The Exclusion of Women from Combat: Is There a Legal Justification?

Sandra G. Pike
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Laws preventing women from serving in military combat positions reflect the complexity of laws treating women and men differently. Although the United States Constitution does not require that all individuals be treated in the same way, the Fourteenth Amendment’s Equal Protection Clause explicitly guarantees that no state can deny any person “the equal protection of the laws.” This principal is extended implicitly to the federal government by the Fifth Amendment’s Due Process Clause. The idea of classification, treating one class of people differently from another based upon those differences, is fundamentally based upon inequality. Thus, courts have struggled with the meaning of equality and application of the equal protection concept.

In an attempt to resolve the constitutional problems created by the deliberate categorization of social groups, the United States Supreme Court has espoused the doctrine of reasonable classification. This concept prohibits the government from making unreasonable classifications. A reasonable classification is one which includes all persons who are “similarly situated.” Therefore, the Fifth and Fourteenth Amendments guarantee that people who are similarly situated will be treated similarly by the federal and state governments. The difficulty, of course, is that women and men differ from one another and are therefore not always “similarly situated.”

Situations in which individuals are not similarly situated are often the product of legislative and judicial creation. Historically, legislators and judges thought it reasonable to classify persons according to their sex. Denial of admission to the legal profession, denial of the right to vote or hold public office, and denial of the right to have women jurors are only a few examples of unequal treatment of women which were justified because of differences between women and men.

Since the 1960s, the women’s movement in America has challenged biological determinism, the theory that attempts to justify the subordination of women as a direct and natural consequence of biological differences. The women’s movement has emphasized a legal theory of equal rights: the right of each individual to equal treatment based on equal performance. Feminist legal scholars have challenged biological determinism by postulating that substantial overlap exists between women and men as to characteristics which are relevant to job performance and social roles. They argue that individuals should be free to choose careers and social roles based on individual abilities and inclinations rather than on the basis of stereotypical perceptions of female and male capabilities. Although recent legislation and court decisions have reflected the impact of the women’s movement, many laws still reflect biological determinism based on outmoded stereotypes.

One of the most hotly debated areas involving gender-based classification concerns the role of women in the military. Central to the resolution of this conflict is the determination as to whether there are differences between men and women which legally justify the exclusion of women from combat positions. Such an examination provides a microscope through which to view equal rights application and the question of how laws should address gender differences.

Part I of this article will examine the current law. Part II will provide concrete experiences to illustrate ways in which individuals are affected by the law. Part III will postulate a hypothetical constitutional challenge to the law and define the methodology of analysis to be employed. Part IV will individually analyze the reasons most frequently espoused to justify sustaining the current law.

It is clear from a constitutional perspective that laws and policies which exclude women from all combat positions violate the Fifth Amendment Due Process Clause by denying equal treatment under the law in the areas of employment opportunity and participation in vital acts of citizenship. None of the reasons given by the military would be sufficient for a civilian employer to legally close jobs to women. Only one constitutionally valid reason exists for excluding women from a limited number of combat positions. That reason is to provide the constitutional right of privacy. However, the current law and policies are not narrowly tailored enough to achieve this goal with as little infringement as possible on other constitutional rights. Therefore, if extreme deference were not given to Congress in deciding military affairs, the exclusion of women from all combat positions would not pass constitutional muster. Having been granted this deference, Congress should reform the law so that the only positions closed to women would be those for which a
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Existing Laws and Policies

No law bars women from engaging in combat, yet women are excluded from nearly one-half of all military positions.11 All of these exclusions are based only upon one post-World War II era statute and upon military policy.12 The only area of combat service from which women are excluded by law is service on combat vessels.13

There is no statutory restriction to the assignment of women to combat positions in the Air Force.14 However, regulations drafted by the Secretary of the Air Force exclude women from combat positions in the Air Force, U.S. Air Force Reserve, and Air National Guard.15 Similarly, there is no law restricting the Army’s assignment of women. However, the Secretary of the Army has established policies that exclude women from combat positions.16

The Department of Defense does not have a directive or regulation excluding women from combat positions. Its general policy is to “provide women with full and equal opportunity … to serve in all roles except those prohibited by combat exclusion laws and policy[ies].”17 The Secretary of Defense issued the Risk Rule in 1988 to standardize positions closed to women in the armed services.18 Thus, the policies excluding women from combat positions are based upon this one law which precludes women from serving on combatant ships.19

I. THE EFFECTS OF THE LAW

A. Discrimination in Employment Opportunities and Advancement

For women in the military, one of the most obvious disadvantages of the combat exclusion is the denial of equal opportunities for advancement. Speaking candidly to the Armed Services Committee, General Merrill McPeak, the Air Force Chief of Staff, conceded that a double standard exists. In his opinion, “combat-exclusion law is discrimination against women that … works to their disadvantage in a career context.”20

Only eleven women hold the rank of general or admiral out of a total of 1,021 positions in all branches.21 Because the system of military promotion favors officers with combat service, most women are excluded from the higher echelons of military service.22 There are many examples of women who are blocked from promotion because of the combat exclusion. Ensign Caren Ritter is a Naval Special Operations Officer and a diver on the U.S.S. Hoist, a rescue and salvage ship.23 She is one of two women serving alongside 113 men. Ensign Ritter took the same training and tests as other Navy Special Operations divers and Navy SEALS. The training and work is physically rigorous. The U.S.S.

