An Equal Right to Fight: An Analysis of the Constitutionality of Laws and Polices that Exclude Women from Combat in the United States Military

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AN EQUAL RIGHT TO FIGHT: AN ANALYSIS OF THE CONSTITUTIONALITY OF LAWS AND POLICIES THAT EXCLUDE WOMEN FROM COMBAT IN THE UNITED STATES MILITARY

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I. INTRODUCTION

Law and policy restrict women in the United States Military from serving in positions that would require them to engage in direct combat.¹ The Women’s Armed Services Integration Act of

¹ U.S. DEPARTMENT OF DEFENSE, OFFICE OF THE SECRETARY OF DEFENSE, MILITARY WOMEN
1948\textsuperscript{2} excludes women from Air Force and Navy vessels and aircraft that might engage in combat.\textsuperscript{3} The Army and the Marine Corps also exclude women from combat through their official established policies.\textsuperscript{4} The result of these statutes and policies is the exclusion of women, on the sole basis of gender, from over twelve percent of the skill positions and thirty-nine percent of the total positions offered by the Department of Defense.\textsuperscript{5} There has never been a direct challenge to the constitutionality of these laws and regulations banning women from combat. The closest the United States Supreme Court has come to deciding the issue was in \textit{Rostker v. Goldberg},\textsuperscript{6} where the constitutionality of a male-only draft registration was upheld. The purpose of this Note is to establish reasons that these statutes and policies excluding women from combat positions should be repealed by Congress or declared unconstitutional.

Part II explains that there is some question about what standard of scrutiny would be applied if there is a direct constitutional challenge to the combat exclusion laws. Part III examines the case of \textit{Rostker v. Goldberg}\textsuperscript{7} and speculates about the effect this case will have on the standard of scrutiny applied if there is a test of the constitutionality of the combat exclusion laws. Part IV asserts that these laws and policies do not meet the standards set forth in \textit{Craig v. Boren}.\textsuperscript{8} Part V reviews the traditional justifications for banning women from combat and explains why these reasons are no longer appropriate or acceptable. Part VI proposes additional reasons the combat exclusion laws should be declared unconstitutional or re-
pealed. Finally, Part VII concludes that the passage of legislation calling for an experimental program where women would serve in combat units would be a substantial step towards the total abolition of these discriminatory statutes and policies.

II. THE STANDARD OF SCRUTINY TO BE APPLIED IN A CONSTITUTIONAL CHALLENGE OF COMBAT EXCLUSION LAWS

The Fourteenth Amendment's Equal Protection Clause insures that no state can deny any person "the equal protection of the laws." Although the Fourteenth Amendment's Equal Protection Clause is not applicable to the federal government, the United States Supreme Court has held that the Fifth Amendment's Due Process Clause prohibits the federal government from making unreasonable classifications. Thus, the Fifth and Fourteenth Amendments guarantee that people who are similarly situated will be treated similarly by federal and state government.

Historically, courts have applied two levels of scrutiny to statutes and policies challenged as being discriminatory. Under the lowest level of scrutiny the government only has to establish that a classification used by the statute or policy in question has a mere rational relationship to a legitimate governmental end. Under strict scrutiny the statute will be upheld only if it is necessary to promote a compelling governmental interest. In the past few decades, however, the United States Supreme Court appears to have established a middle level of scrutiny for gender discrimination cases.

The first case in which the Court explicitly rejected the mere rationality test for gender discrimination was Frontiero v. Richard-

12. G. Gunther, CONSTITUTIONAL LAW 588 (11th ed. 1985). Actually, this is an over simplification of the number of standards of scrutiny that the courts apply in Equal Protection cases. There have been variations on each of these standards in several opinions.
15. Id. at 590.
16. In an earlier case the court purported to apply the mere rationality test, but seemed to be applying it with more force. See Reed v. Reed, 404 U.S. 71 (1971).
son.” In *Frontiero* a plurality opinion held that gender classifications should be strictly scrutinized because they are inherently suspect. Since gender, like race, is an immutable characteristic, “statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.” The plurality opinion written by Justice Brennan stated that classifications based upon sex are inherently objectionable.

The Court, however, retreated from applying the strict scrutiny standard in gender discrimination cases three years later. In *Craig v. Boren*, the Court struck down an Oklahoma statute that forbade the sale of 3.2 percent beer to males under the age of twenty-one and females under eighteen. Justice Brennan’s majority opinion articulated the standard that was to be applied in gender-based discrimination cases. The classification “must serve important governmental objectives” and “must be substantially related to achievement of those objectives.” Although the Court was not explicit in declaring a new intermediate standard of review, Justice Powell in his concurrence stated that this new middle level of scrutiny would be applied to gender classifications. The Court reaffirmed the intermediate standard of review for gender classifications in *Mississippi University for Women v. Hogan*, where it struck down the school’s women only policy. It is questionable, however, whether the court will apply the *Craig* intermediate standard of re-

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17. 411 U.S. 677, 688 (1973). In *Frontiero*, the challenged statute allowed servicemen to claim their wives as dependents automatically, but servicewomen had to prove their husbands were actually dependant on them. *Id.*
18. *Id.*
19. *Id.* at 686-87.
20. *Id.* at 688.
23. *Id.*
view to decide the constitutionality of restrictions on women in combat.

The military context of the issue of women in combat may mean that a lesser standard of scrutiny than the Craig test would be applied. The Supreme Court’s treatment of constitutional claims against the military has been inconsistent and no explicit guidance as to the appropriate standard of review has been offered.\(^\text{27}\) The Supreme Court’s approach in military cases is often referred to as the “principle of deference”\(^\text{28}\) or the “separate community” doctrine.\(^\text{29}\) The decisions of Congress and military authorities which restrict the constitutional rights of servicemen and servicewomen are given considerable deference.\(^\text{30}\)

Many dissenting opinions and commentaries have criticized the separate community approach.\(^\text{31}\) One contention is that the approach is “based on a historically obsolete model of the relation of the armed forces to society.”\(^\text{32}\) Another “criticism is that the majority’s approach . . . does not demonstrate that the judiciary is any less competent to consider individual rights in a military context than in connection with prisons, government employment, or national security.”\(^\text{33}\)

Despite these criticisms, the Supreme Court would most likely apply the deferential separate community doctrine to a challenge on exclusion of women from combat. The strongest indication that the Court would not apply the Craig test in such a case is Justice Rehnquist’s failure to adopt the test explicitly in Rostker v. Goldberg,\(^\text{34}\) where there was a constitutional challenge to male-only draft reg-

\(^{27}\) Note, Judicial Review of Constitutional Claims Against the Military, 84 COLUM. L. REV. 390.


\(^{30}\) Id.

\(^{31}\) Id.

\(^{32}\) Id. at 178-9.

\(^{33}\) Id. at 179.

