

# THE BURDENS OF MANLINESS

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Considering the countless forms of discrimination that men have historically heaped upon women, I am sure to provoke disbelieving groans from some of the thoughtful readers of this Journal when I suggest, as the thesis of this Article, that the Equal Protection Clause should be read to protect men, not simply as collateral beneficiaries of the protection afforded women, but in their own right. I should add at the outset, however, that mine is neither a contrived joke borne of some middle-aged fraternity dare nor a stale plea left over from the sensitive troglodyte yearnings of the 1980s Men's Movement. Moreover, I do not feel in the least that women have stolen power from men, and I have no wish to advance the position that discrimination against men to benefit women is necessarily unjust. I will argue rather that men, like women, are bound by stereotypes, perpetuated in society and legitimized by law, that preclude opportunities for self-definition and coerce men into stifling identities. The Equal Protection Clause should not, I shall contend, presumptively tolerate such burdens on a man's right of self-definition.

The Article is organized as follows. In Part I, I show that the Supreme Court has identified in the Constitution's Due Process and Equal Protection clauses what I style the right of self-definition. I argue that the right, as conceived by the Court, is broad enough to extend coverage to men. And I

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argue in Part II that such protection is warranted because men, like women, are compelled by society and sometimes coerced by law to conform to an ascribed gender ideal. The specific stereotype that preoccupies me is that, whereas women must adhere to a femininity that is lacking physical courage, men are required to demonstrate their manhood through performances that evince such courage. In Part II, I explain how manliness derives from etymological and cultural notions of courage. In Part III, I argue that combat in war is often considered to be the ultimate test of a man's mettle. I conclude in Part IV that the expectation for men to be courageous, like the feminine mystique that is its female counterpart, is an impossible ideal to realize and that, even as it spurs many men to fight and die, when taken seriously, it is conceptually elusive.

## I. THE CONSTITUTION'S PROTECTION OF THE RIGHT OF SELF-DEFINITION

I believe that the Constitution guarantees people the right of self-definition. By the right of self-definition, I mean the right not to be overly dominated by the government in how I structure and give meaning to my identity.<sup>1</sup> On its face, this is a rather ambiguous standard but the Supreme Court has, I will show, protected acts of self-definition in a manner that provides interpretive guidance.

### A. *Right of Privacy in the Substantive Due Process Clause*

The right of self-definition arguably emanates from various places in the Constitution,<sup>2</sup> but two especially illustrative sources are the Due Process Clauses in the Fourteenth and Fifth Amendments.<sup>3</sup> Both clauses refer to a right of "liberty" which the government may not deprive without due process of law.<sup>4</sup> The Supreme Court has inferred from this right of liberty what I have called a right of self-definition.

*Griswold v. Connecticut*<sup>5</sup> is an apt place to begin our examination. A Connecticut law forbade anyone, including married couples, from using contraceptives or assisting others in using them.<sup>6</sup> The Supreme Court overturned the law as violating the Constitution. Pointing to several provisions

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<sup>1</sup> What I mean by the right of self-definition is similar to Jed Rubenfeld's definition of the right of privacy. See Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 783-84 (1989) (describing the right to privacy as the right against the state shaping the totality of one's identity).

<sup>2</sup> Such places include the First Amendment's rights of religious expression and association. U.S. CONST. amend. I. Laurence Tribe's treatment of the right of "personhood" is broadly consonant with my idea of the right of self-definition. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1302-1435 (2d ed. 1988).

<sup>3</sup> U.S. CONST. amends. XIV, V.

<sup>4</sup> *Id.*

<sup>5</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>6</sup> *Id.* at 480.

of the Bill of Rights, Justice Douglas argued for the Court that the Constitution protected a “penumbra” of privacy that encompassed the right of married persons to use contraceptives.<sup>7</sup> He also justified the constitutional protection of marriage as a means by which individuals could define themselves in a fundamental way. A married person, Justice Douglas believed, did not simply acquire new legal rights and duties. He or she assumed a new “way of life” that encompassed “bilateral loyalty” and an intimacy that was “sacred.”<sup>8</sup> Previously alone, he or she was now part of a “harmony in living,” an association “as noble” as any.<sup>9</sup>

*Eisenstadt v. Baird* extended to nonmarried couples the right of reproductive autonomy.<sup>10</sup> Justice Brennan, writing for the Court, justified the decision with words that appeared to speak to the right of self-definition: “If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>11</sup> In this passage, Justice Brennan unmoored reproductive freedom from marriage, and it made sense to do so from the perspective of the right of self-definition. For a person obviously does not need to be married to be faced with matters “so fundamentally affecting [her or him] as the decision whether to bear or beget a child.”<sup>12</sup> One may even argue that Justice Brennan’s opinion paved way for women, in particular, to fashion new gender ideals as independent sexual beings whose principal purpose for sex was emotional gratification, not the traditional obligations of reproduction.<sup>13</sup>

Justice Brennan’s logic of self-definition in 1965 prefigured the Court’s 1973 decision in *Roe v. Wade*.<sup>14</sup> At issue in *Roe* was a Texas statute that prohibited abortions except to save the life of the mother.<sup>15</sup> The Court overturned the statute as violating the right of privacy.<sup>16</sup> This time, the Court, as it would do thereafter, eschewed Justice Douglas’s penumbra approach from *Griswold* and located the right of privacy in the Fourteenth Amendment Due Process Clause.<sup>17</sup> Justice Blackmun’s majority opinion stated that “[t]his right of privacy . . . founded in the Fourteenth Amendment’s concept of personal liberty . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”<sup>18</sup> For without such a right, the government “may force upon [her] a distressful life and future” that may include

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<sup>7</sup> *Id.* at 484–86.

<sup>8</sup> *Id.* at 486.

<sup>9</sup> *Id.*

<sup>10</sup> *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

<sup>11</sup> *Id.* at 453 (emphasis in original).

<sup>12</sup> *Id.*

<sup>13</sup> See Kenneth L. Karst, Book Review, 89 HARV. L. REV. 1028, 1037 (1976).

<sup>14</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>15</sup> *Id.* at 117–19.

<sup>16</sup> *Id.* at 164–67.

<sup>17</sup> *Id.* at 153.

<sup>18</sup> *Id.*

the “continuing stigma of unwed motherhood.”<sup>19</sup> Justice Blackmun asserted, in other words, that the government may not unduly circumscribe a woman’s right of self-definition as it pertains to her choice whether to become a mother.

Almost twenty years after *Roe*, the Court affirmed in *Planned Parenthood v. Casey* a woman’s right to an abortion.<sup>20</sup> A joint plurality opinion by Justices O’Connor, Kennedy, and Souter stated that the Due Process Clause “affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.”<sup>21</sup> “These matters,” the plurality continued, “involv[e] the most intimate and personal choices a person may make in a lifetime.”<sup>22</sup> They are choices that are “central to personal dignity and autonomy.”<sup>23</sup> The joint plurality added that “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life” and “[b]eliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”<sup>24</sup> Observe the focus on the idea of self-definition. The joint plurality believed that were the government to force a woman to carry a child to term, she would be afflicted by something worse than “distress,” as Justice Blackmun had suggested in *Roe*; she would be prevented from defining that which makes her a *person*.<sup>25</sup>

The right of self-definition has also been extended by the Supreme Court to homosexual intimacy. In 1986, the Court in *Bowers v. Hardwick* upheld a Georgia law that prohibited such intimacy, an almost inevitable outcome given Justice White’s dismissive and rather contemptuous framing of the issue.<sup>26</sup> For him, the essential question was “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy.”<sup>27</sup> Thus worded, the right had little to do with self-definition; it was only about conduct, and an illicit one at that.

