141.

66. RAND SEXUAL ORIENTATION STUDY, *supra* note 3, at 158.

67. See *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion) (prohibiting the military from providing differential family benefits based on gender).

68. RAND SEXUAL ORIENTATION STUDY, *supra* note 3, at 159.

69. See IT’S OUR MILITARY TOO!, *supra* note 17, at 117-23. The special issues that confront women of color are discussed in Part III.A, *infra*.

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barring the assignment of women to combat units.⁷⁰ As the race and gender intersection matters most specifically relate to constraints on identity performance, they will be discussed in Part III. This second issue, of course, finds part of its justification in norms related to the role of women within society and military norms related to masculinity.⁷¹

While a 1998 GAO report indicates that there have been increases in opportunities, women are still excluded from direct ground combat.⁷² The breadth of the combat exclusion has, however, been waning, with the prohibitions on women serving on combat vessels and most combat aircraft being lifted in the early nineties.⁷³ Also, the DoD-wide "no-direct-ground-combat rule" was revised in 1994, after Operation Desert Storm. The rule was rewritten to only exclude women from "assignments to units below the brigade level whose primary mission is direct ground combat."⁷⁴ The policy also permitted services to close positions to women for units physically collocated with direct ground combat units. Direct ground combat is further defined as 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 . . . [that] takes place well forward on the battlefield while locating and closing with the enemy to defeat them by fire,

70. See GEN. ACCOUNTING OFFICE, GENDER ISSUES: INFORMATION ON DOD'S ASSIGNMENT POLICY AND DIRECT GROUND COMBAT DEFINITION (1998) [hereinafter GAO REPORT], available at <http://www.gao.gov/archive/1999/ns99007.pdf>. One military member studying this issue has suggested that the strategies previously used to limit the service of African Americans, are currently used to deny women a role in combat. Lt. Col. Henderson Baker, II, *Women in Combat: A Culture Issue 6-7* (Mar. 15, 2006) (unpublished Master's thesis, U.S. Army War College) (on file with author).

71. Peach, *Women at War*, *supra* note 65, at 207 ("Ideological notions about gender operate in the debate about women in combat to perpetuate not only myths about women, but also about men, the military and the nature of war and combat. Traditional notions of gender identity link men with war and women with peace."); Karst, *supra* note 3, at 536 ("[W]omen's relative physical strength and passivity have little to do with maintaining the combat exclusion. The real concerns are of two kinds: The first is the special regard for women who must be protected as the symbolic vessel of femininity and motherhood.") (alteration added).

72. In 1998, approximately 221,000 of the DoD's 1.4 million positions (roughly fifteen percent) were closed to women, who comprised fourteen percent of the Armed Services at the time. By force, the number of positions closed to women were: 141,950 in the Army (or twenty-nine percent); 43,460 in the Marine Corps (or twenty-five percent); 33,366 in the Navy (or nine percent; of this number, seventy-seven percent were on submarines and thirteen percent were collocated with Marines); and 2,310 in the Air Force (or less than one percent). GAO REPORT, *supra* note 70, at 3.

73. National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 531, 105 Stat. 1290, 1365 (1991) (opening naval aviation to women and repealing 10 U.S.C. § 8549, which barred women in the Air Force from assignment to "duty in aircraft engaged in combat missions"); National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 541, 107 Stat. 1547, 1659 (1993) (repealing 10 U.S.C. § 6015, which barred women from assignment to "duty on vessels that are engaged in combat missions (other than as aviation officers as part of an air wing or other air element assigned to such a vessel)" and from assignment to "other than temporary duty on other vessels of the Navy except hospital ships, transports, and vessels of a similar classification not expected to be assigned combat missions"). See also Peach, *Women in Combat*, *supra* note 17, at 159.

74. GAO REPORT, *supra* note 70, at 3.

maneuver, or shock effect”⁷⁵.

Even as opportunities for full integration for women within the military continue to improve, the combat exclusion stands as a policy which still sets some formal limits. While these limiting policies mark the official gap between the integration stories of gender and race, throughout the remainder of the Article, we will see other ways that gender—especially for women of color—continues to mark disparate outcomes in success.

B. Gays and Lesbians: The Effect of Exclusion on Integration Success Stories

To understand why it would be inappropriate to indiscriminately credit the military for its integration success, one need look no further than the ways in which the organization still blatantly tolerates some forms of identity-based discrimination. For as successful as Truman’s declaration for racial equality has come to be perceived, another president failed miserably in his attempt to liberate gay and lesbian soldiers and sailors from their closeted lives.⁷⁶ On January 29, 1993, President Bill Clinton drafted a memo to the Secretary of Defense directing him to draft an Executive Order that would end discrimination in the military, “in a manner that is practical, realistic, and consistent with the high standards of combat effectiveness and unit cohesion our Armed Forces must maintain.”⁷⁷

President Clinton’s plan was, however, met with insurmountable opposition from civilians, the military, and Congress. He was forced to abandon his initial directive and settle for the compromise referred to as the “Don’t Ask, Don’t Tell, Don’t Pursue” policy. The policy allows gays and lesbians to serve in the military so long as they do not identify themselves as gay or lesbian and abstain from intimate homosexual relationships. This compromise did not achieve the goal of protecting gay men and lesbians within the military. In fact, the Department of Defense still maintains a version of DoD Directive 1332.14, which once stated:

Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements demonstrate a propensity to engage in homosexual conduct seriously impairs the accomplishment of the military mission. The presence of such members adversely impacts the ability of the Military Services to maintain discipline, good order, and morale⁷⁸

While the language of the above-quoted Directive has been revised,⁷⁹

75. *Id.* at 7 (alteration added).

76. As others have indicated, the Armed Forces fear only “overt homosexuality”; gays and lesbians can serve as long as they do not come out. See Kathryn Abrams, *Gender in the Military: Androcentrism and Institutional Reform*, 56 LAW & CONTEMP. PROBS. 217, 227, n.43 (1993).

77. Memorandum from President William Clinton on Ending Discrimination on the Basis of Sexual Orientation in the Armed Forces to the Secretary of Defense (Jan. 29, 1993), available at <http://dont.stanford.edu/regulations/pres1-29-93.pdf>.

78. Dep’t of Defense Directive No. 1332.14, Enlisted Administrative Separations, pt. 1, § H (1982), available at <http://dont.stanford.edu/regulations/regulation41.pdf> (alteration added).

79. See Dep’t of Defense Directive No. 1332.14, Enlisted Administrative Separations, encl. 3, at

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similar language in federal statutes still provides the policy guidance supporting Department of Defense Regulations that exclude gays, lesbians, and bisexuals from service.⁸⁰ One way that the exclusion of gays, lesbians, and bisexuals from the military detracts from the military's integration success narrative is obvious: a group of individuals is being excluded based purely on its status identity. Separate from the choice to exclude on this basis, nothing about the policy is related to notions that these service members are incapable of performing. Certainly, recent data has been compiled to advance the claim that "Don't Ask, Don't Tell" is costly⁸¹ and patently unfair⁸² discrimination. Formally, the exclusion is maintained under the premises of ensuring combat effectiveness and unit cohesion,⁸³ and shifting public opinion supporting allowing gays to serve openly has had little effect on the policy. For example, a 1993 RAND study concluded that even though military members still have negative attitudes about the service of gays and lesbians, sexual orientation discrimination—like race discrimination—could be effectively eliminated by instituting a policy creating a conduct-based standard, which would acknowledge that sexual orientation is not germane to military service.⁸⁴ More recently, a 2004 Urban Institute study concluded that at least 60,000 gay persons were serving in the Armed Forces,⁸⁵ and a 2004 Gallup poll found that sixty-three percent of respondents favored allowing gay men and lesbians to serve openly.⁸⁶ While the

¶ E3.A1.1.8.1.1 (1994) [hereinafter DoDD 1332.14], available at <http://www.dtic.mil/whs/directives/corres/pdf/133214p.pdf>.

80. See 10 U.S.C. § 654(a)(15) (2000) ("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.").

81. See, e.g., FRANK J. BARRETT, ET AL., THE PALM CENTER, FINANCIAL ANALYSIS OF "DON'T ASK, DON'T TELL": HOW MUCH DOES THE GAY BAN COST? 2 (Feb. 2006), available at <http://www.palmcenter.org/files/active/0/2006-FebBlueRibbonFinalRpt.pdf> (challenging the results of a General Accountability Office study of the same subject and determining that between 1994 and 2003 the cost of implementing the policy was \$363.8 million).

82. HUMAN RIGHTS WATCH, UNIFORM DISCRIMINATION: THE "DON'T ASK, DON'T TELL" POLICY OF THE U.S. MILITARY 3 (2003) ("In theory, all servicemembers are treated with dignity and respect regardless of sexual orientation. In practice, gay servicemembers endure anti-gay remarks, name-calling, threats, and even physical attacks."), available at <http://hrw.org/reports/2003/usa0103/USA0103.pdf>.

83. See RAND SEXUAL ORIENTATION STUDY, *supra* note 3, at 161; Gregory Herek & Aaron Belkin, *Sexual Orientation and Military Service: Prospects for Organizational and Individual Change in the United States*, in *MILITARY LIFE: THE PSYCHOLOGY OF SERVING IN PEACE AND COMBAT*, VOL. 4, AT 119 (Thomas Brit et al. eds., 2005) ("[D]iscussion in the United States has focused primarily on whether allowing openly gay and lesbian personnel to serve would undermine the military's ability to accomplish its mission. . . .") (alteration added); Elizabeth Kier, *Discrimination and Military Cohesion: An Organization Perspective*, in *BEYOND ZERO*, *supra* note 21, at 38 (discussing sexual orientation integration as a danger to morale, good order, and discipline).

84. See RAND SEXUAL ORIENTATION STUDY, *supra* note 3, at xxiv–xxv.

85. Lizette Alvarez, *Gay Groups Renew Drive Against "Don't Ask, Don't Tell,"* N.Y. TIMES, Sept. 14, 2006, at 18.

86. *Id.* (citing also to Pew Research Center survey from the same year claiming that sixty percent of respondents favor allowing gays to openly serve); Gallup Poll, *Gays in Military: Public Says Go Ahead and Tell*, Dec. 21, 2004. The civilian numbers, however, are very different from military

official military policy remains that of excluding from serving all but “hidden” gay men and lesbians, recent data suggests that in these times of increased military demands due to the “War on Terrorism,” the Services have been discharging fewer persons based on homosexuality.⁸⁷ Given that societal acceptance of gays and lesbians being allowed to serve openly is growing, and the RAND study conclusion that integration opposition could be overcome by regulating conduct, the military’s opposition to open service seems hollow. It certainly appears to be out of step with the positive integration narrative with regard to race.

Apart from taking away from the integration success narrative because it involves exclusion based upon sexuality alone, the exclusion of gays and lesbians from the military also negatively affects the narrative by excluding an important part of the very groups it wishes to include: racial minorities, but specifically those who are gay, lesbian, or bisexual. This often unacknowledged overlap of race and sexual orientation identity markers has created a problem for those wishing to construct a comprehensive conversation about integration. For those who do not see this as a conversation about overlapping bases for subordination, emphasis is placed on the dissimilar nature of race and sexual orientation, which then explains their different integration trajectories. These critics, essentially, have concerns with sexual orientation integration of the military being viewed as directly analogous in some ways to race and gender integration.⁸⁸ The point here is not to extensively rehash the propriety of such analogies,⁸⁹ but to make the separate point that there are dangers in embracing

respondents. CONGRESSIONAL RESEARCH SERVICE, *HOMOSEXUALS AND U.S. MILITARY POLICY: CURRENT ISSUES*, at CRS-6–CRS-7 (May, 27, 2005) (discussing a *MILITARY TIMES* poll of active-duty military respondents, which found that only twenty-five percent favored allowing gays to serve openly) [hereinafter CRS REPORT].

87. Evelyn Nieves & Ann Scott Tyson, *Fewer Gays Being Discharged Since 9/11: “Don’t Ask” Ousters At Lowest Level Yet*, *WASH. POST*, Feb. 12, 2005, at A1 (noting that discharges based on homosexuality have declined from 1227 in 2001 to 653 in 2004); CRS REPORT, *supra* note 86, at CRS-11 (displaying twenty-four years of homosexual discharge statistics, which illustrate a steady decline in discharges each year between 2001 and 2004). Some claim the avoidance of enforcing the policy recurs during times of increased manpower needs. Katzenstein & Reppy, *supra* note 21, at 18.

88. RAND SEXUAL ORIENTATION STUDY, *supra* note 3, at 158–60 (discussing the applicability of the racial and gender integration stories, and finding race was the more applicable experience to the case of homosexuality). *Cf.* John S. Butler, *Homosexuals and the Military Establishment*, 31 *SOC’Y* 13, 17 (Nov.–Dec. 1993) (arguing that the integration of homosexuals into the military should not be grounded in a racial or black civil rights metaphor); *but see* Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights: The Deployment of Race/Sexual Orientation Analogies in the Debates About the “Don’t Ask, Don’t Tell” Policy*, in *BLACK MEN ON RACE, GENDER, AND SEXUALITY: A CRITICAL READER* 285–89 (Devon W. Carbado ed., 1999) [hereinafter *BLACK MEN ON RACE*] (criticizing Butler’s aversion to a race/sexuality analogy in the military as distinguishing color/race which conveys identity from sexuality which is behavioral).

89. These types of race/sexuality comparative arguments have been extensively critiqued. *See* Carbado, *supra* note 88, at 289–96; Margaret Russell, *Lesbian, Gay, Bisexual Identity and the Civil Rights Agenda*, 1 *AFR.-AM. L. & POL’Y REP.* 33 (1994); Jane Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 *HARV. C.R.-C.L. L. REV.* 283 (1994). On the dangers of comparing various forms of identity-based discrimination, see generally Stephanie Wildman & Trina Grillo, *Obscuring the Importance of Race: The Implications of Making Comparisons Between Racism and Sexism (or Other -Isms)*, 1991 *DUKE L.J.* 397.

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as legitimate an integration narrative for an organization that privileges some marginalized communities while disadvantaging others. Doing so creates a world where the included, but marginal, are encouraged to participate in the ostracism of the fully excluded. For example, many officers of color chastised President Clinton’s plan to integrate gays as an attempt to treat sexuality like race—categories they perceived to be irreconcilably distinct. This view was represented in the comments of the then African-American Chairman of his Joint Chiefs of Staff, who was heavily opposed to lifting the ban. In a letter to Congress, General Colin Powell stated:

Skin color is a benign, non-behavioral characteristic. Sexual orientation is perhaps the most profound of human behavioral characteristics. Comparison of the two is a convenient but invalid argument. I believe the privacy rights of all Americans in uniform have to be considered especially since those rights are often infringed upon by conditions of military service.⁹⁰

The military’s top black officer rejecting the race-sexual orientation metaphor clearly hurt the credibility of the plan to remove the ban. Following Powell’s letter, two other high ranking black officers criticized the race-sexual orientation analogy, saying the traits were like “apples and oranges” and calling into question the incomparably unique history of prejudice and bigotry surrounding Blacks in the U.S.⁹¹

Others resist the impulse to engage the analogy question and instead focus on the dangers attendant in so stringently maintaining hard lines between race, gender, and sexuality classifications. In the foreword to *Black Men on Race Gender and Sexuality*, Kimberlé Crenshaw spoke of the necessity to integrate gender and sexuality into black political consciousness and discourses.⁹² So too it is important to situate race into discourses of gender and sexuality. There is a need to debunk the notion that the military is comprised of separate and distinct populations of persons who either are racial minorities, white women, or gay men and lesbians. As Devon Carbado has articulated, “[this] oppositional formulation of identity (African Americans and women, African Americans and the disabled, African Americans and gays and lesbians) linguistically and conceptually authenticates an essential notion of Blackness that, at the very least, is gendered and heterosexist.”⁹³ The goal here is to draw attention to two issues that such identity separation encourages us to overlook: (1) that multiple forms of subordination operate in concert across categories of difference;⁹⁴ and (2) that

90. See Charles Moskos, *From Citizens’ Army to Social Laboratory*, WILSON Q. 26 (Winter 1993).

91. Lynne Duke, *Drawing Parallels—Gays and Blacks; Linking Military Ban to Integration Fight Stirs Outrage, Sympathy*, WASH. POST, Feb. 13, 1993, at A1. (quoting Lt. Gen. Calvin Waller and Lt. Gen. Samuel Ebbeson expressing outrage over the comparison); Butler, *supra* note 88 (discussing Gen. Powell’s statements and rejecting the race/sexual orientation analogy). On this claim about the uniqueness of the black experience vis-à-vis other groups’ experiences with subordination, see Roy L. Brooks, *Race As an Under-Inclusive and Over-Inclusive Concept*, 1 AFR.-AM. L. & POL’Y REP. 9, 19–21 (1994).

