

“DON’T ASK, DON’T TELL” REVISITED: DEBUNKING THE UNIT-COHESION RATIONALE FOR THE CONTINUING EXCLUSION OF GAYS FROM THE MILITARY

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I. INTRODUCTION

A. A Dilemma

Imagine you are a division officer aboard the USS *Haze Gray* nearing the end of your training cycle and preparing for a six-month deployment. One afternoon as you sit in your stateroom reviewing your divisional training schedule, there is a knock at the door. When you answer, you find a young sailor from your division who wishes to speak with you in private about a problem. Your first response is to ask if he has spoken with the divisional chief petty officer about the problem. His response is that he would prefer to speak to you, and it is then that you notice that he appears fearful and distraught. You invite him in as you prepare for a leadership challenge which you hope you are equipped to handle.

As the sailor before you unwinds his tale, you become ashen and uncomfortable. In short, he informs you that he is a homosexual, and that another sailor has uncovered his hidden identity by a chance encounter out in town, where he was seen kissing his boyfriend. While he knows his disclosure imperils his career, he fears harassment and violence if and when his shipmate brings his sexual orientation out into the open. Finally, he asks you if there is anything you can do to help him in this situation that will allow him to continue to serve.

This is bad news. The sailor before you happens to be one of your top performers. On his last performance evaluation, you rated him as a candidate for early promotion and had previously nominated him for Junior Sailor of the Quarter. But your hands are tied. As a commissioned officer, you are bound to

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uphold the Constitution, the laws of the United States, and the orders of your superior officers. One such law, commonly referred to as “Don’t Ask, Don’t Tell,” requires you to bring this promising young sailor’s admission of homosexuality to the attention of the command, which will almost certainly mean his separation from the Navy despite his sustained superior performance since his induction into the military. Worse, his separation will constitute an unplanned loss to the command for which a replacement will likely be unavailable until his original rotation date, sometime after the completion of the ship’s deployment.

B. Unit Cohesion and “Don’t Ask, Don’t Tell”

It has been nearly fifteen years since Congress enacted into law the current policy of excluding gays, lesbians, and bisexuals from military service. The asserted justification for this clearly discriminatory policy is that “[t]he presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the armed forces’ high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.”¹ Thus, the question constantly debated is whether homosexuality is indeed incompatible with military life as a threat to unit cohesion that justifies the discriminatory treatment of the homosexual men and women who seek to serve their country in uniform.

In order to resolve the question of whether discriminating against gays, lesbians, and bisexuals is necessary to maintain military preparedness for the primary mission of winning the country’s wars, this Note will first examine the concept of unit cohesion as proffered by the proponents of the ban, and the asserted detriment to military effectiveness that allowing homosexuals to serve would cause. Next, the experiences of foreign militaries which have rescinded the ban on gay service will be investigated as particularly pertinent both for evidence of the effects of allowing homosexuals to serve in uniform and for the lessons which our military leaders can use if and when they decide to take the lead on ending discrimination against gays in the military. Finally, the Note will look at how the traditional leadership tools possessed by military commanders could be strengthened and utilized to diminish any ill effects of allowing gays to serve without jeopardizing military readiness. Ultimately, the conclusion will become clear: the ban on gays is wholly unnecessary to

¹ 10 U.S.C. § 654(a)(15) (2006).

maintaining unit cohesion and military readiness, and thus “Don’t Ask, Don’t Tell” should be repealed as a discriminatory policy without real justification.

II. HISTORY

A. Brief Lead-up to “Don’t Ask, Don’t Tell”

While the official military preoccupation with how to handle the presence of homosexuals within the ranks of the armed forces dates from World War I,² the current debate over whether gays should be allowed to serve in the military had its public genesis during the 1992 presidential race, when Bill Clinton made a campaign promise to end discrimination against gays, lesbians, and bisexuals serving or willing to serve in the U.S. military.³ Shortly after being elected, Clinton sought to fulfill his promise to end the official ban on gays by charging his Secretary of Defense, Les Aspin, with drafting an executive order that would end discrimination in the military on the basis of sexual orientation.⁴

Opposition response was swift. The Joint Chiefs vehemently expressed their disdain for the proposed policy change during their first meetings with the new President and his Secretary of Defense, and even threatened to resign in protest if any changes were made to the military’s anti-gay stance.⁵ Congress also quickly got into the act, threatening the White House with legislation to entrench the ban on gay military service, which it eventually did, and ordering the Senate Armed Services Committee to hold hearings on the necessity or desirability of any changes the executive branch might attempt to implement.⁶

Threatened from without by Congress and from within by the Joint Chiefs, the Clinton Administration began compromise negotiations with military and congressional leaders that lasted through the spring and into the summer of

² For a thorough analysis and historical context of the military’s response to homosexuals in the armed forces prior to the 1990s, see Timothy Haggerty, *History Repeating Itself: A Historical Overview of Gay Men and Lesbians in the Military Before “Don’t Ask, Don’t Tell,”* in *DON’T ASK, DON’T TELL: DEBATING THE GAY BAN IN THE MILITARY* 9 (Aaron Belkin & Geoffrey Bateman eds., 2003).

