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THE UNEQUAL BATTLEFIELD: HOW THE TRANSGENDER BAN WOULD AFFECT ONE- PERCENT OF THE ARMED FORCES

*Jennifer M. Garcia**

I. INTRODUCTION

Imagine you are born a lefty. However, when you are taught to write, you are told not to use your left hand. They tell you, “it is wrong” and even though there is no logical explanation, you are given the following excuse: “it is just the way things are done.” As a result of being told it is wrong, you learn to use your right hand exclusively. One day you decide to use your left hand and it feels natural. That is how Riley Dosh describes being transgender.¹ Riley Dosh was a rising cadet in her last year at West Point. In the spring of 2016, during her junior year, Dosh came out as a transgender woman.² Dosh was later diagnosed with gender dysphoria by a medical profession at West Point.³ During the summer of 2016, the Pentagon announced trans people would be allowed to serve openly in the armed forces.⁴ However, the

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¹ Jarid Watson, *West Point's First-Ever Transgender Graduate Uncertain If She Will Ever Serve*, CBS RADIO: CONNECTING VETS (July 31, 2017), <http://connectingvets.com/2017/07/31/west-points-first-ever-transgender-graduate-uncertain-if-she-will-ever-serve/>.

² Sheryl Gay Stolberg, *Loophole in Rules on Transgender Troops Denies 2 Their Commissions*, N.Y. TIMES (May 26, 2017), <https://www.nytimes.com/2017/05/26/us/loophole-in-rules-on-transgender-troops-denies-2-their-commissions.html>.

³ *Id.*

⁴ Transcript, Ash Carter, U.S. Sec’y of Def., Briefing of Transgender Service Policies in the Pentagon Briefing Room (June 30, 2016), <https://www.defense.gov/News/Transcripts/Transcript->

policy would only apply to members of the armed forces who were categorized as active duty.⁵ Dosh would be excluded because the policy does not include to new recruits or new officers.⁶ Following her May 2017 graduation, Dosh was not allowed to become an officer in the armed forces.⁷ In July 2017, President Trump announced his plans to enforce a transgender ban in the Armed Forces due to increasing medical costs.

This article questions the constitutionality of prohibiting transgender individuals from serving in the Armed Forces and, explores the legal, social and psychological similarities between the *Don't Ask, Don't Tell* policy and the proposed transgender military ban. This article is divided into six parts. Part II will explore the meaning of transgender in the psychology community and how it contributes to societal stigma and the legal ramifications of such stigma. Part III will give a brief overview of homophobia and transphobia in the military⁸, and discuss the implementation and repeal of *Don't Ask, Don't Tell*. Part IV will discuss transphobia in the military, including a study performed by former Defense Secretary Ash Carter in June 2016 that ordered the Pentagon to spend a year investigating how to allow transgender individuals to join the military.⁹ Part IV will also give an overview of President Trump's memorandum to ban transgender individuals in the armed forces.¹⁰ Part V will review and examine Title VII of the Civil Rights Act of 1964¹¹, along with Constitutional Law to determine if there is any guidance to this issue.¹² This article will conclude with hope for Riley Dosh and other members of the military community.¹³

[View/Article/822347/departments-of-defense-press-briefing-by-secretary-carter-on-transgender-service/](#) [hereinafter Carter Transcript].

⁵ Stolberg, *supra* note 2.

⁶ *Id.*

⁷ *Id.*

⁸ See *infra* Part III.A.

⁹ See *infra* Part IV.B.

¹⁰ See *infra* Part IV.C.

¹¹ See *infra* Part V.A.

¹² See *infra* Part V.B.

¹³ See *infra* Part VI.

II. THE TRANSGENDER ROAD TO SELF-CONFIRMATION, TREATMENTS, AND MORE

The American Psychological Association defines Transgender as “an umbrella term for 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.”¹⁴ The process of determining a person’s true gender is unique; however, usually the first step is self-awareness.¹⁵ During Dosh’s time at West Point, cadets were constantly told by their superiors “not to hide” – to be authentic and not afraid of their true selves.¹⁶ Dosh, who was tired of being in hiding, was finally able to recognize that she identified as a woman. The road to self-awareness is sometimes not easy, especially when serving in the military.

In 2012, the Diagnostic and Statistical Manual of Mental Disorders, or DSM, replaced the diagnostic term “Gender Identity Disorder” with the term “Gender Dysphoria.”¹⁷ DSM is a manual that provides criteria for mental health disorders.¹⁸ The American Psychiatric Association, which publishes DSM-V¹⁹, defines

¹⁴ *What Does Transgender Mean?*, AM. PSYCHOL. ASS’N, <http://www.apa.org/topics/lgbt/transgender.aspx> (last visited Oct. 20, 2017).

¹⁵ YES Institute, *YES Institute Gender Transition Guide* (Feb. 2017), <http://yesinstitute.org/wp-content/uploads/2017/05/gender-guide.pdf>.

¹⁶ Stolberg, *supra* note 2.

¹⁷ Camille Beredjick, *DSM-V To Rename Gender Identity Disorder ‘Gender Dysphoria’*, ADVOCATE (July, 23 2012), <https://www.advocate.com/politics/transgender/2012/07/23/dsm-replaces-gender-identity-disorder-gender-dysphoria>.

¹⁸ Kayley Whalen, *(In)Validating Transgender Identities: Progress and Trouble in the Dsm-5*, THE TASK FORCE, <http://www.thetaskforce.org/invalidating-transgender-identities-progress-and-trouble-in-the-dsm-5/> (last visited Oct. 26, 2017).

