

THE INVISIBLE ARMY: WHY THE MILITARY NEEDS TO RESCIND ITS BAN ON TRANSGENDER SERVICE MEMBERS

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I. INTRODUCTION

The U.S. military received great media and public attention due to the well-publicized repeal of the sexual orientation exclusion law referred to as “Don’t Ask, Don’t Tell.”¹ The repeal was an important step toward realizing a fully integrated military and recognizing that gay, lesbian, and bisexual persons are capable of serving openly while having successful military careers. However, for many in the transgender community, the repeal was simply “another bridesmaid moment”;² although the military now allows gay, lesbian, and bisexual persons to serve openly, members of the transgender community are still categorically barred from service because of medical and psychological regulations.³ The military must rescind its ban on transgender persons from serving and recognize that there is nothing that makes this group inherently or uniformly unfit for the military.⁴

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1. Don’t Ask, Don’t Tell was a Congressional, legal ban on “lesbians, gays, and bisexuals serving in the military.” SHARON ALEXANDER, ET AL., THE SURVIVAL GUIDE: A COMPREHENSIVE GUIDE TO “DON’T ASK, DON’T TELL” AND RELATED MILITARY POLICIES 7 (2007). The ban only applied to lesbians, gays, and bisexual persons but had been incorrectly applied to heterosexual transgender persons. *Id.* at 13.

2. Lisa Leff, *Transgender Vets Want Military Access for Own*, ASSOCIATED PRESS ONLINE (Jan. 11, 2011), <http://www.armytimes.com/news/2011/01/ap-transgender-veterans-011111>.

3. See Matthew F. Kerrigan, *Transgender Discrimination in the Military: The New Don’t Ask, Don’t Tell*, 18 PSYCHOL. PUB. POL’Y. & L. 500, 505 (2012).

4. Nothing in this Note suggests that transgender persons need not qualify under other regulations, such as those imposing hearing and height requirements. See, e.g., U.S. DEPT. OF ARMY, REG. 40-501, STANDARDS OF MEDICAL FITNESS ¶ 2-7 (stating, for instance, that hearing aids do not meet the standard); ¶ 2-20 (stating that men shorter than sixty inches and taller than eighty inches, and women shorter than fifty-eight inches and taller than eighty inches, do not meet the standard) (Aug. 2011) [hereinafter STANDARDS OF MEDICAL FITNESS].

Part II of this Note gives necessary background information to support the main argument. It explains the gender binary and what it means to be a transgender person, and then details the current military policies that exclude transgender persons from serving.

Part III argues that the military should rescind its categorical ban because transgender persons are not *per se* incapable of serving in the military. Section A argues that the current medical regulations are unwarranted because transgender persons are not uniformly incapable of or unfit for military service, and thus the regulations' blanket exclusions are arbitrary. Further undermining the regulations, the type of medical care that transgender service members would require is analogous to the kind of medical care that the military already provides for its female, pregnant, and diabetic service members. Section B argues that the military should remove Gender Identity Disorder ("GID") as a disqualifying condition because of the controversies over whether it is an actual mental illness and because the American Psychiatric Association changed the name of the diagnosis from GID to gender dysphoria to reflect a less pathologized and less "mentally disordered" medical condition.

Part IV presents and counters objections to allowing transgender persons to serve in the military. First, it attacks the unit cohesion argument by looking at the U.S. military's history with racial integration and the repeal of Don't Ask, Don't Tell; it describes other nations' experiences with transgender service members to illustrate that unit cohesion will not suffer; and it suggests that disclosure of gender identity might actually improve unit cohesion. Part IV further argues that transgender service will not be costly to the military. Finally, it argues that any "implementation problems" that might arise if transgender service members are allowed to serve are not overly problematic and could be easily solved by relying on the policies toward and regulations of transgender service members in other countries. Finally, the Conclusion briefly addresses how repeal might occur in practice.

II. BACKGROUND

Before addressing why the military needs to rescind its ban on transgender service members, it is necessary to explain who falls into this military exclusion. Part A begins with background information on gender theory in order to lay a foundation about constructions of gender. Part B explains how transgenderism fits into these constructions and what it

means to be a transgender person. Finally, Part C explains the military's regulatory exclusions of transgender persons.

A. THE GENDER BINARY, WRIT LARGE AND IN THE MILITARY

Our society is dominated by a gender binary, the idea that "the body can only assume two biological forms, the male body and the female body."⁵ This male/female binary has existed for centuries⁶ and encompasses both a biological binary and a gender binary. The biological binary refers generally to sex, which is assigned at birth⁷ and comprised of attributes like chromosomes, hormones, and genitalia.⁸ The gender binary is a culturally defined and socially constructed set of acceptable behaviors for biologically defined men and women.⁹ While sex is assigned at birth, gender is taught from a young age and is continuously enforced throughout life.¹⁰ For instance, boys and girls are taught to like certain colors, to play with certain toys, and to confine themselves to behaviors that are appropriate for their respective gender. Additionally, the gender binary dictates how we interact with people, who we can marry, which bathrooms we use, and what clothes we are expected to wear.¹¹ Like the sex binary, the gender binary sets out two categories, male or female, which are mutually exclusive.¹² In other words, in the gender binary, it is impermissible to try to transcend your category by "switching" to the other category or embodying characteristics of both genders simultaneously.¹³

5. TARYNN M. WITTEN, GENDER IDENTITY AND THE MILITARY—TRANSGENDER, TRANSSEXUAL, AND INTERSEX IDENTIFIED INDIVIDUALS IN THE U.S. ARMED FORCES 1 (2007).

6. Jack Drescher, *Queer Diagnoses: Parallels and Contrasts in the History of Homosexuality, Gender Variance, and the Diagnostic and Statistical Manual*, 39 ARCHIVES OF SEXUAL BEHAV. 427, 430 (2009) (noting that many scientific studies of homosexuality contained binary gender beliefs).

7. *Id.*

8. Am. Psychological Ass'n, *Answers to Your Questions About Transgender People, Gender Identity, and Gender Expression*, 1 (2006), <http://www.apa.org/topics/sexuality/transgender.pdf> [hereinafter *Answers to Your Questions*].

9. See Drescher, *supra* note 6, at 430; Kristin Schilt & Laurel Westbrook, *Doing Gender, Doing Heteronormativity: "Gender Normals," Transgender People, and the Social Maintenance of Heterosexuality*, 23 GENDER & SOC'Y 440, 442 (2009).

10. *Understanding Gender*, GENDER SPECTRUM, <http://www.genderspectrum.org/understanding-gender> (last visited Mar. 6, 2013); ROBIN RYLE, QUESTIONING GENDER: A SOCIOLOGICAL EXPLORATION 120 (2012).

11. AM. PSYCHOLOGICAL ASS'N, REPORT OF THE APA TASK FORCE ON GENDER IDENTITY AND GENDER VARIANCE 10 (2009), available at <http://www.apa.org/pi/lgbt/resources/policy/gender-identity-report.pdf> [hereinafter REPORT OF THE APA TASK FORCE].

12. Drescher, *supra* note 6, at 431.

13. *See id.*

The military enforces the gender binary in numerous ways. For example, men and women are sex-segregated in basic training and in housing barracks.¹⁴ Until recently, women were not allowed to serve in direct ground combat positions.¹⁵ Additionally, many consider the military a male-oriented institution.¹⁶ Because the military values traditionally male characteristics, service is challenging for women, lesbian, gay, and bisexual persons, transgender persons, or any gender non-conforming person who is not a heterosexually identified male.¹⁷

B. WHAT DOES IT MEAN TO BE A TRANSGENDER PERSON?

Transgenderism challenges the gender binary that is assumed by our society and the military.¹⁸ “Transgender” is a broad term that encompasses persons whose “gender identity, gender expression, or behavior does not conform to that typically associated with the sex to which they were assigned at birth.”¹⁹

Transgender persons express their gender identities in various ways. Some, though not all, may choose to transition to the “other” gender or to a gender that is “neither traditionally male nor female.”²⁰ Every transgender person has a different experience with his or her transition process.²¹ Although there is not a “right” way to transition, transgender persons often experience one or more of the following: “adopting the appearance of the desired sex through changes in clothing and grooming, adopting a new name, changing sex designation on identity documents, using hormone

14. 10 U.S.C. § 9319(a) (1988); 10 U.S.C. § 6931(a) (1998); 10 U.S.C. § 4319(a) (1998).

15. Martin E. Dempsey & Leon E. Panetta, *Elimination of the 1994 Direct Ground Combat Definition and Assignment Rule*, DEP’T OF DEFENSE (Jan. 24, 2013), <http://www.defense.gov/news/WISRJointMemo.pdf>.

16. Kerrigan, *supra* note 3, at 505.

17. *Id.*

18. *Id.* at 501. See also PAISLEY CURRAH, RICHARD M. JUANG & SHANNON PRICE MINTER, TRANSGENDER RIGHTS xiii, xiv (2006); *supra* Part II.A.

Note that there is a difference between sex and gender. Sex, as the “biological binary,” is assigned at birth and refers to biological attributes. Gender refers to a socially constructed role that determines what behaviors, activities, and attributes are associated with a person’s sex. *Answers to Your Questions*, *supra* note 8, at 1.