³ Sharon E. Debbage Alexander, *A Ban by Any Other Name: Ten Years of “Don’t Ask, Don’t Tell,”* 21 *HOFSTRA LAB. & EMP. L.J.* 403, 408 (2004).

⁴ Memorandum for the Sec’y of Def., 1 *PUB. PAPERS* 23 (Jan. 29, 1993).

⁵ JANET E. HALLEY, *DON’T: A READER’S GUIDE TO THE MILITARY’S ANTI-GAY POLICY* 20-21 (1999).

⁶ *Id.* at 21-22.

1993.⁷ Central to the broiling debate on the proposed end to the ban on gays in the armed services was whether lifting the ban would negatively impact unit cohesion and morale and thereby affect the military's ability to fight and win the nation's wars. In order to address these questions of paramount importance and aid in developing a draft executive order to comply with the President's request, the Secretary of Defense commissioned two reports on the subject in April 1993, one to be developed by RAND's National Defense Research Institute,⁸ and the other to be completed by a Military Working Group (MWG) comprised of a flag officer and staff from each branch of the armed services.⁹

The reports submitted by RAND and the MWG came to starkly different conclusions on whether lifting the ban on gay service in the military would impact unit cohesion in the armed forces and thereby affect the military's ability to carry out its mission. On one hand, the RAND report concluded that sexual orientation was "not germane" to whether an individual was capable of effectively serving in the military and that the Department of Defense (DOD) could effectively lift the ban against gays without eroding unit cohesion in the ranks, provided the new policy was implemented in a clear and even-handed manner.¹⁰ On the other hand, the MWG concluded that homosexuality was "incompatible" with military service, echoing the historical military stance on gays in the armed forces, based on the assertion that open homosexuality in the military would cause such a breakdown in unit cohesion and morale that the military would be disabled from carrying out its primary mission of winning the country's wars.¹¹ The MWG's recommendations, backed by the legislative trump card Congress held, won the day and were substantially adopted first by President Clinton as DOD policy before laying the basis for the current "Don't Ask, Don't Tell" statute.¹²

"Don't Ask, Don't Tell" is actually a misnomer for the law Congress passed and Clinton signed, as its provisions only lend statutory force to the "Don't Tell" portion of the policy.¹³ Generally speaking, a service member will

⁷ *Id.*

⁸ RAND NAT'L DEF. RESEARCH INST., *SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: OPTIONS AND ASSESSMENT* (1993) [hereinafter RAND].

⁹ OFFICE OF THE SEC'Y OF DEF., *SUMMARY REPORT OF THE MILITARY WORKING GROUP* (1993) [hereinafter MWG].

¹⁰ RAND, *supra* note 8, at 2-3.

¹¹ MWG, *supra* note 9, at 7-8.

¹² See HALLEY, *supra* note 5, at 23.

¹³ The "Don't Ask" aspect of the policy, which generally prohibits the military from asking questions about a service member's sexual orientation, is left to DOD and service regulations.

be separated from service under the law if one of three findings is made: (1) the member has engaged in homosexual acts; (2) the member has stated that he or she is a homosexual or bisexual; or (3) the member has married or attempted to marry someone of the same sex.¹⁴ Thus, while the law purports to focus strictly on homosexual conduct rather than on the status of being a homosexual or bisexual, it is clear that “Don’t Ask, Don’t Tell” is a continuation of the military’s historical policy of excluding and discriminating against gays, lesbians, and bisexuals.¹⁵

B. *Since Enactment*

In order to appreciate the importance of scrutinizing the underlying justifications for “Don’t Ask, Don’t Tell,” a couple of facts and estimates will be useful. For starters, in the first ten years after “Don’t Ask, Don’t Tell” became law, nearly 10,000 service members were administratively separated from the military under the policy.¹⁶ Aside from the obvious human cost to those Americans so separated and the disruption and humiliation they have been forced to endure, there are serious budgetary costs to the federal government incurred to recruit and train replacement troops in order to maintain military manpower needs. The price tag put on these replacement recruiting and training costs is in the range of \$190.5 million¹⁷ to \$363.8 million¹⁸ for the ten years from 1994 through 2003. At a time when U.S. forces and budgets are stretched thin due to the requirements of the War on Terror and the war in Iraq, the manpower and fiscal drain resulting from “Don’t Ask, Don’t Tell” is all the more substantial and merits a reconsideration of the policy and its justifications.

See Memorandum from Les Aspin, Sec’y of Def., to the Sec’y of the Army, Sec’y of the Navy, Sec’y of the Air Force, and Chairman, Joint Chiefs of Staff, Policy on Homosexual Conduct in the Armed Forces (July 13, 1993).