¹⁹ Originally, homosexuality was listed as a disorder in the 1967 DSM-II. In 1987, it was removed from the manual. See Neel Burton M.D., *When Homosexuality Stopped Being a Mental Disorder: Not until 1987 did homosexuality completely fall out of the DSM*, PSYCHOL. TODAY (Sept. 18,

gender dysphoria as a distress that accompanies the “incongruence between one's experienced or expressed gender and one's assigned gender.”²⁰ This classification can have damaging legal and social ramifications for someone who wants to express themselves as transgender. For example, the classification of gender dysphoria can negatively impact a trans person’s likelihood of keeping custody of their children after their transition.²¹ Gender dysphoria may be labeled as a “severe, chronic mental illness that might be harmful to the child.”²² If diagnosed with gender dysphoria, a transgender parent will often be denied the right to see his or her own children. Jessica Lynn, a transgender woman, had been married for sixteen years when she and her wife decided to divorce.²³ A California state court awarded full custody of their three children to Ms. Lynn.²⁴ During Ms. Lynn’s gender-affirming surgeries, she gave temporary custody to her ex, Ms. Butterworth, and helped finance her former partner’s dental school tuition plus two years of living expenses.²⁵ During this time, Ms. Butterworth and their two youngest children moved to Plano, Texas.²⁶ Two years later, Ms. Butterworth petitioned the Collins County court (one of the country’s most conservative) to cut off Ms. Lynn’s contact with their children.²⁷ What would follow is a “grossly”

2015), [https:// www.psychologytoday.com/blog/hidden-and-seek/201509/when-homosexuality-stopped-being-mental-disorder](https://www.psychologytoday.com/blog/hidden-and-seek/201509/when-homosexuality-stopped-being-mental-disorder).

²⁰ AM. PSYCHIATRIC ASS’N, DIAGNOSTIC & STAT. MANUAL OF MENTAL DISORDERS 451 (5th. ed. 2013).

²¹ Beredjick, *supra* note 17.

²² *Id.* See *J v. B* [2017] EWFC (U.K.) (holding that a transgender woman’s contact with her children can only include four annual letters to her children out of fear of “mother being marginalised or excluded by the ultra-Orthodox community”).

²³ Chris Roney, *How a Transgender Parent in Grief Won Over the Ivy League*, HUFFINGTON POST (Oct. 11, 2016), https://www.huffingtonpost.com/entry/how-a-transgender-parent-in-grief-won-over-the-ivy_us_57fcfc53e4b0d786aa52bdd0.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

discriminatory action because Ms. Lynn was transgender.²⁸ Judge Scott J. Becker reached a verdict on June 26, 2013 and terminated all of Ms. Lynn's parental rights on three counts: endangering the emotional well-being of a child, failure to support, and voluntary abandonment.²⁹ A final court order postmarked on December 21, 2013 stated: "It is ordered that Jeffrey A. Butterworth's name shall be removed from the birth certificate of the child the subject of this suit."³⁰ Upon the recommendation of the U.S. Justice Department, Ms. Lynn sought appellate legal counsel but, by the time she reached an attorney, she was beyond the appeal deadline.³¹

Although the classification of transgender as a "disorder" has contributed to negative social stigmas, it can provide a legal defense³² for transgender people who have experienced discrimination based on their identity.³³ In addition, the classification of gender dysphoria diagnosis allows for trans people who are seeking gender confirmation surgery and other medical procedures to receive insurance coverage.³⁴

The placement of Gender Dysphoria in the DSM sends a mixed message to society – are all trans people mentally ill? The answer is no. However, the characterization within the medical field creates an emotional block for transgender people to speak openly about themselves. The medical designation of a term can stigmatize a person to feel that they are abnormal. Most transgender individuals transition in their own unique way, at their own pace, and at their own comfort level. Typically, once someone becomes self-aware of his or her true gender identity, the next step is social transition.

Social transition involves using the right pronouns, using a different name, which they identify better with, and changing the way they present themselves to society. During a social transition

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *See infra* Part V.B.

³³ Roney, *supra* note 25.

³⁴ *See* YES Institute, *supra* note 16. *See also* Am. Psychol. Ass'n, *supra* note 21.

period, a trans person may begin to explore their sexual orientation. Sexual orientation defines attraction, in comparison, gender orientation is how you view yourself, which is typically defined by the societal imposed binary classifications – male or female. Each transition is different and unique to the individual.

The next step would be medical transition, which can include hormone blockers, hormone replacement therapy, gender affirming surgery, and/or cosmetic procedures. The final step is legal recognition. Legal recognition includes making changes to your birth certificate, identification card or driver's license, and social security card.

III. HOMOPHOBIA AND TRANSPHOBIA IN THE MILITARY: A TRAJECTORY

A. The Early Years

Since the Revolutionary War, grounds for dismissal from the military included homosexual activity. The following cases illustrate how former service members were treated unfairly due to their sexual orientation or gender identity. These are the earliest cases of such discrimination and provide clarity on how these practices have contributed to the negative attitude of homosexuals and transgender people. In early 1952, US Air Force Reservist Fannie Mae Clackum was discharged after being accused of being a lesbian.³⁵ A year before her discharge, Fannie was interrogated by her commanding officer and accused of engaging in homosexual conduct.³⁶ Fannie was then given several opportunities to resign and underwent a psychological evaluation.³⁷ Fannie was eventually discharged and “her reputation as a decent woman was officially destroyed. Her rights to her accrued pay and accrued leave, and to the numerous and valuable benefits

³⁵ Clackum v. United States, 296 F.2d 226 (Ct. Cl. 1960).

³⁶ *Id.*

³⁷ *Id.*

conferred by the nation and many of the states upon former soldiers were forfeited.”³⁸

After her discharge, Fannie appealed to the Air Force Discharge Review Board.³⁹ During Fannie’s appeal, her psychological evaluation was used to show a diagnosis of “sexual deviation manifested by latent homosexuality.”⁴⁰ The appeal board affirmed the US Air Force’s decision to discharge Fannie, even though the “evidence of record” upon which the Board based its finding of guilt was not the evidence actually heard in Fannie’s previous trial. The “evidence of record” included damaging affidavits from Fannie’s comrades and, confidential reports of the Office of Special Investigations. Fannie was not even aware of these reports at the time of her appeal. The Court of Claims reversed the Air Force Discharge Review Board’s decision and found the discharge to be one of “the most elementary notions of due process of law” violations. Fannie’s appeal is the earliest known case of a successful appeal of a discharge from the U.S. Armed Forces on the grounds of homosexuality.