19. *Answers to Your Questions*, *supra* note 8, at 2; KARL BRYANT & KRISTEN SCHILT, TRANSGENDER PEOPLE IN THE U.S. MILITARY: SUMMARY AND ANALYSIS OF THE 2008 TRANSGENDER AMERICAN VETERANS ASSOCIATION SURVEY 2 (2008).

20. *Answers to Your Questions*, *supra* note 8, at 3; REPORT OF THE APA TASK FORCE, *supra* note 11, at 37.

21. *Id.*

2014]

The Invisible Army

189

therapy treatment, and/or undergoing medical procedures that modify their body to conform with their gender identity.”²²

In line with how the military defines and excludes transgender persons,²³ this Note will use the term “transgender person(s)” to include individuals who identify as transgender, but who have not taken—and do not want—hormones or steps toward sex-reassignment surgery; individuals who are taking hormones or who are in the process of undergoing sex-reassignment surgery or surgeries;²⁴ and individuals who have undergone sex-reassignment surgery.

C. CURRENT MILITARY POLICY

Issues for transgender persons may arise at enlistment, during service, and in the inactive reserve.²⁵ This Section addresses each in turn.

1. Enlistment

In order to join the military, potential service members must go through both a physical and a psychological examination, either of which may disqualify a transgender prospective service member.²⁶ Each branch of the military has its own medical disqualifications. The Army’s Standards of Medical Fitness, which is representative of the other branches’ standards,²⁷ lists numerous ways in which a current or prospective service member may be medically disqualified, including sex-reassignment surgery and identification as a transgender person.²⁸ Although some medical conditions may be waived, scholars have been unable to find a circumstance in which a transgender service member received a waiver.²⁹

22. *Id.*

23. *See infra* Part II.C.

24. Transgender persons who elect to undergo sex-reassignment surgery actually go through a series of surgeries. The surgical process can include “top surgery (breast augmentation or removal) or bottom surgery (altering genitals).” NAT’L CTR. FOR TRANSGENDER EQUAL. TRANSGENDER TERMINOLOGY (2009), available at http://transequity.org/Resources/NCTE_TransTerminology.pdf (internal quotations omitted). However, this Note, like most literature, refers to the entire process as “sex-reassignment surgery.”

25. ALEXANDER, *supra* note 1, at 16–17.

26. *Id.* at 16; WITTEN, *supra* note 5, at 8.

27. *Certain Health Issues Can Make It Hard to Join*, MILITARY.COM, <http://www.military.com/join-armed-forces/disqualifiers-medical-conditions.html>.

28. *See STANDARDS OF MEDICAL FITNESS*, *supra* note 4.

29. ALEXANDER, *supra* note 1, at 17.

Transgender persons who have undergone sex-reassignment surgery³⁰ are disqualified under a medical regulation during the physical exam.³⁰ Transmen³¹ who have had sex-reassignment surgery may be excluded for “major abnormalities or defects of the genitalia” and change of sex.³² Transwomen³³ who have had sex-reassignment surgery may be excluded for penis amputation, “major abnormalities or defects of the genitalia,” and change of sex.³⁴

Transgender persons who have not had sex-reassignment surgery but who identify as transgender are disqualified under the psychological examination.³⁵ Specifically, transgender persons may be disqualified for a long list of disorders, including transvestism, transsexualism, psychosexual conditions, and GID.³⁶

Pursuant to the Standards of Medical Fitness, after each evaluation, the service member is either marked “medically acceptable” or “medically unacceptable.”³⁷ Being “medically unacceptable” is a cause for rejection from service.³⁸

2. During Service

Transgender service members who wish to remain in the military must “pass” as their biological sex, which means they cannot take hormones or pursue sex-reassignment surgeries, and they must conceal their gender identities and transgenderism.³⁹ Service members who wish to transition during service may be discharged for an enlistment violation.⁴⁰

30. STANDARDS OF MEDICAL FITNESS, *supra* note 4, at 10–11, ¶¶ 2-14(a)(5), 2-14(b)(5), 2-14(d); Kerrigan, *supra* note 3, at 505; BRYANT & SCHILT, *supra* note 19, at 3. Having abnormalities or defects of the genitalia would also include potential service members who were born intersex and who had surgery performed when they were infants. Although this Note does not explicitly analyze intersex individuals, the same arguments can be made for allowing intersex individuals to serve in the military.

31. Transman is a term that refers to a transgender person who was born biologically female but has transitioned to the male gender.

32. STANDARDS OF MEDICAL FITNESS, *supra* note 4, ¶¶ 2-14 (b)(5), 2-14(d).

33. Transwoman is a term that refers to a transgender person who was born biologically male but has transitioned to the female gender.

34. STANDARDS OF MEDICAL FITNESS, *supra* note 4, ¶¶ 2-14 (b)(5), 2-14(d).

35. *Id.* ¶ 3-35(a).

36. *Id.*

37. *Id.* ¶ 1-5.

38. *Id.*

39. Katie Miller, *The New DADT: The Military’s Ban on Transgender Service*, OUTSERVE MAG. (Jan. 31, 2012), <http://outservemag.com/2012/01/the-new-dadt-the-militarys-ban-on-transgender-service>.

40. WITTEN, *supra* note 5, at 8 (citing personal communication with military recruiters). Witten does not expressly state why a transgender service member could be discharged under an enlistment

Transgender service members could also be discharged for cross-dressing even though dressing consistently with their gender identities is pivotal to their gender expressions and transition processes.⁴¹

The military does not currently provide any support for transitioning service members.⁴² Because the military will not provide health care for transitioning and because there is limited doctor-patient confidentiality within the military,⁴³ some transgender service members try to receive medical assistance with their transition from civilian medical practitioners.⁴⁴ The military regularly schedules physical exams, so if a transitioning service member has sex-reassignment surgery or starts taking hormones secretly, the changes will likely become known during the exam.⁴⁵ Moreover, some branches of the military require service members to report any medical care obtained from civilian providers, so failure to disclose could lead to disciplinary action as well as potential discharge.⁴⁶ Transgender service members who wish to transition during service could therefore face disciplinary penalties as well as a potential discharge, which may or may not be honorable.⁴⁷

3. Members of Inactive Reserve

Recalled members of the inactive reserve are subject to the same medical examinations that active service members undergo at enlistment

violation. However, one possible reason is that the service member lied during his enlistment exams about being a transgender person.

41. *Id.* The military generally regards wearing any gender-inappropriate clothing as cross-dressing. Cross-dressing could also be penalized with discipline or criminal prosecution. ALEXANDER, *supra* note 1, at 17.

42. *Id.*

43. WITTEN, *supra* note 5, at 9; Kerrigan, *supra* note 3, at 513; James Dao & Dan Frosch, *Military Rules Said to Hinder Therapy*, N.Y. TIMES (Dec. 6, 2009), <http://www.nytimes.com/2009/12/07/us/07therapists.html>.

44. Kerrigan, *supra* note 3, at 513.

45. ALEXANDER, *supra* note 1, at 17.

46. *Id.*

47. Carol Ann Alaimo, *Transgender Vets a Hidden Population: Men with Gender Struggles Drawn to Macho Military*, ARIZONA DAILY STAR (Feb. 22, 2009), http://azstarnet.com/news/local/govt-and-politics/transgender-vets-a-hidden-population/article_c2507f38-4f44-5afc-a5df-9bc5af954f4f.html (relating the story of Russ, a transgender Army officer, who was allowed to resign honorably after he was court-martialed for cross-dressing).

Being discharged from the military means that a service member has been released from his obligation to serve in the armed forces. Ryan Guina, *Types of Military Discharges*, THE MILITARY WALLET, <http://themilitarywallet.com/types-of-military-discharges> (last updated Aug. 14, 2012). There are different types of discharges, including “honorable” and “dishonorable.” *Id.* Each type of discharge carries different repercussions, for example, a dishonorable discharge prevents the service member from receiving all military and veteran benefits. *Id.*

and on a yearly basis. Being recalled to active duty poses at least three potential problems for transgender service members. First, service members may have to halt the transition process.⁴⁸ Ceasing hormone therapy could lead to discomfort and an increased risk for certain diseases or conditions.⁴⁹ Second, because returning service members must take a physical exam, transitioning or post-transitioned service members could be medically disqualified upon their examination.⁵⁰ Third, service members who identify as transgender but who have not begun hormone therapy or sex-reassignment surgery could be disqualified under the psychological regulation as administratively unfit. Essentially, recalled transgender service members must choose between seeking discharge from the military in order to continue their transitions and hiding a central part of their identities in order to go back into service.

III. THE CASE FOR RESCINDING THE BAN ON TRANSGENDER MILITARY SERVICE

This Part argues that transgender service members should not be categorically barred from serving in the military. Section A exposes the flaws in the medical regulations that bar transgender service members by looking at examples of successful, high-achieving, transgender military service members and demonstrating that current military medical provisions for cisgender⁵¹ service members could be easily adapted to deal with transgender service members' medical needs. Section B argues that the military should rescind its ban on persons diagnosed with GID. Subsection 1 explores the controversy over this ostensible disorder to contend that a diagnosis should not uniformly disqualify every transgender person who exhibits its symptoms. Subsection 2 examines the American Psychiatric Association's decision to change the diagnosis from GID to gender dysphoria and suggests that this diagnostic change should prompt a reevaluation of the transgender exclusion in favor of removing the service bar.