\(^{34}\) Comment, The Supreme Court, 1980 Term, 95 HARV. L. REV. 17, 164 (1981) [hereinafter Supreme Court].
istration policies. In *Rostker*, Justice Rehnquist stated that "the tests and limitations to be applied may differ because of the military context." 35 A majority of the present Court seems willing to grant Congress extreme deference in military matters.

III. *ROSTKER v. GOLDBERG*: THE CLOSEST THE COURT HAS COME TO THE ISSUE

Since 1948 the Military Selective Services Act (MSSA)36 has authorized the President to require males to register for the draft.37 The MSSA does not give the President the power to require the registration of women.38 In 1980, as a response to the Soviet invasion of Afghanistan, President Carter requested that Congress authorize funding for the registration of both men and women.39 The President wrote, "My decision ... is a recognition of the reality that both women and men are working members of our society. It confirms what is already obvious ... that women are now providing all types of skills in every profession. The military should be no exception." 40 Although Congress agreed to the reactivation of draft registration, they passed a joint resolution appropriating funds for the registration of men only.41

Reactivation of draft registration revitalized a dormant lawsuit originally brought in 1971 as a result of the Vietnam conflict.42 The case became *Rostker v. Goldberg* after the substitution of new parties.43 At issue was whether the MSSA violated the Fifth Amendment's Due Process Clause by requiring the registration of males and not females.44 The plaintiffs, a group of men subject to the registration, did not challenge specifically the statutes and policies

35. *Id.* at 164 (citing *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981)).
37. *Supreme Court, supra* note 34, at 162.
38. *Id.*
39. *Id.*
42. *Id.* at 102-03.
44. *Id.* at 520.
that prohibit females from combat.\textsuperscript{45} Neither did they concede their constitutionality, but rather they took the position that whether women could be excluded from combat was irrelevant for the purposes of their case.\textsuperscript{46}

A three judge panel of the United States District Court of the Eastern District of Pennsylvania agreed with the plaintiffs that the MSSA unconstitutionally discriminated between males and females.\textsuperscript{47} After applying the \textit{Craig} test the Court declared that the complete exclusion of women from registration was not substantially related to achieving any important government objectives.\textsuperscript{48} The district court’s decision came just three days before the registration process was to begin.\textsuperscript{49} Justice Brennan, however, stayed the injunction until the Supreme Court could review the case in order to avoid confusion and added costs that would result from the delay.\textsuperscript{50}

After hearing the case, six of the Supreme Court Justices held that the MSSA exclusion of women from the registration process did not violate equal protection under the Fifth Amendment.\textsuperscript{51} The majority opinion, written by Justice Rehnquist, repeatedly alluded to the great deference given to Congress on military matters.\textsuperscript{52} The Court then, somewhat inconsistently, rejected the Government’s argument that the rational relationship test requiring minimal scrutiny should be used.\textsuperscript{53} Justice Rehnquist further rejected the assumption that the \textit{Craig} test should be applied in all gender based discrimination cases.\textsuperscript{54} Stating that any such standards “may all too readily become facile abstractions used to justify a result,” he declined to be specific about the standard he used in his analysis.\textsuperscript{55} He articulated the opinion using the language from \textit{Craig}. Nevertheless, the

\textsuperscript{46} \textit{Id.} at 87 n.2.
\textsuperscript{48} \textit{Id.}
\textsuperscript{49} Note, supra note 22, at 520.
\textsuperscript{50} \textit{Id.}
\textsuperscript{52} Comment, supra note 25, at 111.
\textsuperscript{53} Note, supra note 22, at 523.
\textsuperscript{54} \textit{Supreme Court, supra} note 34, at 164 (citing Rostker v. Goldberg, 453 U.S. at 67).
\textsuperscript{55} 453 U.S. at 70.
standard of review that was actually applied "demanded a great deal less analysis of the appropriateness of means" than the Craig test called for.56

After pointing out that the district court had not been appropriately deferential, Justice Rehnquist stated that Congress had given careful consideration whether to register women for the draft.57 According to Justice Rehnquist, Congress' main purpose for the registration was to obtain combat troops.58 He then reasoned that because the law excludes women from participating in combat, men and women are not "similarly situated" for registration purposes.59 Therefore, requiring only males to register was not a violation of the Due Process Clause.60

The majority opinion relied on the combat exclusion statutes and policies as their basis for upholding the male only draft registration.61 Justice Rehnquist pointed out, "Congress specifically recognized and endorsed the exclusion of women from combat . . . ."62 Apparently, termination of the combat exclusion laws would eliminate any basis for exempting women from draft registration since they would then be "similarly situated."63

While relying on these combat exclusion policies as the basis for their decision, the majority never made any reference to their constitutionality.64 Justice Marshall in his dissent, however, does allude to the constitutionality of excluding women from combat, if only to point out that these restrictions were not at issue.65 Justice Mar-

57. Supreme Court, supra note 34 at 164 (citing Rostker v. Goldberg, 453 U.S. 57, 72 (1981)).
58. Id. (citing 453 U.S. at 76).
60. Id.
62. Id. at 76-77.
64. Id. at 153. The impression given by the majority opinion is that the Court just assumed that excluding women from combat was constitutionally permissible. Even in Justice White's dissent, which was joined by Justice Brennan, he stated, "I assume what has not been challenged in this case — that excluding women from combat positions does not offend the Constitution." 453 U.S. at 83.
65. 453 U.S. at 87, n.2.
shall, in a footnote, stated that the "[a]ppellees do not concede the constitutional validity of these restrictions on women in combat, but that they have taken the position that their validity is irrelevant for purposes of this case." Justice Marshall's language in framing his argument suggests that he may view the issue as still open to question.

Rostker provides an impediment to a challenge on the constitutionality of statutes and policies restricting women from combat, but it is not an unsurpassable one. Rostker could be distinguished by pointing out that the constitutionality of restricting women from combat was not at issue. The case, however, would likely play a major role in the Supreme Court's decision on the level of scrutiny to be applied to the question. The Court would almost assuredly cite Rostker as solid precedent in support of extreme deference to Congress in military matters. Therefore, Rostker would be a crucial element in challenging the ban on women in combat.

IV. APPLYING THE CRAIG V. BOREN STANDARDS TO COMBAT EXCLUSION LAWS AND POLICIES

Justice Marshall's dissent in Rostker points out that the analysis employed by the majority significantly differed from the Craig approach. He warns that "even in the area of military affairs, deference to congressional judgments cannot be allowed to shade into an abdication of this court's ultimate responsibility to decide constitutional questions." Deference to Congress on military issues is justified, but not to the extent of upholding laws that violate equal protection. The courts should apply the true Craig test in a challenge to the statutes and policies banning women from combat as it does in other types of gender discrimination cases. Under the Craig test, such statutes and policies should be declared a violation of the Fifth Amendment's Due Process Clause.

