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# Women and the Draft: A Response to Critics of the Equal Rights Amendment

By MARICLAIRE HALE\*

and

LEO KANOWITZ\*\*

Equality of rights under the law shall not be denied or abridged  
by the United States or by any State on account of sex.

SO reads the crucial part of the proposed Equal Rights Amendment (ERA).<sup>1</sup> Efforts have been made in Congress to secure passage of an equal rights amendment since 1923. Recently, stimulus for enactment has come from widespread disappointment over the Supreme Court's performance in cases challenging sex discrimination as a violation of existing constitutional provisions such as the equal protection, due process, and privileges and immunities clauses of the Fourteenth Amendment.<sup>2</sup> In the second session of the Ninety-first Congress, passage of the Equal Rights Amendment came closer to achievement than ever before. It passed the House of Representatives,<sup>3</sup> but in the Senate, though 75 of the 100 Senators had been cosponsors,<sup>4</sup> the proposed Equal Rights Amendment was effectively defeated by the addition of two amendments that were unacceptable to most ERA proponents.<sup>5</sup>

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1. S.J. Res. 8, 92d Cong., 1st Sess. (1971); H.R.J. Res. 35, 92d Cong., 1st Sess. (1971).

2. See generally L. KANOWITZ, *WOMEN AND THE LAW* 149-196 (1969).

3. Because of the opposition of its chairman, Emanuel Celler, the House Judiciary Committee failed to hold hearings on the proposed amendment. After Congresswoman Martha Griffiths invoked the rarely-used "discharge petition" to extract the bill from the committee, the measure passed the House of Representatives by a 350-15 vote. 116 CONG. REC. H7953-85 (daily ed. Aug. 10, 1970).

4. 116 CONG. REC. H2588 (daily ed. Mar. 26, 1970) (remarks of Congresswoman Griffiths).

5. The Baker Amendment reads in pertinent part: "Nothing contained in this Constitution shall abridge the right of persons lawfully assembled, in any public building which is supported in whole or in part through the expenditure of public funds to

One of those crippling amendments, sponsored by Senator Ervin of North Carolina, would have exempted women from compulsory military service.<sup>6</sup> A similar modification was voted by the House Judiciary Committee in the first session of the Ninety-second Congress— notwithstanding the recommendation of its Subcommittee Number Four that the unadorned Equal Rights Amendment, without any military exemption provision, be passed.<sup>7</sup> The full House of Representatives rejected this modification by a vote of 265 to 87 on October 12, 1971,<sup>7a</sup> passing the unadorned Equal Rights Amendment on the same day by a vote of 354 to 23.<sup>7b</sup> As of this writing, the Senate has not yet acted on the ERA. Indications are, however, that efforts will be made to block a vote by a filibuster. Alternatively, some of the Senate opponents have indicated their intention to reintroduce the draft exemption proviso. The experience of the Ninety-first Congress suggests that even ERA proponents would be reluctant to support it with the draft exemption proviso attached.

Whether women should be subject to compulsory military service is, for a variety of reasons, an emotional issue. ERA proponents insist that the principle of equal treatment under the law embodied in the basic language of the amendment requires men and women not only to be accorded equal rights and privileges but also to be subjected to the same responsibilities, burdens, and duties of citizenship. By contrast, congressional supporters of the draft exemption proviso appear to be divisible into two groups. Members of one sincerely believe that, though the equal rights principle may be acceptable as an abstract proposition, subjecting women to compulsory military service on the same basis as men is unthinkable—whether in peacetime or in time of war. Members of the second group, on the other hand, appear to support the draft exemption proviso primarily because they know it is unacceptable to most ERA supporters. By appending it

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participate in nondenominational prayer." 116 CONG. REC. S17923 (daily ed. Oct. 14, 1970). The amendment passed on a roll call vote 50-20. *Id.* at S17949.

The Ervin Amendment reads: "This article shall not impair, however, the validity of any law of the United States or any state which exempts women from compulsory military service or which is reasonably designed to promote the health, safety, privacy, education, or economic welfare of women, or to enable them to perform their duties as homemakers or mothers. *Hearings on S.J. Res. 61 and S.J. Res. 231 Before the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess., at 8 (1970) [hereinafter cited as *Hearings*].

6. See note 5 *supra*.

7. 24 CONG. QUART. WEEKLY REPORT at 1562-63 (July 23, 1971).

7a. 117 CONG. REC. H9390 (daily ed. Oct. 12, 1971).

7b. *Id.* H9392.

to the basic amendment, they believe that they can virtually assure its defeat.

As is well known, the Selective Service Act has traditionally discriminated between the sexes, withholding both the burdens and the benefits of compulsory military service from women.<sup>8</sup> Implementation of the principle of equal treatment without regard to sex—whether by the adoption and ratification of the proposed ERA or by a revised interpretation of the Fifth Amendment's due process clause—could, therefore, produce either of two results. One would be the complete elimination of compulsory military service, a result that is not inconsistent with the thinking of many members of Congress at this point in history. The other would be the extension of the draft to women.

Whether *anyone* should be subject to a military draft in a free society is a subject of current debate that is by no means free from complexity. For some people, the idea of compulsory military service is incompatible with the democratic ideal. For others, the alternative of a professional army drawing upon the poor and oppressed of our society, and the dangers it poses of weakening civilian control over military affairs, is equally unacceptable.

In this examination of the military and social ramifications of extending the draft to women, a discussion of whether there ought to be a draft at all has been deliberately avoided. The current state of affairs in which people are subject to compulsory military service has been accepted. The only concern has been with this question: If a system of compulsory military service is to be an institution of American life, is it just, fair, reasonable, or compatible with the goals of our society to subject men, and only men, to the burdens of this system or to allow only men to reap the benefits flowing from it?

