ACT LIKE A LADY!: RECONSIDERING GENDER STEREOTYPES & THE EXCLUSION OF WOMEN FROM COMBAT IN LIGHT OF CHALLENGES TO "DON'T ASK, DON'T TELL"

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I. INTRODUCTION

"Gender now shuts the door for me," explained Heidi Brown, a brigadier general in the U.S. Army, in an interview with National Public Radio.[1] Brown is the only woman to command a combat arms brigade when she did so in 2003, during an invasion of Iraq.[2] She has been a member of the U.S. Army for over thirty years, serving in Air Defense Artillery—one of the few combat units that allow women.[3] However, now working in the Pentagon, Brown sees future promotions closed to her due to the military's policy banning women from combat positions.[4]

Individuals who rise to the top through combat positions are more likely to get elite jobs.[5] As Brown pointed out, there has never been a woman division commander, corps commander, chief of staff of the Army, vice chief to the Army, or chairman of the Joint Chiefs of Staff.[6] Further, Brown would like to serve as commandant of West Point, but she points out that commandant is typically held by infantrymen.[7] This is not the first time Brown dealt with discrimination in the military based on her gender. Brown further recalled an incident where a battalion commander attempted to make her his operations officer, only to find out the position was "coded out to women."[8]

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* J.D. Candidate, Southern Illinois University School of Law, May 2012. I would like to thank Professor Cindy Buys for her invaluable guidance and editorial expertise.

1. Rachel Martin, *A Lonely Club for Women in Top Army Jobs,* NAT'L. PUB. RADIO (February 25, 2011), http://www.npr.org/2011/02/25/134025084/a-lonely-club-for-women-in-top-army-jobs.
2. *Id*.
3. *Id*.
4. *Id*.
5. *Id*.
6. *Id*.
7. *Id*.
8. *Id*. ("Coded out" meant that a woman could not apply for a particular job because the job entailed working in a unit involved in direct combat.).

Today, women are serving in the military in increasingly larger numbers and in greater capacities.[9] Recently, the Navy notified Congress that it would begin allowing women to serve on submarines.[10] Secretary of the Navy, the Honorable Ray Mabus, proclaimed "[t]here are extremely capable women in the Navy who have the talent and desire to succeed in the submarine force," and "[w]e literally could not run the Navy without women today."[11] However, despite women's hard work and commitment to our nation, women are prohibited from combat positions, and top leadership positions in the military are foreclosed.[12] Thus, our military women, and women in the rest of society, must live with the constant reminder that they are not quite as good as their male counterparts.

This comment discusses current obstacles standing in the way of women's service in combat, and how recent challenges to "Don't Ask, Don't Tell" provide guidance for the future of women's status in the military. More specifically, Section Two provides a history of women and homosexuals in the military, relevant challenges to the military's policies concerning these two groups, and the similar reasons used by the military to exclude these two groups. Section Three explores the implications of the military's ban on women on combat for society as whole, analyzes the policy in light of current gender and military deference jurisprudence, and further explores the similarity in stereotypes relied on to discriminate against women and homosexuals. Section Four discusses the avenues of relief women may seek in achieving gender equality in the military.

II. BACKGROUND

Despite their official exclusion, women have consistently contributed to our nation's armed forces in various capacities. For instance, there are many tales of women disguising themselves as men in order to serve in the military and of women serving as spies.[13] Women, however, were not legally recognized as a part of the military until recently. Similarly, homosexuals have a long history of exclusion from the military. This section will summarize the progression of women's recognition in the

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9. *See* Martha McSally, *Women in Combat: Is the Current Policy Obsolete?*, 14 DUKE J. GENDER L. & POL'Y 1011, 1020-28 (2007).

10. Commander, Submarine Forces Pub. Affairs, *Navy Policy Will Allow Women to Serve Aboard Submarines*, U.S. NAVY (Apr. 29, 2010), http://www.navy.mil/search/display.asp?storyid=52954.

11. *Id*.

12. *See* SARA L. ZEIGLER & GREGORY G. GUNDERSON, MOVING BEYOND G.I. JANE: WOMEN AND THE U.S. MILITARY 64 (2005) ("[A]lthough the proceedings of military promotion boards are secret, it is common knowledge that the system favors officers with combat service.").

13. Linda Strite Murnane, *Legal Impediments to Service: Women in the Military and the Rule of Law*, 14 DUKE J. GENDER L. & POL'Y 1061, 1062 (2007).

military, changing gender jurisprudence, and relevant challenges to the "Don't Ask, Don't Tell" policy.

A. History of Women in the Military

It was not until 1901 that Congress authorized the Army Nurse Corps, officially sanctioning women's service in an aspect of the military.[14] Having experienced large casualties during World War I, the Marines and Navy began to enlist women for clerical positions out of necessity.[15] After the shortage was alleviated, women were no longer allowed to fill these positions.[16] In 1942 the Women's Army Auxiliary Corp[17] was established, allowing women who met unique qualifications to serve in the Army for inferior benefits.[18] Similarly, the Navy established the "Women Accepted for Volunteer Services" program for women.[19]

Congress passed the Women's Armed Services Integration Act of 1948, allowing women to enlist in the armed forces.[20] This Act restricted the total enrollment of women to two percent, limited rank to colonel, and required parental permission if the woman was under the age of twenty-one.[21] This Act also provided that women could not claim their husbands and children as dependents unless they showed the husband and children were actually dependent on the enlisted women for support.[22] Men, however, were not required to prove actual dependency.[23] Further, the exclusion of women from combat and limitations on rank were based on this Act for years.[24] This Act also provided part of the authority to separate women due to pregnancy.[25] In 1967, Public Law 90-130 removed the two percent cap and some promotion restrictions.[26]

The passage of the 1992 Defense Authorization Act repealed Air Force and Navy restrictions, allowing women to serve on combat ships.[27] This Act also established the "Commission on the Assignment of Women

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14. 31 Stat. 753 (1901).
15. Murnane, *supra* note 13, at 1064.
16. *Id*.
17. Selective Training and Service Act of 1940, Pub. L. No. 76-783, 54 Stat. 885 (1940).
18. Murnane, *supra* note 13, at 1065 (women received inferior pay and benefits, no entitlements for dependents, and limited promotions).
19. *Id*.
20. Pub. L. No. 80-625, 62 Stat. 368 (1948).
21. Murnane, *supra* note 13, at 1066.
22. Pub. L. No. 80-625, 62 Stat. 356 (1948).
23. *Id.*
24. Murnane, *supra* note 13, at 1067.
25. *Id*.
26. Pub. L. No. 90-130, 81 Stat. 374 (1967).
27. Murnane, *supra* note 13, at 1094.

in the Armed Forces," allowing for test assignments of women in combat; however, this work was never completed.[28] Most recently, the National Defense Authorization Act for Fiscal Year 2006 required that the Secretary of Defense notify Congress before making changes "to the ground combat exclusion policy" or opening or closing positions for women.[29]

The historical justifications for the differential treatment of women in the military are based on traditional stereotypes of the roles of women in society. Women occupied the domestic sphere, while men the public. For instance, in *United States v. St. Clair*, upholding male-only registration and conscription, the Court declared that "[i]n providing for involuntary service for men and voluntary service for women, Congress followed the teachings of history that if a nation is to survive, men must provide the first line of defense while women keep the home fires burning."[30]

Statements of officials in the military and Congress further indicate the underlying stereotypes at the root of the exclusion of women from many aspects of the military. General Eisenhower's hopes were that women "will come in [to the military] and I believe after an enlistment or two enlistments they will ordinarily—and thank God—they will get married."[31] Senator Ervin proclaimed "[i]t is absolutely ridiculous to talk about taking a mother away from her children so that she may go out to fight the enemy and leave the father at home to nurse the children."[32] Representative Dennis stated "drafting of American women and mothers into the military service is a thoroughly undesirable social development which would go far, indeed, to transform us into a national socialist state."[33]

Women have consistently challenged these stereotypes, and it is time to reconsider the military's gender policies. Women comprised combat-related missions in conflicts in Grenada, Panama, and the Gulf War.[34] Women comprised 9.7% of Army personnel and 7.2% of the total armed

