

THE EFFEMINATE PATRIOT: DECONSTRUCTING “SEX” IN MARINE COMBAT ROLES

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I. INTRODUCTION

For more than 150 years, women have had the daunting task of arguing the legitimacy of our obligation and ability to participate in the protection and defense of this country.¹ In fact, it was only the increasing demand of manpower of World War II that compelled Congress to allow women to pursue noncombatant military roles.² Still, official legislation and military policies continued to warp the perceptions of female ability and authority in the military by placing severe limitations on women’s military opportunities.³ In 2015, a hint of opportunity came when there was a final lift of the 1994 Direct Ground Combat Definition and Assignment Rule (“the 1994 Rule”). Today, women can no longer be excluded from assignments to units and positions “whose primary mission is to engage in direct combat on the ground.”⁴

The formal termination of the 1994 Rule was certainly a celebratory move towards sexual equality in the military—albeit presenting a challenging task for the military, Congress, and

¹ Linda K. Kerber, “A Constitutional Right to be Treated Like . . . Ladies”: *Women, Civic Obligation and Military Service*, 1993 U. CHI. L. SCH. ROUNDTABLE 95, 110 (1993). During the American Revolution, Patriots were “skeptical about giving women official status in the army,” even George Washington objected the requirement of a fixed number of women in the military, *id.*

² See Kristy N. Kamarck, *Women in Combat: Issues for Congress*, CONG. RES. SERV. 1, 2 (Dec. 13, 2016), <https://fas.org/sgp/crs/natsec/R42075.pdf>.

³ See *Pers. Adm’r of Mass. v. Feeny*, 442 U.S. 256, 269–70 n.21 (1979) (discussing previous federal statutes, regulations, and policies that have restricted career opportunities, mandated maximum enlistment quotas, and imposed stricter eligibility requirements upon women).

⁴ Memorandum from Leslie Aspin, Sec’y of Defense on Direct Ground Combat Definition and Assignment Rule, to Sec’y of the Army, Navy, Air Force, Joint Chiefs of Staff Chairman, Assistant Sec’y of Defense (Personnel and Readiness), and Assistant Sec’y of Defense (Reserve Affairs) (Jan. 13, 1994), <http://www.govexec.com/pdfs/031910d1.pdf>.

civilians regarding whether the new eligibility standards for entry into roles that were previously closed to women should be modified or kept in place. For proponents of gender inclusion, the standards serve as a de facto barrier for women in obtaining these positions; for opponents, national security is far too valuable to compromise for the sake for social engineering. Notably, this debate also raises a critical feminist concern: in a nation where military participation is a fundamental part of citizenship,⁵ women are inevitably estopped from becoming full citizens where the extent of our military obligation and service is systematically hindered compared to the rest of our cohort.⁶ As Ann Scales argues,

”[M]ilitarism” [is] the pervasive cluster of forces that keep history insane: hierarchy, conformity, waste, false glory, force as the resolution of all issues, death as the meaning of life, and a claim to the necessity of all of that. Ultimately, force and gender are parts of the same death-seeking process. For these same forces account in turn for the oppression of women in whatever patriarchal institution—religion, state, family, academy—and by whatever method—rape, bettering, economic exploitation, rendering invisible.⁷

Thus, the relationship of women and military participation should not only be on the feminist agenda, but “should be viewed as being in fundamental symbiosis with gender oppression.”⁸ And the historical treatment of gender differences in the military only confirms the endorsement of such oppression: in 1944, in order to “g[e]t around the ticklish problem of female authority,” the Marine Corps ruled that “it was proper for a woman officer to direct men when her orders were construed to be emanating from her male superior.”⁹

⁵ See *Finding Their Reasons to Serve*, MILITARY.COM, <http://www.military.com/join-armed-forces/finding-their-reasons-to-serve.html> (last visited Dec. 10, 2016) (interviewing a Philippine-born male applicant who enlisted in the Army to help gain U.S. citizenship). See also *infra* text accompanying notes 85–87.

⁶ See generally Blythe Leszkay, *Feminism on the Front Lines*, 14 HASTINGS WOMEN’S L.J. 133, 136 (2003), reprinted in 27 HASTINGS WOMEN’S L.J. 261, 264 (2016) (arguing citizenship is the foundation for equality and “[e]quality is what gives us a platform to claim the rights that are the natural possession of all citizens . . .”).

⁷ Ann Scales, *Militarism, Male Dominance and Law: Feminist Jurisprudence as Oxymoron?*, 12 HARV. WOMEN’S L.J. 25, 26 (1989).

⁸ *Id.*

⁹ SUSAN M. HARTMANN, *THE HOME FRONT AND BEYOND: AMERICAN WOMEN IN THE 1940S* 38 (1982).

To be sure, reconciling personal feminist values and societal attitudes towards national defense and security appears especially difficult within a sector that is founded on predominately male principles and traits. Yet, by viewing the standards of these newly open roles under an “equality as acceptance” lens feminists can accept the final lift of the 1994 Rule as an advancement towards military gender inclusion without compromising our military’s readiness. Part II provides a general background of the 1994 Rule and the effects of its rescission. Focusing solely on the Marine Corps’ response to the rescission of the 1994 Rule, Part III discusses the details of the Marine Corps’ new Combat Fitness Test (“CFT”) gender-neutral standards and the two competing opinions of those current standards. Part IV argues overall that viewing the new CFT standards under symmetrical approaches is inadequate as it forces feminists to compromise military readiness by requiring standards be lowered; symmetrical approaches also fail to appropriately further the goal of gender equality in the military because women will continue to be treated unequally in terms of qualifying for and obtaining combat positions. Part V argues that by emphasizing the basic commonality of citizenship as a human endeavor involving both men and women, feminists can support a finding that the current CFT standards are not artificially high for women because the men and women seeking combat positions are on equal footing with regard to exercising this fundamental right.