To answer this question, and thus evaluate the military implications of the Equal Rights Amendment, it is necessary to consider whether women could serve effectively as fighting members of the military. If they are qualified then it can be demonstrated that there is no legal or social reason for excluding them from equally sharing the benefits and the burdens of military service.

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8. "[I]t shall be the duty of every *male* citizen of the United States, and every other *male* person now or hereinafter in the United States who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder. 50 U.S.C. APP. § 453 (1964) (emphasis added).

## Women As Combatants

The arguments that women are incapable of serving in the military have centered around two main themes—first, that women are physically incapable of serving in the military and, second, that they have historically demonstrated their unsuitability as soldiers. Both of these arguments are specious at best.

### Physical Ability

Dr. Margaret Mead has an interesting view which raises some novel questions as to why women have not traditionally been warriors.

Recent work on aggression in the animal world emphasized the amount of ritual combat between males of the same species, in which competitive and rivalrous behavior was kept within biologically structured bounds. The females of the same species, when they fight, fight in defense of their young and fight to the death.

The controls which operate on male aggression seem to be lacking in females. Among human beings where cultural controls replace biological controls, the ability to use violence in a disciplined way seems to be dependent upon early experiences and learning how to subject aggressive physical behavior to rules of fair play and appropriateness.

The historical and comparative material at least suggests that it may be highly undesirable to permit women, trained to inhibit aggressive behavior, to take part in offensive warfare. Defensive warfare, on the other hand does not have the same disadvantages, as it invokes the biological basis of defense of the nest and the young.<sup>9</sup>

Is the implication, then, that women might be altogether too deadly when turned loose in aggressive warfare? One can hardly believe that much of the warfare presently being waged is guided by principles of appropriateness and fair play even though it is waged exclusively by men. Perhaps fighting to the death in defense of one's young and otherwise inhibiting aggression is not such a bad idea. Ritual combat is wasteful and extremely dangerous in a world with nuclear weapons.

An alternative explanation for the limited role women play in warfare is put forward by anthropologist Lionel Tiger who thinks the reasons are primarily physiological, aggressive behavior depending upon testosterone stimulation.

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9. Mead, *A National Service System as a Solution to a Variety of National Problems*, in THE DRAFT 99, 107 (S. Tax ed. 1967).

In experiments on primates, when both males and females are given extra testosterone, they show much more aggressive, hyper-male activity. Humans have similar reactions under artificial manipulation of hormone levels. Among boys and girls before puberty, boys show more testosterone than girls. But at adolescence the changes are startling: Testosterone in boys increases at least tenfold, and possibly as much as 30 times. On the other hand, girls' testosterone levels only double, from a lower base to begin with. These levels remain stable throughout the life cycle.<sup>10</sup>

Here we have a well-known anthropologist who differs with Dr. Mead. Rather than lacking an ability to control their aggressive instincts within the bounds of fair play, women are, Lionel Tiger suggests, simply not as chemically aggressive as are men. But, even if this is true, is it significant? We must question whether, with warfare so technical and destructive potential so great, there is a proven value in having military personnel who are as much as sixty times as aggressive as others. We must also consider whether natural and instinctive behavior is controlling when military personnel undergo extensive physical and psychological conditioning.

Physiologically, women have certainly been greatly handicapped as fighters by the demands of motherhood. Now, however, for the first time in history, women can effectively control their fertility. With the advent of sophisticated birth control techniques, the threat of pregnancy is no longer an obstacle to the effectiveness of a military woman.

Perhaps the most important factor facilitating the effective use of women in the armed forces is the technological revolution in warfare that has taken place over the last generation. The changes include the use of bombs, missiles and high-powered guns which minimize the strength required and maximize the precision and technological ability needed. Such changes make women more fit to wage war than ever before. In fact, technology would seem to be moving toward making the traditional warrior obsolete and the technician all important. It has been estimated that the majority of Viet Cong killed in Vietnam were killed by soldiers who never saw them face to face—deadly technicians rather than hand-to-hand combatants.<sup>11</sup> The extent of the technological revolution in warfare is illustrated by the fact that only 14 percent of the United States armed forces personnel now actually

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10. Tiger, *Male Dominance? Yes, Alas. A Sexist Plot? No*, N.Y. Times, Oct. 25, 1970, (Magazine) at 124.

11. See generally P. SLATER, *THE PURSUIT OF LONELINESS* 29-52 (1970).

serve in combat units.<sup>12</sup> An examination of the present armed forces job categories reveals that at least half of the jobs being done in the military could be handled by women of no more than average endurance, strength, and abilities.<sup>13</sup> Moreover, women in particularly fit condition could qualify for any combat position.

Admittedly, present physical standards might have to be modified, but that should be encouraged in any event. Since so few military personnel are assigned to combat units, it is evident that many current physical standards are unrealistic. Frequently, they work to the disadvantage of the physically perfect, the unsophisticated, the poor, and the honest. At present, a high proportion of physical deferments go to young men in the highest educational brackets.<sup>14</sup> While this might suggest that education is a process dangerous to one's health, it is more likely that many physical deferments of an exotic nature go to those who have the ability to research the physical standards and the money to pay for high-class medical testimony. If a system were worked out whereby physical standards were relaxed and draftees were assigned according to their physical limitations, the justice of the requirements would be greater. Ninety-pound women could serve efficiently as supply clerks, as could ninety-pound men, and under the equal rights principle both would be equally draftable.

