

ARTICLES

Physical-Strength Rationales for De Jure Exclusion of Women from Military Combat Positions

Maia Goodell[†]

I. INTRODUCTION

In his first State of the Union Address, President Obama pledged, “This year, I will work with Congress and our military to finally repeal the law that denies gay Americans the right to serve the country they love because of who they are. It’s the right thing to do.”¹ Since its foundation, our country has struggled with the legal and social challenge of defining the “right thing” with respect to a perceived tension between a desire for military effectiveness on the one hand, and concerns over the inequality arising from blanket rules classifying certain citizens as ineligible for the privilege of citizenship that is military service because of “who they are” on the other.

Through World War II, the U.S. military built up during wars and narrowed at their close, returning many “citizen soldiers” to civilian life. From the earliest days of our military, the post-war narrowing of forces restricted military service opportunities on the basis of race, sex, and

[†] Maia Goodell is a partner at Vladeck, Waldman, Elias & Engelhard, P.C. L.L.M., Yale Law School, 2006; J.D. University of Michigan, 2001. Before attending law school, she was a Surface Warfare Officer in the U.S. Navy, serving on the USS *Abraham Lincoln* and USS *Port Royal*. She is a member of the Committee on Military Affairs and Justice of the New York City Bar. The views expressed in this Article are those of the author and are not intended to convey the position of Vladeck, Waldman, Elias & Englehard; the New York City Bar; or the Committee on Military Affairs and Justice.

1. President Barack Obama, State of the Union Address (Jan. 27, 2010), <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address> (applause omitted). High-level military reaction was mixed; in Congressional testimony, Chair of the Joint Chiefs of Staff, Adm. Mike Mullen, backed the repeal, but the Army and Air Force chiefs did not. Ed O’Keefe, *Air Force, Army Leaders Seek More Data on ‘Don’t Ask, Don’t Tell’*, WASHINGTON POST, Feb. 24, 2010, at A11.

other classifications.² In 1792, at the end of the Revolution, Congress restricted militia service to “free able-bodied white male citizens.”³ Even after World War II, some military leaders resisted racial integration, citing concerns similar to those advanced today about the integration of gay service members; for example, General George Marshall, the Army Chief of Staff during the early 1940s, stated, “[E]xperiments within the Army in the solution of social problems are fraught with danger to efficiency, discipline, and morale.”⁴

Military sociologists document a shift between World War II and the present day, where the buildup of citizen soldiers during wartime is now replaced with a standing force (of variable size) of professionals serving their country.⁵ Perhaps in part as a result of this transition and in part as a result of the evolution of social attitudes, society—and the military with it—began to find earlier exclusions unacceptable. In 1948, President Truman ordered the military to allow African-American men to serve on equal terms.⁶ Years of de facto segregation and discrimination followed, but some argue the military ultimately achieved the integration of African-Americans more successfully than civil society, or indeed drove desegregation in nonmilitary areas.⁷

President Obama now calls to repeal another exclusion, the law prohibiting service by those who are openly gay, termed “Don’t Ask Don’t Tell” (DADT).⁸ Proponents explained DADT as a compromise between full repeal and full enforcement of the ban on gays in the mili-

2. See James Burk, *Military Mobilization in Modern Western Societies*, in HANDBOOK OF THE SOCIOLOGY OF THE MILITARY 111 (Giuseppe Caforio ed., 2003); CHARLES C. MOSKOS & JOHN SIBLEY BUTLER, *ALL THAT WE CAN BE: BLACK LEADERSHIP AND RACIAL INTEGRATION IN THE ARMY WAY* (1996).

3. Militia Act, ch. 33, § 1, 1 Stat. 271, 271 (1792).

4. Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 519–20 (1991); see *Watkins v. U.S. Army*, 721 F.2d 687, 691 (9th Cir. 1983) (Norris, J., concurring).

5. See generally HANDBOOK OF THE SOCIOLOGY OF THE MILITARY (Giuseppe Caforio ed., 2003).

6. Exec. Order No. 9981, 3 C.F.R. 722 (1948).

7. See, e.g., MOSKOS & BUTLER, *supra* note 2; GAIL BUCKLEY, *AMERICAN PATRIOTS: THE STORY OF BLACKS IN THE MILITARY FROM THE REVOLUTION TO DESERT STORM* (2001); F. Michael Higginbotham, *Soldiers for Justice: The Role of the Tuskegee Airmen in the Desegregation of the American Armed Forces*, 8 WM. & MARY BILL RTS. J. 273 (2000); JAMES E. WESTHEIDER, *FIGHTING ON TWO FRONTS: AFRICAN AMERICANS AND THE VIETNAM WAR* (1997); HERMAN GRAHAM III, *THE BROTHERS’ VIETNAM WAR* (2003); John L. Newby, II, Note, *The Fight for the Right to Fight and the Forgotten Negro Protest Movement: The History of Executive Order 9981 and Its Effect Upon Brown v. Board of Education and Beyond*, 83 TEX J. C.L. & C.R. 83 (2004).

8. Obama, *supra* note 1.

tary.⁹ By changing the regulation into a statute, however, DADT removed the ability of the military and Department of Defense to set evolving policy on this issue.¹⁰ By all accounts, thousands of service members, disproportionately women, were still discharged for homosexuality.¹¹

The segregation of African-Americans and exclusion of gay Americans have appropriately come under fire, but another rule has remained oddly under the radar: the exclusion of women from combat. About the same time DADT became law, Congress and the military debated combat-exclusion rules for women.¹² The history of these rules combines elements of the history of racial segregation and of the ban on gays in the military, as well as unique features. Women served in varying numbers and capacities in all of the U.S. wars.¹³ In World War II, a significant number of women served in segregated auxiliary corps.¹⁴ At the close of World War II, Congress passed a law that abolished the separate auxiliary corps and integrated women into the regular force, but imposed new, draconian restrictions on women's service.¹⁵ Women were excluded from combat in aircraft and naval vessels; other provisions restricted promoting women and placed a 2% cap on female personnel.¹⁶ Meanwhile, the Army excluded women from combat roles by internal regulation, which was later justified on the basis of the statute.¹⁷

9. See, e.g., DAVID F. BURRELLI, CONG. RESEARCH SERV., RL 40782, "DON'T ASK, DON'T TELL: THE LAW AND MILITARY POLICY ON SAME-SEX BEHAVIOR 2 (2009), available at <http://www.fas.org/sgp/crs/misc/R40782.pdf>.

10. The statute, 10 U.S.C. § 654(b), codifies "Don't Tell" by mandating discharge of individuals who state that they are homosexual except in certain circumstances and codifies a ban on gays in the military. The "Don't Ask" portion of the bargain is not in the statute, but in regulations. See DEP'T OF DEF. DIRECTIVE 1332.30 (Feb. 5, 1994); DEP'T OF DEF. DIRECTIVE 1304.26 (Feb. 5, 1994). The ban on gays in the military is the subject of numerous analyses. See, e.g., Om Prakash, *The Efficacy of "Don't Ask Don't Tell,"* 55 JOINT FORCE Q., 4th Quarter 2009, at 88 (arguing DADT is harmful to military mission); Karst, *supra* note 4; RANDY SHILTS, CONDUCT UNBECOMING (1993).

11. *Id.* at 10; U.S. GOV'T ACCT. OFF., REPORT TO CONGRESSIONAL REQUESTERS, MILITARY PERSONNEL: FINANCIAL COSTS AND LOSS OF CRITICAL SKILLS DUE TO DOD'S HOMOSEXUAL CONDUCT POLICY CANNOT BE COMPLETELY ESTIMATED, GAO-05-299, at 10 (Feb. 2005).

12. LINDA BIRD FRANCKE, GROUND ZERO: THE GENDER WARS IN THE MILITARY (1997); Elaine Donnelly, *Constructing the Co-Ed Military*, 14 DUKE J. GENDER L. & POL'Y 815 (2007).

13. See *infra* text accompanying notes 14–28.

14. LEISA D. MEYER, CREATING GI JANE: SEXUALITY AND POWER IN THE WOMEN'S ARMY CORPS DURING WORLD WAR II 14–16 (1996).

15. Women's Armed Services Integration Act of 1948, Pub. L. No. 80-625, 62 Stat. 356, §§ 356–75 (1948) (prior to 1956 amendment).

16. *Id.*

17. *Women in the Military: Hearings Before the Military Personnel and Compensation Subcomm. of the H. Comm. on Armed Services*, 101st Cong., 2d Sess. 24 (1990) (statement of Lieutenant General A.K. Ono, Deputy Chief of Staff for Personnel, U.S. Army).

Some of the restrictions were lifted in the late 1960s and early 1970s,¹⁸ but a few years later, Congress passed a law reinstating registration for the draft for men only.¹⁹ In 1981, in *Rostker v. Goldberg*, the Supreme Court upheld the male-only draft against an Equal Protection challenge that argued the draft discriminated against men.²⁰ The Court relied on the combat-exclusion laws to hold that women were not “similarly situated” to men with respect to military service.²¹ Neither the Court nor the plaintiffs questioned the legality of the combat-exclusion laws themselves.²²

Recent years have seen further integration of women into the military, but the military retains a core set of de jure restrictions on women’s service. During the waning years of the first Bush Administration,²³ a Presidential Commission on the Assignment of Women in the Armed Forces studied opening combat positions to women and recommended certain restrictions be lifted, including the ban on women in combat ships.²⁴ Under President Clinton, Congress went further and repealed statutes prohibiting women’s service on combat ships and aircraft.²⁵

The next year, the Clinton Administration’s Secretary of Defense, Les Aspin, promulgated new rules. Under these newest rules, restrictions prevent women from serving in about 20% of military jobs.²⁶ First, women cannot serve in “units below the brigade level whose primary

18. See, e.g., Pub. L. No. 90-130, 81 Stat. 374 (1967) (lifting 2% cap).

19. See Military Selective Service Act, 50 App. U.S.C. § 451 et seq. (2010); Pub. L. No. 96-107, §§ 811–12, 93 Stat. 803; Pub. L. No. 96-282, 94 Stat. 552 (1979).

20. *Rostker v. Goldberg*, 453 U.S. 57, 71–72, 83 (1981).

21. *Id.* at 76–78.

22. *Id.* at 83 (White, J., dissenting).

23. The event that prompted the examination was the Tailhook Navy scandal involving sexual assault of a female Navy pilot by her male colleagues at a Naval aviators’ convention. OFFICE OF THE INSPECTOR GEN., UNITED STATES, THE TAILHOOK REPORT: THE OFFICIAL INQUIRY INTO THE EVENTS OF TAILHOOK ‘91 (1993); Kenneth B. Noble, *Tailhook Whistle-Blower Recalls Attack*, N.Y. TIMES, Oct. 4, 1994, at A12; Donnelly, *supra* note 12.

24. UNITED STATES PRESIDENTIAL COMMISSION ON THE ASSIGNMENT OF WOMEN IN THE ARMED FORCES, WOMEN IN COMBAT: REPORT TO THE PRESIDENT (1992) [hereinafter PRESIDENTIAL COMMISSION].

25. See National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 541(a), 107 Stat. 1547, 1659 (repealing 10 U.S.C. § 6015, which provided that “women may not be assigned to duty on vessels or in aircraft that are engaged in combat missions.”); National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 531(a)(1), 105 Stat. 1290, 1365 (repealing 10 U.S.C. § 8549, which provided that female members of the Air Force “may not be assigned to duty in aircraft engaged in combat missions.”).