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II. Encouragement of Sexual Harassment of Women in the Military

An even more difficult problem than inequality in employment opportunities is a pervasive attitude in the military that women are second class citizens and that it is therefore acceptable to discriminate against them. Retired Marine Colonel Dr. Paul Roush, a leadership professor at the U.S. Naval Academy, believes that reducing sexual misconduct will be difficult until servicewomen are no longer excluded from combat.29 “Women as professionals will not be fully legitimized until the combat exclusion is eliminated,” he

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said. "Its continuation perpetuates second class status and expectations of substandard performance for women." The Washington Post reported that Admiral Kelso, Chief of Naval Operations, said that "the Navy may need to allow women to serve on all Navy warships to eradicate sexual harassment. The absence of women on ships has contributed to a 'male culture' and results in women being treated with less respect than male sailors." Thousands of male and female sailors also perceive a relationship linking the combat exclusion law with second class status for women. This often results in tolerance of sexual harassment. Many women suffer sexual harassment silently rather than risk reprisals for reports which will probably be ignored.

III. THE CONSTITUTIONAL CHALLENGE

This article poses a challenge to the law excluding women from combat as a result of the two major negative effects of the law:

(1) discrimination against women in employment opportunities; and
(2) encouragement of sexual harassment of women in the military.

The exclusionary law is based upon a gender classification which results in discrimination against women as a class of citizens. In Craig v. Boren, the Supreme Court established a mid-level scrutiny test for discrimination cases based on gender. To be constitutionally valid, laws involving gender classifications must serve "important governmental objectives" which are "substantially related to the achievement of those objectives." In order to determine whether the law is substantially related to the governmental objective, the court must evaluate whether gender is an accurate proxy for the characteristics or traits which gender is purported to represent.

The Supreme Court acknowledged the Craig test as the relevant inquiry in gender classification cases in Rostker v. Goldberg. However, the Court decided Rostker on the basis of extreme deference to Congress rather than upon the application of the Craig test, thereby setting a precedent in support of such deference to Congress in military matters. As a result, changes in the law excluding women from combat would likely come from the legislature rather than the courts. Ultimately, the goal of both the legislature and the judiciary is to effectuate laws which are based upon the Constitution. Therefore, the Craig test serves as the foundation for this constitutional analysis of the law excluding women from serving in combat positions.

The constitutional analysis suggested here differs from that of Craig because it expands the analysis in two ways. First, in considering the important governmental purpose, this article will also consider underlying purposes implied by the reasons articulated for excluding women from combat. Second, in considering the substantial relationship of the law to the achievement of that purpose, this article will utilize a total of three analysis techniques. These techniques are:

(1) to determine whether gender is an accurate proxy for the characteristic or trait which the law seeks to define;
(2) to determine whether the classification based upon gender is
   (a) underinclusive by not encompassing some individuals within a class who have the characteristics or traits upon which the law is based, or
   (b) overinclusive by encompassing within the class individuals who do not exhibit those characteristics or traits; and
(3) to determine whether a gender-neutral rule based directly on that characteristic would be less effective in achieving the government's goal.

IV. BASES FOR EXCLUDING WOMEN

Providing a combat-ready military capable of defending our nation is the underlying important governmental purpose of the military. The same reason is espoused for excluding women from combat positions. Without question, this is a legitimate, important governmental objective. The military has given eight reasons to explain why excluding women from combat positions is substantially related to achieving that purpose. This article divides those reasons into three classes. The first class includes perceptions about women. This class encompasses the four justifications most often espoused by the military for the exclusion. The second class involves three differences between men and women which lead to the perceptions discussed in class one. The third class involves the effects of women in combat on families.

A. CLASS 1 - Perceptions: The Four Most Frequently Argued Reasons for Excluding Women from Combat

Arguments given by the military in recent polls for excluding women from combat were that American forces would appear more vulnerable to enemy forces which are comprised solely of men, that men would feel compelled to protect women soldiers, and that both men and women would suffer a loss of privacy. A fourth argument, given by the Presidential Commission on the Assignment of Women in the Armed Forces, is that a negative impact on unit cohesion would result.

Perception of Greater Vulnerability to All-Male Enemy Forces. One of the most frequently espoused reasons for excluding women from combat positions is that American forces would be perceived as more vulnerable to all-male enemy forces. Thus, an underlying governmental purpose of the law is to avoid a perception of vulnerability by enemy forces. For the purposes of discussion, this underlying purpose will be accepted as a subcategory of the important governmental purpose of providing for the national defense.