The first step of the Craig test states that gender-based classifications "must serve important governmental objectives." One in-
terest the government has in excluding women from combat is to protect them. In *Mississippi University*, however, Justice O’Connor stated in the majority opinion:

> Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or protect members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate."

Thus, excluding women from combat to protect them is not a governmental objective likely to withstand intermediate scrutiny successfully.

Furthermore, if the purpose of the exclusion laws is to protect women from combat, then that purpose fails miserably. As Representative Patricia Schroeder, a member of the House Armed Forces Committee, asserts:

> [The Army evaluates the jobs they open to women in terms of their theoretical proximity to the battlefield. However, the realities of modern warfare, whether missiles or guerilla tactics, make it difficult to define a field of battle. Military personnel, regardless of their position, are likely to be exposed to danger. While women are barred from assignment to the jobs that are most likely to face direct combat, they are assigned to support and service support positions that bring them into the battlefield on a regular basis.]

For example, women piloted tankers used to fuel fighter planes in the 1986 air strike on Libya and cargo planes in the invasion of...
Grenada. These slower, less equipped supply planes make an even more tempting target than the fighters. Thus, if the original purpose of the exclusion laws was to "protect" women, they are obsolete in terms of modern warfare.

The government would be able to satisfy the first step of the Craig test by arguing that the maintenance of an effective national defense is an important governmental objective. But the government could not meet the second step of the Craig test because the exclusion of women from combat is not substantially related to maintaining an effective military force. The nearly unanimous opinion within the military establishment is that "women contribute to, rather than detract from, military effectiveness." The success of women in all branches of the military confirms this conclusion. Further, a review of the traditional arguments against women serving in combat will illustrate that these reasons are no longer accurate or acceptable.

V. TRADITIONAL ARGUMENTS FOR EXCLUDING WOMEN FROM COMBAT AND THEIR WEAKNESSES

A. Physical Ability

The traditional argument for banning women from combat is that they do not have the physical ability to perform adequately.

74. Lamar, Hallanan and van Voorst, Redefining a Woman's Place, Time, Feb. 15, 1988, at 27 [hereinafter Lamar].
Women are not allowed to fly fighter planes, but they are free to fly AWAC radar planes which are so big, slow, and tactically important that they may as well have 'Shoot me first' stenciled on their sides. Women can't fight in tanks, but they sit in communications trucks that may be in harm's way. They can't serve on destroyers, but they serve on supply ships that drop anchor alongside destroyers.


75. Lamar, supra note 74, at 27.

76. 453 U.S. at 70 and 88. See also Note, Women and the Draft: The Constitutionality of All-Male Registration, 94 Harv. L. Rev. 411 (1980).

77. Note, supra note 76, at 411.

78. Id. at 412.

Studies by the Pentagon concluded that “[w]omen have only fifty-five percent the muscle strength and sixty-seven percent the endurance of men.” Generally, the studies showed that women are shorter, lighter, and slower than men. Brian Mitchell, author of Weak Link: The Feminization of the American Military, argues that women are not capable of performing critical battle field functions. For example, the Marines do not allow women to throw live grenades because of the belief that they cannot throw them far enough to avoid injury. The argument is that women’s physical differences make them unsuitable for combat, so they are not “similarly situated” for equal protection purposes.

Many military personnel, however, are now dismissing such arguments as largely irrelevant. As warfare has become more centered on technology, “intellect has replaced brawn,” according to Air Force General Jeanne Holm. The ability to learn sophisticated technical skills is “replacing simple physical prowess as the prime attribute” of the modern soldier. Measured by this standard, women are equal to and often better than men. As Representative Schroeder points out, “[h]ow much muscle does it take to launch an ICBM [Intercontinental Ballistic Missile]?” Undeniably, physical stamina is a fundamental requirement for any soldier, but it should not be the sole requirement.

A main concern expressed by Mitchell and others is that the only way women would qualify for combat units such as the infantry is by lowering the rigorous physical standards of the units which would lead to a weaker military. However, surely no one with even min-
imal understanding of the physical stamina required by the infantry in actual combat would advocate for the reduction of physical requirements.\textsuperscript{90} While it is true that most women will not qualify for positions that require extreme physical strength, that is no reason to ban \textit{all} women per se.\textsuperscript{91} As expressed by Brigadier General Evelyn Foote, “Never compromise standards. Be sure that anybody in any MOS [Military Occupational Specialty] can do everything required in that MOS.’\textsuperscript{92} Those that can meet the same physical standards as the men should be allowed to serve in those positions. The reality, however, is that many of the combat positions now closed to women, such as flying F-16 fighters and commanding aircraft carriers, do not require great physical strength.\textsuperscript{93} Thus, the physical strength argument for excluding women from these positions simply has no merit.

As Representative Schroeder stated in hearings before the Subcommittee on Military Personnel and Compensation, “[s]ome women can indeed carry as much weight, throw as far and run as fast as some men, and some women exceed some men in physical strength and endurance.”\textsuperscript{94} She believes “that the real issue is training,” and

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not actually lowered, only that there were different requirements for the women. \textit{Id.} at 71. The academies are training officers for a variety of positions that will require various amounts of strength. For actual combat positions more studies need to be done to determine exactly how much and what type of physical strength is needed for each position. A single set of physical standards could then be developed for each position that anyone who wished to qualify would be required to pass regardless of their gender. \textit{But see Women in Battle, National Review,} Feb. 5, 1990 at 19.

90. Kelly, The Exclusion of Women From Combat: Withstanding the Challenge, JAG J., Summ. 1984, at 100. Lowering the physical requirements for such units as the infantry would be a disservice not only to the women who would be unprepared in actual combat, but also to everyone in their unit. The enemy is not going to grant any concessions for gender, thus the United States Military should not reduce the physical requirements for those positions where it is essential. There are some women, however, who are capable of meeting those requirements and should be given the chance to do so.

91. Canada is one country that abides by this philosophy. Since opening of all combat positions except submarines to women in 1989, only 10 out of 88 women remained in basic training for the infantry, and only one has graduated. \textit{Soldier Boys, Soldier Girls, supra} note 74, at 8.

Although the political pressure to lower the standards may be great, to do so would be a disservice to the women and men in their units in an actual combat situation. The infantry, however, is only one combat position. There are many other units that were opened up to women, such as combat aviation, in which they are doing very well. Suh, \textit{Canadian Women at Arms}, Ms., June 1989, at 72.

92. Moskos, \textit{supra} note 1, at 77.

93. 60 Minutes, \textit{supra} note 1.

94. Hearings, \textit{supra} note 53.
\end{flushleft}
that properly trained women will be able to perform effectively in combat. Military women point out that they are already lifting as much weight on stateside tugboats as they would on a destroyer or piloting a fighter. In order to ensure the most efficient military it would seem logical to select the most capable individuals for the job — regardless of their gender.