II. RESCINDING THE 1994 DIRECT GROUND COMBAT DEFINITION AND ASSIGNMENT RULE

In 1994 the Department of Defense (“DOD”) authorized the 1994 Rule, mandating “[s]ervice members are eligible to be assigned to all positions for which they are qualified, except that women shall be excluded from assignment to units . . . whose primary mission is to engage in direct combat on the ground. . . .”¹⁰ Units involved in “direct ground combat” are tasked with

engaging an enemy on the ground with individual or crew served weapons, while being exposed to hostile fire and to a high probability of direct physical contact with the hostile force’s personnel. Direct ground combat takes place well forward on the

¹⁰ Memorandum, *supra* note 4.

battlefield while locating and closing with the enemy to defeat them by fire, maneuver, or shock effect.¹¹

To implement the 1994 Rule military branches were required to coordinate policies and regulations which restricted the assignment of women where the costs of appropriate privacy arrangements were prohibited; “where units and positions [were] doctrinally required to physically collocate and remain with direct ground combat units that are closed to women;” where units are involved with reconnaissance operations and Special Ops missions; and “where job related physical requirements would necessarily exclude the vast majority of women Service members.”¹²

Despite these restrictions, in the latter half of the 20-year course this policy was active women readily shouldered the weight of battle in the Iran and Afghanistan wars alongside their male counterparts.¹³ In part due to the gallant performance of women in combat situations and the recognition of the importance of servicewomen to the national security mission,¹⁴ in 2012 the DOD and the Joint Chiefs of Staff modified the 1994 Rule, which opened over 14,000 positions to women.¹⁵ One year later, the Joint Chiefs of Staff “propose[d] a new way forward that [would] fully integrate women without compromising out readiness, morale, or war-fighting capacity” by immediately rescinding the 1994 Rule in its entirety, requiring all closed units and positions be opened up to servicewomen.¹⁶ However, inasmuch as patriotic feminists can celebrate the rescission of an obviously gender-biased rule, there came a caveat: an occupational specialty or unit could remain closed to women upon approval of an exception by the Chairman of the Joint Chiefs of Staff and the Secretary of Defense.¹⁷ Accordingly, under the 2013 directive each military branch was to

¹¹ *Id.*

¹² *Id.*

¹³ See generally Nora Bensahel et. al., *Battlefield and Boardrooms: Women’s Leadership in the Military and the Private Sector*, CTR. FOR A NEW AM. SEC. 9 (Jan. 2015) (noting as of April 2014, over 9,000 women have received Army Combat Action Badges for “actively engaging or being engaged by the enemy”).

¹⁴ See Memorandum from Martin E. Dempsey, Joint Chiefs of Staff Chairman, and Leon E. Panetta, Sec’y of Defense on Elimination of the 1994 Direct Ground Combat Definition and Assignment Rule to Sec’ys of the Military Dept’s and Chiefs of the Military Services (Jan. 24, 2013), <http://www.defense.gov/news/WISRJointMemo.pdf>.

¹⁵ See *id.*

¹⁶ *Id.*

¹⁷ See *id.*

develop "gender-neutral occupational standards" to be fully implemented by January 1, 2016, or submit for approval an exception to the policy.¹⁸ Such exceptions were to be "narrowly tailored, and based on a rigorous analysis of factual data regarding the knowledge, skills and abilities needed for the position."¹⁹

"Over the ensuing three years, the Military Services opened over 111,000 positions to women and . . . independently studied, developed, and verified operationally relevant standards for them."²⁰ After extensive studies on unit cohesion, women's health, equipment, facilities modifications, propensity to serve, and international experiences with women in combat, at the end of 2015 then-Secretary of Defense Ashton Carter "determined that no exceptions [were] warranted to the full implementation of the rescission of the [1994 Rule]."²¹ Stated in Secretary Carter's official memorandum:

Anyone, who can meet operationally relevant and gender neutral standards, regardless of gender, should have the opportunity to serve in any position. . . . The responsibility for implementation is not borne solely on the shoulders of women, nor by the forces within the newly integrated career fields; it is borne in equal measures by the entire force and the military and civilian leadership of the Department of Defense. We all share the imperative to preserve and improve the finest fights force the world has ever known.²²

¹⁸ *Id.*

¹⁹ *Id.*

"Importantly, then-Chairman of the Joint Chiefs of Staff commented, "if we do decide that a particular standard is so high that a woman couldn't make it, the burden is now on the service to come back and explain . . . why is it that high? Does it really have to be that high? With the direct combat exclusion provision in place, we never had to have that conversation."

Pete Winn, *Gen. Dempsey: If Women Can't Meet Military Standard, Pentagon will ask "Does it Really Have to be That High?"*, CNSNEWS (Jan. 25, 2013, 10:41 AM), <http://www.cnsnews.com/news/article/gen-dempsey-if-women-can-t-meet-military-standard-pentagon-will-ask-does-it-really-have>.

²⁰ Memorandum from Ashton Carter, Deputy Sec'y of Defense, on Implementation Guidance for the Full Integration of Women in the Armed Forces to Secy's of the Military Dep'ts, Chiefs of the Military Servs., and U.S. Special Operations Command Commander (Dec. 3, 2015), <http://www.defense.gov/Portals/1/1/Documents/pubs/OSD014303-15.pdf>.