There is weak congruence between a gender classification
The underlying purpose of the law excluding women from combat positions reflected in this reason could be either to protect those who need protection or to respond to men’s feelings about women. Responding to men’s feelings about women has been determined not to constitute an important governmental purpose. 49

For purposes of discussion, an underlying goal of protecting those in need of protection will be accepted as ancillary to the overriding purpose of providing for the national defense. However, gender is an inaccurate proxy for the need to be protected.

Thirteen women were killed and two taken prisoner in Operation Desert Storm while serving in non-combat positions. 50 The law excluding women from combat did not and could not accomplish the goal of protecting all of those who need protection. Thus, gender classification is underinclusive because non-combat positions are not included. The law is additionally underinclusive because some men need more protection than some women. Men have taken extraordinary risks to protect other men in combat, and they have frequently received medals of honor for doing so. Moreover, the law is overinclusive because not all women need to be protected. Thus, gender does not distinguish those who need protection from those who do not.

A gender-neutral rule requiring each person, male or female, to be tested and qualified for the position to which they are assigned and rules providing protection to those requiring it, regardless of their sex, would be more effective in achieving the government’s purpose of protecting those who need it. Therefore, the law excluding women from combat positions is not substantially related to achieving the purpose of providing protection for those in need of protection.

Moreover, classification, based on gender, into protectors and protected groups is ineffective and overinclusive. Not all males are protectors of females as is evidenced by the problems of sexual harassment and rape of servicewomen by servicemen. 51 “[R]ampant sexual violence” is referred to as “[t]he military’s best-kept secret” by Representative Patricia Schroeder (D-Co.). 52 Sexual harassment is a major concern in the loss of privacy argument favoring the exclusion law.

Loss of Privacy for Both Men and Women. The third most frequently articulated reason for excluding women from combat positions is the loss of privacy for both males and females. Privacy in this context includes both providing general privacy by avoiding visual contact to curb sexual attractions and preventing rape and sexual harassment. 53

Preventing a forced loss of general privacy has been determined to be an important governmental purpose. 54 Realistically, it may be impossible to provide privacy in some combat positions. If such positions are not voluntary for both males and females and if full disclosure and acceptance of the lack of privacy is not obtained, the government would be liable for a violation of a person’s constitutional right to privacy. In Bell v. Wolfish, the Supreme Court held that, to the extent necessary to achieve a legitimate goal, some privacy rights may be restricted. 55 However, the Court continued that there was a duty to ascertain that such restrictions represent reasonable means of achieving these goals. 56 Gender classification is not totally irrational for this purpose, and gender separation represents an accurate proxy for privacy in this situation.

The law, however, is overinclusive. Positions from which women are excluded include positions where as much privacy can be offered as is available in non-combat positions. 57 Changes in the law excluding women from combat would likely come from the legislature rather than the courts.
privacy in the majority of combat positions.

While there may be a small number of positions, such as ground combat, for which there are no gender-neutral solutions, there is no justification for excluding women from all positions. Privacy in this context also refers to preventing rape and sexual harassment. The prevention of rape and sexual harassment has been held to be important governmental purposes.59 Gender, however, is not an accurate proxy for discipline. Representative Patricia Schroeder (D-Co.) is outraged that Congress would suggest that eliminating the presence of women is a solution to the problems of rape and sexual harassment.60 Removing the victims of crime is not a reasonable solution to combating crime. The result is to punish the victim rather than the perpetrator.

Leadership, commitment to change, and uncompromising punishment of violators were identified as the keys to overcoming the problems of drug abuse and racial discrimination in the armed forces.61 These are also gender-neutral solutions to overcoming the problems of sexual harassment and rape. According to Dr. Paul Roush, “sexual harassment is not primarily about sex—it is about power. Harassment is an attempt by members of the charter group to tell those seeking membership in the group that they do not belong. Its intent is to ensure that individuals in the membership-seeking group are kept vulnerable.”62 Thus, laws and policies which do not tolerate rape and sexual harassment, rather than those which eliminate the presence of women, would be a more effective means of achieving the governmental purpose of preventing rape and sexual harassment.

Negative Impact on Unit Cohesion. A fourth reason frequently espoused by the military for excluding women from combat positions is that there would be a resultant negative impact on unit cohesion.53 Unit cohesion has been defined as the power of a group to act as a single unit in pursuit of a common objective.64 For purposes of this discussion, it will be assumed that unit cohesion contributes to the overriding goal of military readiness to provide for the national defense and is, therefore, an important governmental purpose.