26. See *Schwartz v. Brodsky*, 265 F. Supp. 2d 130 (D. Mass. 2003) (dismissing complaint in action challenging male-only Selective Service requirement despite substantially increased roles for women since *Rostker*); OFFICE OF THE UNDER SEC’Y OF DEF. FOR PERS. AND READINESS, POPULATION REPRESENTATION OF THE MILITARY SERVICES, FISCAL YEAR 2008 REPORT 18, <http://prhome.defense.gov/MPP/ACCESSION%20POLICY/PopRep2008/> (“Currently, over 80 percent of all positions are open to women.”) [hereinafter POPULATION REPRESENTATION].

mission is to engage in direct combat on the ground.²⁷ Second, services may exclude women in other circumstances, including “where job related physical requirements would necessarily exclude the vast majority of women service members.”²⁸

While women are serving in greater numbers and in more military positions than ever before, the combat exclusions continue to confer on women a different legal status than men. Recent decisions still cite the continued de jure combat exclusion as the basis for continuing to uphold the male-only draft registration.²⁹ Further, like the DADT compromise, the new opportunities for women were tempered with new statutory limitations: Congress passed a series of laws beginning in 1993, which required the Secretary of Defense to provide notice to Congress if any of these restrictions changed.³⁰

It was in this landscape that I, then an undergraduate, joined the Navy to become a Surface Warfare Officer. The Navy assigned me to be one of the first women on the newly integrated combatant ships in the mid-1990s. Since then, the military landscape has changed dramatically: We are fighting two wars. Furthermore, women are a higher percentage of the Armed Services than ever.³¹

In today’s military, despite the continued de jure restrictions, the armed forces have included increasing percentages of women in the services,³² each branch choosing its own strategy for doing so.³³ The Army has quietly found ways around the restrictions that avoid triggering the congressional-reporting requirement.³⁴ A 2004 draft Army presentation,

27. Memorandum from Sec’y of Def. Les Aspin to the Secretaries of the Army, Navy, and Air Force et al., Direct Ground Combat Definition and Assignment Rule (Jan. 13, 1994), http://media.timesfreepress.com/docs/2009/03/DoD_policy_0322.pdf.

28. *Id.*; Donnelly, *supra* note 12, at 829.

29. *See Elgin v. United States*, 594 F. Supp. 2d 133, 145–48 (D. Mass. 2009) (dismissing equal protection challenge to male-only draft registration in the Military Selective Service Act because of “insufficient change in the governing considerations since *Rostker*,” noting that plaintiffs “failed to allege that women are eligible for ground combat positions”); *Schwartz*, 265 F. Supp. 2d at 134–35 (D. Mass. 2003) (dismissing equal protection challenge to Selective Service, following *Rostker*).

30. National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160 § 542, 107 Stat. 1547, 1659–60 (1993). The current provisions, as amended and supplemented over the years, are codified at 10 U.S.C. §§ 652 & 6035.

31. POPULATION REPRESENTATION, *supra* note 26, at 18–32.

32. *See generally* DAVID F. BURRELLI, CONG. RESEARCH SERV., RL 92-008, WOMEN IN THE ARMED FORCES (1996), <http://www.fas.org/man/crs/92-008.htm>.

33. *Infra* text accompanying notes 34–38.

34. Lizette Alvarez, *GI Jane Breaks the Combat Barrier*, N.Y. TIMES, Aug. 16, 2009, at A1 (noting that women are assigned to combat areas under “muddled” rules and as a result of “bending” regulations); Donnelly, *supra* note 12, at 840–52 (noting that military officials have intentionally circumvented policy barring women’s assignments in combat); Elizabeth L. Hillman, *The Female Shape of the All-Volunteer Force*, in IRAQ AND THE LESSONS OF VIETNAM 150, 155 (Lloyd C. Gardner & Marilyn B. Young eds., 2007).

apparently leaked to the conservative policy advocacy Center for Military Readiness, noted that the “pool of male recruits” was “too small to sustain” the force as currently configured and explored options to expand the use of women in combat positions.³⁵ Some of those options would require congressional notification and some would not; no notification has been forthcoming, but many reports indicate women’s increased roles.³⁶ With this lack of legal recognition, women experience real consequences; for example, women veterans report that society and even the Department of Veterans Affairs often assume women cannot have issues associated with combat service, such as post-traumatic stress disorder.³⁷

Going a different route, the Navy provided formal notice to Congress on February 19, 2010, that women would serve in submarines.³⁸ After Congress considered the notice, the Navy announced it would begin phasing in billets for female officers (but not enlisted women) on submarines: “There are capable women who have the interest, talent, and desire to succeed in the submarine force. Maintaining the best submarine force in the world requires us to recruit from the largest possible talent pool.”³⁹

Under the Constitution’s Equal Protection Clause, the government must justify classifications, like the combat-exclusion policy, that limit its citizens’ privileges based on “who they are.” The first Part of this Article examines applicable law in the United States as well as challenges to combat-exclusion laws overseas, concluding that it is well-established that beliefs about women’s proper role in society are inadequate justifications for de jure classifications. In Part II, the Article turns to the main justification for excluding women that differs from the justifications advanced for excluding African-American or gay men: physical strength. Drawing on studies of vocational testing, athletics, and military fitness, and using the conservative commentators who have made the physical-strength argument most explicitly as a counterfoil, this Article examines four problems with the physical-strength rationale: stereotyping, differential training, trait selection, and task definition. Each of these problems exposes a basis in ideology: The real issue is not that

35. DEP’T OF THE ARMY, COMBAT EXCLUSION QUICK LOOK OPTIONS, 7–18 (Draft Presentation 5/10/2004), available at cmrlink.org/cmnotes/ce-qlo%20051004.pdf; Alvarez, *supra* note 34; Donnelly, *supra* note 12, at 840–52 (2007).

36. *See supra* note 34.

37. *See, e.g.*, Laura Fitzpatrick, *How We’re Failing Our Female Veterans*, TIME, Jun. 30, 2010, <http://www.time.com/time/nation/article/0,8599,2000829,00.html>.

38. Commander, Submarine Forces Pub. Affairs, *Navy Policy Will Allow Women to Serve Aboard Submarines*, U.S. NAVY (Apr. 29, 2010), available at http://www.navy.mil/search/display.asp?story_id=52954; Donna Miles, *Women to Serve on Subs, Gates Tells Congress*, U.S. DEP’T OF DEF. (Feb. 23, 2010), available at <http://www.defense.gov/news/newsarticle.aspx?id=58066>.

39. *Supra* note 38.

women cannot do the job. The real issue is that critics believe the military should be masculine. This belief is not, of course, adequate justification for a government rule that, on its face, does not treat male and female citizens equally. In conclusion, this Article examines the normative basis for excluding women that is thus exposed and offers some reasons why women, men, and the military itself should resist this normative basis for exclusion.

II. THE LEGAL LANDSCAPE

Because the exclusion of women from combat is a sex-based government policy, the long-established jurisprudence of sex equality is a logical starting point for considering such a sex-based exclusion. This Part first analyzes the law of sex equality and its applicability to the military in the United States, concluding that a disconnect exists between what the law says it requires—justification for sex-based exclusions—and what the law has done—leave the *de jure* exclusion largely unexamined. Second, this Part considers legal treatment in other countries. As a matter of politics or court-made law, more and more countries are abolishing the exclusion. Just as in the United States, however, courts in other countries often rely on unstated assumptions rather than proof to uphold sex-based combat exclusions, and virtually all countries retain sex-based classifications in their military draft.

A. *United States*

United States law is quite clear: governmental policies cannot differentiate between men and women simply on the basis of normative beliefs of what men and women ought to do. As the Supreme Court explained in *United States v. Virginia*,

[T]he Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.⁴⁰

The Court went on to explain that the law does recognize “physical differences” between men and women, but that “inherent differences” cannot be cause “for denigration of the members of either sex or for artificial constraints on an individual’s opportunity.”⁴¹ Sex classifications, the Court said, “may not be used, as they once were . . . to create or perpe-

40. 518 U.S. 515, 532 (1996).

41. *Id.* at 533.

tuate the legal, social, and economic inferiority of women.”⁴² In this vein, the Supreme Court has squarely and repeatedly rejected the rationale that women can be excluded from jobs based on beliefs about women’s separate sphere or role in society:⁴³ “[G]eneralizations about ‘the way women are,’ estimates of what is appropriate for most women, no longer justify denying opportunity to women whose talent and capacity place them outside the average description.”⁴⁴

In the 1970s, some courts applied these principles when women challenged barriers to their military service.⁴⁵ These challenges formed part of the dialog that led to the legislative reforms of the 1970s.⁴⁶ As early as 1972, Ruth Bader Ginsburg argued that invoking pregnancy to exclude women from the military was sex discrimination.⁴⁷ A landmark case was *Owens v. Brown*.⁴⁸ There, Judge Sirica for the District of Columbia District Court held that the statutory bar preventing women’s assignment to most Navy vessels, originally passed in 1948, violated equal protection.⁴⁹ Applying the then-new intermediate scrutiny standard, the court agreed that the asserted objective of the law “to increase the combat effectiveness of Navy ships” was “a governmental objective of the highest order.”⁵⁰ However, there was no evidence that this objective was the actual intended purpose of the legislation. To the contrary, the ban on women serving in Navy ships was added to the 1948 law “over the military’s objections and without significant deliberation.”⁵¹ In fact, the amendment’s congressional sponsor explained that he was offering it because he did not believe ships were a “proper place” for women.⁵² Further, the court held, the Navy’s cited concerns about group dynamics, morale, and discipline—an argument virtually identical to that termed

42. *Id.* at 534.

43. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 729 (2003); *Virginia*, 518 U.S. at 532; *Califano v. Goldfarb*, 430 U.S. 199 (1977).

44. *Virginia*, 518 U.S. at 550; *see also* *Adams v. Baker*, 919 F. Supp. 1496, 1503 (D. Kan. 1996) (rejecting school’s assertion of parent and student moral beliefs as failing to constitute a state interest sufficient to justify excluding female students from wrestling).

45. *Infra* notes 47–54.

46. *Id.*; *cf.* Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323 (2006).

47. Neil S. Siegel & Reva B. Siegel, Essay, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. 771 (2010) (discussing Ginsburg’s brief to the Supreme Court in *Struck v. Sec’y of Def.*, 409 U.S. 1071 (1972)).

48. 455 F. Supp. 291 (D.D.C. 1978) (holding unconstitutional 10 U.S.C. § 6015).

49. *Id.* at 294 & n.1.

50. *Id.* at 305.

51. *Id.*

52. *Id.* at 206 n.53.

“unit cohesion” today—were not borne out by evidence.⁵³ And, at least as to the non-combat positions at issue in that case, the court held that studies showed women could do them.⁵⁴ Rather than appeal, the government pursued an amendment to the law that was already in the works at the time of the decision.⁵⁵

After the 1970s, however, there were few recorded court challenges to the combat exclusion.⁵⁶ One possible explanation for the lack of recent cases is the deference that courts began to accord to Congress and the Executive in the military realm.⁵⁷ The suggestion that all things military are untouchable is questionable. The cases limiting constitutional claims vastly expand a line of Supreme Court cases beginning with *Feres v. United States*, which involved statutory construction of the Federal Tort Claims Act.⁵⁸ The *Feres* doctrine is often dubbed non-justiciability,⁵⁹ a dubious moniker given the doctrine’s origins in statutory construction. The Court extended the doctrine to claims brought under the cause of action created in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.⁶⁰ The key case extending the doctrine was *Chappell v. Wallace*⁶¹ in which Justice Berger, writing for a unanimous Court, held that a *Bivens* remedy was unavailable to Navy-enlisted men for racial discrimination: “We hold that enlisted military

53. *Id.* at 309.