B. Men's Response to Women in Combat

An argument also used to uphold the restrictions on women in combat is that men would instinctively try to protect them. Military experts fear that this male instinct to protect women might hamper coed combat units. Additionally, some military experts fear that the presence of women would interfere with the male camaraderie they believe is crucial in warfare. As Mitchell argues, "[t]he presence of women inhibits male bonding, corrupts allegiance to the hierarchy, and diminishes the desire of men to compete for anything but the attentions of women." These authorities believe that women should be excluded from combat because they would have a negative effect on the men.

The problem with the argument that women must be excluded from combat because men feel compelled to protect them, is that it crosses the line from gallantry into chauvinism. The concept of men as women's protectors "loses its mystique in the face of the enormous incidence of rape, battering, [and] the portrayal of women in pornographic materials . . . ." The argument that men will be distracted from their duties by trying to protect the women also holds little merit when the military is compared to other fields where men and women work efficiently together. For example, there are

95. Id.
99. Id.
100. Id.
101. B. MITCHELL, supra note 63, at 190.
many female policemen who are working everyday with their male counterparts in combat-like situations. 103 Men have adjusted to working with women in many dangerous professions such as fire fighting, coal mining and construction. 104 As the number of women in the military exceeds the current eleven percent, 105 men will grow accustomed to fighting alongside females as they have adjusted to working alongside them in civilian life.

Additionally, the argument that the presence of women will negatively affect the unit cohesion is of questionable validity. 106 Studies have shown "that the proportion of women in combat support ... units had no effect on measurable unit performance in field training exercises." 107 Gender integration has already begun to change interpersonal dynamics within military units and those changes would carry over into combat situations. 108 The cohesion of combat units derives largely from respect for the capabilities of fellow members in performing the necessary tasks for survival. 109 Mutual respect and interdependence can develop in mixed gender groups. 110 Therefore, research efforts should be focused on understanding the conditions that promote the development of such cohesion. 111

104. Lieberman, supra note 102, at 220.
105. Fire When Ready, Ma'am, supra note 82, at 29.
106. As Mary Segal points out:
The concern that women in combat units will reduce unit cohesion is reminiscent of arguments that have been used in the past to justify excluding women from other occupations.
It was not long ago that women were excluded from law, medicine, police work, and fire fighting .... This exclusion was based partly on ... the potential disruption of men's interpersonal relations if women were included .... [S]uch arguments ... have now been shown to be fallacious.
Segal, The Argument for Female Combatants, FEMALE SOLDIERS: COMBATANTS OR NONCOMBATANTS 279 (N. Goldman ed. 1982).
107. Id. at 278.
108. Id. at 279.
109. Id. at 280.
110. Id.
111. Id. at 281. The most practical way to study the effect of women on combat units would be to pass Representative Schroeder's legislation calling for a four year experiment where women are allowed to serve in Army combat units. See infra section VII. The December 1989, invasion of Panama, however, provides the most convincing evidence to date that women and men can work together effectively in combat. See infra section VI, D.
C. Prisoners of War

Another argument often cited as a justification for excluding women from combat is the treatment they would receive upon becoming prisoners of war.112 The Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 provides specific regulations for the treatment of women prisoners.113 Prior experience has shown that many countries often ignore these international regulations,114 so it must be assumed that captured military women will be subjected to "cruel and inhuman" treatment.115 That assumption then leads to concerns about national security, pregnancy and sexual assault.

Some are concerned that women prisoners of war would create a serious threat to national security.116 The basis of this argument is the belief that women would not be able to resist enemy interrogation and exploitation.117 United States Air Force training experiences, however, have shown that women are "very adept at

Wayne Dillingham is a Major in the United States Air Force and an Assistant Professor of Law at the United States Air Force Academy. Id. His article provides in-depth discussion on many issues surrounding the concern over women as prisoners of war. He states his position on women in combat as follows:
American military women are human beings with a free will . . . I believe that when that free will is informed by reason, those women who chose to expose themselves to the risk of capture should be treated with dignity and allowed to make that choice. Our current combat exclusion rules, however, deny American military women that freedom of choice. Id. at 229.

113. Id. at 224. The Geneva Convention Relative to the Treatment of Prisoners of War in Article 14, paragraph 2 provides: "Women shall be treated with all regard due to their sex and shall in all cases benefit by treatment as favorable as that granted to men." Id. Commentaries on this provision explain that due regard means that the following points should be considered: "(a) weakness; (b) honour and modesty; [and] (c) pregnancy and childbirth." Id. See also D. SCINDLER & J. JAMAN, THE LAWS OF ARMED CONFLICTS 342 (1988).

114. Id. at 225.

115. Id. American women have been prisoners of war in the past. "During World War II, for example, eleven Navy nurses and sixty-six Army nurses were captured by the Japanese in the Philippines and held prisoner for thirty-seven months." Id. at 224. Although the nurses were required to perform camp labor such as laundry and cleaning, and suffered from malnourishment, they were not subjected to physical abuse. Id. It is unlikely, however, that American military women would receive similar treatments as these non-combatants. Id.
resistance techniques — perhaps even better than their male counterparts.”

Also, many believe that there would be situations in which the male prisoners would be more willing to cooperate with the enemy in order to protect the women. The way to guard against this possibility is through more psychological training in programs such as the Resistance Training Laboratory at the United States Air Force Academy. The programs should include preparation for the possibility that female soldiers may be abused in order to weaken the male soldiers’ resistance.

Additionally, when considering women as prisoners of war, the issue of pregnancy arises, whether from rape or relations with another prisoner. The possibility of such pregnancies, however, is remote from a medical perspective. “Given the extreme stress and poor diet generally associated with the prisoner of war environment, most if not all of these women will likely experience amenorrhea (absence of menses) and, therefore, the likelihood of pregnancies will be decreased.” The essence of this argument is that all women should be excluded from combat because some of them may be captured, and a fraction of that number might become pregnant. Such a justification for the exclusion of all women from combat is overinclusive and unconstitutionally broad.

Another concern expressed is that women prisoners of war will be sexually abused. “Women are as likely as men to be taken prisoners of war, and although no form of torture can be dismissed, women would certainly be more vulnerable to . . . rape.”

118. Id. at 227. The Air Force’s high stress training program takes place at the Air Force Academy during the summer. Major Dillingham was one of the Officers-in-Charge of the Resistance Training Laboratory, and his conclusions are based on his own observations and from discussions with others on the staff. He states that while the training program is not actual captivity, it should at least provide some insights into the performance of women under such conditions. Id.