92. Kimberlé W. Crenshaw, *Foreword*, in BLACK MEN ON RACE, *supra* note 88, at xii.

93. Carbado, *supra* note 88, at 288 (making the claim and criticizing its genesis in the work of Brooks, *supra* note 91).

94. See Darren L. Hutchinson, *Out Yet Unseen, Racial Critique of Gay and Lesbian Legal Theory and*

excluding gay men and lesbians helps to maintain the pretense that people are typically marked by a single social identity category, thereby erasing any need to acknowledge or be concerned for those affected by more than one basis to discriminate. With regard to the latter claim, it seems odd that at this advanced stage in our understanding of the operation of status identity that it would still be necessary to draw special attention to the challenges of persons viewed as multiply deviant. As the data below seem to illustrate, however, in some contexts, the military still respects a dichotomy of difference that separates the experiences of women from those of racial minorities, without acknowledging the unique circumstances of persons existing at the intersection of the two (or more) categories.

If gay men and lesbians were allowed to serve openly, it would become clear that sexuality—like gender—touches persons across race. When sexuality is left off the table we not only pay less attention to the various aspects of identity that coalesce to define particular persons, but we also face the danger of treating sexuality as if it is a category that does not affect minorities at all—as if there were no persons of color serving who were also gay or lesbian.⁹⁵

Beyond the ways in which excluding sexual minorities masks the presence of intersectional identities, the policy also obscures the notion that each person who is subordinated in some way has a “shared status”—an understanding that, across race, class, and nation, “a life is a life is a life” and each should be valued.⁹⁶ Including members of some marginalized populations while excluding others undermines the concept that our well being is interconnected and we all benefit from staking out principled positions against subordinating rules and policies.⁹⁷ When we ignore shared status, the courts become emboldened to reflect back to us our acceptance of separatism. With regard to integration narratives, the avoidance of this interconnectedness principle facilitates opinions that embrace the military as equally justified when it integrates as when it excludes. A belief in shared status should undermine the ability of one to maintain a coherent narrative of integration success, unless all oppressed individuals are treated fairly.

A recent example of the failure of the concept of shared status to be

Political Discourse, 29 CONN. L. REV. 561, 624–34 (1997); Francisco Valdes, *Queer Margins, Queer Ethics: A Call to Account for Race and Ethnicity in the Law, Theory, and Politics of “Sexual Orientation,”* 48 HASTINGS L.J. 1293, 1299 (1997) (“Intersectional analyses and projects are valuable to sexual minorities, racial and ethnic minorities, and other subordinated groups because they can enhance our joint capacity to understand the interconnectedness of multifaceted power systems that stand on intersected axes of privileges.”).

95. See Carbado, *supra* note 88, at 286–89 (discussing how certain race and sexuality discourses render black gays and lesbians invisible).

96. THE PARADOX OF LOYALTY: AN AFRICAN AMERICAN RESPONSE TO THE WAR ON TERRORISM 193–94 (J. Malveaux & Regina Green eds., 2002).

97. The late Prof. Jerome Culp of Duke Law School described this being concerned with the oppression of others as a first step in the process of defeating self-hatred. See Jerome McCristal Culp, Jr., *The Seventh Aspect of Self-Hatred: Race, LatCrit, and Fighting the Status Quo*, 55 FLA. L. REV. 425, 436 (2003) (“How does one combat . . . self hatred? One way is to accept the multiple identities of others and to hear the power of their stories in our own lives. Hearing the oppression of others is also a first step to slaying self-hatred.”).

narrative-influencing can be seen in the Supreme Court’s decision in *Rumsfeld v. Forum for Academic and Institutional Rights (FAIR)*.⁹⁸ This case held that it was constitutional for the federal government to condition university funding on compliance with the Solomon Amendment—legislation that requires schools to treat military recruiters on the same footing with other employers.⁹⁹ The Court allowed the government to cut funding to any college or university that bans military recruiters due to the school’s position that the “Don’t Ask, Don’t Tell” policy constitutes unacceptable discrimination. Since the *FAIR* litigants were primarily law schools and professors, the recruiters at issue were primarily those recruiting potential Judge Advocate General’s (JAG) Corps candidates.¹⁰⁰ In effect, the Court that used the military’s integration success to justify allowing schools to continue admissions policies based upon race in *Grutter*,¹⁰¹ was also willing to support a policy that limited—based on sexual orientation—those who could be considered for the JAG Corps. Even though the Court’s decision was not based upon the Equal Protection doctrine,¹⁰² there is a message about equality in the *FAIR* holding. That message is that the difference in treatment—the incoherence between race and sexuality narratives in the military—is acceptable. Hence, the military is allowed to fashion different stories around what it constructs as *oppositional*, rather than *intersectional* identities (race, gender, and sexuality). In the very least, subscribing to this brand of identity-politics should prevent an organization from holding itself out as a model for integration.

C. The Death of Race- and Gender-Consciousness and Integration Success

This Part provides a separate basis to challenge the accuracy of the military’s integration success story: the fact that, with regard to promotion and retention (as opposed to recruiting), the Armed Forces have moved away from explicit considerations of how race and gender have historically been used to discriminate against minorities. Essentially, this Part details how the military became a victim of the power of its integration narrative, as the so-called success led to lawsuits alleging reverse discrimination. Building on the backlash against

98. 126 S. Ct. 1297 (2006).

99. *Id.* at 1313.

100. CRS REPORT, *supra* note 86, at CRS-31.

101. *See supra* notes 49–52 and accompanying text.

102. While the plaintiffs premised their case on a claim that the Solomon Amendment led to violations of their free speech rights, this was so styled due to the varying degrees of scrutiny afforded to identity classifications under Equal Protection analysis. Some classifications, such as race and gender, receive heightened forms of scrutiny as opposed to rational basis categories, such as sexual orientation. The strict scrutiny that the Court affords to national origin and racial classifications is articulated in cases such as *Korematsu v. United States*, 323 U.S. 214 (1944) and *Loving v. Virginia*, 388 U.S. 1 (1967). *Croson*, discussed *supra* note 53, provides the analysis for government race-based affirmative action programs. *Craig v. Boren*, 429 U.S. 190 (1976), articulates the intermediate scrutiny standard for gender. Rational basis analysis applies to most other classifications, including sexual orientation—although *Romer v. Evans*, 517 U.S. 620 (1996), represents the rare case where a government drawing a classification premised on sexual orientation was found to fail the test for lack of a legitimate purpose.

affirmative action which took place in federal courts in the late 1980s and early 1990s, a series of military reverse-discrimination cases led to significant changes to the equal opportunity language used by each of the Services in their promotion and retention guidance. These changes have resulted in race- and gender-neutral promotion policies. While presented here, the effects of these changes will be explored in Part III.

Until the end of the Clinton administration, the separate Services used meaningful race- and gender-conscious equal opportunity statements in the precepts to promotion boards.¹⁰³ The guidance was not precisely the same from year to year, but each statement mentioned the significance of race and gender identity—at times, including reference to the subtle ways in which identity can create disadvantage—and the effect of past histories of discrimination. For example, precepts in the Army typically included language to the effect that each board should consider “the past personal and institutional discrimination” faced by women and minorities in the service.¹⁰⁴ While the boards challenged in the reverse-discrimination cases did not use quotas to ensure race and gender representation in promotion results, the precepts did also instruct that “[t]he goal for this board is to achieve a percentage of minority and female selections not less than the selection rate for all officers in the promotion zone (first time considered category).”¹⁰⁵

In their precepts, the Navy and Marine Corps included language to the effect that equal opportunity should be available for all personnel “without regard to race, creed, color, gender, or national origin,” but also indicated that the boards should “be alert to the possibility that past discrimination may have placed these officers at a disadvantage in the Performance Evaluation System.”¹⁰⁶ The instructions went on to state minority officers, especially African Americans, had not historically been promoted at the same rates as Whites.¹⁰⁷ Finally, the Air Force, by comparison, used language that was a bit more tepid, stating, “[y]our evaluation of minority and some officers must clearly afford them fair and equitable consideration,” and “[i]n your evaluation of the records of minority and women officers, you should be particularly sensitive to the possibility that past individuals . . . may have placed these officers at a disadvantage from a total career perspective.”¹⁰⁸ While the precise language varied, previously, each of the Services utilized precepts that directed boards to

103. Precepts are instructions provided from the relevant Service Secretary to the Board, which direct the Board to be convened, provide a percentage of candidates to be selected, and set the rules and policies for the operation of the Board surrounding the selection. For a discussion of the race- and gender-conscious precept language, see notes 104–107.

104. RAND NATIONAL DEFENSE RESEARCH DIVISION, MINORITY AND GENDER DIFFERENCES IN OFFICER CAREER PROGRESSION 117 (Susan D. Hosek et al. eds, 2001) [hereinafter RAND MINORITY AND GENDER DIFFERENCES STUDY], available at http://www.rand.org/pubs/monograph_reports/MR1184/. See also Neely Tucker, *Judge Halts an Army Policy on Promotion: Ruling Says Gender, Race Overly Stressed*, WASH. POST, Mar. 5, 2002, at A1 (discussing the Army policy and the *Saunders* case).

105. RAND MINORITY AND GENDER DIFFERENCES STUDY, *supra* note 104, at 117.

106. *Id.* at 118.

107. *Id.* at 119.

108. *Id.* at 120 (alterations added).

consider the special history of challenges facing women and minorities.

These more explicit and remedial race-conscious policies were significantly disrupted by a group of antidiscrimination cases, which culminated in the holding in *Saunders v. White*.¹⁰⁹ In this case, the plaintiff, Lieutenant Colonel (Lt. Col.) Raymond Sanders, was a retired JAG officer who was white and male. He sued the Army claiming that due to the Army’s equal opportunity policy, he was discriminated against by the 1996 and 1997 Army JAG Colonel Promotion Selection Boards.¹¹⁰ Initially, he claimed that the Army’s precept referencing past discrimination and its directive that boards attempt to promote minorities and women at rates consistent with their overall selection rate,¹¹¹ were discriminatory—“unconstitutional both facially and as applied.”¹¹² Later, he amended his complaint to allege that he was “denied ‘equal protection of the laws [through the use of] racial and sexual classifications in [the] composition of the [promotion] selection board.’”¹¹³ In discussing Saunders’ standing to raise his claim, the court determined his injury was his “inability to compete on equal footing” with minority and female candidates and that the critical question was whether he was being “*personally* subject[ed] to different treatment” as a result of the Army’s equal opportunity policy.¹¹⁴

In the *Saunders* case, the Army provided no compelling interest for the consideration of race in the initial evaluation of records, instead choosing to argue that evaluation in Saunders’ case involved no racial classification.¹¹⁵ For

109. 191 F. Supp. 2d 95 (D.D.C. 2002). While *Saunders* was the case most relevant to promotion, it was predated slightly by the case of *Christian v. United States*, 46 Fed. Cl. 793 (2000) (rejecting the Army’s use of an identical equal opportunity policy statement regarding minorities and women being considered by its mandatory retirement boards).

110. *Saunders*, 191 F. Supp. 2d at 98. For the 1996 and 1997 boards, the Army used the following specific equal opportunity language:

In evaluating the files of the officers you are about to consider, be alert to the possibility of past personal or institutional discrimination—either intentional or inadvertent—in the assignment patterns, evaluations, or professional development of officers in those groups for which you have an equal opportunity selection goal. . . . This goal will not be interpreted as guidance to meet a particular quota. . . . Prior to recess, review and report in the board report the extent to which minority and female officers were selected at a rate less than . . . non-minority officers.

Id. at 121. In a separate appendix, the precept instructed that the goal was “to achieve a selection rate in each minority and gender group . . . that is not less than the selection rate for all officers in the promotion zone” *Id.* at 123. For a discussion of the Army-promulgated equal opportunity instructions prior to *Saunders*, see Bigelow, *supra* note 36, at 161–64; Capt. Holly O’Grady Cook, *Affirmative Action: Should the Army Mend It or End It?*, 151 MIL. L. REV. 113, 140–45 (1996) (noting that the board instructions, including equal opportunity guidance, were contained in DA Memo 600-2).

111. *Saunders*, 191 F. Supp. 2d at 113 n.22.

112. *Id.* at 98.

113. *Id.* (alterations added). His claim stated that discrimination existed both in the initial review stages of the Board and during the review and revote stages. *Id.* at 111. Lt. Col. Sanders also challenged the composition of the boards that failed to select him, but these challenges were denied.

114. *Id.* at 111 (alteration added).

115. *Id.* at 128. The Army’s position was in the 1996 and 1997 JAG Colonel promotion boards, the boards only revoted on one selectee—a white woman—and hence race did not factor into those boards’ decisions. *Id.* In their motion to dismiss, the Army claimed among other things that in 1996 the equal opportunity policy did not discriminate and that in 1997, Saunders would not have been

gender, the Army indicated the policy was necessary to “create the perception of equal treatment and . . . to redress the consistent under-selection of women in the promotion process.”¹¹⁶ The court was willing to apply the Army’s proffered rationale for using gender to the use of race and determined that neither the Army’s desire to create the perception of equal treatment, nor its commitment to remedying underselection would support the consideration of either race or gender in selection boards.¹¹⁷ In response to the argument that the Army’s present and past history of discrimination could be used to support the policies, the court, relying heavily on *Croson*¹¹⁸ and *Wygant*,¹¹⁹ stated:

Thus, in the instant case, the Court’s inquiry will not focus on whether the Army has a compelling interest in remedying past or present discrimination Instead, the Court will examine the statistical and testimonial evidence submitted by the Army to determine whether there is a strong basis in the evidence to support the Army’s conclusion that remedial action was necessary¹²⁰

Although the Army presented the court with a publication¹²¹ which detailed twenty years of data for black personnel, the court was not convinced by the data. In its ruling, the court found that: (1) the report did not indicate whether “there was discrimination against black officers from 1983 to 1993”; (2) “the data and conclusions therein relate to the Army in general, rather than specifically to the JAG Corps”; and (3) the conclusions within the report did not “represent strong or convincing evidence of past or present discrimination against black officers.”¹²² Specifically, the court took notice of the report’s conclusion that, at times, Blacks promoted as fast or faster to lower ranks and that the difference in promotion rates to senior ranks had been greatly decreased in the previous decade.¹²³ The court thus held the findings were not consistent with the requirement that the government’s discriminatory conduct be “pervasive, systematic and obstinate.”¹²⁴

The *Saunders* court did not find that the previous history of discrimination

selected even in the absence of the equal opportunity policy. *Id.* at 99.

116. *Id.* at 128 n.39.

117. *Id.* at 129.

118. *City of Richmond v. J.A. Croson*, 488 U.S. 469, 493 (1989) (“[T]he purpose of strict scrutiny is to ‘smoke out’ illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.”) (alteration added).

119. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1989) (“[E]videntiary support for the conclusion that remedial action is warranted becomes crucial when the remedial program is challenged”) (alteration added).

120. *Saunders*, 191 F. Supp. 2d at 130.

121. JAMES A. THOMAS, RACE RELATIONS RESEARCH IN THE UNITED STATES ARMY IN THE 1970’S: A COLLECTION OF READINGS (1988).

122. *Saunders*, 191 F. Supp. 2d at 130–31.