54. *Id.*

55. *Id.*; Pub. L. No. 95-485, § 808, 92 Stat. 1611 (1978) (stating that “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 combat missions.”).

56. The most recent A.L.R. on sex discrimination in the military dates from 1984. Sonja A. Soehnel, *Sex Discrimination in United States Armed Forces*, 56 A.L.R. FED. 850 (1984).

57. Thus, most constitutional claims to DADT have been rejected, either declining to consider them out of hand, *Meister v. Tex. Adjutant Gen.’s Dep’t*, 233 F.3d 332, 341 (5th Cir. 2000), or holding that the challenged decision passes muster because of a heavy deference to military affairs. *See, e.g., Cook v. Gates*, 528 F.3d 42, 57–58 (1st Cir. 2008) (upholding DADT in light of deference, reviewing cases); *Able v. United States*, 155 F.3d 628 (2d Cir. 1998). *But see Witt v. Dep’t of the Air Force*, 527 F.3d 806 (9th Cir. 2008) (remanding to develop record on substantive due process claim). Citing similar concerns, courts of appeals have construed Title VII to have no application to uniformed armed services personnel, dismissing the service members’ discrimination claims. *Roper v. Dep’t of Army*, 832 F.2d 247, 248 (2d Cir. 1987) (citing *Gonzalez v. Dep’t of the Army*, 718 F.2d 926 (9th Cir. 1983); *Johnson v. Alexander*, 572 F.2d 1219 (8th Cir. 1978), *cert. denied*, 439 U.S. 986 (1978)).

58. 340 U.S. 135, 138 (1950).

59. *See, e.g., Wetherill v. Geren*, 644 F. Supp. 2d 1135, 1139 (D.S.D. 2009) (dismissing constitutional claims of sex and race discrimination by Army National Guard colonel as nonjusticiable despite claim that challenged conduct did not involve an assessment of plaintiff’s military qualifications).

60. 403 U.S. 388 (1971); *see United States v. Stanley*, 483 U.S. 669, 676 (1987); *Chappell v. Wallace*, 462 U.S. 296, 305 (1983); *Feres*, 340 U.S. at 138.

61. 462 U.S. 296 (1983).

personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations.”⁶² The Court remanded the case, leaving intact the claims for declaratory judgment and injunctive relief, as well as expressly reserving the question of whether the constitutional conspiracy claim under 42 U.S.C. § 1985(3) should stand.⁶³ *Chappell* relied on the *Bivens* “special factors” doctrine, which disallows the judicially created remedy where such factors are present, as well as the “peculiar and special relationship of the soldier to his superiors and the effects on the maintenance of such suits on discipline.”⁶⁴

Meanwhile, between *Feres* and *Chappell*, the Fifth Circuit decided the leading case of *Mindes v. Seaman*, holding that federal courts could sometimes adjudicate constitutional claims by uniformed service personnel challenging military decisions.⁶⁵ *Mindes*, an Air Force officer, alleged due-process violations in an adverse performance report.⁶⁶ The court dismissed the claim with minimal analysis, but articulated four factors to consider in such cases: (1) the nature and strength of the claim; (2) potential injury to the plaintiff; (3) interference with the military function; and (4) degree of military discretion involved.⁶⁷

In *United States v. Stanley*, the Supreme Court attempted to harmonize the inconsistencies in the circuits’ applications of *Chappell*.⁶⁸ That case held that a service member had no cause of action to challenge the secret administration of LSD to him.⁶⁹ Writing for a divided Court,⁷⁰ Justice Scalia indicated that the *Feres* “incident to service” test should guide the *Bivens* “special factors” determination in the military context.⁷¹ Justice O’Connor had an interesting dissent on this point: although she agreed that *Feres* and *Chappell* both involved application of the “incident to service” test, she would have held the action alleged here to be

62. *Chappell*, 462 U.S. 296 at 305.

63. *Id.* at 297, 305 & n.3.

64. *Id.* at 299 (citation and internal alterations omitted).

65. 453 F.2d 197 (5th Cir. 1971).

66. *Id.*

67. *Id.* at 201–02.

68. 483 U.S. 669, 676 (1987).

69. *Id.* It overturned an Eleventh Circuit decision allowing the claim to proceed on *Bivens* grounds, distinguishing it from *Chappell* in part because some of the defendants were not Stanley’s superior officers. *Id.* at 676, 680. The Eleventh Circuit also remanded an FTCA claim to allow repleading. Justice Scalia’s opinion expressed strong skepticism but did not reach the merits of this ruling, overturning it instead on procedural grounds in a portion of the opinion joined by all nine Justices. *Id.* at 676–77.

70. Chief Justice Rehnquist and Justices White, Blackmun, and Powell joined the majority in pertinent part. Justices O’Connor, Brennan, Marshall, and Stevens dissented, although all of the dissenters did not embrace the same rationale.

71. *Stanley*, 483 U.S. at 680–82.

“so far beyond the bounds of human decency that as a matter of law it simply cannot be considered a part of the military mission.”⁷²

Among the circuits, there are some areas of agreement that have extended the *Feres* doctrine still further. It is generally agreed that any claim for money damages by a uniformed service member is barred if it is for harm incurred “incident to service,” unless there is an express statute authorizing military personnel to sue.⁷³ For example, the Federal courts of appeals that considered the question have all held that the “incident to service” test applies to § 1983 claims for damages brought against state officials by National Guard members.⁷⁴ These decisions ignore the Supreme Court’s express reliance in *Stanley* and *Chappell* on the fact that it was limiting a judicially created right of action.⁷⁵ The First Circuit’s reasoning is illustrative: “[T]here is no principled basis for according state actors sued under 42 U.S.C. § 1983 a different degree of immunity than would be accorded federal actors sued for an identical abridgement of rights under *Bivens*.”⁷⁶ Apparently lost on the lower courts are the Supreme Court’s pains to distinguish “the availability of a damages action under the Constitution for particular *injuries* (those incurred in the course of military service)” from “immunity to such an action on the part of particular *defendants*.”⁷⁷

On the question of injunctive relief, however, the circuits remain divided.⁷⁸ The Ninth Circuit still applies *Mindes*,⁷⁹ while its circuit of origin, the Fifth (and the Eleventh), has abandoned it.⁸⁰ Several courts apply the “incident to service” bar to claims for injunctive relief for specific personnel actions but allow facial challenges to military regulations.⁸¹ Just prior to the *Stanley* decision, the D.C. Circuit held that

72. *Id.* at 708–09 (O’Connor, J., concurring). Justices Brennan and Marshall’s dissent noted the international condemnation of unconsented human experimentation at Nuremburg, the need for military members to have effective redress for serious constitutional violations, and, in the only portion of the dissent joined by Justice Stevens, the adequacy of qualified immunity to protect the interests discussed here and the fact that *Chappell* cited but did not simply follow *Feres*. *Id.* at 686–707 (Brennan, J., dissenting).

73. *Speigner v. Alexander*, 248 F.3d 1292, 1295 (11th Cir. 2001) (discussing *Feres* and its progeny).

74. *See id.* (collecting cases).

75. *Stanley*, 483 U.S. at 678; *Chappell v. Wallace*, 462 U.S. 296, 300 (1983).

76. *Wright v. Park*, 5 F.3d 586, 591 (1st Cir. 1993).

77. *Stanley*, 483 U.S. at 684.

78. *See generally Speigner*, 248 F.3d at 1296–98 (discussing split).

79. *Wilkins v. United States*, 279 F.3d 782, 788 (9th Cir. 2002).

80. *Speigner*, 248 F.3d at 1295 n.5; *Meister v. Tex. Adjutant Gen.’s Dep’t*, 233 F.3d 332, 341 (5th Cir. 2000) (“*Stanley* blocks claims brought by servicemen incident to their military service, which therefore preempts *Mindes* with respect to such claims.”).

81. *Speigner*, 248 F.3d at 1298 (collecting cases); *Wilkins*, 279 F.3d at 787–89 (collecting cases); *Ayala v. United States*, 624 F. Supp. 259, 262 (S.D.N.Y. 1985).

claims for injunctive relief are allowed, following exhaustion of administrative remedies, even for specific personnel actions:

We have no quarrel with the district court's conclusion that the operation of the military is vested in Congress and the Executive, and that it is not for the courts to establish the composition of the armed forces. But constitutional questions that arise out of military decisions . . . are not committed to the other coordinate branches of government. Where it is alleged, as it is here, that the armed forces have trenched upon constitutionally guaranteed rights through the promotion and selection process, the courts are not powerless to act. The military has not been exempted from constitutional provisions that protect the rights of individuals. *Parker v. Levy*, 417 U.S. 733 (1974). It is precisely the role of the courts to determine whether those rights have been violated. *Dillard v. Brown*, 652 F.2d 316, 320 (3d Cir. 1981).⁸²

The military's expertise deserves deference, but it is a disservice both to service members and to the military to suggest that military service requires invidious discrimination. As Judge Sirica stated in *Owens v. Brown*, deference to the military is correctly analyzed as a prudential consideration requiring courts to refrain from reviewing discretionary decisions that will involve the court "in an inappropriate degree of supervision over primary military activities," not an absolute bar to justiciability of any constitutional claim against the military.⁸³

While this court-made deference may explain why advocates no longer bring challenges on behalf of women, it has not similarly deterred Equal Protection challenges to military policies that are intended to benefit women and service members of color. Deference has been notably absent from cases alleging reverse discrimination in the military. For example, a series of actions challenged the military's late 1990s promotion and retention instructions that included mandates to achieve diversi-

82. *Emory v. Sec'y of Navy*, 819 F.2d 291, 294 (D.C. Cir. 1987) (per curiam) (reversing dismissal of black medical officer's challenge to failure to promote him to the rank of Rear Admiral). On remand, the district court denied the claim on the merits. Although the promotion board had no African-Americans, and indeed there were no black admirals in the medical corps, the plaintiff had not shown the requisite discriminatory purpose—he had failed to demonstrate that his record was "overwhelmingly superior" to that of white officers who were promoted, or to introduce evidence of racial disparities in the Navy generally. *Emory v. Sec'y of the Navy*, 708 F. Supp. 1335, 1342 (D.D.C. 1989). This case appears to remain good law, even after *Stanley*. See *Emory v. Sec'y of Navy*, No. 89-5196, 1989 WL 201552 (D.C. Cir. Dec. 29, 1989) (per curiam) (summarily affirming district court decision on the merits of the claim); *Veitch v. England*, No. CIV.A. 00-2982, 2005 WL 762099 (D.D.C. Apr. 04, 2005) (distinguishing *Emory* on the facts).