The theory has been advanced that under the Equal Rights Amendment, Congress might set extremely rigorous physical standards which would favor men over women. "The Government could then say that since so few women qualified, they should be cut out altogether. The women's lib groups would raise hell, but the courts are going to have to interpret this amendment reasonably or we'll have chaos."<sup>15</sup>

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12.	OCCUPATION GROUP	PERCENT DISTRIBUTION 1967
	Ground combat	14.1
	Electronics	14.7
	Other Technical	7.7
	Administrative and Clerical	18.4
	Mechanics and Repairmen	26.1
	Craftsmen	6.8
	Services	12.0

BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 260 (1970) [hereinafter cited as STATISTICAL ABSTRACT].

13. See *id.*

14. "There are definite data to indicate higher disqualification rates for medical reasons among [college graduates] . . . which seemingly may be attributed to these candidates being more 'sophisticated' about . . . medically disqualifying defects." NEWSWEEK, Aug. 3, 1970, at 42 (quoting an official report).

15. *Hearings, supra* note 5, at 23 (testimony of Prof. James J. White).

This approach would not only contradict the policy and purpose of the amendment, but would also be unworkable from a constitutional law standpoint. In some parts of this country, racial minorities are sufficiently under educated and physically substandard that they are consistently rejected by the military at a shamefully high rate.<sup>16</sup> But if it were suggested that minority groups in these places ought to be entirely exempted from the draft because of their high failure rates, there is little likelihood that courts would uphold the reasonableness of such an exclusion. Such an approach would also be self-defeating since physical standards so rigorous that most women would be unable to qualify would probably result in a high proportion of men failing as well. Thus, physical requirements should not bar women from the military.

### Historical Role

As to the historical perspective on women's role in the military, there seems to be some difference of opinion. In *United States v. St. Clair*,<sup>17</sup> the defendant in a criminal draft evasion proceeding challenged the Selective Service Act on the basis of sex discrimination.<sup>18</sup> The judge, citing another opinion which stated that women are exempt from the draft since they are "still regarded as the center of home and family life,"<sup>19</sup> dismissed the sex discrimination argument with the following observation:

In 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.<sup>20</sup>

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16. See REPORT OF THE NATIONAL ADVISORY COMMISSION ON SELECTIVE SERVICE, IN PURSUIT OF EQUITY: WHO SERVES WHEN NOT ALL SERVE? 9 (Feb. 1967) (of all black men examined for military service 50% are rejected, whereas only 25% of white examinees are found ineligible).

17. 291 F. Supp. 122 (S.D.N.Y. 1968).

18. The defendant argued the act was unconstitutional because it created "an invidious discrimination based upon sex in violation of his right to due process of law under the fifth amendment . . . that men are denied equal protection of the laws in being compelled to serve in the Armed Forces when women are not so compelled . . . [and] that Congress has established women's corps in the various branches of the Armed Forces and therefore . . . has treated the sexes equally with respect to their ability to serve in the Armed Forces." *Id.* at 124 (emphasis added).

19. *Hoyt v. Florida*, 368 U.S. 57, 62 (1961).

20. 291 F. Supp. at 125. See also *United States v. Fallon*, 407 F.2d 621 (7th Cir. 1969), cert. denied, 395 U.S. 908 (1969). "Congress was entitled to consider factors which both maximize the efficiency and minimize the expense of raising an army and minimize the disruption of what were considered important civilian functions." *Id.* at 623; *United States v. Cook*, 311 F. Supp. 618 (W.D. Penn. 1970),



This rather complacent judicial interpretation of the teachings of history is subject to challenge. Some nations, for example, have found that survival may necessitate taking women into the military service and allowing them to share in the defense of their countries. At the same time, it would appear that some young women have been accused of keeping the "home fires burning" in ways the good judge may not have had in mind. Such women, include Bernadette Dorhn, Jane Alpern, Diane Oughton, Bernadette Devlin, and Angela Davis.

The judge in *St. Clair* appears to have assumed too much. History's lessons on the appropriateness of women in the military are by no means settled. Even before the advent of modern military technology, there were female warriors. Herodotus mentions women soldiers who were as bloodthirsty as men. And history provides such examples of women warriors as Joan of Arc who transcended her role as a peasant maid to become a rather formidable foe. Moreover, the military technology and social values of other eras are hardly legitimate considerations in meeting today's issues—let alone controlling precedents.

Undeniably the temper of the times has changed sufficiently that the traditional analysis of the role of women in the military must be carefully re-examined. The United States has long fancied itself as a country where women enjoy more rights and greater potential for self-development than almost any other country. However, other countries, such as Israel, North Vietnam, Cambodia, and Thailand, have all extended military service to their women. While the efficient use of technology has become as important as matching brute strength, most Americans are still clutched by an anachronistic horror at the mere thought of having women serving equally with men in the military.

It may thus be fairly said that the sociological, physiological, and historical arguments marshalled to discredit the potential effectiveness of women in the armed forces are tenuous, subject to question, and impossible of proof. When the actual functions of servicemen in the modern military are examined, it seems obvious that the greater number of today's military jobs could be effectively performed by women.

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"While each of the sexes has its own innate characteristics, for the most part physical strength is a male characteristic, and so long as this is so, the United States will be compelled to establish and maintain armed forces of males which may at least physically be equal to the armed forces of other nations, likewise composed of males, with which it must compete." *Id.* at 622; *United States v. Clinton*, 310 F. Supp. 333 (E.D. La. 1970), "Congressional chivalry in drafting men only to comprise an army has a sufficiently rational basis to avoid constitutional condemnation as mere male chauvanism." *Id.* at 336.