Seventeen years later, the Court revisited the issue in *Lawrence v. Texas*,<sup>28</sup> a case whose facts were nearly identical to those of *Bowers*. The petitioners in *Lawrence* were two gay men who had been prosecuted by Texas for having consensual sex. Writing for the majority, Justice Kennedy

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<sup>19</sup> *Id.*

<sup>20</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992).

<sup>21</sup> *Id.* at 851.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> There was additional language in the joint plurality opinion that reflected a commitment to protect a woman’s right of self-definition: “The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. . . . Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman’s role . . . .” *Id.* at 852.

<sup>26</sup> *Bowers v. Hardwick*, 478 U.S. 186, 187–88 (1986).

<sup>27</sup> *Id.* at 190.

<sup>28</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

clarified that the right at issue transcended matters of “sodomy”: “To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.”<sup>29</sup> For Justice Kennedy, the right at issue was one that implicated the right of self-definition. Explaining why the Texas statute violated the right of privacy in the Due Process Clause, Justice Kennedy offered:

It suffices for us to acknowledge that adults may *choose* to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as *free* persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to *make this choice*.<sup>30</sup>

The theme of individual choice, a prerequisite for self-definition, bookends the passage. Just as *Casey*’s joint plurality opinion had alluded to the “right to define one’s own concept of existence,”<sup>31</sup> Justice Kennedy argues that “adults may choose” a concept of existence in which they are someone’s intimate partner.<sup>32</sup>

*B. The Equal Protection Clause: A Means to Protect a Woman’s Right of Self-Definition*

The Equal Protection Clause, unlike its cousin, the Due Process Clause, would seem an unlikely underwriter for the right of self-definition. Rather, the Equal Protection Clause would seem to be animated by the principle of treating “like for like” for some given end.<sup>33</sup> Its very name—the *Equal* Protection Clause—presupposes such a function. Nonetheless, the task of assessing the government’s legal categories will necessarily involve the Equal Protection Clause in enabling and limiting the ways in which people can define themselves.

Consider that the subject of self-definition was at the forefront of the most celebrated equal protection case of the twentieth century, *Brown v. Board of Education*.<sup>34</sup> To best appreciate this aspect of *Brown*, begin by comparing it with *Plessy v. Ferguson*,<sup>35</sup> the case that *Brown* arguably over-

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<sup>29</sup> *Id.* at 567.

<sup>30</sup> *Id.* (emphases added).

<sup>31</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

<sup>32</sup> *Lawrence*, 539 U.S. at 567.

<sup>33</sup> See LOUIS MICHAEL SEIDMAN, CONSTITUTIONAL LAW: EQUAL PROTECTION OF THE LAWS 4–7 (2003).

<sup>34</sup> *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

<sup>35</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).

turned. In *Plessy*, Louisiana had segregated black and white passengers on train cars.<sup>36</sup> The Court upheld the segregation as consistent with the Fourteenth Amendment's Equal Protection Clause.<sup>37</sup> Writing for the majority, Justice Brown acknowledged that

[the] object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.<sup>38</sup>

Political equality before the law was guaranteed to blacks but "social" equality was not.<sup>39</sup> And social equality, Justice Brown stressed, was precisely what Homer Plessy importuned. "We consider the underlying fallacy of the plaintiff's argument," Justice Brown wrote, "to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority."<sup>40</sup> "If this be so," he insisted, "it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."<sup>41</sup> Segregationist laws, Justice Brown added, "do not necessarily imply the inferiority of either race to the other."<sup>42</sup>

As illustration, he proffered that "[t]he most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power."<sup>43</sup> Separate but materially equal schools were therefore deemed by Justice Brown to be consistent with the Equal Protection Clause. About sixty years after these words were written, the Court in *Brown v. Board* would challenge their organizing principle. The Supreme Court struck down a policy of racially segregated public schools in Topeka, Kansas.<sup>44</sup> Writing for the Court, Chief Justice Warren explained that even if the two schools—one white, the other black—were equal in their material resources, black children may suffer "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."<sup>45</sup>

Contrast this statement with Justice Brown's aforesaid view that racially segregationist laws do not necessarily impart any message of inferiority and,

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<sup>36</sup> *Id.* at 538.

<sup>37</sup> *Id.* at 548.

<sup>38</sup> *Id.* at 544.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 551.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 544.

<sup>43</sup> *Id.*

<sup>44</sup> *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

<sup>45</sup> *Id.* at 494.

if African Americans suffer the pain of such inferiority, they have only themselves to blame. “Political” equality before government, Justice Brown had argued, was guaranteed by the Equal Protection Clause; “social” equality in civil society was not.<sup>46</sup> For Chief Justice Warren, however, these domains were porous. He argued in *Brown* that the government was significantly responsible for engendering a feeling of racial inferiority in black children.<sup>47</sup> Quoting a lower court, Chief Justice Warren stated that the “impact [of racial inferiority] is *greater* when it has the *sanction of the law*; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group.”<sup>48</sup> According to the lower court, “[a] sense of inferiority affects the motivation of a child to learn,” and “[s]egregation *with the sanction of law*, therefore, has a tendency to [retard] the educational and mental development of negro children.”<sup>49</sup> Notice that the quote is being conscripted by Chief Justice Warren to make the case for the right of self-definition. Specifically, he cannot abide forms of legal categorization that perpetuate stereotypes about racial inferiority and thus are likely to discourage black children from exercising meaningful choice over who they wish to be and how to fashion their lives.

A similar concern with providing opportunities for self-definition manifests itself in some of the most important Supreme Court cases dealing with gender. Before we explore these cases, it will be useful to review how stereotypes perpetuated by the law have hampered opportunities for women to define themselves. *Bradwell v. Illinois*<sup>50</sup> is a notorious example. The Court in that case upheld an Illinois law that denied Myra Bradwell a license to practice law because she was a woman.<sup>51</sup> Justice Bradley penned an unforgettable concurrence. He explained that “the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman.”<sup>52</sup> For Justice Bradley, “[m]an is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.”<sup>53</sup> Not nature alone but, ostensibly, God, sanctioned such gender differences, or so Justice Bradley believed: “The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which

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<sup>46</sup> Justice Brown is apparently suggesting that political equality entails the right to be treated equally regarding political rights, whereas social equality entails the right to be treated equally—specifically, with regard to matters of dignity—by those in civil society. *Plessy*, 163 U.S. at 544.

<sup>47</sup> *Brown*, 347 U.S. at 494–95.

<sup>48</sup> *Id.* at 494 (emphasis added).

<sup>49</sup> *Id.* (alteration in original) (emphasis added).

<sup>50</sup> *Bradwell v. Illinois*, 83 U.S. 130 (1872).

<sup>51</sup> *Id.* at 131–32.

<sup>52</sup> *Id.* at 141.

<sup>53</sup> *Id.*

properly belongs to the domain and functions of womanhood.”<sup>54</sup> If “divine ordinance” and “nature” commanded the proper cultural roles for man and woman, who were judges at common law to gainsay the truth?