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28. *Id*.
29. 10 U.S.C. § 652(a) (repealed 2011).
30. United States v. St. Clair, 291 F. Supp. 122, 125 (S.D.N.Y. 1968).
31. To Establish the Women's Army Corps in the Regular Army, to Authorize the Enlistment and Appointment of Women in the Regular Navy and Marine Corps and the Naval and Marine Corps Reserve, and for Other Purposes: Hearings on S. 1641 Before the Subcomm. on Organization and Mobilization of the H. Comm. on Armed Services, 80th Cong. 5564 (1948) (statement of General Dwight D. Eisenhower).
32. 118 CONG. REC. 9102 (1972) (statement of Sen. Samuel Ervin, Jr.).
33. 117 CONG. REC. 35,316 (1971) (statement of Rep. David Dennis). Professor Hasday explains that "[o]pponents of women's equality have long attempted to discredit both feminism and socialism by linking them together as movements meant to undermine women's family roles." Jill E. Hasday, *Fighting Women: The Military, Sex, and Extrajudicial Constitutional Change*, 93 MINN. L. REV. 96, 110 n.53 (2008) (citing B.V. Hubbard, *Socialism, Feminism, and Suffragism, the Terrible Triplets: Connected by the Same Umbilical Cord, and Fed from the Same Nursing Bottle* 286 (1915))).
34. Murnane, *supra* note 13, at 1093.

forces deployed in the 1991 Gulf War.[35] In addition to their service in the Gulf War, thirteen women sacrificed their lives, and two women were prisoners of war.[36] As of September 30, 2010, women accounted for 14.5% of active duty military.[37] From March 19, 2003, through February 6, 2010, 104 military women have died in Operation Iraqi Freedom, and from October 7, 2001, through February 6, 2010, twenty women died in Operation Enduring Freedom.[38] Most recently, in 2008, Ann E. Dunwoody became the first woman to become a four-star general.[39] While women have succeeded in their military positions, their success in the courts has been limited.

B. Challenges to the Military's Gender Policies

The Supreme Court has invalidated several laws that distinguish between individuals on the basis of sex beginning around the same time as the women's rights movement in the 1970s. Judicial intervention in sex equality as to military matters, however, has been nearly absent.

In *Rostker v. Goldberg*, a year after Congress rejected President Carter's recommendation that women be included in Selective Service registration,[40] the Supreme Court held that male-only registration for the draft was constitutional.[41] The case was brought by four men claiming that male-only registration and conscription violated equal protection.[42] The Court reasoned that Congress excluded women from the draft simply because they were ineligible for combat positions.[43] While the holding addressed Selective Service registration, underlying this holding was the idea that the Court accepted the differential treatment of women in combat. The Court addressed this issue by citing various statutes and military policy supporting women's exclusion, and by quoting from a report of the Senate Armed Services Committee, that stated as follows:

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35. DEP'T OF DEFENSE, CONDUCT OF THE PERSIAN GULF CONFLICT: AN INTERIM REPORT TO CONGRESS 10-1, 10-2 (1991).
36. Murnane, *supra* note 13, at 1092.
37. Statistics on Women in the Military, Women in Military Service for American Memorial Foundation, Inc., (Sept. 30, 2011), http://www.womensmemorial.org/Press/stats.html.
38. ANNE LELAND ET AL., CONG. RESEARCH SERV., RL 32492, AMERICAN WAR AND MILITARY OPERATIONS CASUALTIES: LISTS AND STATISTICS (2010).
39. *First Female Four-Star U.S. Army General Nominated*, CNN (June 23, 2008), http://articles.cnn.com/2008-06-23/us/woman.general_1_fourth-star-elizabeth-hoisington-third-star?s=PM:US.
40. *See* Jimmy Carter, Selective Service Revitalization: Statement on the Registration of Americans for the Draft, 1 Pub. Papers 289, 289 (Feb. 8, 1980) ("I will seek additional authority to register women for noncombat service to our Nation.").
41. Rostker v. Goldberg, 453 U.S. 57, 83 (1981).
42. *See* Rowland v. Tarr, 480 F.2d 545, 546-47 (3d Cir. 1973).
43. *Rostker*, 453 U.S. at 76-77.

> The principle that women should not intentionally and routinely engage in combat is fundamental, and enjoys wide support among our people. It is universally supported by military leaders who have testified before the Committee . . . Current law and policy exclude women from being assigned to combat in our military forces, and the Committee reaffirms this policy.[44]

The Court went on to state that "[t]he fact that Congress and the Executive have decided that women should not serve in combat fully justifies Congress in not authorizing their registration, since the purpose of registration is to develop a pool of potential combat troops."[45]

The *Rostker* Court did not fully address the history of stereotypical roles which gave rise to the military's policy towards women. Instead, the Court determined that Congress's recent examination of the roles of women in the military, through debate brought on by Carter's proposal to register women for the draft, justified women's further exclusion from registration. Accordingly, the Court determined that Congress had come up with new reasons for the exclusion of women from the draft, and "the decision to exempt women from registration was not the 'accidental by-product of a traditional way of thinking about females.'"[46]

Cases challenging the differential treatment of women in the military since *Rostker*'s 1981 decision have been sparse. Cited reasons for the absence of litigation include the avoidance of military involvement by the feminist movement, and that *Rostker* precluded judicial intervention as a means of change.[47]

One of the few challenges occurred in 1987 in *United States v. Schmucker*.[48] The defendant was a Mennonite seminary student who refused to register with the Selective Service System for religious reasons.[49] Among other claims, the defendant contended that the failure to exempt

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44. *Id*. at 77 (quoting S. Rep. No. 96-826, at 157 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2612, 2647.)
45. *Id*. at 79.
46. *Id*. at 74 (quoting Califano v. Webster, 430 U.S. 313, 320 (1977)). Congress' "new reasons" for excluding women from registration included the following: women were not eligible for combat, mixed-sex units would be "an experiment to be conducted in war with unknown risk," and "other administrative problems such as housing and different treatment with regard to dependency, and hardship and physical standards." S. Rep. No. 96-826, at 157-59 (1980). The Senate also stressed "important societal reasons," including "unprecedented strains on family life," and "unpredictable reactions to the fact of female conscription" by a "large majority of our people." *Id*. at 159. Further, the Senate Report felt that "a decision which would result in a young mother being drafted and a young father remaining home with the family in a time of natural emergency cannot be taken lightly, nor its broader implications ignored." *Id*.
47. *See* Hasday, *supra* note 33, at 131-32.
48. United States v. Schmucker, 815 F.2d 413 (6th Cir. 1987).
49. *Id*. at 415-16.

religious objectors from combat, while exempting women and individuals with mental disabilities, violates equal protection.[50] Citing *Rostker* without further explanation, the Sixth Circuit said women are exempt because they are ineligible for combat.[51] Accordingly, the court found no equal protection violation because conscientious objectors are not "readily identified as persons ineligible for combat."[52]

More recently, in *Schwartz v. Brodsky*, a district court similarly found that male-only registration did not violate equal protection.[53] The plaintiffs argued that the court should reconsider the constitutionality of the Selective Service Act because of the increasing role women played in the military.[54] Again, the court cited *Rostker*, stating that women were ineligible for combat, and thus did not need to register because the purpose of selective service was to draft combat troops.[55] The court went on to state that because Congress had already reconsidered the constitutionality of excluding women, the court should treat Congress's determination with deference.[56] Again, in 2009, the same district court dismissed another equal protection challenge to male-only draft registration on the basis of "insufficient change in the governing considerations since *Rostker*."[57]

In *Lewis v. U.S. Army*, the plaintiff challenged the military's policy of allowing men, but not women, to enlist in the Army with only a G.E.D.[58] The court declined to apply the intermediate scrutiny test used in gender equal protection cases pursuant to *Craig v. Boren*.[59] Rather, the court found it appropriate to review the policy under rational basis, "with any doubt as to constitutionality resolved in favor of deference to the military's exercise of its discretion."[60] The court found it reasonable for the Army to set higher standards for women, because it needs fewer women than men due to the combat exclusion of women.[61] In dicta, the district court judge opined that the policy would have survived a challenge even if the appropriate standard of review was the intermediate scrutiny of *Craig v. Boren*.[62] Gender jurisprudence, however, has evolved since *Craig v. Boren*, and the decision in *Lewis*.