## Benefits of Military Service

Since women are qualified to serve, there is no reason to deny them the many benefits available in the military. During the past decades, the military has been an avenue to acceptance and social betterment in this country. Minorities such as the American Indian, Americans of Japanese ancestry, Mexican Americans, and black Americans have served competently and even heroically. In fact the experience of black men in the American military service may provide an interesting parallel for the experience of women in the service. The United States military began to use black men as combat soldiers during the American Revolution.<sup>21</sup> In the First World War, large numbers of blacks served but they were relegated primarily to positions such as cooks, valets, and trench diggers<sup>22</sup>—jobs behind the lines not unlike those now assigned to women. During the Korean War, the supposed inability of blacks to serve as effective combat soldiers was dramatically disproved after the armed forces were desegregated by law.<sup>23</sup> The reappraisal of the fighting ability of this group has been so drastic that it is now a matter of concern that blacks constitute such a high proportion of the combat troops in Vietnam.<sup>24</sup>

With this reappraisal, minority group persons have gained access to many benefits of military service. They have received at least temporary recognition as equals by their fellow soldiers and have sometimes found less prejudice and greater economic opportunity in the armed forces than in civilian society. Military service has extended economic independence to many such Americans. While the compensation is hardly high, it includes "three squares," a place to live, and medical care, and for some Americans that is more than they ever were assured outside the military. At the same time, it affords many individuals their first opportunity for extensive travel and contact with the outside world.

An important aspect of the military is that it offers young men the experience of meeting a cross-section of other people from all over the country. There is the advantage of being made aware of different social milieus and of learning to cooperate with people from differ-

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21. THE AMERICAN NEGRO REFERENCE BOOK 613 (J. Davis ed. 1966).

22. Of the 200,000 black soldiers who were overseas in World War I, 150,000 were assigned to labor and stevedore battalions. *Id.* at 616.

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

24. 113 CONG. REC. 10000 (1967) (remarks of Congressman Hawkins). See also REPORT OF THE NATIONAL ADVISORY COMMISSION ON SELECTIVE SERVICE, *supra* note 16, at 9-10.

ent backgrounds and value-systems. Ideally, the person who is congenial and competent is accepted as a comrade by men with whom he might never have associated in civilian life. While the ideal may not always be found in practice, it is one of the tenets upon which the Selective Service is founded. Certainly, being able to function as a comrade and as an equal with men and with other women would be an enormous advantage for some women. A situation in which they would be judged upon their abilities and performance rather than upon their sexual attractiveness might well lead them to a higher estimation of their personal worth and to placing a higher value upon achievement and competence.

Military services also offer numerous educational benefits and even the most unqualified are given a chance to better themselves through the military. Marguerite Rawalt, former Chairman of the Task Force on Family Law and Policy of the Citizens Advisory Council on Status of Women, notes that:

Military service benefits, especially for the young with limited education or training, accompany the responsibility. Since October 1966, some 246,000 young men who did not meet the normal mental or physical requirements, have been given opportunities for training and correcting physical problems, while such opportunities are not open to their sisters.<sup>25</sup>

Many young men who were unable to finish high school in civilian life are given the aid necessary to receive their diploma while in the military. Each of the services is also authorized to grant 5,500 ROTC scholarships to young men in colleges and universities.<sup>26</sup> These scholarships provide tuition, instructional fees, and an allowance for books. For the veteran, the G.I. Bill provides an educational assistance allowance which covers many expenses.<sup>27</sup> If he has a wife and dependents, the sum of the stipend is increased to absorb some of the financial burden.<sup>28</sup> Some individuals are allowed to continue their college or professional training while serving in the military and often the cost is financed by the government. Without these programs many young men might never be able to continue their educations.

Additionally, job training and experience is extended to many

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25. *Hearings, supra* note 5, at 426.

26. BLUE RIBBON DEFENSE PANEL, REPORT TO THE PRESIDENT AND THE SECRETARY OF DEFENSE ON THE DEPARTMENT OF DEFENSE at 142 (1970).

27. "The Administrator shall pay to each eligible veteran . . . an educational assistance allowance to meet, in part, the expenses of his subsistence, tuition, fees, supplies, books, equipment, and other educational costs. 38 U.S.C. § 1681(a) (Supp. V, 1970).

28. *Id.* § 1682(a)(1).

through the military services. Over half of the veterans questioned in one survey indicated that their military experience had resulted in a better job title or increased pay.<sup>29</sup> Norman Dorsen, a professor of constitutional law at New York University Law School, states that:

Women are denied the opportunity to obtain the job training and experience available to servicemen from the working class and minority group backgrounds. It is well known that the armed forces serve as a "college" for many of the nations poor; I fail to see why women should be deprived of this opportunity.<sup>30</sup>

Another significant benefit of military service is the training in self-defense. Offering women the same minimum physical training as is offered to every male draftee would have enormous psychological effects. According to Kate Millet:

Where differences in physical strength have become immaterial through the use of arms, the female is rendered innocuous by her socialization. Before assault she is almost universally defenseless both by her physical and emotional training. Needless to say, this has the most far-reaching effects on social and psychological behavior of both the sexes.<sup>31</sup>

If women were given some training in self-defense, many of the stultifying "protections" now afforded them would no longer be necessary. For instance, hours limitations designed to protect women from possible attacks would be harder to justify. If the potential rapist knew there was a good chance his victim was an expert in judo, he might well be deterred from attacking her.<sup>32</sup>

Frequently, the armed forces are also prescribed as the cure for aimless young men guilty of anti-social behavior. The prescription is sanctioned to the extent that it is not uncommon for a judge to give a young man the choice between enlisting or being sentenced for some

29. Weinstein, *Occupational Crossover and Universal Military Training*, in *THE DRAFT* 23, 30 (S. Tax ed. 1967).

30. *Hearings, supra* note 5, at 325 (statement of Prof. Norman Dorsen).