Gender is an inaccurate proxy for the ability to bond. In an analogous situation, race was used as a proxy for leadership and the ability to bond. Integration of African-American men into the military was resisted by the military leaders. Some felt that leadership was not “imbedded in the negro race.”65 There was great concern that “white [men would] not accept a negro in a position of authority over him.”66 African-Americans, however, were able to prove that race was not a valid indicator of leadership ability.67

In the same way, the integration of women into the military was resisted.68 One critic remarked that enrolling women into the Naval Academy was “poisoning the preparation of men.”69 According to General Carl E. Mundy, Jr., Commandant of the Marine Corps, the male bonding issue goes to the heart of the combat exclusion.70

Kenneth Karst suggests that

Historically . . . the academies and a few other areas of the military—Marine Corps boot camp, airborne training—have provided a ritualistic rite of passage into manhood. It was one small area of our society that was totally male. Women now have a full range of choice, from the totally female—motherhood—to the totally male—the academies, for example. Males in the society feel stripped, symbolically . . . .71

Many men resist initial integration because they find it threatening to their manhood. However, relying upon an ideology of manhood which subordinates women to justify excluding women from any form of government service is unconvincing and unjust.

Gender-neutral rules would be more effective in achieving the governmental purpose of fostering positive unit cohesion. Martin Binkin, a senior fellow at the Brookings Institute, believes that “[w]omen will continue to have problems in the military so long as they are a distinct minority.”72 As women become more commonplace in combat roles, men will learn to relate to them as part of the team rather than as an unwelcome minority. Men have grown accustomed to working alongside women in non-combat military life and in male bastions of civilian life such as in police departments, in fire departments, on construction sites, and in the courts.

The feeling of inclusion and of being a part of a team is a key element in unit cohesion. Women and men train and serve together. They are asked to become a team. Yet both know that when their unit is called into combat, the unit will split. Without regard to similarities or superiorities in skill, knowledge, or competence, the men will go into combat and the women will not. Rather than fostering unit cohesion, the law excluding women from combat inhibits such cohesion. Therefore, the law excluding women from combat positions is not substantially related to achieving this purpose.

Confidence in the competence and ability of other team members to rescue a wounded member of a unit also contributes to unit cohesion. These concerns relate to the second class—differences between men and women.

B. CLASS 2 - Differences between Women and Men

Surprisingly, physical differences, pregnancy, and psychological differences are espoused as reasons for excluding women from combat less frequently than the reasons previously discussed.73 However, these differences, real and imagined, underlie the perceptions about women and the effects of allowing women into combat positions.

Physical Differences. Many argue that, because women are generally physically weaker than men, women in combat would weaken the military. Author Brian Mitchell claims that the rigorous physical standards of the military would have to be lowered for women to qualify for combat units, resulting in a weaker military.74 John Luddy, a Marine Corps
Reserve Infantry officer and defense analyst at the Heritage Foundation, contends that "[t]he military is not a jobs program, nor is it an equal opportunity program . . . . Putting women in combat will weaken the fighting ability that is the key to winning battles and wars. It is not worth a single life to provide equal opportunity."75

Assuring that service personnel have the physical capability to competently perform their jobs is, therefore, an implied purpose underlying this reason for excluding women from combat positions. Assuring the physical capacity to competently perform is part of military readiness and thus an important governmental purpose.

Substantial evidence supports the view that more men than women would qualify for certain physically strenuous positions. Women rarely have the physical strength of men. Men are generally taller, heavier, and more muscular than women.76 Female dynamic upper torso muscular strength is approximately fifty to sixty percent that of males.77 Female aerobic capacity is approximately seventy to seventy-five percent that of males, requiring the average female to work at a higher percentage of her aerobic capacity and making her more susceptible to fatigue than the average male.78 Women are also at greater risk of exercise-induced injuries than men.79 Therefore, as compared to men, women are generally at a disadvantage when performing tasks requiring high levels of muscular strength and aerobic capacity.

This disparity in strength is not trivial in a statistical sense, yet it can hardly form the basis for use of gender lines as a classifying device. Gender is being employed as an inaccurate proxy for physical competence tests. Some military personnel dismiss arguments based on physical strength as irrelevant. According to Newton N. Minnow, "[i]n today's technological fighting, with laser guided bombs, heatseeking missiles, Tomahawks, satellites, AWACS, Hellfires, SLAMS, and Patriots, the traditional military definition of 'combat' is hopelessly artificial and obsolete."80 Air Force General Jeanne Holm agrees that "intellect has replaced brawn" as warfare has become more technological in nature.81

The lines distinguishing combat and combat support positions are blurred. During Operation Desert Storm, women were allowed to fly Air Force refueling planes, officially a "combat-support" position. Yet some observers say this is more dangerous than flying a bomber, which is a "combat" position.82 Lieutenant General Thomas Hickey, Deputy Chief of Staff for personnel of the Air Force, told the House Armed Services Committee that "the one thing I am sure of is there is probably not a combat job in the United States Air Force that women cannot do."83 According to the National Women's Law Center, "[w]omen now train men to fly combat aircraft, serve as test pilots for combat planes, and experience the stress of flying into enemy territory in slower, more vulnerable aircraft."84