By contrast, Air Force Reservist Jane Anne Leyland was not as lucky. Leyland was honorably discharged from the Air Force Reserve for being psychologically and physically unfit due to the completion of a “sex change surgery”, and transsexualism.⁴¹ Leyland filed an action seeking to have her discharge vacated.⁴² The district court granted summary judgment for the Air Force, which Leyland then appealed.⁴³

During the appeal, the Ninth Circuit reviewed the Air Force Regulation (AFR), which outlines the medical qualifications for duty.⁴⁴ Specifically, AFR 160-43 removes active service members who possess “medical defects which will significant interfere with their duty performance”.⁴⁵ Additionally, in

³⁸ *Id.* at 227.

³⁹ *Id.* at 228.

⁴⁰ *Id.*

⁴¹ *Leyland v. Orr*, 828 F.2d 584 (9th Cir. 1987).

⁴² *Id.* at 585.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

paragraphs six and fifteen there are requirements such as medical evaluation of transgender individuals for their physical fitness.⁴⁶ During trial, Dr. Donald Novicki, a urology consultant to the Air Force Surgeon General, stated that a “sex change constitutes a risk significant enough to restrict the individual’s performance” in the Air Force.⁴⁷ However, Leyland argued that she should have been evaluated per paragraphs six and fifteen on her ability to perform her duties.⁴⁸ The court rejected the argument and instead focused on the physical attributes of sex confirmation surgery, which would hinder a serviceperson from performing their individual performance, and did not focus on the psychology of a transgender person in the military who elects not to have surgery.

B. Don’t Ask, Don’t Tell

Thirty years after the *Fannie Mae Clacklum* decision, the Department of Defense issued a directive that would give formal orders on reasons for separation due to homophobic conduct.⁴⁹ The directive made discharge essentially mandatory.⁵⁰ In 1992, twenty-two year old U.S. Navy radiomen petty officer Allen R. Schindler, Jr. was brutally beaten to death in a public restroom three blocks from the Navy base at Sasebo, Japan.⁵¹ Schindler was a victim of gay bashing. At the time of his murder, Schindler was being processed for an administrative discharge because he was homosexual.⁵² Shortly after Schindler’s death, President Bill Clinton was elected into office and gay rights

⁴⁶ *Id.*

⁴⁷ *Leyland v. Orr*, 828 F.2d 584, 585 (9th Cir. 1987).

⁴⁸ *Id.* at 586.

⁴⁹ U.S. DEP’T OF DEF., DIR. 1332.14, DOD ENLISTED ADMINISTRATIVE SEPARATIONS (Jan. 28, 1982).

⁵⁰ MARC WOLINSKY AND KENNETH SHERRILL, *GAYS AND THE MILITARY, JOSEPH STEFFAN VERSUS THE UNITED STATES* 12, (1st ed. 1994).

⁵¹ H.G. Reza, *Homosexual Sailor Beaten to Death, Navy Confirms: Crime: Gay-bashing may be motive, activists & family members say. They charge cover-up by military*, L.A. TIMES (Jan. 1, 1993), http://articles.latimes.com/1993-01-09/news/mn-1001_1_family-members.

⁵² *Id.*

advocates urged the president take swift action to legitimize the presence of homosexuals in the military.⁵³ In a compromise, President Clinton announced “Don’t Ask, Don’t Tell” (DADT), a policy in which gay and lesbian Americans can serve in the armed forces, but only if they did not disclose their sexual orientation.⁵⁴

During the legislative process in 1992, General Colin Powell noted in testimony before the House Budget Committee that the introduction of homosexual servicemen and placing them in close proximity with hetero-servicemen would be “a very difficult problem in the military”.⁵⁵ Specifically, Powell mentioned how uncomfortable it would be to other service members who would have someone of the same-sex find them “sexual[ly] attractive”.⁵⁶ The Senate agreed with General Powell’s statement and noted that his statements “represent a prudent evaluation of the impact of such behavior on the armed forces, and underscore the fact that the policy is based upon prudence, not prejudice.”⁵⁷ Policies, including judicial decisions, create and reaffirm negative stereotypes. *American Male*, a short film from filmmaker Michael Rohrbaugh, tells the story of how gay men hide behind certain facts to hide their homosexuality.⁵⁸ In one part of the film, the narrator shows how they project masculinity by “[o]rder[ing] beer. Not wine. And beef, not chicken. Never light beer, though. And tofu. Can’t get more gay than tofu.”⁵⁹ Gendered stereotypes create feelings of self-doubt for anyone who is considered gender nonconforming in the military.⁶⁰ Stereotypes create a toxic environment and cause unequal treatment by military superiors.

⁵³ *Id.*

⁵⁴ See Memorandum on Ending Discrimination in the Armed Forces, 1 PUB. PAPERS 23 (Jan. 29, 1993). See also Remarks Announcing the New Policy on Homosexuals in the Military, 1 PUB. PAPERS 1109 (July 19, 1993).

⁵⁵ S. REP. NO. 103-112, at 283 (1993).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ AM. MALE (MTV Networks 2016).

⁵⁹ *Id.*

⁶⁰ 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) (discussing how the military is a male-oriented institution).

During an appearance on the *Late Show with Stephen Colbert*, actress, Ellen Page described how “toxic” life can be when you are closeted as a homosexual.⁶¹ The rates of suicide with members of the LGBT community are two to ten times higher than heterosexuals.⁶² Specifically, “LGBT youth contemplate suicide at almost three times the rate of heterosexual youth, and are almost five times as likely to have attempted suicide compared to heterosexual youth.”⁶³ After witnessing social advances in the LGBT community, such as the right to marry,⁶⁴ journalist Michael Hobbes took a look at mental illness and suicide rates within the community. Mr. Hobbes saw a trend of high suicide rates and depressive episodes in comparison to heterosexuals.⁶⁵ After conducting some research, he found that researchers used the term “minority stress” to describe the tendency for marginalized groups to have higher rates of depression and anxiety.⁶⁶ Minority stress is when “being a member of a marginalized group requires extra effort.”⁶⁷ Mr. Hobbes goes on to describe how a homosexual individual at twelve years old would have to work harder to fit in, while battling internal questions of self-doubt.⁶⁸ For example, growing-up as a gay boy, Mr. Hobbes knew marriage was not possible for himself, and lived with the constant fear and stress of being called gay.⁶⁹

⁶¹ *Late Show with Stephen Colbert* (CBS television broadcast Sept. 29, 2015), <https://www.youtube.com/watch?v=K2RXXuPfQr0>.