31. K. MILLETT, *SEXUAL POLITICS* 44 (1970).

32. In support of these speculations one might note the freedom with which nineteen-year-old Israeli servicewomen hitchhike around their country. They exhibit an air of self-confidence and self-assuredness which testifies to the fact that they do not feel the need of male protection. The fate of an American who tried to force his affections upon one such young woman was amusingly chronicled in *Portnoy's Complaint*: "Here a little struggle took place as I rushed her at the side of the bed. I reached for a breast, and with a sharp upward snap of the skull, she butted me on the underside of the jaw.

"Where the hell did you learn that," I cried out, "in the Army?"

"Yes."

"I collapsed into my chair. 'That's some training to give to girls.'" P. ROTH, *PORTNOY'S COMPLAINT* 264 (1968).

minor offense.<sup>33</sup> Such an alternative is rarely, if indeed, ever, offered to young women in similar circumstances. Whether or not the young men do "straighten themselves out" in the military, it seems an opportunity which should be offered to members of both sexes equally. Giving the individual an opportunity to prove himself in a new environment and a chance to grow up seems commendable in itself and should not be limited in its application on such an arbitrary and unreasonable basis as that of sex.

Another potential benefit to be extended to all young women who might be drafted if the Equal Rights Amendment were passed is that of access to contraception. Tragic though it is in human and social costs, many young women, particularly poor and socially disadvantaged young women, do not have effective birth control available to them. If women were drafted it would be essential for the armed forces to provide them with an effective means of birth control.<sup>34</sup> Thus, one consequence of men and women serving as equals and being as equally free from the fear of pregnancy might well be an undermining of the double moral standard.

If the draft were extended on an equal basis to women, one of the most far-reaching and important effects might be that of providing young women with a viable alternative to higher education and marriage. Women with a high school degree or less are severely limited in the types of jobs open to them. The work for which they qualify will most often be repetitious and uninteresting. They will not achieve more

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33. This is largely an unspoken practice that is somewhat difficult to document. *But see* Army Reg. 601-270, para. 3-9c(1) (Mar. 18, 1969): "Men who have criminal charges filed and pending against them alleging a violation of a State, Federal, or territorial statute, and who as an alternative to trial for such violation are granted a conditional release from the charge by a court on the condition that they will apply for induction into the Armed Forces, are unacceptable. Waivers will not be granted in these instances." However, when a draftee refuses induction it is no defense that prosecuting authorities had dismissed criminal charges against him in order to permit his induction. *Sumrall v. United States*, 397 F.2d 924, 926-27 (5th Cir.), *cert. denied*, 393 U.S. 991 (1968).

34. It is interesting to note that the military had been ahead of the rest of the country in providing abortions to military personnel and the wives of military personnel almost free of charges and regardless of state and local laws. *But see, Statement by the President Upon Directing that Policy be Made to Correspond with State Laws*, 7 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 598 (Apr. 12, 1971): "I have directed that the policy on abortions at American military bases in the United States be made to correspond with the laws of the States where those bases are located. If the laws in a particular State restrict abortions, the rules at the military base are to correspond to that law.

"The effect of this directive is to reverse service regulations issued last summer, which had liberalized the rules on abortions at military hospitals."

than the barest financial independence, if they are able to achieve it at all. This situation means that women who are disinclined to go to college or are too poor to do so may find themselves in the position where marriage seems the only possible salvation from drudgery and poverty. Poor and minority group women may be marrying and/or having children during their teenage years because they see no realistic alternatives.<sup>35</sup> These women and their children have woefully high chances of being plunged back into the cycle of poverty. The highest percentages of divorces occurs among teenage marriages.<sup>36</sup> Many couples in such marriages have children prior to their breakup and often the woman is left to support the child or children by herself.<sup>37</sup> This type of poverty, in families headed by women, is perhaps the most difficult kind to cure.<sup>38</sup>

Certainly the problem is a serious one and it would be foolish to look to the military for a complete solution. However, it does not seem unrealistic to pose national service as a possible alternative for young women who want to get away from their homes but who are untrained for employment and too young to start families with much chance of success. Margaret Mead has suggested that:

Universal national service would replace for girls, even more than for boys, marriage as the route away from the parental home, and provide a period of responsible and directed reappraisal before marriage and parenthood were assumed. The postponement of marriage until the age of 20 would cut down on the number of divorces due to immaturity, reduce the number of fatherless families, and contribute to the control of the population explosion.<sup>39</sup>

Colonel Bar-On of the Israeli Defense Forces has commented upon the need in Israel for military service to serve much the same function as that suggested by Dr. Mead. He noted with regret that in most cases the needs of the military dictate that only girls with at least a minimum of education can be drafted.<sup>40</sup>

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35. Unemployment and marginal employment rates are highest among minority teenage girls. See STATISTICAL ABSTRACT, *supra* note 12, at 216.

36. NATIONAL CENTER FOR HEALTH STATISTICS, U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, DIVORCE STATISTICS ANALYSIS 56 (1969).

37. In 1969, women were the responsible heads of 12,877,000 families. STATISTICAL ABSTRACT, *supra* note 12, at 36. Of these approximately 40% are below the poverty level. *Id.* at 328.

38. In 1968 only 8.8% of all male headed families were below the poverty level, whereas 38.9% of families headed by females were in that category. *Id.* at 328. The median income deficit for male headed families was \$875 while that of female headed families was \$1,290. *Id.* at 329.

39. Mead, *supra* note 9, at 108.

40. "If the I.D.F. were in a position to include all future mothers in the scope of its educational activities, its contribution to the closing of the education gap and the

If the United States armed forces extended compulsory military service merely to women with the same educational qualifications as are presently required of male draftees, the effect would be to provide the above-mentioned benefits to a large number of American women. The military services could upgrade the educational attainments of such women, provide them in the basics of self-defense, provide access to contraception, and give them an alternative to early marriage. In many ways the benefits as well as the burdens of serving their country would be extended to women.