In ground combat, a woman would need the ability to throw a grenade beyond the bursting radius and the ability to rescue a wounded soldier. However, many of the combat positions traditionally closed to women, such as flying F-16 fighters85 and commanding aircraft carriers, require less physical strength than positions now held by women in non-combat positions.86 In fact, because of the inverse relationship between height and G-tolerance,87 women pilots enjoy physiological advantages over men.88 Thus, a law which excludes women from all combat positions is overinclusive because some combat positions do not require physical strength. It is probably true that in hand-to-hand combat a few more people would be lost because women are not as strong, admitted Dr. Roush. "However on balance, fewer lives would be lost for all combat."89 Hand-to-hand combat is extremely rare. In most situations other skills are more important than strength. Dr. Roush points out that "people do not die because they cannot do pull ups."90

The law is also underinclusive because some differences, though more common to one gender, are not gender-specific. Representative Schroeder stated in a hearing before the Subcommittee on Military Personnel and Compensation that "[s]ome women can indeed carry as much weight, throw as far, and run as fast as some men, and some women exceed some men in physical strength and endurance."91 American women are slightly larger than the Vietcong and North Vietnamese men that the U.S. forces opposed in the Vietnam War. Dr. Roush suggests that had the U.S. been able to "settle that conflict with a weight lifting contest the outcome might have been very different."92

Gender-neutral regulations which require tests of physical ability related to requirements of that position would constitute a more effective means of achieving the government's purpose of assuring the physical capacity of military personnel to skillfully perform in combat. Brigadier General Evelyn Foote offers a reasonable resolution - "Never compromise standards. Be sure that anybody in any MOS [Military Occupational Specialty] can do everything required in that MOS."93

Another consideration related to strength is the way in which the equipment which is used has been designed. "For most military equipment, we find out how strong the average man is and then write specifications to that standard. As new

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equipment is contemplated the initial design phase could, instead, incorporate the strength of the average woman . . . . The equipment would be easier for everybody to operate," concluded Dr. Roush. Some may argue that the increased costs are not worth the few women who would qualify. However, fitness tests are already required so the costs of matching skills with the MOS would be minor. New equipment is constantly being designed and implemented. Therefore, incorporating the strength of the average woman into the design phase would not substantially increase cost. In addition, cost has been held as an invalid justification for discrimination.

Therefore, the law excluding women from combat positions is not substantially related to assuring that service personnel in combat positions have the physical capability and competence to perform the requirements of the position.

Pregnancy. Another physical difference between men and women which is used to justify the exclusion of women from combat positions is that women can become pregnant. Opponents of women in combat argue that, because pregnancy is gender specific, women are not "similarly situated" for equal protection purposes on the issue of combat. Pregnancy results in lost time and diminished troop readiness. The germane concerns, therefore, are lost time and troop readiness rather than pregnancy.

Gender is an accurate proxy for pregnancy but not an accurate proxy for lost time. Lost time includes pregnancy, hospitalization, confinement, desertion, and other unauthorized absences.

Gender classification is underinclusive because males also contribute to time loss which effects combat readiness. Men have quadruple the lost time rate of women during their first enlistment. Dr. Roush points out that true lost time should include time taken from productive work by the infrastructure as a result of disciplinary problems. That infrastructure includes psychologists, substance abuse counselors, chaplains, trial lawyers, legal clerks, Judge Advocate General reviewers, commanding officers, witnesses, operators of the brigades and stockades, and medical personnel. He speculates that the true lost time rate of men is probably ten times that of women. Moreover, the law banning all women from combat positions because of lost time due to pregnancy is overinclusive because not all women will become pregnant.

Gender-neutral rules relating to lost time would be more effective in achieving the government's purpose of reducing lost time and thereby increasing military readiness. Therefore, the law excluding women from combat is not substantially related to achieving the asserted governmental purpose.

Psychological Differences. Another argument used to justify the exclusion of women from combat is that women do not have the psychological makeup to win in combat. Neither the intellectual capabilities nor the leadership abilities of women has been questioned. Women have proven themselves capable in these areas in non-combat positions. The argument centers on whether women will have the aggressiveness required to go into combat and kill. This reason suggests an underlying purpose of providing and maintaining mentally and psychologically fit military personnel. The nexus between providing for the national defense and this underlying reason is sufficient to accept it as an important governmental purpose.

However, there is weak congruence between gender and the characteristic of aggressiveness which gender is purported to represent. Phyllis Schlafly, a writer for the Heritage Foundation, fears that after expensive training in peace time, many women would purposefully get pregnant to avoid service during a battle. Dr. Roush suggests that many are comparing actual women to ideal men. It is estimated that during World War II, only fifteen percent of the infantry soldiers fired their weapons during action with the enemy. During the Vietnam War, thousands of men avoided the draft, even if it required fleeing the country to do so. Some men and women would undoubtedly avoid combat. Although specific methods of avoiding combat may be gender specific, the problem of individuals avoiding combat is not. In fact, Navy data shows that academy women stay in the Navy longer following graduation than their male counterparts. Thus, the law excluding women from combat is underinclusive in that men as well as women may avoid combat. It is also overinclusive because not all women would avoid combat.