83. *Owens v. Brown*, 455 F. Supp. 291, 300 (D.D.C. 1978). The cases limiting Title VII liability are also problematic in light of the statutory text, which expressly applies to "employees or applicants for employment . . . in military departments." 42 U.S.C. 2000e-16(a). For an earlier argument favoring Title VII liability, see *Hill v. Berkman*, 635 F. Supp. 1228 (E.D.N.Y. 1986).

ty and account for the effects of discrimination in evaluating performance.⁸⁴ The courts struck down not only numerical goals in promotion and retention, but also simple directives to consider the potential effects that discrimination may have had in determining the relative qualifications of women and service members of color.⁸⁵

These reverse discrimination holdings were not impeded by the supposed broad deference to military judgment. For example, in *Berkley v. United States*, the Federal Circuit brushed the *Feres* argument aside, stating that deference to the military “does not prevent or preclude our review of [the policy] in this case in light of constitutional equal protection claims raised.”⁸⁶ The deference cannot, of course, be one way. A better rule was articulated by the D.C. Circuit: “The military has not been exempted from constitutional provisions that protect the rights of individuals.”⁸⁷

Under virtually any level of deference, the continued de jure combat exclusion is particularly puzzling in light of the Supreme Court’s stringent anti-classification jurisprudence, recently reaffirmed in *Ricci v. DeStefano*.⁸⁸ The Supreme Court again emphasized an “employee’s legitimate expectation not to be judged on the basis of” a protected characteristic—in that case, race.⁸⁹ So strong is this principle, the Court held, that an employer cannot deviate from it absent an almost bulletproof showing that it needed to take race into account to correct a violation of the law.⁹⁰ In other words, *Ricci* continued the Supreme Court’s familiar line of cases that held that, even if not intended to harm, any classification on the basis of race is de jure discrimination—which is almost always illegal.⁹¹ Although sex-based classification is subject to a different

84. *See, e.g.*, *Berkley v. United States*, 287 F.3d 1076 (Fed. Cir. 2002); *Saunders v. White*, 191 F. Supp. 2d 95 (D.D.C. 2002); *Alvin v. United States*, 50 Fed. Cl. 295 (2001); *Kim v. Brownlee*, 344 F. Supp. 2d 758 (D.D.C. 2004); *Sirmans v. Caldera*, 138 F. Supp. 2d 14 (D.D.C. 2001); *Sirmans v. Brownlee*, 346 F. Supp. 2d 56 (D.D.C. 2004); *Christian v. United States*, 46 Fed. Cl. 793 (2000). *But see Speigner*, 248 F.3d at 1298 (applying *Feres* doctrine to hold that reverse discrimination challenge to promotion decision was “nonjusticiable”; this holding “in no way bars facial challenges to military regulations.”).

85. *See supra* note 84.

86. 287 F.3d 1076, 1091 (Fed. Cir. 2002). The court remanded for strict scrutiny analysis of the challenged policy; the case settled. *Berkley*, 59 Fed. Cl. at 675; *see also Saunders*, 191 F. Supp. 2d at 95.

87. *Emory v. Sec’y of Navy*, 819 F.2d 291, 294 (D.C. Cir. 1987) (per curiam) (citing *Parker v. Levy*, 417 U.S. 733 (1974)).

88. 129 S.Ct. 2658, 2677 (2009).

89. *Id.*

90. *Id.*

91. *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003) (burden associated with individual evaluation instead of across-the-board classification does not justify unconstitutional classification); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 222 (1995) (citing and extending *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520 (1989)).

level of scrutiny, the government still has a clear constitutional mandate to justify any classification that the government makes on the basis of sex.⁹² Sex, like race, is a suspect classification that cannot be invoked without some showing of a basis in reality for the distinction.⁹³ In light of the Supreme Court's guidance that normative beliefs about women's role in society are insufficient justification for such classifications, the combat-exclusion rules warrant further examination.

B. International Cases

Internationally, a few courts have struck down sex-based barriers to women's military service based on equality law. A 1989 decision of the Canadian Human Rights Tribunal removed gender-based employment barriers and directed complete integration of women into combat roles "with all due speed."⁹⁴ A decade later the Court of Justice of the European Communities (ECJ) ruled that Germany's restrictive combat-exclusion law—limiting women to "medical and military-music services"—was too sweeping and thus violated European Council Directive 7/207/EEC, which mandates equal access to employment.⁹⁵ The court's language emphasized proportionality and indicated that a less restrictive law might pass muster,⁹⁶ but Germany reportedly responded by opening all positions, including combat, to women.⁹⁷

As the limited scope of the German case suggests, international jurisprudence, like U.S. case law, more commonly accepts sex-based military classifications without much justification. A number of countries have changed their law under political instead of judicial impetus, but

92. *United States v. Virginia*, 518 U.S. 515, 532–34 (1996).

93. *Id.* at 533.

94. *Brown v. Canadian Armed Forces*, T.D. 3/89 (Canadian H.R. Trib., Feb. 20, 1989), http://www.chrt-tcdp.gc.ca/search/files/t121_2386de_02_20.pdf. The court upheld, with a bare few sentences of justification, the exclusion of women from submarines for "privacy" reasons. *Id.* at 9. The court also expressly declined to set up a detailed monitoring mechanism or to mandate affirmative action. Citing success in integrating small ships, the Canadian Navy announced that women would be allowed to serve in submarines. Kevin Cox & Jeff Sallot, *Navy to Let Women Sail on Submarines*, ARMY.CA FORUMS (Mar 10, 2001), <http://forums.army.ca/forums/index.php/topic,2254.msg25092.html?PHPSESSID=dqm3ljb9dpmccs3d9nksfs8ht3#msg25092>.

95. Case C-285/98, *Tanja Kreil v. Federal Republic of Germany*, 2000 E.C.R. I-69.

96. *See, e.g., id.* at Para. 27 ("In view of its scope, such an exclusion, which applies to almost all military posts in the Bundeswehr, cannot be regarded as a derogating measure justified by the particular nature of the posts in question . . .").

97. Ulrike Liebert, *Europeanization and the "Needle's Eye": The Transformation of Employment Policy in Germany*, 3 REV. POL'Y RESEARCH 479 (2003); Peter Finn, *German Women Gain Job Parity in Military*, WASH. POST, Jan. 3, 2001, at A12.

others defend their sex-based combat exclusions.⁹⁸ Virtually all countries that have compulsory military service have a male-only draft.⁹⁹

Often erroneously believed to afford full equality in combat to women, Israel followed a similar course to the United States in banning women from combat positions until the 1990s. In the 1948 Israeli war of independence, women served on the front lines in small numbers.¹⁰⁰ In addition to filling support roles, women made up about 20% of the Palmach, the most active force.¹⁰¹ These policies changed, however, in the Defense Service Law, first passed in 1949, which excluded women from such roles.¹⁰²

Israel is unusual in that it has a draft that covers women, but women's mandatory service differs from men's in several respects, including a shorter length and more available exemptions.¹⁰³ In 1995, the Israeli Supreme Court issued a decision that was a mirror image of *Rostker*. It held that the military could not use the difference in mandatory service to exclude women who volunteered for longer service from combat positions, but did not question the difference in the draft.¹⁰⁴ Following this decision, the law was amended, somewhat equivocally, to provide wom-

98. Without judicial prompting, in 2004, Switzerland's "Army XXI" reform approved full integration of women in every role as part of transforming its army to eliminate any combat positions, repealing its earlier restriction that allowed women to carry arms only for self-defense and police functions. Ordonnance de l'Assemblée fédérale sur l'organisation de l'armée, art. 14 (Oct. 4, 2002) (repealing R.S. 513.11, art. 11.c., as modified 24 Nov. 1999 by R.O. 2000 85). According to a NATO report, combat positions are now open to women in Belgium, Denmark, Hungary, Italy, Poland, Slovakia, and Spain. See N. ATL. TREATY ORG., DEPLOYABILITY OF SERVICE WOMEN IN SERVICES AND COUNTRIES (2006), http://www.nato.int/issues/women_nato/rfi_submarines_combat_2006.pdf. Many countries, however, retain and have defended their combat exclusions. In addition to provisions listed elsewhere in this section, see, for example, *Sex Discrimination Act of 1984* (Cth) s 43 (Austl.) ("Combat duties, etc. (1) Nothing in Division 1 or 2 renders it unlawful for a person to discriminate against a woman on the ground of her sex in connection with employment, engagement or appointment in the Defense Force: (a) in a position involving the performance of combat duties; or (b) in prescribed circumstances in relation to combat duties.").

99. CENT. INTELLIGENCE AGENCY, MILITARY SERVICE AGE AND OBLIGATION, WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/fields/2024.html>. (last visited June 14, 2010).

100. See Anne R. Bloom, *Israel: The Longest War*, in FEMALE SOLDIERS—COMBATANTS OR NONCOMBATANTS? 137, 149–51 (Nancy Loring Goldman ed., 1982) [hereinafter FEMALE SOLDIERS]; PRESIDENTIAL COMMISSION, *supra* note 24, at C-28.

101. See FEMALE SOLDIERS, *supra* note 100; PRESIDENTIAL COMMISSION, *supra* note 24, at C-28.

102. Daphne Barak-Erez, *The Feminist Battle for Citizenship: Between Combat Duties and Conscientious Objection*, 13 CARDOZO J. L. & GENDER 531, 533 & n.14 (2007) (citing statutes).

103. *Id.* at 537–38.

104. *Id.* at 543–46 (discussing HCJ 4541/94 Miller v. Minister of Def. [1995] IsrSC 49(4)).

en an “equal right to that of a man to serve in any duty,” except “if demanded by the nature or character of the position.”¹⁰⁵

Some courts do not even go as far as the limited holdings of the ECJ in the German case and the Israeli court. The ECJ upheld Switzerland and Germany’s all-male draft laws in 2003,¹⁰⁶ and upheld the United Kingdom’s ban on women in the Royal Marines in 1999.¹⁰⁷ Emphasizing proportionality, the court agreed with the United Kingdom that even a female cook could be excluded because the Royal Marines, unlike other branches of the service, are the “point of the arrow head” and thus, all Marines may be “required to serve as front-line commandos.”¹⁰⁸ The court did not explain, much less cite any factual findings supporting, the basis for its conclusion that women could not be front-line commandos.¹⁰⁹ The United Kingdom has thus far not removed the remaining restrictions.¹¹⁰ An official commission designated to study the question military-wide concluded inter alia that only an “elite few” women could pass the physical-strength tests required for infantry and Royal Armoured Corps, or tank regiment, positions.¹¹¹

The upshot of jurisprudence both in the United States and internationally is that courts often fail to apply equality mandates to women in combat, with little analysis or justification. Because perceived innate differences, usually physical strength, seem to be the implicit, unexamined justification that courts use to uphold the combat exclusion, I turn now to the physical-strength argument.

III. FOUR PROBLEMS WITH PHYSICAL-STRENGTH RATIONALES

This Part discusses four problems with physical-strength rationales: stereotyping, differential training, trait selection, and task definition. Analysis of each of these rationales reveals a different argument against

105. *Id.* at 544–45 (citing Women’s Equal Rights Law, 5711-1951, 5 LSI 33 (1951-52) (Amend. 2000 No. 2) (Isr.).

106. Case C-186/01, Alexander Dory v. Federal Republic of Germany 2003 E.C.R. I-2508 (holding that Germany’s male-only compulsory service law was a “choice[] of military organization for the defense of their territory or of their essential interests” and therefore, exempted from European equality law).

107. Case C-273/97, Angela Marie Sirdar v. Army Bd. 1999 E.C.R. I-7403 (upholding Sex Discrimination Act of 1975, Section 85(4), which exempts the armed services from laws prohibiting sex discrimination in employment, and thus allows facially discriminatory regulation).

108. *Id.*

109. *Id.*

110. See Sean Rayment, *Army Warned by own Lawyers over ban on Women Serving in Combat Units*, SUNDAY TELEGRAPH, Sept. 27, 2008, <http://www.telegraph.co.uk/news/newsttopics/ontheroutine/3089327/Army-warned-by-own-lawyers-over-ban-on-women-serving-in-combat-units.html>.

111. EMPLOYMENT OF WOMEN IN THE ARMED FORCES STEERING GROUP, WOMEN IN THE ARMED FORCES (May 2002), http://www.mod.uk/NR/rdonlyres/A9925990-82C2-420F-AB04-7003768CEC02/0/womenaf_fullreport.pdf.

allowing perceived differences in physical strength to justify de jure exclusion of women from the military. Furthermore, each rationale exposes a deeper level of discrimination that is built into the strength argument.