119. Id. at 227-28.
120. Id. at 227.
121. Id. at 226.
122. Id.
123. Id. Amenorrhea is common among women athletes, dancers and among female cadets in the high stress atmosphere of the service academies. Amenorrhea substantially reduces the chance of women becoming pregnant after capture, even if held for a long period of time. Id.
124. Salter, Annie Don’t Get Your Gun, ATLANTIC, June 1980 at 84.
125. Id.
the ordeal of sexual assault cannot be disregarded, the experience must be looked at in the whole context of a war. Wars are terrifyingly violent situations. While the image of the enemy assaulting a female soldier is appalling, the impact of that image lessens when compared with other horrors of war such as the massacre of whole villages or the bombing of entire cities. When considered among other hideous events that occur during wars, sexual assault becomes a lesser evil. Moreover, in peacetime the rape of a woman occurs every three and a half minutes. Therefore, excluding women from combat will not ensure their safety from sexual assault.

Furthermore, to exclude women from combat because of their vulnerability to sexual assault merely serves to perpetuate the idea that rape is the worst thing that can happen to a woman. While the emotional and physical trauma of sexual assault should never be dismissed lightly, it is survivable, unlike many things in war. Also, excluding women from combat because of their vulnerability to sexual assault merely enhances their susceptibility to such occurrences in society overall. In Rostker v. Goldberg, the National Organization of Women (NOW) and several other women's groups filed amicus briefs. NOW argued that “[e]xclusion of women from the draft injures their self perception, reinforces the stereotypes of women as weak and men as aggressive, and helps to perpetuate the conditions under which . . . men are lead to believe that it is normal to assault women.” Thus, the possibility of sexual assault does not justify the exclusion of women from combat.

D. Pregnancy

There is also anxiety that fraternization among the troops would be impossible to prevent, which would result in pregnant soldiers. Brian Mitchell states in his book Weak Link that seven to seventeen percent of the females in the military service are pregnant each year.
Regulations require evacuation of pregnant women from remote installations with limited medical facilities and restricts them from sea duty. The argument is that since women can become pregnant, they are not "similarly situated" for equal protection purposes on the issue of combat.

Undoubtedly, pregnancy would be a problem in combat situations, but not an insurmountable one. The Pregnancy Discrimination Act requires employers to treat women affected by pregnancy in the same manner as other employees for employment related purposes, although there is still some question whether this Act applies to the uniformed military. A woman unable to perform her duties because of pregnancy must be treated in the same manner as any other employee with a temporary disability. Excluding women from combat because they may be temporarily unable to fulfill their duties violates the purpose of this Act. The military adjusted its policies to the reality of pregnancy in peacetime and the Pentagon modified the regulations so that pregnancy is no longer grounds for compulsory discharge. Instead, new mothers are eligible for up to six weeks paid postpartum leave. They also have the option of being discharged if they prefer.

The wide range of individual differences between women in regards to what they can and cannot do while pregnant and the wide range of combat positions must be considered. Some women are capable of strenuous activity in the early months of pregnancy. One young female Marine even completed the strenuous officer-

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132. Id. at 169.
In 1972, Congress also amended Title VII to cover employees "in military departments as defined in section 102 of title 5." 42 U.S.C. § 2000e-16(a) (1982). Section 102 provides that 'military departments' are the Departments of the Army, Navy, and Air Force. 5 U.S.C. § 102 (1988). The majority of the courts thus far have held that Title VII does not apply to the uniformed military. See infra section VI, B.
135. Beck, supra note 40, at 41.
136. Id. See also B. MITCHELL, supra note 63, at 169.
137. B. MITCHELL, supra note 63, at 166.
138. Segal, supra note 106, at 272.
candidate school at Quantico, Virginia, while she was six months pregnant.\textsuperscript{140} Important also is the reality that persons assigned to combat positions do not spend the majority of their time in combat, thereby reducing the amount to which pregnancy would interfere with job performance.\textsuperscript{141} When job performance is interfered with, contingency plans must be made to reassign pregnant women, as is done with other conditions that require the reassignment of personnel.\textsuperscript{142}

Charles Moskos points out that the miserable field conditions existing during combat would go a long way towards discouraging eroticism.\textsuperscript{143} The rapid advances in birth control would also prevent many pregnancies in combat situations.\textsuperscript{144} Still, there will be some female soldiers who become pregnant, and that must be an accepted phenomena to having women in combat. The possibility that some women will become pregnant is not so great a burden, however, that it justifies the exclusion of all women from combat. Such overinclusive policies are unconstitutionally broad.

E. Family Life

Many authorities also express concern about the strains that allowing women in combat would create on family life.\textsuperscript{145} In an amicus brief filed in support of the Justice Department’s position in \textit{Rostker}

\begin{footnotesize}
140. Beck, \textit{supra} note 40, at 42.
141. Segal, \textit{supra} note 106, at 273.
142. \textit{Id.} at 272.
143. Moskos, \textit{Female GIs in the Field, Society, Sept.-Oct. 1985}, at 31 [hereinafter \textit{Female GIs in the Field}].
144. Amenorrhea (absence of menses) may also reduce the possibility of pregnancy in high stress-combat situations. See infra section V, at C (discussion of amenorrhea).
\end{footnotesize}
v. Goldberg, sixteen women argued that "[t]he potential absence of a mother from a home is . . . more likely to be disruptive than the potential absence of a father."\textsuperscript{146} To send women off to war "would leave the home deserted" and "empty out the heart of the community."\textsuperscript{147} The argument is that women are the traditional homemakers and caretakers and to send them into combat would undermine the basis of the family.

The fallacy in the argument that the potential absence of the mother would be devastating to the family is that it is based on traditional stereotyped images of family life in America. Changes in family structure have made it impossible to define a "typical" American family.\textsuperscript{148} Economic necessity has already caused mothers in many families to be absent from the home.\textsuperscript{149} "[B]y 1978, more than half (58 percent) of all American mothers of school-age children were in the labor force."\textsuperscript{150} Once the child is no longer physically dependant on the mother, no justification remains for distinguishing between the responsibilities of the mother and father.\textsuperscript{151} An argument could be made that the emotional bond between the mother and child is stronger than that between the father and child.\textsuperscript{152} Nevertheless, as fathers assume greater child-rearing roles, the circumstances may shift to create stronger emotional bonds between the father and child.\textsuperscript{153}

The easiest solution to the perceived potential problem would be to ban women with children from combat. However, that solution would only serve to perpetuate the traditional stereotypes of women as the caretakers, since men with children are not subject to similar

\textsuperscript{146} Draft Women?: The Arguments For and Against, U.S. News & World Report, supra note 145.

\textsuperscript{147} Notes and Comments, New Yorker supra note 145, at 31.


\textsuperscript{149} Weitzman, supra note 148, at 7.

\textsuperscript{150} Id.

\textsuperscript{151} Salter, supra note 124, at 84.

\textsuperscript{152} See Segal, supra note 106, at 274.