48. ALEXANDER, *supra* note 1, at 17.

49. Jennifer L. Levi & Bennett H. Klein, *Pursuing Protection for Transgender People Through Disability Laws*, in TRANSGENDER RIGHTS 74, 86 (Paisley Currah, Richard M. Juang & Shannon Price Minter eds., 2006).

50. ALEXANDER, *supra* note 1, at 17.

51. Cisgender is a term that describes people who identify with the sex they were assigned at birth.

A. MEDICAL REGULATIONS

1. Being Transgender Does Not Per Se Affect Service Capability

The following case study of S.C., a transgender pilot, illustrates several key points that should prompt the military to rescind its ban on transgender persons. First, despite the fact that she was a transgender person, S.C. had a successful military career, logging thousands of practice and combat hours. S.C. was capable of doing her job, regardless of her gender identity. Second, after her surgery, S.C. was able to return to work as a pilot without any limiting medical complications. This example suggests that transgenderism does not make a person per se unfit for the military and that post-transition soldiers can successfully reintegrate into the military. Transgender persons who have had sex-reassignment surgery should not be disqualified solely on that basis. Third, S.C. experienced distress with her GID until she was able to disclose her gender identity and undergo surgery to realign her body with that identity. After this disclosure and her sex-reassignment surgery, she resumed her military position with no complications. Hence, disclosure of one's identity as a transgender person might lead to better, more capable military service.⁵²

S.C.'s case is analyzed in an internal military document that addresses how transgenderism may or may not affect a person's ability to function as a soldier.⁵³ The authors, T.I. Clements and R.E. Wicks, were medical residents in the Aerospace Medicine Branch in the U.S. Air Force School of Aerospace Medicine.⁵⁴ S.C., a thirty-three-year-old biologically male instructor pilot, had over 7,000 flying hours and over 3,000 hours of combat.⁵⁵ At one of her⁵⁶ yearly medical exams, S.C. admitted that she had been undergoing "oral and systemic estrogen therapy" for about a year and a half, and had undergone cosmetic facial surgery and electrolysis on her facial hair.⁵⁷ Two months after this examination, S.C. was "grounded by [her] supervisor for repeated episodes of poor judgment," including excessive banking and improperly using night vision goggles.⁵⁸ Later that

52. See *infra* text accompanying notes 181–87.

53. T.I. CLEMENTS & R.E. WICKS, TRANSEXUALISM AND FLIGHT SAFETY 2 (1990), available at <http://www.dtic.mil/cgi/tr/fulltext/u2/a229995.pdf>.

54. *Id.* at 1 (explaining that the report only reflects the opinions of the authors and is not the official opinion of the U.S. Air Force).

55. *Id.* at 2.

56. Although the document switches from male to female pronouns to correspond with S.C.'s gender transition, this Note uses the female gendered pronoun that reflects S.C.'s gender identity.

57. *Id.* at 2–3.

58. *Id.* at 3.

year, S.C. began dressing and living as a woman full-time.⁵⁹ She also underwent sex-reassignment surgery.⁶⁰ Four months after her surgery, S.C. was evaluated “to ascertain aeromedical fitness to return to flying duties.”⁶¹ At this evaluation, S.C. reported that from the time of childhood and adolescence she dressed as and fantasized about being a female.⁶² Clements and Wick note that she “possessed above-average intelligence and was neither flamboyant nor hysterical” and that she was “restrained in dress and behavior.”⁶³ Her physical examination was largely “unremarkable,” with the exception of a non-problematic heart murmur, and her genitals, which had been surgically corrected to female genitals to reflect her gender identity.⁶⁴

The medical residents who authored the report found that after her sex-reassignment surgery, S.C. was capable of performing her duties as an instructor pilot and had no further “episodes of questioned judgment or episodes of psychologic [sic] dysfunction.”⁶⁵ The authors further note that all surgical procedures, not just those relating to transgenderism, “are fraught with aeromedical concerns for flight safety” due to the “pain and wound healing.”⁶⁶ The doctors ultimately concluded that a transgender aircrew member is “no more likely to be unsafe than the non-[transgender].”⁶⁷

S.C.’s story of military success is not the only example of effective transgender service. Transgender persons are able to serve successfully in the military⁶⁸ and, in fact, already do serve successfully, albeit in secret.⁶⁹ While the names of many transgender service members will never be known, this subsection further presents a few illustrative examples of transgender service members who had productive military careers.

Mick Andoso earned the rank of First Sergeant in the Air Force, serving as a woman for twenty years.⁷⁰ He⁷¹ was “named one of the

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 5.

64. *Id.*

65. *Id.*

66. *Id.* at 14.

67. *Id.* at 13.

68. Kerrigan, *supra* note 3, at 505.

69. Alaimo, *supra* note 47.

70. *Id.*

71. This Note uses the male gendered pronoun that reflects Mick’s gender identity.

service's top airmen for [his] work at the military's Defense Language Institute in California.”⁷² Mick waited to transition until after his military service was complete.⁷³ Given the high praise he received for his work in the military, his secret identity as a transgender person does not appear to have negatively impacted his service.

Allyson Robinson is an Army veteran and a graduate of the U.S. Military Academy where she majored in physics.⁷⁴ Robinson, while serving as a man, commanded a Patriot missile unit in Europe and the Middle East.⁷⁵ A colleague describes Robinson as having an “exemplary military background.”⁷⁶

Paula Neira, an officer in the Navy during the Gulf War, served as a man despite grappling with her gender identity.⁷⁷ Paula was an officer in the Navy’s countermeasures task group and was in charge of “supervising sea mine clearance off the coast of Kuwait.”⁷⁸ This was a “pressure-filled assignment in which the lives of her fellow service members were at stake.”⁷⁹ Neira explained that she made the sacrifice to suppress her gender identity because of the importance of her job.⁸⁰ Neira calls the choice between her gender identity and serving in the military “ridiculous” and adds: “[p]atriotism has nothing to do with gender [or] sexual orientation.”⁸¹

These examples, in addition to that of S.C., illustrate that being a transgender person does not make one inherently or automatically unfit for service. Transgender persons of any sexual orientation can be decorated,

72. Alaimo, *supra* note 47.

73. *Id.*

74. Andrea Stone, *Allyson Robinson, Transgender Veteran, Named to Helm Advocacy Group for LGBTs in Military*, The HUFFINGTON POST (Oct. 25, 2012, 7:30 AM), http://www.huffingtonpost.com/2012/10/25/allyson-robinson-transgen_n_2016086.html; Allyson Robinson, *About Allyson and this Blog*, CROSSING THE T: LIFE AT THE INTERSECTION OF CHURCH AND TRANS WITH REV. ALLYSON ROBINSON (Dec. 9, 2007), <http://crossingthet.wordpress.com/about/>.

75. Stone, *supra* note 74.

76. *Id.*

77. Chris Bull, *“Don’t Ask Don’t Tell” Goes to War: For the First Time, the Policy That Failed in Peacetime is Being Tested in Battle*, THE ADVOCATE (Dec. 4, 2001), <http://www.thefreelibrary.com/%22Don't+ask+don't+tell%22+goes+to+war%3A+for+the+first+time,+the+policy..-a080500126>.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

high-achieving service members, just like cisgender straight, gay, lesbian, and bisexual persons.⁸²

The military's ban on transgender service members is counterproductive; in many cases, the transgender service member is academically more qualified than a non-transgender service member,⁸³ and these case studies vividly illustrate that transgender service members can have successful and high-achieving careers. It is detrimental to military strength to turn away qualified, willing, and educated service members because of their gender identities or because they have had sex-reassignment surgeries.

2. Utilizing Current Military Medical Policies for Transgender Medical Needs

Disqualifying transgender service members because of medical concerns is inconsistent with how the military generally addresses other medical conditions and diagnoses. As an initial matter, many transgender persons do not need constant treatment, nor do all transgender persons want sex-reassignment surgery.⁸⁴ However, if transgender persons do wish to receive surgery or treatment, their medical needs could be addressed consistently with existing military medical policies. The military's policies toward oral contraceptives, pregnant servicewomen, and diabetics represent three ways that the military could address transgender service members' medical needs without having to entirely ban their service.

First, the military currently allows women to regularly take hormones, in the form of oral contraceptives, during military service.⁸⁵ According to one study, roughly thirty-four percent of women in the military used contraceptives, ranging from a low thirty percent in the Army to a high of thirty-nine percent in the Air Force.⁸⁶ Of the approximately 214,000 women in the military,⁸⁷ that means about 72,000 women take contraceptives.

82. Tom Carpenter & Karen Ocmb, *Carpenter: Why LGB People Should Care About Trans Bias in the Military*, LGBT POV (Oct. 24, 2012), <http://lgbtpov.frontiersla.com/2012/10/24/carpenter-why-lgb-people-should-care-about-trans-bias-in-the-military/>.

83. *Id.*

84. Kerrigan, *supra* note 3, at 516.

85. Lindsey Enewold, et al., *Oral Contraceptive Use Among Women in the Military and the General U.S. Population*, 19 J. WOMEN'S HEALTH 839, 840 (2010), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2940458>.

86. *Id.*

87. *Women in the Military Statistics*, STATISTIC BRAIN, <http://www.statisticbrain.com/women-in-the-military-statistics/> (last updated Apr. 4, 2012).