In subsequent cases, the Supreme Court would reject such restrictive caricatures of women as a basis for gender classifications. *Frontiero v. Richardson* was the first case in which a plurality of the Court subjected gender discrimination to strict scrutiny.<sup>55</sup> At issue in *Frontiero* was an Air Force regulation that provided increased quarters allowances and medical benefits for those service members who had financial dependents.<sup>56</sup> Servicewomen had to prove such dependence by their husbands, but servicemen did not have to do so for their wives.<sup>57</sup> Married to a man who was then a full-time college student, Lieutenant Sharon Frontiero argued that the Air Force’s requirement violated her rights under the equal protection component of the Fifth Amendment’s Due Process Clause.<sup>58</sup>

The Court agreed and struck down the Air Force policy. Embedded in the Air Force policy, Justice Brennan explained, was a traditional stereotype that women were financially dependent on their husbands.<sup>59</sup> Such stereotypes were, he lamented, nothing new to the law.<sup>60</sup> In fact, Justice Brennan stated that gender discrimination historically has been “rationalized by an attitude of ‘romantic paternalism’ which, in practical effect, put women, not on a pedestal, but in a cage.”<sup>61</sup> The metaphor of a “cage” implies that stereotypes do more than reflect societal expectations; stereotypes can also shackle a person’s ability to exercise the right of self-definition. To wit, Justice Brennan explained that because of prejudices like those expressed by Justice Bradley in *Bradwell*, statute books “gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes.”<sup>62</sup> By rejecting the Air Force policy, Justice Brennan sought to weaken those traditional stereotypes that have impeded women from defining themselves as breadwinners and financially independent beings.

Justice O’Connor furthered Justice Brennan’s position in her majority opinion for *Mississippi University for Women v. Hogan*,<sup>63</sup> which, like *Frontiero*, contained a potentially debilitating stereotype for women. However, unlike *Frontiero*, *Hogan* involved a law that appeared to benefit women. A public university limited its nursing program to women only, thus denying

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<sup>54</sup> *Id.*

<sup>55</sup> *Frontiero v. Richardson*, 411 U.S. 677 (1973).

<sup>56</sup> *Id.* at 678.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 679.

<sup>59</sup> *Id.* at 688–89.

<sup>60</sup> *Id.* at 685.

<sup>61</sup> *Id.* at 684.

<sup>62</sup> *Id.* at 685.

<sup>63</sup> *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

Joe Hogan admission solely because of his gender.<sup>64</sup> The Court rejected the discrimination as a violation of the Equal Protection Clause, but the justices made hardly any mention of the harms inflicted on the hapless Hogan and similarly situated men.<sup>65</sup> What chiefly worried the Court was how the school's gender discrimination perpetuated a negative stereotype about women. Women, noted Justice O'Connor, "earned 94 percent of the nursing baccalaureate degrees conferred in Mississippi and 98.6 percent of the degrees earned nationwide."<sup>66</sup> There was nothing to suggest, then, that women encountered obstacles to becoming nurses.<sup>67</sup> Accordingly, Justice O'Connor argued that MUW's policy "tends to perpetuate the stereotyped view of nursing as an exclusively woman's job."<sup>68</sup> "By assuring that Mississippi allots more openings in its state-supported nursing schools to women than it does to men," Justice O'Connor explained, "MUW's admissions policy lends credibility to the old view that women, not men, should become nurses, and makes the assumption that nursing is a field for women a self-fulfilling prophecy."<sup>69</sup>

Like the exclusively female MUW, the admissions policy of the exclusively male Virginia Military Institute would meet its demise in the Supreme Court for likewise perpetuating a stereotype that hindered women's ability to define themselves in unconventional terms.<sup>70</sup> The publicly funded Virginia Military Institute ("VMI") sought to produce "citizen-soldiers" prepared for leadership in civilian and military life.<sup>71</sup> To that end, VMI employed an "adversative method" that would subject new recruits to the sort of psychological ordeal used by a Marine Corps boot camp.<sup>72</sup> VMI believed that women "as a group" were incapable of enduring the adversative method and thus denied them admission.<sup>73</sup> Yet the Court argued that even if women *as a group* could not endure, some women might be able to do so.<sup>74</sup> Moreover, Justice Ginsburg, writing for the Court in *United States v. Virginia*, aptly observed that Virginia "never asserted that VMI's method of education suits *most men*."<sup>75</sup> Gross stereotypes, argued Justice Ginsburg, "no longer justify denying opportunity to women whose talent and capacity place them outside the average description."<sup>76</sup> Stated differently, even if most women neither desired nor were capable of overcoming the rigors of VMI, the Equal Protec-

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<sup>64</sup> *Id.* at 720–21.

<sup>65</sup> The Court did mention that Hogan, because of the school's female-only policy, had to drive a long distance to an alternative nursing school. *Id.* at 723 n.8.

<sup>66</sup> *Id.* at 729.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 729–30.

<sup>70</sup> See *United States v. Virginia*, 518 U.S. 515 (1996).

<sup>71</sup> *Id.* at 520.

<sup>72</sup> *Id.* at 522.

<sup>73</sup> *Id.* at 549.

<sup>74</sup> *Id.* at 550.

<sup>75</sup> *Id.* (emphasis in original).

<sup>76</sup> *Id.*

tion Clause should, Justice Ginsburg felt, protect opportunities for those few women to do the unconventional and define themselves as VMI cadets.

Sometimes the Court's dedication to protect the right of self-definition is less obvious, but no less present. Consider *Craig v. Boren*, the first case where the Court agreed that intermediate review should apply for legal classifications based on gender.<sup>77</sup> Oklahoma had permitted females who were at least 19 years old to purchase 3.2 percent alcohol beer while requiring males to wait until 21 years of age.<sup>78</sup> The state justified the difference based on state arrest records that showed a 2 percent arrest rate for drunk driving among males in the age group and a .18 percent rate among females.<sup>79</sup> Writing for the Court, Justice Brennan asserted that such disparity "hardly" formed the basis for the gender discrimination against males;<sup>80</sup> it was an "unduly tenuous 'fit,'" he demurred.<sup>81</sup> But look again at Oklahoma's statistical inference. A two percent arrest rate for boys versus a .18 percent rate for girls meant that boys were arrested *ten times* more often than girls for driving drunk.<sup>82</sup> That Justice Brennan dismissed this disparity tellingly illustrates the Court's fear that stereotypes can unduly limit the ways that females wish to define themselves. Unhappily, Justice Brennan consigned his explanation to a brief footnote: "The very social stereotypes that find reflection in age-differential laws . . . are likely substantially to distort the accuracy of these comparative statistics" such that "'reckless' young men who drink and drive are transformed into arrest statistics, whereas their female counterparts are chivalrously escorted home."<sup>83</sup>

If the Equal Protection Clause can be characterized as protecting a woman's right to define herself, should the right also extend to men? I take up this question in the next section.

## II. THE EXPECTATION FOR MEN TO BE COURAGEOUS

As odd (or vexing) as it may first seem, the proposition that men should also be protected by the Equal Protection Clause finds support from both the Constitution and the Supreme Court. Most plainly, the text of the Equal Protection Clause does not limit itself to females: "No State shall . . . deny to any *person* within its jurisdiction the equal protection of the laws."<sup>84</sup> So, too, Justice Ginsburg, hardly the foe of women's empowerment, acknowledged in her majority opinion in *Virginia* that the Court should not abide gender differences that work to the "denigration of the members of *either*

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<sup>77</sup> *Craig v. Boren*, 429 U.S. 190 (1976).

<sup>78</sup> *Id.* at 191-92.

<sup>79</sup> *Id.* at 223.

<sup>80</sup> *Id.* at 201.

<sup>81</sup> *Id.* at 202.

<sup>82</sup> *Id.* at 223.

<sup>83</sup> *Id.* at 202 n.14.