⁶² Michael Hobbes, *Together Alone: The Epidemic of Gay Loneliness*, HUFFINGTON POST: HIGHLINE (March 2, 2017), <http://highline.huffingtonpost.com/articles/en/gay-loneliness/>.

⁶³ The Trevor Project, <https://www.thetrevorproject.org/resources/preventing-suicide/facts-about-suicide/> (last visited on Oct. 26, 2017).

⁶⁴ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty).

⁶⁵ Hobbes, *supra* note 62.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

Mr. Hobbes' fears are common. James Dale became a Boy Scout of America at eight years old.⁷⁰ Spending more than twelve years as a boy scout, Dale learned how to respect others and was able to hone his leadership skills.⁷¹ At seventeen years old, Dale was awarded the Eagle Scout Badge, an honor achieved by only the top three percent of all scouts.⁷² Once Dale turned eighteen, he sought adult membership to the Boy Scouts.⁷³ In the fall of 1989, Dale went off to college at Rutgers University. Once at college, Dale acknowledged to himself, and to his family and friends, that he was gay.⁷⁴ Shortly thereafter, he became involved with the Rutgers University Lesbian/Gay Alliance, eventually becoming the chapter president.⁷⁵ During a seminar, Dale was interviewed by a local newspaper; the paper published an article about the seminar, and included a photo of Dale with a caption that announced his title with the Lesbian/Gay Alliance.⁷⁶ Later that month, Dale received a letter revoking his Boy Scouts of America membership.⁷⁷

Dale filed a suit against the Boy Scouts of America with the New Jersey Superior Court stating that the Boys Scouts violated New Jersey's public accommodations statute and its common law by revoking Dale's membership based solely on his sexual orientation.⁷⁸ The Boy Scouts argued that the First Amendment's right to freedom of expression prevented the government from forcing the Boy Scouts to accept Dale as an

⁷⁰ Dale v. Boy Scouts of Am., 530 U.S. 640 (2000).

⁷¹ James Dale, *Why did I challenge the Boy Scouts' anti-gay policy? Because I am a loyal Scout.*, THE WASHINGTON POST (Feb. 8, 2013), https://www.washingtonpost.com/opinions/why-did-i-challenge-the-boy-scouts-anti-gay-policy-because-i-am-a-loyal-scout/2013/02/08/346ebab2-7159-11e2-a050-b83a7b35c4b5_story.html [hereinafter *Why did I Challenge*].

⁷² Dale, 530 U.S. at 644.

⁷³ *Id.*

⁷⁴ *Id.* at 645.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Dale v. Boy Scouts of Am., 530 U.S. 640, 645 (2000).

adult leader.⁷⁹ The New Jersey Supreme Court ruled that the Boy Scouts were subject to public accommodations law, and the organization was not exempt from the law under any of its express exceptions.⁸⁰ In addition, the New Jersey Supreme Court noted that the “state had a compelling interest in eliminating the destructive consequences of discrimination from our society.”⁸¹ The Boy Scouts petitioned the Supreme Court of the United States to determine whether the application of New Jersey’s public accommodations law violated the First Amendment.⁸²

The Supreme Court ruled in favor of the Boy Scouts, and held that the Boy Scouts of America has a constitutional right to bar homosexuals from serving as troop leaders.⁸³ Chief Justice Rehnquist wrote for the Court that the acceptance of homosexuals within the Boy Scouts “would, at the very least, force the organization to send a message, both to the young members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.”⁸⁴

Decisions such as *Dale*, or policies questioning the legitimacy of homosexuality and transsexualism, stigmatize this class of people as unwanted members of society. In addition, it creates inaccurate stereotypes and ignorance.⁸⁵ The *Dale* decision is an example of how the dominant American attitude views homosexuality as immoral.⁸⁶ As Justice Stevens stated in his

⁷⁹ *Id.* 646.

⁸⁰ *Id.* at 647.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 660.

⁸⁴ *Dale v. Boy Scouts of Am.*, 530 U.S. 640, 653 (2000).

⁸⁵ See Amy D. Ronner, *Scouting for Intolerance: The Dale Court’s Resurrection of the Medieval Leper*, 11 TUL. J.L. & SEXUALITY 53, 108-09 (2002) [hereinafter *Scouting for Intolerance*] (discussing the effects of judicial decisions and policies which hinder LGBT outness).

⁸⁶ *Lawrence v. Texas*, 539 U.S. 558, 602 (2002) (Scalia, J., dissenting) (“Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children’s schools They view this as protecting themselves and their families from a lifestyle that they believe to be immoral.”).

dissent of *Dale*, “[t]hat harm can only be aggravated by the creation of a constitutional shield for a policy that is itself the product of a habitual way of thinking about strangers.”⁸⁷

The propagation of homophobic and transphobic attitudes through the courts creates further difficulty for people to express themselves freely.⁸⁸ These decisions create a greater fear and anxiety about exploring the identity they feel most comfortable with; and the concealment can have damaging affects to their psyche. The affirmation of ignorant attitudes such as the one decided by the *Dale Court*, can bring shame to the decision of finally coming out. Dale was, finally living his authentic life in college and had emotional support after coming out to his family and friends as gay. However, once Dale received his letter from the Boy Scouts revoking his membership, he was devastated.⁸⁹ Others are not as lucky to have familial support. These societal fears are those shared by Mr. Hobbes⁹⁰ and can cause depression, substance abuse and suicide among gay youth.⁹¹ In addition, it can create a fear of advocating for a positive change.⁹²

C. The Repeal of DADT⁹³

⁸⁷ *Dale*, 530 U.S. at 700 (Stevens, J., dissenting).