Because the military allows women to take hormones, it should also allow transgender service members, many of whom take hormones as part of their transitions or in lieu of sex-reassignment surgeries, to do the same.⁸⁸ Although there is no official data on the number of transgender persons who are currently in the military, it is certainly a significantly smaller number than the number of women in the military taking oral contraceptives.⁸⁹ It would not be overly burdensome or costly for the military to allow transgender persons to take hormones. Furthermore, because women are allowed to take hormones and this has not affected their ability to serve, there is no reason to assume that allowing transgender service members to take hormones will impact their abilities to serve.⁹⁰ Finally, the military would not have to change its policy drastically for transgender service members. Both transmen and transwomen can take their transition hormones by pill.⁹¹ Indeed, most transwomen take their hormones by pill.⁹² Because the military allows cisgender women to take hormones orally, the military should also allow transmen and transwomen to take hormones orally.

The military's provisions for diabetics offer another alternative as to how the military could treat transgender service members who take hormones. In addition to its provisions on birth control, the military also makes provisions for diabetic service members who require insulin injections.⁹³ In the Army, for example, diabetic service members who take insulin cannot be deployed to areas where insulin cannot be stored or where "appropriate medical support cannot be reasonably assured."⁹⁴ Diabetics

88. *Answers to Your Questions*, *supra* note 8, at 3; REPORT OF THE APA TASK FORCE, *supra* note 11, at 37.

89. Although there is no estimate for how many transgender service members are currently serving, comparing the number of transgender veterans to cisgender veterans may be useful. The Transgender Americans Veterans Association estimates that of the twenty-six million veterans, a mere three-hundred thousand are transgender persons. Lisa Leff, *Transgender Veterans Seek Recognition*, BOSTON (Jan. 30, 2011), http://www.boston.com/news/nation/washington/articles/2011/01/30/transgender_veterans_seek_recognition/?camp=pm. That is one percent of veterans. The numbers of transgender persons trying to access military medical services will likely be similarly small.

90. See generally Carpenter & Ocambo, *supra* note 82.

91. Darlene Tando, *Physical Transition Options for the Transgender Individual*, PFLAGSD, <http://www.pflag.com/physical-transition-options-for/>; Olivia Ashbee & Joshua Mira Golberg, *Hormones: A Guide for MTFs*, VANCOUVER COASTAL HEALTH, <http://transhealth.vch.ca/resources/library/tcpdocs/consumer/hormones-MTF.pdf>.

92. Tando, *supra* note 91.

93. STANDARDS OF MEDICAL FITNESS, *supra* note 4, at 60, §§ 5-14(f)(1), 5-14(f)(2).

94. STANDARDS OF MEDICAL FITNESS, *supra* note 4, at 60, § 5-14(f)(1).

who take insulin must inject it underneath their skin, and often must do so several times a day.⁹⁵

As with diabetics who require insulin, the military could require that transgender persons who take hormones only be deployed to areas where the hormones could be properly stored or where appropriate medical care can be assured. If the military allows diabetics to receive insulin injections several times a day, the military could also allow transgender persons to receive their hormones by injection.

Finally, the military's provisions on leaves of absence for pregnant women could address the needs of transgender service members who require time off for sex-reassignment surgery. Although the military formerly considered pregnancy and motherhood incompatible with military service, there are now regulations in place that allow pregnant women to continue serving during and after their pregnancy.⁹⁶ Approximately fifty-eight percent of hospitalizations among active-duty women are for pregnancy.⁹⁷ Current policies stress that pregnancy by itself should not restrict tasks normally assigned to servicewomen.⁹⁸ It is the service woman's responsibility to try and plan pregnancies to fit in with her military duties.⁹⁹ Studies have shown that pregnant military women lose no more time from work than military men, who might lose time from service because of injuries or for disciplinary reasons.¹⁰⁰

These provisions demonstrate ways in which the military could make similar accommodations for transgender service members who require surgeries. First, like pregnancy, transgenderism by itself should not disqualify a person from service, nor should it restrict service members to certain types of tasks. As previously discussed, transgender service members are capable of serving in all branches of the military in a variety of tasks.¹⁰¹ Second, transgender service members who wish to transition mid-service could be required to plan their transition so as not to conflict

95. *Diabetes Treatment*, MAYO CLINIC, <http://www.mayoclinic.com/health/diabetes-treatment/DA00010/NSECTIONGROUP=2> (last accessed Mar. 6, 2013).

96. STANDARDS OF MEDICAL FITNESS, *supra* note 4, at 79, § 7-9; Issue: *Pregnancy and Military Operations*, ALLIANCE FOR NATIONAL DEFENSE: A POSITIVE VOICE FOR MILITARY WOMEN (2005), <http://www.4militarywomen.org/Pregnancy.htm> [hereinafter *Pregnancy and Military Operations*].

97. Mark Thompson, *Women in Combat: Vive a Différence*, TIME U.S. (Jan. 25, 2013), <http://nation.time.com/2013/01/25/women-in-combat-vive-a-difference/>.

98. *Pregnancy and Military Operations*, *supra* note 96.

99. *Id.*

100. *Id.*

101. See *supra* Part III.A.1.

with important military duties, just as pregnant servicewomen must try and plan pregnancies responsibly. Finally, recovery from sex-reassignment surgery takes about six weeks, which is the same amount of time given to women in the military for postpartum care.¹⁰² Admittedly, transgender persons often undergo more than one surgery in order to complete their transition. However, if women are allowed to have multiple pregnancies and take time off for each recovery, transgender persons should similarly be allowed to undergo surgeries and take the required time off to recover for each one.

Because the military already makes provisions for service members who take hormones, take insulin, or become pregnant, the military could clearly make similar provisions for transgender service members who take hormones or who require surgery to complete their transitions. Being diabetic, taking birth control, and becoming pregnant do not bar one from service because none of those conditions are *per se* incapacitating. Nor should being transgender bar one from service. As one author aptly summarizes, “[g]iven the commonality of medical issues throughout a career, and the rarity of [transgender persons], [a transgender service member wishing to transition] is unlikely to place a significant burden on the force, especially since the timing of sex-reassignment surgery can be scheduled to have minimal impact on readiness.”¹⁰³ Instead of banning an entire group of service members because of potentially non-existing complications from hormone treatment or sex-reassignment surgery, the military should recognize that transgender persons are generally as fit for service as any other service members and rescind the medical bans. In the place of the medical bans, the military can adopt medical provisions—similar to those for diabetics, pregnant women, and women who take contraceptive hormones—that would ensure transgender service members receive adequate medical support.

B. PSYCHOLOGICAL REGULATIONS

Transgender service members who are not disqualified by the medical regulations discussed in Part A can also be disqualified if they are diagnosed with GID, which the military considers a mental disorder.¹⁰⁴

102. Carpenter & Ocamb, *supra* note 82; STANDARDS OF MEDICAL FITNESS, *supra* note 4, at 80, § 7-10(a) (women are given forty-two days, or six weeks, off after delivery).

103. Carpenter & Ocamb, *supra* note 82.

104. STANDARDS OF MEDICAL FITNESS, *supra* note 4, at 33, § 3-35.

The Diagnostic and Statistical Manual (“DSM”) IV, published by the American Psychiatric Association (“APA”), defines the criteria for diagnosing and classifying mental disorders. GID is the psychiatric diagnosis for transgender persons in the DSM-IV. The military, though not bound to the DSM, relies on it and currently lists GID as a disqualifying psychiatric condition.¹⁰⁵ In May 2013, the newest edition of the DSM, DSM-V, changed the diagnosis from GID to gender dysphoria.¹⁰⁶ The change is meant to depathologize the diagnosis. It remains unclear whether or how the military will respond to the new DSM. However, this diagnostic change provides the military with an impetus to modify its policies on transgender service members. Rather than simply update the psychological regulations to reflect the new diagnosis, the military could remove the diagnosis as a disqualifying condition. Although this change would not completely rescind the transgender ban,¹⁰⁷ it would be an important step to fully integrated military service.

Like transgender persons who seek sex-reassignment surgery or hormone therapy, persons who are diagnosed with GID are not inherently unfit for military service.¹⁰⁸ In light of the debate over whether GID is properly considered a mental illness and the changes to the DSM—which make the diagnosis of gender dysphoria less of a mental disorder and more of a “temporary mental state”¹⁰⁹—the military should recognize that transgender persons are capable of successful military service and rescind the categorical ban on persons diagnosed with GID.

1. Is GID a Mental Illness?

The question of how to define a mental illness “has been and remains a point of tremendous contention within the psy-professions.”¹¹⁰ This is particularly true with the diagnosis of GID. According to the APA, in order to be diagnosed with GID, the following criteria must be met: a “strong and persistent cross-gender identification” and a “persistent discomfort with his

105. *Id.*; Carpenter & Ocambo, *supra* note 82.

106. *See infra* Part III.B.2.

107. As further discussed in Part V, there are both military medical codes as well as statutes that need to change in order to completely remove the transgender ban.

108. *See supra* Part III.A.1 (noting that transgender service members can be decorated, high-achieving service members).

109. Camille Beredjick, *DSM-V to Rename Gender Identity Disorder ‘Gender Dysphoria,’* THE ADVOCATE (July 23, 2012), <http://www.advocate.com/politics/transgender/2012/07/23/dsm-replaces-gender-identity-disorder-gender-dysphoria>.