<sup>84</sup> U.S. CONST. amend. XIV (emphasis added).

sex or . . . artificial constraints on an *individual's* opportunity.”<sup>85</sup> Unfortunately, Justice Ginsburg never elaborates what this more expansive jurisprudence might look like.

This lack of explication is unfortunate because men are also bound by stereotypes that unduly constrain them from exercising control over how they wish to define themselves. None is more palpable than the stereotype that men, to be considered men, must prove that they are courageous. So embedded is the assumption that “[c]ourage and notions of manhood [are] inseparable, the very word for courage in many languages deriv[es] from the word for man.”<sup>86</sup> William Ian Miller offers this etymology:

[I]t is nearly impossible to speak of [courage] without invoking male body parts or the word for man itself. Greek *andreia* (courage, literally manliness) is derived from the stem *andr-* (adult male). The Hebrew root G-B(V)-R (man) yields GEV(B)URA (courage). Latin *vir* (man) gives us “virtue”; although in modern English “virtue” has come to indicate general moral excellence, it used to mean, more narrowly, in earlier English as well as in Latin (*virtus*), courage, valor, forcefulness, strength, manliness.<sup>87</sup>

None of this is to suggest, of course, that women cannot possess courage; many women do and many men do not.<sup>88</sup> It is rather that “men to be men . . . must be courageous; otherwise they are like women, only lower.”<sup>89</sup> As Miller comments: “Cowardly men are allowed none of the virtues women have for being women, and they are understood to be embarrassments *as much to women* as they are to men.”<sup>90</sup> “To call someone a ‘sissy’ or a ‘pussy,’” Miller continues, “is really to create a new entity, not woman, not man, but a womanly man, an un-man.”<sup>91</sup> Consider that “it is nearly impossible to speak of [courage] without invoking male body parts,” or, more specifically, the coarse idioms for such parts.<sup>92</sup> No less an authority than the *Oxford English Dictionary* defines “balls” as “[c]ourage, determination; (manly) power or strength; masculinity.”<sup>93</sup> “Ballsy” is defined by the dictionary as “[c]ourageous, plucky; determined, spirited.”<sup>94</sup> On the other

<sup>85</sup> *United States v. Virginia*, 518 U.S. 515, 533 (1996) (emphasis added).

<sup>86</sup> WILLIAM IAN MILLER, *THE MYSTERY OF COURAGE* 13 (2000).

<sup>87</sup> *Id.* at 233 (citation omitted). See also RICHARD HOLMES, *ACTS OF WAR: THE BEHAVIOR OF MEN IN BATTLE* 143 (1985) (“For many centuries physical courage was a gentleman’s essential attribute, and failure to display it would be certain to result in social ostracism.”); HARVEY C. MANSFIELD, *MANLINESS* 18 (2006) (“The Greek word for manliness, *andreia*, is also the word the Greeks used for courage, the virtue concerned with controlling fear.”).

<sup>88</sup> MILLER, *supra* note 86, at 234.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* (emphasis added).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 233.

<sup>93</sup> 1 *OXFORD ENGLISH DICTIONARY* 904 (2d ed. 1989).

<sup>94</sup> *Id.* at 913.

hand, to call a man a “pussy” is to deride him as a coward.<sup>95</sup> Applauding a brave woman for having “balls” is thus an ungraciously barbed compliment that, while paying homage to her person, nonetheless evinces oblique contempt for her craven gender.

As the anthropologist David Gilmore observes, there exists a persistent pattern among cultures throughout the world where young men are initiated into manhood through tests of physical danger.

In particular, there is a constantly recurring notion that real manhood is different from simple anatomical maleness, that it is not a natural condition that comes about spontaneously through biological maturation but rather is a precarious or artificial state that boys *must* win against *powerful* odds. This recurrent notion that manhood is problematic, a critical threshold that boys *must* pass through testing, is found at all levels of sociocultural development regardless of what other alternative roles are recognized.<sup>96</sup>

This mentality, so pervasive, is found in geographically disparate cultures around the world.<sup>97</sup> The residents of Truk Island in the South Pacific believe, according to Professor Gilmore, that men should “take risks with life and limb and . . . think ‘strong’ or ‘manly’ thoughts, as the natives put it.”<sup>98</sup> Men thus “challenge fate by going on deep-sea fishing expeditions in tiny dug-outs and spearfishing with foolhardy abandon in shark-infested waters.”<sup>99</sup> During weekends, Professor Gilmore continues, young Trukese men get drunk and fight “to attain a manly image.”<sup>100</sup> Those males in Trukese culture who sheepishly cop out are taunted: “Are you a man? Come, I will take your life now.”<sup>101</sup> On the other side of the world in the Greek Aegean island of Kalymnos, male divers scorn diving gear, a risky gamble that causes many to be “crippled by the bends for life.”<sup>102</sup> Those men who take sensible precautions are mocked as “effeminate” and “scorned and ridiculed by their fellows.”<sup>103</sup>

Those who believe that boys in the developing world are happily spared the horrors of female circumcision required of their sisters will find it useful to know that in East Africa, the boys from the cattle-herding tribes of the Masai, Rendille, Jie, and Samburu are separated “from their mothers and

<sup>95</sup> MILLER, *supra* note 86, at 233–34.

<sup>96</sup> DAVID D. GILMORE, *MANHOOD IN THE MAKING: CULTURAL CONCEPTS OF MASCULINITY* 11 (1990) (emphasis added).

<sup>97</sup> *Id.* Gilmore adds: “[A test for manhood] is found among the simplest hunters and fishermen, among peasants and sophisticated urbanized peoples; it is found in all continents and environments. It is found among both warrior peoples and those who have never killed in anger.” *Id.*

<sup>98</sup> *Id.* at 12.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

subjected at the outset of adolescence to bloody circumcision rites by which they become true men.”<sup>104</sup> The boys

must submit without so much as flinching under the agony of the knife. If a boy cries out while his flesh is being cut, if he so much as blinks an eye or turns his head, he is shamed for life as unworthy of manhood, and his entire lineage is shamed as a nursery of weaklings.<sup>105</sup>

In Ethiopia, the Amhara tribe insist that men must “never back[ ] down when threatened.”<sup>106</sup> To prove their manhood, Amhara youth “are forced to engage in whipping contests called *buhe*.”<sup>107</sup> During the ceremony, “[f]aces are lacerated, ears torn open, and red and bleeding welts appear.”<sup>108</sup> For good measure, the boys “are wont to prove their virility by scarring their arms with red-hot embers.”<sup>109</sup> At the same time, “[a]ny sign of weakness is greeted with taunts and mockery.”<sup>110</sup>

The seemingly barbaric rites of the Amhara tribe may seem nonexistent in contemporary America, but self-congratulation is unwarranted. We have our own ceremonies of male valor that entail violence. Football at the high school, college, and professional levels is a spectacle where we revel in performances of courage. While football may not require branding one’s arms with red-hot embers, its physical toll may be far worse—evidenced by the number of concussions and the amount of permanent brain damage that the NFL has kept quiet over the years but that is now coming to the fore.<sup>111</sup> Similar remarks may be made of hockey,<sup>112</sup> boxing,<sup>113</sup> and ultimate fight-

<sup>104</sup> *Id.* at 13.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> See Malcolm Gladwell, *Offensive Play: How different are dogfighting and football?*, NEW YORKER, Oct. 19, 2009, at 50; Ken Hambleton, *Trauma of concussions lingers in athletes, families: Educating coaches, parents can help to prevent tragedies*, LINCOLN J. STAR, July 26, 1998, at C1; Alan Schwarz, *Dementia Risk Seen in Players in N.F.L. Study*, N.Y. TIMES, Sept. 30, 2009, at A1; Alan Schwarz, *N.F.L. Acknowledges Long-Term Concussion Effects*, N.Y. TIMES, Dec. 21, 2009, at D1; Alan Schwarz, *Redirecting the Debate on Brain Injuries*, N.Y. TIMES, Dec. 27, 2009, at SP9; Alan Schwarz, *Study of Ex-N.F.L. Players Ties Concussion to Depression Risk*, N.Y. TIMES, May 31, 2007, at A1.