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50. *Id*. at 419.
51. *Id*.
52. *Id*. at 419-20.
53. Schwartz v. Brodsky, 265 F. Supp. 2d 130, 132 (D. Mass. 2003).
54. *Id*. at 133.
55. *Id*.
56. *Id*.
57. Elgin v. United States, 594 F. Supp. 2d 133, 145 (D. Mass. 2009).
58. Lewis v. U.S. Army, 697 F. Supp. 1385, 1386 (E.D. Pa. 1988).
59. *Id*. at 1390 (citing Craig v. Boren, 429 U.S. 190 (1976)).
60. *Id*.
61. *Id*. at 1393.
62. *Id*. at 1393 n.7.

C. Changes in Gender Jurisprudence

For much of this nation's history, gender classifications were held only to rational basis review, and decisions were replete with stereotypical views of the role of women in society. These classifications were justified by the view that "a woman is, and should remain, 'the center of home and family life."[63] Further, the common view was that "a proper discharge of [a woman's] maternal functions—having in view not merely her own health, but the well-being of the race—justif[ies] legislation to protect her from the greed as well as the passion of man."[64]

The Court began to call into doubt the application of rational basis review to sex classifications in the 1970s with its decision in *Frontiero v. Richardson*.[65] That case addressed the military's policy of automatically providing benefits to male soldier's wives, while requiring women to prove their husband depended on them for over one-half of his support before they were accorded the same benefits.[66] After considering the history of discrimination against women and the actions of Congress by passing the Equal Pay Act and the Equal Rights Amendment, the plurality in *Frontiero* decided strict scrutiny was the appropriate level of review.[67] Finding that the statute at issue discriminated solely on the basis of sex between similarly situated men and women, the Court found the statute in violation of the Due Process Clause of the Fifth Amendment.[68] This victory in gender jurisprudence never gained a support of the majority, and was short lived. In *Craig v. Boren*, the Court settled on an intermediate level of review from *Reed v. Reed*,[69] holding that "classification by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[70]

In *Michael M. v. Superior Court of Sonoma County*, the same year *Rostker* was decided, the Supreme Court found that the differential treatment of individuals based on gender was justifiable where the difference "realistically reflects the fact that the sexes are not similarly situated in certain circumstances."[71] *Michael M.* involved a California

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63. Nev. Dept. of Human Res. v. Hibbs, 538 U.S. 721, 729 (1972) (quoting Hoyt v. Florida, 368 U.S. 57, 62 (1961)).
64. *Id*. (quoting Muller v. Oregon, 208 U.S. 412, 419 (1908)).
65. 411 U.S. 677 (1973).
66. *Id*. at 678.
67. *Id*. at 687-88.
68. *Id*. at 690-91.
69. Reed v. Reed, 404 U.S. 71, 75-76 (1971) (holding that administrative ease was not a sufficient justification for a statute that determined that males were to be preferred to equally-qualified females in estate administration).
70. Craig v. Boren, 429 U.S. 190, 197 (1976).
71. Michael M. v. Sup. Ct. of Sonoma Cnty., 450 U.S. 464, 469 (1981).

statutory rape law that defined statutory rape so that only a male could be convicted of the crime.[72] The Court acknowledged "that a legislature may not 'make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class.'"[73] However, the Court found that a real difference was at issue because intercourse for females could result in pregnancy, while it could not for males.[74] Accordingly, this gender classification did not violate Equal Protection because women and men were not similarly situated with respect to sexual intercourse, and the restriction was "realistically related" to the state's objective in preventing teenage pregnancy.[75]

In 1996, the Supreme Court held that Virginia could not exclude capable women from the Virginia Military Institute in *United States v. Virginia*.[76] The Court rejected Virginia's arguments that the entry of women would prevent the institution from effectively training its "citizen soldiers" by destroying unit cohesion and male bonding.[77] Writing for the majority, Justice Ginsburg[78] stated that sex classifications "may not be used, as they once were, to create or perpetuate the legal, social and economic inferiority of women."[79] In order to justify sex classifications, the state must demonstrate an "exceedingly persuasive" justification, seemingly adding a higher level of scrutiny to the previous intermediate scrutiny test used for sex classifications.[80]

Most recently, in *Nevada Department of Human Resources v. Hibbs*, the Supreme Court held the portion of the Family Medical Leave Act, which requires family leave for all employees regardless of sex, constitutional.[81] The Court recognized Congress' interest in preventing discrimination against women in the workforce because of their potential

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72. *Id*. at 466.
73. *Id*. at 469 (quoting Parham v. Hughes, 441 U.S. 347, 354 (1979)).
74. *Id*. at 478.
75. *Id*. at 479.
76. United States v. Virginia, 518 U.S. 515, 516 (1996).
77. *Id*. at 550.
78. Justice Ginsburg's legal career was devoted to gender discrimination issues. *See* Michael J. Klarman, *Social Reform Litigation and Its Challenges: An Essay in Honor of Justice Ruth Bader Ginsburg*, 32 HARV. J.L. & GENDER 251, 251-52 (2009). She was cofounder and director of the American Civil Liberties Union's Women's Rights Project, and many "say that she is to the women's movement what . . . Marshall was to the movement for the rights of African Americans." *Id*. at 251 (quoting President William J. Clinton & Justice Ruth Bader Ginsburg, President's Announcement and Judge Ginsburg's Remarks (June 15, 1993), in N.Y. Times, June 15, 1993, at A24.).
79. *Virginia,* 518 U.S. at 533-34.
80. *Id*. at 545.
81. Nev. Dept. of Human Res. v. Hibbs, 538 U.S. 721, 740 (2003).

use of family leave for pregnancy and family-related matters.[82] Writing for the majority, Justice Rehnquist stated that "[s]tereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men," and "[t]hese mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees."[83]

The Court's holding in *Rostker* is not only inconsistent with current gender jurisprudence, but also with the course the Ninth Circuit has taken in finding other discriminatory military policies unconstitutional.[84] The military's historical treatment of homosexuals, and recent "Don't Ask, Don't Tell" challenges demonstrate the similar stereotypes supporting the exclusion of both homosexuals and women from the military.

D. Stereotypes Relied on for the Exclusion of Homosexuals from the Military and Recent "Don't Ask Don't Tell" Jurisprudence

Historically, the military found individuals unfit due to a "personality disorder" or "mental illness" if they were discovered to be homosexual.[85] In 1982, the military began to exclude homosexuals to "ensure the integrity of the system of rank and command" and "prevent breaches of security."[86] Further, up until the 1990s, a ban on homosexuals was advocated because homosexuals "could not be trusted and were 'far more likely' to 'spread' infectious diseases."[87]

"Don't Ask, Don't Tell" (DADT) was introduced into the military in 1993,[88] and not repealed until September 20, 2011.[89] Under DADT,

82. *Id*. at 737.
83. *Id*. at 736.
84. *See infra* Part 2.D.2.
85. Able v. United States, 968 F. Supp. 850, 855 (E.D.N.Y. 1997) (citing Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. on Armed Services, 103d Cong. 13-14 (1993) (statement of Dr. David F. Burrelli) (noting that the military has abandoned these exclusions)).
86. *Hearing*, *supra* note 85, at 15 (statement of Dr. David F. Burrelli).
87. *Id*. (citing Policy Implications of Lifting the Ban on Homosexuals in the Military: Hearings Before the House Comm. on Armed Services, 103d Cong. 89-90 (1993) (statement of Col. John Ripley)).
88. S. Rep. No. 103-112, at 270 (1993); H.R. Rep. No. 103-200, at 287 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2073 at 2074.
89. Liz Halloran, *With Repeal of 'Don't Ask, Don't Tell,' An Era Ends*, NAT'L PUB. RADIO (September 20, 2011), http://www.npr.org/2011/09/20/140605121/with-repeal-of-dont-ask-dont-tell-an-era-ends. While gay service members may openly serve in the military, this policy is still controversial and is evidenced by recent remarks at Republican debates calling for the re-implementation of DADT as audience members booed an openly gay service member. Z. Byron

homosexuals were permitted to serve in the military as long as they refrain from "homosexual acts," talking about their sexual preference, and marrying someone of the same sex.[90] The statute's findings declared that "[t]he presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability."[91] During a Congressional hearing, General Powell declared that homosexuality "involves matters of privacy and human sexuality that, in our judgment, if allowed to exist openly in the military, would affect the cohesion and well-being of the force."[92]

However, since DADT's implementation, the Supreme Court decided *Lawrence v. Texas*, and declared that adults have a liberty interest in private, consensual same-sex relations, protected under the Due Process Clause of the Fourteenth Amendment.[93] The Court went on to declare that upholding contrary precedent "demean[ed] the lives of homosexual persons."[94] Declining to declare a fundamental right in homosexual sodomy or the appropriate level of scrutiny, the Court left lower courts to debate the implications of *Lawrence* for DADT.[95] Recent DADT cases reveal that courts are increasingly willing to implement constitutional standards in the military setting, and not simply defer to the executive branch in all military matters. Further, the DADT cases show that the exclusion of homosexuals from the military is based on similar stereotypes as the exclusion of women from combat. While DADT is no longer effective, the following analysis is relevant to the exclusion of women from certain military positions. Next, this comment will summarize relevant DADT cases.