110. David B. Cruz, *Controlling Desires: Sexual Orientation Conversion and the Limits of Knowledge and Law*, 72 S. CAL. L. REV. 1287, 1313 (1999).

2014]

The Invisible Army

201

or her sex or sense of inappropriateness in the gender role of that sex.”¹¹¹ In addition, the individual’s “disturbance [must] not [be] concurrent with a physical intersex condition” and, most controversially, the disturbance must cause the individual “clinically significant distress or impairment in social, occupational, or other important areas of functioning.”¹¹² That some transgender persons experience stress and disability does not mean that transgenderism is a “gender-disordered mental illness.”¹¹³ Additionally, many transgender persons do not feel that their gender identities are distressing or disabling.¹¹⁴ Nonetheless, they may seek a diagnosis for other purposes, such as getting their health insurance to pay for sex-reassignment surgery.¹¹⁵

The distress that transgender persons experience (if they experience any at all) may not be an intrinsic aspect of transgenderism.¹¹⁶ Rather, because of the anti-transgender sentiment in society at large, transgender persons feel stigmatized and experience discrimination, which then causes their distress independently.¹¹⁷ Since not every transgender person experiences significant distress or disability, and since these symptoms might not actually be caused by transgenderism itself, there is a strong “impl[ication] that being transgender does not constitute a mental disorder per se.”¹¹⁸ Ultimately, it is “improper . . . to make normative judgments of

111. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS IV (DSM-IV-TR) 581, (4th ed. 2000) [hereinafter AM. PSYCHIATRIC ASS’N, DSM].

112. *Id.*

113. See Cruz, *supra* note 110, at 1327 (arguing that distress and disability do not establish that homosexuality is a gender-disordered form of mental illness).

114. Nikki Burrill & Valita Fredland, *The Forgotten Patient: A Health Provider’s Guide to Providing Comprehensive Care for Transgender Patients*, 9 IND. HEALTH L. REV. 69, 71 (2011) (internal quotations omitted).

115. Drescher, *supra* note 6, at 428; *Answers to Your Questions*, *supra* note 8, at 3.

116. REPORT OF THE APA TASK FORCE, *supra* note 11, at 32. See also Carpenter & Ocamb, *supra* note 82 (noting that transgender persons, like the LGB community, experience depressive symptoms because of societal stigmatization, social isolation, and harmful labeling, not their transgender identities by themselves).

117. REPORT OF THE APA TASK FORCE, *supra* note 11, at 32.

118. Kerrigan, *supra* note 3, at 516; *Answers to Your Questions*, *supra* note 8, at 3. See also G. DECUYPERE, ET AL., RESPONSE OF THE WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH TO THE PROPOSED DSM 5 CRITERIA FOR GENDER INCONGRUENCE (2010) (stating that gender variance in and of itself is not pathological and having a transgender identity does not constitute a psychiatric disorder).

This is not to say that all transgender persons are perfectly comfortable with their diagnosis. Some transgender persons engage in self-harm practices, like genital mutilation. *Mental Wellbeing and Trans People*, NHS CHOICES, <http://www.nhs.uk/Livewell/Transhealth/Pages/Transmentalhealth.aspx> (last visited Sep. 23, 2013).

mental health on the basis of prescribed differences in how men and women are supposed to feel.”¹¹⁹

2. Changes in the DSM-V

In May 2013, the APA removed GID from the DSM and replaced the diagnosis with gender dysphoria.¹²⁰ Jack Drescher, a member of the APA group that considered this issue, explained that the change in diagnosis reflects a desire to stop “pathologizing all expressions of gender variance just because they were not common or made someone uncomfortable.”¹²¹ The APA further explains that gender dysphoria was chosen “to avoid a presupposition of the presence of a clinically significant acute distress in all cases as a requirement for the diagnosis.”¹²²

The two new diagnostic criteria for gender dysphoria are (1) a “marked incongruence between one’s experienced/expressed gender and assigned gender” as manifested by two or more of six factors, and (2) “clinically significant distress or impairment in social, occupational, or other important areas of functioning, or with a significantly increased risk of suffering, such as distress or disability.”¹²³ The second criteria, eliminating GID’s language that the “disturbance *causes* clinically significant distress or impairment,” recognizes that transgenderism alone does not cause distress.¹²⁴ Rather, the language recognizes that transgenderism can contribute to distress but that there are also other relevant factors. The new language suggests that gender dysphoria does “not imply, in any way, shape, or form, a disordered personality.”¹²⁵ Instead, gender dysphoria should not be considered a mental disorder at all, as it does not “necessarily imply any loss of functionality in day to day life.”¹²⁶

The updated DSM-V suggests that the military should change its policies toward transgender persons. This key DSM revision highlights “for

119. Cruz, *supra* note 110, at 1326. Though Cruz writes in the context of the depathologization of homosexuality, the quote is similarly applicable to transgender persons.

120. Beredjick, *supra* note 109.

121. *Id.*

122. *APA Releases Proposed Revisions to Diagnostic Criteria for “Transgender Children”*, GENDER T RENDER, <http://gendertrender.wordpress.com/tag/dsm5/> (last visited Oct. 15, 2013).

123. Michele O’Mara, *Gender Dysphoria, Proposed Diagnostic Criteria for DSM-V*, MICHELE O’MARA, PhD, <http://micheleomara.com/gender-dysphoria-proposed-diagnostic-criteria-for-dsm-v/>.

124. AM. PSYCHIATRIC ASS’N, DSM, *supra* note 111, at 581 (emphasis added).

125. Carpenter & Ocamb, *supra* note 82.

126. Brynne Tannehill, *Trans is Not a Mental Illness*, OUTSERVE MAG. (Oct. 22, 2012), <http://outservemag.com/2012/10/trans-is-not-a-mental-illness>.

the armed forces, just how out of touch their regulations are.”¹²⁷ The APA’s recognition that transgender persons are not “disordered” nullifies any argument that the military should bar them from service because of GID. Just as the military recently removed the Combat Exclusion Policy, which prohibited women from serving in combat positions, and repealed Don’t Ask, Don’t Tell, the military should continue to eliminate outdated restrictions and remove its transgender exclusion.

IV. OTHER OBJECTIONS TO TRANSGENDER SERVICE

This Part addresses other arguments in opposition to transgender military service. First, Section A responds to the position that unit cohesion will suffer if transgender persons are allowed to openly serve. Section B refutes the idea that transgender inclusion poses significant financial costs for the military. Finally, Section C addresses post-integration implementation concerns that some opponents have about transgender military service.

A. UNIT COHESION

One objection to transgender military service is that unit cohesion will suffer. This objection is analyzed under three subsections. Subsection 1 summarizes the unit cohesion argument, then investigates the repeal of Don’t Ask, Don’t Tell and the racial integration of the military, and concludes that this unit cohesion argument is implausible. Subsection 2 evaluates a number of countries with openly transgender service members to reject unit cohesion as an adequate basis for categorical transgender exclusion. Subsection 3 establishes that open transgender service members might improve, rather than harm, unit cohesion.

1. Inclusion of Openly Transgender Service Members Will Not Harm Unit Cohesion

One prominent argument against transgender inclusion in the military is that unit cohesion, defined as “the bonds of trust among individual service members,”¹²⁸ will suffer if transgender people are allowed to

127. Sunnivie Brydum, *The Trans Woman Who Is Taking on the Military*, THE ADVOCATE (Jan. 25, 2013), <http://www.advocate.com/print-issue/current-issue/2013/01/25/trans-woman-who-taking-military>; Tannehill, *supra* note 126.

128. Danny Kaplan & Amir Rosenmann, *Unit Social Cohesion in the Israeli Military as a Case Study of “Don’t Ask, Don’t Tell,”* 33 POL. PSYCHOL. 419, 422 (2012).

serve.¹²⁹ The rationale behind this argument is that this “divergent” addition would threaten aspects of bonding and trust, disrupt unit cohesion, and impede overall military performance.¹³⁰ This argument was first advanced to support the Army’s racial segregation; it was then resurrected to prevent women, and later, openly lesbian, gay, and bisexual people from serving.¹³¹ For each of these restrictions, this argument was undermined and the military ultimately reversed its initial position.¹³²

Although the Don’t Ask, Don’t Tell Repeal Act passed over a year ago, an interview with Sergeant Jonathon Mills of the Air Force suggests no deleterious impact on unit cohesion.¹³³ In fact, Sergeant Mills reported that, in the year since the act’s passage, he had not experienced a single incident in which a gay service member disrupted unit cohesion.¹³⁴ Although one sergeant’s experience cannot in itself prove that unit cohesion has not suffered after the repeal of Don’t Ask, Don’t Tell, other countries’ data support Sergeant Mills’s suggestion that inclusion of gay and transgender service members does not harm unit cohesion.¹³⁵

For example, a Canadian study found that the Canadian military’s repeal of its gay ban “had no impact on military performance, readiness, cohesion, or morale.”¹³⁶ In Israel, researchers found that knowledge, or suspected knowledge, of gay peers was “insubstantially related to [unit] cohesion.”¹³⁷ In 2010, researchers polled five countries with openly gay service members—Britain, Canada, Australia, South Africa, and Israel—and concluded that “transitions to policies of equal treatment without regard to sexual orientation have been highly successful and have had no

129. Bonnie Moradi, *Sexual Orientation Disclosure, Concealment, Harassment, and Military Cohesion: Perceptions of LGBT Military Veterans*, 21 MIL. PSYCHOL. 513, 514 (2009).