<sup>112</sup> Dr. Gifford-Jones, *Big hits in hockey, football can cause brain injury*, WATERLOO REGION REC., Oct. 2, 2009, at C2; Hambleton, *supra* note 111; Alan Schwarz & Jeff Z. Klein, *Brain Damage Found in Hockey Player*, N.Y. TIMES, Dec. 18, 2009, at B11.

<sup>113</sup> See Chicago Tribune, Editorial, *Let’s Put a Stop to Boxing Injuries*, GREENSBORO NEWS & REC., Apr. 10, 1998, at A15; Morag McKinnon, *What drove Bruno over the edge?*, EVENING NEWS (Edinburgh), Sept. 24, 2003, at 20; John Noble Wilford, *Physicians’ Journal Calls for a Ban on Boxing*, N.Y. TIMES, Jan. 14, 1983, at A1; William Winslade, *Save brains by banning boxing*, DALLAS MORNING NEWS, July 24, 1998, at 35A.

ing,<sup>114</sup> the latter two sports having as their formal expectation that men will be brave enough to inflict and endure massive pain and devastating injuries. Then there is the celebration of manly courage in movies, books, and television shows, as men are cast as characters who bravely fight for mortal stakes. An uncanny example of life imitating art is the proliferation of “fight clubs”—modeled after the movie *Fight Club*—where young male professionals pummel each other with bare fists, break their noses, and are sent to emergency rooms.<sup>115</sup>

But exotic examples are unnecessary, for familiar examples abound in our schools. At the grade school level, male students are readily familiar with the aphorisms that “boys don’t cry” and that they should “take it like a man.”<sup>116</sup> Failure to comply with these maxims can provoke insults that are imbued with ascriptions of cowardice: wimp, faggot, dork, nerd, girl, gay, Mama’s boy.<sup>117</sup> These harsh epithets are meant to patrol a culture where boys must act tough and brave while those who are bookish and feminine are put on notice. Even at the level of elite colleges, manliness as courage is readily accepted by none other than the former President of the United States, George W. Bush. While a student at Yale, he defended skin branding by his fraternity, Delta Kappa Epsilon, as “‘only a cigarette burn.’”<sup>118</sup> Indeed, Professor Michael Kimmel recounts rites of manhood among middle class American college men that may very well appall those East African tribes that subject their boys to branding and the like:

In 1967, the *New York Times* and the *Yale Daily News* reacted with mortified disdain to stories about fraternity branding; today, hundreds of pledges are ritually branded every year with nary an eyebrow raised. Emergency rooms at campus-based hospitals bulge with alcohol-related injuries and illnesses virtually every weekend, and they overflow during pledge week events. *At least one pledge has died during some campus-based event every year for the past decade.*<sup>119</sup>

Besides tests of intense drinking, fraternity brothers initiate new recruits with torturous ceremonies involving physical and psychological abuse that would surely qualify as violations of the Eighth Amendment were the gov-

<sup>114</sup> Jon Anderson & Danny Buttler, *Fighters kick up a fuss*, HERALD SUN (Melbourne), Oct. 25, 2003, at 5; Editorial, *Violent to the Max: Few Rules Apply to Bare-Knuckle Brawlers*, COLUMBUS DISPATCH, Dec. 2, 1995, at 8A; Doug Segrest, *The Ultimate Controversy: A Violent Sport Banned in Other Places Finds a Haven in Alabama*, BIRMINGHAM NEWS, July 27, 1997, at 1.

<sup>115</sup> Jordan Robertson, *Tough Techies: Adult Fight Clubs Operate under Radar*, JOURNAL-GAZETTE (Ft. Wayne, Ind.), June 6, 2006, at 1D.

<sup>116</sup> MICHAEL KIMMEL, GUYLAND: THE PERILOUS WORLD WHERE BOYS BECOME MEN 45 (2008).

<sup>117</sup> *Id.* at 48.

<sup>118</sup> *Id.* at 111.

<sup>119</sup> *Id.* at 17 (emphasis added).

ernment to administer them on citizens.<sup>120</sup> The recruits, however, because they are not quite men by disposition and experience, embrace these opportunities to show that they are “real men.”<sup>121</sup> Like the young Trukese men who pummel each other and swim in shark-infested waters, many young men in America see no other means to prove manhood than through behavior that tests their physical courage.

What makes courage “manly,” then, is the prospect of danger, especially physical danger, and even death. It is an axiom that does more than inform our society; judges rely on it to make sense of and to regulate that society. Dissenting in the VMI case, Justice Scalia remarked that all first year cadets were required to have in their possession at all times a pamphlet containing “The Code of a Gentleman.”<sup>122</sup> The Code listed rules for male behavior that would have been at home in Justice Bradley’s cosmology where man was woman’s “protector and defender.”<sup>123</sup> A gentleman, the Code enjoined, “[d]oes not go to a lady’s house if he is affected by alcohol. . . . Does not hail a lady from a club window. . . . Does not slap strangers on the back nor so much as lay a finger on a lady.”<sup>124</sup> Justice Scalia bitterly reflected that “it is precisely VMI’s attachment to such old-fashioned concepts as manly ‘honor’ that has made it, and the system it represents, the target of those who today succeed in abolishing public single-sex education.”<sup>125</sup> The referenced manly honor rested indispensably on courage. With perspicuous approval, Justice Scalia quoted from the Code of the Gentleman: “‘The honor of a gentleman demands the inviolability of his word, and the incorruptibility of his principles. He is the descendant of the knight, the crusader; he is the defender of the defenseless and the champion of justice . . . or he is not a Gentleman.’”<sup>126</sup> The VMI gentleman, it seems, is more than a chap with good manners. He is a fighter: the “defender of the defenseless and the champion of justice.”<sup>127</sup> Indeed, as the Code of the Gentleman makes clear, his is no mere courage; it is the rare and mythic courage of the *knight*, the *crusader*, and hence, that which logically courts violence and death.

Justice Scalia’s opinion is not unique in its expectation that men be courageous. Read how a similar perspective is reproduced in *Fairbanks v. United States*,<sup>128</sup> a 1936 federal court case from Montana. Fairbanks was a World War I veteran who sought governmental insurance benefits for having allegedly suffered permanent disability from combat.<sup>129</sup> Judge Pray, in a

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<sup>120</sup> *Id.* at 96–97.

<sup>121</sup> *Id.*

<sup>122</sup> *United States v. Virginia*, 518 U.S. 515, 601–02 (1996) (Scalia, J., dissenting).

<sup>123</sup> *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring).

<sup>124</sup> *Virginia*, 518 U.S. at 602–03 (Scalia, J., dissenting).

<sup>125</sup> *Id.* at 601.

<sup>126</sup> *Id.* at 602.

<sup>127</sup> *Id.*

<sup>128</sup> *Fairbanks v. United States*, 17 F. Supp. 550 (D. Mont. 1936).