¹⁴ 10 U.S.C. § 654(b) (2006).

¹⁵ For a discussion of the conduct-versus-status question related to “Don’t Ask, Don’t Tell,” see HALLEY, *supra* note 5, at 27-56.

¹⁶ SERVICEMEMBERS LEGAL DEF. NETWORK, CONDUCT UNBECOMING: THE TENTH ANNUAL REPORT ON “DON’T ASK, DON’T TELL, DON’T PURSUE, DON’T HARASS” 2 (2004), available at <http://dont.stanford.edu/commentary/sldn.10.pdf>.

¹⁷ See U.S. GOV’T ACCOUNTABILITY OFFICE, MILITARY PERSONNEL: FINANCIAL COSTS AND LOSS OF CRITICAL SKILLS DUE TO DOD’S HOMOSEXUAL CONDUCT POLICY CANNOT BE COMPLETELY ESTIMATED 12-15 (2005).

¹⁸ BLUE RIBBON COMM’N, MICHAEL D. PALM CTR., UNIV. OF CAL., SANTA BARBARA, FINANCIAL ANALYSIS OF “DON’T ASK, DON’T TELL”: HOW MUCH DOES THE GAY BAN COST? 2 (2006), available at <http://www.palmcenter.org/files/active/0/2006-FebBlueRibbonFinalRpt.pdf>.

III. ANALYSIS

A. *Unit Cohesion: Legitimate Basis for Discrimination?*

The primary justification asserted by the backers of “Don’t Ask, Don’t Tell” for the discriminatory treatment of gays, lesbians, and bisexuals in the military is that exclusion of homosexuals is necessary to preserve unit cohesion within the ranks of the services.¹⁹ The concept of unit cohesion is broad and encompasses such issues as bonding within military units, the ability of leadership to function, good order and discipline, respect for the privacy of military members, military morale, and the core values upon which the military profession is based.²⁰ The U.S. military does not explain in any detail what effect the presence of homosexuals has on unit cohesion beyond the assertion that known homosexuals, by their mere presence, threaten unit cohesion, which in turn would disrupt the military in performing its missions.²¹

Thus, in analyzing whether unit cohesion is truly affected by the presence of known gays, lesbians, and bisexuals within the ranks of the military, it will first be critical to analyze exactly what the phrase “unit cohesion” means. Once a general definitional framework for unit cohesion is established, and its necessity to the accomplishment of military goals is understood, the analysis will focus on the dichotomy of social cohesion versus task cohesion as separate aspects of unit cohesion. Finally, the focus will shift to the factors impacting cohesion, and a determination of which factor supports the current policy and which factor should support a new policy. By the end of this discussion it will become clear that justifications for “Don’t Ask, Don’t Tell” based on the preservation of unit cohesion merely accommodate base prejudices and stereotypes about homosexuals²² and, though the threats posed by such bigotry do pose real problems, unit-cohesion rationales are an improper basis for the wholesale discrimination practiced by the military against gays, lesbians, and bisexuals.

¹⁹ 10 U.S.C. § 654(a) (2006).

²⁰ MWG, *supra* note 9, at 5-6.

²¹ C. Dixon Osburn, *A Policy in Desperate Search of a Rationale: The Military’s Policy on Lesbians, Gays and Bisexuals*, 64 UMKC L. REV. 199, 212-13 (1995).

²² *See id.*

Unit or group cohesion is variously defined by social scientists in language “emphasizing the quality of the relationships among group members.”²³ One of the common military explanations in use states:

[C]ohesion exists in a unit when the primary day-to-day goals of the individual soldier, of the small group with which he identifies, and of unit leaders are congruent—with each giving his primary loyalty to the group so that it trains and fights as a unit with all members willing to risk death to achieve a common objective.²⁴

It is hard to imagine, on the face of things, what sex or sexual orientation has to do with the achievement of cohesion so defined. Rather, it would seem logical that sex of any sort, irrespective of its particular nature, not only is not part of, but cannot enter into, the military group equation if cohesion is to be attained or maintained. Thus, to understand the confusion that the term “cohesion” has engendered, it is necessary to break the concept down into its two main types: social cohesion and task cohesion.²⁵

The two types of cohesion, social and task, refer to distinct characteristics of a group, i.e., a group with good social cohesion refers to a group in which the individuals like each other and are bonded by friendship, while task cohesion refers to a shared commitment to and coordinated effort towards achieving a common goal or goals.²⁶ With reference to the cohesion definition above, it is obvious that task cohesion is what is meant when military leaders and theorists refer to unit cohesion. However, the reasoning underlying unit cohesion as a justification for “Don’t Ask, Don’t Tell” emphasizes the impact on the social cohesion of a group if confronted by the presence of an open homosexual. The confusion surrounding these distinct types of cohesion and the belief that both social and task cohesion are necessary to overall unit cohesion belies the impact of each type on performance.²⁷ At the outset, it is interesting to note that data suggest that while cohesion generally can improve group performance, its impact is not as great as one would think,²⁸ and it is more likely that successful performance has a greater effect on promoting cohesion than the inverse.²⁹

²³ RAND, *supra* note 8, at 287.