1. DADT in the First Circuit

In 2008, the First Circuit upheld the constitutionality of DADT subsequent to *Lawrence* in *Cook v. Gates*.[96] Twelve former service members who were separated under DADT challenged DADT under

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Wolf, *Debate Crowd Booed Gay Soldier*, ABC NEWS (September 23, 2011), http://abcnews.go.com/blogs/politics/2011/09/debate-crowd-booed-gay-soldier/.

90. 10 U.S.C. § 654(b)(1)-(3) (2009).

91. *Id*. § 654(a)(15).

92. S. Rep. No. 103-112, at 281 (1994).

93. Lawrence v. Texas, 539 U.S. 558, 578-79 (2003).

94. *Id*. at 575.

95. *See* Steven J. Fugelsang, *Reconciling Lawrence v. Texas with "Don't Ask, Don't Tell:" The Value of the Cook v. Gates Intermediate-Deferential Approach*, 20 GEO. MASON U. CIV. RTS. L.J. 237, 248 (2010).

96. 528 F.3d 42 (1st Cir. 2008).

substantive due process, equal protection and the first amendment.[97] The court, while acknowledging that "the wisdom behind the statute . . . may be questioned by some," dismissed the challenges "in light of the special deference we grant Congressional decision-making in this area . . .."[98] The First Circuit concluded that *Lawrence* applied an intermediate level of review.[99] The First Circuit dismissed the plaintiffs' facial challenge, but declared that their as-applied challenge presented "a more difficult question."[100] Nevertheless, the court dismissed all of the plaintiffs' as-applied challenges on the basis of deference to Congress and the Executive in military affairs.[101] The court explained as follows:

> Here, as in *Rostker*, there is a detailed legislative record concerning Congress' reasons for passing the Act. This record makes plain that Congress concluded, after considered deliberation, that the Act was necessary to preserve the military's effectiveness as a fighting force, 10 U.S.C. § 654(a)(15), and thus, to ensure national security. This is an exceedingly weighty interest and one that unquestionably surpasses the government interest that was at stake in *Lawrence*.[102]

The First Circuit also dismissed the plaintiffs' equal protection claims, finding that homosexuals did not constitute a suspect class.[103] The court reasoned that the law at issue in *Romer v. Evans* was held unconstitutional under rational basis review, and nowhere did the Court recognize a new suspect class.[104] Further, *Lawrence* applied only to substantive due process claims, and thus had no implication for equal protection claims.[105] Again, citing deference to Congress, the court found that the classification survived rational basis review.[106] Thereafter, the Supreme Court denied one of the plaintiff's petitions for a writ of certiorari.[107] Less than three weeks before the First Circuit's decision in *Cook*, the Ninth Circuit confronted a similar DADT challenge in *Witt v. Department of Air Force*.[108]

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97. *Id*. at 47.
98. *Id*. at 65.
99. *Id*. at 56.
100. *Id*. at 56.
101. *Id*. at 60.
102. *Id*.
103. *Id*. at 61-62.
104. *Id*. at 61.
105. *Id*.
106. *Id*. at 61-62.
107. Pietrangelo v. Gates, 129 S. Ct. 2763 (2009).
108. Witt v. Dep't. of Air Force, 527 F.3d 806 (9th Cir. 2008).

2. DADT in the Ninth Circuit

Margaret Witt was discharged from the military in 2007 on account of her relationship with another woman.[109] Witt entered the military in 1987, and received numerous promotions and medals.[110] She brought suit alleging DADT violated substantive due process, the Equal Protection Clause, and procedural due process.[111] Hesitant to adopt strict scrutiny because of the Court's failure to discuss "narrow tailoring" or a "compelling state interest" in *Lawrence*, the Ninth Circuit adopted an intermediate balancing test.[112] The new test was based on the intermediate scrutiny test employed by the Supreme Court in *Sell v. United States*.[113] The Ninth Circuit went on to note that the test it was basing its new *Lawrence*-test on is "similar to intermediate scrutiny in equal protection cases [in *Craig v. Boren*]."[114]

Specifically, the court challenged the government's reliance on "unit cohesion" as a justification for DADT.[115] In regard to unit cohesion, the court noted as follows:

> Major Witt was a model officer whose sexual activities hundreds of miles away from base did not affect her unit until the military initiated discharge proceedings under DADT and, even then, it was her suspension pursuant to DADT, not her homosexuality, that damaged unit cohesion.[116]

In applying this test, the court acknowledged an important governmental interest in the management of the military.[117] The court noted normal judicial deference to Congress in military affairs; however, quoting *Rostker*, the court stated that "deference does not mean

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109. *Witt*, 527 F.3d at 809-10.
110. *Id*. at 809.
111. *Id*.
112. *See id.* at 818-19.
113. *See* Sell v. United States, 539 U.S. 166 (2003). *Sell* addressed the constitutionality of the forced administration of drugs to a defendant to render the defendant fit to stand trial. In addressing the case, the Court employed a four-part intermediate scrutiny inquiry as follows: (1) The courts "must consider the facts of the individual case in evaluating the Government's interest"; (2) "the court must conclude that involuntary medication will *significantly further* those concomitant state interests . . ."; (3) "the court must conclude that the involuntary medication is *necessary* to further those interests. The court must find that any alternative, less intrusive treatments are unlikely to achieve substantially the same results…"; (4) The court must conclude that administration of the drugs is *medically appropriate*." *Witt*, 527 F.3d at 819-20. Finding the fourth factor specific to *Sell*, the First Circuit only adopted the first three factors of the *Sell* test. *Id*. at 820.
114. *Witt*, 527 F.3d at 818, n.7 (citing *Sell*, 539 U.S. at 178 (balancing the "liberty interest against the 'legitimate' and 'important' state interest . . ..")).
115. *Id*. at 821.
116. *Id*. at 821 n.11.
117. *Id*. at 821.

abdication."[118] "Congress, of course, is subject to the requirements of the Due Process Clause when legislating in the area of military affairs . . .."[119] The court then remanded the case to the district court for further evidentiary findings as to the second and third *Sell* factors.[120]

On remand, the district court found that DADT, as applied to Witt, violated her substantive due process rights.[121] In applying the test set forth by the Ninth Circuit, the district court found that:

> The evidence produced at trial overwhelmingly supports the conclusion that the suspension and discharge of Margaret Witt did not significantly further the important government interest in advancing unit morale and cohesion. To the contrary, the actions taken against Major Witt had the opposite effect.[122]

The court further considered Witt's outstanding military record, and the negative effect of DADT on the military as a whole.[123] Accordingly, the court found that DADT failed under prong two of the test and ordered her reinstatement.[124]

Most recently, in *Log Cabin Republicans v. United States*, the plaintiffs brought a facial challenge to DADT in the Central District of California.[125] The court employed the three-prong test from *Witt* in assessing the case, finding that DADT is not necessary to further the Government's interest in military readiness and unit cohesion.[126] Ultimately, the district court found that DADT violated the Fifth and First Amendments, and entered an injunction barring the enforcement of DADT.[127] On October 20, 2010, the Ninth Circuit stayed the injunction, pending appeal.[128]

The court assessed the evidence, including the discharge of members despite a shortage of troops, the discharge of those with critically needed skills, the negative impact on recruiting, and the admission of less-qualified applicants.[129] Particularly, the court found it relevant that the military

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118. *Id*. (quoting Rostker v. Goldberg, 453 U.S. 57, 70 (1982)).
119. *Id*. (quoting Weiss v. United States, 510 U.S. 163, 176 (1994)).
120. *Id*.
121. Witt v. U.S. Dep't. of the Air Force, 739 F.Supp.2d 1308, 1317 (W.D. Wash. 2010).
122. *Id*. at 1315.
123. *Id*. at 1316 (stating a negative impact of DADT is "the loss of highly skilled and trained military personnel once they have been outed and the concomitant assault on unit morale and cohesion caused by their extraction from the military").
124. *Id*. at 1316.
125. Log Cabin Republicans v. United States, 716 F. Supp. 2d 884, 888 (C.D. Cal. 2010).
126. *Id*. at 911, 923.
127. *Id*. at 929.
128. Log Cabin Republicans v. United States, 2010 WL 4136210, at *1 (9th Cir. 2010).
129. Log Cabin Republicans v. United States, 716 F. Supp. 2d 884, 915-18 (C.D. Cal. 2010).

would delay proceedings against individuals suspected of violating DADT until after their deployments were completed.[130] The court noted that this evidence undermined the Government's argument that the Act furthered military readiness because they still deployed gay and lesbian service members into combat.[131]

The foregoing DADT cases demonstrate the similar underlying stereotypes of the recent exclusion of homosexuals from the military, and also how the courts rejected these stereotypes and did not simply defer to Congress's discriminatory military practice. It is time to similarly reconsider the exclusion of women from combat. The DADT victories provide the guidance by which to go forward.