### Availability of Military Service Benefits to Women

No doubt some people will argue that the potential benefits of military service are already available to women. The Army, Navy, Air Force and Marines are all open to women volunteers. Yet numerous facts refute such an argument. One of the most telling is that, at present, women constitute only slightly over one percent of total military personnel.<sup>41</sup> With various deterrents to enlistment, the military effectively discourages women from serving in the armed forces. In the recruitment literature they are continually told that the military is for males. Slogans such as "The Marine Corps Builds Men" or pictures of Army men slogging through rice paddies with their rifles held over their heads entitled "Men's Work" can only discourage women from enlisting. These psychological deterrents, however, are only the beginning.

Until very recently, women could by law constitute no more than 2 percent of the total personnel serving in the armed forces.<sup>42</sup> Although information is not easy to obtain, it appears that the requirements for entry into the armed forces are more stringent for women

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prospects of the future generation would be truly revolutionary, for of course in most families the mothers exert a more important education function than the father. However, the army enlists girls only at a comparatively high educational level, while girls from the lower levels do not reach its ranks. . . ." Bar-on, *Educational Process in the Israel Defense Forces*, in *THE DRAFT* 138, 163 (S. Tax ed. 1963). "[W]e tried to bring into the military semi-literate girls—with a thought to educate the mothers of the next generation. And the mothers will become more and more vital in the process of breaking through vicious circles of deprivation. We did it a few times with quite an amount of success. It was very costly, but we believe that we should move very fast toward better conditions in the social structure. . . ." *The Discussions: Sixth Session—Issues and Areas Requiring More Data*, in *THE DRAFT* 425, 431 (remarks of Colonel Bar-on) (S. Tax ed. 1963).

41. STATISTICAL ABSTRACT, *supra* note 12, at 257.

42. See, e.g., Act of Aug. 10, 1956, ch. 1041, 70A Stat. 173, as amended 10 U.S.C. § 3209(b) (Supp. V, 1970); 10 U.S.C. § 5410 (1964) (repealed 1967).

than for men. The minimum age to qualify has been higher for women;<sup>43</sup> they had to compete against each other for limited openings; and a high school diploma is necessary even to be considered,<sup>44</sup> although the same is not true for young men wishing to enlist.<sup>45</sup>

Also, until recently, a woman was required, in effect, to forego family life completely if she wished to embark upon a military career. The unreasonableness of the military policy became obvious last September when Mrs. Tommie Sue Smith, a judge advocate in the Air Force, filed a suit charging a violation of her constitutional rights because she was subject to regulations which did not apply to men.<sup>46</sup> Mrs. Smith, a divorcee, had been granted custody of her 8-year-old son. The Air Force told her that she would have to choose between her career and leaving her son behind when she was transferred to a new post. (Male officers are allowed to take their dependents except when they are transferred to battlezones.) Faced with the suit the Air Force made a statement that they would abandon policies which were out of line with the "recent emphasis on women's rights."<sup>47</sup> Women will be allowed to remain on active duty unless they ask to be discharged on grounds they have adopted or taken custody of minor children.

Since the beginning of June 1971, however, this and many of the armed forces' other sanctions against marriage and having children imposed upon service women have been greatly modified.<sup>48</sup> Prior to that time married women could not enlist in the Army, and widows or divorced women were accepted only if they had no dependents. While these restrictions have not been entirely removed, the Army will consider waiving them in meritorious cases.<sup>49</sup>

Despite these advances, factors still exist which may discourage

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43. 10 U.S.C. §§ 3256, 5533, 8256 (1964) (repealed 1968).

44. 32 C.F.R. § 571.2(c)(2) (1971).

45. *Id.* § 571.2(c)(1).

46. S.F. Chronicle, Sept. 29, 1970, at 17.

47. *Id.*, Sept. 30, 1970, at 5.

48. "In September, 1970, the Secretary of the Air Force rescinded the following provisions of AFR 36-12 and AFM 39-10 which required discharge of any woman who (a) Is the parent of adoption of a child under 18 years of age; (b) Is the step-parent of a child under 18 years of age and the child is within the household for a period of more than 30 days a year; or (c) Has or assumes personal or legal custody of any child under 18 years of age." N.Y. Times, Apr. 21, 1971, at 11, col. 1. "In those instances in which a woman Marine would normally be separated by reason of pregnancy, she will be advised that she may request retention, and that separation shall not be effected until the woman's request for retention has been considered by the commandant of the Marine Corps." Marine Corps Bulletin 1900, AOIC-sps-47(3)(a) (Mar. 26, 1971).

49. Army Reg. 601-210 (Change 8) (June 24, 1971).



women from enlisting. One of these is the "double standard" of morality in the services. Recently a Navy enlisted woman was discharged on the grounds of sexual immorality after she had had a miscarriage at the base dispensary. The father, a Navy enlisted man, was not severed from the service. The American Civil Liberties Union has challenged the woman's dismissal on the grounds that the "moral standards are not applied equally to Navy men, who are not dismissed for fathering children out of wedlock."<sup>50</sup> The complaint alleged that the "double standard" violated due process and equal protection guarantees, and asked the federal district court to declare the pertinent Navy regulations unconstitutional.<sup>51</sup>

The potential enlistee must also confront the social stigma carried by women in the military since service women seem to be viewed as something of misfits and possibly homosexual.<sup>52</sup> While their conduct is probably a good deal more discreet than that of their brothers in uniform, the general public has the impression that women in the military have rather low moral standards. The existence of this social stigma is evidenced by the efforts made in recruiting literature to dispel it, in one instance by re-printing a rather classic article by a Catholic Father:

One last item: if a girl has high moral standards . . . and the Armed Forces make it plain that such is the kind they want . . . then she will get along all right in the service. . . . The Armed Forces get their share of rotten characters, but it is not fair to blame the Armed Forces for producing these characters.