⁸⁸ *Scouting for Intolerance*, *supra* note 85.

⁸⁹ *Why did I Challenge*, *supra* note 71.

⁹⁰ *See* Hobbes, *supra* note 62.

⁹¹ *Why did I Challenge*, *supra* note 71.

⁹² *Scouting for Intolerance*, *supra* note 85.

⁹³ *Log Cabin Republicans v. United States*, 658 F.3d 1162(9th Cir. 2011). Log Cabin, a non-profit organization, sought a declaration that the “*Don’t Ask, Don’t Tell*” policy is facially unconstitutional and an injunction barring the United States from applying the policy. The District Court dismissed the equal protection claim but allowed the due process and First Amendment challenges to proceed to trial. After a bench trial, in October 2010 the district court ruled that the policy on its face violates due process and the First Amendment. The court permanently enjoined the United States from

On June 19, 2009, former Congressman Jason Altmire (D-PA) introduced the “Don’t Ask, Don’t Tell” Repeal Act.⁹⁴ During one of the repeal debates, Senator John McCain said the gay ban would do “great damage” to the military, and cost the lives of military personnel.⁹⁵ Following the repeal of DADT, a study was conducted on its effects and found that the repeal “had no overall negative impact on military readiness or its component dimensions, including cohesion, recruitment, retention, assaults, harassment or morale.”⁹⁶ With the stroke of a pen, President Barack Obama signed the act repealing DADT with the hope that the walls of the toxic closet created by the policy were gone.

IV. TRANSPHOBIA IN THE MILITARY: A TRAJECTORY?

A. *The 2010 Directive*

In a 2010 Department of Defense Directive Instruction, a “change of sex” was deemed to be a disqualifying physical condition.⁹⁷ The Directive justified their decision by quoting a 1981 District of Minnesota decision, which stated “that transsexuals would require medical maintenance,” and that “complications which may stem from the hormone therapy” could

applying the policy. The United States appealed. During the appeal, DADT was appealed.

⁹⁴ Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515.

⁹⁵ Nathaniel Frank, *The Last Word on “Don’t Ask, Don’t Tell,”* SLATE (Sept. 20, 2012),

http://www.slate.com/articles/news_and_politics/politics/2012/09/study_of_don_t_ask_don_t_tell_repeal_helped_the_military_.html.

⁹⁶ Aaron Belkin et. al., *One Year Out: An Assessment of DADT Repeal’s Impact on Military Readiness*, PALM CTR. (Sept. 20, 2012), http://archive.palmcenter.org/files/One%20Year%20Out_0.pdf.

⁹⁷ Peter Sprigg, *A transgender military is a weaker, compromised military*, THE HILL: PUNDIT’S BLOG (Dec. 8, 2016), <http://thehill.com/blogs/pundits-blog/the-military/309429-a-transgender-military-is-a-weaker-compromised-military>.

cause service members “to lose excessive duty time and impair [the] ability to serve in all corners of the globe.”⁹⁸

Jane Doe was born in 1940, served in the United States Air Force as a man for approximately eight and one-half years, and then left the Air Force in 1967. Sometime after 1967 she underwent surgery and became herself -- a woman. She applied for admission as an officer into the Army Reserve in 1976, but was rejected because she failed to meet the medical fitness requirements.⁹⁹ Doe then filed suit against the Secretary of Army, where they alleged that Doe did not qualify for a commission in the army reserve and therefore lacks standing to sue. The court agreed and said it would be difficult to determine whether Doe had any chance of receiving a commission as a captain since it would depend on “special criteria” which were not listed in of the Army Reserve’s directives or regulations.¹⁰⁰ Doe also failed to either raise a fundamental constitutional right or establish that she was a member of a suspect class so as to invoke a higher standard of judicial review. After giving an analysis on why Doe’s complaint should be dismissed for lack of standing¹⁰¹, the court concluded its opinion with suggesting that the Army’s reasons for impairing the ability to “serve in all corners of the globe” due to complications that may stem from the sexual confirmation process would be a valid reason.¹⁰² With this final conclusion, the Court continued to uphold negative stereotypes surrounding transgender individuals.

B. The Study

In 2015, Defense Secretary Ash Carter ordered the Pentagon to spend a year studying how to allow transgender individuals to openly serve in the military.¹⁰³ The yearlong study focused on the treatment of 2,000 transgender active-duty

⁹⁸ *Id. citing* Doe v. Alexander, 510 F. Supp. 900 (D. Minn. 1981).

⁹⁹ Alexander, 510 F. Supp. at 902.

¹⁰⁰ *Id.* at 903.

¹⁰¹ *Id.* at 902.

¹⁰² *Id.* at 905.

¹⁰³ Carter Transcript, *supra* note 4.

members (out of 1.3 million active-duty members) and 1,500 reserve service members (out of 825,000).¹⁰⁴ Secretary Carter took issue with the idea that a small number of “talented, and trained Americans”¹⁰⁵ did not feel equal to their colleagues. The findings of the study illustrated how transgender service members had to go outside the military medical system to obtain medical care, and pay for it out of their own pockets.¹⁰⁶

During the study, Secretary Carter observed how transgender service members were no different than other service members – they were just as dedicated and persistent, as others, and did not feel threatened to quit¹⁰⁷ even though they were not viewed as equal. The study looked at how eighteen other countries allowed transgender individuals to serve in the military.¹⁰⁸ The study also looked at how the American workforce had non-discrimination policies and offered health insurance plans with transgender-inclusive coverage.¹⁰⁹ A reoccurring theme, within the study, observed how transgender service members did not want special treatment,¹¹⁰ as such policies purposely isolated them. A year after the study was completed, Secretary Carter implemented a policy that would allow transgender Americans to serve openly without the ramifications of a military discharge or separation.¹¹¹

C. The “Trump” Effect: President Trump’s Memorandum to Ban Transgender in the Armed Forces

After more than six months in office, President Donald Trump tweeted his promise to enforce a transgender ban in the

¹⁰⁴ SCHAEFER, ET AL., ASSESSING THE IMPLICATIONS OF ALLOWING TRANSGENDER PERSONNEL TO SERVE OPENLY (2016).