III. ANALYSIS

Having set forth recent developments in case law concerning both gender and DADT, one should have a basic overview of the courts' jurisprudence in these two areas. First, Section A will discuss the implications of women's exclusion from combat on society as a whole. Section B discusses how changes in law through both gender and DADT cases have undermined *Rostker v. Goldberg,* thus calling for the courts to look anew at the exclusion of women from combat.

A. Women's Exclusion from Combat Perpetuates Gender Stereotypes in Society

The exclusion of women from combat impacts more than just the individual women who are denied opportunities in the military. This differential treatment of women stigmatizes all women in our society. The Supreme Court has acknowledged the great impact that subordination through the legal system can have on groups of individuals. For instance, in striking down Virginia's anti-miscegenation laws, the Supreme Court recognized that laws banning interracial marriage served a larger purpose of subordinating blacks through the legal system.[132] In the context of gender, in *J.E.B.* the Supreme Court recognized social stigmatization to women resulting from the discriminatory use of peremptory challenges.[133] Ultimately finding gender-based peremptory challenges unconstitutional, the court stated that:

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130. *Id*. at 918.
131. *Id*.
132. Loving v. Virginia, 388 U.S. 1, 11 (1967).
133. J.E.B. v. Ala. *ex rel*. T.B., 511 U.S. 127, 139 (1994).

> [t]he Equal Protection Clause . . . acknowledges that a shred of truth may be contained in some stereotypes, but requires that state actors look beyond the surface before making judgments about people that are likely to stigmatize as well as to perpetuate historical patterns of discrimination.[134]

Similarly, the differential treatment of women in the military works to perpetuate the perception of women's inferiority to men and reinforces gender inequality.[135] Military participation in this country has long been connected with the idea of full citizenship. Representative Bella Abzug expressed this idea, stating that "[i]n the Congress of the United States and in the political life of this Nation, political choices and debate often reflect a belief that men who have fought for their country have a special right to wield political power and make political decisions," and women are accordingly "denied the status of full citizenship, and the respect that goes with that status."[136] Moreover, "women should not be excluded from participating in a process which represents commitment to our Nation and its principles.[137]

Our nation has already recognized the stigmatization that can result from the exclusion of groups, such as African-Americans and homosexuals, from full participation in the military. In the 19th Century, finding that African-Americans were not citizens, the Court partially relied on state law which limited military service to "free white citizens."[138] The Court went on to state that "[n]othing could more strongly mark the entire repudiation of the African race," because "he is not, by the institutions and laws of the State, numbered among its people."[139] "He forms no part of the sovereignty of the State, and is not therefore called on to uphold and defend it."[140] The notion of equating military service with citizenship persists today. Under the Immigration and Nationality Act, a noncitizen who serves in the military is put on a fast-track to citizenship.[141] In the context of DADT, Speaker Pelosi declared that "by repealing the discriminatory [DADT] policy, we also honor the service and sacrifice of all who dedicate

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134. *Id*. at 139 n.11.

135. Valorie K. Vojdik, *Beyond Stereotyping in Equal Protection Doctrine: Reframing the Exclusion of Women from Combat*, 57 ALA. L. REV. 303, 318-22 (2005).

136. 117 CONG. REC. 35,311 (1971) (statement of Rep. Bella Abzug).

137. 126 CONG. REC. 13,879 (1980) (statement of Sen. Nancy Kassebaum).

138. Scott v. Sandford, 60 U.S. 393, 415 (1857).

139. *Id*. at 415.

140. *Id*.

141. *See* 8 U.S.C. § 1439 (2009) (providing for expedited naturalization during peacetime after three years of military service, rather than the normal five years); *see also* 8 U.S.C. § 1440 (2004) (providing for naturalization with no time-period requirement for service when the applicant served in active-duty status during a designated period of hostilities).

their lives to protecting the American people. We honor the values of our nation and we close the door on fundamental unfairness."[142] The historical exclusion of both African-Americans and homosexuals from full military service represented and perpetuated the social stigmatization of those groups on society as a whole.

Similarly, courts should look beyond mere classifications, and fully realize the societal harm associated with gender subordination in the military. By denying combat positions to women, and prohibiting women from rising through the ranks in the military, the United States clearly sends the message that women are still not on par with men. Thus, just as our nation has realized the social consequences of the exclusion of African-Americans and homosexuals from the military, the United States must recognize the social stigma associated with excluding women from combat and similarly remedy the situation. Recognizing the full effect of social stigmatization resulting from the message sent by excluding women from combat is the first step in conveying the serious implications of the military's policy.

In addition to general social stigmatization, the military's discriminatory practices result in discrimination towards women in the receipt of post-combat medical services.[143] While the policy officially prohibits women in combat units, women are frequently in combat situations, and in need of treatment for associated problems such as post-traumatic stress disorder.[144] Women who seek treatment for these combat-related problems are faced with a society who believes that they cannot be suffering from such problems because they are under the impression that women are excluded from combat.[145] As a result, these women are not taken seriously, and face difficulty in receiving appropriate medical treatment.[146] In light of the effect of the military's gender policy, it is time for courts to take another look at *Rostker*, and developments in caselaw since *Rostker* that seriously undermine its holding.

B. *Rostker* Was Incorrect When It Was Decided

Rostker still remains the main decision sanctioning the military's policy banning women from combat roles. However, aspects of *Rostker* were wrong when it was decided, and have even less support today. First,

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142. 156 CONG. REC. H4058 (daily ed. May 27, 2010) (statement of Speaker Pelosi).

143. Maia Goodell, *Physical-Strength Rationales for De Jure Exclusion of Women from Military Combat Positions*, 34 SEATTLE U. L. REV. 17, 22 (2010).

144. *Id.* at 21-22.

145. *Id.* at 22 (stating that female veterans report problems receiving post-traumatic stress disorder services from the Department of Veterans Affairs).

146. *Id.*

one of the reasons the Court upheld the exclusion of women from draft registration was because "the decision to exempt women from registration was not the 'accidental by-product of a traditional way of thinking about females.'"[147] The legislative history relied up by the Court, however, is full of "traditional way[s] of thinking" about women.

For instance, Senator Warner feared that if Congress made "a law which treats men and women equally for purposes of registration, there is the danger that the Federal court will construe that as being the first step in a military career [and thereby striking down] the right of the Commander in Chief . . . to practice discrimination and exclude women."[148] Further, reading from the "Report of the Subcommittee on manpower and personnel on the Rejection of Legislation Requiring the Registration of Young Women Under the Military Selective Service Act," Senator Warner conveyed that "[a] decision which would result in a young mother being drafted and a young father remaining home with the family in a time of national emergency cannot be taken lightly, nor its broader implications ignored."[149] Senator Levin also expressed that "[o]ur society mores" justified the restriction of women "to noncombat roles."[150]

Contrary to the Court's statements in *Rostker*, legislative history relied on in *Rostker* conveyed "traditional" stereotypes of the proper role of both women and men in society. These statements convey that a woman's place was thought to be in the home or private realm, while the man's place was in the public realm.[151] The man is constructed as the provider and rescuer, and thus his place is in the battlefields to protect the women.[152] The woman, meanwhile, is constructed as the nurturer and the one in need of rescue.[153] Accordingly, her place is at home to take care of the children, and definitely not on the front lines. The legislative history at issue, here, perpetuates those stereotypes.