123. *Id.* at 131. Notably, this data is inconsistent with later promotion data, which found that men of color, women, and women of color in particular, have promotion rates poorer than those of white men. See RAND MINORITY AND GENDER DIFFERENCES STUDY, *supra* note 104, at 44–45.

124. *Saunders*, 191 F. Supp. 2d at 131–32 (citing *Adarand Constructors v. Peña*, 515 U.S. 200, 237 (1995)).

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in the Armed Forces was the compelling interest that supported the Army's program. Instead, the court determined that due to the Army's failure to present sufficient evidence that remedial actions in the form of racial classifications were warranted, they had failed to provide the "first step of strict scrutiny."¹²⁵ Moreover, despite the Army's claims that Saunders would have been unsuccessful even with no equal opportunity policy, the court placed the greatest amount of emphasis upon the question of whether the plaintiff was subject to a discriminatory process.¹²⁶ It then surmised that the Army had failed to "demonstrate that both the 1996 and 1997 selection boards would have reached the same conclusion regarding the promotion of plaintiff" in the absence of the equal opportunity directions.¹²⁷ In the end, the court held that the Army's policy, both at the initial stage and the review and revote stage, "unjustifiably provide[d] a benefit to minority and female officers," which facially violated the Fifth Amendment.¹²⁸

While the *Saunders* decision was not the sole impetus,¹²⁹ after the reverse-discrimination cases, a significant sea change was signaled for the use of equal opportunity statements in military promotions. Unlike the various race- and gender-conscious statements referenced above,¹³⁰ the next generation of statements used language that only referenced equality in the most general terms, if at all. For example, the Army simply abandoned any equal opportunity statement.¹³¹ The Navy was not so restrictive, but it backed away from its previous language as well. The equal opportunity guidance in the precept for the Fiscal Year 2007 (FY-07) Active Duty Navy JAG Commander Selection Board,¹³² which will be discussed more fully in Part III.B, indicated: "The

125. *Id.* at 133–34.

126. *Id.* at 111 (essentially, the Court's central inquiry was whether the 1996 and 1997 boards contained race and gender classifications that were motivating factors in the decision not to promote Saunders). In a footnote, the Court addressed at length the problems it believed ensued from accepting as a defense the claim that the plaintiff would not have received the desired benefit even where there was no consideration of race or gender. *Id.* at 112 n.21.

127. *Id.* at 112. The Court did acknowledge that the Army could not prove the contention because, in accordance with procedures, the records of the boards had been destroyed. *Id.* at 112–13.

128. *Id.* at 137 n.55 (alteration added).

129. After *Adarand*, President William Clinton ordered an affirmative action review that applied to the military. See *supra* note 47. Before *Saunders*, some military personnel saw that the Army policies would not stand up to the analysis in *Croson* and *Adarand*. See Bigelow, *supra* note 36, at 165–67; Cook, *supra* note 110, at 117.

130. See *supra* notes 103–108 and accompanying text.

131. For instance, the Army issues on a yearly basis a Department of Army Memorandum (DA Memo 600-2) promulgating policies and procedures for promotion boards. In 1996, the DA Memo 600-2 issued to the board that considered Saunders contained robust considerations of race and gender in the selection process; these guidelines included a goal that the minority selection numbers approximate the overall selection rate. See Cook, *supra* note 110, at 143. In 2006, DA Memo 600-2 provided no equal opportunity guidance, goals, or policies—only a requirement that boards report the statistics for "racial, ethnic, and gender categories . . ." See DA Memo 600-2, Policies and Procedures for Active-Duty List Officer Selection Boards 52 (Sept. 25, 2006), available at http://www.army.mil/usapa/epubs/pdf/m600_2.pdf at 52.

132. For this board, the precept was contained in a Memorandum from the Secretary of the Navy. Memorandum from the Secretary of the Navy to the President, FY-07 Active Duty

Department of the Navy is dedicated to equality of treatment and opportunity for all personnel without regard to race, creed, gender or national origin.”¹³³ While the statement goes on to say that these categories should neither “limit opportunities” nor create disadvantage, the ending paragraph instructs that the guidance should not be interpreted as permitting preferential treatment based on these classifications.¹³⁴ In addition to making no statements about the effects of past discrimination or how one might have been disadvantaged as a result of one’s minority status, the wording seems to suggest strongly that the goal is to ensure these identity categories do not factor into the board’s decisionmaking.

III. ASSESSING THE DANGERS OF PERCEIVED INTEGRATION SUCCESS

Certainly, it is true that the military has been more successful at achieving racial integration than many institutions, but this does not mean that military work environments have been unproblematic for individuals traditionally viewed as outsiders. Within this Part of the Article, two dangers of an overstated integration success story which pertain to the military as a work environment are analyzed. First, Part III.A explores the difficulties facing minorities and women who must manage the effects of identity within the military in a post-*Saunders* world. As Professor Kenji Yoshino has argued about civil rights in general, within the military, outsiders need not be white, male, heterosexual, and middle class to succeed within the institution; they need only act as if they are.¹³⁵ In looking at this need to assimilate, the effect of the uniqueness of the military environment on identity performance is considered, as well as how the predominant narrative of integration success may upset the desired aims of performing toward dominant norms. Principally, this first danger is understood to be that individuals marked by difference in military environments will find it difficult to be fully included in the manner necessary to ensure professional success. It is argued that this is the case because identity performance or other assimilative practices are undermined by the success story. In effect, the success story provides support for the military’s choice to elect race- and gender-neutral promotion and retention policies, which may tend to nullify any benefits of assimilative practices.

The second danger of the success story relates to institutional rather than personal behaviors. Where an organization views itself as generally succeeding with regard to integration, the danger arises that a type of complacency with

Commander Judge Advocate General’s Corps Promotion Selection Board and FY-07 Active Duty Lieutenant Commander Judge Advocate General’s Officer Continuation on Active Duty Selection Board (Mar. 22, 2006) [hereinafter FY-07 Active Duty Navy Commander JAG Precept], available at <http://www.npc.navy.mil/NR/rdonlyres/328036F7-A29D-4039-B025-C431CA23B3B4/0/FY07USN05JAGPrecept.pdf>. The FY-07 Board was the most recent Board at the time of this writing, the results of which are discussed in Part III.B, *infra*.

133. *Id.* at app. C.

134. *Id.* at app. C ¶ 4.

135. Yoshino, *supra* note 19, at 775. See also MOSKOS & BUTLER, *supra* note 7, at 93 (noting the work of Christopher Jencks, who has described the following paradox within race relations: “[T]hat while many [W]hites will treat [B]lacks as equals if they ‘act white,’ few are prepared to treat [B]lacks as equals if they ‘act black.’” (alterations added)).

that success may develop. This complacency will arise even as the organization continues to emphasize its commitment to diversity and equal opportunity for all within the institution.¹³⁶ As a way of exploring whether there is a disjuncture between the narrative of integration success and the experience of women and people of color in the military, Part III.B analyzes a series of years of Navy officer promotion statistics. The data reveal that minority selection numbers widely vary from year to year for some career fields, and that those inhabiting multiple identity categories face potentially unnoticed and enhanced impediments to success. Due to small sample sizes and the limited number of years discussed, the statistics are largely used descriptively rather than to make empirical claims. Even so, they do suggest that the military should be vigilant with regard to monitoring the promotion prospects of minorities.

A. Integration Success and Identity Performances within the Military

The exploration of workplaces as environments that reward and punish based on how workers present their race, gender, sexual orientation, and other ascriptive markers of difference has been brought to the fore in the work of scholars analyzing workplace culture,¹³⁷ identity performance,¹³⁸ and demands for assimilative conduct.¹³⁹ These theories, however, have not been significantly explored within the context of the military. Within the various military services, there are numerous and varied workplaces or commands. The structures of these commands are often unique, and typically defined by the unit's organization type and mission. For example, it is a given that within operational commands, at times, units deploy. Deployments require individuals to live in close quarters, often away from their primary worksites and, sometimes abroad. Additionally, the Services are environments with specific and heightened social norms. Not only are these norms raced and gendered,¹⁴⁰ but they may be exacerbated by the greater amounts of time members must spend both with

136. For example, the Chief of Naval Operations recently promulgated a Diversity Policy where diversity is described as “a strategic imperative.” See Chief of Naval Operations Public Affairs, *CNO Calls Diversity a Strategic Imperative*, NAVY NEWSSTAND (online), June 6, 2006, available at http://www.news.navy.mil/search/display.asp?story_id=24463.

137. Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623, 655–56 (2005).

138. Carbado & Gulati, *supra* note 15, at 1262–63; Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 701 (2001); *The Law and Economics of Critical Race Theory: Crossroads, Directions, and a New Critical Race Theory*, 112 YALE L.J. 1757, 1757 (2003); *Race to the Top of the Corporate Ladder: What Minorities Do When They Get There*, 61 WASH. & LEE L. REV. 1645, 1645 (2000). See also Harris, *supra* note 12, at 121–22.

139. Yoshino, *supra* note 19, at 771–83 (discussing the demands of assimilation in general, and specifically, the three methods for achieving it: conversion, passing, and covering); see also Barbara J. Flagg, *Fashioning A Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2036 (1995) (discussing Title VII as a tool to combat assimilationist workplace policies); Kimberly A. Yuracko, *Trait Discrimination as Race Discrimination: An Argument About Assimilation*, 74 GEO. WASH. L. REV. 365, 410–19 (2006) (proposing an approach to determine when employers should be prevented from maintaining rules requiring assimilation in appearance and speech).

140. See Katzenstein & Reppy, *supra* note 21, at 7 (claiming, with regard to the entrenched gendered nature of the forces, “the masculinist norms of military culture have come to be identified with an exclusionary male and heterosexist politics, an identity that is tenacious but not changing”).

fellow military members and away from family members and personal social networks.¹⁴¹ Finally, some challenges arise from the fact that the military is conceived not only as an organization that defines what one does, but also who one is. Based on these factors, negotiating identity in this environment may be especially challenging—involving, at times, legal and social consequences¹⁴² and a requirement that norms must be maintained across one's professional and personal life. Applying the identity performance and assimilative conduct research and theories, Part III.A.1 discusses the burdens attendant in service members having to manage their identities within the military, and it specifically analyzes the continuum or arc of performance ostensibly required for minorities and women to succeed. When attempting to chart a path to success, one must also consider the myriad strategies persons ascribed multiple markers of difference or deviance must deploy to “work” identity within the military. Part III.A.2 suggests that, given institutional behavioral norms and the organizational recommitment to colorblindness, it is questionable whether the military is an environment where much advantage can be gained through the working of one's identity.

1. *Myriad Strategies for Managing Multiple Identities in a Colorblind World*

In order to effectively illustrate the demands of performance on women and people of color within the Armed Forces, an example will be provided in this section. As this Article is concerned with the particular difficulties facing persons who inhabit multiple identity categories and to be consistent with the data discussed in Part III.B, the illustration will involve a military officer who is African-American and female. Devon Carbado and Mitu Gulati would describe the identity work necessary for success as contingent upon her negotiating her sense of self versus her understanding of the identity the military would prefer or value.¹⁴³ As an outsider, this would include choices about how to manage stereotypes associated with her race and gender.¹⁴⁴ Similarly, the scholarship of Kenji Yoshino suggests that she would need to make decisions about covering (downplaying) or reverse covering (emphasizing) her race and gender differences to succeed within what is certainly a predominantly white, male environment.¹⁴⁵ An example of her negotiating identity or covering could take

141. While many jobs involve working long hours, military forces are unique in that they deploy as units to support various missions. With regard to the Navy, in particular, forces are routinely deployed for several month periods on ships and submarines, forcing members to exist in close quarters.

142. Unlike most other workplaces, failing to observe proper courtesies in the military could result in administrative or criminal processing for any number of offenses. See 10 U.S.C. §§ 889–891 (2000) (codifying the Uniform Code of Military Justice, Articles 89, 90, and 91, respectively, pertaining to disrespect, disobedience, and insubordinate conduct offenses).

143. Carbado & Gulati, *supra* note 15, at 1263–64.

144. This includes the concept of avoiding the implications of negative stereotypes and exploiting positive ones. *Id.* at 1269–70.

145. This is not to suggest that there is an “essential” white, male experience, but rather a commentary that some social activities may become preferred among a sizeable number of any numerically dominant group, which then tend to set the requirements for suitable social behaviors for an organization on the whole. My own comment would be that participation in athletics—most

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the shape of avoiding displays of what might be considered ethnic speech¹⁴⁶ or appearance.¹⁴⁷ Reverse covering or exploiting identity could take place in those instances where she agreed to engage in recruiting activities or other duties where she would serve as a confirming symbol of the integration success narrative. Aside from merely deciding how to present or mitigate her race and gender, she might also have to make decisions about engaging in types of social activities prevalent among colleagues, even if it would not typically be her preference to do so.¹⁴⁸

In keeping with this Article’s previous analysis of how some critics create a false dichotomy between race and sexual orientation, other identity concerns can be explored were our black, female officer also to be gay. Beyond the race and gender work, there would also be some negotiation required around her minority sexual orientation. While there are some ways one might try to cover sexual orientation within the military,¹⁴⁹ the predominant form of assimilative

sports being acceptable, but some clearly preferred—was such an activity. This is not surprising, given that each Service has appearance and physical-fitness requirements. While maintaining fitness is a personal and command obligation, the additional social value of the activity was conveyed through these norms.

146. RAND MINORITY AND GENDER DIFFERENCES STUDY, *supra* note 104, at 61 (presenting the statement of a black officer: “You need to avoid ‘black’ mannerisms—speech, walk—because the first impression is very important.”).

147. This could extend to how she dresses or grooms in and out of uniform. For example, the military uniform requirements allow women to wear ethnic hairstyles as long as they otherwise conform to length and grooming requirements. The specific language provides:

Multiple braids are authorized. Braided hairstyles shall be conservative and conform to the guidelines listed herein. . . . Corn row ends shall not protrude from the head, and shall be secured only with inconspicuous rubber bands that match the color of the hair. Appropriateness of a hairstyle shall also be judged by its appearance when headgear is worn. All headgear shall fit snugly and comfortably around the largest part of the head without distortion or excessive gaps.

U.S. Navy Uniform Regulations (NAVPERS 15665I) § 2201.1b, *available at* http://buperscd.technology.navy.mil/bup_updt/508/unireg/uregMenu.html (last visited Mar. 31, 2007). While the regulations permit the wearing of ethnic hairstyles, making the choice to do so, however, certainly would be a move away from assimilative conduct. *See* Carbado & Gulati, *The Fifth Black Woman*, *supra* note 138, at 714–19 (offering the fictional story of “Mary,” a black woman with “dreadlocks” who was denied partnership in a corporate law firm where four other black women—with relaxed hairstyles—were selected, as an example of how, based upon identity performance or assimilative conduct, employers may treat differently persons sharing the same status markers of identity); Flagg *supra* note 139, at 211–12 (discussing potential consequences that can arise at work when a black female employee conveys a cultural perspective through speech and grooming choices, but how similar consequences can also occur for a black woman attempting to fit in with transparent but majority-influenced workplace norms).

On using hairstyle as a display of racial identity, see Ashleigh Shelby Rosette & Tracy L. Dumas, *The Hair Dilemma: Conform to Mainstream Expectations or Emphasize Racial Identity*, 14 DUKE J. GENDER L. & POL’Y 407, 408 (2007); Laura Morgan Roberts & Darryl D. Roberts, *Testing the Limits of Antidiscrimination Law: The Business, Legal and Ethical Ramifications of Cultural Profiling at Work*, 14 DUKE J. GENDER L. & POL’Y 369, 378–79 (2007) (discussing the ways wearing an “Afro” may be perceived as a political choice at work).

148. Carbado & Gulati, *supra* note 15, at 1264 (analyzing one type of identity compromise as a person choosing to socialize with one’s colleagues for the purposes of improving his or her chances for promotion).