²⁴ WM. DARRYL HENDERSON, COHESION: THE HUMAN ELEMENT IN COMBAT 4 (1985).

²⁵ RAND, *supra* note 8, at 290-91.

²⁶ *Id.*

²⁷ *Id.* at 293-95.

²⁸ *Id.* at 294-97.

²⁹ *Id.* at 294, 303.

Since performance of military tasks—whether plotting a fire-control solution in a chaotic battle environment or maintaining safe hygienic standards in situations of close living quarters—is the true measuring stick of success, the effects of cohesion on performance must be understood to assess the validity of the unit-cohesion rationale for banning homosexuals from military service. Most studies that have attempted to measure the effects of cohesion on group performance have either exclusively focused on social cohesion or have failed to differentiate social from task cohesion.³⁰ These studies have reached conflicting results on the effects of social cohesion within a group on performance, finding in some instances that high levels of social cohesion displaced the focus of the group on the performance of tasks with a resultant negative impact on group performance.³¹ However, one study undertaken to resolve the inconsistent research results measuring the impact of cohesion on group effectiveness directly addressed the distinct types of cohesion and the independent effect of each on performance.³² When separated, it was found that only task cohesion was independently correlated with performance, suggesting that task cohesion, rather than social cohesion, drives group performance.³³

Though achieving task cohesion or a shared commitment to the accomplishment of group goals is more important to successful performance than the social cohesion of a unit, there is no doubt that a breakdown in social cohesion can threaten to disintegrate the effectiveness of a unit and that a moderate level of social cohesion is desirable when considering group effectiveness.³⁴ Given that a breakdown in social cohesion and its catastrophic effects on the military mission is offered as a primary justification for the exclusion of gays from military service, it is necessary to determine how or why the sexual orientation of a person is thought to cause unit cohesion to suffer. Among those factors found to be important antecedents of social cohesion, similarity or homogeneity³⁵ and leadership³⁶ are the factors which will be examined in furtherance of the debate on whether gays indeed threaten unit cohesion, justifying their exclusion.

³⁰ *Id.* at 299.

³¹ *Id.* at 294-97.

³² *Id.* at 293.

³³ *Id.*

³⁴ *Id.* at 295-96.

³⁵ *Id.* at 306-07.

³⁶ *Id.* at 302-03.

While factors such as company assignment, high personnel turnover rates, group size, success experience, and shared threats all contribute to the enhancement or degradation of unit cohesion in the military context,³⁷ none of these can be used to explain the threat to cohesion that the proponents of “Don’t Ask, Don’t Tell” claim justifies the continued ban. The similar or homogenous nature of a group, on the other hand, seems an apt basis for the aspect of unit cohesion that is threatened by the presence of homosexuals in the ranks.³⁸ At root, the military argues that homosexuality is morally repugnant to the majority of service members and that such deeply held prejudices are worthy of honor so as to safeguard unit cohesion in the name of military efficiency and effectiveness.³⁹ An eerily analogous argument was advanced by those opposed to the integration of blacks into the military more than fifty years ago and found to be without basis when the threatened violence and destruction of military purpose never materialized.⁴⁰ Though the analogy between race and sexual orientation is far from perfect,⁴¹ the lesson should be clear to military leaders that a policy based on fears and the expectation of the worst response from the lowest common denominator not only devalues the military’s ability to handle such problems with firm and fair leadership but that the doomsday predictions are startlingly overblown.

The military’s reliance on this prejudice-of-the-majority justification not only appears to abdicate the role of leadership in the fair administration of the organization as a whole but also overemphasizes the impact that the similarity of a group’s attitudes and values has on performance.⁴² As stated above, it is task cohesion rather than social cohesion that is important as a factor that enhances group performance, yet homogeneity of values is primarily a factor, or attribute, of social cohesion and does not appear to appreciably influence task cohesion.⁴³

³⁷ *Id.* at 299-306.

³⁸ *Id.* at 306-07; *see also* MWG, *supra* note 9, at 5-6 (claiming that unit bonding, good order and discipline, and morale are factors of cohesion threatened by homosexual troops because the majority of the military community’s “moral and ethical beliefs” would be in “open conflict” with those of gays).

³⁹ Osburn, *supra* note 21, at 212-13.

⁴⁰ RAND, *supra* note 8, at 158-90.

⁴¹ *See* Mario L. Barnes, “*But Some of [Them] are Brave*”: *Identity Performance, the Military, and the Dangers of an Integration Success Story*, 14 DUKE J. GENDER L. & POL’Y 693, 710-11 (2007).