Not only was *Rostker* misinformed as to underlying stereotypes, but changes since *Rostker* have left its holding largely undermined. For instance, the Court relied on the attitudes of the Executive, Congress, the military, and the general public to uphold the exclusion of women from the draft. Those attitudes, however, have changed over the last thirty years since *Rostker* was decided. Also, *Rostker* relied heavily on deference to Congress and the Executive; however, the courts have shown in recent

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147. Rostker v. Goldberg, 453 U.S. 57, 74 (1981) (quoting Califano v. Webster, 430 U.S. 313, 320 (1977)).
148. 126 CONG. REC. 13,879 (1980) (statement of Sen. Warner).
149. *Id*. at 13,880.
150. *Id*. at 13,885 (statement of Sen. Carl Levin).
151. *See* Goodell, *supra* note 143, at 47-48.
152. *See* McSally, *supra* note 9, at 1041.
153. *See id*.

DADT cases that they are not so quick to rely on judicial deference in matters of discrimination. Moreover, the courts' gender jurisprudence has continued to progress since the time of *Rostker*. Accordingly, this comment will next discuss the elements that have changed the landscape in which *Rostker* was decided.

C. Recent Jurisprudence Undermines *Rostker's* Strict Judicial Deference in Military Affairs

First, in order to get to the question of whether the military's treatment of women is constitutional, one must first jump past the hurdle of judicial deference. Traditionally, the Court has viewed the military as "society apart from civilian society, so 'military law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment.'"[154] In *Rostker*, Rehnquist repeats this sentiment, declaring that "judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged."[155] Again, in the 1986 decision of *Goldman v. Weinberger*, finding the military's punishment of an orthodox Jew for wearing religious garb legal, the Court stated "the military is, by necessity, a specialized society separate from civilian society."[156] More recently, in 2006 in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, Chief Justice Roberts referred to the deference doctrine, stating that "Congress' power in this area 'is broad and sweeping.'"[157]

The judicial deference doctrine was employed in the DADT context by the First Circuit in *Cook v. Gates*.[158] "[P]aus[ing] to recognize the unique context in which the liberty interest"[159] in *Cook* arose, the court noted the reasoning for such deference included institutional competence of Congress in military affairs and Congress's power under the Constitution "to raise and support armies and to make all laws necessary and proper to

154. Parker v. Levy, 417 U.S. 733, 744 (1974) (quoting Burns v. Wilson, 346 U.S. 137, 140 (1953)).
155. Rostker v. Goldberg, 453 U.S. 57, 70 (1981).
156. Goldman v. Weinberger, 475 U.S. 503, 506 (1986) (quoting Parker v. Levy, 417 U.S. at 743)).
157. Rumsfeld v. Forum for Academic & Inst'l Rights, 547 U.S. 47, 58 (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)) (rejecting a challenge to the Solomon Amendment, which requires law schools to provide military recruiters access to campus).
158. Cook v. Gates, 528 F.3d 42, 57 (1st Cir. 2008).
159. According to the First Circuit, *Lawrence* "recognized only a narrowly defined liberty interest in adult consensual sexual intimacy in the confines of one's home and one's own private life." *Id*. at 56. The First Circuit found that the facial challenge to DADT failed because the act covered conduct, which was not within the *Lawrence* liberty interest. *Id*. However, the as-applied challenge "present[ed] a more difficult question," because DADT potentially prohibits conduct protected under *Lawrence*, such as consensual sexual conduct in one's home. *Id*.

that end."[160] The Ninth Circuit, however, has not followed suit with the First Circuit in addressing challenges to DADT's constitutionality.[161] Moreover, the doctrine of military deference has been criticized, and recent cases demonstrate the Supreme Court's and lower courts' willingness to adjudicate constitutional matters in the military context.

Some scholars are skeptical of broad-reaching judicial deference.[162] These individuals believe that deference to Congress's military decisions should be the same as congressional deference in other matters, citing the fact that there is nothing in the Constitution to suggest otherwise.[163] Further, recent DADT cases, including *Witt v. Department of the Air Force* and *Log Cabin Republicans v. United States*, provide evidence that courts are not all willing to blindly adhere to the doctrine of deference in the face of constitutional violations. The Ninth Circuit in *Witt*, cited to the doctrine of judicial deference, but quickly noted that "deference does not mean abdication,"[164] and "Congress . . . is subject to the requirements of the Due Process Clause when legislating in the area of military affairs."[165] Similarly, the Central District of California, relying on *Rostker*'s language, expressed that judicial deference was "the overriding principle;" however, since "deference does not mean abdication," the district court granted an injunction declaring that DADT violated the Fifth and First Amendment.[166]

Overall, the Ninth Circuit was relatively dismissive of the doctrine of judicial deference, while the First Circuit provided a detailed analysis of the history and importance of judicial deference. While this might appear to leave the Ninth Circuit's decision in *Witt* vulnerable in the face of a challenge in the Supreme Court,[167] recent Supreme Court decisions concerning military detention since 9/11 also suggest the Court may take another look at *Rostker*'s deference to the military concerning gender.

In *Hamdan v. Rumsfeld*, concerning a detainee held at Guantanamo to be tried by a military commission, the Court declared that the President was "entitled to a heavy measure of deference."[168] However, the Court

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160. *Id*. at 57 (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)).
161. *See* Witt v. Dep't of Air Force, 527 F.3d 806 (9th Cir. 2008).
162. *See* Diane H. Mazur, *Rehnquist's Vietnam: Constitutional Separatism and the Stealth Advance of Martial Law*, 77 IND. L.J. 701, 761 n.350 (2002); *see also* Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1081 (2008).
163. *See id*.
164. Witt v. Dep't of Air Force, 527 F.3d 806, 821 (9th Cir. 2008) (quoting Rostker v. Goldberg, 453 U.S. 57, 70 (1981)).
165. *Id*. (quoting Weiss v. United States, 510 U.S. 163, 176 (1994)).
166. Log Cabin Republicans v. United States, 716 F. Supp. 2d 884, 929 (C.D. Cal. 2010) (citing *Rostker*, 453 U.S. at 70).
167. *See* Gustavo Oliveira, *Cook v. Gates and Witt v. Department of the Air Force: Judicial Deference and the Future of Don't Ask Don't Tell*, 64 U. MIAMI L. REV. 397, 416 (2009).
168. Hamdan v. Rumsfeld, 548 U.S. 557, 680 (2006).

ultimately found that the President's power as Commander-in-Chief was not sufficient, stating that "the Executive is bound to comply with the rule of law that prevails in this jurisdiction."[169] After *Hamdan*, Congress enacted the Military Commissions Act in an attempt to suspend the rights of habeas corpus.[170] In *Boumediene v. Bush*, however, the Court recognized that deference should be accorded the political branches in matters of national security and terrorism.[171] However, in holding that the habeas corpus could not be suspended in this matter, the Court declared that "[s]ecurity subsists, too, in fidelity to freedom's principles."[172]

In *Hamdi v. Rumsfeld*, concerning a U.S. citizen held as an enemy combatant, the government argued that individual case fact-finding should be eliminated, and the Court should be limited to the question of whether the military's detention scheme is authorized.[173] The Court, however, declined to accord broad deference, noting it had "made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[174] Ultimately, the Court applied the *Mathews v. Eldridge* test, finding that citizen-detainees are entitled to "notice of the factual basis" for their detention, and an opportunity to respond "before a neutral decisionmaker."[175] Thus, even in the tense environment of post-9/11 terrorism and military affairs, the Supreme Court has not been shy in enforcing constitutional principles in the face of the doctrine of deference.

While the doctrine of deference exercised in *Rostker* is no doubt still in place, the Supreme Court's subsequent decisions in *Hamdan, Boumediene,* and *Hamdi*, suggest the Court may in fact enforce current constitutional gender jurisprudence if presented with such a challenge. Accordingly, this comment will now examine the military's policy towards women in light of current gender jurisprudence.