¹⁰⁵ Carter Transcript, *supra* note 4.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

military.¹¹² President Trump noted that “victory cannot be burdened” by the medical costs and disruptions that are associated with being transgender.¹¹³ On August 23, 2016, the White House drafted a memo to the Department of Defense (DOD) to draft a policy banning the Armed Forces from recruiting transgender individuals, and stopping the DOD from using its resources to provide medical treatment regimens for transgender individuals currently serving in the military.¹¹⁴ The White House memorandum left one thing unclear: whether current transgender troops would be allowed to remain in the military under those policy guidelines.

Hoping to clear those guidelines, Secretary of Defense Jim Mattis issued a memorandum stating that transgender individuals can continue to serve in the military and continue to receive any required medical care.¹¹⁵ The memo remained in effect until February 2018, when Secretary Mattis delivered a report, as requested by President Trump, on how and when transgender individuals may serve in the military. The memorandum also set forth that no new “sexual reassignment surgeries” would be authorized after March 22, 2018, unless medically necessary.¹¹⁶

On February 22, 2018, Secretary Mattis delivered a report to President Trump outlining how transgender with a history or diagnosis of gender dysphoria “disqualified from military service except under certain limited circumstances.”¹¹⁷ Secretary Mattis’s report also asked President Trump to revoke the August 2017 Memorandum, and allow the Secretary of Homeland Security and himself to “implement appropriate policies concerning military service by transgender persons.” The report, which was compiled

¹¹² Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:04 AM), <https://twitter.com/realDonaldTrump/status/890196164313833472>.

¹¹³ Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:08 AM), <https://twitter.com/realdonaldtrump/status/890197095151546369>.

¹¹⁴ Memorandum on Military Service by Transgender Individuals, 2017 DAILY COMP. PRES. DOC. 3 (Aug. 25, 2017)

¹¹⁵ Memorandum from U.S. Dep’t of Defense, to Secretaries of the Military Departments (Sept. 14, 2017) [hereinafter Interim Guidance Memorandum].

¹¹⁶ *Id.*

¹¹⁷ Memorandum from U.S. Dep’t of Defense to Office of the President (Feb. 22, 2018) [hereinafter Mattis February 2018 Memo].

with the support of panel of experts comprised of uniformed and civilians from the Dept. of Defense and U.S. Coast Guard, outlined three limited circumstances which included: (1) if the transgender person has been stable for 36 consecutive months in their biological sex prior to accession; (2) if a service member has been diagnosed with gender dysphoria but has “not require[d] a change of gender and remain[s] deployable”; (3) current service members who have been diagnosed with gender dysphoria since before “the previous administration’s policy took effect and prior to the effective of this new policy” may continue to serve.”¹¹⁸ In addition, transgender individuals who require or have undergone gender transition are disqualified from military service; and transgender persons without a history or a diagnosis of gender dysphoria may serve under their biological sex.¹¹⁹ Essentially, Secretary Mattis’s allows transgender service members to options: (1) serve in their biological sex, or (2) ban transgender service member if they have had sex confirmation surgery. On March 23, 2018, President Trump revoked the August 25, 2017 memorandum and allowed the Secretary Mattis and the Secretary of Homeland Security exercise their authority to implement any appropriate policies concerning military service by transgender individuals.”¹²⁰

V. IS THERE HOPE FOR RILEY DOSH?

A. *Can Title VII Help?*

Title VII of the Civil Rights Act of 1964, prohibits an employer with fifteen or more employees from discriminating on the basis of race, national origin, gender, religion, or sex. The Equal

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Memorandum on Military Service by Transgender Individuals, 2018 DAILY COMP. PRES. DOC. (March 23, 2018).

Employment Opportunity Commission (EEOC) views protecting transgender applicants and employees under the basis of gender.¹²¹

In 1968, Eastern Airlines hired Kenneth Ulane as a pilot.¹²² Ulane became a licensed pilot in 1964 with the United States Army.¹²³ After leaving the Army, Ulane then began flying with Eastern. In 1979, Ulane came out as transgender. Ulane began taking female hormones as part of her transition, and eventually developed breasts due to her hormones. In 1980, Ulane underwent sexual confirmation surgery. She subsequently revised her birth certificate with the State of Illinois, and the FAA certified her as a female. Eastern fired Ulane a year after her surgery.

Ulane brought a suit against Eastern Airlines, alleging employment discrimination in violation of Title VII. The trial court ruled in favor Ulane. However, the Seventh Circuit reversed and held that Title VII does not protect transsexuals.¹²⁴ The court looked at the statutory language and history and said that because “sex as a basis of discrimination” was added as a joke to scuttle the adoption of the Civil Rights Act, there was a lack of legislative history supporting that sex discrimination was meant to include homosexuality. In fact, the court noted that there were various attempts from members of Congress to amend Title VII to prohibit that type of discrimination, but all attempts failed.

Twenty-four years after the *Ulane* decision, the United States District Court of the District of Columbia held that non-conforming gender discrimination was in violation of Title VII.¹²⁵ Born as male, Diane Schroer was diagnosed with gender dysphoria. Before changing her name or presenting herself as a female, she served twenty-five years in United States Armed Forces. Schroer applied for a terrorism specialist position with the Library of Congress. Out of all the eighteen candidates that interviewed, Schroer had received the highest interview score.

¹²¹ Jay-Anne B. Casuga, *Military Transgender Ban Unlikely to Have Wide Employment Impact*, BLOOMBERG LAW (July 26, 2017), <https://www.bna.com/military-transgender-ban-n73014462314/>.

¹²² *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1082 (7th Cir. 1984).