A. Stereotyping

The first, and fairly obvious, question about the physical-strength justification for de jure exclusions of women is why women who could pass the physical tests are not allowed to serve, while men who could not pass the physical tests are allowed to serve. Individual evaluation is the popular legal response to de jure discrimination.¹¹² An individual approach holds both attractions and pitfalls,¹¹³ but it highlights an important aspect of the physical-strength claim.

Few people seriously claim that the differences are so vast and the standards so exacting that no woman can meet them. Even the most ardent opponent to integration must admit there are some women who can outperform the vast majority of men.¹¹⁴ A mainstay of the argument against women's service, however, is that such women are rare. The argument stresses averages: the "average woman" has less aerobic capacity, muscle mass, etc.¹¹⁵ For example, one group, dissenting from a governmental commission set up in the early 1990s to study expanding women's roles in the military, argued, "In terms of physical capability, the upper five percent of women are at the level of the male median."¹¹⁶ Of course, the first problem with this claim is that the "average woman," like the "average man," may not be joining the military. To his credit, Brian Mitchell, author of one of the better-researched physical-strength arguments against women's military service, discusses instead the physi-

112. See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996); *Gilman v. Nw. Airlines*, 230 Mich. App. 293, 300, 583 N.W.2d 536, 540 (1998) (holding that state civil rights law was not preempted by federal Airline Deregulation Act because discrimination on the basis of sex has no "reasonable connection or relation" to airline's ability to select physically capable employees).

113. Catherine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, in *FEMINISM UNMODIFIED* 32, 33–38 (1987).

114. For example, one study found that on average men run a mile in 7.6 minutes when first reporting to Army basic training and run 2 miles in 14 minutes after 8 weeks of training. Nicole S. Bell et al., *High Injury Rates Among Female Army Trainees: A Function of Gender?*, 18 *AM. J. PREVENTIVE MED.* 141, 142 (2000). The female Olympic gold medalist in 1996 for the 1500-meter run ran the equivalent of a 4.3-minute mile. Even the woman who placed 100th for the marathon averaged a 5.8-minute mile. Phillip B. Sparling et al., *The Gender Difference in Distance Running Performance Has Plateaued: An Analysis of World Rankings from 1980 to 1996*, 30 *MED. & SCI. SPORTS & EXERCISE* 1725, 1726–27 (1998).

115. PRESIDENTIAL COMMISSION, *supra* note 23, at 63–64; STEPHANIE GUTMANN, *THE KINDER, GENTLER MILITARY: CAN AMERICA'S GENDER-NEUTRAL FIGHTING FORCE STILL WIN WARS?* 247 (2000).

116. PRESIDENTIAL COMMISSION, *supra* note 24, at 64 (alternate views).

cal attributes of the “average female Army recruit.”¹¹⁷ Here again, however, an argument about averages cannot explain why the women who are above average are excluded, or for that matter, why men who are below average are not.

Mitchell attempts to show that very few women would qualify for the positions from which they are currently excluded. Mitchell’s assertion that “men have enormous advantages physically”¹¹⁸ might at first appear to have some support. He cites Army studies that find women entering the service have about 55% of the upper body strength of men. Additionally, he reports the results from a 1978–1983 Navy study of damage control tasks—the emergency response work, such as firefighting, that all crewmembers participate in during battle and other shipboard emergencies.¹¹⁹ The study was designed to validate a strength-test battery. It examined two sets of tasks: general shipboard tasks, including damage control; and rating-specific tasks. It set time limits on performing the tasks and attempted to identify strength tests that would exclude the same percentage of the test group as had failed at the actual task. For the general shipboard tasks, the sample consisted of twenty-four men and twenty-one women assigned to a shore intermediate maintenance facility; for the rating-specific tasks, the sample was a much larger group of around 200 men and 200 women recruits in the second half of their basic training.¹²⁰

The most dramatic differences involved carrying large, heavy objects. For example, in a two-person carry of a loaded (approximately 190 pounds) stretcher up and down an inclined ladder, 81% of the women and 4% of the men failed to complete the task on time. Likewise, in a two-person carry of a 147-pound P250 fire pump (a large, gasoline-powered engine in a cubical frame) down ladders quickly, 90% of the women and 36% of the men failed to finish on time. About one-quarter of the women, and few or no men, failed five tasks involving moving through doors and scuttles.¹²¹ The larger, rating-specific study confirmed that selecting the most muscularly demanding tasks from the most demanding Navy ratings, and translating the requirements to an arm-strength test, “excluded most or all women but few men.”¹²²

117. BRIAN MITCHELL, *WOMEN IN THE MILITARY: FLIRTING WITH DISASTER* 141 (1998).

118. *Id.* at 141.

119. *Id.* at 144.

120. David W. Robertson & Thomas Trent, *Documentation of Muscularly Demanding Job Tasks and Validation of an Occupational Strength Test Battery (STB)*, NAVY PERS. RESEARCH AND DEV. CTR., 3–12 (1985).

121. *Id.* at app. C.

122. *Id.* at 20.

Even if this study shows some differences in men's and women's abilities to accomplish particular tasks, it does not explain a decision to use de jure exclusions for women alone rather than individual evaluations for the exclusion of both men and women.¹²³ Both women and men qualified, and both men and women failed to qualify in most tests—what purpose is served in excluding all and only women? For example, in the P250 carry, 90% of the women failed, but 10% passed. Moreover, 36% of the men failed. Certain physical tests, such as an arm pull, were relatively well-correlated to the ability to do static muscularly demanding tasks.¹²⁴ The military has the advantage of a basic-training period in which to evaluate potential recruits; it could administer tests like those validated in this study and avoid de jure discrimination.

A common response to the stereotyping analysis is cost—that everything from equipment to medical attention is more expensive when women are integrated into a service that ought to be all male. The cost argument is addressed in more detail below.¹²⁵ For now, the cost rebuttal to the stereotyping analysis tells us something about the contours of the strength argument. The claim must be that the differences are large enough that it is possible to measure strength traits with a single cutoff that will include most men and exclude almost all women. The claim must further be that this cutoff exactly corresponds with the military's needs. As a “statutory scheme which draws a sharp line between the sexes,” this argument seems suspicious. Drawing such a line “solely for the purpose of achieving administrative convenience,” is arguably a purpose “forbidden by the Constitution.”¹²⁶

Ultimately, the stereotyping argument—that women should be included and excluded based on individual performance, not an assumption that women generally cannot adequately perform—cannot support the argument against integration. Critics have to fall back on a normative argument. Thus, Mitchell and others invoke the military “soul” as the true “cost” of integrating women, explicitly championing masculinity norms of protection of the feminine.¹²⁷ The stereotyping analysis, then,

123. There are some other problems as well: the study does not account for differences in experience; it admittedly selects tasks thought to be most difficult for women, not a representative sample of shipboard duties; and it assumes that the women, not the tasks, are the problem. These issues are discussed below. *See infra* Part III.B–D.

124. Robertson & Trent, *supra* note 120, at 13–16.

125. *See infra* notes 187–92 and accompanying text.

126. *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (plurality opinion) (internal alteration and citation omitted).

127. MITCHELL, *supra* note 117, at 341–43; PRESIDENTIAL COMMISSION, *supra* note 24, at 60; GUTMANN, *supra* note 115, at 275.

has removed the centrality of the strength rationale and flushed out social norms as the key to de jure exclusion.

B. Differential Training

The stereotyping analysis is limited in the same ways that the physical-strength argument is limited: It assumes that observed differences in studies indicate natural differences in men's and women's ability to do a job.¹²⁸ This assumption is the second difficulty with the physical-strength claims: They leap to the conclusion that the observed differences in physical strength must be entirely inherent.¹²⁹ Such a conclusion is not supported by research; to the contrary, a substantial body of research shows that women are systematically discouraged from physical activities and sports from the day they are born.¹³⁰ Therefore, it is not surprising if women show less physical prowess when they arrive at the military as young adults.

Differences in physical training are profound and go well beyond a few hours on a sports field or at a gym.¹³¹ Women's approach to physical tasks hobbles them; they do not use the full potential of their bodies.¹³² Women are taught to occupy less space and avoid getting hurt.¹³³ Women take themselves to be the object, rather than the originator, of movement.¹³⁴ In other words, discrimination is built into our bodies.¹³⁵

Reversing a lifetime of training is no small task, but there is evidence that training women intensively can close the gap. A four-month, three-times-a-week training program for female civilian firefighting candidates produced 25% of approximately thirty-six participants in the program who passed a physical test to compete for the job as New York City firefighters.¹³⁶ This result was still worse than men's 57% passage rate,

128. See *infra* notes 207–13 and accompanying text.

129. *Id.*; *infra* notes 130–52.

130. This is well-worn ground that I do not attempt to retread here. See, e.g., Ruth Colker, *Rank-Order Physical Abilities Selection Devices for Traditionally Male Occupations as Gender-Based Employment Discrimination*, 19 U.C. DAVIS L.R. 761, 767–776 (1986); *infra* notes 132 & 135.

131. See Carol Lynn Martin, *Social Role Theory of Sex Differences and Similarities*, in *THE DEVELOPMENTAL SOCIAL PSYCHOLOGY OF GENDER* (Thomas Eckes & Hanns M. Trautner eds., 2000).

132. Iris Young, *Throwing Like a Girl*, in *THROWING LIKE A GIRL AND OTHER ESSAYS IN FEMINIST PHILOSOPHY AND SOCIAL THEORY* 141–42 (1990).

133. *Id.*

134. *Id.*

135. Catharine A. MacKinnon, *Women, Self-Possession, and Sport*, in *FEMINISM UNMODIFIED* 117–24 (1987).

136. Kevin Flynn, *Most Women Applicants Fail Physical Test for Fire Dept.*, N.Y. TIMES, Feb. 3, 2000, at A25. Passing required, in essence, a perfect score, because the jobs were highly competitive.

but substantially better than the overall women's passage rate of 9.5% for the 105 women who took the test.¹³⁷ Likewise, women's running times in Olympic marathons decreased steadily in the eight years after the event was introduced for women, and much more rapidly than men's, a phenomenon plausibly attributed to increased opportunities for women to train.¹³⁸

The results of the Navy study also suggest that the cause of the observed differences in strength is differential training, rather than innate differences, in three ways. First, the study apparently did not control for differences in sea-duty experience. In the early 1980s, the men assigned to a shore intermediate maintenance facility probably would have much more experience serving on ships than the women because of the limited availability of sea billets to women.¹³⁹ This disparity in experience would be particularly significant for the tasks involving moving through doors and scuttles, since these are routine movements for personnel assigned to ships but unfamiliar to others.¹⁴⁰

Second, the results suggest that it is not sheer muscle mass that is inhibiting women. For example, on several tests the cutoff score for the strength-test battery had to be set higher for women than for men in order to exclude the same proportion of the group that failed the shipboard task that the test was designed to measure the ability to do.¹⁴¹ In other words, women needed to be stronger to perform at the same level as men. This finding supports the conclusion that women are not trained to use their bodies in ways that are as efficient as men. Thus, differences in what women can do may be based on how the women are using their bodies, which can change, rather than immutable physical differences.

Finally, the age of the study is a concern given significant increases in women's physical training in the 1980s and 1990s, pursuant to changing norms particularly among United States and European women.¹⁴² Thus, this study cannot be taken as evidence that women cannot ever do the job.

137. *Id.*

138. Sparling, *supra* note 114, at 1725, 1727. The article goes on to argue that performance has leveled out and the remaining gender gap will not close.

139. *See supra* notes 14 & 22.

140. *See Colker, supra* note 130, at 778 (“[S]tereotypes about the difficulty of attaining strength and speed lead employers to ignore the significant component of skill, as opposed to strength, in many physically demanding tasks.”); *id.* at 793–97 (noting that police and fire departments commonly ignore such abilities in delineating physical job requirements).

