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Free a Man to Fight: The Exclusion of Women From Combat Positions in the Armed Forces

Lucy V. Katz*

Introduction

Among the more significant impacts of the 1991 War in the Persian Gulf is the altered image of women in the armed forces. The word "image" is carefully chosen. For years, women have held numerous positions in the Army, Navy, Air Force and Marines, many in non-traditional fields. But with the Gulf War, the American public saw for the first time the widespread participation of women in warfare. This was a TV war, and on television Americans saw women shipping out with their units and hefting sandbags in the desert. Eleven women were killed in the Gulf, five of them in action, and two were taken prisoner of war.¹ Fathers sent their daughters, husbands their wives, off to war. These were powerful images, at odds with the nation's understanding of the legal and social status of women and men. As a result, the Gulf War will ultimately alter the legal status of military women. Already, Congress has voted to remove legal restrictions on women in combat aviation. More critically, however, the new image of women and war may shift the image of all women, changing the status of women generally and altering the core meaning of equality of citizenship, legally, politically and philosophically.

By law and official policy, women are excluded from "combat positions,"² though the distinction between combat and noncombat status is often blurred. The official exclusion rules reflect the widely held notion that combat is a male responsibility. Men go to war while women stay home and nurture the children. If women

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1. WOMEN'S RESEARCH AND EDUCATION INSTITUTE (WREI), WOMEN IN THE U.S. ARMED SERVICES: THE WAR IN THE PERSIAN GULF 2 (1991). [Hereinafter WREI, THE WAR IN THE PERSIAN GULF].

2. See *infra* note 24. The bills end statutory restrictions on women in combat aircraft in the Navy, Marine Corps, and Air Force. Women in air units would be allowed on combat ships. The services, however, retain discretion as to the deployment of women, and there is no change in Army rules.

participated in war at all, which they have always done to some degree, they have filled "support" roles as clerks or nurses.³ "Free a Man to Fight," a World War II recruiting slogan, sums up the role of women in war throughout western history.⁴

That war is not something women "do" has not, until now, been open to serious challenge. In public and private discourse, the combat exclusion takes on the aura of biological fact, much like the fact that only women bear children. As one federal judge phrased it,

... [I]f a nation is to survive, men must provide the first line of defense while women keep the home fires burning. . . . For these reasons, the distinction between men and women with respect to service in the Armed Forces is not arbitrary, unreasonable or capricious.⁵

The image of woman as supporter during wartime reflects a widely held image of women. It portrays women as physically weak, unable to fight an enemy effectively. Women's primary role is seen as biological, as the child-bearers and the child-rearers; they must be protected, enshrined on pedestals, in order to fulfill that role. At the same time, women are seen as temptresses and whores. Placed in close proximity to men, they will surely be sexually ravaged. But more important, women will destroy men's will to fight. Unless men must remain undistracted by the siren-song of femininity, the psychological unity that makes an effective fighting unit will be destroyed. Thus the image tells us women need protection by and from men, but women are also dangerous and men need protection from them.⁶ This article will not argue that women should or should not participate in combat as an empirical or constitutional matter. It is likely that the combat exclusion will eventually be narrowed by Congress and ultimately

3. Women have served in every war in American history. During the American Revolution and the Civil War some dressed up as men and fought, and some, like the model for the mythical Molly Pritcher, took over their husbands' posts. Most, however, functioned as nurses and servants, and in later years, as clerks. MARTIN BINKIN & SHIRLEY BACH, *WOMEN AND THE MILITARY* 4-5 (1977); BRIAN MITCHELL, *WEAK LINK: THE FEMINIZATION OF THE AMERICAN MILITARY* 13-15 (1989).

4. It is also a basic tenet of the Israeli army. While Israeli women are subject to compulsory universal military service, they are strictly excluded from combat roles. As of 1985, approximately 60 percent of army jobs were closed to women, although only 15 percent of the army actually went into battle. Anne R. Bloom, *Women in the Defense Forces*, in *CALLING THE EQUALITY BLUFF: WOMEN IN ISRAEL* 135, 137 (Barbara Swirski and Marilyn P. Safir, eds., 1991).

5. *United States v. St. Clair*, 291 F. Supp. 122, 125 (S.D.N.Y. 1968). See also *United States v. Cook*, 311 F. Supp. 618, 622 (W.D. Pa. 1970).

6. See *infra* Part II, for a more complete discussion of the reasons for the combat exclusion.

eliminated.⁷ Instead, this article will argue that women should hasten the elimination of the combat exclusion. Ending the combat exclusion is necessary for women to achieve true equality of citizenship. Excluding women from combat condemns them to second class status and perpetuates an image of women that is destructive to efforts at real equality, an image that is reflected in congressional debate, military policy, and social discourse, and is accepted largely without question by the judiciary.

Part I of this article discusses the legal status of women in the military and the substance of the combat exclusion rules and the rules' impact on women and men in the armed services. Part II examines the rationale for combat exclusion, and Part III argues that the rationale is unrelated to military effectiveness. Part IV discusses judicial responses to gender driven differences in military policy, and how those responses reflect a socially constructed view of women as inherently inferior. Part V suggests some changes in the image of women that may result from the Gulf War and concludes that the end of the combat exclusion is necessary for the achievement of equal civic status for women.

I. The Combat Exclusion Rules

Historical Background

Any discussion of the legal status of military women requires a preliminary understanding that the military operates in a legal world of its own, in which many of the accepted rules and concepts of civilian law simply do not apply. The military is a "specialized community governed by separate discipline from that of the civilian;"⁸ a "specialized society separate from civilian society," which has "developed laws and traditions of its own during its long history."⁹ While not exempt from constitutional review, constitutional rights are applied with extreme deference to the needs of the armed services in the military context.¹⁰ In many cases, constitutional protections are viewed as subordinate to the military's need for "instinctive obedience, unity, commitment, and esprit de

7. See *infra* note 24 (on removal of restrictions on women in combat aircraft). DACOWITS recommended in Spring of 1991 that the exclusion statutes be repealed. Moreover, only 18 percent of Americans think women should never get combat assignments and 50 percent think that women should be drafted if there is a draft. However, 51 percent think women infantry soldiers would be a burden. *Opinion Watch: On the Front Lines*, NEWSWEEK, Aug. 5, 1991 at 60.

8. *Orloff v. Willoughby*, 345 U.S. 83, 94, *reh'g denied*, 345 U.S. 931 (1953).

9. *Parker v. Levy*, 417 U.S. 733, 743 (1974).

10. *Id.* at 758.

corps."¹¹ The military system categorizes, classifies and rationalizes in ways that would never be tolerated in the civilian sector under principles of either equal protection or antidiscrimination statutes.¹²

For most of American history, the role of women in the military was shaped by custom, not by law. Traditionally, women were used either as domestic servants or in roles that men rejected, such as nurses, clerks or cleaners. Such traditions date back to the American Revolution, when 20,000 women joined the Continental Army, mostly as nurses.¹³ Later, when the Cavalry patrolled the frontier, regulations required that every fort have one woman for every 7½ men: the women's purpose was to do the laundry.¹⁴ Such customs persisted until after World War II, when Dwight Eisenhower testified before Congress that

[F]or the particular tasks for which the woman is particularly qualified in war, she is far better than any man in the Army. She takes pride in the job, often when a man will not.

If a soldier is in the field and you detail him to a switchboard where efficient service is most important, he gets to feeling, "Well, this is not a very good job for a big 200 pounder." He is not concerned really to do it and do it efficiently.¹⁵

Women continued to function in the military as nurses and clerks, first informally, and then in special organizational units during World War I.¹⁶ Such units expanded during World War II

11. *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986).

12. The military, according to the majority view, is exempt from Title VII of the Civil Rights Act of 1964. *Roper v. Dept. of the Army*, 832 F.2d 247 (2d Cir. 1987); *Gonzales v. Dept. of the Army*, 718 F.2d 926 (9th Cir. 1983); *Taylor v. Jones*, 653 F.2d 1193 (8th Cir. 1981); *Johnson v. Alexander*, 572 F.2d 1219 (8th Cir. 1978), *cert. denied*, 439 U.S. 986 (1978); *Cobb v. United States Merchant Marine Academy*, 592 F. Supp. 640 (E.D.N.Y. 1984). *But see* *Hill v. Berkman*, 635 F. Supp. 1228 (E.D.N.Y. 1986) (Title VII applies to uniformed members of the armed services, but combat exclusion is bona fide occupational qualification for exclusion of women from certain positions.) The military is also exempt from the Rehabilitation Act's provisions on discrimination against the handicapped, 29 U.S.C. § 794 (1991); *Milbert v. Koop*, 830 F.2d 354 (D.C. Cir. 1987); and from the Age Discrimination in Employment Act, 29 U.S.C. § 621 (1991); *Ridgeway v. Aldridge*, 709 F. Supp. 265 (D. Mass. 1989). *See also* *Chappell v. Wallace*, 462 U.S. 296 (1983) (military personnel may not sue superior officers or the United States for damages).

13. 131 CONG. REC. S15192-01 (daily ed. Nov. 12, 1985) (statement of Sen. Eagleton).

14. 131 CONG. REC. H9650-05 (daily ed. Nov. 4, 1985) (statement of Rep. Schroeder).

15. *Hearings on S. 1103, S. 1527, and S. 1641, The Women's Armed Services Integration Act of 1947 Before Senate Committee on Armed Services*, 80th Cong., 1st Sess. 11 (1947) (statement of Gen. Dwight D. Eisenhower).

16. BINKIN & BACH, *supra* note 3, at 5. Military sources, however, state that women were "part of the armed forces" since the Army Nurse Corps and the Navy Nurse Corps were formed in 1901 and 1908 respectively. DEPARTMENT OF DEFENSE, DEFENSE ADVISORY COMMITTEE ON WOMEN IN THE SERVICES (DACOWITS), INFOR-

with the formation of the Women's Army Auxiliary Corps (WAAC), which became the Women's Army Corps (WAC) in 1943, the Navy's Women Accepted for Voluntary Emergency Service (WAVES), the Marine Corps and Coast Guard Women's Reserves (SPARS) and the Women's Airforce Service Pilots (WASPS).¹⁷ Women's roles gradually expanded to include key functions in intelligence, and as drivers and pilots in World War II.¹⁸ Eighteen-hundred women flew fighter planes to and from the front.

Combat Exclusion Statutes and Regulations

The Armed Forces Integration Act of 1948¹⁹ for the first time integrated women and granted them full status in the military services and the reserves. There was, of course, a price. For the first time women were explicitly excluded from combat positions by law. Legislation prohibited assignment of Navy women to combat aircraft or to any ships²⁰ and of Air Force women to duty in combat missions.²¹ No statute addressed combat in the Army. In 1948, the Army rejected statutory coverage to maintain maximum flexibility in assignment. The Army argued that defining combat in the army context is too difficult.²² Instead, as a matter of policy the Army excludes women from combat, but it can define combat free of statutory restraint or legislative oversight. The Coast Guard, which is part of the Department of Transportation, has no restrictions on women except in wartime when it comes under the jurisdiction of the Navy. Coast Guard women are trained for combat roles which, presumably, they would assume at time of deployment. By law, women have never been subject to a military draft, and they are not required to register with the Selective Service System.²³

These statutory and policy restrictions remained in place for many years, with minor modifications that allowed women on noncombat Navy vessels. Then in 1991, after the Gulf War, the

MATION PAPER, WOMEN IN THE MILITARY (January, 1991) [hereinafter DACOWITS, INFORMATION PAPER].

17. BINKIN & BACH, *supra* note 3, at 7.

18. George Quester, *The Problem*, in FEMALE SOLDIERS—COMBATANTS OR NON-COMBATANTS? 221 (Nancy Loring Goldman, ed., 1982) [hereinafter FEMALE SOLDIERS].

19. Armed Forces Integration Act of 1948, Pub. L. Chs. 447-49, 62 Stat. 356-75 (1948).

20. 10 U.S.C. § 6015 (1991).

21. 10 U.S.C. § 8549 (1990).

22. Ralph P. Witherspoon, *Female Soldiers in Combat—A Policy Adrift*, VI MINERVA QUARTERLY REPORT ON WOMEN AND THE MILITARY 1, 5 (Spring, 1988).

23. 50 U.S. App. § 453 (1990); Pres. Proc. No. 4771, July 2, 1980.

House and Senate repealed all statutory restrictions on women in combat aircraft.²⁴ The new law will remove all restrictions on women in the Air Force. Like the Army, it will now have discretion as to their deployment. The Navy retains the statutory ban on women on combat vessels, but the new law eliminates Navy bars to women in combat aviation, thereby opening up some positions on aircraft carriers.

The statutory language does not reveal either the meaning or the consequences of the combat exclusion. Congress has never defined combat. Instead, Congress permitted the services to establish their own definitions. Moreover, the statutes set minimum standards. The services are free to bar women from positions not technically within the statutory definitions, and they have all done so. The military has used its discretion over the years to close, and then open opportunities for women, depending on logistical needs and societal attitudes.

Combat has meant, generally, what the Army calls "direct combat," defined as "engaging an enemy with individual or crew-served weapons while being exposed to direct enemy fire, a high probability of direct physical contact with the enemy's personnel, and a substantial risk of capture."²⁵ The Army evaluates and

24. The Secretary of the Navy may prescribe the manner in which women officers, women warrant officers, and enlisted women members of the regular Navy and Marine Corps shall be trained and qualified for military duty. The Secretary may prescribe the kind of military duty to which such women members may be assigned and the military authority which they may exercise. However, women may not be assigned to duty on vessels or in aircraft that are engaged in combat missions nor may they be assigned to other than temporary duty on vessels of the Navy except hospital ships, transports and vessels of a similar classification not expected to be assigned to combat missions.

10 U.S.C. § 6015 (1980).

Female members of the Air Force, except those designated under section 8067 of this title (professional functions) or appointed with a view to designation under that section, may not be assigned to duty in aircraft engaged in combat missions.

10 U.S.C. § 8549 (1980). See H.R. 2100, 102d Cong., 1st Sess. (1991). The Act would repeal 10 U.S.C. § 8549, removing any restrictions on women in the Air Force. The third sentence of § 6015 would be amended to read:

However, women may not be assigned to duty on vessels that are engaged in combat missions *other than as aviation officers as part of an air wing or other air element assigned to such a vessel* nor may they be assigned to other than temporary duty on *other* vessels of the Navy except hospital ships, transports and vessels of a similar classification not expected to be assigned to combat missions. (emphasis added).

25. WOMEN'S RESEARCH AND EDUCATION INSTITUTE, WOMEN IN THE MILITARY 1980-1990, app. at 9 (1990). [hereinafter WREI, WOMEN IN THE MILITARY]. "Direct combat takes place while closing with the enemy by fire, maneuver, or shock effect in order to destroy or capture, or while repelling assault by fire, close combat or counterattack." *Id.*

codes all positions according to the probability of engaging in direct combat. Under the resulting Direct Combat Probability Codes (DCPC), positions designated P1 have the highest combat probability and are closed to women.²⁶ The Navy defines combat to include assignments in which "a mission of a unit, ship, aircraft or task organization . . . has as one of its primary objectives to seek out, reconnoiter, or engage an enemy."²⁷ The Marines are covered by Navy policy, and they also bar women from any position requiring an "armed combat trained Marine."²⁸ The Air Force, before the 1991 amendment, imposed a complex definition generally barring women from delivering munitions or flying over territory where hostile fire or risk of capture were probable.²⁹

The combat exclusion rules do not merely bar women from positions that fit within these definitions. In addition, women are excluded from noncombat positions that are assumed to carry a high risk of exposure to fire or capture by an enemy.³⁰ Even more insidious are policies that bar women from noncombat positions due to the need to rotate a certain number of people back and forth from combat to noncombat assignments and other administrative personnel needs.³¹ In 1988, the combat exclusion rules closed approximately half of the 2.2 million total military positions: 675,000 combat jobs and an additional 375,000 noncombat jobs denied to women to meet rotation and promotion needs.³² The Navy regularly rotates men on ships to shore for a year or

26. *Id.*

27. SECNAVINST 1300.12, DEPARTMENT OF DEFENSE, REPORT, TASK FORCE ON WOMEN IN THE MILITARY 12 (1988) [hereinafter DOD TASK FORCE].