Our experience has been . . . that a girl who would throw herself away in the Armed Forces would do it anywhere else. . . . Our nation's colleges and universities provide the occasion for many a girl's downfall, yet no one raises too much of a protest when a girl wants to go to college. In fact she's encouraged . . . and it is an open secret that the one reason why many girls go to college is to "find a man."<sup>53</sup>

Thus social attitudes and past official policies making it more difficult for women to serve than men have effectively discouraged women from entering the military. Such discouragement can only continue as long as women are "second-class" soldiers. Until they have full access on an equal basis with men, women cannot be said to enjoy the full benefits of military service.

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50. Washington Post, Aug. 25, 1970, at B2, col. 1.

51. *Id.*

52. See Father Conroy, *Women in the Armed Forces*, Recruiting Pamphlet No. RPI 484 (July 1970).

53. *Id.*

## The Probable Military and Social Consequences of Drafting Women

Given the present low level of female involvement in the armed forces, the extension of involuntary military service to women on equal terms with men would radically alter the situation. Assuming that realistic and uniform standards of physical and educational eligibility could be tailored to the nature of the work expected of draftees, the number of women in the service would be close to 50% of total service personnel—an increase of almost 5000% over the present level of women in the military. Such a drastic change would have the immediate and obvious consequence of greatly decreasing the number of young men whose lives would be interrupted by the burden of military service. The obligation to serve would be spread more widely and would fall more fairly upon the shoulders of all citizens. This, however, would only be the beginning of the impact. Such a change would have important long-range consequences of great benefit to society.

### Political Involvement

It is likely that women would become more actively involved in United States politics. They have had the vote for fifty years and take an active part in the political process, but they become political non beings when it comes to the business of waging war. Women pay the supporting taxes and suffer the loss of their men yet never are they confronted with the personal decision of whether to comply with an induction order, whether to affirmatively support or resist the policies of their government. For young men, their reaction to the draft is frequently the first and most decisive political action they ever take. A similar confrontation would be a strong "politicizing" factor for women. It may be no coincidence that Israel, a country that drafts women, has a woman prime minister.

Exclusion from the draft reflects women's second-class status. An analogy may be appropriate. Participation in jury service, whether characterized as a benefit or as a burden, has been extended to women because it is a part of the political process and women should not, as a group, be deprived of participation in the political process.<sup>54</sup> The draft is also a major facet of that process. Two years of military service looms large beside the possibility of occasional jury service. As one writer has said:

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54. See, e.g., *White v. Crook*, 251 F. Supp. 401, 408 (M.D. Ala. 1966).

[O]n a deeper level, when women are excluded from the draft—the most serious and onerous duty of citizenship—their status is generally reduced. The social stereotype is that women should be less concerned with the affairs of the world than men. Our political choices and our political debate often reflect a belief that men who have fought for their country have a special qualification or right to wield political power and make political decisions. Women are in no position to meet this qualification.<sup>55</sup>

### Equal Employment

In all probability, the move for women's rights in all areas of employment would be greatly stimulated. Faced with the military liabilities of full citizenship, women would be more likely to demand the full economic privileges of that citizenship. Moreover, if the draft and in-service jobs were meted out on a fair basis, many women would for the first time have an opportunity to learn employment skills. Having worked in the military, they would be loathe to accept a job with less responsibility or fewer benefits outside the services. Socially sex-relegated jobs in civilian life such as electronic and mechanical work might be invaded by women who had learned such skills in the military. These new veterans might more actively challenge vestiges of employment discrimination with a vigorous equal rights principle to help them do battle.

### Foreign Policy

An intriguing possibility is that the foreign policy of the United States might be affected. If women were being drafted and assigned to jobs within the military solely upon the criteria of their physical capacities, some particularly fit specimens would certainly be fighting alongside men. The emotional effect upon statesmen of sending young women as well as young men to early graves might be considerable. Nat Hentoff comments:

Why should men be discriminatorily more vulnerable to the insanity of war than women? Let the populace see mutilated American women in uniform on the evening news. The changed perspective might save a whole lot of lives.<sup>56</sup>

Who knows but what, had the threat of the draft been hanging over the heads of Luci and Lynda Johnson, and Julie and Tricia Nixon, our involvement in Vietnam might be considerably less than it is. If one is to be permitted a moment of optimism, perhaps having a military force made up equally of men and women would stimulate the

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55. *Hearings, supra* note 5, at 326 (statement of Prof. Norman Dorsen).

56. Henthoff, *The Law Is an Ass (Male)*, EVERGREEN REVIEW, Nov. 1970, at 50.

military to become more truly a Department of Defense and less of an adventurers' club for foreign entanglements. If we agree with the speculations of Drs. Mead and Tiger, there is good reason to believe that our defensive powers would be enhanced at the same time that our aggressive tendencies would be decreased.

One by-product of drafting women would be a dividend for our allies. One cannot see the hordes of young American military men in Germany, Japan, Taiwan, Thailand, and, of course, Vietnam without being aware of the profoundly negative effects service in foreign countries has on both the men and the host countries. The men are separated from women with whom they have something in common and are turned loose to exploit the economic inequality of the local women. The soldiers' view of women as sexual objects and non persons is strengthened, as are racial stereotypes on both sides. At the same time, the situation leads to poor relations between the soldiers and the local men. A military made up of equal numbers of men and women would not eliminate the problem, but it might do much to mitigate it.

### **Compulsory National Service**

Perhaps the most far-reaching social consequence of drafting women would be its impetus toward a concept of compulsory national service rather than strictly military service. Because of its possible effect in diminishing the voice of adventurists in American foreign policy, because of the probable reluctance of the "silent majority" to see women in traditional military roles, and because of the approximate doubling of the pool of eligible draftees, the extension of the draft to women would be a strong force for expanding the focus of draftee services to include a broad range of non military services such as are presently performed by VISTA volunteers, Peace Corps and Public Health Service people.