141. Robertson & Trent, *supra* note 120, at C-8.

142. *See, e.g.,* ANNICK DAVISSE & CATHERINE LOUVEAU, *SPORTS, ÉCOLE, SOCIÉTÉ: LA DIFFÉRENCE DES SEXES: FÉMININ, MASCULIN ET ACTIVITÉS SPORTIVES* (1998); BENILDE VÁSQUEZ, *ACTITUDES Y PRÁCTICAS DEPORTIVAS DE LAS MUJERES ESPAÑOLAS* (1993).

Some advocates of the physical-strength argument do address the argument that differential training, which can be overcome, is responsible for the differences. Mitchell remarks on dramatic differences between male and female West Point attendees after “eight weeks of intensive training,” with men demonstrating 270% more power and 473% more work than women at the bench press.¹⁴³ In a footnote, we learn that the study was conducted in 1976, and that strength and power were not emphasized in the training.¹⁴⁴ More recent and relevant studies indicate that training may make a substantial difference in women’s physical performance. A 2000 study found that female Army trainees made substantially larger improvements in physical fitness than men in the course of an eight-week basic training, although both men and women improved. Women’s average numbers went from 70% to 97% of men’s for sit-ups, from 33% to 56% of men’s for push-ups, and, for running, women’s times went from 133% to 121% of men’s.¹⁴⁵ The study suggests that basic training is capable of addressing some of the difference between men and women. While critics often charge that basic training has “gone soft,” because physical standards were lowered across the board (for men and women) when women were integrated,¹⁴⁶ this study supports a different story (and one consistent with my personal experience): Basic training is rigorous and individualized enough that it will push those who enter less fit, including women, to narrow the gap.¹⁴⁷

Another reason for disparities in strength is that women in the military are still subject to powerful social norms that dictate that they limit their physical capabilities. Tellingly, Mitchell notes that when a Navy ship was outfitted with strength-training equipment and women were encouraged to train, they did not, because physical fitness was “anathema” to them.¹⁴⁸ For him, women failed to train because they are naturally feminine, which is to say averse to physical exercise.

Yet it seems more likely that frequent charges by critics, such as Mitchell, that women in the military are lesbians,¹⁴⁹ combined with high-

143. MITCHELL, *supra* note 117, at 142.

144. *See id.* at 362 n.2.

145. Bell, *supra* note 114, at 142–43.

146. *See, e.g.*, MITCHELL, *supra* note 117, at 142.

147. There are accounts of elite women’s combat units in Africa. These accounts come from European men and may be suspect to the distortions of racism; however, they suggest that, in other societies, women have served with distinction as combatant foot soldiers. STANLEY B. ALPERN, *AMAZONS OF BLACK SPARTA: THE WOMEN WARRIORS OF DAHOMEY* 87–102, 158–62 (1998); ROBERT B. EDGERTON, *WARRIOR WOMEN* (2000).

148. MITCHELL, *supra* note 117, at 145.

149. *See id.* at 163–66.

er numbers of discharges of women for homosexuality,¹⁵⁰ require women in the military constantly to affirm their (heterosexual) femininity by making their bodies physically weak.¹⁵¹

Thus, differential training and socialization account for at least a part of the observed differences. The failure of critics to take these factors into account signals a bias toward naturalizing difference. Critics ignore increases in women's observed physical strength when their training is changed. For example, both improvements in women's physical-fitness standards changed since the 1980s and specialized training have been shown to increase women's physical strength.¹⁵² These failures signal an underlying bias—a desire to believe that the differences between men and women are natural and immutable. That bias has prevented exploring the empirical evidence of how best to find qualified personnel for the military.

C. Trait Selection

Thus far, I have only addressed the question of whether women might perform better than critics would suggest, based on the critics' own scales, that is, that women might be able to do more push-ups or carry heavier objects. Critics of complete integration generally argue that if women cannot measure up in an evaluation of these tasks, they will be less able to do certain military jobs, such as infantry.¹⁵³ However, there is a step missing in that analysis. How do we know that push-ups are beneficial to the foot soldier? Test validation¹⁵⁴ never enters into the

150. See OFFICE OF THE UNDER SEC'Y OF DEF. (PERS. AND READINESS), REPORT TO THE SECRETARY OF DEFENSE: REVIEW OF THE EFFECTIVENESS OF THE APPLICATION AND ENFORCEMENT OF THE DEPARTMENT'S POLICY ON HOMOSEXUAL CONDUCT IN THE MILITARY (April 1998).

151. Cf. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion) (“An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible Catch-22: out of a job if they behave aggressively and out of a job if they do not.”).

152. *Supra* notes 145 & 148.

153. See, e.g., Donnelly, *supra* note 12, at 836.

154. In the civilian world, test validation, in the formal social science sense of making sure that the test has some value at predicting job performance, is required under Title VII for tests used in selecting job candidates that have a differential impact by race or sex. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (finding literacy test with differential impact on blacks insufficiently related to factory line jobs); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1974) (“[D]iscriminatory tests are impermissible unless shown, by professionally acceptable methods, to be . . . significantly correlated with important elements of work behavior . . .”). The Equal Employment Opportunity Commission's Uniform Guidelines on Employee Selection Procedures set forth criteria for determining when a test is valid. 29 C.F.R. § 1607.1(B) (2009); see also *Albemarle Paper Co.*, 422 U.S. at 431 (indicating that deference is due to these guidelines though they are not law). Thus, even facially neutral physical-strength entry tests for police and firefighters must be validated; they are often upheld. See, e.g., *EEOC v. Dial*, 469 F.3d 735, 742 (8th Cir. 2006); *Zamlen v. City of Cleveland*, 906 F.2d 209, 219 (6th Cir. 1990); *Berkman v. City of New York*, 812 F.2d 52

argument, presumably because critics rely on the association of the military with masculinity to fill the gap.¹⁵⁵ Women's lower scores are taken as evidence that women are weaker rather than as evidence that the tests are an inadequate measure of physical ability.¹⁵⁶

Critics often invoke women's lower scores on the general physical-fitness tests as proof of women's lower ability to perform in particular military positions. The military disagrees; it does not hold the general physical-fitness requirements to map onto job-specific requirements.¹⁵⁷ In fact, the military has different requirements based on age group and sex. For example, as of 2000, in the Navy's general Physical Readiness Test, men over 50 needed to complete 42% fewer curl-ups and had 12% more time to complete a 1.5 mile run than women 17–19 years old; the push-up requirements were the same.¹⁵⁸ Standards were set similarly for the Army and Marine Corps fitness assessments.¹⁵⁹ Older men are likely to be less physically capable by these measures than the women the critics claim are an intolerable liability, yet the critics do not argue that the test results should be used to exclude those men.

At least one physical-strength argument advocate claims, in an unsupported and underdeveloped line of reasoning, that changing the tasks and the requirement tests to include women reduces the military's tough image and, therefore, its effectiveness. Mitchell argues that allowing the physical-fitness requirement to vary contradicts a "worldwide consensus" that soldiers must be "tougher, faster, stronger, and more physically

(2d Cir. 1987); *Clady v. Los Angeles County*, 770 F.2d 1421, 1430 (9th Cir. 1985); *Legault v. La-Russo*, 842 F. Supp. 1479 (1994). *But see Evans v. City of Evanston*, 881 F.2d 382 (7th Cir. 1989) (Posner, J.) (noting that city's apparently irrational scoring of physical agility test for firefighters probably failed to demonstrate job-related qualification justifying disparate impact on women).

155. As the Third Circuit has explained, "[A]n employer's job requirements may incorporate societal standards based not upon necessity but rather upon historical, discriminatory biases." *Lanning v. Se. Pa. Transp. Auth. (SEPTA)*, 181 F.3d 478, 490 (3d Cir. 1999) (holding that, under Title VII disparate impact theory of discrimination, which Congress reaffirmed in the 1991 Civil Rights Act, the court must examine employer's claimed requirements). The court went on to explain that showing that "more is better," i.e., that higher performance on a single test correlates to better task performance on the job, was sufficient to validate reliance on that test score for hiring:

[I]n only the rarest of cases where the exam tests for qualities that fairly represent the totality of a job's responsibilities. It is unlikely that such a study could validate rank hiring with a discriminatory impact based upon physical attributes in complex jobs such as that of police officer in which qualities such as intelligence, judgment, and experience surely play a critical role.

Id. at 493 n.23.

156. *See id.*; *infra* notes 191–93 & accompanying text.

157. *Infra* notes 158–59.

158. DEP'T OF THE NAVY, OPNAV INSTRUCTION 6110.1F (15 Aug. 2000), Enclosure (7) app. A, at A-1, A-8.

159. *Id.* at 1.

able than the rest of the populace.”¹⁶⁰ With nothing more to justify it than a “consensus,” Mitchell’s argument apparently reverts to a normative claim. This may instead be a third-party claim—a claim that military members must look tough or masculine to our potential enemies. Although the third-party claim has some force, it is unclear that it would outweigh the need for personnel qualified to perform the actual job functions. In the employment context, if third-party preferences are used to justify discrimination, courts have required that they must be for something that is central, not peripheral, to the business.¹⁶¹ At the very least, speculation is insufficient.

Outsiders’ perceptions aside, the Navy study mentioned above¹⁶² might seem to come closest to measuring ability to do the job, but that is deceptive: That study and others show that physical ability is a complex phenomenon and that men and women may have very divergent scores on some tests, but substantially overlap on others. There is not a uniform distance across men’s and women’s scores, so the scores do not justify a static line drawn precisely where it will include most men and exclude most women. For example, women were significantly closer to men in a task that involved carrying the P250 fire pump both up and down ladders in a longer time frame; 38% of women and 14% of men failed.¹⁶³ Similarly, the larger rating-specific study analyzes the difference in women’s and men’s scores and finds statistical overlaps vary enormously.¹⁶⁴ For example, the overlap between men’s and women’s scores was 90% in a task that simulated carrying molten metal between 99 and 168 pounds and moving sideways and pouring it into molds; it was 7% in a task that simulated pulling an airplane tow bar, bearing about 62 pounds of weight, for 300 feet.¹⁶⁵

The studies suggest several areas where women’s ability is more closely matched to men’s. Not unexpectedly, body weight, one of the physical measures, was directly correlated with static lifting tasks but inversely correlated with rigorous movement requirements.¹⁶⁶ This finding suggests that women, statistically lighter, would have the advantage in dynamic military tasks. Thus, the study raises questions about which traits are being selected as measures of physical ability.

160. MITCHELL, *supra* note 117, at 143.

161. *See, e.g.,* *Wilson v. Sw. Airlines*, 517 F. Supp. 292 (1981) (Higginbotham, J.).

162. Robertson & Trent, *supra* note 120.

163. *Id.* at C-8.

164. *Id.* at 14, B-2, B-3.

165. *Id.* The study uses the Tilton index of overlap. *Id.* (citing J.W. Tilton, *Measurement of Overlapping*, 28 J. EDUC. PSYCH. 652 (1937)).