28. DOD TASK FORCE, *supra* note 27, at 13.

29. AFR 35-60 precluded assignment of women to:

a. Aircraft whose principle mission involves aerial combat, defined as: (1) delivery of munitions or other destructive material against an enemy, or (2) aerial activity over hostile territory where enemy fire is expected and where risk of capture is substantial. b. Duties or units where there is a probability of exposure to hostile fire and substantial risk of capture. c. Instructor or staff positions where training or experience in combat aircraft is a prerequisite.

DOD TASK FORCE, *supra* note 27, at 14.

30. DOD TASK FORCE, *supra* note 27.

31. UNITED STATES GENERAL ACCOUNTING OFFICE (GAO), REPORT, WOMEN IN THE MILITARY, MORE MILITARY JOBS CAN BE OPENED UNDER CURRENT STATUTES 11, 12-19 (September 1988) [hereinafter Sept. 1988 GAO REPORT]. For example, the Air Force as of 1988 closed the following aircraft to women: A-7, A-10, AT-38, B-1, B-52, CV-22, C/HC/MC/AC-130, C-141 AIRDROP/SOLL, F/RF-4, F-5, F-15, F-16, F-106, F/FB/EF-11, CH/HH-3, HH-60, MH-53, OV-10, OA-37, SR-71. Air Force Regulation 35-60. In 1989 the Air Force lifted restrictions on certain transport and reconnaissance planes, including the C-130, which was flown by women in the Gulf. Gordon and Ludvigson, *The Combat Exclusion for Women Aviators: A Constitutional Analysis*, 1 USAFA J.LEG.STUD. 51, 66 (1990).

32. September 1988 GAO REPORT, *supra* note 31, at 11.

more. In all the services, standard duty rotation rules, combat losses under fire, administrative need for reassignment, or illness require that a certain number of men assigned to combat roles must be rotated out periodically. To keep this system viable, there must be enough combat-eligible men in noncombat assignments to take their place.³³

Women have also been barred from positions in which they are perceived to have inadequate opportunities for promotion, again due to the combat exclusion. The military needs to prevent promotion bottlenecks, i.e., there must be enough higher rank positions to accommodate the women in lower ranks. The Army, for example, restricts the maximum percentage of women in each job category within a career field to the percentage of women in that category with the lowest percentage of women.³⁴ The Army also bars some noncombat jobs in order to make available "career-enhancing experience for men in combat jobs."³⁵ Thus, under the DCPC System, women were barred from positions coded P1 and from positions in entire MOS or AOCs (Military Occupational Specialty or Area of Concentration) in which the predominance of P1 positions limited women's career advancement.³⁶

The services also set general accession goals by gender, which eliminate many of the positions not closed by the combat exclusion rules.³⁷ Thus the Air Force set aside 24 percent of its new pilot positions each year as unrestricted, or noncombatant. Of these, only forty, or 8.3 percent were open to women, with 440, or 91.7 percent available to men. Similar restrictions were placed on noncombat navigator positions.³⁸

To open more opportunities to women, and to eliminate inconsistencies among the services, a 1988 Department of Defense Task Force Report recommended that the Department implement

33. BINKIN & BACH, *supra* note 3, at 23; Gordon and Ludvigson, *supra* note 31, at 66; Kathy L. Snyder, Note, *An Equal Right to Fight: An Analysis of the Constitutionality of Laws and Policies That Exclude Women from Combat in the United States Military*, 93 W. VA. L. REV. 421, 444 (1991).

34. September 1988 GAO REPORT, *supra* note 31, at 13.

35. *Id.*

36. WREI, WOMEN IN THE MILITARY, *supra* note 25, at 9-10.

37. September 1988 GAO REPORT, *supra* note 31, at 20-41.

38. *Id.* at 21, 22. General policy considerations also limit accessions. One commentator maintains that in the early 1980s the services proposed to cut by 60,000 the enlistment quotas for women, in an effort to reinstate the draft. The plan was to cut enlisted strength by limiting the numbers of women admitted, and then to claim that there were not enough volunteers to staff the proposed Reagan military build-up. The plan was rejected at the highest levels in the Department of Defense, which issued directives requiring an increase in the utilization of women and an end to discrimination in recruitment and promotion. Witherspoon, *supra* note 22, at 21-22.

a "Risk Rule," to be used by all the services in designating combat positions. New combat definitions were to be implemented because women were underutilized.³⁹ The Risk Rule states that "[r]isks of exposure to direct combat, hostile fire, or capture are proper criteria for closing noncombat positions or units to women, providing that the type, degree, and duration of such risks are *equal to or greater than* that experienced by combat units in the same theater of operations."⁴⁰ In other words, women are generally barred from noncombat positions only if those positions involve a risk of battle or capture at least equivalent to the risk faced by combat troops.

The elastic definitions of combat have allowed the services to open, restrict and then open positions to women in response to policy needs. The shift to an all volunteer military in 1973 provided the biggest impetus for increasing the numbers of women in the military.⁴¹ To obtain enough qualified volunteers, women had to be recruited as well as men.⁴² Moreover, the Department of Defense (DOD) has not been immune to the women's movement of the past twenty-five years, and has as a matter of policy frequently proclaimed its commitment to equality of opportunity.⁴³ Even before the Risk Rule, the DOD tried to encourage the services to open more positions to women. In 1972 a DOD task force on women led to an increase in the number of women in all branches.⁴⁴

39. DOD TASK FORCE, *supra* note 27, at 10. And see, UNITED STATES GENERAL ACCOUNTING OFFICE (GAO), REPORT, WOMEN IN THE MILITARY, IMPACT OF PROPOSED LEGISLATION TO OPEN MORE COMBAT SUPPORT POSITIONS AND UNITS TO WOMEN 14-16 (July 1988) [hereinafter July 1988 GAO REPORT].

40. *Id.* And see, WREI, WOMEN IN THE MILITARY, *supra* note 25, at 10 (emphasis original).

41. 50 U.S.C. App. § 467(c) (1990).

42. Women volunteers have generally been better qualified than men since elimination of the draft. They have a higher educational level. DACOWITS, INFORMATION PAPER, *supra* note 16. Their standardized test scores are higher, a greater percentage have high school diplomas (99.8 percent versus 98 percent of the men) and more have attended college. WREI, WOMEN IN THE MILITARY, *supra* note 25, at 2. Note, however, that the Army has required that women have a high school diploma in most of the years since the All Volunteer Force was established, so that by definition their educational level is higher than men's.

43. Women will be provided full and equal opportunity, with men, to pursue appropriate careers in the military services for which they qualify. . . . Women can and should be used in all roles except those explicitly prohibited by combat exclusion statutes and related policy. . . . Women contribute significantly to the high degree of readiness which we currently enjoy. . . . No artificial barriers to career opportunity for women will be constructed or tolerated.

DEPARTMENT OF DEFENSE POLICY, July 1983, in DACOWITS, INFORMATION PAPER, *supra* note 16.

44. DEPARTMENT OF DEFENSE, CENTRAL ALL VOLUNTEER TASK FORCE, UTILIZATION OF MILITARY WOMEN (Dec. 1972), in BINKIN & BACH, *supra* note 3, at 14.

The DOD has altered promotion requirements for women to make up for disadvantages caused by the combat exclusion,⁴⁵ and promotion boards are told to compensate for the competitive disadvantages of women generally.⁴⁶

President Carter, the closest America has come to electing a feminist president, actually proposed that women be required to register for the draft and be subject to the draft should it ever be reinstated.⁴⁷ Carter's efforts were rejected by the Congress, and the early Reagan years saw a regression in efforts to increase the role of women in the military. The Army definition of direct combat, and the Direct Combat Probability Coding System, were part of an effort to close positions that were otherwise open to women.⁴⁸ Although the DOD has kept up efforts, including promulgation of the Risk Rule, to open opportunities to women, significant restrictions on opportunities for women in the military remain.

The Impact of the Combat Exclusion

Application of the Risk Rule opened 31,000 new jobs to women.⁴⁹ Many military women, in spite of the system's limitations for them, speak positively about the equality they enjoy in the military.⁵⁰ Because all those in rank receive identical pay, and promotion procedures are standardized, women do not face the overt discrimination they do in civilian jobs. If they are officers, they have command superiority over enlisted men that, in the military setting, is unquestioned. But the system involves tremendous inequalities as well.

The combat exclusion operates to bar women from 80 percent of all Marine and over 40 percent of all Army and Navy positions.⁵¹ The Army bars women from all infantry and armor

45. See, e.g., *Schlesinger v. Ballard*, 419 U.S. 498 (1975).

46. D'Amico, *Women at Arms: The Combat Controversy*, VIII MINERVA QUARTERLY REPORT ON WOMEN AND THE MILITARY 7 (Summer, 1990).

47. H.R. DOC. NO. 96-267, 96th Cong., 2d Sess. 2 (1980).

48. WREI, *WOMEN IN THE MILITARY*, *supra* note 25.

49. 31,000 new positions were opened to women after 1988. *Women in the Military, Hearing Before Subcomm. on Military Personnel and Compensation of the House Comm. on Armed Services*, 101st Cong., 2d. Sess. 17 (1990) [hereinafter 1990 Hearings] (statement of Christopher Jehn, Assistant Secretary of Defense).

50. 1990 Hearings, *supra* note 49, at 76 (statements of Senior Chief Babette E. White, United States Navy, and M. Sgt. Diane E. Cahill, United States Air Force). Interview with Lt. Nancy Lansing, United States Navy, Fairfield, Connecticut, July 2, 1991. Lt. Lansing's opinions are her own, and do not represent the position of the United States Navy).

51. DACOWITS, FACT SHEET, *Women in the Military* (1991).

units.⁵² Army combat and service support positions are open to women; these include artillery, military police and engineers, in addition to medical, transportation, supply and maintenance functions.⁵³ Yet even before the Gulf War it was clear that women were at substantial risk in some jobs officially designated as non-combat; for example women could serve on missile crews.⁵⁴ In the Gulf, the Risk Rule resulted in extensive exposure of women to enemy fire. Women truck drivers and mechanics drove to the front lines with the tanks and infantry. Others ferried troops to and from the front in helicopters. One Army woman who drove a fuel truck said she was in greater danger than the men at the front she was trying to reach. A convoy is a clear target for the enemy, and fuel is one of the first things an army would want to eliminate.⁵⁵

In interpreting figures on the numbers of women in the military, it is important to differentiate between skill designations and individual positions. While in recent years large numbers of skill designations have been opened to women, there are many more actual positions in the closed designations. The following chart shows the numbers of skills and positions open to women in each branch of the service as of September, 1990.

	Skills open	Positions Open
Army	90.0%	398,000 (54.7%)
Navy	82.6%	340,800 (56.4%)
Marines	80.0%	39,500 (20.0%)
Air Force	99.0%	511,547 (97.0%)
Total	87.0%	1,289,847 (62.9%) ⁵⁶

Moreover, only a fraction of the open positions are actually filled by women. There are now 378,550 women in all the armed services—11 percent of active duty personnel and 13 percent of the reserves.⁵⁷ The breakdown by service is:

52. The army excludes women from all infantry and armor units at brigade level and below. July 1988 GAO REPORT, *supra* note 39, at 10.

53. Jeff M. Tuten, *The Argument Against Female Combatants*, in FEMALE SOLDIERS, *supra* note 18, at 248.

54. September 1988 GAO REPORT, *supra* note 31, at 38.

55. Telephone interview with Sgt. Linda Delles, Third Armored Division, July 1, 1991. Sargeant Delles's opinions are her own, and do not represent the position of the United States Army.

56. DACOWITS, FACT SHEET, *supra* note 51, at 2.

57. WREI, THE WAR IN THE PERSIAN GULF, *supra* note 1, at 1.

Army:	active duty	83,200	11%
	reserves ⁵⁸	63,100	21%
	Army National Guard	31,500	7%
Navy	active duty	57,100	10%
	reserves	23,100	14%
Marine Corps	active duty	9,300	5%
	reserves	1,800	5%
Air Force	active duty	73,600	14%
	reserves	16,000	19%
	Air National Guard	15,500	13%
Coast Guard	active duty	2,600	7%
	reserves	1,750	15% ⁵⁹

With this background, it is useful to consider who is harmed by the combat exclusion, and the nature and extent of that harm. In many ways, men are harmed by women's protected status. Combat is dangerous, and men suffer when they must shoulder the entire combat burden. Freedom from combat is, in this view, a privilege that should not depend on gender.⁶⁰ Men have from time to time asserted a denial of their constitutional rights as a result of women's special military status. Men unsuccessfully challenged the male-only draft registration and induction policies of the Selective Service laws on equal protection grounds in *Rostker v. Goldberg*.⁶¹ A male Navy officer unsuccessfully challenged the more lenient promotion regulations for women in *Schlesinger v. Ballard*.⁶² Several men charged during the Vietnam War with failure to comply with the Selective Service laws raised due process and equal protection objections to women's draft exemption.⁶³

58. The large percentage of women Reservists may account for their high visibility during the Gulf deployment, due to the high media interest in Reserve call-ups. It may also be one reason for all the attention given the problem of single parents or dual military couples being deployed and leaving young children without adequate care. Since it is easier for a Reservist to fulfill family obligations than for a parent on active duty, more Reservists may have been unprepared for the call-up in terms of child care.

59. WREI, *THE WAR IN THE PERSIAN GULF*, *supra* 1, at 1-3.

60. Men have successfully challenged protective legislation as gender discrimination prohibited by the Fifth and Fourteenth Amendments. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (single sex admissions policy in state nursing school); *Caban v. Mohammed*, 441 U.S. 380 (1979) (statute requiring consent of mother, but not father, for adoption of out-of-wedlock children); *Orr v. Orr*, 440 U.S. 268 (1979) (statute requiring husbands, but not wives, to pay alimony); *Craig v. Boren*, 429 U.S. 190 (1976) (statute restricting sale of 3.2 beer to women under age eighteen and men under twenty-one); *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975) (social security survivors benefits available to women but not men).

61. *Rostker v. Goldberg*, 453 U.S. 57 (1981).

62. *Schlesinger v. Ballard*, 419 U.S. 498 (1975).