⁴² *See* RAND, *supra* note 8, at 306.

⁴³ *Id.* at 307.

Leadership, on the other hand, is a key factor promoting both task and social cohesion⁴⁴ and seems the proper basis for a policy on accepting or excluding homosexuals as a group. As highlighted in the section discussing foreign military experiences with this issue,⁴⁵ clear promulgation of sound policies backed by a leadership enabled to apply wisdom as well as doctrine to fluid situations such as those encountered when homosexuals come into the open within the military will ensure a smooth transition to a military free from discrimination on the basis of sexual orientation. The reality is that U.S. troops care much more about whether the men and women next to them can fight and do their jobs than where they came from or what they do in their free time.⁴⁶ It is the responsibility of commanders and leaders throughout the chain of command to promote unit cohesion and the accomplishment of military goals, primarily through training, the fair application of military discipline, and example. To rob military leaders of the discretion necessary to overcome problems within units so as to promote the needs of the unit and the military in a fair and nondiscriminatory way questions the competence of the military chain-of-command structure and erodes its authority. Yet under the false guise of unit cohesion, "Don't Ask, Don't Tell" does precisely this by favoring a policy which reinforces the idea that base prejudices, rather than performance or conduct, are a legitimate foundation for judging the individuals in uniform who have committed themselves to protecting our country.

B. Lessons and Expectations Learned Abroad

While the use of unit cohesion as the basis for the official discrimination against gays, lesbians, and bisexuals by the military stands on shaky theoretical ground because it relies on and reinforces prejudices, the question remains whether lifting the ban on homosexuals will in fact cause a serious deterioration in the military's ability to achieve its goals. The answer is neither easy nor assured, but analogous situations from which policymakers can learn abound, both within the American experience⁴⁷ and from the many foreign militaries which have ended the exclusion of homosexuals from their respective armed forces.⁴⁸ Because of the similarities that some foreign militaries share with the U.S. military, particular examples from these foreign militaries might offer

⁴⁴ *Id.* at 302.

⁴⁵ *See infra* Part III.B.

⁴⁶ Osburn, *supra* note 21, at 214.

⁴⁷ *See* RAND, *supra* note 8, at 106-54.

⁴⁸ *Id.* at 65-104.

expectations and lessons regarding what the overall effect on unit cohesion might be if and when the United States overturns its current ban.

In this section, the experiences of Israel, Australia, and Great Britain in overturning bans on the service of homosexuals in their respective militaries will be addressed in turn to assess whether the acceptance of gays in the military results in a breakdown in unit cohesion. Since the U.S. military questions the relevance of foreign military experiences in lifting gay bans on various grounds,⁴⁹ these objections will be considered, followed by an assessment of the data and conclusions to evaluate whether gay military service had the advertised catastrophic effects on unit cohesion and military performance. Finally, the method of policy implementation utilized by each country will be assessed for lessons that the United States can use in order to devise a more humane policy without sacrificing military effectiveness.

1. *Israel*

The Israel Defense Forces (IDF) have a high operating tempo by anyone’s standards, having “fought five major wars, conducted numerous major operations against hostile neighbors, and supplied an army of occupation in the West Bank and Gaza for more than thirty years.”⁵⁰ A conscription force in which all Israelis must serve for two or three years upon reaching the age of majority followed by annual reserve training after the period of active duty has ended, the IDF serves both as a symbol of and a mechanism for achieving full Israeli citizenship, and the means for successfully assimilating the diverse Jewish immigrants who flock to the homeland.⁵¹

Though the IDF has never officially forbidden gays from entering its ranks, the policy response to an open gay prior to 1983 was generally to discharge the individual.⁵² Beginning in 1983, and effective until revised under pressure from the Israeli Knesset in 1993, the IDF operated under a regulation which called for the exclusion of homosexuals from top-secret and intelligence positions and required known homosexuals to undergo evaluations focused on the potential of security risks.⁵³ Under the regulation, the Field Security

⁴⁹ See MWG, *supra* note 9, at 10.

⁵⁰ Aaron Belkin & Melissa Levitt, *Homosexuality and the Israel Defense Forces: Did Lifting the Gay Ban Undermine Military Performance?*, 27 *ARMED FORCES & SOC’Y* 541, 542 (2001).

⁵¹ See RAND, *supra* note 8, at 85-86.

⁵² Belkin & Levitt, *supra* note 50, at 543.