D. *Rostker* is Inconsistent with Current Gender Jurisprudence

Pursuant to *United States v. Virginia*, classifications based on sex must not be "based on 'fixed notions concerning the roles and abilities of males and female.'"[176] "[G]eneralizations about 'the way women are,' estimates of what is appropriate for most women, no longer justify denying

169. *Id*. at 635.
170. Boumediene v. Bush, 553 U.S. 723, 831 (2008).
171. *Id*. at 796-97.
172. *Id*. at 797.
173. Hamdi v. Rumsfeld, 542 U.S. 507, 527 (2004).
174. *Id*. at 536 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952)).
175. *Id*. at 533.
176. United States v. Virginia, 518 U.S. 515, 541(1996) (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982)).

opportunity to women whose talent and capacity place them outside the average description."[177] However, gender classifications in the military would be constitutionally sound if such a classification "realistically reflects the fact that the sexes are not similarly situated in certain circumstances."[178]

As previously delineated, the traditional reasoning for excluding women was undoubtedly based on generalizations about women and their expected roles as the center of domestic life. The military, however, has reassessed its position on women over the years. A 1998 report to the Committee on Armed Services in the United States Senate expressed that the Department of Defense (DOD) had not changed its policy excluding women from combat because the DOD believed a change in policy "lacked both congressional and public support." [179] The Department went on to declare that women "'would not contribute to the readiness and effectiveness of those units' because of physical strength, stamina, and privacy issues."[180] Congressional and public support rationales would not survive under current gender jurisprudence. Such rationales would be excluded as supporting traditional notions of the role of women in society, rather than real differences between the sexes. Physical strength and stamina, however, deserve deeper consideration. Accordingly, one must consider whether there is a real physical difference between men and women that would prohibit women from serving in combat.

Opponents of women in combat commonly assert that physical strength, stamina, and pregnancy are three real differences. [181] It is commonly accepted that men, on average, are physically stronger than women; however, at the same time, there are women who are physically stronger than the average man.[182] Accordingly, it would follow that more men than women would be suited physically for the demands of combat such as carrying large loads. However, men who are incapable of meeting the harsh physical demands of combat are not excluded, while women who

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177. *Id*. at 550.
178. Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 469 (1981).
179. Mark E. Gebicke et al., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-99-7, GENDER ISSUES: INFORMATION ON DOD'S ASSIGNMENT POLICY AND DIRECT COMBAT DEFINITION 3 (1998).
180. *Id*.
181. BRIAN MITCHELL, WOMEN IN THE MILITARY: FLIRTING WITH DISASTER 147 (1998).
182. *See* Goodell, *supra* note 143, at 33-34. In a comparison of studies, Goodell demonstrates this point. Upon first entering basic training, the average man runs a mile in 7.5 minutes, and can run 2 miles in 14 minutes after 8 weeks of basic 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). However, in 1996, the female Olympic gold medalist averaged a mile in 4.3 minutes, and even the woman who placed 100th averaged a mile in 5.8 minutes. 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)).

are in fact physically capable are excluded from combat. Similar to *United States v. Virginia*, both sides agree that some women could meet the physical standards. As Justice Ginsburg proclaimed in *Virginia*, the remedy must be crafted for those who are physically capable, not the average woman.[183] Unlike *Michael M*., where the real physical differences of pregnancy existed, both sexes are capable of participating in combat, and some members of both sexes are similarly situated when it comes to the physical capabilities of combat. Accordingly, following from *Virginia*, women who are physically capable of the rigors of combat should be able to join combat units.

Pregnancy represents an area where there is, without debate, a real difference between the sexes.[184] Opponents of women in combat contend that pregnancy negatively affects military readiness and unit cohesion.[185] In fact, one critic asserts that [p]regnancy is perhaps the single greatest obstacle to the acceptance of women in the military among military men."[186] For instance, it is impossible to know when a woman will be pregnant, and thus unable to deploy.[187] Further, while a pregnant female is on leave, a replacement will not be forthcoming and co-workers will have to take on additional duties.[188] Others fear that women will become pregnant just to avoid duty, thus deteriorating unit morale.[189]

A woman may very well become pregnant while in the military, and not able to serve in combat during that time. That reason alone, however, is not sufficient to bar all women from combat. While a pregnancy may legitimately exclude a woman from combat during the time she is pregnant, the overall impact on military readiness would not be any greater than disabilities encountered by men who are unable to deploy. In fact, evidence shows that women actually lose less time to pregnancy in the military than men do for illness, drug and alcohol abuse, and disability.[190] Moreover, not all women become pregnant, and those that do become pregnant will

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183. United States v. Virginia, 518 U.S. 515, 550-51 (1996).

184. *See* Michael M. v. Sup. Ct. of Sonoma Cnty., 450 U.S. 464, 478 (1981) (Stewart, J., concurring) ("[W]hile detrimental gender classifications by government often violate the Constitution, they do not always do so, for the reason that there are differences between males and females that the Constitution necessarily recognizes. In this case we deal with the most basic of these differences: females cannot become pregnant as the result of sexual intercourse; males cannot.").

185. Zeigler & Gunderson, *supra* note 12, at 54.

186. MITCHELL, *supra* note 181, at 156.

187. *Id.*

188. *Id.*

189. *Id.*

190. Lucinda J. Peach, *Women at War: The Ethics of Women in Combat*, 15 HAMLINE J. PUB. L. & POL'Y 199, 218 (1994); Zeigler & Gunderson, *supra* note 12, at 54.

normally be able to return to duty within a fixed timeframe.[191] Unit morale would suffer no more for a pregnancy leave than when a male takes disability leave for drug treatment or a disability. Further, the fact that some women may become pregnant just to avoid service is a possibility; however, the fact that a few women would do this should not affect the vast majority who would not engage in such behavior.[192] Accordingly, while a real difference exists between men and women when it comes to pregnancy, that fact would not prevent a woman from fulfilling combat duties, and it is not sufficient to justify blanket exclusion of all women from combat. The idea of pregnancy as sufficient to exclude women seems more like "blatant prejudice against women for a condition peculiar to their sex."[193] Physical strength and pregnancy arguments are unique to women; however, women encounter several other stereotypical arguments that are commonly used in justifying DADT.

E. Unit Cohesion and Privacy Justifications are Similarly Unfounded in the Context of Women and DADT

In addition to the real-physical-difference argument, opponents of the inclusion of women in combat argue that women will disrupt unit cohesion, and thus affect military readiness.[194] Similar arguments are used to defend discrimination against homosexuals in the military. Common justifications for DADT include unit cohesion, privacy of heterosexuals, and the reduction of sexual tensions.[195] Congress declared that "[t]he presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to . . . unit cohesions [which is] the essence of military capability."[196] The Government argued that the mere presence of homosexuals "would raise 'concerns' of heterosexual members 'based on moral precepts and ethical

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191. *Id*. at 219 n.84 (noting that "[o]nly about ten percent of servicewomen are pregnant at any given time) (citing Marilyn Gordon & Mary J. Ludvigson, *A Constitutional Analysis of the Combat Exclusion for Air Force Women*, 9 MINERVA: Q. REP. ON WOMEN & MIL. 22-23 (1991).

192. Zeigler & Gunderson acknowledge that evidence does not support that women will become pregnant to avoid duty. Zeigler & Gunderson, *supra* note 12, at 54.

193. Brief for Petitioner at ?, Struck v. Sec'y of Def., 409 U.S. 1071 (1972) (No. 72-178), 1972 WL 135840 at *?. (Merits brief prepared by Ruth Bader Ginsburg, as general counsel for the ACLU's Women's Rights Project, in 1972 on behalf of Captain Susan Struck, who was discharged from the military for refusing to have an abortion.).

194. PRESIDENTIAL COMM'N ON THE ASSIGNMENT OF WOMEN IN THE ARMED FORCES, REPORT TO THE PRESIDENT 24-27 (1992); *see also* Zeigler & Gunderson, *supra* note 12, at 58-60 (2005); Mitchell, *supra* note 175, at 349.

195. *See* Able v. United States, 968 F. Supp. 850, 858 (E.D.N.Y. 1997).