63. *United States v. Reiser*, 394 F. Supp. 1060 (D. Mont. 1975), *rev'd*, 532 F.2d 673 (9th Cir. 1976); *United States v. St. Clair*, 291 F. Supp. 122 (S.D.N.Y. 1968);

One man challenged the male only admissions policies of the service academies.⁶⁴ In *Frontiero v. Richardson*,⁶⁵ the Supreme Court struck down a statute that favored wives of servicemen more than husbands of servicewomen regarding eligibility for dependents' benefits such as increased quarters allowances and medical and dental benefits. However, these challenges did not involve a direct assault on the combat exclusion laws. Instead, *Rostker*, *Ballard* and the Vietnam era cases used the combat exclusion laws to justify gender based differentials, with little or no examination into the underlying rationale for the exclusion.⁶⁶

Women tend to view the combat exclusion from another perspective. Along with other "privileges" in the law, the combat rules ultimately work deep and pervasive harm. That harm is both the concrete disadvantages for individual military women and the systemic harm to the legal and social status of all women.

When women join the military, they have many of the same hopes, aspirations and expectations as men: money, status, a way out of an unsatisfactory civilian life, glamour, excitement and patriotism. But women are excluded from many aspects of military service that can fulfill these expectations.

The combat exclusion has served to justify numerous other restrictions on women, in particular a series of quotas on the number of women permitted in various otherwise "open" designations. The 1948 Act imposed a 2 percent ceiling on female enlistees (excluding nurses) and an officer ceiling of 10 percent ceiling of enlisted women. The Act also barred women from any officer grade above lieutenant colonel or Navy commander. It decreed that one woman in each service could be temporarily assigned to the rank of colonel, or Navy captain, for no more than four years.⁶⁷ The statutory ceilings were lifted in 1967,⁶⁸ but they persisted as a matter of internal policy well into the 1970s.⁶⁹

The services still limit precisely the total number of women enlistees and officers, as well as the number in each skill category

United States v. Cook, 311 F. Supp. 618 (W.D. Pa. 1970); United States v. Yingling, 368 F. Supp. 379 (W.D. Pa. 1973).

64. *Waldie v. Schlesinger*, 509 F.2d 508 (D.C. Cir. 1974), *reh'g denied*, (Jan. 29, 1975). The court reversed a summary judgment in favor of the Secretary of Defense. Soon thereafter the first women were admitted to the academies, and the case was dismissed.

65. *Frontiero v. Richardson*, 411 U.S. 677 (1973).

66. For a more extensive discussion of the legal issues involved in these opinions, see Part IV, *infra*.

67. 10 U.S.C. § 3209 (1964); repealed by Defense Officer Personnel Management Act (DOPMA), P.L. 96-513, 10 U.S.C. § 501 (1990).

68. *Id.*

69. 32 C.F.R. 580.4(b) (1974).

and rank.⁷⁰ ROTC scholarships for women are limited.⁷¹ The Air Force is the only branch of the military to depart from this system. In 1989 the Air Force began a policy of gender neutral accessions, ending enlistment quotas for women.⁷² But the Air Force has always been more inclusive of women than have the other branches. Its current position is that there is no military reason to exclude women from any Air Force position, including combat.⁷³ Presumably this is because flying aircraft and aerial precision bombing do not require any particular physical strength.⁷⁴ In addition to the limitations imposed by quotas, the military has disparate enlistment requirements for men and women. For example, until recently the Army required a high school diploma or a General Educational Development certificate plus fifteen hours of college credit for women, but accepted men with only a General Educational Development certificate.⁷⁵

There are also quotas on the availability of certain benefits associated with the military. Women were excluded from the service academies until 1976.⁷⁶ The rotation requirements discussed earlier, together with the combat exclusion, limits opportunities for training. Under the combat exclusion rules prior to 1991, the Air Force greatly restricted the numbers of women in pilot and navigator training.⁷⁷ In the Navy, the exclusion of women from carriers means women doctors, lawyers, engineers and many others in jobs regularly required on carriers are hampered in their career advancement, even though their jobs are not combat-related.⁷⁸ Ironically, the new legislation opening combat aircraft positions to Navy women means that women aviators will now be

70. September 1988 GAO REPORT, *supra* note 31, at 20.

71. *Kovach v. Middendorf*, 424 F. Supp. 72 (D. Del. 1976). In 1975, the year this litigation took place, there were sixteen four-year NROTC scholarships authorized for women and 1,988 for men. The scholarships pay all tuition, fees and textbook costs and a \$100 a month stipend. *Id.* at 74. See 10 U.S.C. §§ 2107 and 2107a (1991). The court held that the combat exclusion was sufficient justification for the disparity and found no equal protection violation.

72. 1990 Hearings, *supra* note 49, at 41 (statement of Lt. Gen. Thomas A. Hickey, Deputy Chief of Staff, Department of the Air Force).

73. Barton Gellman, "Officials Avoid Stance on Combat Role," WASH. POST, June 19, 1991, at 16.

74. Tuten, *supra* note 53, at 247.

75. See *Lewis v. United States Army*, 697 F. Supp. 1385 (E.D. Pa. 1988). The 1948 Act required that women could not enlist until age eighteen, and those under twenty-one had to have written consent from a parent or guardian. Men could enlist at seventeen and required permission if under eighteen. 62 Stat. 357, 360-61; 363; 368. Ages are now the same for men and women. 10 U.S.C. § 505 (1990).

76. Department of Defense Appropriations Act of 1976, P.L. 94-106 (1975).

77. Gordon & Ludvigson, *supra* note 31, at 66. See also text accompanying note 46, *supra*.

78. Telephone interview with Lt. Commander Marie E. Peck-Llewellyn, July

assigned to carriers from which women in much less strenuous jobs are still excluded.⁷⁹

The personal impact of such policies is evident in *Hill v. Berkman*.⁸⁰ Joan Hill sued the Army when she was excluded from the position of nuclear biological and chemical (NBC) specialist in the Army Reserve. Hill was qualified and was promised training for NBC specialist. She left her job and gave up her apartment in anticipation of basic training. When she reported for duty as ordered, she was told that the NBC position had been classified as a combat position, and she was discharged. Later the position was reopened to women. The court granted the Army's motion for summary judgment and held that the Army did not violate the plaintiff's rights by closing the NBC specialist position to women and discharging her.⁸¹

The combat exclusion restricts access to the many benefits accorded members of the military. Women do not receive hazardous duty pay if they are not in combat roles.⁸² Certain awards or medals are granted only to combat personnel. Moreover, reduced opportunities for enlistment mean fewer women from the general United States population can take advantage of lucrative military benefits. These benefits include retirement at up to 50 percent of base pay after twenty years;⁸³ unlimited health care on active duty and dependents' health care at extremely low rates;⁸⁴ post-retirement care through the Veterans Administration;⁸⁵ use of the commissary and post exchanges;⁸⁶ low cost insurance; bonuses and loans; and veterans' preferences in federal and state employment.⁸⁷

Education is probably the primary benefit associated with military service. The military has sometimes been termed a col-

29, 1991. Lieutenant Commander Peck Llewellyn's opinions are her own, and do not represent the position of the United States Navy.

79. See *supra* note 24.

80. *Hill v. Berkman*, 635 F. Supp. 1228 (E.D.N.Y. 1985). The court held that the exclusion of women from the NBC position was justified as a bona fide occupational qualification and so did not violate Title VII of the Civil Rights Act of 1964. Ten months after Hill's discharge, the position was reclassified as non-combat.

81. *Id.* at 1242. The court held that Title VII applied to military decisions but the combat exclusion rule made sex a bona fide occupational qualification and therefore there was no unlawful discrimination in the classification of the NBC specialist position.

82. Laurie J. Sanderson-Walcott, *The Army's Combat Exclusion: An Update*, 16 WEST.ST.U.L.REV. 665, 669 (1989).

83. See 10 U.S.C. § 1401 (Law. Co-op. 1991).

84. See 10 U.S.C. §§ 1071-1089 (Law. Co-op. 1991).

85. 10 U.S.C. § 1074(6) (Law. Co-op. 1991).

86. 10 U.S.C. §§ 1063-1065 (Law. Co-op. 1991).

87. BINKIN & BACH, *supra* note 3, at 34.

lege for the poor. Vocational training in fields from aviation to mechanical engineering to cryptology is available to enlisted persons and officers.⁸⁸ There are opportunities for college training while in the military as well as before and after enlistment. College courses are given at no cost at most bases and on board Navy ships, and the military will pay 75 percent of tuition at off-base institutions.⁸⁹

Under the Veterans Educational Assistance Program, all active duty personnel entering the service on or after January 1, 1977, and before July 1, 1985, may contribute from \$25 to \$100 per month of their pay, up to a total of \$2,700, to a college fund administered by the Veterans Administration. The government matches contributions two for one, and on discharge the veteran may use the funds for educational purposes.⁹⁰ Students who enlist in the Army Reserves in college receive a stipend of \$100 per month for one weekend's active duty, and \$140 per month in benefits.⁹¹ They must attend summer training camp where they receive base pay of approximately \$700 a month, increasing each year and with each promotion. The Army repays up to \$20,000 of outstanding student loans.⁹² ROTC students receive similar benefits, with opportunities for ROTC scholarships that pay an even higher stipend.⁹³ Other programs are available for medical⁹⁴ and legal education.⁹⁵

For men, and recently for women, military service has long been an "avenue for social and career mobility."⁹⁶ The limits on women in the military are particularly important to women of color, who currently make up 38 percent of all military women, and 41 percent of enlisted women, compared to 28 percent of enlisted men.⁹⁷ They are excluded in disproportionate numbers from this route away from the prejudices of civilian life.

Limitations on assignment also limit promotions. Currently, roughly 12 percent of all officers are women, close to the propor-

88. *Id.* at 37.

89. 10 U.S.C. §§ 1061, *et. seq.*

90. Post Vietnam Veterans' Educational Assistance Act, Pub. L. 94-502, 38 U.S.C. § 1622 (1990). For those who enlisted before January 1, 1977, the GI Bill of Rights gave monthly stipends for up to 48 months of education, plus low interest education loans.

91. 10 U.S.C. § 2131(b) (Law. Co-op 1991).

92. 10 U.S.C. § 2171 (Law. Co-op 1991).

93. 10 U.S.C. § 2107(c).

94. 10 U.S.C. §§ 2120-2127 (1991).

95. 10 U.S.C. § 2004(a) (Law. Co-op 1991).

96. 10 U.S.C. § 2127 (1990). Interview with Lt. Nancy Lansing, *supra* note 50.

97. MARTIN BINKIN & MARK J. EITLENBERG, *BLACKS IN THE MILITARY* 63 (1982).

tion of enlisted women to men (12 percent).⁹⁸ While technically promotions are made without regard to gender, women can be promoted only into positions in accordance with the Risk Rule. Lack of combat experience remains a bar to promotion, even though promotion criteria have been modified for women to lessen the effect of the combat exclusion.⁹⁹ In the Navy, for example, extended periods of sea duty are still essential to a successful career, and "the more combat related (e.g., aircraft carriers, destroyers, and cruisers) the sea duty the more advantageous the person's career ladder."¹⁰⁰ According to Representative Pat Schroeder, "by pretending they were protecting women from harm, all they were really protecting them from was promotions."¹⁰¹

The intangible harms wrought by the combat exclusion are harder to document but potentially far more significant. Combat is the main task, the *raison d'être*, of the military. To be excluded from that central mission is to be relegated to a peripheral role. According to a woman Air Force Captain, "[I]t is very true that combat experience is something that is valued by our services. *In fact, it is the core value of our profession.*"¹⁰² Even with equal pay and rank, there is a stigma attached to those who cannot participate in the military's real work.

In other intangible ways, military women are disadvantaged. Women, like men, seek the personal fulfillment, achievement and excitement that come with physically and psychologically demanding work. Boot camp, while unappealing to most civilians, creates

98. WREI, WOMEN IN THE MILITARY, *supra* note 25, at 7-8.

99. *Id.* at 1. DACOWITS, FACT SHEET, *supra* note 51, at 1.

100. 1990 Hearings, *supra* note 49, at 88-89. (statement of Capt. Kathleen M. Conley, United States Air Force) ("To be excluded from [combat experience] can not help but slow people in their advancement to the senior ranks to colonel and on to general. So while combat leadership is probably not necessary even to be a Wing Commander in the military airlift command, it is necessary in the long run."); *Id.* at 8 (statement of Rep. Schroeder); *Id.* at 90 (statement of Capt. Priscilla W. Locke, United States Army) ("I have been assigned to very demanding jobs and since Air Defense Artillery is a combat arms job branch, I have lots of opportunities open to me. However, I do feel that because a portion of the Air Defense Artillery branch is limited to me, I will not get the wide range of job assignments and experience I think that I will probably need at the higher ranks.") See also, *Officials Avoid Stance on Combat Role*, WASH. POST, June 18, 1991, at 16; and DOD TASK FORCE, *supra* note 31.

101. Witherspoon, *supra* note 22, at 16. And see September 1988 GAO REPORT, *supra* note 31, at 40: "... a major impact [of the combat exclusion] has been to inhibit the career progression of women in the military by excluding them from some jobs they are capable of filling." The rules also limit recruitment, efficient assignment of personnel, morale and retention.

102. Anna Quindlen, *Women Warriors*, N.Y. TIMES, Feb. 3, 1991, at 25. Quindlen concludes: "To become a Stormin' Norman, you have to have flown the bombing raids, led the troops through the jungles."

an enormous sense of accomplishment for those who complete its rigors. Many women seek to express their patriotism through military service. Yet many of the most glamorous and challenging military jobs are closed to women. There are women in the Army who attend parachute training just because they want the satisfaction and thrill of jumping out of planes, even though they can never be assigned to a parachute unit, because these are classified as combat.¹⁰³ Navy women want to spend time on ships, and ships, in the Navy, means aircraft carriers, destroyers, cruisers and submarines, not the few supply and hospital vessels currently outfitted for women. As Senior Chief Babette E. White testified before the House Armed Services Committee, "I like going to sea and I like the carriers. . . . If they would open it up, I would love to ride them but I would not limit it to [carrier positions] because I enjoy going to sea. That is what sailors do, is go to sea."¹⁰⁴

II. The Combat Exclusion Rationale

Two of the most frequent reasons given for excluding women from combat can be disposed of with little discussion. Women, it is often said, do not want to be in combat. Perhaps most women do not want to go to war, but some do, and in any case the statement is irrelevant. Most men do not want to be in combat either. As one woman sergeant remarked:

I think it kind of odd that we are asking for females to see if they would like to go into a combat situation. I would like to see a survey of a percentage of men that would like to go. I do not think it would be any different."¹⁰⁵

The military rationales for the combat exclusion generally fall into four categories: physical differences; socio-political issues; efficiency; and psychological differences. All these reasons are based on stereotypical notions of women and men in war, and on generalizations about the sexes that break down in individual cases.

The physical difference issues involve the most obvious objections to women in combat: women lack the strength to do it. Men are, on average, bigger and stronger. They are thought to have greater endurance.¹⁰⁶ Men can throw farther, carry a heavier pack

103. 1990 Hearings, *supra* note 49, at 88-89 (statement of Capt. Kathleen M. Conley, United States Air Force).

104. 1990 Hearings, *supra* note 49, at 79 (statement of Senior Chief Babette E. White). Chief White had recently completed a tour of duty on the U.S.S. Lexington, an aircraft training carrier, and the only carrier then open to women.

105. *Id.* at 78 (statement of M. Sgt. Diane E. Cahill, United States Air Force).

106. See, e.g., Tuten, *supra* note 53, at 247-49; MITCHELL, *supra* note 3, at 157;

longer, and generally are believed to make better fighters. Women are also thought to lack the physical endurance to resist and survive capture by the enemy.¹⁰⁷ Finally, women are thought to be unfit for traditional combat because of menstruation and pregnancy.