166. Robertson & Trent, *supra* note 120, at 28, 31.

Similarly, the 2000 study did not find differences to be uniform across strength measures. After completing basic training, women's mean run time and push-up numbers did fall more than a standard deviation below the men's means, but their sit-up numbers were virtually identical.¹⁶⁷ Moreover, other studies find that women and men are much more closely matched in leg strength than in arm strength.¹⁶⁸

It is important to keep in mind what question is being answered. A study may have valid measures of the ability to do a particular task, yet not provide an accurate measure of the ability to do the whole job—the study measures only the parts of the job that men tend to do better, and not the parts of the job that women tend to do better.¹⁶⁹ As discussed above, critics cite studies of whether women are capable of isolated tasks identified as muscularly demanding.¹⁷⁰ These studies do not tell us whether women can do the job of a sailor assigned to a Navy ship. For example, the Navy study researchers explicitly studied precisely those tasks perceived to be the most difficult for women, because that is what Congress asked them to do.¹⁷¹ As Jeanine Altmann has pointed out in the context of primate studies, understanding what is involved in the life and work of a particular group requires a representative sample of what all group members do over time, not isolated study of subjectively identified events.¹⁷² By no means do all men in a ship's crew ever carry a P250 fire pump.

Indeed, real life examples show that, despite the lower scores on isolated tasks, women performed well in the jobs for which those same studies were meant to apply. For example, in actual damage control situations, no one has reported any problems with women's performance. The Presidential Commission appointed by President George H.W. Bush found that "200 women performed well in an actual firefighting emergency aboard a Navy ship in 1988."¹⁷³ The difference between the theo-

167. Bell, *supra* note 114, at 142.

168. K.F. DYER, CHALLENGING THE MEN: THE SOCIAL BIOLOGY OF FEMALE SPORTING ACHIEVEMENT 72 (1982); MITCHELL, *supra* note 117, at 141.

169. See *Lanning v. Se. Pa. Transp. Auth. (SEPTA)*, 181 F.3d 478, 493 n.21 (3d Cir. 1999) (noting that study purporting to validate aerobic capacity test for transit police was questionable, *inter alia*, because it focused on "a small aspect of the job"); *id.* at n.23.

170. *Supra* text accompanying notes 166–68.

171. Congress identified general shipboard and damage control tasks it thought would be difficult for women; the researchers expanded the study along the same lines. Robertson & Trent, *supra* note 120.

172. HARAWAY, *supra* note 147, at 305–06.

173. PRESIDENTIAL COMMISSION, *supra* note 24, at 32. Unofficial reports from the USS *Cole*, after a terrorist attack put a forty-foot hole in the hull, tend to confirm this finding in that they mention a valiant crew, working around the clock for days to save the ship, and do not mention deficiencies in women's performance. "I have never been so proud . . . of the men and women that I serve with than I was today." *Fighting to Save the Cole*, ABOUT.COM, (last updated Oct. 26, 2000),

retical expectation that women are unable to perform the job (because some women were unable to perform some tasks) and actual results in a real life emergency can probably be explained by the fact that women possess many unmeasured abilities. For instance, isolated studies do not measure the critical endurance that is required for crews to fight fires for days on end.

Women have a number of advantages that are useful in the military context.¹⁷⁴ It is important to realize that generalizations about these advantages, even when intended to benefit women, run the risk of accepting differences as natural—an acceptance, that, as we have seen, is neither empirically supported nor ultimately empowering to women. Studies can only measure women’s bodies as they come to be in conditions of today’s imperfectly equal society.¹⁷⁵ With this in mind, we can still note findings suggesting that women today have physical characteristics that warrant just as much study as potentially important to various military tasks. Survey respondents in the Navy study reported that restricted space made twenty of fifty tasks very difficult,¹⁷⁶ suggesting that a smaller stature may actually be an advantage. Mitchell admits that women are less susceptible to altitude sickness and cold.¹⁷⁷ Women have a higher speed-to-body-size ratio in sprint events, suggesting that they pack power more efficiently.¹⁷⁸ Women’s greater body fat contributes to streamlining and cold resistance, both of which are advantages in swimming.¹⁷⁹

Endurance is another area in which women may have an advantage. Several studies have found that, in submaximal performance, women’s muscles have significantly slower fatigue and faster recovery than men’s do.¹⁸⁰ A 1999 study concluded this result is likely due to different mus-

<http://usgovinfo.about.com/library/news/aa102300a.htm> (quoting embarked helicopter pilot). By definition these are emergencies and not conducive to controlled study, but one would expect that any deficiencies in women’s performance would stand out, just as pregnancy was quick to be remarked upon during the Gulf War. See FRANCKE, *supra* note 12, at 104–29.

174. Cf. Colker, *supra* note 130, at 778 (“Employers ignore the importance of physical attributes traditionally held by women, such as flexibility, small-hand motor coordination, balance, endurance, and ability.”).

175. See MacKinnon, *Women, Self-Possession, and Sport*, *supra* note 135, at 120; Sally Haslanger, *On Being Objective and Being Objectified*, in *A MIND OF ONE’S OWN: FEMINIST ESSAYS ON REASON AND OBJECTIVITY* 85 (Louise M. Antony and Charlotte Witt eds., 1993).

176. Robertson & Trent, *supra* note 120, at 7.

177. MITCHELL, *supra* note 117, at 141.

178. DYER, *supra* note 168, at 72.

179. *Id.* at 81; *WOMEN AND EXERCISE: PHYSIOLOGY AND SPORTS MEDICINE* 79 (Mona Shingleton & Gabe Mirkin eds., 2d ed. 1994).

180. See C.S. Fulco et al., *Slower Fatigue and Faster Recovery of the Adductor Pollicis Muscle in Women Matched for Strength with Men*, 167 *ACTA PHYSIOLOGICA SCANDINAVICA* 233, 236–37 (1999) (finding and describing other studies).

cle composition.¹⁸¹ Women also have higher percentages of intramuscular fat and may burn it more efficiently, possibly contributing to their endurance for submaximal (less than the maximum of which an individual is capable) work.¹⁸² Other military forces have taken advantage of women's greater capacity for endurance.¹⁸³ For instance, the Vietnamese military put women's greater endurance to practical use when it assigned women to carry supplies because they had greater stamina and complained less of the drudgery.¹⁸⁴ They earned the description of "water buffalo of the Revolution."¹⁸⁵

Physical ability is substantially more complex than a single unified "strength" trait. If physical abilities are to justify selections for job performance, one cannot pick and choose which abilities to measure by sex, not job, correlation.¹⁸⁶ By failing to justify trait selection that advantages men as job-related, critics reveal that they are defining "strength" around men's abilities. They thus attribute large observed differences on selective measures to a natural "physical strength." However, it is the strategic selection of the measures, not the job requirements, that leads to the dramatic gap.

D. Task Definition

Finally, to the extent that military tasks remain better suited for men's bodies, it is by no means apparent that this is the only, or even the best, way to design military equipment and procedures. Both the measures and the tasks are designed to fit men. Critics often respond to suggestions that tasks and equipment be modified by claiming that inserting women into a man's world is an unnecessary expense taken only to further social engineering instead of military readiness. This argument ignores the constant redesign needed to maintain the United States military's technological advantage. For example, Mitchell discusses the

181. *Id.*

182. DYER, *supra* note 168, at 75.

183. *Infra* notes 184–85.

184. William J. Duiker, *Vietnam: War of Insurgency*, in FEMALE SOLDIERS, *supra* note 100, at 115.

185. *See id.* Some observations suggest Dahomey women soldiers in the nineteenth century may have displayed exceptional endurance, flexibility, agility, and speed. ALPERN, *supra* note 147, at 99. It is, of course, impossible to sort out how much the European male accounts should be credited: they report qualities the observers may have seen as more feminine, or consistent with a racist understanding of African women. These qualities, however, would be useful in today's special operations units, from which women are excluded.

186. Ruth Colker provides an example: employers cite firefighters' need to lift and carry victims from fires to justify height, weight, and physical-strength tests for firefighters, yet they never employ such tests for nurses, who similarly must lift and carry patients. Colker, *supra* note 130, at 778.

“problems” posed by women’s “smaller size and different shape” (the unstated comparison being to men and military members, a single conflated category)—the need to design “special” equipment and clothing.¹⁸⁷ Obviously, as the Mad Hatter would point out,¹⁸⁸ we might just as well say that men’s larger size and different shape creates the need for special equipment and clothing.¹⁸⁹ Mitchell’s appeal, though, is for the ease of maintaining the status quo, and he uses the high cost of modifications to support his argument that it is simply too costly to integrate women into the military. The chief difficulty with this cost argument is that the military is, and must be, constantly in the process of upgrading its equipment. Technological advancement is one of the major ways that the United States remains a world military leader.¹⁹⁰ For example, the P250 fire pump used in the Navy study has since been redesigned to run on jet fuel instead of gasoline, to eliminate the need to store highly flammable gasoline on ships; the new model is also smaller.¹⁹¹ As Martha Minow has noted, redesigning the status quo for those who have been left out can result in advantages for everyone.¹⁹² “[L]ighter firefighters’ helmets”¹⁹³ would probably benefit not only women but also men who must wear them for long hours during disasters in Navy ships.

Mitchell raises a more serious problem, involving anthropometric standards,¹⁹⁴ but again the argument advances the male norm rather than real constraints. Anthropometrics is the concern that some equipment, for example jet-fighter cockpits, needs to be designed for a particular size person. A mixed-gender military means that there will be a greater range of sizes to consider.¹⁹⁵ First, anthropometrics are complex, and vary by race as well as sex.¹⁹⁶ Some equipment may be available to a smaller percentage of military members regardless of whether there are women

187. MITCHELL, *supra* note 117, at 145.

188. See LEWIS CARROLL, *ALICE’S ADVENTURES IN WONDERLAND*, ch. 7 (BiblioBazaar 2010) (1865) (making a related logical point).

189. See MARGARET EICHLER, *NONSEXIST RESEARCH METHODS: A PRACTICAL GUIDE* 139 (1988).

190. See WILLIAM S. COHEN, SEC’Y OF DEF., *ANNUAL REPORT TO THE PRESIDENT AND CONGRESS* 88 (2001), <http://www.dod.mil/execsec/adr2001/index.html>.

191. See U.S. COAST GUARD, *NAVAL ENGINEERING MANUAL, COMMANDANT INSTRUCTION M9000.6E*, October 21, 2004, at 555–5, *available at* www.uscg.mil/directives/cim/9000-9999/CIM_9000_6E.pdf.

192. MARTHA MINOW, *MAKING ALL THE DIFFERENCE* 95–97 (1990).

193. MITCHELL, *supra* note 117, at 146.

194. *Id.*

195. *Id.*

196. See, e.g., Miyo Yokota, *Head and Facial Anthropometry of Mixed-Race US Army Male Soldiers for Military Design and Sizing: A Pilot Study*, 36(3) *APPLIED ERGONOMICS* 379 (May 2005).

in the military.¹⁹⁷ Second, the argument does not consider that, if particular roles are to be limited by anthropometrics, they should be limited by those with physical characteristics best suited to the job—who may not always be men. For example, Mitchell concedes that women suffer less from altitude sickness, but does not consider whether it would be more efficient to design cockpits for their average measurements.¹⁹⁸ Once again, the argument favors ideology over reality.

Another cost-increase physical-strength argument advocates use to counter the concept of task redefinition is the need for more crew to do the same job. Mitchell does discuss one attempt to redefine tasks, at a fire station in Adak, Alaska, with a crew of three-quarters women.¹⁹⁹ He claims that despite “special, lighter” equipment and the procedures rewritten for women’s physiques, “the department was forced to assign five women to engine companies that normally required only four men.”²⁰⁰ The argument is that task redefinition in the context of strength requirements will simply come down to needing more personnel.

Even if redefinition of some tasks includes adding more personnel, *de jure* exclusion of women is an excessive response. It may be that some tasks require unusually strong people, more likely to be men than women in the world today, even given some professional training. In order to justify broad exclusions, not just rating-specific tests, it would also need to be the case that it is difficult to extricate those tasks from general duties. Assuming this difficulty to be true still does not justify a *de jure* exclusion of women who have the strength, as noted above, without a supplemental normative argument. It does force a choice, though. Physical-strength standards could be set very high for broad segments of the military, so that every member of a ship’s crew, for example, is able to wrestle fire pumps up and down ladders without help.