²¹ *Id.*

²² *Id.*

On March 10, 2016, Secretary Carter approved all implementation plans for each military branch, and the integration of women into these combat roles has been active since.²³

III. THE MARINE CORPS' IMPLEMENTATION PLAN

A. The Gender-Neutral Standards for the New Combat Fitness Tests

The Marine Corps' response was to adjust its training regime "to ensure that those applying for physically demanding combat jobs would be tested differently, even before their first day at Marine Corps boot camp."²⁴ In particular, the Marine Corps created two distinct testing routes: every recruit, male or female, must pass a series of *gender-based* strength tests, such as the initial strength test ("IST") and the annual physical fitness test ("PFT") and combat fitness test ("CFT").²⁵ Those recruits interested in pursuing a military occupational specialty ("MOS") must meet certain *gender-neutral* MOS Classification Standard ("MCS") scores²⁶ which gradually become harder and more complex throughout their training.²⁷ If a recruit satisfies the MCS requirements, they must pass the last and final gender-neutral evaluation known as the MOS Specific Physical Standards

²³ Kamarek, *supra* note 2, at Summary. Notably, the Marine Corps was the *only* service to seek a partial exemption from opening all jobs to servicewomen, including infantry positions. Gina Harkins, *How Female Troops are Taking on Some of the Military's Toughest Jobs*, MILITARY OFFICERS ASS'N. OF AM. (Mar. 7, 2017), <http://www.moaa.org/Content/Publications-and-Media/Features-and-Columns/MOAA-Features/The-Right-to-Fight.aspx#>. The request was "based on data from a months-long study that showed mixed-gender combat teams were outperformed by their all-male counterparts." *Id.* The data also showed that women were "slower and more likely to become injured and fired their weapons with less accuracy." *Id.* Still, Secretary Carter denied the Marines' application for exception to keep some jobs closed to women. *Id.*

²⁴ Thomas Gibbons-Neff, *How the Marines' New Physical Standards for Combat Jobs Weed Out Men and Women*, WASH. POST (June 22, 2016), https://www.washingtonpost.com/news/checkpoint/wp/2016/06/22/how-the-marines-new-physical-standards-for-combat-jobs-weed-out-men-and-women/?utm_term=.1161daf11362.

²⁵ *Id.* See also "Gender-Normed Initial Strength Test" table, appended as Table A.

²⁶ See Gibbons-Neff, *supra* note 24. See also "Ground Combat Arms MOS Classification Standard" table, appended as Table B.

²⁷ See also Lolita C. Baldor, *New Standards Weeding Out Both Male and Female Marine Combat Hopefuls*, MILITARY.COM (June 21, 2016), <http://www.military.com/daily-news/2016/06/21/few-proud-physically-fit.html>.

("MSPS").²⁸ A recruit who fails any gender-neutral evaluation at any point during training is "re-classed" into a different, noncombat specialty.²⁹ Some of the MSPS requirements apply to all occupational specialties, such as being able to lift a MK-19 grenade launcher, while others vary by job, like scaling a wall or breaching a door with a battering ram.³⁰ Reasons for the addition of higher physical standards for MOS positions appeared to be that "the old, one-size-fits-all approach to certifying Marines for ground combat jobs was 'too low,' in that candidates needed to 'simply pass' with minimum scores to get into physically demanding jobs."³¹ For the Marines, requiring additional standards for entry based on the capabilities needed to complete tasks associated with that occupation is more predictive of success in training and operation.³²

To be sure, the scores for MOS positions have also proven to be more difficult for male recruits compared to the previous combat standards.³³ However, when nearly 86% of women fail these new scores—compared to less than 3% of male recruits—it leads on to wonder whether these standards should be lowered to adequately integrate women into these newly open combat roles. At a DOD press briefing, John Kelly, former Marine General now Secretary of Homeland Security, stated that the Marines will face "great pressure" to lower the MOS standards given they have shown to be incredibly difficult for women to pass—only one of seven female recruits have passed the MCS and MSCS tests³⁴—and would in turn make it "very very difficult to have any numbers . . . come into the infantry. . . ."³⁵ Secretary Kelly

²⁸ Gibbons-Neff, *supra* note 24. See also "MOS Standards Table," appended as Table C.

²⁹ Gibbons-Neff, *supra* note 24.

³⁰ See *infra* "MOS Standards Table," appended as Table C.

³¹ Gibbons-Neff, *supra* note 24.

³² See *id.*

³³ Baldor, *supra* note 27 (noting Marine Commandant Gen. Robert Neller is hopeful the new MOS requirements will raise the overall quality of the force as a whole; the new standards eliminated 40 out of 1,500 male recruits; those 40 men "would have moved on to combat jobs, where they would likely have been unproductive members of their units").

³⁴ Baldor, *supra* note 27.

³⁵ Gen. John Kelly, Commander, U.S. S. Command, Department of Defense Press Briefing by General Kelly in the Pentagon Briefing Room, DEP'T OF DEFENSE (Jan. 8, 2016), <http://www.defense.gov/News/Transcripts/Transcript-View/Article/642104/departments-of-defense-press-briefing-by-general-kelly-in-the-pentagon-briefing>.

predicted that the Marines will be pressured to “lower standards because that’s the only way the agenda-driven people in Washington” want it to work.³⁶

B. MOS Standards: Competing Views

1. Defenders of the Current Standards

“We’re going to get away from political correctness, and we are going to have to do that.”³⁷

On one side of the coin the Marines should not lower MOS standards—national security cannot be compromised for the sake of social engineering³⁸ and lowering standards could be “potentially damaging to military readiness.”³⁹ Put more frankly, the progress of women is not the most important issue at hand, and . . . military readiness and national security have been and would further be weakened due to the presence of women in combat units.⁴⁰

Some have even argued that any reduction to the current standards or the creation of a separate standard for women could actually bolster the negatively gender-biased perceptions of female servicewomen in general.⁴¹ For Lieutenant Colonel Kate Germano, former commander of a Marines’ all-female basic training battalion, having women and male recruits in different boot camps with different standards created the perception that it was “easier to be a female Marine.”⁴² Determined to raise the scores and expectations for her female Marines, Germano required her

³⁶ *Id.*

³⁷ Trump Slams ‘politically correct’ Military, WASH. POST (Oct. 3, 2016), <http://wapo.st/2dlqUTB>. (Response of President Trump at a Retired American Warriors PAC event when asked what he would do about the imposition of “social engineering” and “political correctness” that is happening in the military to allow women and transgender individuals to serve.)