149. According to Kenji Yoshino, since the military claims to prohibit conduct rather than status,

conduct would be an attempt to “pass” as straight.¹⁵⁰ Doing so within the military environment is necessary to avoid being administratively discharged or criminally prosecuted.¹⁵¹ This behavior may not be as simple as not mentioning one’s same-sex partner or dating preferences, because “Don’t Ask, Don’t Tell” mandates silence for gays serving in the Armed Forces.¹⁵² The goal of passing would require the service member to put to rest any notion of a presumed difference, which might also make it necessary to display the outward signs of a heterosexual lifestyle.¹⁵³ Of note, in the military, her passing behavior is undertaken to avoid the harshest consequences of difference, but passing, covering, reverse covering, or any intentional “working”¹⁵⁴ of identity all serve the same essential purpose—to enhance career longevity and opportunities for minorities by presenting one’s status-marker of identity in a particular way. At bottom, however, each mode of presenting identity is done to achieve an

a gay sailor or soldier could theoretically self-identify as gay and cover by abstaining from sodomy. Yoshino, *supra* note 19, at 843. This identification of a possible opportunity to cover is somewhat unlikely, given that the military’s anti-homosexual policy states that, apart from acts, a member can be separated for making a statement “that a reasonable person would believe was intended to convey that a person engages in, attempts to engage in, or has a propensity to engage in homosexual acts.” DoDD 1332.14, *supra* note 79, encl. 2, at E2.1.16. See also Military Personnel Manual, Separation by Reason of Homosexual Conduct, at § 1910-148 (Apr. 25, 2005), available at http://buperscd.technology.navy.mil/bup_updt/upd_CD/BUPERS/MILPERS/MilpersmanPDF_TOC.htm. Still, it is technically possible that Yoshino is correct, because federal policy guidance dictates that a statement that one is a homosexual can be overcome as a basis for separation where the military member demonstrates that he or she is not a person who engages in the conduct, notwithstanding the statement. See 10 U.S.C. § 654(b)(2) (2000).

150. There are a number of ways to define this concept of identity pretense; Yoshino describes passing as “secretly retaining” one’s underlying identity even as “she presents a separate face to the outside world.” Yoshino, *supra* note 19, at 813.

151. If she engaged in same-sex sexual relations, she could be charged with violating a sex-specific crime like sodomy. See 10 U.S.C. § 925 (2000) (codifying the Uniform Code of Military Justice, Article 125). Even though *Lawrence v. Texas*, 539 U.S. 558 (2003), held that the Due Process Clause protected adult, consensual, private same-sex sexual conduct from government intervention or criminalization, the ruling has not led to the demise of Article 125. See *United States v. Marcum*, 60 M.J. 198, 206 (C.A.A.F. 2004) (the Court of Appeals for the Armed Forces applying the *Lawrence* constitutional analysis to the military context where a soldier was convicted of “non-forcible sodomy” in violation of Article 125, UCMJ, and stating: “In the military setting . . . an understanding of military culture and mission cautions against sweeping constitutional pronouncements that may not account for the nuance of military life.”) Consequently, the court reasoned that a “contextual, as applied analysis, rather than facial review” of Article 125 was necessary to review convictions for non-forcible sodomy, particularly in the military environment. *Id.* at 205. In the alternative, she could be charged with a more generalized offense like conduct unbecoming an officer and gentleman, 10 U.S.C. § 933 (2000) (codifying the Uniform Code of Military Justice, Article 133). Under military and Navy policy, she could be additionally or instead administratively discharged. See 10 U.S.C. § 654(b) (providing that, unless the conduct is a departure from their customary behavior, service members “shall be separated” for engaging in homosexual conduct); Military Personnel Manual, *supra* note 149, Separation by Reason of Homosexual Conduct, at § 1910-148 (allowing separation based on homosexual conduct, which can be proved through “credible information” such as a statement conveying one’s orientation).

152. See *supra* notes 78–80.

153. Yoshino describes this type of passing strategy as “counterfeiting”—attending company functions and making vague references to imply heterosexuality. Yoshino, *supra* note 19, at 812.

154. On the concept of working identity, see *supra* notes 15 and 20.

assimilative effect.

Having or choosing to “work” one’s identity in the military clearly presents challenges and problems. As the example above demonstrates, one of the challenges has to do with the breadth of performance required, when multiple differences exist across race, gender, sexuality, or other identity categories for a single person.¹⁵⁵ Not only is there the problem of how many strategies must be deployed, but there are issues pertaining to what Carbado and Gulati have identified as backfire and the dangerous interplay of stereotypes for persons inhabiting multiple and interconnected identities.

Backfire describes a condition where co-workers regard the performing individual’s behavior as manipulative or strategic.¹⁵⁶ For example, a backfire could occur if military members viewed the willingness of the above-described officer to be a poster-child for military diversity in recruiting as a decision to take unfair advantage of race and gender. The interplay-of-stereotypes issue revolves around the danger that “taking steps to negate one kind of stereotype will activate some other negative stereotype.”¹⁵⁷ For example, a black, gay woman could attempt to overcome claims of antisocial conduct created by her race and gender difference by engaging in physical training or sporting activities with co-workers.¹⁵⁸ She could, however, be punished if she performs too well, because this competence or talent could be interpreted as a proxy for masculinity, which could cause some to question her sexual orientation.

These types of examples illustrate the complications of managing identities involving interconnected categories of difference, and within a particularly intractable social environment. As John Calmore has surmised, with regard to negotiating race alone: “Performing blackness is neither romantic nor heroic. It is a struggle. While racial performance furthers agency, it is neither autonomous nor transcendent.”¹⁵⁹ Still, outsiders massage identity in an effort to mold difference into advantage, while remaining mindful that their choices are constrained by the fact that one cannot escape belonging to groups with ascribed traits, the presentation of which create reactions in others.¹⁶⁰ The ultimate problem—that within the military all of this identity work may be for naught—

155. The difficulties are understood as particularly harrowing when one considers the position of intersectionality scholars that the social construction of identity is not a simple additive equation of race, plus gender, plus class. Instead, inequality works across the categories in an “interactive and multiplicative” manner. See Stacy De Coster & Karen Heiner, *Crime at the Intersections: Race, Class, Gender and Violent Offending*, in *THE MANY COLORS OF CRIME* 138–39 (Ruth Peterson et al. eds., 2006) (citation omitted); Darren L. Hutchinson, *Identity Crisis: “Intersectionality,” “Multidimensionality,” and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 309–10 (2001) (“Multidimensionality posits that the various forms of identity and oppression are ‘inextricably and forever intertwined’ and that essentialist equality theories ‘invariably reflect the experiences of class- and race-privileged’ individuals.”) (citation omitted).

156. Carbado & Gulati, *supra* note 15, at 1291.

157. *Id.* at 1292.

158. See RAND MINORITY AND GENDER DIFFERENCES STUDY, *supra* note 104, at 59–63, 85–91 (discussing social separations in the military based on race and gender, respectively).

159. Calmore, *supra* note 12, at 110 (citation omitted).

160. Harris, *supra* note 12, at 121–22 (discussing the distinction between attempting to “work” identity and simply presenting one’s status marker of difference).

is next considered.

2. *Ineffective Assistance of Performance?*

One of the central claims of this Article is that, at times, those identified by multiple markers of difference, such as women of color, are subject to unsteady and disparate promotion results, and that perhaps their identities factor into these results.¹⁶¹ It only makes sense that these women would attempt to fit in to their work environments in any reasonable way that would potentially signal success. Within the area of promotions, in particular, Carbado and Gulati make this point: “Employees who wish to be promoted have an incentive to take extra actions to demonstrate that they have the qualities the employer values. This incentive is especially strong within an institutional context in which the employer is making decisions for scarce promotion slots.”¹⁶²

In the alternative, one could suggest that looking to promotion results provides no insight into the management of identity and stereotypes within the Services. This comment, however, seems unpersuasive for reasons beyond the Carbado and Gulati explanation. First, the military, by its very nature, requires all members to sublimate, to some extent, individual expressions for the interests of morale and unit cohesion.¹⁶³ Hence, at some level, all members are performing or conforming to community norms.¹⁶⁴ Second, as stated earlier, some identity performances occur inadvertently, because all who are different have their conduct judged against stereotypes. If one is unwilling to accept that women and minorities (and those who are both) are somehow inherently less worthy of promotion selection, it becomes necessary to consider what unique factors may undermine the effectiveness of assimilative identity performances.

If minority members are actually working to mitigate the potential costs of difference and fit in to the military environment, what then accounts for how poorly men and women of color sometimes perform in promotion processes? The answer has to do with how promotion processes work and the nature of military institutions. Promotion boards are comparative processes designed to evaluate and select those officers who have performed well enough to be

161. This is first a comment on the notion that, whether or not they attempt to work identity to their advantage, all women and persons of color—by their very nature of existing within minority identity categories—present a “performance identity.” See Harris *supra* note 12, at 121; see also Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination By Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1177–79 (2004) (discussing alternatively that the choice to perform identity may be an invisible decision or consciously undertaken). Additionally, belonging to minority identity categories triggers at least unconscious bias on the part of some.

162. Devon W. Carbado & Mitu Gulati, *Interactions at Work: Remembering David Charny*, 17 HARV. BLACKLETTER L.J. 13, 18 (2001).

163. See RAND SEXUAL ORIENTATION STUDY, *supra* note 3, at 288 (noting that the military defines unit cohesion in terms of group loyalty and common purpose). See also Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (citing Orloff v. Willoughby, 345 U.S. 83, 92 (1953) (“The essence of the military service ‘is the subordination of the desires and interests of the individual to the needs of the service.’”)).

164. Whether the conduct works or not, junior personnel are encouraged to subscribe to tradition and convention in order to facilitate improved vertical and horizontal relationships. See RAND MINORITY AND GENDER DIFFERENCES STUDY, *supra* note 104, at 60–63.

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promoted to the next higher rank. The boards consider complete service records, which include one’s documented history of assignments, performance, awards, training, education, etc. The primary method of assessing performance is the performance evaluation. Some part of military performance evaluations involves an attempt by reporting seniors (evaluating officers) to describe current duties and assess the performance and potential of those officers being rated. In the Navy these evaluations are Fitness Reports (FITREPs)¹⁶⁵ and they not only assign numerical scores over seven performance traits,¹⁶⁶ but they also rank individuals in comparison to others of the same rank who are working for that evaluating officer.¹⁶⁷ Each Service uses a unique evaluation system and form, but all involve some type of narrative commentary¹⁶⁸ that promotion boards weigh heavily when selecting which officers will be promoted.¹⁶⁹

I have every confidence that the evaluating officers and board members attempt to assess people of color and women in same fashion that they assess white males.¹⁷⁰ FITREPs and board deliberations, however, involve subjective perceptions—perceptions that may unconsciously be affected by race and gender bias. The board members themselves may not even be aware of the harmful ways in which they are influenced by gender or race. A recent gender-discrimination case involving a number of the Navy JAG Corps Commander Promotion Boards considered in this Article makes the point.¹⁷¹

In the case, a female lieutenant commander (Lt. Cmdr.) sued the Navy based on comments made to her by a member of one of the boards that considered her promotion to commander.¹⁷² Allegedly, a member of the 2001

165. For the Navy: “The FITREP includes a description of the current duties and responsibilities of the officer, a physical readiness rating, a performance rating, comments describing the officer’s performance” RAND MINORITY AND GENDER DIFFERENCES STUDY, *supra* note 104, at 112.

166. The seven traits are: professional expertise; command or organizational climate/equal opportunity; military bearing/character; teamwork; mission accomplishment and initiative; leadership; and tactical performance. Fitness Report and Counseling Record (E7-O6), NAVPERS 1610/2 (Rev. Mar. 2002) [hereinafter NAVPERS 1610/2], available at http://buperscd.technology.navy.mil/bup_updt/upd_CD/BUPERS/FORMS/PDF/n1610_2.pdf. Officers are rated on a five-point scale, where 1 is “below standards” and 5 represents “greatly exceeds standards.” *Id.*

167. RAND MINORITY AND GENDER DIFFERENCES STUDY, *supra* note 104, at 112–13. Individuals are assigned to one of the following promotion categories: early promote, must promote, promotable, progressing, significant problems. Each FITREP displays the individual’s promotion rating, and a summary for all officers of the same rank the reporting senior evaluates in that cycle. NAVPERS 1610/2, *supra* note 166.

168. RAND MINORITY AND GENDER DIFFERENCES STUDY, *supra* note 104, at 111–16.

169. *Id.* at 112.

170. Certainly, however, service members have alleged intentional discrimination by superior officers. See *infra* notes 276–279 and accompanying text (discussing Chappell v. Wallace, 462 U.S. 296 (1983)).

171. In the interest of full disclosure, it should be acknowledged that I know Elizabeth Miller, the plaintiff in the case. We served in different divisions of the Office of the Judge Advocate General of the Navy, in the early 2000s. However, I have neither spoken to her since that time nor was I aware of her lawsuit.

172. Miller v. Dep’t of the Navy, 383 F. Supp. 2d 5 (D.D.C. 2005) (alleging gender bias in the FY-02, FY-03, and FY-04 Active Duty JAG Commander Boards), *rev’d and remanded*, 476 F.3d 936, 937–38 (D.C. Cir. 2007) (finding a “material error” in the Navy’s consideration of Lt. Cmdr. Miller’s claim

board informed the female lieutenant commander that she “had been in a ‘difficult zone’ because there ‘were a lot of very competitive women in the zone’ that year.”¹⁷³ Additionally, he opined that her promotion chances would be better the following year “‘because the women in the prospective zone were weaker.’”¹⁷⁴ At some level, it appears that the board member’s comments were designed to inform and console the affected officer, especially since he was speaking of deliberations that are supposed to be confidential.¹⁷⁵ One interpretation of his statement, however, is that he was considering women as a class as vying for a limited or separate number of spots. In other words, this female officer—Lt. Cmdr. Miller—was not competing with all officers for each available slot, but only against women, for whom there were presumably a smaller number of promotions available.¹⁷⁶ To be promoted to one of these fewer spots she would need to be one of the “best women.”¹⁷⁷ As a result of the comments, Lt. Cmdr. Miller alleged that the board was “not impartial” but “prejudiced” in its deliberations and she requested a special selection board, which the Secretary of the Navy denied.¹⁷⁸ She sued to challenge the Secretary’s decision. The trial court, citing to the “highly deferential” nature of military promotion decisions,¹⁷⁹ granted summary judgment to the Navy.¹⁸⁰ The matter has now been reversed and remanded for further action by the Navy.¹⁸¹

The alleged bias operating in Lt. Cmdr. Miller’s case stems from the method of comparison undertaken by at least one board member. Additionally, bias may simply result from the nature of the documents presented to the board. In a board, perceptions about a member can be communicated directly through

and remanding the matter to the district court for the application of the correct section of the relevant regulation).

173. *Miller*, 476 F.3d at 937.

174. *Id.*

175. *See, e.g.*, FY-07 Active Duty Navy Commander JAG Precept *supra* note 132, at app. A, ¶2.d (providing that members are not to reveal board deliberations). One of Lt. Cmdr. Miller’s complaints referred to the board member violating the confidentiality oath by speaking with Lt. Cmdr. Miller. *Miller*, 383 F. Supp. 2d at 11–12. This confidentiality was also the reason the court denied her Freedom of Information Act request to see the deliberations of the boards. *Id.* at 17.

176. Plaintiff claimed that the board member “improperly ‘considered men and women differently and as if they were not competing against each other, but rather just competing against their own gender.’” *Miller*, 383 F. Supp. 2d at 8.

177. This conduct strikes me as comparable to what Stephen Carter has termed the “best Black” syndrome, which involves an employer hiring or promoting a black employee because he or she is the best applicant of their race, rather than the best candidate overall. *See* STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 49 (1991). This philosophy both serves to suggest that minorities cannot compete with non-minorities and to justify that the “token black is the only black person needed.” *Id.* at 50–52. *See also* Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being “Regarded As” Black, and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283, 1315–16.

178. *Miller*, 476 F.3d at 937. According to the Chief of Naval Personnel, her non-selection was based upon “her failure to perform at a consistently outstanding level and to perform in arduous duty assignments rather than a board with gender bias.” *Miller*, 383 F. Supp. 2d at 8.