\textsuperscript{153} Lieberman supra note 102, at 219.
restrictions. If combat duty becomes available to women, steps could be taken to ensure children’s care in the event of their mothers’ injury or death. For example, the Army requires single parents to sign a statement that they have appointed a legal guardian for their children in case of their mobilization or death. The reality is “that the problem of child care is not applicable to all women,” since not all women have children. Furthermore, the problem is not unique to women, since it also applies to a growing number of single fathers in the military.

F. Public Opinion

Questions are often raised about the American public’s willingness to accept the inevitable consequence of female casualties if women participate in direct combat. The argument is that the “image of a female soldier being brought home in a body bag is somehow more hideous than that of a male soldier. However, it is hard for anyone to argue that a women’s life is more sacred than a man’s.” As Lieutenant Roberta Spillane comments about the American public: “[w]hen children die, it hurts, regardless of the gender. So if they’re not ready for their daughters to be killed in combat protecting this country, they’d better reconsider just how ready they are that their sons are doing it.” Further, the women who join the military are aware of the possible consequences. When asked whether the American public would accept female casualties, First Lieutenant Kimberly Warren responded, “I’m not sure the American public is ready to see that. But the women that are possibly going to come home in those body bags are ready for that.”

While the argument has been made that the American public does not want women serving in combat, the latest opinion polls

154. Segal, supra note 106, at 274.
155. Beck, supra note 40, at 42. See also Segal, supra note 106, at 274; B. MITCHELL, supra note 63 at 172.
156. Segal, supra note 106, at 274.
157. Id.
158. 60 Minutes, supra note 1.
159. Salter, supra note 124, at 85.
160. 60 Minutes, supra note 1.
161. Id.
162. Kelly, supra note 90, at 106.
show that most Americans support the proposal of women in combat.163 "In a 1982 poll, taken by the National Opinion Research Center, 84 percent of the American public supported keeping or increasing the proportion of women in the services, and 62 percent were in favor of allowing women to be fighter pilots."164 A New York Times/CBS News report in January 1990, stated that 72 percent of Americans believed that women who wanted to serve in combat units should be allowed to do so.165 Therefore, the laws and policies excluding women from combat are contrary to the will of the majority of the American public.

G. Survival of the Species

An additional argument against women in combat is that "protection from combat is a way of ensuring the survival of the species," since women are the childbearers.166 The theory is that since a few men can impregnate many women, more young women than men must survive a war to ensure the continuation of the American society.167 The flaw in this argument is that at its base is the assumption that one man will impregnate several females. This "survival of the species" argument fails to consider American cultural values and norms.168 While alternative lifestyles are becoming more common, the overwhelming norm in the American society is still monogamous marital relationships.169 If our society is to continue with its social and cultural values intact, as many young men will need to survive a war as young women.170

While the argument could be made that a woman's childbearing years would coincide with the years she would be most likely to

163. B. Mitchell, supra note 63, at 153.
164. Hearings, supra note 73.
165. Id. Also, "A survey of 556 military women conducted in April 1989 resulted almost two to one in favor of repealing rules excluding women from combat." Lieberman, supra note 102, at 219 (citing Mitchell, Women Don't Belong in the Military, NAVY TIMES, July 3, 1989).
166. Segal, supra note 106, at 281 (citing Gilder, The Case Against Women in Combat, NEW YORK TIMES MAGAZINE, Jan. 28, 1979, at 29).
167. Segal, supra note 106, at 281.
168. Id.
169. Id.
serve in combat, many women today are starting families much later.\textsuperscript{171} "Furthermore, the health risks of women bearing children when they are relatively older (that is, twenty-five to forty years of age) have been substantially reduced through a variety of medical developments."\textsuperscript{172} It seems doubtful that authorizing women to serve in combat will endanger the survival of the American society more than any previous war.

This review of the traditional arguments raised in defense of excluding women in combat illustrates that they are either invalid or based on unacceptable, outdated stereotypes. These reasons fail to show that restrictions on women in combat substantially relate to maintaining an effective military force or to any other important governmental interest. Therefore, the restrictions fail the second part of the \textit{Craig} test.

\textbf{VI. ADDITIONAL REASONS TO REPEAL THE STATUTES OR DECLARE THEM UNCONSTITUTIONAL}

\textbf{A. Job Restrictions}

The number of positions from which the military excludes women varies from eighty percent in the Marine Corps to four percent in the Air Force.\textsuperscript{173} Overall, the combat exclusion laws and policies restrict women from thirty-nine percent of the total positions in the Department of Defense.\textsuperscript{174} The combat exclusion laws even close off job opportunities to women that do not involve combat.\textsuperscript{175} The military functions on a rotation basis, whereby men can be rotated out of "combat-ready" posts when needed.\textsuperscript{176} As a result there are limits on the numbers of women who can be accepted into the military for even clerical and administrative jobs.\textsuperscript{177} "Military statistics show

\footnotesize{171. Id. at 281-82.}
\footnotesize{172. Id. at 282.}
\footnotesize{173. U.S. Department of Defense, supra note 1, at v.}
\footnotesize{174. Id.}
\footnotesize{176. Beck, supra note 40, at 39.}
\footnotesize{177. Id.}
that female volunteers . . . are easier to recruit, more mature, better educated, more quickly promoted, more inclined to re-enlist, and less inclined to have drug or disciplinary problems than their male counterparts." Yet despite manpower shortages, the limits set on the number of women that can be accepted are forcing recruiters to turn away qualified women. Therefore, the combat exclusion laws result in some women being completely restricted from the military.

The laws and regulations banning women from combat not only restrict them from the military completely because of the rotation system, but also deprive them of promotions. Promotions normally require officer experience in a major command or extensive sea or flight experience. Because women lack experience in combat positions, the exclusion laws and policies are keeping women out of top military posts. These combat restrictions severely limit the careers of women who join the military.

The laws and policies excluding women from combat violate the Fifth Amendment’s Due Process Clause by denying women their fundamental right to engage and advance in their chosen occupation. The statutes and policies intentionally discriminate against women as a class. The explicit basis of the classifications is gender and the statistics cited above show the discriminatory effect that the statutes have had in denying women promotions and employment.

B. Title VII

Restrictions that exclude women from combat are not only unconstitutional, but they may also violate Title VII of the Civil Rights

179. Beck, supra note 40, at 40.
181. Lamar, supra note 74, at 27.
183. Lamar, supra note 74, at 27.
Act of 1964, as amended by the Equal Employment Opportunity Act (EEOA) of 1972. The EEOA added the term "sex" to the list of traits that employers may not use to discriminate for employment purposes. Congress also amended Title VII in 1972 to include "military departments." Whether Title VII applies to the uniformed military, however, is not yet settled. Until recently, federal district courts consistently held that Title VII does not protect uniformed members of the military. Nevertheless, in a recent sex discrimination suit, Hill v. Berkman, the court of the Eastern District of New York held that Title VII protection does extend to uniformed members of the armed forces, but does not nullify the combat exclusion laws.