³⁸ See Marines’ Memorial Club, *2015—4th Annual Salute to Iraq and Afghanistan Veterans—General James Mattis—Full Version*, YOUTUBE (Apr. 18, 2015), <https://youtu.be/kSjEc-aM8Dg>. (showing Retired Marine General James Mattis arguing that if women are allowed in combat units, the mission will be compromised by “eros,” or sexual desire).

³⁹ See *generally* Kamarck, *supra* note 2, at 27 (“Readiness is typically described as the capability of a military force to accomplish specified missions or goals. . . . Personnel readiness is often measured by the qualifications [and] experience . . . of [the] personnel assigned to a unit.”).

⁴⁰ *Id.*

⁴¹ See Anna Mulrine, *Marines’ Controversial Path to Integrating Combat Women*, CHRISTIAN SCI. MONITOR (Apr. 14, 2016), <http://www.csmonitor.com/USA/Military/2016/0414/Marines-controversial-path-to-integrating-combat-women>.

⁴² *Id.*

recruits to hike farther and carry more weight.⁴³ By holding her recruits to the same standards as the men, “[she] leveled the playing field and allowed [the men] to see that the women were being held to the same standards . . . [and] [I]f males see women as hiking as far, carrying the same weight, the perception out of boot camps is, ‘Yes, she earned this just like I did.’”⁴⁴ Despite her mission and her success in improving her recruits’ performance, she was released of her command in June 2016 for her “abusive” leadership style.⁴⁵

2. Reasons for Change

“[I]t is remarkable to me that we have Americans who want to say that even if you meet the standard, you cannot be there.”⁴⁶

For others, the rigorous standards to serve on the front lines are artificially high, and act as a de facto exclusionary barrier to the entry of women into combat occupations.⁴⁷ With the advancement of modern weaponry, the combat field is now equalized for women since “wars are less likely to be fought on a hand-to-hand basis.” Thus, keeping women out of combat positions is unfair to both men and women since “properly trained women [are] able to perform successfully in combat.”⁴⁸ Also, the military could actually benefit from changing the standards since including more women in combat units would increase the number of recruits available for deployment.⁴⁹ Due to the demands of the Iraq and Afghanistan wars, the Army was required to expand quickly, yet it struggled to recruit and retain enough soldiers fit for combat;⁵⁰ often, male soldiers no longer physically or mentally fit to serve were

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *See id.* (stating Germano’s belief that “she was punished for forcefully expressing her opinion in a male-dominated command;” the circumstances of her reassignment are currently under investigation by the Pentagon).

⁴⁶ Richard Sisk, *Mattis Pick Could See Senate Clash on Women in Combat, PTSD*, MILITARY.COM (Last visited Apr. 16, 2019), <https://www.military.com/daily-news/2016/12/01/mattis-pick-could-see-senate-clash-on-women-in-combat-ptsd.html> (Gayle Tzemach Lemmon, author of “Ashley’s War: The Untold Story of a Team of Women Soldiers on the Special Ops Battlefield).

⁴⁷ Murline, *supra* note 41.

⁴⁸ Kamarck, *supra* note 2 at 32.

⁴⁹ *See* John Spencer, *The Military’s Real Problem: Fewer Americans are Joining*, POLITICO (Dec. 15, 2015, 6:40 AM), <http://www.politico.com/agenda/the-militarys-real-problem-fewer-americans-are-joining-000005>.

⁵⁰ *Id.*

redeployed, putting entire units at risk.⁵¹ Thus, a bigger pool of qualified candidates who could appropriately fill in the gaps for those who were no longer fit for combat would be beneficial for deployment assignments.

III. FEMINIST PERSPECTIVES ON WOMEN IN COMBAT

A. “Phallogentrism” and the Military

In *Reconstructing Sexual Equality*, Christine Littleton focuses on a form of male domination which is *promoted by culture*: what she terms as “phallogentrism.”⁵² Littleton argues that cultural discourse has historically been focused on male occupation that has “created a self-referencing system by which those things culturally defined as ‘male’ are more highly valued than those identified as ‘female,’ even when they appear to have little or nothing to do with either biological sex.”⁵³ It is the cultural differences between men and women that are the most problematic because they are more likely to yield harmful stereotypes of women.⁵⁴ Take, for example, the military: as a social institution, the military was created on and fosters exclusively predominately masculine principles of power, wealth, status, and defense.⁵⁵ Thus, the institutional encouragement of “male” characteristics and masculinity stigmatizes and demeans those things that are seen as culturally “female” or feminine.⁵⁶

The precise point in which to inject female cultural references into military combat—the representation of “the apotheosis of

⁵¹ *Id.*

⁵² Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1280 (1987).

⁵³ *Id.*

⁵⁴ *Id.* at 1327 (footnote omitted).

⁵⁵ See generally JOHN BROWN, AN ESTIMATE OF THE MANNERS AND PRINCIPLES OF THE TIMES 95–96 (2nd ed. 1757) (arguing the connection between militarism and manliness). Brown argues that mid-century gentlemen, brought up in the “warmth of the nursery” and educated at the universities, are wholly unfit for military duties. *Id.* at 29–30. Brown’s reasoning stems from his contrast of the “old hero’s” devotion to military virtue and his love of his country while the “modern man of Fashion” has a pride for “[d]ress, [g]aming, [e]ntertainments, and [e]quipage.” *Id.* at 95–96

⁵⁶ See Valorie K. Vojdik, *Beyond Stereotyping in Equal Protection Doctrine: Reframing the Exclusion of Women From Combat*, 57 ALA. L. REV. 303, 325 (2005) (“The military’s policy of excluding women from direct combat . . . rests not only on traditional gender stereotypes but also upon hostility toward women and a desire to preserve the institution as exclusively male and masculine.”).