The idea of restructuring the draft to change its emphasis from that of military service to that of national service is one that would merit a lengthy discussion on its own. For present purposes our discussion will focus only briefly on the role women draftees might play in such a change. The connection between drafting women and expanding the military service to a national service is a natural one.<sup>57</sup>

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57. The idea of using military personnel for improving the social welfare of one's country is being implemented. In Iran, the military sponsors a literacy corps that penetrates the most isolated areas of the country and sets up schools. Another example is provided by the use of women, drafted in the Israeli Defense Forces. "All girls

Men are already given the alternative of serving in human service positions when they have been classified by the Selective Service System as conscientious objectors. Compulsory national service for women would not horrify most Americans if women draftees could choose non combat work.

Certainly the idea is not a new one. A 1965 survey of some 1,450 girls were asked the following question:

Do you think that a National Service Program should include involuntary service for women for the tasks of protecting, conserving and developing our country or those countries which seek our aid?<sup>58</sup>

Almost half of the girls responded positively to the question and only one third were opposed to the idea.

As far back as 1961 a survey of 10,000 students in high schools in 45 states posed a somewhat similar question:

A prominent educator has proposed that young women be drafted for selective service. Instead of serving in the military, however, women would serve as teachers' assistants, nurses' aides, or social workers either in the United States or overseas. Do you favor such a plan of compulsory service for one year?<sup>59</sup>

More than 60 percent of the students were in favor of the idea; slightly more girls favored the idea than did boys. Less than 15 percent of the high school students were definitely opposed to the idea.<sup>60</sup>

It is easy to imagine the effectiveness and value of having such teacher corps in the ghettos of the cities, on the Indian reservations and in migrant worker camps of this country. Certainly our own military has had the occasion to play a decisive role in persuading

who graduate from teachers' seminaries enlist in the [Israeli] Defense Forces] on completion of their studies. Part of them serve in teaching assignments within the army, in soldier schools. The others are given short periods of recruit training, and are then dispatched to the Ministry of Education and Culture for two years and posted to ordinary primary schools in the border settlements where it is difficult to find salaried teachers. . . .

" . . . As a result there are many hundreds of I.D.F. girl soldiers in uniform who live in all immigrant settlements and development centers of the country, teaching children in elementary schools or adults in night classes, organizing activities in youth clubs, and in many places bearing the main load of responsibility for education and cultural affairs and thus becoming the main agents in the process of acclimatization and acculturation of the new immigrants." Bar-on, *supra* note 40, at 153.

58. Bramson, *The High School Student, the Draft, and Voluntary National Service Alternatives: Some Survey Data*, in THE DRAFT 177, 179 (S. Tax ed. 1963).

59. *Id.* at 183.

60. Of the students surveyed, only 14.2% were definitely opposed to the idea, and another 16.8% expressed the opinion that it was a poor idea. The remaining 60% reacted favorably to the proposal. *Id.* at 183.

many young men to volunteer for Peace Corps, Vista, or Public Health Service duty or to work in jobs of human service as alternative service. Young women serve beside men in these volunteer services in equal or greater numbers even without the hot breath of the military on their necks. They have shown themselves willing to undergo hardships and personal inconveniences greater than those generally required in the military services. In many cases these women have realized advantages which military service might have offered.

It would seem that all of the advantages potentially available to women draftees would follow if women were assigned to socially constructive jobs rather than to purely military functions. Dr. Margaret Mead is emphatic as to the necessity of including women in a national service corps.

[F]ailure to include [women] will promote a split in experience of men and women at a time when it is essential that they should move in step with each other, economically and politically.

. . . .

. . . If women are left behind in isolated rural regions, in the slums or in the ghettos, the broadening educational effects for men will be at least partially nullified because their wives will not be able to maintain the standards their husbands have learned to respect.

. . . Half our intellectual and gifted citizenry are women. Because of the persistence of traditional ideas about women's aptitude, we are at present losing more highly gifted women than highly gifted men. . . . The chance to assay their abilities during universal national service would provide a background for appropriate career choices when they wish to reenter the labor market and are seeking additional education.<sup>61</sup>

It is not the draft *per se* that bothers Americans so much as its tie in their minds to aggressive combat duty. The strong resistance to drafting women would be greatly weakened if draftees could choose between productive human service capacities and combat positions. The real cause for concern may not be that women will be delayed from becoming home makers and mothers. It is more likely that people are bothered by the possibility that women might learn nasty habits of aggression and self-defense in much the same manner as blacks learned the military arts in the Armed Forces and, on discharge, refused to return to situations of oppression.

The equal rights principle would probably be more palatable to Americans if the draft gave young women the alternative of non military service. Under the equality principle such non military alternative

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61. Mead, *supra* note 9, at 106-07.

service would have to be available equally to young men being drafted. Such a result would be a good thing.

### Conclusion

The foregoing arguments and speculations are not meant to be an endorsement of military means or goals. They are rather an attempt to discuss the effects of the equal rights principle upon the draft and to explore the possibility of a draft for women. We conclude that the effects on women and on the military preparedness of this country would not be the disaster predicted by many Equal Rights Amendment critics. In fact, extending military service to women might result in a substantial number of benefits—both for women individually and for society as a whole.

Sexual protectivism is no longer a viable ethic. Any system which makes an arbitrary distinction as to who must serve militarily does an injustice both to the individual who is denied the opportunity to serve and to the individual upon whom the burden falls more heavily. The equal rights principle should be extended to women so that they may, at long last, assume their rightful place as full citizens.