But the military has never chosen to exclude such broad swaths of qualified personnel. The military evidently does not turn away the men who do not meet the physical requirements that the critics advocate, because men as well as women failed each one of the tests in the studies discussed above.²⁰¹ It is more likely to be cost effective to use a second alternative, based on a less partial view of the job: Select the best people for the other 99% of the job description. The need for the rare instance in which an extra body is required to accomplish a difficult task is a very

197. Margaret C. Harrell et al., NAT’L DEF. RESEARCH INST., RAND, THE STATUS OF GENDER INTEGRATION IN THE MILITARY: ANALYSIS OF SELECTED OCCUPATIONS 92 (2002).

198. MITCHELL, *supra* note 117, at 141.

199. *Id.*

200. *Id.*

201. Robertson & Trent, *supra* note 120.

small part of the overall picture. The steadily increasing participation of women in the military²⁰² suggests that this is precisely the military's judgment.

Task definition is the clearest indicator that all of the thinking behind physical-strength arguments assumes that a male military member is normal and a female military member must be accommodated with "special" clothing, equipment, and procedures. This section has aimed to show that standards for job performance can remain high despite task redefinition. The failure to explore this possibility indicates that a normative belief, rather than an inexorable reality, is driving the physical-strength rationale for de jure exclusion of women from the military.

IV. THE NORMATIVE BASIS FOR DE JURE EXCLUSION

A pattern emerges from these four problems. What appears to be a biological truth is actually better understood as a normative belief that the military's job is in some way peculiarly suited to men. It is not that women's bodies do not measure up against an objective standard, but that the standard is defined so women do not fit it. This Part examines the normative claims exposed as underlying the physical-strength arguments.

In pre-*Rostker* cases, rejecting men's equal protection challenges to the draft, courts made the underlying normative rationale quite clear: "If a nation is to survive, men must provide the first line of defense while women keep the home fires burning."²⁰³ Subsequent cases cite this policy as justification for otherwise unsupported claims about "obvious" innate differences in physical strength, rather than providing factual support for actual differences as a justification for the policy.²⁰⁴

In contrast, a Montana district court actually examined the physical-strength evidence and rejected the "actual differences" defense. The judge found: "There is simply no basis for concluding that all or even a significant number of women are incapable of serving in the military. This statement is true even assuming they would be placed in combat roles."²⁰⁵ As a society, we still seem to accept the belief that it is the re-

202. POPULATION REPRESENTATION, *supra* note 26, at 18–32.

203. *United States v. St. Clair*, 291 F. Supp. 122, 125 (S.D.N.Y. 1968).

204. *United States v. Yingling*, 368 F. Supp. 379, 386 (W.D. Pa. 1973); *United States v. Cook*, 311 F. Supp. 618, 622 (W.D. Pa. 1970).

205. *United States v. Reiser*, 394 F. Supp. 1060 (D. Mont. 1975); *see also* Carol Schuster et al., U.S. GOV'T ACCT. OFF., *Gender Issues: Information On DOD's Assignment Policy and Direct Ground Combat Definition*, GAO/NSIAD-99-7, at 3 (Oct. 1998) ("We found no positions closed to women because of job-related physical requirements. DOD's current rationale for excluding women from direct ground combat units or occupations is . . . [that] DOD officials . . . believed that the

ality of women's bodies that limits their participation in the military. As we have seen, however, that belief is deeply flawed—for example, consider again the simple stereotyping analysis that asks why women would be excluded *de jure*. The exclusion instead relies on an understanding that the kinds of things the military does are, and should be, appropriately within the male realm. But in incorrectly presupposing that men are, literally, strong, and women are, literally, weak, competence is confused with masculinity, and incompetence is confused with femininity. This presupposition has an important corollary: masculinity becomes a mark of power and status—even in all-male settings.²⁰⁶

It goes beyond stereotyping, however, because in believing men are stronger, we both train them to be stronger, and we create a military designed around their abilities—in other words, we make the belief real. Epistemologist Sally Haslanger has termed this cognitive mechanism “assumed objectivity.”²⁰⁷ Members of a powerful group ascribe characteristics to a weak group in a way that makes the differences real, and in a vicious cycle, the ascribed characteristics help make the weak group weak.²⁰⁸ For example, slave owners might ascribe a lack of intelligence to slaves, claim that this characteristic is innate, use this professed belief to justify a lack of education, and in this way make real a difference that keeps the slave owners in power.²⁰⁹

It works the same way for sex.²¹⁰ First, observed regularities—women's lower scores on physical-strength tests—are taken to be a consequence of women's weak nature. Second, women's weak nature is argued to constrain decisions around their inclusion in certain military jobs. Haslanger argues that, while there is not necessarily anything wrong with conforming action to the nature of things, in the context of gender, such constraints reinforce a distorted view of reality.²¹¹ This view leads to the third, critical step of assumed objectivity, contributing “the element of illusion—the masking of social/moral facts as natural facts.”²¹² The starting position that purports to be neutral in fact presupposes the masculinity of the military.²¹³

integration of women into direct ground combat units lacked both congressional and public support.”).

206. CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 127–54 (1989).

207. Haslanger, *supra* note 175, at 102–04.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at 111.

212. *Id.*

213. See GUTMANN, *supra* note 115; MITCHELL, *supra* note 117, at 341–43; PRESIDENTIAL COMMISSION, *supra* note 24, at 60; Donnelly, *supra* note 12, at 929–30.

This distortion is counterproductive for women and for men. Women lose by being defined as incompetent to serve in combat roles just because they are women. The military is a central institution of national and international power. It has a vital role in the international rule of law. The physical-strength argument reveals an underlying normative distinction between combatant and noncombatant that is gendered and hierarchical. Women must shatter this distinction or risk permanent subordination. If women want to invoke state protection from violence, as we should, the institution that provides that protection cannot legally define women as unequal.

If the arguments to exclude women from the military are less than empowering to women, they are less than flattering to men: “Our ultimate marching orders,” writes Stephanie Gutmann, “come from the imperative to extend our species, and on some very primitive level we ‘understand’ that eggs are expensive and sperm—that is men’s bodies, which throughout history have been treated like so much matchwood—are cheap.”²¹⁴ Gutmann’s willingness to characterize military men, who are disproportionately rural and black,²¹⁵ as disposable and oversexed is particularly surprising given her explicit recognition of the class attitudes that lead political liberals to look down on the military.²¹⁶

Men lose by being constrained to the role of oversexed aggressors, on pain of losing their identity as men.²¹⁷ As bell hooks puts it: “Men are not exploited or oppressed by sexism, but there are ways in which they suffer as a result of it.”²¹⁸ The United Nations Secretary General found that “[t]here is . . . significant diversity among men, shaped by local context and cultures.”²¹⁹ Even among men, diversity of ability is an important aspect of military teams,²²⁰ yet it is threatened when a single set of characteristics conforming to beliefs about masculinity are confused with military ability.

214. GUTMANN, *supra* note 115, at 274.

215. POPULATION REPRESENTATION, *supra* note 26, at 26, 36.

216. GUTMANN, *supra* note 115, at 18.

217. See U.N. ESCOR, COMM’N ON THE STATUS OF WOMEN, *The Role of Men and Boys in Achieving Gender Equality: Report of the Secretary-General*, 48th Sess., at 5, U.N. Doc. E/CN.6/2004/9 (Dec. 22, 2003).

218. bell hooks, *FEMINIST THEORY: FROM MARGIN TO CENTER* 73 (2000). Psychologist William Pollack explains that the distorted image of the ideal boy is impossible to attain for flesh-and-blood boys, who thus see themselves as constantly falling short. “Is it any wonder, then, that he may later become frustrated, depressed, or angry, suffer low self-esteem, fail to succeed in intimate relationships, or even turn violent?” WILLIAM POLLACK, *REAL BOYS: RESCUING OUR SONS FROM THE MYTHS OF BOYHOOD* xxiii (1998).

219. See U.N. ESCOR, *supra* note 217, at 6.

220. STEPHEN B. KNOUSE, DEF. EQUAL OPPORTUNITY MGMT. INST., *Keeping “On Task”: An Exploration of Task Cohesion In Diverse Military Teams 3* (DEOMI Research Series Pamphlet 98-1, 1998).

The question becomes not whether equality should be accommodated at the expense of military readiness, but how much military readiness can be sacrificed to adhere to inaccurate views about women's and men's ability.²²¹ Analyzing the physical-strength rationale for de jure exclusion of women from combat exposes the distorted lens demanding that men be strong and women be weak. This distorted lens compromises the military mission on many levels. It leads to excluding available personnel who not only would be capable of doing the job, but also might do it better.

More profoundly, the mission of the military is to protect and defend our democratic society. This mission is compromised if it is achieved through subordination of a segment of that democratic society.²²² To echo President Obama, it is time to repeal another law and regulation "that denies . . . Americans the right to serve the country they love because of who they are".²²³ The prohibition on women serving in combat.

221. Historically, it can be argued that using women more extensively in war was a winning strategy. During the Civil War following the Russian Revolution, women fought on both sides but were used for a wider variety of tasks in the Bolshevik forces. They fought in regular combat on every front in the Red Army, as well as in support, psychological warfare, espionage, and guerrilla roles. See Anne Eliot Griesse & Richard Stites, *Russia: Revolution and War*, in *FEMALE SOLDIERS*, *supra* note 100, at 1, 64–65. In World War I and II, the Germans and, in World War II, the Japanese, were extremely reluctant to use women in any but the most limited civilian roles, while the United States, Britain, Russia and later the USSR, and the Yugoslavian resistance fighters used women in larger numbers and incorporated them into the military in some capacity. See *id.* Nancy Loring Goldman & Richard Stites, *Great Britain and the World Wars*, in *FEMALE SOLDIERS*, *supra* note 100, at 21; Jeff M. Tuten, *Germany and the World Wars*, in *FEMALE SOLDIERS*, *supra* note 100, at 47; Barbara Jancar, *Yugoslavia: War of Resistance*, in *FEMALE SOLDIERS*, *supra* note 100, at 85; Karl L. Wiegand, *Japan: Cautious Utilization*, in *FEMALE SOLDIERS*, *supra* note 100, at 179; PRESIDENTIAL COMMISSION, *supra* note 24, at C-28 & C-29; Meyer, *supra* note 14. In Vietnam, the North Vietnamese and Viet Cong used women to haul supplies, as terrorists, and to gather intelligence; the South Vietnamese and the United States restricted women to more marginal auxiliary roles. William J. Duiker, *Vietnam: War of Insurgency*, in *FEMALE SOLDIERS*, *supra* note 100, at 107. In the Algerian War of Independence, thousands of women participated on the victorious native side, the majority in civilian support roles, a few terrorists and intelligence, and a significant number in the military as regular soldiers. See Djamila Amrane, *Algeria: Anticolonial War*, in *FEMALE SOLDIERS*, *supra* note 100, at 123, 128–34 (Richard Stites trans.). Each time, the side that opened more roles to women won.

222. See POPULATION REPRESENTATION, *supra* note 26, (outlining goal of achieving "on the one hand a successful warfighting capability, and on the other, an organization that comprises 'we the people.'"). See also U.N. ESCOR, *supra* note 217, at 7. ("In many parts of the world, the police and the armed forces reinforce notions of aggressive forms of masculinity associated with violence, but could also be an important venue for gender-sensitive education for men.").

223. Obama, *supra* note 1.