<sup>129</sup> *Id.* at 551.

juryless trial, rejected the government's contention that Fairbanks, the veteran, was not permanently disabled.<sup>130</sup> The judge's admiring, if melodramatic, rationale read:

This soldier volunteered on a mission that required great courage and was almost certain to end in death or serious bodily injury. He escaped with his life, but was literally shot to pieces . . . . Counsel for the government refer to his healthy appearance on the witness stand; it is true that his appearance and speech betokened the *same manly courage* that marked his career as a *soldier*; he apparently tried to walk erect and without limping. . . . [B]ut the strained expression of his face and the restless movements of his body while testifying suggested a history of physical disability, as the evidence later disclosed . . . .<sup>131</sup>

Courage is obviously not the exclusive province of men, but Judge Pray gendered courage as "manly" by symbolically connecting it with the physical valor of a soldier who volunteered for a mission that was "almost certain to end in death or serious bodily injury."<sup>132</sup>

Courts have also stipulated, for example, that a man who attacks another in self-defense is required to demonstrate that, in lieu of a coward's twitchy trigger finger, he had the courage of a reasonable man and thus exercised a measured self-restraint in the face of physical danger.<sup>133</sup>

Such admonishment, in principle, is perfectly sensible, but the rhetoric used by some courts is conspicuously preoccupied with gender conformity. The Supreme Court of Georgia in *Wheeler v. State* approved the following jury instructions:

A bare fear of any of those offenses to prevent which the homicide is alleged to have been committed shall not be sufficient to justify the killing . . . . To justify a homicide the fears of the slayer must be those of a reasonable man, one reasonably courageous, . . . and not those of a coward.<sup>134</sup>

Note the sharp dichotomy: you are either a "reasonably courageous" man or a "coward." And if the former, you have to *prove it* by acting like *other* courageous men. Likewise, the Pennsylvania Supreme Court upheld the trial court's jury instruction that a claim of self-defense required some perception of imminent danger "'in the mind of a reasonable and ordinarily courageous man."<sup>135</sup> The Michigan Supreme Court in *People v. Lennon* also stated:

<sup>130</sup> *Id.* at 553.

<sup>131</sup> *Id.* (emphasis added).

<sup>132</sup> *Id.*

<sup>133</sup> See *infra* notes 134–136 and accompanying text.

<sup>134</sup> *Wheeler v. State*, 175 S.E. 540, 541–42 (Ga. 1934).

<sup>135</sup> *Commonwealth v. Weinberg*, 120 A. 406, 407 (Pa. 1923).

[I]f a man kills . . . through mere cowardice, or under circumstances not warranted to induce in his mind a reasonable fear of injury, and which would be considered to arise from a want of courage, or an unwarrantable cowardice under the circumstances, . . . the law of self-defense would not apply, and would not justify such an act.<sup>136</sup>

Here again, men are expected to be courageous like other men before they can act on a perceived threat.

Note, too, what is conventionally cheered as the most important judicial exposition of free speech: Justice Louis Brandeis's concurrence in *Whitney v. California*.<sup>137</sup> Justice Brandeis tersely summarized that in American colonial history, "[m]en feared witches and burnt women."<sup>138</sup> For him, "[i]t is the function of speech to free men from the bondage of irrational fears."<sup>139</sup> But free speech was insufficient; according to Justice Brandeis, it needed the help of courage. The Founding Fathers, Justice Brandeis argued, "believed liberty to be the secret of happiness and courage to be the secret of liberty."<sup>140</sup> It is this courage that will "make men free to develop their faculties" such that "the deliberative forces should prevail over the arbitrary."<sup>141</sup> Men, not women, are charged by Justice Brandeis with the duty of courage. Women exist for him as objects, whether witches or otherwise, to be acted upon by (hopefully courageous) men.<sup>142</sup>

In the different flora of constitutional criminal procedure, Judge McGowan, writing in 1977 for the D.C. Circuit Court of Appeals, upheld a warrantless entry by police officers who obtained evidence that the defendant was in unlawful possession of narcotics.<sup>143</sup> He justified the constitu-

<sup>136</sup> *People v. Lennon*, 38 N.W. 871, 872 (Mich. 1888).

<sup>137</sup> *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

<sup>138</sup> *Id.* at 376.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 375.

<sup>141</sup> *Id.*

<sup>142</sup> Later, Justice Brandeis couples "self-reliance" and "fearlessness" with manly courage:

To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion.

*Id.* at 377. Brandeis elsewhere associated manly courage with heroism:

They cannot be worthy of the respect and admiration of the people unless they add to the virtue of obedience some other virtues—the virtues of *manliness*, of truth, of courage, of willingness to risk positions, of the willingness to risk criticism, of the willingness to risk the misunderstandings that so often come when people do the *heroic* thing.

ALPHEUS THOMAS MASON, *BRANDEIS: A FREE MAN'S LIFE* 281 (1956) (emphasis added).

<sup>143</sup> *United States v. Johnson*, 561 F.2d 832, 842–43 (D.C. Cir. 1977).

tionality of the search in part by calling attention to the police officers' "manly courage":

In the last five years in the United States, 640 police officers were feloniously killed in the performance of their duties. Their "peer-ing" into windows and entering on strange premises, when reasonable suspicion brings them there in exigent circumstances, could save the lives and property of the occupants of the house. That is not duty for the fainthearted and many intentionally avoid it, but the men who have the ability and the *manly courage* to respond in such dangerous imperative emergencies should not be branded as "trespassing prowlers" . . . and the law does not do so. . . . [Police officers] are the friends, not the enemies of the law-abiding citizen.<sup>144</sup>

Not just in our casual parlance, then, but also by judges is manly courage distinguished by its proximity to physical danger.

Even seemingly prosaic cases like the previously reviewed *Craig v. Boren* signal subtle but meaningful stereotypes about men as courageous. *Craig*, you will remember, involved an Oklahoma law that permitted girls, but not boys, to purchase 3.2% alcohol once they were 18 years old.<sup>145</sup> Oklahoma had dutifully presented empirical evidence to suggest that boys were much more likely to drive while drunk.<sup>146</sup> Justice Brennan, writing for the Court, dismissed these findings, partly because they may have been skewed by stereotyped behavior. "The very social stereotypes that find reflection in age-differential laws . . . are likely substantially to distort the accuracy of these comparative statistics" such that "'reckless' young men who drink and drive are transformed into arrest statistics, whereas their female counterparts are chivalrously escorted home."<sup>147</sup> Such chivalrous conduct, and its muted sheen of protective courage, echoes VMI's formal pronouncement that gentlemen should possess the chivalrous courage of the knight. There is an alternative reading of Oklahoma's statistics, however. Boys may be more likely to drive while drunk because they want to show that they are brave. Professor Kimmel offers this observation: "Men ages 19 to 29 are three times less likely to wear seat belts than women the same age. . . . Ninety percent of all driving offenses, excluding parking violations, are committed by men, and 93 percent of road ragers are male."<sup>148</sup> The disparity implies that for young men, "[s]afety is emasculating! So they drink too much, drive too fast, and play chicken in a multitude of dangerous venues."<sup>149</sup>

<sup>144</sup> *Id.* at 849 (emphasis added) (citation omitted).

<sup>145</sup> *Craig v. Boren*, 429 U.S. 190, 191–92 (1976).

<sup>146</sup> *Id.* at 201.

<sup>147</sup> *Id.* at 202 n.14.

<sup>148</sup> KIMMEL, *supra* note 116, at 51.