179. *Miller*, 383 F. Supp. 2d at 10.

180. *Id.* at 12.

181. *See supra* note 172.

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a fitness report (FITREP) or indirectly through any document before the board that serves to communicate the reputation of the candidate. Some reputation data is more powerful, especially data that communicates opinions from respected senior officers who serve as mentors. Mentors, who also happen to be reporting seniors, can use FITREPs to communicate their high regard. Others may write letters of recommendation to boards or intervene in careers to ensure competitive assignments or deployment opportunities. Whatever their conduct, they are perceived as critical to the careers of junior officers.¹⁸²

Based on the foregoing, should a woman of color deliberately choose to “work” her identity, the purpose would be to ensure positive assessments are reflected within service record documents—chiefly through performance evaluations. Given the board results considered in this Article, it would seem that assimilative conduct (intentional or not) is not a particularly effective strategy for guaranteeing success within the military promotion system. Perhaps it is the uniqueness of the military environment that renders assimilative-conduct plays less useful. “Working” one’s identity is about mitigating or accentuating identity stereotypes,¹⁸³ which active duty personnel rarely acknowledge or speak of as affecting military success. Instead, when officers speak of enhancing (intangible) factors leading to career success, they understand that a separate set of unspoken norms and considerations are controlling. These considerations (most of which are not empirically tested) are not finite, but can extend to such considerations as whether you attended a service academy (or your commissioning source more generally),¹⁸⁴ your undergraduate or graduate institution, whether you have obtained an advanced degree, your history of assignments (including whether you have served in a joint or operational billet), and the decision to strategically cultivate relationships with well-regarded and highly placed mentors. Having to manage these considerations—several of which are unique to the military—may account for why identity performances prove less effective within the environment.

Negotiating community norms that are unrelated to identity is a task that everyone must manage at work.¹⁸⁵ The military is just like many work environments where, in addition to managing workplace norms, women and minorities have to do some extra work—related to undermining identity stereotypes—to succeed.¹⁸⁶ Unlike other places, the military presents at least four

182. For instance, an Army study indicated that “most officers who did not have mentors had shorter military careers, while those with strong mentors ascended to the higher levels of the field grade ranks, and in many cases, even achieved the rank of general officer.” REYES, *supra* note 38, at 9. Black officers serving as respondents in a study shared their perceptions that mentoring was critical to success and that “it was less common for senior officers to mentor young black officers.” RAND MINORITY AND GENDER DIFFERENCES STUDY, *supra* note 104, at 60.

183. See *supra* notes 144–150 and accompanying text.

184. On the advantages that accrue to academy graduates, see RAND MINORITY AND GENDER DIFFERENCES STUDY, *supra* note 104, at 8; REYES, *supra* note 38, at 10 (“Many black officers serving during the early 1980s felt that officers commissioned by the United States Military Academy (USMA), as opposed to the Reserve Officer Training Corps (ROTC) or the Officer Candidates School (OCS), had an overwhelming advantage.” (citation omitted)).

185. See Green, *supra* note 134, at 634–40.

186. On the nature of this extra work, see Emily Houh, *Critical Race Realism: Re-Claiming the*

somewhat unique problems: (1) that despite being raced and gendered, the environment is understood by most in the military and society to be unbiased (an integration success); (2) that this attitude about equal treatment has found its way into the performance evaluation and promotion processes; (3) that one's commitment to the military can be daunting as it is understood as larger than a mere commitment to one's work or profession and exists twenty-four hours a day, seven days a week,¹⁸⁷ and (4) that being a minority, especially a person inhabiting multiple bases for subordination, makes it more difficult to negotiate even the non-identity based norms. For an illustrative example, we can return to our black, gay female officer, who (to be consistent with the *Miller* case considered above and the board data reviewed in Part III.B), will be placed in the Navy JAG Corps.

Despite a Service history of race and gender exclusion, and a current policy that prevents women from serving in combat,¹⁸⁸ the Navy enjoys the same reputation as the other Services with regard to its integration success. This means that there are fewer concerns about the types and amounts of discrimination minorities and women face. Additionally, as we can see from the equal opportunity language from the FY-07 Active Duty Navy JAG Commander Promotion Board precept, the only comments on race and gender state in effect that identity should not be used to disadvantage candidates.¹⁸⁹ As such, officers on promotion boards are neither given an opportunity to consider the effects of past discrimination nor to search for the more subtle ways that race and gender bias might currently be manifested (through assignments, lack of mentorship, etc.). Further, if Lt. Cmdr. Miller is correct, and some board members place women in competition against each other for fewer spots, this practice could be especially detrimental for women of color.¹⁹⁰

Antidiscrimination Principle Through the Doctrine of Good Faith in Contract Law, 66 U. PITT. L. REV. 455, 473 (2005) ("Thus identity work burdens outsiders . . . not only in that this work requires them to do more on a physical, mental, and emotional level, but also because it causes them to incur work and identity-related risks that their insider counterparts do not incur."). See also Roberts & Roberts, *supra* note 147, at 378 (noting that "[m]ost workers strategically enact their identities in order to signal to employers that they possess the requisite technical and social competencies as well as the firm's desired character traits" and indicating that certain employees—those who engage in cultural displays of identity—have to expend greater efforts to signal "competence and character") (alteration added).

187. Not surprisingly, it was this characteristic of service that legislators seized upon when discussing why open service by gays and lesbians would be problematic. See 10 U.S.C. § 654(a)(9)–(10):

(9) The standards of conduct for members of the armed forces regulate a member's life 24 hours each day beginning at the moment the member enters military status and not ending until that person is discharged

(10) Those standards of conduct . . . apply to a member of the armed forces at all times that the member has that status, whether the member is on or off base, and . . . on or off duty.

Id.

188. In the Navy, that is mostly limited to preventing her from serving on submarines, see *supra* note 72, an environment where no lawyers are permanently assigned.

189. See *supra* note 132 (quoting the equal opportunity language in the precept).

190. On the one hand, if a board member "slots" not only women, but women of color, a black woman might be understood as competing with other black women for very few or, perhaps, only

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With regard to community norms, her opportunities for success would be improved if she attended the U.S. Naval Academy. Even if she were not an academy graduate, part of her success more generally could depend on where she graduated from college and law school, as she would potentially gain some positive attention by having either attended undergraduate and graduate institutions that are well-regarded or from which other senior officers—ones who might choose to mentor her—have graduated.¹⁹¹ Importantly, she would receive some advantage had she been selected into the JAG Corps through the Navy's Law Education Program (LEP).¹⁹² The advantage here is twofold: first, the program selects from officers already in the Navy, so she would have been commissioned through the Academy, the ROTC program, or Officer Candidate School *and* have experience in another career field, often a line rather than staff profession; and second, the program attempts to tap career officers, which becomes another factor in deciding who should succeed more generally. If she is not a LEP accession or someone with prior military experience coming back into the service after funding her own legal career, then her introduction to the military and JAG Corps will extend only to the more modest training and indoctrination received by all persons whose first contact with the military is through the selection programs used to recruit law school graduates.¹⁹³ The remainder of the community considerations, which relate to matters such as quality of assignments¹⁹⁴ and mentorship, are critical, because—unlike the

one black female slot. On the other hand, even a well-meaning board member might consider that black women need not be regarded as having separate concerns from either women or racial minorities—especially since the success narrative would predict the fair treatment of each of these groups.

191. While no study of the effect of college/law school attended has been conducted for JAG officers, a 1995 study of officer promotions in the Navy and Marine Corps determined that "officers who graduated from more competitive institutions of higher learning, majored in technical subjects, and had higher grades received more positive performance evaluations that led directly to higher promotion rates to Lieutenant Commander." RAND MINORITY AND GENDER DIFFERENCES STUDY, *supra* note 104, at 47. Graduating from a Historically Black College or University (HBCU) might hurt her as well, given that these schools are lesser known. Charles Moskos claims that HBCU attendance and the preparation provided at these institutions may explain the lower promotion rates for black junior officers in the Army. See Moskos, *supra* note 5, at 17. It is not clear that this issue is equally problematic in each Service. The Navy, for instance, has very few ROTC units at HBCUs. MOSKOS & BUTLER, *supra* note 7, at 138 (footnote omitted). By contrast, as of the mid-1990s, HBCUs had produced nearly half of the black officers in the Army. *Id.* at 135.

192. Each Service offers a funded legal education program. For the Navy's program, see Navy Law Education Program, SECNAVINST 1520.7F (Sept. 6, 2002), available at http://dodssp.daps.mil/Directives/1520_7F.pdf. For information on the Army's funded legal education program, see Judge Advocate Legal Services, Army Regulation 27-1, at 37-41 (Oct. 30, 1996), available at http://www.army.mil/usapa/epubs/pdf/r27_1.pdf.

193. The Navy JAG Corps selects new accessions for their Student Program from among students enrolled in law school. They also select law graduates through their Direct Appointment Program. For information on these programs, see The Official Web Site of the United States Navy JAG, Careers, <http://www.jag.navy.mil/Careers/CareersHowToApply3.htm> (last visited Apr. 1, 2007).

194. The concept of "good" is relative and shifting. In the recent past, "good assignments" included those jobs with significant responsibilities, certain operational jobs, positions in a joint environment, and overseas positions. In interviews conducted in one study, "many black officers

matters discussed immediately above—they involve matters open to an ongoing process of negotiation throughout one’s career. Unfortunately, they are also the types of considerations for which identity difference may be the most punitive.

On the surface, all of these community considerations are race- and gender-neutral. This, however, is misleading. Some of the keys to promotion success revolve around other types of selections. First, unless the academies and programs such as LEP or the funded postgraduate legal education (LL.M.) program select women of color in sufficient numbers—or more consistently than promotion boards—black women will be at a systemic disadvantage.¹⁹⁵ Second, many of the other conditions of success are silently identity-dependent. For instance, mentoring depends on our black, female and closeted lesbian being selected by someone as a mentee. While empirical data on interracial mentoring is thin,¹⁹⁶ black officers certainly perceive that mentoring relationships are more difficult to form because they require “that the [commanding officer] has to see himself as a young [officer] in you.”¹⁹⁷ Identity differences make this vision hard to come by. To the extent minority officers attempt to “work” identity, it is as a part of negotiating the necessary social relationships that all officers need,¹⁹⁸ but minority officers believe they must struggle to create. Hence, not only do minorities have to manage the norms and considerations that all officers do, but they also have to manage the myriad elements of identity—some of which also affect the aforementioned norms and considerations. It would seem to follow course that the greater one’s differences from norms, the more work one must do. When one considers that the need for this identity work can be continuous, requiring officers to censor themselves at work and beyond (to make sure that unacceptable or unappreciated behaviors are not reported back to military authorities), it is no wonder that performance wilts or loses strength under this burden. That the work must be done at all, however, signals at least one way that the integration success story is oversimplified and therefore should be subject to continued interrogation.

B. A Promotion Data “Snapshot” and the Limits of Integration Success

Part III.A was about the ways in which minority and women service members must do extra work to achieve the success that many would assume the organization freely facilitates. This Part uses selection board data for Navy JAG Commander promotions to suggest how difficult it can be to achieve that success. Related to the larger aims of this Article, this Part places the integration success narrative into focus by shifting from looking at the significant numbers

expressed a sense that they are often shut out of career-enhancing assignments.” RAND MINORITY AND GENDER DIFFERENCES STUDY, *supra* note 104, at 63.

195. In the twelve-plus years I spent on active duty in the U.S. Navy, I met one African-American, female commander in the JAG Corps, who was an academy graduate, a LEP accession, and who received a funded LL.M. She has since retired. Information on the Navy’s fully funded legal education (LL.M.) program is contained in JAGINST. 1520.1A (Oct. 7, 2005).

196. RAND MINORITY AND GENDER DIFFERENCES STUDY, *supra* note 104, at 63.

197. *Id.* at 60–61 (alterations added).

198. *See supra* note 182.

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of all minorities and women within the Services generally to concentrating on promotion success for some officers, specifically. While promotion rates for enlisted members are also important, they do not reveal vertical success (the success of minorities at integrating the highest levels of military senior leadership). Focusing on senior-level officer promotions makes sense for a number of reasons. First, military sociologists have surmised that "[t]he quickest way to dispel stereotypes of black incapacity is to bring white people into contact with highly qualified Afro-American leaders."¹⁹⁹ Second, the accession and promotion rates for enlisted persons of color are typically superior to those numbers for the officer ranks,²⁰⁰ so in ways the officer population—at least with regard to its representation and success—is a riper population for study. Moreover, the military practices a form of "up or out" policy, whereby enlisted and officer members who fail to promote in a timely manner may be discharged.²⁰¹ For officers, the timing is more severe. At any rank, those who twice fail to select for promotion to the next higher grade "shall be involuntarily released from active duty . . ."²⁰² Finally, looking at promotions at the critical juncture where an officer moves from a junior to a senior officer, may reveal how race and gender function as a glass ceiling,²⁰³ especially with regard to persons inhabiting multiple identity categories.

The analysis of data that follows is designed to serve as a qualitative snapshot of the types of uneven results that can occur in a color- and gender-blind promotion world. It is not meant as an overarching comment on identity

199. See MOSKOS & BUTLER, *supra* note 7, at 135.

200. See *id.* at 44–47 (discussing the promotion success of black Non-Commissioned Officers); Moore, *supra* note 59, at 130–31 (detailing decreasing numbers for black women among the lower enlisted ranks, but increases among the senior enlisted in the late 1980s).

201. Within some career fields, the board that considers promotion to the O-5 rank also considers which of the O-4s who have failed to promote will be retained on active duty. This is the case in the Navy JAG Corps. See *supra* note 132; see also The United States Military, Officer Rank Insignia, <http://www.defenselink.mil/specials/insignias/officers.html> (last visited Apr. 1, 2007) (illustrating hierarchy of officer ranks in the U.S. Army, Navy, Coast Guard, Marines, and Air Force). The Services have varied up or out policies for enlisted members. In the Navy, enlisted members who are promoted to Third Class Petty Officer (E-4) may remain on active duty for eight years; enlisted members who are promoted to Second Class Petty Officer (E-5) may remain until fourteen years; and those who are promoted to First Class Petty Officer (E-6) may remain twenty years—which renders them retirement eligible. See Military Personnel Manual, *supra* note 149, High Year Tenure, at § 1160.120; see also The United States Military, Enlisted Rank Insignia, <http://www.defenselink.mil/specials/insignias/enlisted.html> (last visited Apr. 1, 2007) (illustrating hierarchy of enlisted service member ranks in the U.S. Army, Navy, Coast Guard, Marines, and Air Force).

202. 10 U.S.C. § 6383 (2000). For an example of a policy implementing the statute within the Navy, see SECNAVINST 1920.7B (Jan. 30, 2006). See also Military Personnel Manual, *supra* note 149, Involuntary Release from Active Duty of Reserve Officers, at § 1920-110. Cf. Kathleen T. Rhem, *Up-or-Out Personnel Policy "Lousy Idea," Rumsfeld Tells Sailors*, AM. FORCES PRESS SERVICE (online ed.), Nov. 15, 2003, available at http://www.defenselink.mil/news/Nov2003/n11152003_200311156.html. The statute, however allows a Service-specific administrative board to retain some number of officers who have been twice passed over. See 10 U.S.C. § 6383.