¹²³ *Id.*

¹²⁴ *Id.* at 1084.

¹²⁵ *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008).

Schroer was offered the position, and accepted shortly thereafter. During the interviewing process, Schroer had begun the process of transitioning from male to female. During lunch with another coworker, Charlotte Preece, Schroer told her that she would be transitioning and that she would start work as “Diane.” Schroer also told Preece that, before she began the job, she would have feminization surgery, and that the procedure would pose no problem with her start-date. Preece then asked Schroer what name should appear in the security clearance forms. In addition, Schroer showed Preece photos of herself at time wearing feminine professional attire.

After the lunch, Preece did not complete Schroer’s hiring memorandum, and instead spoke to several staff members about Schroer’s transition. At a meeting the next day with the director of the library and other key staff members, Preece rescinded her recommendation for Schroer as a terrorist specialist. In an email to Schroer, Preece told her that she had to rescind the job offer primarily because her investigation process would be lengthy. Schroer filed a sexual discrimination suit against the Library of Congress. During the bench trial, Schroer presented evidence that gender identity is a component of sex, and discrimination on the basis of gender identity is sex discrimination.¹²⁶ In support of this contention, Schroer offered testimony from Dr. Walter Bockting, a tenured associate professor at the University of Minnesota Medical School who specializes in gender identity disorders.¹²⁷ Dr. Bockting testified that it has long been accepted in the relevant scientific community that there are nine factors that constitute a person’s sex, and one of these factors is gender identity, which he defined as one’s personal sense of being male or female.¹²⁸

The court reasoned that, because Schroer identified as female, she was thus a female. Preece and the other staff members viewing Schroer as a non-conforming female were pretexts for sexual discrimination.¹²⁹ The court noted that because Schroer

¹²⁶ *Id.* at 306.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 308.

failed to conform to those sex stereotypes, the resistance to hire Schorer was ultimately discriminatory “because of . . . sex” under Title VII plain textual language.¹³⁰

In 2014, Attorney General Eric Holder noted that discrimination based on sex under Title VII also prohibited discrimination based on gender identity.¹³¹ In October 2014, Attorney General Jeff Sessions reversed Holder’s clarification and said that looking at the legislative language as written in 1964, sex is defined to mean biologically male to female.¹³² However, the Justice Department¹³³ would continue to “vigorously” prosecute hate crimes against transgender people.¹³⁴ However, Title VII only applies to civilian personnel of the military and not uniformed personnel.¹³⁵ The legal challenge to any discriminatory policy would have to be left up to a constitutional argument.

¹³⁰ *Id.*

¹³¹ Joseph Tanfani, *Reversing Obama policy, Sessions says job protections don't cover transgender people*, LOS ANGELES TIMES (Oct. 5, 2017, 1:30 PM), <http://www.latimes.com/politics/la-na-pol-trump-transgender-20171005-story.html> [hereinafter Tanfani].

¹³² *Id.*

¹³³ DOJ’s policy contradicts the Equal Employment Opportunity Commission’s stance on gender identity discrimination. In 2012, the Equal Employment Opportunity Commission (“EEOC”) held that transgender people are protected from discrimination by federal law. A decision from the EEOC is binding on EEOC offices and investigators throughout the country, which means that transgender people anywhere in the country can file complaints of discrimination with the EEOC and have access to that process for investigation and enforcement.

¹³⁴ Tanfani, *supra* note 131.

¹³⁵ 29 C.F.R. § 1614.103 (2017). *See generally* 42 U.S.C. § 2000e-16 (2009); *Lockett v. Bure*, 290 F.3d 493, 499 (2d Cir. 2002) (“Accordingly, we determine that Title VII protections extend to discrimination actions brought by military personnel in hybrid jobs entailing both civilian and military aspects except when the challenged conduct is integrally related to the military’s unique structure.”); *Brown v. United States*, 227 F.3d 295 (5th Cir. 2000) (precluding military departments from engaging in acts of employment discrimination under Title VII applies only to suits by civilian employees of military departments, not to members of the armed forces); *Coffman v. State of Mich.*, 120 F.3d 57, 59 (6th Cir. 1997) (“Thus, uniformed members of the armed forces have no remedy under Title VII of the Civil Rights Act of 1964.”); *Roper v. Dep’t of Army*, 832 F.2d 247, 248

B. Can Constitutional Law Help?

Born a male, Vandiver Elizabeth Glenn has identified as a female since puberty.¹³⁶ In 2005, Glenn was diagnosed with Gender Identity Dysmorphia.¹³⁷ Soon after, Glenn “began taking steps to transition from male to female under the supervision of her health care providers.”¹³⁸ Part of the transition included Glenn living as a woman outside of the workplace, which is a prerequisite to sex reassignment surgery. During that same year, then known as Glenn Morrison and presenting as a man, Glenn was hired as an editor by the Georgia’s General Assembly’s Office of Legislative Counsel. In the course of the next year, Glenn notified her immediate supervisor that she would be transitioning. During Halloween of 2006, employees were permitted to come to work wearing costumes and Glenn came to working presenting as a woman. Sewell Brumby was the head of the OLC and was responsible for all OLC personnel decisions, including the decision to fire Glenn. When Brumby saw Glenn, he told her that her appearance was not appropriate and asked her to leave the office and that “a man dressed as a woman was unnatural.”

In the fall of 2007, Vandiver Elizabeth Glenn was fired from her position at Georgia’s General Assembly’s Office of Legislative Counsel. After sharing with a co-worker that Glenn was proceeding with a gender transition, Brumby immediately fired her.¹³⁹ Shortly thereafter, Glenn brought action against her former supervisor and state officials, alleging that she was

(2d Cir. 1987) (holding that Title VII does not apply to the uniformed military); *Gonzalez v. Dep’t of Army*, 718 F.2d 926, 928 (9th Cir. 1983) (holding that the term “military departments” in § 2000e-16(a) includes only civilian employees of the Army, Navy, and Air Force and not enlisted personnel).