⁵³ *Id.*

Department had discretion to retain or discharge the individuals depending on the outcome of the evaluations.⁵⁴ In 1993, the IDF amended the regulation on homosexuals in the military so that official discrimination against troops on the basis of sexual orientation no longer exists.⁵⁵

In response to the claim that foreign military experiences are instructive as to what would happen if the American ban were lifted, the U.S. military has generally maintained that such experiences are not relevant due to the unique nature of the U.S. military.⁵⁶ The reason for such a stance is that the cultural backgrounds of foreign militaries and the societies from which they spring are fundamentally different from those of the U.S. military, and that no other military in the world deploys as often or is as operationally active as the U.S. armed forces.⁵⁷

In the case of Israel and the IDF, these criticisms have some merit, as it cannot be seriously questioned that the role of the IDF in the socialization of the Israeli state is substantially greater culturally than in the United States.⁵⁸ On the other hand, Israeli society, and thus the IDF, is not particularly welcoming to homosexuals, although the issue of sexual orientation certainly lacks the acrimony found in U.S. attitudes towards homosexuals.⁵⁹ Finally, though it is true that the IDF is operationally limited to the Middle East region and that deployments are never terribly far from home, the constant threat to the existence of the Jewish state by its neighbors provides continuous, serious security concerns that make the operational tempo of the IDF at least as robust as that of its U.S. counterpart.⁶⁰ Thus, while it is necessary to that the IDF analogy is flawed on some levels, Israel's experience merits mention because of the serious and continuing nature of the threats the country faces and the resulting concern for unit cohesion within the IDF.

The evidence gathered from studies on the impact of open homosexuals serving in the IDF on unit cohesion and military performance indicates that no major problems have developed.⁶¹ The primary explanations for the absence of a negative causal relationship between gay service and unit cohesion illustrate

⁵⁴ *Id.*

⁵⁵ *Id.* at 543-44.

⁵⁶ See MWG, *supra* note 9, at 10.

⁵⁷ See *id.*

⁵⁸ RAND, *supra* note 8, at 85.

⁵⁹ *Id.* at 86; see also Belkin & Levitt, *supra* note 50, at 555-56.

⁶⁰ RAND, *supra* note 8, at 85 ("Israel [has] a warfighting experience unparalleled in the rest of the world.").

⁶¹ Belkin & Levitt, *supra* note 50, at 544-45.

recurring themes. First, gay service members represent a small minority within the IDF and tend to remain discreet about their sexual orientation even when it cannot serve as an official basis for discrimination or discharge.⁶² There is no valid reason to assume that gays in the U.S. military will not similarly rely on discretion to avoid the potential ire that being an open homosexual may engender.⁶³ Second, the IDF officially endeavors to avoid special treatment of the gay population within its ranks so as to defuse any resentment on the part of the majority heterosexual military community.⁶⁴ Additionally, the mandate is clear and understandable within the IDF regulations that discrimination against members on the basis of sexual orientation is intolerable and performance is the only basis for judging a person’s suitability for service or promotion.⁶⁵ This clear guidance and the evenhanded enforcement of its dictates has successfully minimized any ill effects on unit cohesion that open homosexuals are thought to present and should serve as a useful example of how equitable treatment of homosexuals in the military need not be at the expense of unit cohesion.

2. Australia

The particular relevance of the Australian Defence Force (ADF) experience with ending the ban on gays in military service stands on the fact that Australia is culturally similar to the United States, consists of a volunteer force, and has been a valued partner in the American-led wars on terror and in Iraq. Increasing the relevance of the ADF experience is the fact that Australia lifted its ban on gays in the military in 1992 amid widespread controversy and resistance from the military leadership,⁶⁶ much as occurred in the failed attempt to remove discrimination against gays that led up to “Don’t Ask, Don’t Tell.” As in the United States, ADF leaders decried the breakdown in unit cohesion as one of the primary reasons for maintaining a discriminatory ADF policy on

⁶² *Id.* at 549-50; Aaron Belkin, *Don’t Ask, Don’t Tell: Is the Gay Ban Based on Military Necessity?*, PARAMETERS, Summer 2003, at 108, 113; Johnny L. Barnes II, *Don’t Ask, Don’t Tell: A Costly and Wasteful Choice* 36 (Sept. 2004) (unpublished master’s thesis, Naval Postgraduate School) (on file with Dudley Knox Library, Naval Postgraduate School), available at http://bosun.nps.edu/uhtbin/cgiisirs.exe/Wed+Aug+20+09:20:23+2008+/SIRSI/0/520/04Sep_Barnes.pdf.

⁶³ Belkin & Levitt, *supra* note 50, at 551.

⁶⁴ *Id.* at 553-54.

⁶⁵ *Id.* at 543-44.

⁶⁶ AARON BELKIN & JASON MCNICHOL, MICHAEL D. PALM CTR., UNIV. CAL., SANTA BARBARA, THE EFFECTS OF INCLUDING GAY AND LESBIAN SOLDIERS IN THE AUSTRALIAN DEFENCE FORCES: APPRAISING THE EVIDENCE 2, 4 (2000), available at http://www.palmcenter.org/files/active/0/Australia_Final_Report.pdf.

gays.⁶⁷ While, again, the analogy between Australia and the United States is not perfect, it seems careless of the military to disregard as irrelevant the results of the ADF abolishing sexual orientation discrimination within its ranks.