Can women behave aggressively to find and kill the enemy? Views about women's aggressiveness differ greatly. General Robert Barrow believes that "the very nature of women disqualifies them for doing it. Women give life, sustain life, nurture life, they do not take it." Dr. Roush believes that a woman's aggressiveness, like a man's, depends upon what is socially acceptable to the place and time. "There are places that women do things that would put to lie the notion that women cannot do harsh things," he opines. "In this country - without discussing this in terms of whether it is right, wrong, or anything else - [look at] abortion. Like fun they can't take life - they take it 1.6 million times a year in this country. Women can kill." It is true that there are more violent crimes perpetrated by males than females. Prison populations attest to this. Misdirected aggression, however, is not conducive to success in combat.

Constitutionally, classification by gender is an improper criteria for all but a limited number of positions.
The mental and psychological factors which create good leaders and followers and which allow service personnel to succeed in combat are not gender specific. From his experience as a prisoner of war, Admiral James Stockdale said that the "true heroes are not those who blaze along in a moment of superb performance, but those who endure interminably when there is no light at the end of the tunnel."107

Gender classification is overinclusive in that women who are ready, willing, and able to fight and lead are excluded from doing so. In addition, gender classification is underinclusive because men who are not ready, willing, and able emotionally or psychologically are not included.

Gender-neutral rules of training and testing would be more effective in providing emotionally and psychologically fit military personnel. Thus, the law excluding women from combat is not substantially related to the purpose of providing psychologically capable combat troops.

C. CLASS 3 - The Effects on Families

Another reason articulated for maintaining the law excluding women from combat positions is the effect on families, particularly children.108 This concern, associated with mothers in the military, generally becomes more acute with longer deployments and the danger associated with combat positions.

The implied goal suggested by this reason is to protect and provide for the welfare of children. Jeannie Ralston, author of Women’s Work, opined that “o]nly wimps whine about mothers of young children going into a war zone.”109 The Gulf War left children from 17,500 families without their custodial parents.110 Jean Bethke Elshtain questioned how anyone could consider this a feminist victory.111

Gender is an accurate proxy for motherhood. Statistical evidence does support the view that more women than men are the primary caregivers of children. However, excluding all women is an overinclusive classification because not all women are mothers. Moreover, excluding only women is an underinclusive classification because fathers who are the primary or only caregiver are not included.

A gender-neutral means of providing exceptions from combat positions for primary caretakers of children would more effectively achieve the goal of providing for the welfare of children by protecting their primary caregiver.112 Therefore, the law excluding women from combat is not substantially related to achieving the goal of providing for the welfare of children.

The possibility of compulsory military service complicates this issue. Allowing all women to voluntarily choose combat positions, while not allowing the same choice for males, is often suggested as a possible solution. This solution resolves only the problem of unequal employment opportunities. Class discrimination, unequal treatment, problems of resentment, and attitudes of second class status which result as a by-product of unequal treatment would not be resolved.

Legislation which would force mothers to leave their children to serve in the military would be an unacceptable and drastic change to most of society.

Gender-neutral rules allowing exemptions for primary caregivers from selective service or the continuation of the all volunteer military would more efficiently achieve the goal of providing for the welfare of children. The fear that the draft may be reinstated and that exemptions would not be available may be the greatest societal barrier to change of this law.

CONCLUSION

Women have the physical and psychological ability to perform well in combat. The reasons articulated for excluding women from combat positions would not be sufficient justifications for a civilian employer to legally close jobs to women so they should not be sufficient justifications for the military to close jobs to them. Simply being male is not a bona fide occupational qualification.

Constitutionally, classification by gender is an improper criteria for all but a limited number of positions. The only constitutionally valid reason existing for the exclusion of women from combat is to provide the constitutional right of privacy. Other more narrowly tailored solutions can and should be utilized to achieve the goal of privacy in all situations where other alternatives exist. Classification by qualification would be more effective criteria for determining who should serve in almost all combat positions.

The Supreme Court, however, is unlikely to overturn the law and policies or to require a narrowing of the broad exclusion because of deference to Congress in decisions involving military affairs. Questions about the meaning and application of equal rights to gender issues are not the monopoly of the courts. These issues are continually debated in all branches of government and in society at large.

Progress may come through military establishment changes in policy as is evidenced by the overturning of the regulation barring women from flying fighter planes in combat. Even if this step was taken only to appease the public outrage over the sexual harassment of women that has traditionally been accepted in the military, it represents a major step toward achieving equality in the military. However, more progress is required. The legislature, rather than the courts, and each military branch will most likely decide the ultimate issue of women's roles in combat because of the broad implications as to the role of women in society at large.