Joan Hill enlisted in the Army in 1982 after receiving an express promise that she would be trained as a Nuclear Biologist and Chemist (NBC). After she gave up her job and passed the requisite scholastic and medical exams, the Army classified NBC as a "combat support role," and closed it to women. Although she obtained an honorable discharge, she did not receive the papers until more than a year later, making it difficult to find employment. In 1983, the Army reassessed the NBC position and declared that it could accommodate more women without being a threat to combat readiness. Ms. Hill brought an action alleging that the Army discriminated against her because of her gender.

185. Id.
189. Id. at 1231.
190. Id.
191. Id.
192. Id. at 1232.
Judge Weinstein began by pointing out that the 1972 amendment to Title VII made it applicable to "employees or applicants for employment . . . in military departments as defined in section 102 of title 5 . . . ." 194 Section 102 defines military departments as "The Department of the Army, The Department of the Navy, [and] The Department of the Air Force." 195 He observes that there are no further explanations of these terms given and that "on their face these provisions include the armed forces." 196 According to the legislative materials, the 1972 amendments should be applied broadly. 197 Also, "[w]hen Congress wanted to distinguish between uniformed and civilian employees of the military, it did so explicitly," such as in the Fair Labor Standards Act. 198

Judge Weinstein contended that Title VII is the sole judicial remedy for members of the uniformed military with sex discrimination claims. 199 He stated, "[m]embers of the armed forces are federal employees who share in all Americans' constitutional right to equal protection under the law. There is nothing in Title VII to suggest that the uniformed military are an exception to 'members of military departments' expressly covered under § 2000e-16." 200 Therefore, Title VII applied in Joan Hill's case even though she had been a member of the uniformed military.

The court then declared that the only way to reconcile Title VII and the statutes banning women in combat is if the statutes fit under one of the exceptions to Title VII. 201 One exception is the bona fide occupational qualification (BFOQ) that allows distinctions based on sex if "a reasonable good faith and justifiable ground exists . . . ." 202 The court held that Title VII does not nullify the fed-

194. Id. at 1232 (citing 42 U.S.C. § 2000e-16(a) (1972).
195. Id. at 1233 (citing 5 U.S.C. § 102).
196. Id.
197. Id. at 1234.
199. Id. at 1238.
200. Id. This line of reasoning has been explicitly rejected by other courts. See Roper v. Department of Army, 832 F.2d 247, 248 (2d Cir. 1987).
201. Id.
202. Id. (citing H.R. Rep. No. 718, 89th Cong., 1st Sess. 5 (1965)).
eral statutes and policies banning women from combat. Therefore, "because combat risk is an occupational qualification mandated by statute, it is an appropriate BFOQ exception to Title VII." The basis for the decision was deference to Congress and belief that most American people support the restrictions on women in combat. For, as Justice Weinstein stated, the court had not found any previous cases challenging the exclusion statutes.

The court in Hill seemed to say that the only basis for excluding women from combat is that no one has challenged the statutory combat restrictions. The time has come for such a direct challenge to these laws. The standards for establishing gender discrimination are different under Title VII than under the Due Process Clause where intent must be shown. Under Title VII proof of intent is unnecessary and discriminatory impact alone is sufficient to establish a violation.

The exclusion of women from thirty-nine percent of the total positions in the Department of Defense illustrates that the combat restrictions have had a negative impact on employment of women in the military. The appropriate congressionally-mandated standard in a Title VII case is whether the classification is a "bona fide occupational qualification reasonably necessary to normal operation of that particular business . . . ." As indicated in the review of traditional arguments against women in combat, gender does not determine who can perform capably as a soldier. Therefore, being a male should not be a bona fide occupational qualification for military combat. As long as the statutes excluding women from combat endure, however, being male is apt to remain a BFOQ, and the courts are unlikely to rule that the restrictions violate Title VII.

203. Id. at 1239-40.
204. Id. at 1240.
205. Id. at 1238.
206. Id.
208. Id. at 346.
209. U.S. DEPARTMENT OF DEFENSE, supra note 1, at V.
C. International Image

Other countries around the world do not find the idea of women in combat shocking. In Rostker v. Goldberg, Justice Rehnquist pointed out that "[n]o major country has women in combat jobs in their standing army." That statement is no longer true. In 1989, Canada accepted women in all combat forces except on submarines. Canada is the fifth NATO [North Atlantic Treaty Organization] country to employ women in combat positions along with Belgium, the Netherlands, Norway and Denmark. Sweden also dropped its ban on women in combat in 1989. The number of women joining the military rose sharply in Australia when they became eligible for most combat positions in May 1990. Although rigorous physical tests still keep many women out of the infantry, these countries allow women to serve in most combat positions. With more categories of military jobs becoming open to women in the United States, "combat duty is the last hurdle." Americans must show that they believe in the idea of equal rights themselves if the United States is to continue as a leader for equality in the world.

D. The Panama Invasion

The United States' invasion of Panama in December 1989, known as "Operation Just Cause," provided tangible proof that women are capable of performing well in combat. During the invasion, 174 women in Army military police and combat support units fought snipers and provided security. Women commanded two of the...
Army Military Police units.221 One of those units, commanded by Captain Linda Bray, came under enemy fire at a Panamanian guard dog kennel.222 Two other women piloting "UH-60 'Blackhawk' helicopters came under heavy fire as they shuttled soldiers into combat during early hours of the invasion."223 Several rounds of fire struck Warrant Officer Debra Mann's helicopter damaging it so badly it had to be grounded.224 In all, almost 800 women took part in the Panama operation, becoming the first American women to engage hostile troops in modern combat.225

Operation Just Cause also provided at least one example of the senseless results of the combat exclusion laws. Sergeant Rhonda J. Maskus is a paratrooper and intelligence analyst stationed at Fort Bragg.226 She specialized in Panamanian intelligence for two years and spent three months working on the invasion plans.227 However, when officials requested an intelligence analyst from her section, the officers in command sent male soldiers with no special expertise on Panama in her place.228 Incidents of this type serve not only to perpetuate the inferior status of women but also hinder the country's

221. McCullough, supra note 219, at 1.
222. Fire When Ready Ma'am, supra note 82, at 29.

There were many conflicting reports as to what actually took place during this incident. Nevertheless, Captain "Bragg and four other women from her 988th Military Police Company were nominated for the Army Commendation Medal." Army and Air Force Women in Action in Panama, supra note 219, at 3.

223. Army and Air Force Women in Action in Panama, supra note 219, at 3. "Lieutenant Lisa Kutschera and Warrant Officer Debra Mann were recommended for the Air Medal with a 'V' for valor. They would be the first women to receive this decoration with the valor designation." Id.