130. *Id.*; Kaplan & Rosenmann, *supra* note 128, at 422.

131. Kerrigan, *supra* note 3, at 505. The “gay ban” in Canada prohibited service by gay, lesbian, and transgender service members. Aaron Belkin & Jason McNichol, *Homosexual Personnel Policy in the Canadian Forces: Did Lifting the Gay Ban Undermine Military Performance?*, 56 INT’L J. 73, 86 (2001).

132. Kerrigan, *supra* note 3, at 505.

133. Interview by Michel Martin with Sergeant Jonathan Mills, “Has Don’t Ask Don’t Tell Repeal Changed Military?,” NAT’L PUBLIC RADIO, Sept. 20, 2012, available at <http://www.npr.org/2012/09/20/161475625/has-dont-ask-dont-tell-repeal-changed-military>.

134. *Id.*

135. Belkin & McNichol, *supra* note 131, at 74.

136. *Id.*

137. Kaplan & Rosenmann, *supra* note 128, at 431.

negative impact on morale, recruitment, retention, readiness or overall combat effectiveness.”¹³⁸

The unit cohesion argument was similarly raised and discredited during military racial integration in the 1940s and 1950s.¹³⁹ Military commanders argued that racial integration “would undermine unit cohesion among the troops and thereby impair their morale, readiness, and ability to perform as a unified combat force.”¹⁴⁰ During wartime conditions, the military tested the hypothesis that racial integration would destroy unit cohesion and conclusively found that racial integration was not an impediment.¹⁴¹ The Navy conducted one such experiment on supply ships in 1944 and 1945.¹⁴² The Navy purposely integrated these ships and analyzed the impact on efficiency, which was predicted to be harmed by racial integration.¹⁴³ The results of this experiment “revealed high performance and morale, and low incidence of racial friction, among the racially mixed crews.”¹⁴⁴ Another important study, called Project Clear, occurred during the Korean War, in which researchers were able to observe both racially integrated and segregated infantry units who were operating under the same conditions.¹⁴⁵ The researchers compared the “attitudes of soldiers who had experienced racial integration with the attitudes of soldiers who had not.”¹⁴⁶ The results of Project Clear “demonstrated that racial integration had no discernible detrimental effects on task performance, including combat effectiveness.”¹⁴⁷ By the 1960s, it was generally accepted that integration actually promoted unit cohesion and military efficiency.¹⁴⁸

138. NATHANIEL FRANK, GAYS IN FOREIGN MILITARIES 2010: A GLOBAL PRIMER 2 (2010), available at <http://www.palmcenter.org/files/FOREIGNMILITARIESPRIMER2010FINAL.pdf>.

139. BERNARD D. ROSTKER & SCOTT A. HARRIS, SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: OPTIONS AND ASSESSMENT 171 (1993), available at http://www.rand.org/content/dam/rand/pubs/monograph_reports/2009/RAND_MR323.pdf.

140. *Id.* at 172.

141. *Id.* at 173.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 175.

146. *Id.*

147. *Id.*

148. *Id.* at 180.

The unit cohesion argument was ultimately rejected with respect to race,¹⁴⁹ sex,¹⁵⁰ and sexuality.¹⁵¹ It will likely prove similarly false for gender identity and transgender service members.

2. Other Countries Allow Open Service for Transgender Persons

The experiences of other countries that accept transgender service members further suggests that unit cohesion offers an inadequate basis for the U.S. military's categorical exclusion.¹⁵² Currently, at least thirteen countries allow transgender persons to serve openly in the military including the United Kingdom,¹⁵³ Canada,¹⁵⁴ Israel,¹⁵⁵ Thailand,¹⁵⁶ the Czech Republic,¹⁵⁷ Spain,¹⁵⁸ Australia,¹⁵⁹ Norway,¹⁶⁰ Uruguay,¹⁶¹ and New Zealand.¹⁶² Additionally, Belgium, the Netherlands, and Brazil allow service under certain restrictions.¹⁶³ In comparison, at the time Don't Ask, Don't Tell was repealed, approximately twenty-five countries allowed gays and lesbians to serve openly in the military.¹⁶⁴ Their experiences supported

149. See *supra* text accompanying notes 139–48.

150. See *infra* text accompanying notes 220–22.

151. See *supra* text accompanying notes 133–38.

152. See, e.g., Kerrigan, *Transgender Discrimination in the Military*, *supra* note 3, at 516; WITTEN, *supra* note 5, at 5. Contra Major Sherilyn A. Bunn, *Straight Talk: The Implications of Repealing "Don't Ask, Don't Tell" and the Rationale for Preserving Aspects of the Current Policy*, 203 MIL. L. REV. 207, 236 (2010) (arguing that the experiences of foreign militaries are inapplicable to the U.S. military because their laws are different).

153. UK Army Backs Sex-Change Soldiers, BBC NEWS (Aug. 2, 1999, 16:39 GMT), http://news.bbc.co.uk/2/hi/uk_news/409792.stm.

154. Adam Klasfeld, *Transgenderism More Likely in Military, Study Finds*, COURTHOUSE NEWS SERV. (July 24, 2012), www.courthousenews.com/2012/07/24/48664.htm.

155. BRYANT & SCHILT, *supra* note 19, at 9.

156. *Id.*

157. Kerrigan, *supra* note 3, at 516.

158. *Id.*

159. Ian McPhedran, A 'Bridge' Too Far for Capt. Matt?, N. TERRITORY NEWS (AUSTRALIA) (Nov. 8, 2010), at 14.

160. Rserven, *Transgender in the Military*, DAILY KOS (Jul. 27, 2012, 4:00 PM), <http://dailycos.com/story/2012/07/27/1114308/-Transgender-in-the-Military>.

161. PALM CTR., COUNTRIES THAT ALLOW MILITARY SERVICE BY OPENLY GAY PEOPLE (2009), available at <http://www.palmcenter.org/files/active/0/CountriesWithoutBan.pdf>.

162. Rserven, *supra* note 160; Autumn Sandeen, *While U.S. Fumbles on DADT, Australia & Canada Accommodate Trans Servicemembers*, PAM'S HOUSE BLEND (Dec. 10, 2010, 2:00 PM), <http://pamshouseblend.firedoglake.com/2010/12/10/while-us-fumbles-on-dadts-australia-canada-accommodate-trans-servicemembers/>; BRYANT & SCHILT, *supra* note 19, at 9; Carpenter & Ocamb, *supra* note 82; Kerrigan, *supra* note 3, at 516; WITTEN, *supra* note 5, at 5.

163. Rserven, *supra* note 160.

164. PALM CTR., *supra* note 161.

2014]

The Invisible Army

207

the repeal of Don't Ask, Don't Tell.¹⁶⁵ Likewise, other countries' recent experiences in successfully integrating their militaries to include transgender persons obligates the U.S. military to reconsider, and repeal, its ban on transgender service members.

Of the countries that allow transgender service members, none have reversed that decision. Although few reports discuss the impact of transgender service members on the military as a whole, either positive or negative, at least one study found that military performance has not been negatively affected by their inclusion.¹⁶⁶ This Canadian study found that Canada's "decision to lift its [ban on gay, lesbian, and transgender service members] had no impact on military performance, readiness, cohesion, or morale."¹⁶⁷ This study is supported by a 1995 announcement from the Human Rights Policy Bureau of the Canadian Department of National Defense, which reported that despite the anxiety about lifting the gay ban, the military had not been negatively affected.¹⁶⁸ Although the authors refer to the exclusion as the "gay ban," the ban prohibited gay, lesbian, and transgender service members.¹⁶⁹ Once this ban was lifted, the Canadian military enacted policies and practices "that were meant to preserve military effectiveness and simultaneously decrease the fear and anxiety of soldiers who self-identify as sexual minorities."¹⁷⁰ The Canadian military "places paramount importance on getting the job done and respecting the chain of command, regardless of one's attitude concerning homosexuality."¹⁷¹ In addition, the Canadian military emphasized the distinction between beliefs and behavior: personal feelings were respected, but soldiers were expected to "put personal feelings aside to accomplish military objectives and to uphold the law."¹⁷² Therefore, instead of discriminating against capable service members because of their gender

165. Catharine Richert, *Levin Claims That Other Western Countries Have Lifted Their Bans*, TAMPA BAY TIMES (Oct. 12, 2009), <http://www.politifact.com/truth-o-meter/statements/2009/oct/12/carl-levin/levin-claims-other-western-countries-have-lifted-t/>.

166. After searching Westlaw, Lexis, JSTOR, the Palm Center website, and other search engines, this author was only able to find limited material on the actual impact of having a fully integrated, transgender-inclusive military.

167. Belkin & McNichol, *supra* note 131, at 74.

168. *Id.* at 83 (quoting a personal communication with the director of Policy Analysis and Development department).

169. *Id.* at 86.

170. *Id.* at 88.

171. *Id.* at 85–86.

172. *Id.* at 87.

identities, the U.S. military should show the same support for transgender persons as the Canadian military does.