Legal debate on the meaning and application of equal rights has a significant influence on legislative and social reform in all areas of equality. It is possible for the courts or the legislature to balance societal needs, constitutional rights of privacy, equality, and national defense. Reformation of the law and policies which currently exclude women from all combat positions is a vital step in that process.

Women represent one-half of the brain power, leadership ability, and physical strength of our nation. Removing
barriers to women serving in combat positions will strengthen, not weaken, our defense capabilities by allowing the military to assign the best qualified person for each position.

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Sandra G. Pike is entering her final year at the University of Baltimore School of Law and is a member of the Law Forum staff. She wrote this article under the supervision of Professor Jane Murphy. The author gratefully acknowledges the valuable contributions of the supervising professor, and the interviewees, Dr. Paul Roush and Ensign Caren Ritter.

Endnotes:
1U.S. Const. amend. XIV, § 1.
3Id.
5In Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872), the Supreme Court affirmed a decision denying Myra Bradwell's application for a license to practice law because of her gender.
6In Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874), the Supreme Court ruled that the right to vote was not among the "privileges and immunities of United States citizenship." Id. at 178. Therefore, states were not constitutionally prohibited from denying women the right to vote by placing "that important trust to men alone." Id.
7In Hoyt v. Florida, 368 U.S. 57 (1961), the Court upheld a Florida law allowing, but not requiring, women to serve on juries. The law was challenged because an all male jury denies a woman a trial by a jury of her peers.
8The women's movement as used here is a broad general term referring to all women and men who sought or are seeking social and legal change in the treatment and status of women. Women's organizations vary widely on the political spectrum. Some organizations describe themselves as socialist or Marxist-feminist, some as liberal feminist, and others as conservative. The views of women are as diverse as the women themselves. One of the few areas in which there is wide agreement among women and women's organizations is the acceptance of the legal theory of equal rights based on equal performance. See J. Holle and E. Levine, Rebirth of Feminism, 17-107 (1971) for a description of the history and status of the liberal and radical feminist organizations.
9This method, known as storytelling, has been popularized by feminist scholars as an effective tool for raising consciousness. Phylis Goldfarb, A Theory - Practice Spiral: The Ethics of Feminism and Clinical Education, 75 Minn. L. Rev. 1599, 1630-34 (1991).
10A constitutional challenge is unlikely in view of the risk of reprisals to women for challenging the law balanced against the likelihood that the judiciary would follow the precedent of according extreme deference to Congress in military matters established in Rostker v. Goldberg, 453 U.S. 57 (1981). Nonetheless, courts are the forum in which equal rights application is generally debated and articulated. Because legal concepts of...
equality continue to have a significant influence on legislative and social reform, and because these concepts are constantly evolving, it is important to evaluate the constitutional validity of the law and policies excluding women from combat.

10 National Women’s Law Center, Assignment of Women in the Military (1992). (The percentage of positions open to military women are as follows: 52% Army; 59% Navy; 97% Air Force; 20% Marines.)


12 10 U.S.C. § 6015 amended by The National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190 § 531 (1991). “The Secretary [of the Navy] may prescribe the kind of military duty to which women may be assigned and the military authority that they may exercise in the Navy and Marine Corps. However, women may not be assigned to duty on vessels engaged in combat missions other than as aviation officers… and similar classifications not expected to be assigned to combat missions.” Id.


17 Id. The Risk Rule focuses on risk of direct combat, exposure to hostile fire, and capture as proper criteria for closing non-combat positions to women. Each branch of the service interprets the Risk Rule according to its mission.

18 This article will use the word “law” to refer to both the actual law and the salutary policies excluding women from combat positions since a change in the law would necessarily result in a change of related policies as well.


20 Id. at 836.

21 Id.

22 Telephone Interview with Ensign Caren Ritter (Mar. 11, 1993).


26 Id.

27 Griffin, supra note 20, at 836-37.

28 Personal Interview with Paul Roush (Col. USMC Ret.), Professor of Leadership at the U.S. Naval Academy in Annapolis, Maryland (Feb. 22, 1993) [hereinafter Roush Interview].

29 Griffin, supra note 20, at 838 (quoting Dr. Paul Roush).


31 Lieutenant Paula Coughlin repeatedly reported to her superior, Rear Admiral Jack Snyder, that on September 7, 1991, in the Las Vegas Hilton Hotel, dozens of Navy and Marine Corps pilots sexually molested her and twenty-five other women. The report, like many others, was almost ignored. No demands for change or disciplinary actions which would portray a lack of tolerance for this type of behavior were voiced until Lieutenant Coughlin went public. On June 24, 1992, she appeared on the ABC evening news and Prime Time Live - nine months after the first complaint was made. Reports, hearings, and changes have resulted. Yet Ensign Ritter relates that many sailors blame Lieutenant Coughlin, the victim, for betraying the military. Supra note 23.