phallogentrism, a nonstop program of hierarchy, barely controlled aggression, and alienation”—has invoked deeply divided feminist responses.⁵⁷ There are some feminist theorists who argue that challenging the masculine military culture “has left military women excluded, assaulted, harassed, and marginalized.”⁵⁸ Some even go so far as to state that it is impossible to dismantle the “male” structure of the military.⁵⁹ Interestingly for Littleton, changing the male-culture of the military is possible if it were “not so expensive for men to opt out of this particular warrior role, [as] more of them would do so.”⁶⁰ We could then “experiment with different visions of the role.”⁶¹ Perhaps move the role of a combat soldier from “warrior to defender.”⁶²

I argue that feminists can productively challenge the male culture of the military without compromising our military’s readiness if the combat standards are viewed under an asymmetrical feminist approach, specifically by employing Littleton’s “equality as acceptance” lens. The way we have been addressing our biological and cultural differences to advance gender equality in the military is rooted in antiquated notions of liberal feminism and formal equality, both of which limit gender equality to instances in which women have to prove that they are no different than men. Viewing the standard from a symmetrical approach fails to appropriately further the goal of gender equality in the military as women will continue to be treated unequally in terms of qualifying for and obtaining combat positions.

B. Symmetrical Models of Gender Equality

While symmetrists and asymmetrists share the perception that the world is constructed on a male model, what divides these feminist platforms is the extent to which laws and policies should or should not embody explicit sex-based distinctions.⁶³ In

⁵⁷ Littleton, *supra* note 52, at 1328 n.256.

⁵⁸ Jamie R. Abrams, *Debunking the Myth of Universal Male Privilege*, 49 U. MICH. J.L. REFORM 303, 304 (2016) (footnote and citation omitted).

⁵⁹ See Leszkay, *supra* note 6, at 153 (arguing that the dominance theory is impossible to implement as reconstructing the military and our ideas of military obligation is unlikely).

⁶⁰ Littleton, *supra* note 52, at 1328 n.256.

⁶¹ *Id.* at 1329 n.256

⁶² *Id.*

⁶³ See generally Wendy W. Williams, *Notes from a First Generation*, 1989 U. CHI. LEGAL F. 99, 108 (1989) (arguing feminist approaches are divided by the

particular, the symmetrist denies the existence of “any significant natural differences” between the two sexes and urges that the law not employ sex-based distinctions and instead consider the two sexes “symmetrically located with regard to *any* issue, norm, or rule.”⁶⁴ There are two approaches of this vision: “assimilation” and “androgyny.”⁶⁵

1. Assimilation

At the foundation of the assimilation approach is the claim that women really are or could be like men, given the chance, thus social institutions should be required to treat women just as they already treat men.⁶⁶ Addressing our differences in this light renders the Marine Corps’ standards appropriate and acceptable. Even though the Marines previously had separate assignment policies for men and women,⁶⁷ an assimilation approach approves of the fact that women are held to the same standards—even if those standards are unfavorably difficult for women to meet—because the primary result is that women be admitted into combat roles to the extent that they are qualified, just as their male counterparts are.⁶⁸ In practice, it seems like this is the position that most female military members positively associate with. Captain Kristen Griest, one of the first-ever female graduates of the Army Rangers’ special operations school, noted the hopeful impact that being held to the same standards as the male candidates will have out in real-world military situations:

I do hope that with our performance in Ranger school we’ve been able to inform that decision as to what they can expect from women in the military—that we can handle things physically and mentally on the same level as men and that we can deal with the same stresses in training that the man can.⁶⁹

importance on which each approach places on “formal” equality).

⁶⁴ Littleton, *supra* note 52, at 1291 (footnote omitted).

⁶⁵ *Id.* at 1292.

⁶⁶ *Id.*

⁶⁷ See Jeff Schogol, *The PFT and CFT can be Gender Neutral. Here’s how*, MARINE CORPS TIMES (July 10, 2017), <https://www.marinecorpstimes.com/off-duty/military-fitness/2017/07/10/the-pft-and-cft-can-be-gender-neutral-here-s-how/>.

⁶⁸ See Littleton, *supra* note 52, at 1292.

⁶⁹ CNN Wire, *Get Ready for More US Women in Combat*, FOX 43 (Nov. 10, 2016, 11:09 AM), <http://fox43.com/2016/11/10/get-ready-for-more-us-women-in-combat/>.

Yet, inasmuch as holding female candidates to the same standards can play a part in altering the perception of a women's ability to perform in combat roles, the purpose of lifting the 1994 Rule was to "effectively remov[e] the remaining barrier to the integration of women into all military occupational specialties and career fields within the U.S. military."⁷⁰ An assimilation approach will not appropriately further this goal when such standards have been constructed from the perspective of the culturally and biologically male in the first place. In other words, maintaining these current standards will continue to stigmatize and demean culturally "female" characteristics and keep out those women (and men) who do not meet certain culturally "male" characteristics.

For example, to qualify for the Navy's Basic Underwater Demolition/ SEAL ("BUD/ S") program, which only about 25% of all trainees successfully complete, candidates must first pass a series of standardized multiple-choice tests called the Armed Services Vocational Aptitude Battery ("ASVAB").⁷¹ A recent Navy study reported that female candidates had lower scores on the ASVAB and on the performance indicators compared to the male candidates, which suggested that the "use of the ASVAB for selection purposes may create a barrier for females. . . ."⁷² In other words, requiring female candidates to meet the current standards just as all other male candidates have to cannot and has not helped integrate women into this combat position, let alone even qualify for it. In fact, there has not been one woman to date that is in the pipeline to become a Navy SEAL, despite this position being open to women for over a year.⁷³

While it is difficult for men to qualify for and complete SEAL training, they simply have to meet standards that have been invented in their cultural favor and image.⁷⁴ To the extent that

⁷⁰ Memorandum, *supra* note 20 (emphasis added).