Opponents of military service by gay, lesbian, bisexual, and transgender service members often claim that comparing the U.S. military to the militaries of other countries is inappropriate because of myriad cultural differences.¹⁷³ Therefore, the argument goes, the experiences of those other forces are irrelevant to the U.S. military.¹⁷⁴ However, this criticism disregards the history of the United States, which has always “studied other militaries to learn relevant lessons for its own military.”¹⁷⁵ Comparing the U.S. military to other foreign militaries is the norm, rather than the exception.¹⁷⁶ The claim that the U.S. military cannot learn from its foreign peers is directly contradicted by the establishment of the Foreign Military Studies Office, which examines the technology strategies and tactical operations of foreign militaries, as well as cultural aspects like housing, health care, and personnel policy.¹⁷⁷ Furthermore, because the U.S. military has previously compared itself to foreign countries in order to justify its bans on gays, lesbians, and bisexual persons in the military,¹⁷⁸ it seems equally appropriate that the United States compare itself to foreign countries as a way of justifying the *removal* of the ban on transgender service members. The success of other countries in integrating their armies lends support and plausibility to the assertion that the U.S. military could take similar actions.¹⁷⁹ The U.S. military could learn from foreign militaries that it is possible to have transgender service members without destroying readiness or unit cohesion. More pragmatically, the military could learn how to address transgender service members’ needs if they differ from their cisgender peers and ensure that transgender persons are accepted by their supervisors and colleagues.¹⁸⁰

173. See, e.g., FRANK, *supra* note 138, at 106–07; Bunn, *supra* note 152, at 236.

174. FRANK, *supra* note 138, at 106–07.

175. *Id.* at 133.

176. *Id.* at 110.

177. *Id.* at 108.

178. *Id.* at 108–09.

179. *Id.* at 106.

180. Instruction from the Canadian forces could be particularly useful here. Once the Canadian armed forces became fully integrated, the transition was eased because senior military leaders “endorsed the change and encouraged a sense of duty among service members.” Belkin & McNichol, *supra* note 131, at 77. See also *supra* text accompanying notes 170–72 (explaining other ways in which the Canadian military helped both transgender and cisgender service members feel comfortable during the transition into a fully integrated army).

3. Disclosure of Gender Identity Might Improve Unit Cohesion

Allowing transgender service members to serve openly might actually improve unit cohesion. In a recent study, Bonnie Moradi polled 445 lesbian, gay, bisexual, and transgender U.S. military veterans in order to ascertain the relationship between sexual orientation, disclosure, and concealment with unit social and task cohesion.¹⁸¹ Unit social cohesion reflects the emotional bonds amongst unit members, and task cohesion reflects the soldiers' shared commitment to (and confidence in) carrying out group goals.¹⁸²

Moradi's study finds that disclosure of sexual orientation relates positively to unit social and task cohesion, whereas concealment of sexual orientation relates negatively to unit social and task cohesion.¹⁸³ In other words, disclosure of sexual orientation led to improved unit social and task cohesion, but concealment led to decreased unit social and task cohesion. This finding coincides with areas outside of the military, such as the workplace, where disclosure of sexual orientation is considered to "promote positive personal and job-related outcomes."¹⁸⁴ This is because concealment of sexual orientation is a "stressor[] that can have deleterious personal and job-related outcomes."¹⁸⁵ Concealment leads to work-related stress and isolation,¹⁸⁶ which can lead to decreased performance ability. Isolation is dangerous in the military because soldiers must work together to be effective. The negative repercussions of concealment are especially pertinent in the military, where "interpersonal connection, support, and trust among unit members are thought to be paramount to unit cohesion and effectiveness."¹⁸⁷

Granted, most of Moradi's study focused on disclosure of sexual orientation and did not explicitly address disclosure of gender identity.¹⁸⁸ Moradi notes, however, that the outcome of this study provides "useful groundwork for evaluating military policies and practices regarding sexual orientation."¹⁸⁹ Likewise, the study could provide useful groundwork for evaluating military policies toward transgender service members. Many of

181. Moradi, *supra* note 129, at 517.

182. *Id.* at 516.

183. *Id.* at 521.

184. *Id.* at 515.

185. *Id.*

186. *Id.*

187. *Id.*

188. See generally *id.*

189. *Id.*

the same concerns are implicated with disclosure of gender identity as with sexual identity. Transgender persons and gay, lesbian, and bisexual persons all challenge the gender binary by living in a way that is inconsistent with the normative gender roles provided by mainstream society.¹⁹⁰ Transgender persons and gay, lesbian, and bisexual persons experience stress because of their gender nonconformity, but that stress can be ameliorated by improved military policies allowing open service.¹⁹¹ Hence, the results of the study, even if not applicable to transgender service members in their entirety, still raises the possibility that, like disclosure of sexual orientation, disclosure of gender identity might also lead to better unit and task cohesion.

Moradi's study is further limited in that it only surveyed military veterans.¹⁹² Thus, retrospective bias is possible, and the study may not accurately reflect the experiences of the soldiers during their service.¹⁹³ However, a similar survey of current service members conducted by Zogby International, a market research firm, found that the presence of gay soldiers did not disrupt unit cohesion.¹⁹⁴ Given the results of the Zogby survey, it is likely that Moradi's study is not only an accurate representation of veterans but also of currently serving members.

B. THE MAGNITUDE OF THE COST TO THE MILITARY

Another objection to the inclusion of transgender service members in the military is that the cost of accommodating them would be "monumental" due to the cost of the surgeries that some transgender persons choose to undergo.¹⁹⁵ However, this objection exaggerates costs for three reasons. First, not all transgender persons want sex-reassignment surgery, so the cost to the military would not necessarily be "monumental." Given the small percentage of transgender Americans, and the even smaller number of transgender service members,¹⁹⁶ it is illogical to presume the cost of transgender medical care will be high. Proponents of this argument make the same error as the military when they make a sweeping, uniform statement about a community that experiences its gender identities in

190. *See supra* Part II.

191. REPORT OF THE APA TASK FORCE, *supra* note 11, at 41.

192. Moradi, *supra* note 129, at 517.

193. *Id.* at 528.

194. *See generally* ZOGBY INTERNATIONAL, OPINIONS OF MILITARY PERSONNEL ON SEXUAL MINORITIES IN THE MILITARY (Dec. 2006).

195. Bunn, *supra* note 152, at 223–24.

196. *See supra* note 89 (noting that transgender persons make up only one percent of veterans, therefore it is likely that they make up a similarly small percentage of active transgender service members).

individualized, non-uniform ways. Second, research has shown that it would not be costly for the military to allow transgender persons to have sex-reassignment surgery because the demand for these services is very small.¹⁹⁷ Third, the cost of sex-reassignment surgery is approximately the same cost as surgeries required for some of the most common military injuries. For example, the average cost of a male-to-female sex-reassignment surgery is approximately \$20,000.¹⁹⁸ By comparison, surgical repair for Achilles tendonitis, one of the most typical military injuries,¹⁹⁹ can range from \$10,000 to \$20,000,²⁰⁰ and surgery for lower-extremity fractures, another common military injury,²⁰¹ can range from \$500 to \$17,000 depending on the severity of the injury.²⁰²

The experiences of the thirteen countries that have allowed transgender service members also defeat this speculative cost argument. Countries that allow transgender service members have not reported that the inclusion has been overly costly.²⁰³ In fact, some countries pay for their soldiers' transitions and provide financial support for the surgeries. For example, Canada's Department of National Defense pays for one to two

197. BRYANT & SCHILT, *supra* note 19, at 9. A number of civilian institutions are beginning to pay for transition care. For example, a number of colleges are allowing transgender-specific health care coverage, including sex reassignment surgery. Kay Steiger, *Increasing Numbers of Colleges Cover Health Care for Transgender Students*, THE RAW STORY (Feb. 15, 2013), <http://www.rawstory.com/rs/2013/02/15/increasing-numbers-of-colleges-cover-health-care-for-transgender-students/>. Some U.S. cities, including San Francisco, California and Portland, Oregon, cover sex reassignment surgeries for government employees. *San Francisco to Become First U.S. City to Cover Cost of Transgender Surgeries*, FOX NEWS LATINO (Nov. 9, 2012), <http://latino.foxnews.com/latino/health/2012/11/09/san-francisco-to-become-first-us-city-to-cover-cost-transgender-surgeries/>.

198. *Transgender Health Benefits, TRANSGENDER AT WORK*, <http://www.tgender.net/taw/tsins.html> (last accessed Mar. 6, 2013).

199. Bruce H. Jones, et al., *Medical Surveillance of Injuries in the U.S. Military: Descriptive Epidemiology and Recommendations for Improvement*, AM. J. PREVENTATIVE MED. S44 (2010), available [at](http://phc.amedd.army.mil/PHC%20Resource%20Library/Medical%20Surveillance%20of%20Injuries%20in%20the%20U.S.%20Military%20Descriptive%20Epidemiology%20and%20Recommendations%20for%20Improvement.pdf) <http://phc.amedd.army.mil/PHC%20Resource%20Library/Medical%20Surveillance%20of%20Injuries%20in%20the%20U.S.%20Military%20Descriptive%20Epidemiology%20and%20Recommendations%20for%20Improvement.pdf>.

200. *Achilles Tendon Repair Details*, PLACID WAY (last updated 2012), <http://www.placidway.com/subtreatment-detail/treatment,20,subtreatment,225.html> /Achilles-Tendon-Repair-Treatment-Abroad.