203. One study has determined that this circumstance is certainly true as one progresses up the senior ranks. See Hall, *supra* note 22, at 155 (discussing a 1995 GAO report finding that despite predictions that minorities would be represented at the senior officer level, no such representation occurred and that "there was a 'glass ceiling' for Blacks in the upper ranks").

politics and promotions for the entire military, although there is some data to suggest a larger problem than is presented here.²⁰⁴ There is, however, value in looking at promotion statistics for a specific career field (designator or Military Occupational Specialty) within a single Service. Concentrating on such a population allows one to demonstrate how broader population statistics for the Services can obscure certain race and gender effects in sub-populations. This is stated to suggest that, if one were to only look at the numbers for women and minorities in the Services, in general, they would appear more favorable than if we separate the total numbers into statistics for enlisted service members on active duty,²⁰⁵ and the smaller group comprising minority officers.²⁰⁶ It is also very likely that looking at the data for all officers in all services would obscure numerical disparities within a particular force.²⁰⁷ Additionally, the court that issued the opinion dictating how race and gender can be considered by military promotion boards suggested that the most compelling evidence would not only be service-specific, but specific to particular boards within specific career fields.²⁰⁸ Finally, to analyze a broader swath of numbers, career fields, and services than is reviewed here would require a larger scale research project, which is beyond the scope of this Article.²⁰⁹ This data is not presented as empirical proof of the utter lack of opportunity for women and people of color that exists in the military. Instead, it is presented to suggest problems with the types of statistics the forces keep, and most importantly, that it would be premature to use the integration success narrative as a basis to justify colorblind

204. See RAND MINORITY AND GENDER DIFFERENCES STUDY, *supra* note 104, at 25, 44-45 (discussing studies which indicate certain black and female officers in the Navy and Marine Corps were less likely to be selected to Lieutenant Commander, Lieutenant, and Lieutenant (Junior Grade)). The study analyzed officer career promotion and retention using interviews and analysis of selected personnel records from 1967 to 1994 to compare minority and female officers to white male officers. *Id.* at 4.

205. For instance, for the fiscal year ending September 2005, the minority numbers for enlisted military active duty forces and the Coast Guard were as follows: Blacks, 19.1% (225,310); Hispanics, 9.8% (115,528); Asian-American/Pacific Islanders, 4.7% (55,321); American Indian/Alaskan Native 1.9% (22,822); and Multi-racial/Unknown, 2.7% (328). ANNUAL DEMOGRAPHIC PROFILE, *supra* note 5, at 2. For the same time period, analysis by gender (and not race) reveals that enlisted women constituted 169,187 of a total enlisted force of 1,179,233. *Id.* at 2, 8.

206. For officers, however, the numbers were as follows: Blacks, 8.9% (20,915); Hispanics, 4.9% (11,524); Asian-American/Pacific Islanders, 4.1% (9,523); American Indian/Alaskan Native 0.8% (1,915); and Multi-racial/Unknown, 3.5% (8,273). ANNUAL DEMOGRAPHIC PROFILE, *supra* note 5, at 2. For the same time period for gender, not separating by race, female officers constituted 35,867 of a total enlisted force of 233,949. *Id.* at 2, 8.

207. Compare the minority numbers for officers in general, see *supra* note 5, to the number of Asian American/Pacific Islander female officers in the U.S. Coast Guard (0.2% or two officers) or black officers in the U.S. Air Force and the Marine Corps (6.4% for each force; 4,702 persons in the Air Force and 1,208 persons in the Marine Corps, respectively). ANNUAL DEMOGRAPHIC PROFILE, *supra* note 5, at 2, 8.

208. See *supra* note 122 and accompanying text (discussing the finding of the court in *Saunders v. White*, 191 F. Supp. 2d 95 (D.D.C. 2002), that race and gender statistics for the entire Army officer corps were unsuitable to justify race and gender considerations at the Army JAG Corps Lt. Col. board).

209. In the future, I would like to conduct the analysis for other promotions within the JAG Corps, or other operational or staff communities within the Navy.

promotion and retention policies.

1. Navy JAG Active Duty Commander Promotions

This subsection will discuss statistics for a particular promotion board, over a series of years for men of color and women in the Judge Advocate General's (JAG) Corp of the U.S. Navy. The Navy JAG Corps is selected primarily because of its manageable size,²¹⁰ nature of the community,²¹¹ and the fact that the relevant statistics were quickly obtainable. The Commander Board (Lieutenant Commander to Commander promotion) is selected because it is a critical promotion in a number of ways. First, this promotion marks a move from mid-level to senior leadership within the Corps and Service, more generally—a point where some data suggests there tends to be a drop off in minority success in other services.²¹² Second, the promotion to O-5 strongly signals those individuals who will seek to be career officers.

Turning to the promotion statistics for the most recent promotion selection process at the time of the writing of this Article—the Fiscal Year 2007 (FY-07) Active Duty Commander Selection Board—the precept from the Secretary of the Navy authorized the Board to select 66.7% of eligible officers.²¹³ Table 1 shows the results of the FY-07 Selection Board.²¹⁴ In order to assess whether officers are promoting in a timely fashion, the “In Zone” data on Table 1 are the most critical.²¹⁵

210. As of August 2005, there were approximately 735 Navy Judge Advocates (officers) on active duty, including 208 women (28.3%) and ninety-four officers who designate themselves as minorities (12.8%). The Official Website of the United States Navy JAG, Careers, FAQs, UNITED STATES NAVY Careers: FAQ, <http://www.jag.navy.mil/Careers/FAQS.doc> (“3. How Many Attorneys Are There in the Navy JAG Corps and What Are Their Demographics?”) (last visited Feb. 26, 2007). The most recent data from the NALP Directory of Legal Employers entry for the Navy JAG Corps provides slightly different and more detailed information. As of February 1, 2006, the entry indicates there are 744 attorneys (including 208 women), with the minority numbers as follows: 47 Blacks (33 men, 14 women); 45 Hispanics (35 men, 10 women); 4 American Indian/Alaskan (all men); 31 Asian and Pacific Islanders (22 men, 9 women). The NALP entry is available at http://www.nalpdirectory.com/dledir_search_results.asp?fscid=G100201&yr=2006&orgtypeid=G (last visited May 1, 2007).

211. As a staff corps, rather than a line (combat) community, there are very few positions that would be restricted due to the prohibition on women in combat. As such, the career assignments of female officers substantially approximate those of their male counterparts.

212. REYES, *supra* note 38, at 1 (discussing studies that show for officers, black representation decreases as rank increases, especially as one approaches field grade and general officer ranks).

213. The FY-07 Board guidance or precept is discussed in note 132, *supra*.

214. The results of the board are contained in FY-07 Navy Commander Staff Promotion selection board, Judge Advocate General's Corps, Zone Statistics, Mar. 30, 2006 (on file with author) [hereinafter FY-07 Navy JAG Commander Board Statistics]. A version of the board statistics is available at <http://www.npc.navy.mil/Boards/ActiveDutyOfficer/05Staff/FY07Board/> (last visited Apr. 1, 2007). However, this version does not include race or gender data. Race and gender information must be requested from the Navy Personnel Command. The board statistics in Table 1, *infra*, include race and gender data.

215. The phrase “In Zone” refers to those officers receiving their first look at promotion, in the normal time frame expected for that promotion. There are two additional categories for consideration by the selection board: “Above Zone” and “Below Zone.” The “Above Zone” category is comprised of those officers who have been considered (“In Zone”) at a previous selection board,

TABLE 1. FY-07 NAVY COMMANDER STAFF PROMOTION SELECTION BOARD JUDGE ADVOCATE GENERAL'S CORPS, ZONE STATISTICS												
OVERALL STATISTICS												
	Above Zone			In Zone			Below Zone			Total		
Desig	Elg	Sel	Pct	Elg	Sel	Pct	Elg	Sel	Pct	Elg	Sel	Pct
2500	41	3	7.32	30	17	56.67	43	0	0.00	30	20	66.67
Total	41	3	7.32	30	17	56.67	43	0	0.00	30	20	66.67
FEMALE STATISTICS												
	Above Zone			In Zone			Below Zone			Total		
Desig	Elg	Sel	Pct	Elg	Sel	Pct	Elg	Sel	Pct	Elg	Sel	Pct
2500	11	0	0.00	12	7	58.33	9	0	0.00	12	7	58.33
Total	11	0	0.00	12	7	58.33	9	0	0.00	12	7	58.33
STATISTICS BY RACE												
	Above Zone			In Zone			Below Zone			Total		
Desig	Elg	Sel	Pct	Elg	Sel	Pct	Elg	Sel	Pct	Elg	Sel	Pct
Asian	0	0	0.00	1	1	100.00	0	0	0.00	1	1	100.00
Black/Afr. Am.	4	0	0.00	4	0	0.00	1	0	0.00	4	0	0.00
Hispanic/Latino	5	1	20.00	3	0	0.00	5	0	0.00	3	1	33.33
Multiple Race	1	0	0.00	0	0	0.00	0	0	0.00	0	0	0.00
Total	10	1	10.00	8	1	12.50	6	0	0.00	8	2	25.00

For all of the officers "In Zone," 56.7% or (seventeen of thirty) were selected for promotion from Lieutenant Commander to Commander.²¹⁶ The numbers for women, generally, were consistent with the overall selection rate, with 58.3% (seven of twelve) of the "In Zone" women being selected.²¹⁷ Only, however,

without being selected. Officers in the "Below Zone" category will have their record briefed to the selection board, but are considered early for promotion. The Army has defined these categories as follows:

Roughly speaking the "promotion zone" [in zone] refers to a level of experience normally commensurate with promotion to a higher grade. Candidates "above the zone" are candidates who have already been considered for promotion and denied. Candidates "below the zone" are candidates who show particular promise for early promotion. . . [despite the short length of their experience in the Army].

Saunders v. White, 191 F. Supp. 2d 95, 122 n.33 (D.D.C. 2002) (alteration added).

216. Since three of the forty-one officers from the "Above Zone" group were selected, the selection board lists a total selection rate of 66.7% (twenty of thirty selected). This methodology seems somewhat unusual. Since seventeen of thirty were selected from "In Zone" and three of forty-one were selected from "Above Zone," it seems that the more accurate total would be that twenty of seventy-one were selected. See FY-07 Navy JAG Commander Board Statistics, *supra* note 215 & *supra* Table 1. To be most accurate, however, it would make sense to list only the separate zone selection rates, which then would be 56.7% for those "In Zone" and 7.3% of those persons in the "Above Zone" category. It is likely that this methodology of basing the percentage of the total number selected on the number of persons eligible "In Zone," regardless of the category of the selectee, is the only way to prevent "Above Zone" and "Below Zone" selectees from significantly upsetting the selection rate authorized in the precept.

217. FY-07 Navy JAG Commander Board Statistics, *supra* note 215 & *supra* Table 1. This is somewhat consistent with other promotion studies finding that white women were "only [seven]

12.5% (one of eight) of the eligible race/ethnic minority officers were selected for promotion from Lieutenant Commander to Commander.²¹⁸

The race and gender promotion selection statistics analyzed here are problematic in at least two ways. First, the numbers reflect a disparate result between an impoverished selection rate for racial minorities and a strong selection rate for women generally. Separately, there is an "intersectionality" or erasure problem, in that the statistics do not specify results along a gender/race intersection.²¹⁹ If one were to look at these promotion statistics and consider the success of women of color by looking at the numbers for gender selection, he or she might assume that minority women fared well. If they assessed the success of women of color, however, by looking at the selection rates for minorities, they could conclude only that the promotion results were disastrous. Most persons looking at the results then would have no ability to discern the success of women of color, in particular.²²⁰ In looking to the list of officers who were eligible ("In Zone") for promotion, through prior assignments and personal affiliations, I recognized three women who self-identified as African-American and another as Hispanic.²²¹ Using this knowledge and the document promulgating the names of the selectees,²²² I was able to decipher that, while fifty-eight percent (seven of twelve) women were selected, at least four eligible women of color were not. Given that only five women failed the selection

percent more likely to fail promotions . . ." RAND MINORITY AND GENDER DIFFERENCES STUDY, *supra* note 104, at xv-xvi (alteration added).

218. FY-07 Navy JAG Commander Board Statistics, *supra* note 215 & *supra* Table 1. The one Asian officer "In Zone" who was considered was selected, resulting in a promotion rate of 100.0% for Asians. None of the four black/African-American officers or the three Hispanic/Latinos "In Zone" was selected. Of the ten persons of color—four black/African Americans, five Hispanic/Latinos, and one multiple race individual—that were considered in the "Above Zone" category, one Hispanic/Latin was selected. Based on this additional selection, the statistics again list a total percentage of 25.0%, based on two of eight minorities being selected. See FY-07 Navy JAG Commander Board Statistics, *supra* note 215 & *supra* Table 1. Again, for clarity, I maintain the more accurate method would be to list zone statistics of a 10.0% selection rate (one of ten) of the "Above Zone" group and a 12.5% (one of eight) for the "In Zone" group.

219. While the promotion statistics do not include a combined race and gender category, the DEOMI statistics reflecting the number of women and minorities on active duty in the Services include gender numbers for each racial group. See *supra* notes 58-59 and accompanying text.

220. As others have indicated, while researchers tend to focus on the effects of gender and the effects of race, we forget that some women are also racial minorities. See ALL THE WOMEN, *supra* note 26, at xxi; Katzenstein & Reppy, *supra* note 21, at 13 (describing the work of contributor Gwen Hall as follows: "Hall reminds us that groups at the intersection of commonly recognized social identities (Blacks and women) are often rendered invisible in the institution's self-reporting, making it difficult for such groups to know how they stand vis-à-vis others in similar employ and to apprehend what may be their very distinct experiences." (emphasis in original)).

221. For each promotion board, the Bureau of Personnel promulgates a list of eligible candidates, annotating which members are "In Zone," "Above Zone," and "Below Zone." The list of FY-07 candidates discussed here is on file with the author and was, at the time of this writing, available at: <http://www.npc.navy.mil/NR/rdonlyres/5C2A4FB0-DDA3-41D5-9912-3DFE044CAF32/0/FY07ActO5JAGLOE.txt> (last visited Apr. 1, 2007).

222. FY-07 Active Duty Navy Commander Staff Corps Selection, <http://www.npc.navy.mil/NR/rdonlyres/0AC83B28-BF0D-4545-BB25-023D1E41D093/0/ALN06058.txt> (last visited Feb. 26, 2007).

process, the numbers for women (and men) of color are deplorable—at least eighty percent of eligible women of color were not selected. Of course, most people look at the data without having this type of information, and it is not provided in the released statistics.²²³

One might attribute the disproportionately small selection numbers for people of color to their generally small numbers within the community—e.g., since only eight of the thirty “In Zone” officers were racial minorities to begin with, the total number of officers selected is very likely to be modest. Such a claim does not explain why the percentage selection rate for racial minorities would be so different from that of their white counterparts.²²⁴ Also, given that another minority group—women²²⁵—often select in numbers at or near the overall promotion rate for the “In Zone” group, that there are small numbers of “In Zone” minority candidates does not necessarily explain the disparate selection outcomes. Moreover, given that the numbers of racial minorities the selection board considered are not particularly anomalous for the JAG Corps,²²⁶ accepting the “small population” charge as a reason not to analyze poor minority selection rates would be tantamount to admitting there are too few persons of color within the Navy JAG Corps to warrant assessing and attempting to improve their conditions.

As a way of assessing the typicality of the promotion statistics for Fiscal Year 2007, the promotion statistics for the preceding several years were analyzed to see whether they contained similar results. If the goal were to make general claims about the significance of gender and race identity to military promotion selection, looking to only several earlier Navy JAG Selection Boards would be of limited usefulness.²²⁷ The data, however, can serve as a critical snapshot of the types of results that occur in particular career fields in any given year, when no attention is paid to meaningful race- or gender-consciousness in a raced and gendered environment.²²⁸ Also, such results might serve to illuminate

223. The individual board members likely know the race and gender of each eligible service member because such information is included in the member’s file. It is not clear, however, whether the board keeps and internally reports numbers for women of color.

224. This difference between minority officer selection percentages and the overall selection rate, seems to be a problem the Army routinely encountered or anticipated. The Army’s solution—formerly requiring boards to re-vote and explain when minority percentages were off—were the policies challenged as discriminatory in *Saunders*. See *supra* notes 110–113 and accompanying text.

225. For the FY-07 Selection Board, the group of “successful women” mostly meant “white women.” See *supra* note 217.

226. For the FY-06 Selection Board, there were six persons of color among the “In Zone” population of forty eligible officers; for the previous years, the numbers were as follows: FY-05 (4 of 37); FY-04 (1 of 23); FY-03 (5 of 23). Letter from Department of the Navy, Navy Personnel Command (PERS 00J/20070046) to Amanda Frazer (Dec. 1, 2006) (responding to FOIA request containing Commander Selection Board results for fiscal years 2003 through 2006) (on file with author).