⁷¹ See CNN Wire, *supra* note 69. See also Jeanette Steele, *1st Women Could Start Navy Training in August*, SAN DIEGO UNION-TRIBUNE (Mar. 10, 2016, 11:23 AM), <http://www.sandiegouniontribune.com/military/sdut-defense-releases-plans-women-seals-marines-2016mar10-story.html>.

⁷² See CNN Wire, *supra* note 69.

⁷³ Hope Hodge Seck, *A Year In, No Female SEAL Applicants, Few for SpecOps*, MILITARY.COM (Feb. 15, 2017), <http://www.military.com/daily-news/2017/02/15/a-year-in-no-female-seal-applicants-few-specops.html>.

⁷⁴ See *Navy SEALs: Background and Brief History*, MILITARY.COM, <http://www.military.com/special-operations/about-the-navy-seals.html> (last visited July 10, 2017). Navy SEAL training is based on three core pillars: [1] Men of character: the nature of our mission requires men who will uphold the Navy Core Values—

women can be applauded for surviving the same challenging, grueling training as their male counterparts holding women to the current standards further advances the phallogentric nature of the military by endorsing and rewarding the higher value placed on those things culturally identified as “male” (like physical strength). This leaves women aspiring, and inevitably subjected to the dominance of the culturally male. The current standards give us no solution for remedying the fact that they actually treat women less favorably than men when it comes to being tested on physical strength. Explained in a CNN interview, retired Army Major General Robert Dees admitted

[t]here are just certain realities where men can do certain things better, women can do certain things better. . . . Certainly some women can perform well in combat under certain tasks. But if you look at the population demographics, most women—and you’re talking thousands—cannot properly carry a 230-pound soldier with [a] rucksack and combat vest on, off of the battle field to save his life.⁷⁵

Thus, requiring the military to treat women just as they treat men is unlikely, and the assimilation approach becomes essentially impossible to implement. An assimilation approach will fail to appropriately further the goal of gender equality in the military as women will continue to be treated unequally in terms of qualifying for and obtaining these positions. Consequently, feminists would be seen to be arguing for the military to compromise our national security for the sake of what some call “social engineering,” which is a result we should aim to avoid.

2. Androgynous

Androgyny, the second symmetrical model, is similarly unhelpful. This approach also posits that women and men are, or could be, like each other but argues “equality requires institutions

Honor, Courage, and Commitment; [2] Physical: The nature of our mission also requires men who are physically fit and capable in every environment, especially the water; [3] Technical: Finally, maritime Special Operations require SEALs who are intelligent and can quickly learn new tasks. *Id.* See also Leszkay, *supra* note 6, at 140–41 (describing how she was “directly disadvantaged” as a woman when competing for “Soldier of the Year” because she was not an infantry soldier).

⁷⁵ Thom Patterson, *Get Ready for More U.S. Women in Combat*, CNN (Nov. 11, 2016, 11:40 AM), <https://www.cnn.com/2016/11/10/us/women-combat-us-military/index.html>.

to pick some golden mean between the two and treat both sexes as androgynous persons would be treated.”⁷⁶ Notably, Littleton debates that androgynous symmetry is difficult to conceptualize as social institutions have to “find a single norm that works equally well for all gendered characteristics.”⁷⁷

Employing this approach requires the Marines to lower their combat standards that were formulated from the perspective of the culturally male to a “golden mean” that can be met by an androgynous person. Yet the same major problem here is that this approach requires us to compromise the standards we expect of those who are fighting for our nation’s defense.

C. Asymmetrical Approaches

Asymmetrical approaches posit that equality cannot be achieved by simply ignoring or eradicating sexual differences.⁷⁸ These differences must be addressed head on and society must deal with both the sexual and cultural differences between men and women, as “problematic as that may be.”⁷⁹ The four asymmetrical approaches—special rights, accommodation, empowerment, and acceptance—differ in the extent to which each attempts to recognize and grapple with those differences.

1. Special Rights

A special rights approach accepts that men and women *are* different, but posits that “those differences, some generated by roles in reproduction, have consequences for our perspectives.”⁸⁰ This model argues that while some of the rights needed by women are equal rights (like those connected with jobs and promotions), women also have special needs that are deserving of special rights (particularly relating to women who care for a family), and “society must take account of these differences and ensure that women are not punished for them.”⁸¹

Yet, special rights model would further gender integration and

⁷⁶ Littleton, *supra* note 52, at 1292.

⁷⁷ *Id.* at 1293.

⁷⁸ *Id.* at 1295.

⁷⁹ *Id.*

⁸⁰ ELIZABETH H. WOLGAST, EQUALITY AND THE RIGHTS OF WOMEN 62 (1980).

⁸¹ *See id.* (“A union of individuals of opposite sexes which functions to raise children will necessarily contain asymmetries while childbearing concerns them.”). *See also* Littleton, *supra* note 52, at 1295.

equality when employed *only after a woman is already in the combat position*. Since special rights should be granted based on the special needs that women have, this approach would still require that women qualify for and obtain combat positions in just the same manner as men do—jobs and promotions are equal rights women have with men and are not afforded special treatment. Accordingly, this approach would similarly face the same problems as the assimilation framework earlier noted.

2. Accommodation

An accommodation model requires differential treatment of the biological differences between men and women (such a pregnancy) and an equal or androgynous treatment of our cultural differences (such as interests or skills).⁸² However, differential treatment afforded only in regards to men and women’s biological differences, ignores the important cultural differences that clearly exist as a result of women’s traditional exclusion from these roles.⁸³ Indeed,

[s]ince its foundation, our country has struggled with the legal and social challenge of defining the “right thing” with respect to a perceived tension between a desire for military effectiveness on the one hand, and concerns over the inequality arising from blanket rules classifying certain citizens as ineligible for the privilege of citizenship that is military service because of “who they are” on the other.⁸⁴

Pursuing equality through accommodations instead brushes our cultural differences under the rug, so to speak. While the military would be able justify the harder standards, this approach would not effectively address the deeply rooted negative perceptions of women pursuing ground combat roles.