201. Jones, *supra* note 199, at S44.

202. *Broken Foot Cost*, COSTHELPER, <http://health.costhelper.com/broken-foot.html> (last updated Dec. 2010).

203. At the time that this Note was written, there were no reports indicating that including transgender service members was overly costly.

sex-reassignment surgeries per year,²⁰⁴ as well as for hormonal and psychiatric treatment.²⁰⁵ Australia has also paid for some of its soldiers' surgeries.²⁰⁶ The populations in Canada and Australia, roughly 34,000,000²⁰⁷ and 22,000,000²⁰⁸ respectively, are smaller than the population in the United States, which is about 314,000,000.²⁰⁹ Canada has approximately 90,000 members in its armed forces.²¹⁰ Australia has approximately 47,000 members in its armed forces.²¹¹ The U.S. military has approximately 1,400,000 active military personnel.²¹² Although Canada and Australia have smaller general populations and armed forced than the United States, it is possible that the American economy, which is larger than those of Canada and Australia,²¹³ might be able to accommodate the higher number of transgender service members who would seek surgeries.

C. POST-INTEGRATION IMPLEMENTATION

This Section will briefly consider some of the “implementation problems” that might arise if transgender persons were allowed to openly serve in the military. Implementation problems raised by opponents of transgendered military service include the assignment of jobs that the transgender service member can occupy while transitioning and what uniforms the transitioning or transitioned service member should wear.

The U.S. military could look to other countries’ militaries to address these implementation concerns. For example, the U.S. military should not

204. BRYANT & SCHILT, *supra* note 19, at 9; Tony Gosgnach, ‘Don’t Ask, Don’t Tell’ Policy Falls, 19 CATHOLIC INSIGHT 21 (2011).

205. Thaddeus Baklinski, *Canadian Military Establishes Dress Rules for Transsexuals*, LIFE SITE NEWS (Dec. 8, 2010, 4:59 PM), <http://www.lifesitenews.com/news/canadian-military-establishes-dress-rules-for-transsexuals>.

206. McPhedran, *supra* note 159.

207. *Population by Year, by Province and Territory*, STAT. CAN., <http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/demo02a-eng.htm> (last updated Sept. 27, 2012).

208. *Population Clock*, AUSTRALIAN BUREAU OF STAT., <http://www.abs.gov.au/ausstats/abs@.nsf/0/1647509ef7e25faaca2568a900154b63?opendocument> (last updated June 20, 2013).

209. *U.S. and World Population Clocks*, U.S. CENSUS BUREAU, <http://www.census.gov/popclock> (last visited Sept. 4, 2013, 11:34 AM).

210. *About the Canadian Forces*, NAT’L DEFENCE AND THE CANADIAN FORCES, <http://www.forces.gc.ca/en/about/canadian-armed-forces.page> (last modified July 27, 2013).

211. *Active Military Personnel by Country*, GLOBAL FIRE POWER, <http://www.globalfirepower.com/active-military-manpower.asp> (last updated Dec. 2012).

212. *Id.*

213. Gross Domestic Product 2012, The World Bank, <http://databank.worldbank.org/data/download/GDP.pdf> (last updated Sept. 23, 2013).

be concerned that transitioning service members will be unable to hold a service-related job during the entirety of their transition processes. In the United Kingdom, a transgender service member was given a desk job during his transition so that he could continue serving.²¹⁴ The United Kingdom Army treats transgenderism as a long-term medical condition and makes allowances for service during a service member's transition.²¹⁵ The United States could mirror this policy and permit transitioning service members to occupy temporary, low-risk jobs²¹⁶ that allow them to take time off for the required surgeries. Once they are fully recovered, they could switch from their interim jobs to their usual positions in the military. Allowing service members time to transition and undergo sex-reassignment surgeries affects military readiness no differently than allowing non-transgender service members to receive medical care for injuries sustained in battle, pregnancy-related interruptions of service, or corrective surgeries like laser eye-surgery, which the military regularly provides free of charge.²¹⁷

The assignment of uniforms to transgendered service members might pose a challenge because Articles 133 and 134 in the Uniform Code of Military Justice ("UCMJ") have been interpreted to restrict things like cross-dressing and other gender non-conforming behaviors.²¹⁸ To provide uniforms to transgendered service members, the UCMJ must be interpreted to hold that transgender persons who wear the uniforms of their lived genders²¹⁹ are not cross-dressing. The U.S. military can base its uniform policy on Canada's, in which transgender service members wear the uniforms of their lived genders.²²⁰ The United States should also treat transgender service members according to their lived genders and allow them to wear gender-appropriate uniforms.

214. *UK Army Backs Sex-Change Soldiers*, *supra* note 153.

215. *Id.*

216. "Low risk" jobs include temporary desk jobs or other jobs that would not place transgender soldiers in any kind of danger while they are transitioning. This might mean that transgender service members who transition should not be deployed during their transitions.

217. See generally Rudi Williams, *Services Offering PRK and LASIK Eye Surgery to Active Duty Members*, U.S. DEP'T OF DEF. (Jan. 14, 2003), <http://www.defense.gov/news/newsarticle.aspx?id=29579>.

218. 10 U.S.C. §§ 933, 934 (2013); Kerrigan, *supra* note 3, at 505; WITTEN, *supra* note 5, at 1.

219. This Note uses the term "lived gender" to refer to the gender that the transgender person feels is their correct gender.

220. Sandeen, *supra* note 162.

In sum, the implementation problems raised by opponents of transgender military service could be easily resolved by adopting the international community's policies toward transgender service members.

V. CONCLUSION

*"We are fully committed to removing as many barriers as possible to joining, advancing, and succeeding in the U.S. Armed Forces. Success in our military based solely on ability, qualifications, and performance is consistent with our values and enhances military readiness."*²²¹

This sentiment was expressed by the Department of Defense in January 2013 after the elimination of the 1994 Combat Exclusion Policy, which precluded women from serving in direct ground combat roles in the military.²²² The Department of Defense recognized that women are "indispensable to the national security mission," noting that thousands of women have served alongside their male peers in hostile enemy territory.²²³ President Barack Obama has praised this decision as a "historic step toward harnessing the talents and skills of all our citizens," adding that the decision to rescind the ban on female combatants will "strengthen the military, enhance readiness, and be another step toward fulfilling the nation's founding ideals of fairness and equality."²²⁴

In the wake of the repeal of Don't Ask, Don't Tell,²²⁵ the removal of the Combat Exclusion Policy,²²⁶ and the changing attitude toward transgender persons as reflected in the DSM-V,²²⁷ the moment is opportune to rescind the ban on transgender service members. Enacting this change will not be simple because rules against transgender persons are found in both military regulations and statutes. As discussed in Part II, each branch of the military has its own medical regulations that prevent transgender persons from serving.²²⁸ Additionally, there are two sections in the UCMJ

221. Martin E. Dempsey & Leon E. Panetta, *Elimination of the 1994 Direct Ground Combat Definition and Assignment Rule*, U.S. DEP'T OF DEF. (Jan. 24, 2013), <http://www.defense.gov/news/WISRJointMemo.pdf>.

222. Paula Broadwell, *Women at War*, N.Y. TIMES (Oct. 20, 2009), <http://www.nytimes.com/2009/10/21/opinion/21iht-edbroadwell.html>.

223. *Id.*

224. *Obama Praises DOD for Removing Women's Combat Exclusion*, U.S. DEP'T OF DEF. (Jan. 24, 2013), <http://www.defense.gov/News/NewsArticle.aspx?ID=119099>.

225. See *supra* text accompanying notes 1–2.

226. See *supra* text accompanying notes 222–224.

227. See *supra* text accompanying notes 122–29.

228. E.g., STANDARDS OF MEDICAL FITNESS §§ 2-14(a)(5), 2-14(b)(5), 2-14(d), 3-35(a); U.S. NAVY, NAVMED P-115, MANUAL OF THE MEDICAL DEP'T §§ 15-45, 15-46, 15-58(15) (2012).

that prohibit conduct unbecoming of military personnel, which, although not explicitly stated, have been deemed to include such gender non-conforming behavior as cross-dressing.²²⁹ Transgender persons who dress as their lived genders could therefore be penalized for violating the UCMJ.

A federal statute is the best means to implement change in the military. A federal statute, passed by Congress and either signed by the President or passed by two-thirds of each house in the case of a veto, supersedes military regulations. Unlike an executive order, which could only command the military to change its medical regulations, a federal statute could implement changes to the medical and psychological regulations and place limitations on the UCMJ. This Note proposes that Congress enact a statute to order each branch of the military to remove the medical and psychological exclusions of transgender persons. Since the UCMJ does not explicitly mention cross-dressing or anything specifically related to transgender persons, the statute should also contain a provision that explains that transgender persons who dress or act as their lived genders are not engaging in conduct unbecoming of military personnel.

Removing this ban will strengthen the military, enhance readiness, and will, in President Obama's words, conclusively move the military toward this country's ideals of fairness and equality.²³⁰

229. 10 U.S.C. §§ 933, 934 (2013); Kerrigan, *supra* note 3, at 505; WITTEN, *supra* note 5, at 1.

230. See *Obama Praises DOD for Removing Women's Combat Exclusion*, *supra* note 224.