As noted above in the case of Israel, the effect on unit cohesion within the ADF since the gay ban was lifted has been negligible to nonexistent,⁶⁸ and for the same reasons. The small proportion of the total force identifying itself as homosexual coupled with guarded discretion on the part of gays within the ADF indicate that as a matter of self-protection and career preservation, gays within the ADF are hesitant to come out into the open with their sexual orientation, regardless of official policy.⁶⁹ Interviews with ADF officers also show that unit-level leaders view the presence of homosexuals as just another personnel management issue—potentially difficult, but not the divisive and destructive influence threatening unit cohesion that was promised in Australia and is still promoted in America.⁷⁰ Thanks in part to the negligible effect that allowing homosexuals to serve has had on ADF unit cohesion, the controversy has disappeared from the Australian debate, which now centers on the extension of equal benefits to the domestic partners of gay military members.⁷¹

The specific ways the ADF minimized the impact of the policy change on gays in the military bear mentioning. When the policy was changed to allow homosexuals to serve equally, the ADF also revised other policies, particularly those concerning sexual harassment, sexual misconduct, and equal opportunity, to strengthen ADF commanders' ability to deal fairly with any incidents.⁷² The revision of harassment and equal-opportunity policies focused on evaluating individuals on the basis of their conduct and contributions to the achievement of military goals, or lack thereof, rather than on the basis of other irrelevant factors such as sexual orientation.⁷³ While problems with full integration and harassment of homosexuals admittedly still exist in the ADF, they are uniformly thought to pose less of a problem for unit cohesion than the presence of women in the military.⁷⁴

⁶⁷ *Id.* at 13.

⁶⁸ *Id.* at 16-18.

⁶⁹ *Id.* at 17; Belkin, *supra* note 62, at 112; Barnes, *supra* note 62, at 29-30.

⁷⁰ BELKIN & McNICHOL, *supra* note 66, at 15.

⁷¹ *Id.* at 36.

⁷² *Id.* at 12-13.

⁷³ *Id.*

⁷⁴ *Id.* at 24-26.

3. Great Britain

Of the three foreign state militaries considered as analogous, the British Armed Forces (BAF) matches the U.S. military most closely in terms of history, organization, size, and mission, to name a few areas. The BAF is a moderate-sized, modern force with high technical capabilities and, through NATO and the “Coalition of the Willing,” has shared in many of the extended, far-flung deployment and mission experiences of the U.S. military over the past couple of decades.⁷⁵ In particular, the Ministry of Defense implemented a policy nearly identical to and contemporaneously with “Don’t Ask, Don’t Tell” for the same reasons, even to the extent of the “incompatibility” rationale as supported by the perceived threat to unit cohesion.⁷⁶ In 2000, however, these closest of allies broke ranks, at least in terms of the policy treatment of gays, lesbians, and bisexuals that sought service in the military. Forced to accept that exclusion of gays from the military on grounds of sexual orientation alone violated the privacy rights of service members under the Human Rights Act in a 1999 decision by the European Court of Human Rights, the BAF moved to lift the ban and had new regulations based on those developed earlier in Australia in place by 2000.⁷⁷

While this change in policy is of more recent vintage, eight years have passed since Great Britain eliminated official discrimination against homosexuals in the BAF, so short-term data are available. Just as occurred in Israel and Australia, the controversy over gay service and unit cohesion fell into obscurity shortly after the ban was lifted, and no horrific news surfaced to validate the scaremongering of foreseen disasters.⁷⁸ As late as a December 2007 episode of *60 Minutes*, the British estimate of the effect of open homosexuals on unit cohesion was that it has not “affected the fighting capability of our forces.”⁷⁹ Coming out by individuals is still slow as in the other foreign services examined and probably contributes to the lack of major problems during the time of transition.⁸⁰ But military leadership, in devising a

⁷⁵ See AARON BELKIN & R.L. EVANS, MICHAEL D. PALM CTR., UNIV. OF CAL., SANTA BARBARA, THE EFFECTS OF INCLUDING GAY AND LESBIAN SOLDIERS IN THE BRITISH ARMED FORCES: APPRAISING THE EVIDENCE 8-9 (2000), available at <http://www.palmcenter.org/files/active/0/Britain1.pdf>.

⁷⁶ *Id.* at 12,17.

⁷⁷ *Id.* at 23-24.

⁷⁸ *Id.* at 4.

⁷⁹ *60 Minutes: Don’t Ask, Don’t Tell* (CBS television broadcast Dec. 16, 2007) (quoting Admiral Sir Alan West).