227. To make such a claim would require data collection on a much larger scale. For instance, we would need to look at the promotion results for the Navy JAG Corps over a much greater period of time or analyze more communities of naval officers or more services.

228. For officer perceptions on how race matters in the military, see RAND MINORITY AND GENDER DIFFERENCES STUDY, *supra* note 104, at 49–73; for a similar commentary on gender, including the “double-jeopardy” affecting black women, see *id.* at 75–101, and Mitchell, *supra* note 17, at 36 (discussing the gender lie: “the notion that because intentions are ‘good’ and standards are ‘gender

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an issue that very few persons outside of the military seem to recognize as a problem: sporadically poor promotion opportunities for men and, especially, women of color.²²⁹ The goal then is to use the data to support a normative commentary on how race and gender, and the intersection thereof, may unconsciously figure into opportunities for success.

With regard to analyzing the previous years' selection boards, the data was very illuminating. Rather than revealing a consistent or hardened pattern of consistently poor promotion opportunities, the data was both more positive and uneven than one might imagine given the FY-07 data. For instance, for FY-06, the selection rate for all "In Zone" officers was 62.5% (twenty-five of forty); for women the rate was 66.7% (eight of twelve); and for persons of color 66.7% (four of six, where the four selected were one Hispanic/Latino, two Asians, and one multiple-raced person).²³⁰

For FY-06, given that the rates for women and minorities were greater than the overall selection rate for officers "In Zone," one could argue that color- and gender-blindness work and there is no need for special considerations related to race and gender. FY-05, however, substantially mimics FY-07, in that the selection rates for women were superior to the overall selection rate, but the numbers for persons of color were not nearly so successful—only one of four were selected—and it was not clear how women of color fared. The story of FY-04 was that there was an incredibly small population of women and people of color eligible within the zone. Only three women and one person of color were considered, with only one woman being selected for promotion. For FY-03, 52.2% (twelve of twenty-three) of those eligible "In Zone" were selected, while 60.0% of women (three of five) and 40.0% of minorities (two of five, not listed by constituent races) were also selected. Facially, these statistics certainly confirm that there is no quota for minority promotions. They also confirm that the promotion rates for women have typically approximated those for men in recent boards, but that people of color—including women who are racial minorities—have enjoyed varying degrees of success.

When looking to the most specific sub-categories, even greater concerns emerge. In addition to the difficulty that arises in tracking the specific fates of women of color, certain racial groups appear to be faring more poorly over the observed boards. For FY-04 through FY-07,²³¹ of the six black/African American

blind,' there cannot be any gendered tension in the military except in the pathological thinking of a female malcontent.").

229. One study found that, relative to white men, white women had a seven percent greater chance of failing to promote, while black men had a twenty-nine percent greater chance and black women had a thirty-nine percent greater chance. RAND MINORITY AND GENDER DIFFERENCES STUDY, *supra* note 104, at 46. While the report typically limits discussions of minority results to black officers, it provided the following more inclusive commentary: "Other minority officers could be assessed only in the earlier career stages and through analysis of their promotion records Overall, their retention and promotion patterns resembled those of their African American counterparts." *Id.* at 105.

230. FY-06 Navy Commander Staff Promotions Selection Board, Judge Advocate General's Corps, Zone Statistics (Mar. 31, 2005) (on file with author).

231. No individual race data was available for FY-03.

officers eligible “In Zone,” only one was selected for promotion. In that time period, additionally, one of the fourteen black officers considered from the “Above Zone” category was selected, for a total of two black Navy JAG commanders in the past four years. For Hispanic/Latinos, during the same time-frame, two of nine “In Zone” officers were selected and two of thirteen “Above Zone” officers, for a total of four Hispanic/Latino officers in four years were selected. For Asians, three of the three officers considered were selected for promotion during the four year period; no Asians were within the “Above Zone” category.

2. *Deciphering the Data: Of Missing Categories and Low Sample Sizes*

Given the decision to look at one promotion for one career field and the small numbers of people of color within that field, it would be imprudent to make large general claims about the Navy JAG Corps promotions based on the above data. Several narrow and largely descriptive claims, however, appear to be supportable. On the one hand, the very uneven promotion results should confirm for those who worry about the *sub-rosa* implementation of race and gender quotas that the system is not rigged in this way. The results, however, expose a number of problems. First, as previously mentioned, the methods used to gather data do not provide those concerned with an opportunity to measure the success of women of color. Second, these data bring to mind a problem experienced by the University of California when it ended the consideration of race in admissions. By comparison, when the California voters and the University’s Board of Regents ended affirmative action in that state,²³² many saw it as deplorable that colorblind admissions resulted in only one African-American student enrolling at the University of California, Berkeley, Boalt Hall School of Law in 1997.²³³ Like the military, the University of California has endured sporadic minority admission numbers since the law mandated a race-neutral selection system.²³⁴ However, the University has undertaken measures—principally related to minority recruitment—that have prevented a return of these initially drastic results, which first followed the implementation of

232. On November 5, 1996, fifty-four percent of California voters voted to adopt Proposition 209, otherwise known as the “California Civil Rights Initiative.” See *Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 697 (9th Cir. 1997) (holding that Proposition 209 does not violate the Equal Protection Clause of the U.S. Constitution), *cert. denied*, 522 U.S. 963 (1997). Proposition 209 prohibits discrimination and racial and gender preferences in public employment, public education, and public contracting. See CAL. CONST. art. I, § 31, cl. a.

The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

Id.

233. Jerome Karabel, *The Rise and Fall of Affirmative Action at the University of California*, 25 J. BLACKS HIGHER EDUC., 109, 109–12 (1999); Suzanne E. Eckes, *Race-Conscious Admissions Programs: Where do Universities Go From Gratz and Grutter?*, 33 J.L. & EDUC. 21, 58 (2004). That student had been selected in the year prior to the implementation of Proposition 209 and had elected to defer admission by one year.

234. See ANDREA GUERRERO, SILENCE AT BOALT HALL: THE DISMANTLING OF AFFIRMATIVE ACTION 170–72 (2002).

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Proposition 209. Finally, while the data are not large or robust enough to empirically prove the operation of unconscious bias and discrimination, they should cause us to worry about the opportunities for women and people of color and to be vigilant to challenge an overstated narrative of integration success.

The remainder of this Article articulates how the various military services, should they be so inclined, might seek to prevent the types of promotion disparities evinced in the results of the FY-07 Navy Active Duty JAG Commander Promotion Board. To undermine such results, the Services will have to place to rest the purported success stories that society has embraced with regard to the organization’s history of integration. In other words, the military may need to return to some more specially tailored measures of race- and gender-conscious promotion considerations, and to do so, they will need to articulate for courts and the citizenry why it is necessary. Currently, the maintenance of colorblindness and the prevalence of the narrative of integration success prevent the undertaking of this needed work. Moreover, the narratives—like the promotion results—present stories that fail to explore the conditions of individuals who exist at the nexus of race and gender difference.

Separate from the above-reviewed Navy JAG Corps data, broader studies of promotion success rates for black female line officers from 1967 to 1991 indicate that they were the “least likely to be promoted at all stages,”²³⁵ and that some described themselves as “doubly disadvantaged in the same ways as black men *and* white women.”²³⁶ Hence, the very positive racial integration narrative and the somewhat less positive story for gender fail to represent the especially tenuous position of women of color—they who are “brave.” The whole point of presenting the promotions statistics in this Part has been to expose the shaky truth of the integration narratives and to support a return to identity-conscious promotion processes.

IV. DEFENDING IDENTITY CONSCIOUSNESS:
REVISITING THE CASES AND RESURRECTING DEFERENCE?

When President Truman issued the Executive Order that begins this Article, it also included text mandating that promotions would be decided “solely on merit and fitness.”²³⁷ This is ironic, because such a directive can be used to argue for identity-conscious and identity-blind policies. For instance, “merit and fitness” alone could be interpreted to mean that there is no room for the consideration of race or gender. To the contrary, the words could be understood as a directive to avoid the vestiges of racial discrimination in such selections. This latter interpretation certainly makes sense for a number of reasons related to the history of explicit discrimination that existed at the time.²³⁸

235. RAND MINORITY AND GENDER DIFFERENCES STUDY, *supra* note 104, at 105.

236. *Id.* (emphasis in the original).

237. Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948).

238. History tells us that, at the time the Order was issued, “[a]ttacks on Black Soldiers by military and civilian police and by white civilians and soldiers were common, especially in the South. In general, the norms and cultural codes of the wider society were reflected in the military.” A COMMON DESTINY, *supra* note 27, at 67. These discriminatory policies “led to many nonviolent and

The point of the integration success narratives is to represent that the disparate conditions that existed at the time the Order was issued have improved. The military is not, however, a race or gender utopia.²³⁹ There is a continuum from the deliberate racism and sexism of past decades to the unconscious bias that now may be partially responsible for the disparate success experienced by some. The problem is not likely deliberate malfeasance but rather a culture where identity makes it hard for one to truly obtain insider status and this status signifies being marked for success. As recent studies have confirmed:

- (1) the magnitude of implicit bias toward members of outgroups or disadvantaged groups is large, (2) implicit bias often conflicts with conscious attitudes, endorsed beliefs, and intentional behavior, (3) implicit bias influences evaluations of and behavior toward those who are the subject of the bias, and (4) self, situational, or broader cultural interventions can correct systematic and consensually shared implicit bias.²⁴⁰

Rectifying the problem in the military is made all the more difficult because “[n]either Title VII of the Civil Rights Act of 1964 nor the equal employment opportunity or affirmative action regulations of the Equal Employment Opportunity Commission apply to active-duty military officers.”²⁴¹ Before the problem can be addressed, however, its existence has to be acknowledged. If the problem exists, however, then the military cannot be completely regarded as the integration success that many see it as. Herein lies the critical conflict—preserving the integration narratives in the face of known and continuing gender and race inequalities.

Even placing the recent Navy JAG Commander promotion statistics to one side, it is clear from entry and promotion statistics of enlisted and officer service members, that minority women—African Americans in particular—as opposed to their numbers in the population, are overrepresented and underappreciated in the Services.²⁴² At least one scholar surmises that it just may be that their experience with so-called inclusion is noticeably different, and if so, this clearly evinces the need for conducting research on intersectional women.²⁴³ Compiling such statistics would also be of help in convincing a court of the nature of the problem and the need for identity-conscious remedies.

If the military is to begin both to study the effects of intersectional identities on success and to reinstitute stronger identity-conscious policies, it will have to

violent confrontations between [B]lacks and [W]hites, but at home and in European and Asian theaters of War.” *Id.* (alterations added).

239. See Moskos, *supra* note 5, at 16.

240. Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CAL. L. REV. 1063, 1064 (2006) (citations omitted).

241. RAND MINORITY AND GENDER DIFFERENCES STUDY, *supra* note 104, at 1 (alteration added). The Supreme Court has not weighed in, but the circuits have definitively rejected the application of Title VII to active duty military personnel. See, e.g., *Randall v. United States*, 95 F.3d 339, 343 (4th Cir. 1996) (“As the district court correctly recognized, every federal court of appeal that has addressed the issue has held that Title VII does not apply to uniformed members of the military.”).

242. Hall, *supra* note 22, at 144–46.

243. *Id.* at 144.

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do so in a manner that can withstand judicial scrutiny. Given that the Supreme Court has not weighed in, there are at least three ways to move forward: (1) using the initial decision from a case such as *Berkley v. United States*²⁴⁴ to advance an argument that the *Saunders*²⁴⁵ court was incorrect; (2) accepting *Saunders* as correct and amassing data to argue that the standard laid out can be met based on numbers such as those presented in the promotion data cited above; or (3) arguing deference to the military requires the Court to refrain from upsetting military equal opportunity policies and language.

A. Arguing *Saunders* as Incorrect

Given that *Saunders* is not the only case to make a pronouncement about the military's former promotion language, there is room to argue that there was no need to so dramatically move away from identity-conscious equal opportunity language. For example, the Army's instructions to a mandatory retirement board challenged in *Berkley v. United States* stated:

Your evaluation of minority and women officers must clearly afford them fair and equitable consideration In your evaluation of the records of minority and women officers, you should be particularly sensitive to the possibility that past individual and societal attitudes, and in some instances utilization of policies or practices, may have placed these officers at a disadvantage from a total career perspective.²⁴⁶

With regard to the language, the court noted that the “mere mention of a race or gender” did not trigger heightened scrutiny,²⁴⁷ but that the “government action must bestow a benefit or a burden” based on the contested classification.²⁴⁸ In *Berkley*, the Court of Federal Claims held that “the government's instructions did not operate to benefit or burden a race or gender, but rather helped to ensure ‘a fair appraisal of a candidate's value so that the overall best qualified and suitable candidates may be selected.’”²⁴⁹

If *Berkley* had ended there, we might be talking about a ruling in direct confrontation with *Saunders*. The *Berkley* decision was, however, appealed and the appellate court determined that the language to the retirement board did involve a racial and gender classification, by directing the board to consider a past history of discrimination that might place white male officers at a disadvantage.²⁵⁰ The court vacated and remanded the case to the Court of Federal Claims, for the court to apply strict scrutiny to the language rather than the previously applied rational basis analysis.²⁵¹ The case settled while on

244. 48 Fed. Cl. 361 (2000).

245. 191 F. Supp. 2d 95 (D.D.C. 2002).

246. *Berkley*, 48 Fed. Cl. at 365.

247. *Id.* at 369.

248. *Id.* at 369–70.

249. *Saunders*, 191 F. Supp. 2d at 127 (quoting *Berkley*, 48 Fed. Cl. at 371).

250. *Berkley v. United States*, 287 F.3d 1076 (Fed. Cir. 2002).

251. *Id.* at 1091. Another military retirement case was subject to a substantially similar process. In *Baker v. United States*, 127 F.3d 1081 (Fed. Cir. 1997), the Court of Federal Claims granted summary

remand,²⁵² so there was no opportunity for another court to decide whether the Army's reasoning would survive strict scrutiny. As analyzed in *Saunders*, it did not. Still, *Saunders* was not a Supreme Court pronouncement, and there is room for another circuit to interpret a Service's equal opportunity language to be non-discriminatory. As it is very unlikely the military would attempt to resurrect the very language rejected in *Saunders*, the precise contours of constitutionally viable, but more explicit, equal opportunity statements are unknown. Yet, if the Services do not attempt to craft them, the end result of the *Saunders* strict scrutiny analysis continuing to exist without opposition is that the decision "will cause enormous mischief by potentially invalidating virtually any governmental directive that cautions against the perpetuation of racial discrimination against minorities and gender discrimination against women."²⁵³

B. Crafting an Identity-Conscious Solution Under *Saunders*

Rather than argue against the *Saunders* decision, some space exists to argue that a more effective race- or gender-conscious promotion policy could be used that would pass scrutiny under that case. The court in *Saunders* distinguished itself from the Court of Federal Claims in *Berkley* based upon the fact that *Saunders*' promotion boards also included language that set specific goals for the selection of minorities and women, and an instruction for the board to explain those instances where minority groups fared less well than the overall group.²⁵⁴ *Saunders* also indicated that the Court of Federal Claims, in *Christian v. United States*,²⁵⁵ rejected language identical to the language in *Saunders*.

It can be argued that, without the minority officer selection goals and re-voting language, *Saunders* could have been decided differently.²⁵⁶ Additionally, the court determined that the Army had not survived strict scrutiny because it was not persuaded by the data the Army presented on officer promotions. As discussed above,²⁵⁷ the court was skeptical of the period of review of the proffered study, the fact that in some years black officers outperformed Whites in junior officer promotions, and the fact that the data were for all officers rather than just Army JAGs. Ultimately, the court remarked on the data, "the Court is not suggesting that black officers were treated equally . . . [r]ather, the Court is

judgment in a case involving a Selective Early Retirement Board using very similar language to that in *Berkley*. The same appellate court in *Berkley* vacated and remanded the case for a ruling consistent with the higher scrutiny involved in cases where the government uses gender and race classifications.