The socio-political issues relate to cultural and social norms that demand protection of women from the horrors and rigors of war. These reasons are more frequently cited in Congress than by military people, at least officially. They reflect extremely traditional views of women's roles, and these reasons are separate from any concern about the physical abilities of women soldiers. Witnesses at Congressional hearings in 1948 and 1980 perceived the public as demanding that women be protected from war:

The principle that women should not intentionally and routinely engage in combat is fundamental, and enjoys wide support among our people.¹⁰⁸

I think . . . we should write a provision [in the combat exclusion bill] that no . . . [women] can serve aboard ship, except on a hospital ship. Of course, you can serve at shore establishments, but they have no place at all on ships."¹⁰⁹

An Air Force general, testifying recently before Congress, said that although there was no "sense" behind his position, his "old fashioned" preference and "personal prejudices" would lead him to send a man into combat and not a woman, even though the woman was more qualified to do the job.¹¹⁰

The public opinion argument is not merely a capitulation to political expediency by elected officials. It is linked to military effectiveness in two ways. One is a fear that if women are subject to combat, those at home will refuse to support a war. The second is the suggestion that other nations will believe the United States to be militarily weak if we rely on women to fight. A Senate commit-

Mady Weschler Segal, *Women's Roles in the U.S. Armed Forces*, in CONSCRIPTS AND VOLUNTEERS, MILITARY REQUIREMENTS, SOCIAL JUSTICE, AND THE ALL-VOLUNTEER FORCE 205 (R. Fullinwider, ed. 1983) [hereinafter CONSCRIPTS AND VOLUNTEERS]; Snyder, Note, *supra* note 33, at 431-32.

107. See e.g., Dillingham, *The Possibility of American Military Women Becoming Prisoners of War: Justification for Combat Exclusion?* 37 FED.BAR NEWS & J. 223 (May, 1990). Dillingham argues that the risk of capture is not a valid rationale for the combat exclusion.

108. *Hearings on S. Rep. 96-829 Before Senate Comm. on Armed Services*, 96th Cong., 2d Sess. 77 (1980) [hereinafter 1980 Hearings].

109. *Hearings on S. 1642, To Establish the Women's Army Corps in the Regular Army, Before the Subcomm. on Organization and Mobilization of the House Committee on Armed Services*, 80th Cong., 2d Sess. 5688 (1948).

110. Barton Gellman, *Officials Avoid Stance on Combat Role*, WASH. POST, June 19, 1991, at 16.

tee considering the Carter proposal to register women for the draft stated:

The [Senate] Committee feels that any attempt to assign women to combat positions could affect the national resolve at the time of mobilization, a time of great strain on all aspects of the nation's resources.¹¹¹

A decision which would result in a young mother being drafted and a young father remaining home with the family in a time of national emergency cannot be taken lightly, nor its broader implications ignored. The committee is strongly of the view that such a result, which would occur if women were registered and inducted under the administration plan, is unwise and unacceptable to a large majority of our people.¹¹²

The public also allegedly worries that women being deployed in wartime would strain family life. During the Gulf War the media spotlighted mothers and two-parent couples called away from their homes to serve. In response, the Senate debated, but rejected, a bill that would have required reassignment of single parents or one member of a two-parent military couple out of imminent danger areas.¹¹³ This issue merely reflects the reality of military life. There are male and female single parents in the armed forces. There are also many dual-career military couples. Military people date and marry one another.¹¹⁴ They share similar life styles and value systems, and like other Americans, are likely to meet their mates at the workplace.¹¹⁵ Thus, unless we bar parents and married women from military service entirely, an increase in military couples assigned to dangerous positions away from home is inevitable.¹¹⁶

A second variation on the socio-political argument is that enemy nations will perceive America as weak if we assign women to combat.¹¹⁷ Government officials fear that, particularly in cultures where women are excluded from all positions of power, American military effectiveness will be discounted to the extent we are per-

111. 1980 Hearings, *supra* note 108, at 78. This is a thinly veiled fear of any repetition of the Vietnam experience, with its public outcry against a politically unpopular war. The antiwar movement is often accused of hindering the military effort in Vietnam and contributing to our ultimate defeat.

112. *Id.* at 82.

113. 137 CONG. REC. S1954-03, (daily ed. Feb. 20, 1991).

114. In the Navy, 46 percent of all married women and 3.3 percent of married men are married to another service member. DACOWITS, FACT SHEET, MILITARY COUPLES ASSIGNMENTS (1991).

115. Interview with Lt. Nancy Lansing, *supra* note 50.

116. The services have policies designed to accommodate military couples, mainly by assigning them to the same posts when convenient, though both must be available for deployment anywhere when needed. DACOWITS, FACT SHEET, MILITARY COUPLES ASSIGNMENTS (1991).

117. Segal, *supra* note 106, at 208.

ceived to rely on women to fight for us. It is feared, for example, that because the Soviet Union had to rely on women recruits during World War II, Soviet officials are likely to view the increased reliance on women by the United States as indicative of a shortage of qualified men.¹¹⁸

Some women have suggested another view of the socio-political problems keeping women from combat. The combat exclusion, they argue, is used to perpetuate the image of women as weak and men as the strong protectors of the race. Moreover, to see women as weak is to see them as victims, susceptible to rape, assault and other aggression. If women are accepted as soldiers, they will appear too strong to be attractive targets for rape.¹¹⁹ "A man who believes that a woman could be a combat soldier might be less likely to attack her."¹²⁰

The efficiency arguments assert that the costs involved in accommodating women in what have always been predominantly male facilities are too high. Ships and barracks must be renovated, to a greater or lesser extent, to provide separate bathrooms and other opportunities for privacy. Uniforms must be designed for women's bodies.¹²¹

The psychological arguments for the combat exclusion are the most complex. Success in combat is said to depend as much on psychological as physical factors. Innate psychological differences between women and men, due to differences in testosterone levels as well as social conditioning, supposedly make men more aggressive and combative. Women lack the "fighting spirit" necessary to combat effectiveness.¹²² Women, it is feared, may not, and possibly should not, be able to kill as readily as men. Furthermore, certain activities, such as combat or extremely demanding physical training, allow men to prove their masculinity and develop aggressiveness and other traits calculated to achieve success in war.

Combat training, as well as actual combat experience, results in male bonding, a process through which men are forged into a

118. See BINKIN & BACH, *supra* note 3, at 96-97. The authors also point out that countries with a greater societal emphasis on social equality, such as China, or which had experienced war with an army including many woman, such as Israel and its Arab enemies, might not view American integration of women into the military negatively. *Id.*

119. Linda Grant De Pauw, *Gender as Stigma: Probing Some Sensitive Issues*, VI MINERVA QUARTERLY REPORT ON WOMEN AND THE MILITARY 29, 32 (Spring, 1988).

120. Sanderson-Walcott, *supra* note 82, at 670, (quoting Lori S. Kornblum, *Women Warriors in a Men's World*, 2 LAW & INEQUALITY 351, 381 (1984)).

121. BINKIN & BACH, *supra* note 3, at 53-55.

122. Tuten, *supra* note 53, at 254-55.

psychologically cohesive fighting force. The behavior that leads to male bonding is also believed important to success in warfare: toughness, strength, endurance, aggressiveness and the will to fight.¹²³ Male bonding is said to be essential to the combat effectiveness, the "esprit de corps," of a military unit.¹²⁴ Creating such cohesive groups is behind the extraordinarily tough physical and psychological training prevalent in settings from boot camps to the elite service academies. Here [mostly] men are subjected to intense psychological conditioning designed to break down their individual identity, and then, through extraordinary physical and mental pressure, are re-formed into a cohesive unit where individuality is subordinated to the group mission. Survival is, after all, dependent on group effort, and the primacy of the group is essential to effective training. At its most vicious,¹²⁵ male bonding in the military is explicitly pornographic and misogynist, depending on sexually crude language and sexually aggressive behavior.¹²⁶

With women present, this psychological bonding is allegedly impossible. It is believed that women cannot bond the way men do. At worst, women might actively destroy the group by their sexuality. With women present, men will either be too protective, and take fewer risks out of concern for women's safety, or they will be too intent on pursuing sexual relations to attend to the job of combat.

Such arguments are particularly invidious because they are based on the premise that women, simply by their existence, may destroy the effectiveness of any mixed gender group. If the premise is accepted, the conclusion—exclude women—becomes inevitable.

The male bonding theory recently received explicit judicial endorsement. A federal district court held that the state of Virginia did not deny women equal protection of the law by maintaining the all-male Virginia Military Institute (VMI), a school devoted to military training at the college level.¹²⁷ In upholding and extolling the values of single sex education, the judge ruled that exclud-

123. David H. Marlowe, *The Manning of the Force and the Structure of Battle: Part 2—Men and Women*, in CONSCRIPTS AND VOLUNTEERS, *supra* note 106, at 189, 191-93; Tuten, *supra* note 53, at 251-52; BINKIN & BACH, *supra* note 3, at 91-92.

124. Tuten, *supra* note 53, at 251.

125. The use of this word itself demonstrates the nefarious nature of the argument. Fighting troops are supposed to be "vicious." Therefore group behavior that creates "viciousness" is to be encouraged in the military, including male behavior that denigrates women. Needless to say, for the most part, such behavior is best fostered in an all-male environment.

126. Marlowe, *supra* note 123, at 192.

127. *United States v. Virginia*, 766 F. Supp. 1407 (W.D. Va. June 14, 1991).

ing women from VMI was essential to the education provided by the Institute. Cadets must overcome "almost impossible physical and psychological odds . . . [which contributes] to their obtaining personal goals of leadership, responsibility, self-confidence, ability to get along with others, becoming a more complete person, independence, self-reliance, adaptability, and developing a strong sense of honor and integrity."¹²⁸ The Court said the VMI environment is designed to create "a sense of accomplishment and a bonding to their fellow sufferers and former tormentors,"¹²⁹ so that ". . . key elements of the adversative VMI educational system, with its focus on barracks life, would be fundamentally altered, and the distinctive ends of the system would be thwarted, if VMI were forced to admit females and to make changes necessary to accommodate their needs and interests."¹³⁰ In other words, women, simply by their presence, would make military training at the highest levels impossible.¹³¹

III. Responses to the Combat Exclusion Rationale

The physical difference arguments can be refuted in two ways. First, and primarily, no one currently advocates putting women in positions for which they are physically unfit. Without the absolute bar embodied in the combat exclusion rules, the military could impose any reasonable criteria for any of its positions. Some women, however, are as capable as some men of lifting, running, and enduring great physical stress. Military sources admit that, when tested, women have performed well under physical stress resembling combat.¹³² Those physically able women, albeit a minority, should not be barred from the opportunity to serve based on generalizations about women as a group.¹³³ Not all men are physi-

128. *Id.* at 1442, 1426.

129. *Id.* at 1442.

130. *Id.* at 1411.

131. The court upheld the exclusion of women from Virginia Military Institute (VMI) based solely on the alleged value of its system of training, even though only 15 percent of VMI graduates actually enter military careers. *Id.* at 1432.

132. Two Army experiments in the late 1970s showed women's performance did not detract from the performance of a combat unit. U.S. ARMY RESEARCH INSTITUTE FOR THE BEHAVIORAL AND SOCIAL SCIENCES, SPECIAL REPORT S-7, C.D. Johnson, et al., *Women Content in the Army—REFORGER 77 (REFWAC 77)* (1978); and U.S. ARMY RESEARCH INSTITUTE, WOMEN CONTENT IN UNITS FORCE DEVELOPMENT TEST (MAXWAC) (1977). Women have performed well in high stress training for potential prisoners of war. Dillingham, *supra* note 107, at 227. Air Force Lt. Gen. Thomas J. Hickey, deputy chief of staff for personnel, testified before the Senate Armed Services Committee that "There is not a mission . . . in the U.S. Air Force that women are not physically and mentally capable of performing." Molly Moore, *Women on the Battlefield*, WASH. POST, June 16, 1991, at 1, 16.

133. Segal, *supra* note 106, at 211; Snyder, Note, *supra* note 33, at 432-33.

cally capable of performing high stress combat roles.¹³⁴ Reliance on gender as a shorthand for physical capacity based on statistical correlations has long been impermissible in civilian affairs.¹³⁵ It simply perpetuates stereotypes and, by eliminating some highly qualified individuals, prevents the development of an optimum military force. Moreover, it can be inferred that certain physical requirements are unnecessarily demanding for both sexes. Physical requirements have already been modified for women, though without a perceived impact on military effectiveness.¹³⁶

The second response to the physical ability argument is that, as warfare depends more on technology, physical strength is less relevant to success at combat. Flying combat aircraft, launching missiles, and manning aircraft carriers depend much less on physical strength than on high-level technical skill, leadership and decision-making ability.¹³⁷ The Department of Defense itself seriously questions the combat exclusion rules in view of the technological nature of modern warfare:

The [DOD] Task Force is concerned whether changing war-fighting doctrine, emerging technologies, and global strategies justify the use of risk of harm or capture alone as a primary criterion for identifying assignments precluded because of the combat exclusion[.]. . . Women are currently utilized in units or theaters of operation in which they will be exposed to substantial risk of hostile fire or capture, depending on specific wartime scenarios.¹³⁸

Elimination of the combat exclusion rules will largely ratify an already-existing situation, because women are already performing in many high risk, high stress positions.¹³⁹

A study of the ramifications of women becoming prisoners of war found that neither physical nor mental factors justify a combat exclusion on this basis. The study concluded, "In any event, it is doubtful that the *performance* of American military women as prisoners of war will adversely affect national security—either through interrogation or exploitation—at least not any more so than the performance of their male counterparts."¹⁴⁰ The study also discounts other problems posed by women prisoners, such as the effect on male prisoners or the risk of menstruation, preg-

134. See text accompanying note 240, *infra*.

135. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

136. MITCHELL, *supra* note 3, at 69-71.

137. Snyder, Note, *supra* note 33, at 432.

138. DOD TASK FORCE, *supra* note 30, at 10.

139. Witherspoon, *supra* note 22, at 24-25.

140. Dillingham, *supra* note 107, at 227.

nancy and childbirth, and concludes that risk of capture is not a valid reason for the combat exclusion.

The effects of menstruation and pregnancy are also mitigated by the changing nature of combat. Fewer military roles involve field conditions harsh enough to be totally incompatible with menstruation.¹⁴¹ Moreover, the physical stress associated with even a high-tech war make amenorrhea likely, obviating risk of both menstruation and pregnancy. Up to 80 percent of all female Air Force Academy cadets experience amenorrhea during the school term.¹⁴² Some women may, of course, become pregnant, but the Defense Department already has provisions for maternity leave and redeployment from imminent danger areas.¹⁴³ Pregnancies in the Gulf, many of them existing undiscovered prior to deployment,¹⁴⁴ apparently did not cause any noticeable reduction in combat support capabilities. Men in the Gulf lost more time due to sports injuries suffered off duty than women lost as a result of pregnancy.¹⁴⁵

The issue of abortion has been significantly absent from the debate on women in combat. Department of Defense policy exacerbates the problem of pregnancy by adhering to rules prohibiting abortion at military expense or in military medical facilities. Medical benefits provided military women do not include abortion services, except to save the mother's life. This policy creates severe hardship for women stationed in countries where abortion is

141. Women who become so incapacitated by menstruation that they cannot perform their military function would presumably be deemed physically unfit for their task and reassigned accordingly. But this information should be available long before actual deployment into combat.