196. 10 U.S.C. § 654(a)(15) (2006) (repealed 2011).

values.'"[197] Further, General Colin Powell took the position that the open service of homosexuals involved will create serious issues having to do with cohesion and well-being of the force."[198]

According deference to Congress, in *Cook v. Gates* the First Circuit found that the unit cohesion argument provided a rational basis for DADT.[199] However, in *Witt*, the Ninth Circuit came to a contrary conclusion, and found Major Witt's presence in the military as a homosexual had not impacted unit cohesion.[200] The court concluded that her *suspension* under DADT had negatively affected unit cohesion, not her presence as a homosexual in the military.[201] Witt was a "model officer," and it is no surprise that her exclusion under a discriminatory policy would impact unit cohesion and unit morale.[202]

If Witt had been discharged on the similarly discriminatory basis of gender, unit cohesion would have been affected no less than her discriminatory discharge on the grounds of homosexuality. In *Able v. United States* the court expressed similar concerns of the "unit cohesion" argument in the DADT context stating:

> [T]he court deems extraordinary . . . the almost total lack of concern evidenced in the Congressional hearings and the Committee reports as to the impact on unit cohesion of the attempt to enforce secrecy on homosexuals and to enlist them in the perpetration of a hoax on heterosexuals. Common sense suggests that a policy of secrecy, indeed what might be called a policy of deception or dishonesty, will call unit cohesion into question.[203]

Studies have shown that a mix of genders does not affect unit cohesion.[204] Rather, "it is the commonality of experience of the soldiers involved, rather than their gender, that produces cohesion."[205] Members of the armed forces work with each other intimately, and recognize the physical capabilities of other members. Accordingly, when a capable female soldier is excluded from combat, while an incapable female is

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197. Able v. United States, 968 F. Supp. 850, 858 (E.D.N.Y. 1997).
198. Assessment on the Plan to Lift the Ban on Homosexuals in the Military: Hearing Before the Military Forces and Personnel Subcomm. of the House Comm. on Armed Services, 103d Cong. 32 (1993) (testimony of Gen. Colin Powell, Chairman, Joint Chiefs of Staff).
199. Cook v. Gates, 528 F.3d 42, 48 (1st Cir. 2008).
200. Witt v. Dept. of Air Force, 527 F.3d 805, 821 n.11 (9th Cir. 2008).
201. *Id*.
202. *Id*.
203. Able v. United States, 880 F. Supp. 968, 979 (E.D.N.Y. 1995).
204. Vojdik, *supra* note 129, at 336; MARGARET C. HARRELL & LAURA L. MILLER, NEW OPPORTUNITIES FOR MILITARY WOMEN: EFFECTS UPON READINESS, COHESION, AND MORALE 54-55 (1997) (RAND Report); JOSHUA GOLDSTEIN, WAR AND GENDER 199 (2001)).
205. Vojdik, *supra* note 135, at 336 (quoting Goldstein, *supra* note 198, at 201).

included in combat, morale will be affected from the obvious inequity. Also, service members observe females in combat zones fulfilling combat duties. At the same time they observe a policy that officially excludes females from combat units. This "perpetration of a hoax" (we proclaim to exclude women from combat, while they actually fulfill combat roles) should be of more concern to policymakers when unit cohesion is in question. Accordingly, just as the *Witt* court recognized in the context of DADT, it is the discriminatory *exclusion* of women that is more likely to affect unit cohesion.

The military also expresses a concern for the privacy of its male heterosexual members in justifying excluding women and homosexuals. The military excludes women from "assignments where the costs of appropriate . . . privacy arrangements are prohibitive."[206] The idea is that being forced to sleep and shower with the opposite sex is an infringement on an individual's privacy.[207] For instance, the Navy excluded women from service on submarines because of these privacy concerns.[208] Similarly, the military expressed privacy concerns of heterosexual members when discussing the inclusion of homosexuals in the military, stating that service members are forced to "involuntarily accept living conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy.[209]

Proponents for homosexuals have combated the privacy argument by noting that modern military facilities provide a greater degree of privacy than older facilities.[210] Further, they argue that even in a combat situation out on the field, individuals would simply be used to the lack of privacy and it would not be a "big deal."[211] Members of the military are professionals, and are trained to deal with various situations they encounter, whether in combat or not. Any issues which arise concerning privacy can be properly addressed by appropriate training as to professional conduct.[212]

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206. Hasday, *supra* note 32, at 141.
207. William A. Woodruff, *Homosexuality and Military Service: Legislation, Implementation, and Litigation*, 64 UMKC L. REV. 121, 161 (1995).
208. *See* Hasday, *supra* note 33, at 162.
209. 10 U.S.C. § 654(a)(12) (repealed 2011).
210. Elaine Donnelly, *Constructing the Co-Ed Military*, 14 DUKE J. GENDER L. & POL'Y 815, 947 (2007).
211. Donnelly, *supra* note 210 (citing Aaron Belkin & Melissa Sheridan Embser-Herbert, *A Modest Proposal*, 27 INT'L SEC. 178 (2002)).
212. *See* McSally, *supra* note 9, at 1036 n. 143 ("Privacy concerns can be ameliorated by providing some segregation in sleeping quarters or, if not practical in combat conditions, discretion and respect among profession adults as the focus on the mission, get rest, and attend to personal hygiene. Prejudiced attitudes toward women need to be identified, confronted, and altered, just as they were during racial integration of the military.").

While military affairs and the control of the military are of the utmost importance to the security of our nation, and is unquestionably the expertise of the Executive and Legislative branches, any arguments that women put military effectiveness at risk are undermined by the fact that women presently do fulfill combat functions. Despite the official ban on women in combat roles, the military has found ways to insert women into combat. The Army currently places women in combat areas,[213] avoiding congressional reporting requirements.[214] The Navy recently officially notified Congress that women would begin serving on submarines.[215] The military obviously believes that women have the ability to serve in combat,[216] and that they will not pose any threats to unit cohesion or the privacy of other service members. Accordingly, it is time to reconsider the military's discriminatory policies against women who are capable and willing to serve their country through combat roles.

IV. SOLUTIONS

Avenues of relief for women wishing to pursue a position in military combat vary and include constitutional challenges in the courts, policy changes at the military level, and legislation by Congress. Through a constitutional challenge, a female soldier excluded from combat could bring an equal protection claim. In bringing such a claim before the courts, one must stress the effect of military discrimination as reinforcing a "gendered caste system" affecting women as a whole.[217] A simpler method of change is through a change in military policy. The military could simply change its policy and make the appropriate reporting requirements to Congress. There is no law prohibiting women from serving in combat. Accordingly, the military simply has reporting requirements to Congress, and has already allowed women to serve on submarines using these reporting methods.[218]

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213. *See* Lizette Alvarez, *GI Jane Breaks the Combat Barrier*, N.Y. TIMES, Aug. 16, 2009, at A1.
214. The Secretary of Defense is required to provide notice to Congress if any of the combat restrictions on women change. 10 U.S.C. §§ 652, 6035 (2006).
215. Commander, Submarine Forces Pub. Affairs, *Navy Policy Will Allow Women to Serve Aboard Submarines*, U.S. NAVY (Apr. 29, 2010), http://www.navy.mil/search/display.asp?story_id =52954.
216. For instance, after notifying Congress of the inclusion of women on submarines, the Navy announced "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." *Id*.
217. See Vojdik, *supra* note 135, at 348-49.
218. Commander, Submarine Forces Pub. Affairs, *Navy Policy Will Allow Women to Serve Aboard Submarines*, U.S. NAVY (Apr. 29, 2010), http://www.navy.mil/search/display.asp?story_id =52954.

Of course, Congress could make the appropriate changes through legislation.

In addition to the aforementioned solutions, one cannot overlook the underlying stereotypes that have resulted in the exclusion of women and homosexuals from various aspects of the military. The underlying reason for the discrimination against both women and homosexuals in the military is the social construction of the military as a masculine organization. Earlier cases made it clear that this normative judgment was at play.[219] Today, however, normative judgments are used more subtly, and are couched in ideas of physical strength, unit cohesion, and privacy concerns. Women and homosexuals, both generally constructed as non-masculine, both detract from that idea. Accordingly, the solution on a larger scale is by challenging these stereotypes.

V. CONCLUSION

In conclusion, the basis of excluding women from combat and other areas of the military is inconsistent with both current gender jurisprudence and recent developments in allowing homosexuals to openly serve in the military. Further, like the 9th Circuit in *Witt*, and the Supreme Court in the Guantanamo Bay cases, courts are more likely to decided constitutional issues in the military realm because they are not blindly deferring to the doctrine of deference as the Supreme Court did in *Rostker*. Not only is the military's exclusion in conflict with current legal holdings, but this exclusion has a harmful impact by reinforcing the perception of inferiority of women in society. "There is simply no basis for concluding that all or even a significant number of women are incapable of serving in the military. This is true even assuming that they would be placed in combat roles."[220]

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219. *See* United States v. St. Clair, 291 F. Supp. 122, 125 (S.D.N.Y. 1968) ("If a nation is to survive, men must provide the first line of defense while women keep the home fires burning.").

220. United States v. Reiser, 394 F. Supp. 1060, 1066 (D. Mont. 1975).