¹³⁶ *Glenn v. Brumby et al.*, 724 F. Supp. 2d 1284 (N.D. Ga. 2010), *aff’d*, 663 F.3d 1312 (11th Cir. 2011)

¹³⁷ *Id.*

¹³⁸ *Glenn*, 724 F. Supp. 2d at 1314.

¹³⁹ *Id.* at 1313.

discriminated against on basis of sex and her medical condition, in violation of the Fourteenth Amendment, seeking injunctive relief. The Eleventh Circuit Court of Appeals held that “discriminating against someone on the basis of his or her gender non-conformity constitutes sex-based discrimination under the Equal Protection Clause.”¹⁴⁰ In reaching her decision, Judge Rosemary Barkett specifically used intermediate scrutiny to hold that Brumby did not have “sufficiently important governmental interest”¹⁴¹ to terminate Glenn. Throughout Judge Barkett’s decision, she highlighted court decisions, which have used heightened scrutiny,¹⁴² and eventually settled on intermediate scrutiny.

The levels of scrutiny are important for the future of gender discrimination claims. Under rational basis, can the government or military offer a rational reason for terminating someone based on their identity? So far, President Trump has asked the Department of Defense to develop a directive, which would ban transgender due to the high cost of medical expenses. However, a report developed for the DOD has shown that less than one percent¹⁴³ of active duty individuals are transgender. In addition, the policy implemented by Secretary Ash has been in effect for a little less than a year – can a policy that has been around for less than a year really cause budgetary concerns? The study conducted under former Secretary of Defense Carter estimated that between thirty to 144 new hormone treatments could be initiated a year; and twenty-five to one-hundred and thirty gender transition-related surgeries could be authorized per year among active component service members.¹⁴⁴ The additional health care costs could range between \$2.4 million and \$8.4 million, representing an approximate 0.13-percent increase from the year’s previous budget (FY’ 2015-16).¹⁴⁵

As a contemporary example, eight service members filed a suit in District Court of D.C. on August 31, 2017, alleging that the

¹⁴⁰ *Id.* at 1316

¹⁴¹ *Id.* at 1321.

¹⁴² *Id.*

¹⁴³ SCHAEFER ET AL., *supra* note 104.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

transgender military ban violates both the Equal Protection component of the Fifth Amendment and the Due Process Clause of the Fifth Amendment to the United States Constitution.¹⁴⁶ Six of the eight plaintiff are currently serving in the armed forces and have collectively served in the military for more than ten years.¹⁴⁷ At least two of the plaintiffs will be deployed to the Middle East next year.¹⁴⁸ All of the eight plaintiffs, in good faith, notified their command that they were transgender after the United States' Department of Defense announced in June 2016 that it would allow transgender to serve openly.¹⁴⁹

On October 31, 2017, Judge Colleen Kollar-Kotelly issued a preliminary injunction on the transgender ban.¹⁵⁰ The injunction will remain in place until the lawsuit is settled, or a judge lifts it. The case will likely make its way to the Supreme Court to get the injunction nullified.¹⁵¹ Judge Kollar-Kotelly based her decision on that fact that “there is absolutely no support for the claim that the ongoing service of transgender people would have *any* negative effective on the military at all.”¹⁵² Judge Kollar-Kotelly also noted that fifteen States filed an *amici* brief stating that their citizens will be harmed by the transgender ban.¹⁵³ The court also noted that the Plaintiffs had a clearly identifiable injury by the ban, as they would most likely be discharged from the armed services

¹⁴⁶ Amended Complaint for Declaratory & Injunctive Relief, Jane Doe 1, et al. v. Donald J. Trump et. al., No. 17-1597-CKK (D.D.C. Aug. 31, 2017), ECF No. 9 [hereinafter Amended Complaint for Plaintiffs].

¹⁴⁷ *Id.*

¹⁴⁸ Amended Complaint for Plaintiffs, *supra* note 146.

¹⁴⁹ *Id.*

¹⁵⁰ Memorandum of Opinion for Preliminary Injunction, Jane Doe 1, et al. v. Donald J. Trump et. al., No. 17-1597-CKK (D.D.C. Aug. 31, 2017), ECF. 61 [hereinafter Memorandum of Opinion for Preliminary Injection].

¹⁵¹ Justin Jouvenal, *Federal judge in D.C. blocks part of Trump's transgender military ban*, THE WASHINGTON POST Oct. 30, 2017, https://www.washingtonpost.com/local/public-safety/federal-judge-in-dc-blocks-part-of-trumps-transgender-military-ban/2017/10/30/41d41526-bd94-11e7-959c-fe2b598d8c00_story.html.

¹⁵² Memorandum of Opinion for Preliminary Injection, *supra* note 150.

¹⁵³ *Id.*

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immediately.¹⁵⁴ Since Secretary Mattis's report, the plaintiffs have amended their complaint¹⁵⁵ to include the March 23 implementation policy.

VI. CONCLUSION

This article began with Riley Dosh, who is finally living the authentic life she envisioned. From there, the article examined the constitutionality of the ban on transgender individuals in the Armed Forces and explored the legal, social and psychological similarities between the *Don't Ask, Don't Tell* policy and the proposed transgender military ban. The transgender road to self-confirmation and treatment is rocky. The psychology community's definition of transgender contributes to societal stigma. While homosexual men and women have made great strides in the military, transphobia is still alive and well. In 2016, former Defense Secretary Ash Carter ordered the Pentagon to spend a year to study how to let transgender individuals join the military. At present, President Trump's ban of Transgender in the Armed Forces is a serious setback. The future is somewhat optimistic. Since, the March 23, 2018 implantation there have been at least four lawsuits nationwide challenging the ban. However, it remains to be seen if Title VII of the Civil Rights Act of 1964 or constitutional law will help the Riley Doshes out there.

¹⁵⁴ *Id.*

¹⁵⁵ Second Amended Complaint for Declaratory & Injunctive Relief, Jane Doe 1, et al. v. Donald J. Trump et. al., No. 17-1597-CKK (D.D.C. April 6, 2018), ECF No. 106.