142. Dillingham, *supra* note 107, at 226, speculating on the occurrences of amenorrhea in prisoner of war camps during World War II and citing an 80 percent rate of amenorrhea among female cadets at the Air Force Academy.

143. There is no formal parental leave in the military. Maternity leave during periods of physical disability is available, with a presumption of six weeks leave after birth. DACOWITS, FACT SHEET, PREGNANCY POLICIES (1991). Pregnant women are ineligible for enlistment or for ROTC or OCS programs. Enlisted women who become pregnant during basic training are discharged. In the Army, but not necessarily in the other services, pregnant women on active duty are given a choice of whether or not to be discharged, unless they hold hard-to-fill positions or are committed to serve because of educational benefits they have received. *Id.* Single parents with custody of a child are not admitted to the Navy. Interview with Lieutenant Commander Peck-Llewellyn, *supra* note 78.

144. *36 Women Pregnant Aboard a Navy Ship That Served in Gulf*, N.Y. TIMES, April 30, 1991, at A17. Fourteen pregnancies existed undiscovered until either after the ship was deployed to the Gulf or after the women were transferred to the ship from other assignments. The ship, a supply vessel, carried 1,250 crew members, 360 of them women.

145. Colonel David Hackworth, *War and the Second Sex*, NEWSWEEK, Aug. 5, 1991, at 24, 29.

not readily available. Both houses of Congress have recently voted to require the Defense Department to provide abortions at overseas military health facilities, at the patient's expense, but the President has threatened to veto the bill.¹⁴⁶ Surely a different abortion policy would ease some, though not all, of the concerns about pregnancy. The impact for women on aircraft carriers, or submarines, would be particularly significant.¹⁴⁷

Many of the socio-political issues have been put to rest by the Gulf War experience. Male chauvinism and romantic paternalism in the military and among the public results in a desire to protect women from war. However, such ideas cannot be the basis for national policy, given the real dangers military women faced in the Gulf and the public's receptivity to the idea of women in high-risk military roles. The Gulf War demonstrated that rather than being protected, military women are exposed to extreme hazards in wartime, even in "noncombat" positions. The entire war zone was exceptionally dangerous. All military women were exposed to SCUD attacks, hostile fire and the risk of capture. The concept of a front where fighting takes place is misleading given the high technology aspects of modern war.¹⁴⁸ "There wasn't anything that happened over there to the guys that didn't happen to me," said a woman Army sergeant.¹⁴⁹ Women complained that they were in danger because combat restrictions meant they could not adequately defend themselves if attacked.¹⁵⁰

Americans grieved equally for men and women casualties. The overwhelming public enthusiasm for the war, coupled with the high profile of women participants, belied the idea that the public would not support a war in which women were at risk and parents left young children in order to fight.¹⁵¹ Even before the

146. Tom Kenworthy, *House Backs Abortions in Military*, WASH. POST, May 23, 1991, at 1; Eric Schmitt, *Senate Approves Military Bill Allowing Abortions Overseas*, N.Y. TIMES, September 27, 1991, at A15. As of this writing, the bill has not been enacted into law.

147. The military has its own, largely unpublicized, ways of dealing with pregnancy. NEWSWEEK magazine reports that Capt. Troy Devine had to promise not to become pregnant for at least a year and to submit to pregnancy tests every two weeks in order to be trained to fly a TR-1 spy plane. *The Right to Fight*, NEWSWEEK, Aug. 5, 1991, 22.

148. The idea of "total war," with the entire nation a war zone, grew in the Cold War, and became the genesis of the notion that no one could be protected from combat during actual hostilities. See BINKIN & BACH, *supra* note 3, at 26.

149. Interview with Sgt. Linda Delles, *supra* note 55.

150. Jon Nordheimer, *Women's Role in Combat: The War Resumes*, N.Y. TIMES, May 26, 1991, at 1.

151. "One of the lessons we've learned from Operation Desert Storm is the extent to which the nation accepted the significant role of women in that operation. . . . Until then, there had always been a concern that having women involved

Gulf War, public opinion supported extensive combat roles for women. In January, 1990, after the Panama invasion, a public opinion poll showed 72 percent of those surveyed thought women should be allowed to serve in combat units if they wanted to, and a month later a telephone survey found the percentage to be 79 percent.¹⁵²

Family disruption is a problem for the military, but not solely a women's problem. Eighty percent of the 16,300 single parents in the Gulf were men.¹⁵³ In families where one parent is called away from home, the hardships are hardly sex linked. While men left with the care of young children may be an unusual sight to many Americans, there is no reason why they cannot cope as well as most working mothers do. Moreover, the military already has policies in place to deal with child care. A sole-provider regulation requires that if there are two parents in a combat area and one is killed, the other will be immediately transferred to a safe area.¹⁵⁴ In addition, all members of the military must sign custodial agreements giving contingencies for dependent care if they are deployed. Apparently parents without such agreements, which designate an alternate caretaker, are discharged.¹⁵⁵

It appears that America will adjust to the two-career family in military affairs, as it has in civilian life. In fact, a major hardship for families at home during the Gulf War was financial. In the weak economy during the Gulf War, most families experienced financial problems when a man in charge of a family business or farm had to leave for seven months. Since men still earn more than women, it might be easier financially when a mother, rather than a father is called up during a crisis.

Efficiency arguments are not significant in light of the DOD's current commitment to increasing opportunities for women. While it might be cheaper to maintain an all-male military, women are too essential to the structure of all the services to make such a

in combat would be traumatic for the country." Pete Williams, spokesperson for Secretary of Defense Dick Cheney, quoted in Moore, *supra* note 131.

152. As of July, 1991, 52 percent of Americans polled agreed that women should be assigned to combat units. Barbara Kantowitz, Eleanor Clift, John Barry, *The Right to Fight*, NEWSWEEK, *supra* note 147, at 23. See also, WREI, WOMEN IN THE MILITARY, *supra* note 25, at 3. Even in 1982, in a National Opinion Research Center survey, 62 percent of those surveyed thought women should serve as fighter pilots, 59 percent thought they should be missile gunners, and 57 percent thought they should serve as crew members on combat ships. *Id.*

153. 137 CONG. REC. S1955 (daily ed. Feb. 20, 1991) (statement of Sen. Heinz). Apparently not all of these are responsible for the care of a child, since the figure includes divorced parents with children and an ex-spouse. *Id.*

154. *Id.* (statement of Sen. Glenn).

155. *Id.* at S1956 (statement of Sen. Glenn).

decision viable. Most adjustments, such as uniform design and barracks reconditioning, have already been made, and experience shows the relative ease with which any remaining adjustments could be accomplished. Early research showed that any cost differentials regarding adjustments for women would be offset or at least be narrowed through economies of scale as more women volunteer.¹⁵⁶ Moreover, women soldiers save money for the military. Women, on average, have fewer dependents, and therefore reduce the government's dependent care and housing allowances. Women incur less sick leave than men, have far lower rates of substance abuse, and fewer disciplinary problems.¹⁵⁷

The psychological issues resulting from women in combat require a more complex analysis. Certainly, there is sexual activity in mixed units, but probably less in war than in peacetime.

People were sexually active in Saudi, but it was well-hidden, infrequent, and less of a problem than we usually face when we're back in garrison. After all, when you're out in the desert, afraid of SCUDS and land mines, and your last shower was four days ago, most normal human beings don't have much of a libido left.¹⁵⁸

There was sexual harassment in the Gulf, as there is generally in the military,¹⁵⁹ but the Defense Department has taken steps to eliminate it.¹⁶⁰ Early experiments with women on ships showed that initial problems of sexual fraternization were virtually eliminated with strong disciplinary action.¹⁶¹ Moreover, fear of sexual relations in combat units is a prime example of blaming the victim. By their mere presence, women are seen as a magnet for anti-militaristic, sometimes sexually aggressive, behavior in men. There should be strong evidence, which there is not, that men will be poorer fighters because of their sexual interest in women soldiers before excluding women entirely from combat on this basis.

The problem of sex in combat units is really part of the male bonding problem. There is good reason to doubt that male bonding is essential to combat strength. The bonding theory relates mostly to types of fighting that are now largely obsolete—infantry units

156. BINKIN & BACH, *supra* note 3, at 71.

157. BINKIN & BACH, *supra* note 3, at 55-64.

158. Letter from Major Rebecca Rush, June 12, 1991. Major Rush's opinions are her own, and do not represent the position of the United States Army.

159. Eric Schmitt, *2 Out of 3 Women in Military Study Report Sexual Harassment Incidents*, N.Y. TIMES, Sept. 12, 1990, A22. The article is based on a Department of Defense study reporting 64 percent of military women claimed they had been directly or indirectly sexually harassed.

160. DOD TASK FORCE, *supra* note 30.

161. Witherspoon, *supra* note 22, at 16.

charging an enemy position. There is no evidence that a fiercely aggressive, cohesive unity based on sexual and physical prowess is critical to missile launching, flying aircraft, or manning a carrier. There is, in fact, merely anecdotal evidence to suggest the validity of the bonding theories under any conditions.

This anecdotal evidence raises fascinating questions for women. Male bonding in the military literature is often described as a spirit of cooperation, of caring for one another, of putting the goals and needs of the group ahead of one's individual interests—all qualities associated strongly with women. One writer who opposes women in combat quotes a passage from Philip Caputo's book, *A Rumor of War*:

I have also attempted to describe the intimacy of life in Infantry battalions, where the communion between men is as profound as any between lovers. Actually, it is more so. It does not demand for its sustenance the reciprocity, the pledges of affection, the endless reassurances required by the love of men and women. It is, unlike marriage, a bond that cannot be broken by a word, by boredom or divorce, or by anything other than death. Sometimes even that is not strong enough. Two friends of mine died trying to save the corpses of their men from the battlefield. Such devotion, simple and selfless, the sentiment of belonging to each other, was the one decent thing we found in a conflict otherwise notable for its monstrosities.¹⁶²

These are noble sentiments, and few would argue with the high value Caputo places on this part of his wartime experience. Yet Caputo's language is remarkable from a feminist perspective. The values Caputo describes are feminine values. Recent feminist psychological literature stresses that women exhibit the precise behaviors associated with male military bonding. Women seek connection with others rather than individual achievement, value cooperation over competition, sacrifice their own needs in favor of the group, family, or community, and love unconditionally.¹⁶³ Carol Gilligan has developed the thesis that women define themselves through connection with others, so that their moral imperative is one of responsibility and care for others. Gilligan calls this an ethic of responsibility and care, as opposed to a male ethic of justice based on individual rights. Women depend on connection, while men depend on competition and individual achievement for

162. Marlowe, *supra* note 123, at 193-94, (quoting PHILLIP CAPUTO, *A RUMOR OF WAR* xv (1977)).

163. These ideas were generated primarily by the work of Carol Gilligan and Jean Baker Miller. See CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982); MAKING CONNECTIONS (1990); JEAN BAKER MILLER, *TOWARD A NEW PSYCHOLOGY OF WOMEN* (1976).

self-fulfillment.¹⁶⁴

The kind of bonding men apparently achieve only in the intensity of battle or other comparable activities, such as certain kinds of sporting events, is in fact, a common experience for women. Robin West writes:

More generally, women do not struggle toward connection with others, against what turn out to be insurmountable obstacles. Intimacy is not something which women fight to become capable of. We just do it. It is ridiculously easy.¹⁶⁵

Women's apparently greater capacity for intimacy should make them more likely than men to engage in the bonding that develops in highly trained military units. Perhaps men cherish the psychological connections of the military experience precisely because these connections are denied them in other endeavors. In fact, the values in Caputo's writing are often denigrated as feminine, "soft," emotional. The same rescue of their comrades' corpses by two women soldiers probably would be harshly criticized for the unnecessary risks created by this essentially sentimental, overly emotional and inefficient feminine behavior.¹⁶⁶

Empirical evidence suggests that the presence of women does not destroy the esprit de corps, the bonding, or the morale of military life. Military experiments with mixed gender combat support units show no impact on performance.¹⁶⁷ The service academies, and training situations generally, show eventual acceptance by men of women into military units. Women have played key roles in terrorist organizations, which depend on a high level of emotional commitment to group survival.¹⁶⁸

The Gulf War also indicated that the male bonding issue was irrelevant. Women soldiers in the Gulf War report developing close relationships with the men and women in their units. In the dirt and heat, sexual relationships were rare. The women soldiers said they felt like neuters, or mothers to the male soldiers. One woman wrote of a "rite of passage," a difficult task after which she was accepted by her commanding officer.¹⁶⁹ "No one protected

164. CAROL GILLIGAN, IN A DIFFERENT VOICE 8 (1982). For a jurisprudential application of this work, see Robin West, *Jurisprudence and Gender*, 55 CHIC.L.REV. 1 (1988). See also, DEBORAH TANNEN, YOU JUST DON'T UNDERSTAND (1989).

165. West, *supra* note 164, at 40.

166. One Congressman wondered whether "the romance angle" might lead men to hang back to help a wounded female combatant, endangering the entire unit, while men would "simply leave their male colleague behind." 1990 Hearings, *supra* note 49, at 10 (statement of Rep. Lancaster).

167. Segal, *supra* note 106, at 209. And see sources cited in note 134, *supra*.

168. BINKIN & BACH, *supra* note 3, at 91.

169. Letter from Major Rebecca Rush, *supra* note 158.

us," another wrote. "They knew I could take care of myself."¹⁷⁰

Women do not destroy the cohesiveness or psychological effectiveness of groups. Women served during World War II as intelligence operatives in situations comparable to infantry combat. Their performance was excellent, and the women were accepted in roles carrying a high risk of death and capture. As part of an intelligence underground, women operated in an environment in which trust, mutual confidence, all the elements of bonding, were essential, and they performed as well as men.¹⁷¹

We are left then with a set of images based largely on stereotypes and generalizations. Women are weak; women ought to be sheltered from war; women are expensive. Like Delilah, simply by being female, women destroy men's fighting strength. An analysis of judicial opinions involving women and the military reveal that these stereotypical images are reflected in the judicial system, and sometimes perpetuated by it.

IV. Equality v. Expediency: The Courts and the Military

The judicial response to the combat exclusion and its impact on women depends on two parallel but distinct lines of decisions. The first is concerned with equality issues and is the body of law that has developed since 1970 when women's rights were recognized under the Fourteenth Amendment Equal Protection Clause and the Fifth Amendment Due Process Clause.¹⁷² The second line of decision is concerned with military expediency issues and the protected status of the military due to its critical role as guardian of the national defense. Together, these doctrines parallel general themes that surface in any consideration of women's role in the military—the tension between equity and justice versus the pragmatism of a strong defense.

The Equality Issue

Ironically the expansion of equal protection theory as a force for gender equality was forged in a military context. In *Frontiero*

170. Interview with Sgt. Linda Delles, *supra* note 55.

171. Quester, *supra* note 18, at 229. Quester notes: "The meager evidence we have from the performance of women in espionage and sabotage suggests that women can be as brave and as coldly homicidal as men, whenever their patriotism calls for it." *Id.*

172. Equal protection standards are applied to the federal government, including the military, through incorporation into the Due Process Clause of the Fifth Amendment. *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

v. Richardson,¹⁷³ the Court was faced with a challenge to a statute that provided dependents' benefits to the wives of service men but denied those benefits to the husbands of service women, unless a husband could prove he depended on his wife for over half his support.