3. Empowerment

An empowerment approach contends that the differences

⁸² Littleton, *supra* note 52, at 1296.

⁸³ See generally Daniel N. Kuperstein, *Finding Worth in the New Workplace: The Implications of Comparable Worth’s Reemergence in the Global Economy*, 24 HOFSTRA LAB. & EMP. L.J. 363, 405 (2007) (“[R]ather than discarding cultural differences between females and males, such differences should be confronted as a realistic factor in any workplace.”) (footnote omitted).

⁸⁴ Maia Goodell, *Physical-Strength Rationales for De Jure Exclusion of Women from Military Combat Positions*, 34 SEATTLE U. L. REV. 17, 17 (2010).

between the sexes, alas the sexes themselves, are constructed “by the dynamic of [male] domination and [the] subordination [of women].”⁸⁵ Accordingly, the reason certain characteristics are considered “female” is not because women have miraculously chosen said qualities to be particularly attached to all women but because women have never had the option to choose any different quality to be associated with. As Catherine MacKinnon argues:

[W]hen we understand that women are forced into this situation of inequality, it makes a lot of sense that we should want to negotiate, since we lose conflicts. It makes a lot of sense that we should want to urge values of care, because it is what we have been valued for. We have had little choice but to be valued this way.⁸⁶

As such, society is unable to note the important differences between the sexes, biologically or culturally, that have not been a direct result of our perpetual subordination.⁸⁷ While under an empowerment approach “any law, policy, or practice that contributes to the subordination of women of their domination by men” violates equality, pinning the result of subordination for the current standards is difficult.⁸⁸

For one, it seems less persuasive to argue that the requirements combat tests is what contributes to the subordination of women when these standards were created with the purpose of being “gender-neutral” and when the standards do not necessarily require “something” more than what is required of men. In fact, requiring women to meet the same standards as men has seemed to produce positive results for women.⁸⁹ Thus, holding men and women recruits to the same requirements does not seem to contribute to subordination when women have actually had positive experiences doing so.

Yet, on the other hand, it could be argued that part of the reason these women have had positive gender integration experiences is because they were required to embrace the masculine ideals of the military.⁹⁰ For example, the successful integration of women into

⁸⁵ Littleton, *supra* note 52, at 1300.

⁸⁶ *Id.* at 1300.

⁸⁷ *See id.* at 1300.

⁸⁸ THE KPIM OF FEMINISM: ISSUES & WOMEN IN A CHANGING WORLD, 313 (George Uzoma Ukagba, Obioma Des-Obi, Iks J. Nwankwor eds., 2010).

⁸⁹ *See supra* notes 41–45 and accompanying text.

⁹⁰ *See* Noya Rimalt, *Women in the Sphere of Masculinity: The Double-Edged*

combat roles in Israel has been attributed to Israeli women soldiers “embrac[ing] those masculine bodily and discursive practices because they associate[d] masculinity with military authority.”⁹¹ This appearance of masculinity gave these women “power and legitimize[d] them as ‘real soldiers.’”⁹²

Thus, an empowerment approach would consider the current combat standards as contributing to women’s subordination as this approach to gender equality comes at the cost of merely succumbing to the phallogentric military culture. As such, the current combat standards would violate equality and require a remedy of lowering the standards which then comes at the cost of compromising our expectations of those who protect and defend our country.

IV. EMPLOYING AN “EQUALITY AS ACCEPTANCE” APPROACH

The acceptance model as put forth by Littleton “focuses on the ways in which [sex] differences are permitted to justify inequality.”⁹³ Notably,

[t]he focus of equality as acceptance . . . is not on the question of whether *women* are different, but rather on the question of how the social fact of gender asymmetry can be dealt with so as to create some symmetry in the lived-out experience of all members of the community.⁹⁴

By accepting the biological and cultural differences between the sexes, we can focus our energy on determining law and policy interpretations that eliminate the injustices that result from our gender differences. Therefore, equality as acceptance requires that a policy or law be interpreted in a way that emphasizes a “basic commonality” that involves both men and women; ensuring the equal exercise of a shared right can in turn “support[] efforts to equalize the position” of the sex that would suffer from unequal

Sword of Women’s Integration in the Military, 14 DUKE J. OF GENDER L. & POL’Y 1097, 1098 (2007) (“Women’s recent integration into traditionally masculine roles in the military does not seem to undermine the gendered structure of this institution.”).

⁹¹ *Id.* at 1109.

⁹² *Id.*

⁹³ Littleton, *supra* note 52, at 1296.

⁹⁴ *Id.* at 1297.

consequences with respect to that fundamental right.⁹⁵

Put simply, where men and women share an equal right to X (some basic commonality of a human endeavor involving both sexes), society must ensure the equal exercise of said right. Where one sex is estopped from exercising that right to the same extent that the other sex can, be it due to different treatment of a biological or a cultural difference, then recognizing this unequal power can justify providing the affected sex with additional resources, status, etc. in order to elevate their position with respect to said fundamental right.