⁸⁰ BELKIN & EVANS, *supra* note 75, at 46; Belkin, *supra* note 62, at 113.

fair and firm policy and implementing it with the discipline one would expect of a commander, is likely the most important factor explaining the successful transition to a nondiscriminatory military.⁸¹

As mentioned above, the BAF decided to follow the pattern Australia developed when implementing its decision to lift the ban on gay service. Of particular note was the development of a "Code of Social Conduct" which focuses on behavior and conduct, rather than characteristics (like someone's sexual orientation), and incorporates clear policies with regard to harassment, bullying, and other inappropriate actions.⁸² The short-term success of the BAF transition away from excluding gays is a testament to both the efforts of the military leadership in developing a fair and disciplined approach to the new policy and the professionalism of the individuals up and down the BAF chain of command who have accepted the just authority of the policy, even if they may personally disagree with it.

Thus, what the experiences of Great Britain, Australia, and Israel can teach U.S. military leaders is that accepting homosexuals into the armed forces or acknowledging that they are already there serving with the same dedication, honor, discipline, and courage as their heterosexual counterparts does not degrade unit cohesion when the military leaders get on board and support the force with sound policy and guidance. The same will hold true for America whenever its military leadership decides to follow suit.

IV. RESOLUTION

With reference to the junior officer's dilemma in the Introduction to this Note, the current law regarding homosexuals who serve in the U.S. military mandates that the serviceman be processed for an administrative discharge without regard to the character of his service or his devotion to duty merely because he is a homosexual. Though the scenario described would not be easily resolved if "Don't Ask, Don't Tell" were not in effect, at least then the officer could exercise his judgment and leadership skills through informal conflict resolution in hopes of diminishing the likely personal effects on the sailor and preserving the cohesiveness and capabilities of the division.

Thus, the dilemma created by the statutory rule discriminating against homosexuals that seek to serve in the armed forces must be scrutinized to see whether the justifications for such official policy merit the costs to the

⁸¹ See BELKIN & EVANS, *supra* note 75, at 26.

⁸² *Id.* at 26-29.

individual service members as well as the financial burden enforcement foists onto the federal budget. The most prominent justification put forward by the military for its anti-gay stance is the perceived threat open homosexuals in uniform pose to the cohesion of units throughout the military. That anti-gay sentiments exist within the military is hardly worth debating, but to base a personnel policy which so unfairly discriminates against a minority on the prejudices of the majority and enact it into law is certainly worth some investigative attention. By looking deeper at the unit-cohesion justification for excluding gays from the military, the policy is shown to be wrongheaded and based on fears which have almost no appreciable chance of coming to fruition on the level of magnitude supporters of “Don’t Ask, Don’t Tell” prophesize.

Put simply, the policy was wrong when enacted and continues to be bad law today because it is unjustified by reference to cohesion or any other rationale that has yet been offered. These conclusions are substantially borne out by analyzing the experiences of foreign militaries that have lifted their own bans on gay service. It is also with reference to foreign military practices that a proper solution may be devised.

Thus, the first necessary step toward repealing the ban on homosexuals in the military in a way that maintains military preparedness and effectiveness is not necessarily repealing “Don’t Ask, Don’t Tell,” though this is an absolutely imperative step. The first step is convincing military commanders that not only do homosexuals serve their country with pride and dignity, but that if allowed to do so openly, the military community is flexible and strong enough to subvert discriminatory personal beliefs for the accomplishment of military goals.

If military leaders accept the inevitability of gays serving openly in the ranks, there is no question that commanders will be up to the task of eliminating discrimination against gays. The leadership will be able to concurrently enhance unit cohesion by the fair administration of military rewards and discipline and by focusing the troops on what matters in military affairs: core values, personal integrity, and superior performance, none of which have anything to do with sexual orientation.

Lastly, to resolve the unnecessary discrimination against gays in the military successfully and professionally, it is of paramount importance that the Department of Defense investigate thoroughly the practices of those militaries that have gone before and implement clear expectations. By updating and strengthening current policies on equal opportunity, sexual harassment, fraternization, and hazing into a coherent code of conduct, the transition to a truly egalitarian and merit-based military can be achieved.

V. CONCLUSION

Revisiting and analyzing the discriminatory military policy of excluding gays, lesbians, and bisexuals from service in the U.S. armed forces, commonly referred to as “Don’t Ask, Don’t Tell,” leads to the conclusion that the policy is unnecessary to the achievement of military goals. The primary justification offered for the ban is that it is required to preserve military unit cohesion. However, the justification fails to support the policy in that open homosexuals in the military ranks have no appreciable effect on task cohesion, the element of unit cohesion which matters most in realizing military objectives.

The conclusion that homosexuals serving in the armed forces do not detrimentally affect unit cohesion is amply supported by the experiences of foreign militaries, specifically Israel, Australia, and Great Britain. The lessons to be learned from these foreign experiences are twofold. First, the threat of widespread breakdowns in military units is overblown. Secondly, the firm and fair implementation of a nondiscriminatory policy respecting all service members and based on conduct rather than status can ensure a smooth transition away from excluding gays from the military. Thus, “Don’t Ask, Don’t Tell” is an unfairly discriminatory policy without a valid justification and should be discarded.