<sup>149</sup> *Id.*

No venue, however, is more dangerous, and thus more perfect, for the performance of male courage than the theater of war. Accordingly, I turn next and for the rest of the Article to combat and its related issues.

### III. COMBAT AND COURAGE

What is the role of the law, in the context of the military, in reinforcing stereotypes about men as courageous? Theoretically, female soldiers can be punished for cowardice,<sup>150</sup> but, so far, none have, as though martial courage were only expected of men.<sup>151</sup> On the other hand, two of the most publicized military cases in recent memory involved the first woman B-52 bomber pilot, Kelly Flinn, and Lt. Colonel Karen Tew, both court marshaled, not for lacking the male virtue of courage, but for having sexual relations with male soldiers.<sup>152</sup> The two female officers were thus punished for being absent the virtue that is chiefly ascribed to women—chastity.<sup>153</sup> Perhaps, as suggested by some observers, the ultimate evidence that women have gained full equality with men will be the day when the military executes women soldiers for cowardice,<sup>154</sup> as it did with one male soldier in World War II.<sup>155</sup>

In doling out punishment for cowardice, the military relies on 10 U.S.C. § 899, which codifies Article 99 of the Uniform Code of Military Justice (“UCMJ”).<sup>156</sup> Dispassionately titled “Misbehavior before the enemy,” Article 99 seeks to discern that most emasculating of states, cowardice:

§ 899. Art. 99. Misbehavior before the enemy

Any member of the armed forces who before or in the presence of the enemy—

- (1) runs away;
- (2) shamefully abandons, surrenders, or delivers up any command, unit, place, or military property which it is his duty to defend;
- (3) through disobedience, neglect, or intentional misconduct endangers the safety of any such command, unit, place, or military property;
- (4) casts away his arms or ammunition;
- (5) *is guilty of cowardly conduct*; . . .

shall be punished by death or such other punishment as a court-martial may direct.<sup>157</sup>

<sup>150</sup> Uniform Code of Military Justice, Art. 99, 10 U.S.C. § 899 (2006).

<sup>151</sup> A search of the cases in Lexis and Westlaw does not turn up a single instance of a female soldier having been prosecuted for “cowardice” under Article 99.

<sup>152</sup> MILLER, *supra* note 86, at 253.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 252.

<sup>155</sup> HOLMES, *supra* note 87, at 339.

<sup>156</sup> Uniform Code of Military Justice, Art. 99, 10 U.S.C. § 899 (2006).

<sup>157</sup> *Id.* (emphasis added).

Consider the rhetoric of Article 99. Article 99 is meant to instill men with fear of losing their manhood. Under Article 99, they can be found “guilty of cowardly conduct”: they can be *officially* branded as cowards. Punishment will be inflicted on those who “shamefully” surrender (Section 2) and thus are “guilty of *cowardly* conduct” (Section 5). The moralistic descriptors “shamefully” and “cowardly” make Article 99 look less like an administrative protocol than an official evaluation of the soldier’s manliness. Worse, the imprimatur of cowardice is the product of a formal judicial examination, with the trappings of objectivity and evidence. Once convicted, you are correspondingly a coward in some objective, formal sense. So intolerant is the military of men who are cowards that Article 99 permits punishment “by death.”<sup>158</sup> Courage, the signal virtue of manliness, is forced upon men—and, so far, men alone—while cowardice is punished with death, a dramatic enforcement of a gender stereotype.<sup>159</sup>

### A. *The Selective Service and Ground Combat*

Even before entering the military, the law makes demands on men who are expected to be brave by virtue of their gender. The federal prohibition against women serving in direct ground combat is a powerful reminder that America still expects men to be courageous. Without having directly ruled on the constitutionality of the exclusion, the Supreme Court has lent its indi-

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<sup>158</sup> It is true, however, that only one American has been executed for cowardice since World War II. HOLMES, *supra* note 87, at 339.

<sup>159</sup> Although only one man has been executed by the military for “cowardice,” other men have been issued less severe punishments. *Id.* The following are cases where the military court found evidence of “cowardice” by male soldiers under Article 99: *United States v. Brewer*, 39 C.M.R. 388, 393 (C.M.A. 1968) (assigning punishment of hard labor for one year, forfeiture of all pay and allowances, and reduction to the grade of Private E-1); *United States v. Gross*, 38 C.M.R. 408, 409 (C.M.A. 1968) (affirming board of review’s decision for punitive discharge plus hard labor for two years); *United States v. Williams*, 38 C.M.R. 156, 157, 161 (C.M.A. 1968) (affirming board of review’s punishment for dishonorable discharge and confinement at hard labor for three years); *United States v. Richmond*, 11 C.M.R. 442, 442–44 (C.M.A. 1962) (affirming board of review’s punishment for dishonorable discharge, total forfeiture, and confinement for six months); *United States v. Meirthew*, 11 C.M.R. 450, 453–54 (C.M.A. 1953) (affirming board of review’s punishment for dishonorable discharge, total forfeitures, and confinement at hard labor for three years); *United States v. Heistand*, 3 C.M.R. 209, 211 (C.M.A. 1952) (affirming board of review’s punishment for dishonorable discharge, total forfeitures, and confinement at hard labor for fifteen years); *United States v. Mercer*, 2 C.M.R. 420, 424 (C.M.A. 1952) (affirming board of review’s punishment for dishonorable discharge, total forfeitures of pay and allowances, and confinement at hard labor for twenty years); *United States v. Roberts*, 2 C.M.R. 462, 464 (C.M.A. 1952) (affirming board of review’s decision for dishonorable discharge, total forfeiture of pay and allowances, and confinement at hard labor for 15 years); *United States v. Soukup*, 2 C.M.R. 393, 395 (C.M.A. 1952) (affirming board of review’s punishment for dishonorable discharge, total forfeitures, and confinement at hard labor for fifteen years); *United States v. Vineyard*, 2 C.M.R. 346, 348 (C.M.A. 1952) (affirming the board of review’s punishment of dishonorable discharge, total forfeitures of pay and allowances, and confinement at hard labor for fifteen years).

rect support. In *Rostker v. Goldberg*, the Court decided that Congress, in restricting the military's Selective Service registration to men, did not violate the equal protection component of the Fifth Amendment Due Process Clause.<sup>160</sup> The Court reasoned that because only men were permitted by federal law to engage in combat, the Selective Service, in furtherance of this exclusion of women, could justifiably also be limited to men.<sup>161</sup>

An authority marshaled by the Court was the 1980 report by the Senate Committee on Armed Services. According to the report, which was adopted by both Houses of Congress,<sup>162</sup> "[t]he policy precluding the use of women in combat is, in the committee's view, the most important reason for not including women in a registration system."<sup>163</sup> "The principle," the report observed, "that women should not intentionally and routinely engage in combat is fundamental, and enjoys wide support among our people."<sup>164</sup> So strong is this support that "the committee feels that any attempt to assign women to combat positions could affect the national resolve at the time of mobilization, a time of great strain on all aspects of the Nation's resources."<sup>165</sup>

Behind these explicit remarks about women is also an implicit message about men: sending men to face the terror of violent death and the corollary terror of having to kill would not hurt the "national resolve" because men are expected to submit themselves to such suffering. The committee report avoids advancing this premise directly, opting initially for portentous warnings.