The opinions in *Frontiero* generated the legal theories that would govern gender-based discrimination claims for two decades. At the time, there were two standards for judging equal protection claims. One, known as minimum scrutiny, required simply that to be constitutional, a classification not be wholly arbitrary, that it bear a "rational relationship to a legitimate governmental interest."¹⁷⁴ This standard is generally applied to economic regulatory statutes. However, minimum scrutiny was followed in *Reed v. Reed*,¹⁷⁵ a gender discrimination case decided before *Frontiero*. But *Reed* did hold that a state could not employ an absolute preference for men over women as administrators of decedents' estates, based on the belief that men were better qualified than women. Using minimum scrutiny, the *Reed* Court rejected the statutory classification as having no rational basis. *Reed* was one of the first cases to reject gender stereotyping on equal protection grounds.

Other equal protection claims were subject to another standard of review, known as strict scrutiny. Strict scrutiny is applied to laws that classify or affect suspect groups, such as those based on race, alienage or national origin. Such classifications require extremely strong justification for the Court to find them constitutional. These classifications are upheld only if they are essential to a compelling state interest.¹⁷⁶ Strict scrutiny was also applied to equal protection claims based on deprivation of an important constitutional right, such as freedom of speech.¹⁷⁷ Suspect classifications are generally applied to groups with a long history of discrimination and political powerlessness, based on some immutable characteristic such as race, which is beyond the choice of the group members. Such characteristics are believed to bear no ra-

173. *Frontiero v. Richardson*, 411 U.S. 677 (1973).

174. *Lyng v. Auto. Workers*, 485 U.S. 360 (1988); *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973); *Frontiero v. Richardson*, 411 U.S. 677, 683 (1973); *Dandridge v. Williams*, 397 U.S. 471 (1970); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). See *United States v. Carolene Products Co.*, 304 U.S. 144, n. 4 (1938).

175. *Reed v. Reed*, 404 U.S. 71 (1971).

176. *Loving v. Virginia*, 388 U.S. 1 (1967); *Korematsu v. United States*, 323 U.S. 214 (1944).

177. *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *McLaughlin v. Florida*, 379 U.S. 214 (1944).

tional relationship to individual ability.¹⁷⁸

The Court in *Frontiero* had to decide the perplexing question whether gender classifications were to receive strict or minimum scrutiny. A plurality in *Frontiero* applied strict scrutiny and struck down the statute. The Court held for the first time that gender-based classifications were suspect and could not be justified by administrative efficiency or by stereotypes about the proper role and ability of women. Even empirical evidence that most women were dependent for support on their husbands, while most men were not, could not justify government policy disadvantaging all members of one gender. Nor could the government save money by relying on such generalizations. Writing for the plurality, Justice Brennan broke significant ground by condemning a "‘romantic paternalism’ which in practical effect, put women, not on a pedestal, but in a cage."¹⁷⁹ Our statute books, Brennan wrote, had "gradually become laden with gross, stereotyped distinctions between the sexes," so that women's position in the nineteenth century became comparable to that of blacks before the Civil War.¹⁸⁰ Then came Brennan's most critical language:

Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility."¹⁸¹

Brennan's sweeping conclusions were not accepted by the whole Court. Brennan was joined by Douglas, White and Marshall. Justices Powell, Burger, Blackmun and Stewart concurred in the result but would not apply strict scrutiny to the case. They were unwilling to define all distinctions based on sex as irrational, or suspect. Justice Powell, in an opinion joined by Chief Justice Burger and Justice Blackmun, noted that *Reed* supported the *Frontiero* outcome because *Reed* held that gender stereotypes are not rational if based only on claims of efficiency and administrative convenience.¹⁸² Powell argued that the Court should wait until the Equal Rights Amendment, already passed by Congress, was acted upon by the states. Through the ERA, the will of the people

178. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *Frontiero v. Richardson*, 411 U.S. 677, 678 (1973); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

179. *Frontiero*, 411 U.S. at 684.

180. *Id.* at 685.

181. *Id.* at 686, quoting *Weber v. Aetna Casualty & Sur. Co.*, 406 U.S. 164 (1972).

182. *Id.* at 691-92 (Powell, J., concurring).

could define the constitutional protections due to women. Justice Rehnquist dissented.

Neither Brennan nor Powell ultimately prevailed. In a series of cases involving gender based classifications, the Court ultimately devised a compromise between minimum and strict scrutiny, an entire classification just for gender discrimination—the quasi-suspect class.¹⁸³ A quasi-suspect class is entitled to intermediate scrutiny. Under intermediate scrutiny, a statute will be upheld if it is substantially related to an important government purpose.¹⁸⁴ While women in many ways fit the description of a suspect class, the Court reasoned that some gender classifications might be reasonable and relevant to a legislative purpose, for example, statutory rape, or the military draft.¹⁸⁵ In a series of cases beginning with *Craig v. Boren*,¹⁸⁶ the Court applied intermediate scrutiny to strike down gender classifications.¹⁸⁷

Gender distinctions in military policy, under these opinions, should be substantially related to an important government interest. National defense is certainly important, even compelling. However, under *Craig* and its progeny, the combat exclusion and other restrictions on military women would have to be demonstrably and substantially related to that interest. At the least, the Court should have had to examine carefully the underlying rationale for particular military gender distinctions. Nevertheless, with few exceptions, the courts have accepted military claims without applying the level of scrutiny called for in other gender discrimination cases.

183. Intermediate scrutiny also applies to classifications based on illegitimacy. *Mills v. Habluetzel*, 456 U.S. 91 (1982); *Matthews v. Lucas*, 427 U.S. 495 (1976).

184. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Kirchberg v. Feenstra*, 450 U.S. 455 (1981); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Orr v. Orr*, 440 U.S. 268 (1979); *Craig v. Boren*, 429 U.S. 190 (1976).

185. *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Michael M. v. Superior Court*, 450 U.S. 464 (1981).

186. *Craig v. Boren*, 429 U.S. 190, 211 n.* (1976) (Powell, J., concurring).

187. *Kirchberg v. Feenstra*, 450 U.S. 455 (1981); (state may not allow husbands to unilaterally mortgage jointly owned real property); *Califano v. Westcott*, 443 U.S. 76 (1979) (Congress could not provide aid to families with dependent children where the father is unemployed but not when the mother is unemployed. Distinction held based on invalid sexual stereotype that fathers had primary responsibility to provide a home while mothers are the center of home and family life); *Califano v. Goldfarb*, 430 U.S. 199 (1977) (Plurality held that Congress cannot provide more extensive social security benefits to widows than widowers, based on "old notions" and "archaic assumptions" about relative roles of men and women as providers). But see *Kahn v. Shevin*, 416 U.S. 351 (1974) (upholding \$500 tax exemption for widows and not widowers, based on desire to make up for economic disadvantages suffered by women after spouses' death).

The Military Expediency Issue

Questions affecting women in the military cannot be examined wholly from an equality or justice perspective. Another line of decisions mandates extreme judicial deference to military policy. This deference is based on the extraordinary importance of national defense and the need to free the military and Congress to make decisions based on expediency and military imperatives, not on ideals of equality and justice that are appropriate in the civilian sector. Deference to the military is grounded both on the explicit constitutional grants of power to Congress and the President to wage war and raise troops,¹⁸⁸ and general concerns for comity and deference to decisions by co-equal branches of the government.

Some early Supreme Court opinions indicated a possible constitutional bar to any judicial review of military policy.¹⁸⁹ More recent decisions, however, adopt a less absolute view. While for reasons of comity the courts owe great deference to military decisions, neither statutes nor policies nor individual military decisions are wholly beyond constitutional review.¹⁹⁰ Judicial deference, however, remains great. Courts state they lack competence in military matters,¹⁹¹ that courts are not given the task of running the military,¹⁹² and note that courts should not interfere with Congressional authority to govern the military.¹⁹³ Such opinions have given rise to the "separate society" doctrine, an assumption that the military operates under different standards than the civilian sector:

This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history. The differences between the military and civilian communities result from the fact that "it is the primary business of armies and navies to fight or ready to fight wars should the occasion arise."¹⁹⁴

188. U.S. Const. art. I, § 8: The Congress is empowered "to raise and support Armies . . ." (cl. 12); "to provide and maintain a Navy . . ." (cl. 13); and "to make Rules for the Government and Regulation of the land and naval forces . . ." (cl. 14); and art. II, § 2, cl. 2: the President is the "Commander in Chief of the Army and Navy of the United States."

189. See *Burns v. Wilson*, 346 U.S. 137, 146 (1953) (Minton, J., concurring); *In re Grimley*, 137 U.S. 147 (1890).

190. *Goldman v. Weinberger*, 475 U.S. 503 (1986); *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Parker v. Levy*, 417 U.S. 733 (1974).

191. *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973).

192. *Orloff v. Willoughby*, 345 U.S. 83, 93 (1953).

193. *Rostker*, 453 U.S. 57, 70.

194. *Parker*, 417 U.S. 733, 743 (quoting *Toth v. Quarles*, 350 U.S. 11, 17 (1955)).

Judicial deference has also been applied in constitutional disputes outside the equal protection context. The Court held that the Air Force can forbid an Orthodox Jew and ordained Rabbi from wearing a skull cap, as required by Jewish law,¹⁹⁵ ruling that the Air Force's dress regulations, necessary for uniformity and obedience, outweighed the plaintiff's First Amendment interests.¹⁹⁶ The Court also rejected constitutional claims by those subjected to criminal punishment by the military because "[m]ilitary law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment."¹⁹⁷

In summary, the military is subject to the Constitution, including the Bill of Rights, as is any government agency. However, constitutional guarantees are applied with extreme deference to the nature of the "separate society," the vital nature of its mission, and its need for unfettered decision-making to expedite national defense.¹⁹⁸

Military Women and the Law

The values of equality and military expediency compete within disputes over the status of military women, and, except for *Frontiero*, expediency has generally prevailed. In *Schlesinger v. Ballard*,¹⁹⁹ the Court upheld different promotion rules for men and women in the Navy, and in *Rostker v. Goldberg*,²⁰⁰ the Court upheld the male-only draft registration law. In both, the Court applied equal protection analysis as developed in *Frontiero* and *Craig*, but the military's interest in its own autonomy outweighed any equality concerns. In both opinions the Court was unwilling to question or examine the combat exclusion laws in any depth.

In *Schlesinger v. Ballard*, a military rule provided that women line and staff corp officers could serve for up to thirteen years on active duty before they had to be either promoted or dis-

195. *Goldman v. Weinberger*, 475 U.S. 503 (1986).

196. *Id.*

197. *Parker*, 417 U.S. at 744 (quoting *Burns v. Wilson*, 346 U.S. 137, 140 (1953)) (*Parker* upheld the court-martial and imprisonment of an Army captain for speech urging men not to participate in Vietnam war).

198. Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society . . . to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps.

Goldman, 475 U.S. at 507. See also *Chappell v. Wallace*, 462 U.S. 296 (1983) (military immune from liability for damages for constitutional violations); *Schlesinger v. Councilman*, 420 U.S. 738 (1975); *Orloff v. Willoughby*, 345 U.S. 83 (1953).

199. *Schlesinger v. Ballard*, 419 U.S. 498 (1975).

200. *Rostker v. Goldberg*, 453 U.S. 57 (1986).

charged.²⁰¹ The male plaintiff argued that he was denied equal protection because he was discharged from the Navy as soon as he was passed over for promotion twice, although he had served only ten years. Thus, women could remain on active duty longer than men without being promoted.²⁰² Ruling between the decisions in *Frontiero* and *Craig v. Boren*, the majority in *Ballard* never discussed the appropriate standard of review. Based on *Frontiero*, it ruled that the classification could not treat similarly situated men and women differently, based solely on overbroad generalizations and archaic stereotypes, purely for administrative convenience.²⁰³

However, the majority held that the rule did not involve different treatment of similarly situated men and women because men and women in the Navy were different. Women are excluded from combat, and so the disparate promotional rules were justified because women have fewer opportunities for promotion than men and need more time to qualify for advancement.²⁰⁴ In other words, to treat women fairly and equitably, they must be treated differently from men, because they are different from men. They do not do combat. The Supreme Court relied without question on the Navy's professed need for promotional procedures that met its need for officers at each level of command. The Court never questioned the rationale of the combat exclusion rules. They were simply stated as a given, as immutable as women's reproductive organs. Justice Brennan issued a strong dissent:

Indeed, I find quite troublesome the notion that a gender-based difference in treatment can be justified by another, broader, gender-based difference in treatment imposed directly and currently by the Navy itself. While it is true that the restrictions upon women officers' opportunities for professional service are not here directly under attack, they are obviously implicated in the Court's chosen ground for decision, and the Court ought at least to consider whether they *may* be valid before sustaining a provision it conceives to be based upon

201. 10 U.S.C. § 6401. The military follows an up-or-out policy: officers who fail to be selected for promotion twice must be discharged, unless given special permission to stay on. The section at issue in *Ballard* allowed women officers up to thirteen years before they were discharged, regardless of the number of times they failed to be selected for promotion. For current statutes on failure of selection, see 10 U.S.C. §§ 564 (warrant officers) and 627 (officers).

202. *Schlesinger*, 419 U.S. 498. The up-or-out system guaranteed that there would be enough officers at each rank without bottlenecks at the lower ranks. Congress sets the number of authorized enlisted personnel in each service and the number of line officers as a percentage of that number. See 10 U.S.C. §§ 521-525, 623 (1990). The result is a pyramidal structure, with fewer officers needed at each higher rank than in the rank below.

203. *Schlesinger*, 419 U.S. at 506.

204. *Id.* at 508.

them.²⁰⁵

At best the majority reasoning in *Ballard* is circular—women are treated differently (may remain on active duty longer before being promoted or discharged) because they are treated differently (not allowed on ships or in combat). At worst, the majority abdicates its usual role as guardian of equal rights under law. The most curious aspect of *Ballard* is that the combat exclusion was not the ostensible reason for the different treatment of men and women. Promotion decisions regarding women were, as a matter of policy, not to be based on their lack of combat experience.²⁰⁶ In arguing the *Ballard* case, the Navy claimed that it no longer even needed the time differential.²⁰⁷ Nevertheless the Court upheld the rule. The major authorities cited were *Toth v. Quarles*²⁰⁸ and *Orloff v. Willoughby*,²⁰⁹ both opinions articulating the separate society doctrine and the need for judicial deference in military matters.²¹⁰

*Rostker v. Goldberg*²¹¹ furnished the Court with its clearest opportunity to confront the combat exclusion rule and the different treatment of men and women in the military. But the opportunity was again abandoned. The exclusion was accepted as a given, beyond rational discourse, and so the Court easily upheld the male only draft registration system²¹² under the Military Selective Service Act.²¹³

Congress had recently rejected President Carter's request for authorization to register women as well as men for the draft.²¹⁴

205. *Id.* at 511, n. 1 (Brennan, J., dissenting) (emphasis original).

206. The dissent points out that the combat exclusion was at most indirectly related to the challenged time differentials. Rather, the different treatment of women stemmed from the very small percentages of authorized women officers under the Women's Armed Services Integration Act of 1948. The up-or-out system was deemed perhaps inappropriate given the few opportunities for any promotion for women. By the thirteen year provision, Congress intended to approximate the same time limits as applied to men to keep men and women for the same number of years, not to allow women to stay longer. *Id.* at 512-13.