252. *Berkley v. United States*, 59 Fed. Cl. 675 (2004).

253. *Berkley*, 287 F.3d at 1091 (Dyk, J., dissenting).

254. *Saunders*, 191 F. Supp. 2d at 127. Given the decision of the Court of Appeals, this distinction was no longer necessary. *Berkley*, 287 F.3d at 1091.

255. 46 Fed. Cl. 793, 793 (2000).

256. For this to be so, a different court would have to: (1) agree with the initial assessment in *Berkley*, that no race/gender classification was involved in the language; (2) come to different strict scrutiny determination than the court in *Saunders*—a decision the Court of Claims avoided when *Berkley* settled; or (3) determine that the deference to the military requires the court make no determination—an option proposed by the dissent in *Berkley* and considered in Part IV.C, *infra*.

257. See *supra* note 122 and accompanying text.

finding these statistics are insufficient to demonstrate the opposite conclusion (that black officers are discriminated against).²⁵⁸ Given the promotion board data presented above, we might begin to formulate a claim that, for some Corps and in certain services, the statistics show a different trend. Using the Navy JAG Corps as an example, however, reveals one problem with the *Saunders* highly specific discrimination data requirement. In the boards discussed in this Article, the sample sizes of eligible men and women of color were relatively small. In career fields such as this, it may be that due to such small sample sizes, that even where disparate selection numbers exist, you may not be able to prove empirical significance.²⁵⁹ In the least, statistics for a larger number of years would be needed, in addition to creating separate data for race and gender combined. Following *Saunders*, in the strictest sense, then, would require a massive empirical undertaking—looking at minority success at every rank, in each service, for each career field.

Beyond supplying the data that the court indicated would be necessary to prove current discrimination, following *Saunders* would still leave us in a world where the government would need to survive strict scrutiny by advancing a compelling interest that is narrowly tailored to the purpose of remedying discrimination. While the question of narrow tailoring will depend on the precise language of any promotion instructions and whether the Service uses minority candidate selection goals and re-voting, the compelling interest can be the very diversity rationale the Court accepted in *Grutter*.²⁶⁰ In essence, one could argue that the *Grutter* Court endorsed the contention that officer diversity was paramount to national security.²⁶¹ It then determined that, if diversity was a compelling interest for the purpose of military accessions, then the same could be true in education. The final piece of the argument then is to allege that not only is diversity critical at the officer entry point, but that it is equally important that military promotions also use some race- and gender-conscious considerations.²⁶² Given the strong endorsement of military diversity in *Grutter*, it would be difficult for the court to reject this formulation of a compelling interest standard. The devil will, of course, be in the details of the selected race- and gender-conscious promotion board language—that, however, is one important step beyond the current state of military policy.

258. *Id.* at 133 n.42 (alteration added).

259. *See supra* notes 218, 226, 230 (presenting the small sample sizes of people of color being considered for promotion to commander in the Navy JAG Corps over a four year period).

260. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

261. *See supra* notes 49–52 and accompanying text. This has been referred to as an occupational need argument, an argument that would be rejected under Title VII, for most occupations other than the military. *See* Brian W. Leach, *Race as Mission Critical: The Occupational Need Rationale in Military Affirmative Action and Beyond*, 113 *YALE L.J.* 1093, 1094 (2004).

262. In the same vein as the national security interest raised in *Grutter*, I would suggest that race- and gender-conscious promotions are necessary to ensure effective leadership, mentoring, and retention within a diverse military. At least one other commenter has suggested using the notion of maintaining combat readiness as the compelling interest that one could narrowly tailor identity-conscious promotion considerations to further. *See* Cook, *supra* note 110, at 190–92.

C. Equal Opportunity, the Courts, and Military Deference

One way to attack the strength of the *Saunders* decision is to argue that it never should have been substantively decided in the first place. The federal courts have shown a “special deference” to military decisions with regard to constitutional challenges to military policies and procedures.²⁶³ This deference could be framed as a form of non-interference required as a result of showing respect for the political branch.²⁶⁴ In many cases, this complete deference has involved challenges to the decision to deploy military force.²⁶⁵ More routinely, the deference is defined as a requirement that courts give the military greater latitude with regard to the application of constitutional protections.²⁶⁶ Three well-known cases involving ethnicity, race, and gender that have applied this variety of deference are *Goldman v. Weinberger*,²⁶⁷ *Rostker v. Goldberg*,²⁶⁸ and *Chappell v. Wallace*.²⁶⁹ In *Goldman*, the Court rejected a First Amendment complaint from a Jewish service member who was discharged over his refusal to remove his yarmulke while in uniform. In response to the claim, the Court determined that its review of a constitutional challenge to a military regulation “is far more deferential than constitutional review of similar laws or regulations designed for civilian society.”²⁷⁰

In *Rostker*, the Court rejected an Equal Protection challenge to the congressional decision barring women from registration for the selective service.²⁷¹ While the Court applied heightened scrutiny review to the government’s decision involving a gender classification, it decided whether Congress’s rationale for the policy met the important government objective standard by taking into account the uniqueness of the military. The majority opined that the military was an environment “governed by separate discipline from that of the civilian,”²⁷² and where Congress needed permission to legislate “with greater breadth and with greater flexibility”²⁷³ After *Rostker*, the Court

263. See CRS REPORT, *supra* note 86, at CRS-12.

264. In essence, this deference would result in the Court finding the complaints to involve nonjusticiable political questions. See *Marbury v. Madison* 5 U.S. 137 (1803) (determining that, where cases involve executive actions that are of a political nature, “the opinion of the executive is conclusive”); *Goldwater v. Carter*, 444 U.S. 996, 1003 (1979) (finding a case within the area of foreign policy with military implications to be “a nonjusticiable political dispute that should be left for resolution by the Executive and Legislative Branches of the Government”).

265. See, e.g., *Ange v. Bush*, 752 F. Supp. 509 (D.D.C. 1990) (dismissing a challenge to the U.S. involvement in Desert Storm); *Doe v. Bush*, 322 F.3d 109 (1st Cir. 2003) (dismissing a challenge to the U.S. involvement in current hostilities in Iraq).

266. See, e.g., *Brown v. Glines*, 444 U.S. 348 (1980) (upholding Air Force limits on the circulation of political petitions); *Greer v. Spock*, 424 U.S. 828 (1976) (upholding limits on protests and political speeches).

267. 475 U.S. 503 (1986).

268. 453 U.S. 57 (1981).

269. 462 U.S. 296 (1983).

270. *Goldman*, 475 U.S. at 507.

271. *Rostker*, 453 U.S. at 67.

272. *Id.* at 71.

273. *Id.* at 66 (quoting *Parker v. Levy*, 417 U.S. 733 (1974)).

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decided another Equal Protection case, this time involving race. In *Chappell*,²⁷⁴ a Navy enlisted member brought an action alleging that a superior officer engaged in racial discrimination with regard to duty assignments and performance evaluations. In rejecting the extension of this *Bivens*-style claim to military members,²⁷⁵ the Court cited both Congress's Article I authority to "provide and maintain a navy"²⁷⁶ and the fact that a system to resolve complaints against superiors was already in effect within the Navy.²⁷⁷ Ultimately, referring to the military's "broad power to deal with its own personnel,"²⁷⁸ the Court held that military members could not recover damages from a superior based upon alleged constitutional violations.²⁷⁹

Since the military's equal opportunity policies are involved in the promotion cases, the military could conceivably argue that these personnel policies exist in regulations that are prescribed by the President and Congress, pursuant to their constitutional powers under Article II and Article I of the Constitution, respectively.²⁸⁰ As such, one could broadly assert that the political question doctrine mandates that the Court not review a complaint.²⁸¹ This position against any review seems untenable, especially given that the Justices have typically claimed a right to judicial review,²⁸² and courts have proscribed specific parameters for the justiciability of cases involving military policies.²⁸³ Moreover, the Court has actually reviewed previous Equal Protection challenges to military regulations.

The deference claim in the case of promotion precept language would once again involve an Equal Protection challenge, this time based upon race and gender. Even though the Court showed deference to a gender-based distinction in *Rostker*, it rejected extending protections for race-based constitutional violations in *Chappell*. One could argue, however, that *Chappell* involved

274. 462 U.S. 296 (1983).

275. Such claims for constitutional violations had been authorized for federal civilian employees in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

276. *Chappell*, 462 U.S. at 302.

277. *Id.* at 303.

278. *Id.* at 305 (citing Chief Justice Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 187 (1962)).

279. *Id.*

280. Kathryn Abrams made this claim with regard to the power of the President and Congress to create regulations for including gays and lesbians. See Abrams, *supra* note 76, at 234 n.56.

281. See *supra* notes 264–265 and accompanying text; see also *Baker v. Carr*, 369 U.S. 186 (1962) (listing several instances where the Court should refrain from reviewing cases, including where the matter is committed to a constituent branch).

282. See *Goldman v. Weinberger*, 475 U.S. 503, 515 (1986) (Brennan, J., dissenting) ("And, while we have hesitated . . . to strike down restrictions on individual liberties which could be reasonably justified as necessary to the military's vital function, . . . we have never abdicated our obligation on judicial review." (citations omitted)).

283. See *Murphy v. United States*, 993 F.2d 871, 873 (1993) (holding that military personnel decisions should only be reviewed where there are limits placed on the Secretary's discretion and Congress has provided standards to measure the Secretary's decision-making); *Adkins v. United States*, 68 F.3d 1322 (Fed. Cir. 1995) (holding that the court may review military decisions pertaining to procedural issues).

members seeking rights enforcement. In contrast, the *Saunders*-like cause of action is more akin to the *Goldman* case, where the Court refused to disrupt a military policy. A challenge to an affirmative policy premised upon an identity difference would look much more like the *Rostker* case. There, the Court considered the military's uniqueness when applying heightened scrutiny and upholding a gender-based difference. Still, based on the previous cases, it is unclear how the Court would respond to what is essentially a military affirmative action program, rather than a case involving racial discrimination claims. As the *Saunders* decision may reflect, with regard to litigating equal protection, the courts may be less concerned with military uniqueness and more concerned with societal claims of reverse discrimination.

Since the *Chappell* and *Rostker* rulings, we have seen both the significant demise of federal affirmative action programs²⁸⁴ and that lower courts are uninterested in showing deference.²⁸⁵ Specifically, in *Berkley*, the appellate court determined: "We adhere to the policy of giving deference to the military for matters involving 'discipline, morale, composition and the like.' Such deference, however, does not prevent or preclude our review of the Instruction in this case in light of constitutional equal protection claims raised."²⁸⁶ Essentially, then, the court's comment indicated that it would not defer in reviewing the case. The court did allow the Court of Federal Claims to determine, on remand, "what effect, if any, deference to the military would have on the judicial application of strict scrutiny."²⁸⁷ Additionally, while it is an older case based upon outdated statutes and Equal Protection analysis, *Schlesinger v. Ballard*²⁸⁸ might also be somewhat instructive. Ballard, a male naval officer twice passed over for promotion, challenged statutes that allowed female officers a greater number of years of service prior to mandatory discharge for failing to promote. In upholding the statutes, the Court concluded that the laws were not unconstitutional because they were not premised upon "overbroad generalizations."²⁸⁹ Instead, the Court determined that the statutes were based upon "the demonstrable fact that male and female line officers in the Navy are not similarly situated with respect to opportunities for professional service."²⁹⁰ The cases involved personnel statutes rather than regulations and applied only rational basis review, but at bottom, the Court was willing to allow Congress to determine how best to manage the Armed Forces' promotion and discharge policies.

The foregoing cases seem to suggest then that a federal court, including the

284. See *supra* note 53 (discussing *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989), and *Adarand Constructors v. Peña*, 515 U.S. 200 (1995)).

285. See discussion *supra* Parts II.C, IV.A, IV.B (discussing the *Christian*, *Berkley*, and *Saunders* cases).

286. *Berkley*, 287 F.3d at 1091 (citing *Holley v. United States*, 124 F.3d 1462, 1465-66 (Fed. Cir. 1997)).

287. *Id.*

288. 419 U.S. 498 (1975) (upholding statutory scheme giving women naval officers more time than men to be promoted prior to discharge for lack of promotion).

289. *Id.* at 507.

290. *Id.* at 508. Notably, the Court premised its decision on rejecting a gender success narrative.

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Supreme Court, could extend the various services greater latitude with regard to their chosen selection board equal opportunity policies.²⁹¹ Given that the Services still maintain affirmative action programs for accession, the Supreme Court’s positive comment on diversity and the military in *Grutter*,²⁹² and the tenuous promotion prospects for some, it is at least advisable to attempt some more robust language. Such language would resurrect the pre-*Saunders* standards, which noticed the effect of past discrimination and the more subtle nature of current discrimination.²⁹³ And if we dare to dream big, perhaps we might even begin to explore and explain the special problems of persons inhabiting multiple identities.

CONCLUSION

The difference between being selected and passed over for promotion in the military is often razor thin. A uniform measure of excellent performance is typically required to be seriously considered by a promotion board—certainly by a board promoting members to the rank of senior officer. For boards where minorities and women do not perform particularly well, it could be that the boards’ decisions involve no bias at all. Such a statement would be consistent with the fact that the boards analyzed herein show a selection rate for women often consistent with that of men. Or, the results might be said by some to be completely discriminatory.²⁹⁴ While such a statement may be difficult to prove, it would not be beyond the pale given the disparate selection numbers for race in a number of selection boards reviewed in this Article. The truth of promotions and identity in the military, however, probably lies between these extreme statements and might be best explained in the results for women color—a group at the intersection of gender parity and race disadvantage, and whose success is not closely monitored by the institution.

In a system where we do not carefully annotate who is negatively affected by subjective selection processes—where supposed statements of equal opportunity actually dissuade frank discussions of race and gender, and where these conditions remain unnoticed due to the strength of an organization’s “integration success stories”—it is difficult to decipher precisely what work is being done by identity. From the disparate promotion results presented in this Article, however, it seems fair to suggest that instructing women and minorities to continue to invest in assimilative conduct is unhelpful. Only by using structural tools of an identity-conscious nature can one create an environment that honestly engages the hard work of identifying what it means to be at a

291. In *Miller v. Dep’t of the Navy*, 383 F. Supp. 2d 5 (D.D.C. 2005), *rev’d and remanded*, 476 F.3d 936, 937–38 (D.C. Cir. 2007), discussed in *supra* notes 171–181 and accompanying text, the court even claimed that it should be “unusually deferential” when applying standards of review to military personnel decisions. *Miller*, 476 F.3d at 938.

292. See *supra* notes 50–52.

293. Onwuachi-Willig & Barnes, *supra* note 177, at 1292–93.

294. This charge might extend either to the board members or to the system of assignments and evaluations that may yield different results across race.

disadvantage “because of” race, gender, or other ascriptive markers.²⁹⁵ An organization that does not engage this work should not continue to benefit from its reputation as a model for effective integration. This type of complacency should be viewed as complicity, as blindness to the noticeable effects of identity difference should be understood to be willful.²⁹⁶ Ultimately, the military’s current approach leaves minority service members, especially those straddling multiple identities, as the only parties burdened with managing this task of ameliorating difference. This is unfair. For as much as it is understood that all service requires sacrifice, honor, fidelity, and duty, it is not just to require anyone to be that “brave.”

295. This is the non-applicable-to-the-military, but relevant language of Title VII of the Civil Rights Act of 1964. See 42 U.S.C. § 2000e (2000) (making it illegal for employers “to discriminate against any individual with respect to . . . privileges of employment, *because of* such individual’s race, color, religion, sex, or national origin” (emphasis added)).

296. I thank Prof. D. Marvin Jones, who in conversations and through the richness of his book, *RACE, SEX, AND SUSPICION: THE MYTH OF THE BLACK MALE* (2005), challenged me to distinguish between unconscious bias and what may be willful blindness.