In practice, requiring men and women to meet the same combat standards, albeit difficult for both sexes,⁹⁶ can be seen as evidence that both men and women *are* able to equally exercise the right of citizenry. Since the Revolution, the citizen's "supreme and noble duty" has been to serve in the military.⁹⁷ Evidently, the Supreme Court has noted that "the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need."⁹⁸ The right to exercise citizenry should be offered and accessible to both men and women, with the same opportunities for benefits or disadvantages given to both genders equally.⁹⁹ This would "ensure that [integration] does not reinforce negative stereotypes about the role of women in the [military]."¹⁰⁰

By emphasizing the basic commonality of citizenship as a human endeavor involving both men and women, we can support a finding that the current combat standards are not artificially high or serve as a *de facto* barrier for women because the men and women seeking combat positions are on equal footing with regard to exercising this fundamental right. The acceptance approach enables feminists concerned with the new combat standards being "artificially high" to be at peace with the new requirements while also protecting the belief that our military readiness should not be compromised in the process of promoting and furthering gender

⁹⁵ *Id.* at 1299.

⁹⁶ *See generally* Baldor, *supra* note 27 (noting new physical standards, while disqualifying six of the only seven female recruits, have also disqualified some 40 men (out of 1,500) who "would have move on to combat jobs, where they would likely have been unproductive members of their units").

⁹⁷ *See* Leszkay, *supra* note 6, at 144–45 (a discussion on what makes a citizen).

⁹⁸ Selective Draft Law Cases, 245 U.S. 366, 378 (1918).

⁹⁹ *See* Daniel N. Kuperstein, *supra* note 83, at 417.

¹⁰⁰ *Id.*

inclusion.

V. CONCLUSION

It can certainly be a discouraging task to pinpoint how to delicately balance the importance of maintaining our military's international power status with the ideology of dismantling the male-culture of the military in the name of gender equality. Yet by analyzing the standards under an "equality as acceptance" lens, feminists can productively encourage gender inclusion in combat roles by challenging the male culture of the military without compromising our military's readiness.

As shown, maintaining the symmetrical "assimilation" methodology as applied to the Marines' new standards inhibits the adequate gender equality as sought by lifting the 1994 Rule. Women will continue to be treated unequally in terms of qualifying for and obtaining these positions. Yet, like the symmetrical models discussed above, three other asymmetrical models are also not as persuasive for use in the new combat standards.

The continuing trend with the asymmetrical models, except for Littleton's acceptance approach, shows us that merely acknowledging differences on a biological level is not enough to further gender equality in the military, nor is it enough to keep the appropriate expectations of our national defense afloat. The asymmetrical special rights approach would further gender integration albeit only after a woman is already in the combat position, which does nothing for analyzing the effects of the current standards. Accommodation ignores differences that may exist on a cultural level between men and women and would essentially befall the same result as the symmetrical models. Further, gender equality under the empowerment approach seems nearly impossible to attain.

We must play with the hand that we are currently dealt: women are required to meet the same gender-neutral standards as men, regardless of how difficult they may be. By analyzing the standards under an "equality as acceptance" lens, we can productively further gender inclusion in combat roles by challenging the male culture of the military without compromising our military's readiness. Now that women are no longer excluded from these MOS combat roles, we cannot advocate abdication from the "maleness" of the military because it historically did not work in our favor. Indeed, "[f]ull and equal participation and later

transformation from within is the key to any real change.”¹⁰¹
Rather than discarding cultural differences between men and
women, such differences should be confronted as a realistic factor
in any workplace, including the military.

¹⁰¹ Leszkay, *supra* note 6, at 151.

Table A

Recruiting	(Gender-Normed) Initial Strength Test (IST)		
	Pull-ups / Flexed-arm Hang	Crunches	1.5 mile run
	2 (men) / 12 seconds (women)	44	13:30 (men) / 15:00 (women)

Table B

Ground Combat Arms MOS Classification Standard (MCS)				
Pull-ups	3-mile Run	Ammo Lifts	Movement to Contact	Maneuver Under Fire
6	24:51	60	3:26	3:12

Table C

Standard	MOS
Casualty Evacuation (CASEVAC)	All specified MOSs
MK-19 Lift	All specified MOSs
Scale a Wall	03xx
20km Hike	0302,0311,0331, 0341, 0351, 0352
Rush 300m to Objective	0302, 0311
200m Movement as Machine Gun Ammo Bearer	0331
200m Movement w/ 60mm Mortar	0341
200m Movement w/ Shoulder-Launched Multi-purpose Assault Weapon	0351
Breach Door w/ Battering Ram	0302, 0311
200m Movement w/ Javelin	0352
Disassemble/Assemble M242 25mm Gun	0303, 0313
Light Armored Vehicle CASEVAC	0303, 0313, 2147
Lift Light Armored Vehicle Towbar	0303, 0313, 2147
Recon 20km Ruck run	0307, 0321
Recon 2K yd Fin	0307, 0321
100m Movement w/ Breaching Equipment	0307, 0321
Climb Caving Ladder	0307, 0321
Lift & Carry 5 x Artillery Rounds, one at a time 50m to 7 Ton	0802, 0811
Medium Tactical Vehicle Replacement Casualty Evacuation	0802, 0811
Load 5x 155mm Rounds on Feed Tray	0802, 0811
Breach Door w/ Battering Ram	1302, 1371
HESCO Lift	1302, 1371
150m Movement w/ Anti-Personnel Obstacle Breaching System	1302, 1371
Open & secure Assault Breacher Vehicle Commander's Hatch hatch	1302, 1372
Lift 3x Assault Breacher Vehicle batteries, one at a time to back deck	1302, 1372
Assault Breacher Vehicle Casualty Evacuation	1302, 1372
Lift 3x Tank batteries, one at a time to back deck	1802, 1812
Open & secure Tank TC hatch	1802, 1812
Tank Casualty Evacuation	1802, 1812
Tank Towbar Lift	1802, 1812
Load 120mm Round	1802, 1812
M88 CASEVAC Casualty Evacuation	2146
M88 Towbar Lift	2146
AAV CASEVAC Casualty Evacuation	1803, 1833
AAV Towbar Lift	1803, 1833, 2141
AAV-R7 CASEVAC Casualty Evacuation	2141