207. *Id.* at 510, n. 13 (Brennan, J., dissenting). Justice Brennan, joined by Justices Douglas and Marshall, dissented based on his view that sex was a suspect classification and the government had not shown a compelling interest in the differential promotion rules. Brennan demonstrates thoroughly how neither the military nor the Congress had, at the time of the lawsuit, any justification at all for the different time frames for men and women, and argued that the difference should not even be upheld under a minimum rationality test. *Id.* at 511, 516-18.

208. *Toth v. Quarles*, 350 U.S. 11 (1955).

209. *Orloff v. Willoughby*, 345 U.S. 83 (1953).

210. *Schlesinger v. Ballard*, 419 U.S. at 510 (1975).

211. *Rostker v. Goldberg*, 453 U.S. 57 (1981).

212. *Id.*

213. 50 U.S.C. Appx. § 451 *et seq* (1990).

214. H.R.J. Res. 521, 96th Cong., 2d Sess. (1980).

As a result, the extreme deference to congressional power in military affairs permeates the *Rostker* opinion. Most of the opinion is devoted to the extent of congressional power, and the concomitant lack of competence in the judiciary in anything touching national defense and the raising of armies and navies.²¹⁵ "Judges," it reiterated, "are not given the task of running the army."²¹⁶ Equality again gave way to expediency.

The Court avoided choosing among strict, intermediate or minimum scrutiny and apparently rejected both the government's pleas for minimal rationality and the plaintiffs' arguments for applying *Craig v. Boren*. The Court warned that such distinctions "may all too readily become facile abstractions used to justify a result."²¹⁷ The issue, it said, was "whether Congress, acting under an explicit constitutional grant of authority, has by that action transgressed an explicit guarantee of individual rights which limits the authority so conferred."²¹⁸ Congress's interest in raising and supporting armies, is "important." The Court must simply decide whether the congressional choice in furtherance of that interest denies equal protection of the law.²¹⁹ There is no further guidance on how the Supreme Court, or the lower courts, are to answer this question.

The Court had two grounds for its decision in *Rostker*, both highly unsatisfactory. First it stressed that Congress had actually debated drafting women.²²⁰ The legislature did not act "unthinkingly," or "reflexively and not for any considered reason."²²¹ Without explanation, the Court concluded that the different treatment was not the "accidental byproduct of a traditional way of thinking about females."²²² Second, and of far greater significance, the Court again accepted without question the combat exclusion as the basis for imposing significant differences in women's legal status.²²³ The combat exclusion per se makes women and men different vis a vis the draft; therefore the decision to treat them differently is not unconstitutional. The Court stated, "[t]he Constitution requires that Congress treat similarly situated persons similarly, not that it engage in gestures of superficial equality."²²⁴

215. *Rostker*, 453 U.S. 57.

216. *Id.* at 71.

217. *Id.* at 70.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.* at 72 (citing *Orloff v. Willoughby*, 345 U.S. at 93-94 (1953)).

222. *Id.* at 74 (quoting *Califano v. Webster*, 430 U.S. 313, 320 (1977)).

223. *Id.* at 79.

224. *Id.* at 79.

The combat exclusion is "not only sufficiently but also closely related to" the purpose of registration—drafting soldiers for combat in time of war.²²⁵ Drafting only whites, or only Protestants, or only Democrats might have been irrational, but drafting only men is not. The Court summarized, "[m]en and women, because of the combat restrictions on women, are simply not similarly situated for purposes of a draft or registration for a draft."²²⁶

Women, under this analysis, are not citizens, but "citizens-who-do-not-do-combat." And only "citizens-who-do-combat" should be drafted and made to register for a draft. *Rostker* thus is a clear judicial statement illustrating the depth of the difference in citizenship between men and women resulting from the combat exclusion. Women are not equal citizens; women are a certain kind of citizen, a separate class with distinctly lower status. In a country where equality of citizenship is a primary political value, this unquestioned acceptance of difference is troubling.

It is noteworthy that the primary precedent relied on by the Court for the gender equality analysis was *Michael M. v. Superior Court*,²²⁷ a decision upholding a California statutory rape law that subjected men, but not women, to criminal liability for sexual intercourse with a woman under age eighteen other than one's spouse. The statutory rape law was justified because it protected women from a danger unique to women—the "profound physical, emotional and psychological consequences of sexual activity," getting pregnant.²²⁸ Since only women can get pregnant, women and men are not similarly situated with respect to sexual intercourse, the Court reasoned.²²⁹ Ergo, the law may classify, even to the extent of imprisoning members of one sex and not the other, for a pregnancy-related reason.

The combat exclusion is treated, in *Rostker*, much as pregnancy is treated in *Michael M.* The exclusion is again accorded the status of biological truth. Both opinions imply a strong belief that

225. *Id.*

226. *Id.* at 78.

227. *Michael M. v. Superior Ct.*, 450 U.S. 464 (1981).

228. *Id.* at 471. These consequences are so severe, according to the Court, that they are sufficient deterrent to young women not to engage in intercourse. Pregnancy is explicitly equated with prison: "[b]ecause virtually all of the significant harmful and inescapably identifiable consequences of teenage pregnancy fall on the young female, a legislature acts well within its authority when it elects to punish only the participant who, by nature, suffers few of the consequences of his conduct. . . . Moreover, the risk of pregnancy itself constitutes a substantial deterrence to young females. No similar natural sanctions deter males. A criminal sanction imposed solely on males thus serves to roughly 'equalize' the deterrents on the sexes." *Id.* at 473.

229. *Id.*

women must be protected from the sex drives of men, even if that means tolerating substantial inequalities between them. The combat exclusion is justified in part by the fear of men and women co-existing in the intense environment of a military unit, because sexual activity, and some pregnancy, will be inevitable and will destroy the psychosocial dynamics essential for combat effectiveness. Thus in both *Michael M.* and *Rostker*, women are assumed inevitably to be either targets of male aggression or temptresses to such aggression, and the government is justified in denying important rights and responsibilities on that assumption.

In one sense, *Rostker* and *Ballard* are simply evidence that in a clash between the equality principle and the military expediency principle, military expediency wins. But the two opinions cut more deeply than that. They alter the content of the equality principle as applied to gender. In spite of the Court's reiteration that gender classifications may not be based on "archaic and overbroad generalizations,"²³⁰ statistical correlations,²³¹ or "the baggage of sexual stereotypes,"²³² the majority nevertheless bases its decision on all three: women, in general, are unfit to fight, belong at home, and will tempt men into behavior detrimental to their fighting strength. As Justice Marshall pointed out in dissent in *Rostker*: "The Court today places its imprimatur on one of the most potent remaining public expressions of 'ancient canards about the proper role of women,' . . . [and] categorically excludes women from a fundamental civic obligation."²³³

In the lower federal courts, *Ballard* and *Rostker* have been interpreted to restrict the standard of review in military equal protection cases to minimum scrutiny, requiring that any classification be rationally related to the national defense.²³⁴ These courts have, probably correctly, read the high Court's references to intermediate scrutiny in *Rostker* as meaningless in view of the Court's stress on the deference due Congress and the military.²³⁵ *Lewis v.*

230. *Rostker v. Goldberg*, 453 U.S. at 67 (1981); *Schlesinger v. Ballard*, 419 U.S. at 508 (1975).

231. *Craig v. Boren*, 429 U.S. 190 (1976).

232. *Orr v. Orr*, 440 U.S. at 283 (1978).

233. *Rostker*, 453 U.S. at 86 (Marshall, J., dissenting) (quoting *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 545 (1971) (Marshall, J., concurring)).

234. *Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985); *Lewis v. United States Army*, 697 F. Supp. 1385 (E.D. Pa. 1988); *Mack v. Rumsfeld*, 609 F. Supp. 1561 (W.D.N.Y. 1985), *aff'd* 784 F.2d 438 (2d Cir.), *cert. denied sub nom. Mack v. Weinberger*, 479 U.S. 815 (1986).

235. "Based on my reading of *Rostker v. Goldberg*, 453 U.S. 57 . . . I conclude that the standard outlined in *Craig* is not applicable to gender-based equal protection claims raised in the context of military affairs, and I instead adopt the standard indicated above." *Lewis*, 697 F. Supp. at 1390, n. 5.

United States Army,²³⁶ for example, upheld the use of more stringent entry requirements for women than men, because the Army recruits fewer women due to the combat exclusion, and can therefore apply higher standards for their admission. Such decisions reflect continued acceptance of the combat exclusion as sacrosanct, and apparently beyond examination by the judiciary.

There are exceptions in the lower courts, but these opinions have been overshadowed by the Supreme Court's ruling on the issue of women in combat. A single federal judge, fifteen years ago in a remarkably enlightened opinion, held that the selective service laws denied males the equal protection of the law, and cast considerable doubt on the validity of the combat exclusion. In *United States v. Reiser*,²³⁷ the district court dismissed charges that the plaintiff had failed to submit to induction into the armed forces under the Selective Service Act on the grounds that the male-only draft violated the defendant's constitutional rights. The judge stated:

Although many of the efforts to create a separate legal status for women undoubtedly stem from a good faith attempt to advance the interests of women, they all too often backfire to the economic and social detriment of women. This paternalism is especially prominent in the military, perhaps the most male dominated institution in society. For example, besides being excluded from the draft, women cannot constitute more than two percent of army personnel. The rationale underlying such an approach has been expressed by one court in the following manner: 'If a nation is to survive, men must provide the first line of defense while women keep the home fires burning.' *United States v. St. Clair*, 291 F. Supp. 122, 125 (S.D.N.Y. 1968).

The draft, resulting in compulsory military service, is one of the most serious and onerous duties of citizenship. The Supreme Court has stated that 'the duty of citizens by force of arms to defend our government against all enemies whenever necessity arises is a fundamental principle of the Constitution.' Although women have made great strides in removing the vestiges of sex discrimination in many areas of the law, they will never accomplish total equality unless they are allowed to accept the concomitant obligations of citizenship. . . . Discriminatory treatment in one area of the law is bound to be reflected in other areas.²³⁸

Writing just before *Craig v. Boren*, *Reiser* held that sex is a suspect classification and the all-male draft was not essential to a compelling state interest. The government argued that the male-

236. *Lewis*, 697 F. Supp. 1385 (E.D. Pa. 1988).

237. *United States v. Reiser*, 394 F. Supp. 1060 (D. Mont. 1975), *rev'd*, 532 F.2d 673 (9th Cir. 1976).

238. *Id.* at 1061-62.

only draft was required for national security, a rationale which the district court rejected out of hand.²³⁹ The government then claimed that women could not be drafted because they are physically unfit for military combat, lacking the necessary speed, strength, and endurance. The government argued that only a few women would be physically qualified, and the government would have to induct large numbers of women to find those few, a costly and inefficient process. The court rejected the government's argument, noting that in 1969, 56.4 percent of black male draftees and 43.1 percent of white male draftees were rejected for service.²⁴⁰ It was not easy, apparently, to come up with qualified men. Applying strict scrutiny, the district court found the government's rationale inadequate because they were based on stereotypes and administrative convenience, reasons found insufficient in *Reed* and *Frontiero*.²⁴¹ Unfortunately, *Reiser* was reversed by the Ninth Circuit Court of Appeals in a one page opinion stating that the male-only draft was rationally related to a legitimate governmental interest.²⁴²

A few other courts have struck down military rules that excluded women, based on similar equal protection reasoning. In all these cases, however, the Department of Defense had already decided to change the offending policy to remove its most discriminatory features. For example, the Second Circuit Court of Appeals in *Crawford v. Cushman*²⁴³ invalidated a regulation requiring pregnant women to be automatically discharged from the Navy or Marines and making women with children under age eighteen ineligible for enlistment.²⁴⁴ The court held that the regulation treated pregnancy differently from any other temporary disability, without any rational basis.²⁴⁵ *Crawford* was grounded in the de-

239. "The government must do more than mumble 'national security' and expect of veil of immunity." *Id.* at 1066.

240. *Id.* at 1067-68.

241. *Reiser*, 532 F.2d 673 (9th Cir. 1976).

242. *Id.*

243. *Crawford v. Cushman*, 531 F.2d 1114 (2d Cir. 1976).

244. *Id.* at 1118. The plaintiff was discharged in 1970. The regulation was changed in 1975 to allow discharge on request of the pregnant woman or on initiative of a commanding officer if a woman failed to maintain herself "reasonably available for duty" or was no longer a "productive marine." *Id.* at 1117 n.1. Similar policies were in effect in all the services.

245. *Id.* at 1122. The court applied the rational basis test to the classification. The decision came after the Court had found several gender based classifications invalid, but before it enunciated the intermediate scrutiny standard in *Craig v. Boren*. The Court was at the time moving toward heightened scrutiny of gender based classifications without having yet settled on intermediate scrutiny as the appropriate standard of review. The Court had recently, moreover, struck down a requirement for mandatory discharge of pregnant teachers. *Cleveland Bd. of Educ. v. La*

veloping notion that legal distinctions should not be based on "out-moded generalizations," including "taboos inherent in connection with pregnancy."²⁴⁶ The combat exclusion actually worked in the plaintiff's favor in *Crawford*. Since women could not be assigned to combat, were eligible for service only on transport and hospital ships, and in the Marines, could not be assigned overseas except as volunteers, the government had failed to show any reason why pregnant women could not "respond" as needed to their duties.²⁴⁷ However, the opinion had a minor impact. The government had often waived its right to discharge pregnant women.²⁴⁸ Moreover, the regulation was changed in 1975 to allow discharge only on the pregnant woman's request or by a commanding officer only if a woman failed to maintain herself "reasonably available for duty" or was no longer a "productive" marine.²⁴⁹

In *Owens v. Brown* a New York district court struck down the blanket prohibition against women serving on naval ships.²⁵⁰ At that time statutes restricted women to service on hospital ships or transports, but no hospital ships or transports were in use when the suit was brought. *Owens* held the prohibition denied women equal protection of the law.²⁵¹ Like other aspects of the combat exclusion, the provision at issue restricted women from shore duties because of the rotation requirements and severely limited their opportunities for enlistment, for skill training and for promotion. The statute, *Owens* held, was overinclusive: it presumed that no women were fit for sea duty without evidence to support this presumption. The legislative history showed that Congress, more than the Navy, wanted women kept on shore.²⁵² As in *Crawford*, the *Owens* dispute was largely academic. The combat exclusion statute was about to be amended, at the urging of the Navy, to become the present section 6015, that permits assignment of women

Fleur, 414 U.S. 632 (1974); and the Second Circuit itself had struck down a similar rule in *Green v. Waterford Bd. of Educ.*, 473 F.2d 629 (2d Cir. 1973).

246. *Crawford*, 531 F.2d at 1124.

247. *Id.*

248. *Struck v. Secretary of Defense*, 460 F.2d 1372 (9th Cir. 1971), *cert. granted*, 409 U.S. 947, *vacated and remanded*, 409 U.S. 1071 (1972); *Gutierrez v. Laird*, 346 F. Supp. 289 (D.C. Cir. 1972) *Robinson v. Rand*, 340 F. Supp. 37 (D. Colo. 1972). See *Crawford*, 531 F.2d at 1119.

249. *Crawford*, 531 F.2d at 1117 n.1.

250. *Owens v. Brown*, 455 F. Supp. 291 (D. D.C. 1978).