32 429 U.S. 190 (1976) (Supreme Court struck down an Oklahoma statute forbidding the sale of 3.2% beer to females under the age of eighteen and males under the age of twenty-one).

33 Id. at 197.

34 Id. at 198. See also Reed v. Reed, 404 U.S. 71, 75-76 (1971).


37 The accurate proxy test has been utilized to determine whether the law is substantially related to the important governmental purpose. Craig v. Boren, 429 U.S. 190 (1976).


39 The neutral rule effectiveness test has also been used to determine whether there exists a substantial relationship between an important governmental purpose and the gender classification. Michael M. v. Superior Court, 450 U.S. 464, 488 (1981) (Brennan, J., dissenting); Id. at 499 (Stevens, J., dissenting); Rosker v. Goldberg, 453 U.S. 57, 94 (1981) (Marshall, J., dissenting); Navedo v. Preiss, 630 F.2d 636 (8th Cir. 1980); United States v. Hicks, 625 F.2d 216 (9th Cir. 1980); Meloen v. Helgemoen, 564 F.2d 602 (1st Cir. 1977), cert. denied, 436 U.S. 950 (1978).


41 U.S. Const. art. I, § 8.


43 Commission, supra note 17, at 115. Out of 6,109 flag and general officers queried as to whether women should be allowed to serve in combat positions, 90% of the 3,500 responding gave the negative impact on unit cohesion as their primary reason for opposition.

44 Sadler, supra note 43, at 51.


46 Sadler, supra note 43, at 52.
Griffin, supra note 20, at 837.
50Commission, supra note 17, at 110 (statement by Newton N. Minnlow, Commissioner).
51Roush Interview, supra note 29.
53Commission, supra note 17, at 77-79.
54In Bell v. Wolfish, 441 U.S. 520 (1979), the Court held that requiring male prisoners to shower and use bathroom facilities in the presence of female officers violated the prisoners' constitutional rights of privacy.
55Id. at 546.
56Id.
58Id.
60Gender Discrimination in the Military: Hearings on HASC 102-60 Before the Military Personnel and Compensation Subcommittee and the Defense Policy Panel of the House Committee on Armed Services, 102d Cong., 2d Sess. (1992) (statement of Patricia Schroeder (D-CO)).
61Id. at 2 (statement of Beverly Byron, Chairman of Military Personnel and Compensation Subcommittee).
62Roush, Behavior or Culture, supra note 31.
63Sadler, supra note 43, at 52-53.
64Paul Roush, Women and Cohesion in the Navy, Address Before the Women Officer's Professional Association Professional Development Symposium (July 8, 1992) [hereinafter Roush, Cohesion] (definition found in a Behavioral and Leadership text compiled at West Point).
66Id. at 541 (quoting letter from Board of Naval Officers to Frank Knox, Secretary of the Navy).
67Id.
68Griffin, supra note 20, at 838.
69Karst, supra note 65, at 542.
70Griffin, supra note 20, at 837.
71Karst, supra note 65, at 545 (quoting The Washingtonian, Nov. 1979).
72Griffin, supra note 20, at 838.
73See Sadler, supra note 43 and accompanying text.
75Griffin, supra note 20, at 836.
78Id. at 31.
80Commission, supra note 17, at 110 (statement of Commissioner Newton N. Minnlow).
82Griffin, supra note 20, at 836.
84Id.
85Regulations barring women from becoming fighter pilots were overturned in April 1993 in response to the adverse publicity which surrounded the Tailhook scandal. Achiron, supra note 25.
86Snyder, supra note 81, at 434 (1991). Women are already lifting as much weight on stateside tugboats as they would while lifting on a destroyer or piloting a fighter.
87G represents a unit of force equal to the force exerted by gravity on a body at rest and is used to indicate the force to which the body is subjected when accelerated.
88Paul Roush, Rethinking Who Fights Our Wars - Any Way, Address at Harvard University [hereinafter Roush, Rethinking].
89Id.
90Roush Interview, supra note 29.
91Snyder, supra note 81, at 433 (1991).
93Commission, supra note 17 (Testimony of Brigadier General Evelyn Foote, USA (Ret.) Before the Commission, June 25, 1992).
94Commission, supra note 17, at 11.
96Roush, Rethinking, supra note 88, at 7.
97Roush Interview, supra note 29.
98Id.
99Id.
101Roush Interview, supra note 29.
102Id.
103Id.
104Roush, Cohesion, supra note 64, at 16.
106Roush Interview, supra note 29. Abortion is such a politically charged issue that some, whether pro-life or pro-choice, may take offense at the mention of abortion and miss the significance of this quote. The salient point is that for most people whether they consider abortion to be killing or an act of aggression depends upon what is socially acceptable in that time and place. The same holds true for what one is willing to do in combat.
108Commission, supra note 17, at 74.
110Id.
111Id. at 15.