224. Id.
225. Moskos, Army Women, supra note 1, at 72.

"The Army insisted that none of their activities violated Army policy barring women from combat as that policy is currently defined." The exact number of women taking place in the operation is unknown because the Air Force crew manifest lists only the last names and initials and not their gender. It is known that several Air Force women were involved in the invasion including eighteen deployed with the Strategic Air Command who participated in a refueling mission over the water whose actual proximity to the fighting is classified. Army and Air Force Women in Action in Panama, supra note 219 at 3.

227. Id.
228. Id. "Maskus filed a complaint with the Fort Bragg Equal Opportunity Office on January 10, [1990] charging that failure to send her to Panama during the U.S. invasion constituted sex discrimination."
military effectiveness. In times of crisis the person most qualified for the job is the one to send, regardless of gender.

Now that women have successfully engaged in combat, the reasons for maintaining the restrictions become even less convincing. Nevertheless, Brian Mitchell, author of *Weak Link* argues that the use of female soldiers in Panama proved nothing because "[t]he sorts of things they were doing could be done by a twelve-year-old with a rifle." His argument seems rather weak though, since it is hard to imagine twelve-year-olds piloting helicopters and driving trucks to transport troops under enemy fire. The invasion proved that women not only can survive combat, but can be substantial contributors to its success.

E. *Operation Desert Storm*

The United States is currently engaged in a military conflict with Iraq as a result of the Iraqi invasion of Kuwait on August 2, 1990. The government has classified the exact number of women who are or will be taking part in the Operation, but a Cable News Network (CNN) report estimated that over 27,500 United States military women are in the Persian Gulf area. Never before have women served in such large numbers or in such a wide variety of positions in a major military operation. The women are serving as pilots, mechanics, truck drivers, intelligence specialists, paratroopers, flight controllers, shipboard navigators, communications experts and in many other crucial posts.

Operation Desert Storm illustrates the hypocrisy of the combat exclusion policies. Before the fighting began, the Pentagon told reporters that should active hostilities commence against Iraq, chances
were that the women sent to Saudi Arabia with their units would come under fire.\textsuperscript{237} Iraq has not yet utilized chemical weapons but there is little doubt that if they do, military women will be among the casualties.\textsuperscript{238} These women are training men for missions they themselves are not permitted to carry out, commanding units in which they cannot serve and are working along side the men under hostile fire without being classified as serving in direct combat.\textsuperscript{239}

The Kuwait crisis could prove to be the final factor in determining the fate of the combat exclusion laws and policies. As the authors of one \textit{Newsweek} article stated:

[W]omen, more than the men, believe their future in the armed forces is on the line that George Bush has drawn in the sand. If a major war erupts, spreading unisex casualties throughout the theater, it could finally bring down the combat exclusions or it could so outrage the American public, and its leaders, that women are never again placed so close to the action in so many critical roles.\textsuperscript{240} Although the fighting has just begun, Operation Desert Storm has already undoubtedly provided significant insights into the importance of women in the United States Armed Forces.

VII. LEGISLATIVE CHANGE MAY BE THE MOST SUCCESSFUL MEANS OF ELIMINATING THE COMBAT EXCLUSIONS

There are strong equal protection and Title VII arguments against the combat exclusion laws. Given, however, the judiciary’s traditional deference to Congress on military issues,\textsuperscript{241} there seems to be little chance at present that the courts would declare the exclusion laws and polices to be unconstitutional or in violation of Title VII. Therefore, efforts to change these discriminatory policies will be most successful if focused on Congress.

One of the main arguments for upholding the combat exclusion laws is that there are too many unknowns about the abilities of women in combat situations and the effect of their presence.\textsuperscript{242} While

\begin{itemize}
\item \textsuperscript{237} 60 Minutes, \textit{supra} note 1.
\item \textsuperscript{238} Beck & Wilkinson, \textit{supra} note 232, at 22.
\item \textsuperscript{239} \textit{Id.} at 23.
\item \textsuperscript{240} \textit{Id.} at 25.
\item \textsuperscript{241} See Note, \textit{supra} note 28, at 475.
\item \textsuperscript{242} Kelly, \textit{supra} note 90, at 99-101.
\end{itemize}
it is true that training is not the same as actual combat, an experimental program allowing women to serve in combat units in the United States would tell us more than we know now.\textsuperscript{243} Some authorities speculate that the program would establish that some women have the physical and psychological endurance to perform well in combat.\textsuperscript{244} Such a result would make the pressure to remove the ban on women in combat difficult to resist.\textsuperscript{245}

In 1987, Canada began an experimental program called CREW (Combat Related Employment of Women) trials.\textsuperscript{246} The CREW trials were "a five-year empirical study of mixed gender combat groups in the army and navy."\textsuperscript{247} A ruling by the Canadian Human Rights Tribunal that all combat positions must be opened to women cut the tests short.\textsuperscript{248} During the two year existence of the trials, however, 41 women made it to combat positions in the army and navy.\textsuperscript{249}

In January, 1990, Representative Schroeder introduced House Report 3868, which called for "a four-year test program to examine the implications of the removal of limitations on the assignment of female members of the Army to combat and combat-support positions."\textsuperscript{250} The Defense Advisory Committee on Women in the Services (DACOWITS) proposed a similar program in 1989.\textsuperscript{251} In April 1990, however, the Army announced that it would not activate such a program.\textsuperscript{252} Passage of a bill such as Representative Schroeder's is the only way to establish such an experimental program since the Army has declined to do so voluntarily. Although H.R. Rep. 3868 died in committee there are plans for its reintroduction.\textsuperscript{253} An experimental program which will allow women in combat, however,
will meet with tough opposition in Congress and thus must receive strong support from the public if it is to pass.\textsuperscript{254}

\textbf{VIII. CONCLUSION}

For all the reasons discussed in this Note, the statutes and policies restricting women from combat should be repealed by Congress or declared unconstitutional. The restrictions violate the Fifth Amendment's Due Process Clause and Title VII by purposely discriminating against women. The traditional reasons given for the exclusion of women from combat are outdated and inaccurate. There is no substantial relationship between the restrictions and any important governmental objective. Thus, the statutes and policies fail to meet the standards set forth in the \textit{Craig} test.

The military should not lower standards for combat readiness, nor should women receive special treatment. Neither, however, should the United States government ban women per se from the chance to achieve those standards merely because of gender. Arbitrarily banning qualified women from positions they are capable of performing harms not only military effectiveness, but also the quality of the American society as well. Until women obtain the opportunity to assume their equal share of societal obligations they will never achieve equal rights as citizens.

\textit{Kathy L. Snyder*}

\textsuperscript{254} See Moskos, \textit{supra} note 1, at 78.

* The author would like to thank fellow law student First Lieutenant Caitlin J. Porter, United States Army, for sharing her own experiences in the modern military.