251. *Id.*

252. "Of course, they are not going to be detailed to serve on ships, but you cannot tell what happens . . . somebody might say they need a few of them up there to do communications or other kinds of work and I do not think a ship is a proper place for them to serve." *Id.* at 306 n. 53 (quoting, *Hearings Before the Subcommittee on Organization and Mobilization of the House Committee on Armed Services*, 80th Cong., 2d Sess. 5690, 5711 (1948)).

to temporary duty on hospital ships, transports, and vessels "of a similar classification not expected to be assigned combat missions."²⁵³ *Owens* is similar to *Waldie v. Schlesinger*,²⁵⁴ where the District of Columbia Circuit Court of Appeals reversed a judgment denying review of male-only admissions to the service academies. Legislation was about to be enacted admitting women, so the case was never judicially decided on the merits.

The *Owens* court addressed and rejected all of the traditional justifications for the exclusion of women from combat or other important military posts. Primarily, the *Owens* court reasoned that, according to *Califano v. Goldfarb* and *Craig v. Boren*, even high statistical correlations between certain characteristics (e.g., physical strength, or financial dependency) and gender cannot be used to bar all members of one sex from a government benefit or job.²⁵⁵ Allegations of potential morale problems and the lack of physical accommodations for women on integrated ships were dismissed by the *Owens* court as well. Highly ranked naval officers testified that these problems were easily overcome.²⁵⁶ Like the district court in *Reiser*, the *Owens* court employed a more enlightened view of women in combat than Congress. These courts were willing to consider the fitness of women for combat, and the main thrust of *Owens* was to give the Navy the discretion to assign women as it saw fit. Thus it evaluated the statute

both from the standpoint of women's proven ability to perform capably in noncombat shipboard positions and from the perspective of their yet unproven ability to be satisfactorily integrated into the entire range of Navy duties, noncombat and combat alike. The result is that the statutory presumption is wholly irrational as to noncombat assignments and largely rational but not rational enough as to the full range of naval duties.²⁵⁷

However, *Reiser*, *Crawford* and *Owens* are aberrations, paling under the Supreme Court's consistent acceptance of the combat exclusion as justification for a variety of distinctions that harm both men and women.

V. Reflections and Conclusions

It is difficult to sustain the combat exclusion rules solely on equality principles. Under *Craig v. Boren* and its progeny, inter-

253. 10 U.S.C. § 6015.

254. *Waldie v. Schlesinger*, 509 F.2d 508 (D.C. Cir. 1974).

255. *Owens v. Brown*, 455 F. Supp. at 308 (D. D.C. 1978).

256. *Id.* at 308-09.

257. *Id.* at 308 n.65.

mediate scrutiny should force the Court to acknowledge the insufficient rationale for an exclusion of women from combat. The Court should not accept without question the generalizations about women's physical ability or the stereotypical views of women as sufficient justification for gender classifications. However, it appears clear that the Court is unlikely to apply any equal protection standard without its habitual deference to the military and Congress. The military expediency principle means that mere speculation about the dilution of military strength due to women's participation is enough to validate excluding women from combat. The courts, therefore, are not a promising venue for the elimination of the combat exclusion rules. However, although old stereotypes die hard in the political arena, Congress has significantly modified the combat exclusion rule and at some point the rule is likely to disappear, at least from the statute books. Canada, Belgium, the Netherlands, Norway, Denmark and Sweden have eliminated the automatic exclusion of women in combat.²⁵⁸ Change in the combat exclusion rule raises broad political and theoretical issues and has implications for women's evolving image.

Women on Women in Combat

Women of all political positions have generally accepted the "fact" that women cannot fight in combat. The reasons for this acceptance range from traditionalism, to an inherent pacifism, to radical feminist psychology. Military values are not values traditionally espoused by feminists or the women's movement. Instead, most feminist women consider themselves pacifists, and many believe that even to consider participating in the military is to capitulate to a male value system that has been responsible for the worst abuses against women. Feminist women see value in women's differences from men and stress women's concern for cooperation and connection, rather than aggression and war, the ultimate competitive game.²⁵⁹

Even after the Gulf War, women are ambivalent about the combat exclusion, even as television revealed the exclusion for what it is—an exclusion from certain high-level jobs, but not an exclusion from the risks of death or injury. As Linda Bird Francke wrote:

Like many other civilians, I had been stunned to learn the numbers of women serving in the armed forces. If there hadn't been a war, I never would have known . . . Watching

258. Snyder, Note, *supra* note 33, at 449.

259. See text accompanying *supra* notes 154-157.

the war on television, I'd vacillated between feelings of awe and uneasiness at women in their modern military roles. It was jolting to see young women loading missiles on planes and aching to fly fighter jets in combat. On the other hand, I admired these military women for driving six-wheel trucks and shinnying in and out of jet engine pods. A final barrier seemed to be breaking down between the sexes. But at what cost?²⁶⁰

The responses to Francke, from women and men, were equally ambiguous. Some identified with her ambivalence.²⁶¹ Others argued that women, and men, should eschew all war, and others were clear that the combat exclusion was unjust, lacking any moral or intellectual justification.²⁶²

Military women themselves have not vigorously fought against the combat exclusion for a number of reasons. To survive and succeed in a military career, women must accept and adopt the attitudes of an inherently male culture. Many military women believe they are treated equally, more so than their civilian counterparts due to gender neutral pay structures and promotion rules that on paper operate according to strict guidelines with little room for discretion.

Military women, again because their attitudes reflect the culture they have chosen, as a whole reject the label "feminist" and any ideas they consider feminist. Research shows that military women do not identify with the feminist movement, do not identify with women's issues, and do not seek strong identification with other military women.²⁶³ Women tend to identify with others, mostly men, in their career specialties, and to see their professional groups as their main sources of support.²⁶⁴ As a result,

260. Linda Bird Francke, *Requiem for a Soldier*, N.Y. TIMES MAGAZINE, April 21, 1991, at 24.

261. "I've been a pacifist most of my life, and I was in tears at the thought of bombs raining down on Iraqi women and children. Yet, whenever I saw a young American woman step out of a helicopter or perform military maneuvers, my heart soared." Gabrielle Bernard, Letter to the Editor, N.Y. TIMES MAGAZINE, May 12, 1991, at 6.

262. Loren E. Pedersen, Letter to the Editor, N.Y. TIMES MAGAZINE, May 12, 1991, at 6; Cynthia Harrison, Letter to the Editor, N.Y. TIMES MAGAZINE, May 5, 1991 at 6; Peter Bradley, Letter to the Editor, N.Y. TIMES MAGAZINE, May 5, 1991 at 6; and Sherman L. Greene, Letter to the Editor, N.Y. TIMES MAGAZINE, May 12, 1991 at 6.

263. Karen Dunivin, *There's Men, There's Women, and There's Me: The Role and Status of Military Women*, VI MINERVA QUARTERLY REPORT ON WOMEN AND THE MILITARY 43 (Summer 1988). Respondents in Dunivin's survey disassociated themselves from feminists, and also from other women in the military, whom they referred to as "bubbleheads" or incompetents. *Id.* at 57.

264. Dunivan's interviews tended to refute the male bonding theory and support the idea of bonding in mixed units. One respondent said: "In the flying business,

some military women argue that the combat exclusion should be maintained. They do not want to fight. However, neither do most men. Moreover, women in the military volunteer for parachute school for the thrill of it, even though they are not permitted to join parachute units.²⁶⁵ They want to go on submarines just for the experience. Women join the military to prove themselves, just as young men do. The combat exclusion can never stand or fall on any theory of what most women want. Most women do not want to join the military, do not want to prove themselves in boot camp, do not want to fly combat aircraft or jump out of planes or drive tanks. But some do. As long as even one woman wants to try, we must question whether it is right to deny her.

Combat and Citizenship

Women in and out of the military must understand the profound ramifications of the combat exclusion on women's status as citizens. Historically, unrestricted military service has been associated with full and total citizenship, with all the rights and responsibilities that full citizenship implies. "Service under arms has been seen at some times and in some places as a calling resembling that of the priesthood in its dedication. This view has never wholly disappeared."²⁶⁶ In ancient Greece, the obligation to bear arms was "an essential element in a man's standing as a free citizen, and it was not uncommon . . . for young men to be required to establish their capacity to bear arms as a condition of full citizenship."²⁶⁷ In Rome, only Roman citizens first served in the legions, though eventually necessity led to recruitment from the provinces.²⁶⁸ Civil status was closely linked to military service throughout modern history. According to one description of the French seventeenth century army, the lowest orders, laborers, carters and valets, came from the lowest social classes and were not permitted to enlist as regular soldiers.²⁶⁹

In our own time, exclusion from military service has also been associated with either a lack of citizenship or some diminished form of citizenship. Arabs born inside Green Line Israel, otherwise considered citizens of that country, do not serve in the Army. Black South Africans cannot serve in the military. The

there's a large network. Each squadron is a family and they take care of their own." *Id.* at 453-54.

265. Interview with Sgt. Linda Delles, *supra* note 55.

266. GENERAL SIR JOHN HACKETT, *THE PROFESSION OF ARMS* 9 (1983).

267. *Id.* at 13-14.

268. *Id.* at 21.

269. *Id.* at 61.

United States' treatment of African-Americans in the military parallels in striking ways the current treatment of women.

African-Americans were kept in segregated units in the U.S. military until 1948, when President Truman issued an Executive Order requiring equality of treatment and opportunity for "all persons."²⁷⁰ African-Americans served primarily in combat support functions, often as heavy-duty laborers, until the Korean War, and were not fully integrated into the military until Vietnam.²⁷¹ They were considered inferior in "combat readiness, morale, discipline."²⁷² A 1945 report by the Army recommended that African-American recruitment be limited to 10 percent of the total army.²⁷³ The rationales for racial segregation mirror those supporting the combat exclusion of women. Too many African-Americans, it was feared, would "(a) produce a 'tipping' effect, causing white volunteering to drop off, (b) exacerbate racial tensions inside the Army, (c) erode public support for the military, (d) raise doubts among both allies and enemies about the reliability of American combat arms . . . and (e) exacerbate racial tensions in society, especially in case of combat where black casualties ranging from 30 to 40 percent might prove politically indigestible and precipitate domestic crisis."²⁷⁴ There have been exceptions, of course. Five thousand African-Americans served in the Revolution.²⁷⁵ Women, too, have been cited as heroines for their courage and strength. But neither one Molly Pitcher nor one outstanding African-American aviator unit makes for a truly egalitarian military.²⁷⁶ The link between changes in civic status and military service is apparent both for African-Americans and for women.

The historical exclusion and limitations on African-Americans and women is paralleled today in the absolute exclusion of gay men and lesbian women from any military service. Department of Defense policy states that:

Homosexuality is incompatible with military service. The presence in the military environment of persons who engage

270. John Sibley Butler and Malcolm D. Holmes, *Changing Organizational Structure and the Future of Race Relations in the Military*, in CONSCRIPTS AND VOLUNTEERS, *supra* note 106, at 167, 169.

271. *Id.* at 168-69.

272. *Id.* at 169.

273. *Id.*

274. Robert K. Fullinwider, "The All-Volunteer Force and Racial Balance," in CONSCRIPTS AND VOLUNTEERS, *supra* note 106, at 178.

275. Butler and Holmes, *supra* note 270, at 167.

276. "For every Joan of Arc, however, there have been innumerable Joan Hills: women who would have been part of the prosaic millions of soldiers but who will not be permitted to fight, since the military establishment has excluded women from combat." Hill v. Berkman, 635 F. Supp. 1228, 1235 (E.D.N.Y. 1986).

in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission. The presence of such members adversely affects the ability of the Military services to maintain discipline, good order, and morale.²⁷⁷

For women, as for African-Americans and homosexuals, exclusion from combat is based on their social status as outside the community of true citizens.²⁷⁸ Feminists have documented women's status as "other," perceived as having distinct, and inferior, behaviors, beliefs, and physical attributes compared to the male "norm."²⁷⁹ The combat exclusion rules perpetuate women's otherness. Military service, for African-Americans and for women, has been a way for otherwise excluded "other" groups to establish their political and civil rights.²⁸⁰ The slogan, "Free a Man to Fight" takes on new meaning in this context. Men, at least white men, are and have been free to participate in all aspects of civic life, including, especially, war. To free a man to fight is to perpetuate the notion of men as free and women less than free men.

Women have been slow to recognize that their protection from military combat has kept them in a lower status than the men they are freeing to fight. Whether or not the exclusion survives into the next decade, women and men should at least recognize that full citizenship is not wholly possible without full participation in the community's defense.

To accept that women are incapable of full military service is to accept their incapacity in other spheres as well. The same physical attributes that lead to the combat exclusion also limit women's participation in politics and high corporate office. Pregnancy and menstruation simply are seen as creating too great a risk that women will somehow cease to function at critical moments. Women's physical stamina or mental toughness become an issue in civilian areas as well. Any man with "the right stuff" just would not cry on the campaign trail. The male bonding in military fighting units

277. DOD Policy on Homosexuality. Reprinted by National Organization for Women, Inc. Handout, 1991.

278. For an analysis of the relationship between citizenship and combat, see Sara Ruddick, *Drafting Women: Pieces of a Puzzle*, in CONSCRIPTS AND VOLUNTEERS, *supra* note 106, at 214 *et seq.*

279. See, e.g., MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 194 (1990): "Dominant conceptions of human nature have taken men as the reference point and treat women as 'other,' 'different,' 'deviant,' or 'exceptional.' . . . The historical meaning of gender has signaled particular relationships of power. Men with power have tended to see themselves as free of 'gender' while defining women as having a gender—as having a difference."

280. Segal, *supra* note 106, at 203.

parallels the old boy network that excludes women from high level political and civil opportunities.

Women's opinions on vital issues, especially opinions on war and peace, are discounted due to the combat exclusion. Many women, excluded from the draft during the Vietnam War, felt that their opposition to the war meant less than the opposition of men. A man who, for reasons of conscience, opposed the war, was faced with the choice of killing or being killed against his will, going underground, here or abroad, or going to jail.²⁸¹ Women, on the other hand, risked nothing.

Most important of all, however, is the way in which the combat exclusion denigrates the equalitarian ideals that underlie much of the best in the American political value system. Now that the image of military women is altered, now that we have seen on television women who can do physically demanding and high risk jobs, it is not possible to reconcile the combat exclusion with that ideal. It is difficult in fact to imagine men or women tolerating this inequality in another war which, like Vietnam, requires a draft and subjects soldiers to extreme risks. Our ideas of equality have matured too far for us to accept a male only draft in wartime.

The Gulf War has shifted the image of military women in a way that will ultimately end the combat exclusion rules. The necessity of the combat exclusion is not a biological fact. The combat exclusion is a social construct based on outmoded notions of war, women, and women and men relating together in war. The notion of equal protection under law

... does not permit us governmentally to seek to protect women paternalistically so as to relieve them from the duties, obligations and privileges of citizenship. Women, just as men, are persons and citizens, and in the scheme of government under the Constitution they must be treated as equals of men both as to their rights and obligations. It does not suffice under the Constitution to treat women kindly because we love them. We must treat them rightly because they are persons and citizens. The burdens of citizenship must be borne by all citizens.²⁸²

These words were written over twenty-five years ago. Finally, they are beginning to describe a reality. A final barrier truly appears to be breaking down.

281. Conscientious objector status was difficult to obtain during the Vietnam War, as it is today. It requires a belief based on religious teachings: mere political or philosophical objections to war will not suffice, nor will religious objection to a particular war. *United States v. Seeger*, 380 U.S. 163 (1965).

282. *United States v. Reiser*, 394 F. Supp. at 1069 (9th Cir. 1976).