Finally, the committee finds that there are important *societal* reasons for not changing our present male-only system of registration and induction. The question of who should be required to fight for the Nation and how best to accomplish that end is a social issue of the *highest* order, with *sweeping* implications for *our society*.<sup>166</sup>

A testament to the strength of the gender stereotype, the report believed that sending women to combat would threaten that most fundamental of social organizations, the family: "In addition to the military reasons, which the committee finds compelling, witnesses representing a variety of groups testified before the subcommittee that drafting women would place *unprecedented strains on family life*, whether in peacetime or in time of

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<sup>160</sup> *Rostker v. Goldberg*, 453 U.S. 57, 78–79 (1981).

<sup>161</sup> *Id.* at 77–78.

<sup>162</sup> *Id.* at 65.

<sup>163</sup> S. REP. NO. 96-826, at 157 (1980), *reprinted in* 1980 U.S.C.C.A.N 2612, 2647.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 159, *reprinted in* 1980 U.S.C.C.A.N 2612, 2649 (emphasis added).

emergency.”<sup>167</sup> The logic on offer here assumes that sending men to fight—and die—in war would not present an equivalent strain on family life.

Taken straightforwardly, this would seem a baffling conjecture. If a male soldier dies in war or suffers terrible injuries, his wife and children would be devastated, and if the soldier were the chief breadwinner, the family would suffer gripping financial harms. It cannot be—how could it be?—that the war deaths of fathers, sons, and brothers are less likely to place “unprecedented strains on family life” than the deaths of mothers, daughters, and sisters? The report makes a bid for clarification:

A decision which would result in a young mother being drafted and a young father remaining home with the family in a time of national emergency cannot be taken lightly, nor its broader implications ignored. The committee is strongly of the view that such a result, which would occur if women were registered and inducted under the administration plan, is unwise and unacceptable to a large majority of our people.<sup>168</sup>

What makes the hypothetical “unacceptable to a large majority of our people” is not that the war death of the young father is less likely to put “unprecedented strains” on his family than the war death of the young mother. It is, I suspect, that the former’s death comports with what society expects men to do in times of peril. Our hypothetical young father who must die violently in war resonates with—indeed, exemplifies—the gendered etymology of courage as a derivation of “man.”

This connection is explicitly defended by military leaders in the 1992 hearings by the House Committee on Armed Services, which also deliberated the issue of excluding women from combat.<sup>169</sup> General McPeak delivered some frank comments. He admitted that excluding women from combat worked to their disadvantage in terms of promotion as career military officers.<sup>170</sup> He also conceded, “I couldn’t think of a logical reason, a logical argument, for defending a policy of excluding women from combat assignments.”<sup>171</sup> Notwithstanding this loss, General McPeak declared that “[c]ombat is about killing people; and I am afraid that even though logic tells us that women can do that as well as men, I have a very traditional attitude about wives and mothers and daughters being ordered to kill people.”<sup>172</sup> Killing people is ugly business, as everyone knows, something that, when one is afraid or not fueled by propulsive rage, can require uncommon

<sup>167</sup> *Id.* (emphasis added).

<sup>168</sup> *Id.*

<sup>169</sup> *Gender Discrimination in the Military: Hearings Before the Subcomm. on Military Personnel and Compensation and the Defense Policy Panel of the H. Comm. on Armed Services*, 102d Cong. (1992).

<sup>170</sup> *Id.* at 78 (response of General Merrill A. McPeak, Chief of Staff, U.S. Air Force to question by Rep. Les Aspin, Chairman, Defense Policy Panel).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

courage. So the traditional attitude referenced by General McPeak draws from the cultural stereotype that men have the courage to kill while women do not. That the stereotype, like many stereotypes, gathers social power in the absence of proof does not inhibit General McPeak from stating: “The fact that my position doesn’t really meet everybody’s strict evidence standards for logic really doesn’t bother me all that much.”<sup>173</sup> General Mundy, Commandant of Marines, also suggested that killing probably required the sort of physical courage that was wanting in women.

[W]hen you get right down to it, as General McPeak just said, “combat” is killing. “Combat” in the sense that we usually associate with the direct combat role is looking another human being in the eye and killing him. It is not a pleasant job. It is not done with a precision-guided munition in all cases. Sometimes, it is done with your hands. It is done with a shovel. It is done at close range. It is not good. It is debasing.<sup>174</sup>

It may be debasing but, for the same reason, it requires a courage that is exquisite, a courage that, in General Mundy’s view, only men possess. “It is something,” he explained at the hearing, “that I would not want to see women involved in and for which I do not believe—and I am grateful that this is my perception—that women are suited to do.”<sup>175</sup>

Also included in the hearing record, without objection, was a 1992 article by Colonel John Ripley, a highly decorated Marine and then president of Southern Seminary College.<sup>176</sup> Arguing spiritedly against women in combat, Colonel Ripley recounted a helicopter crash that he suffered in Vietnam: “It took not only brute physical strength to move man after man from that aircraft into another; it also took coping with overwhelming physiological pressure to continue this grisly work—removing legs and parts of other bodies from the cockpit.”<sup>177</sup> The example was meant to be a pedagogic reminder that bravery was properly expected of men alone. “I won’t tell you,” Colonel Ripley continued,

that women do not have courage. Every mother has courage. I will not tell you that women do not have strength. Women have strength sometimes beyond description—certainly strength of character. I will tell you, however, that the combination of

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<sup>173</sup> *Id.* at 79.

<sup>174</sup> *Id.* (response of General Carl E. Mundy, Jr., Commandant, U.S. Marine Corps to question by Rep. Les Aspin, Chairman, Defense Policy Panel).

<sup>175</sup> *Id.*

<sup>176</sup> Col. John W. Ripley, *Women in Combat? A Marine Veteran Says, Simply, No*, MARINE CORPS GAZETTE, Nov. 1992, at 16, reprinted in *Gender Discrimination in the Military: Hearings Before the Subcomm. on Military Personnel and Compensation and the Defense Policy Panel of the H. Comm. on Armed Services*, 102d Cong. 81 (1992).

<sup>177</sup> *Id.* at 17, reprinted in *Gender Discrimination in the Military: Hearings Before the Subcomm. on Military Personnel and Compensation and the Defense Policy Panel of the H. Comm. on Armed Services*, 102d Cong. 82 (1992).

strength, courage, and suppression of emotion that is required on a daily—on an *hourly*—basis on the battlefield is rare indeed. It is rare in the species, and it is not normally found in the female.<sup>178</sup>

It is also not normally found in the male; hence the need for the Selective Service.

### B. *Afraid of Appearing Afraid*

Because men are expected to be courageous, they also are dogged by the fear of seeming or feeling cowardly. This relentless paradox often restricts the ability of men to assay a diversity of choices about who they wish to be. Recall once more Justice Ginsburg's comment in the VMI case that the Equal Protection Clause forbids "denigration of the members of either sex or . . . artificial constraints on an individual's opportunity."<sup>179</sup> To expect men to be courageous is obviously not to "denigrate" them. It is to place them on a pedestal of sorts, but a pedestal that they may have secretly dreaded or, if coveted initially, one from which, after realizing the terrifying costs of manly courage, they may not be able to climb down without excruciating shame and irredeemable disgrace. Justice Brennan had remarked in *Frontiero* that legal discrimination against women was "rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."<sup>180</sup>

Women, however, are not alone in feeling as though gender stereotypes consign them to a cage. Men may feel similarly restricted in having to adhere to the norms of courage that constitute the core of manliness. Consider the novelist Tim O'Brien's narrative as a draftee in the Vietnam War. He describes the last night in his small Minnesota hometown before having to report for basic training the next morning. Although the potential horrors of war frightened him, O'Brien was more afraid to dodge the draft: "I also feared . . . inevitable chaos, censure, embarrassment, the end of everything that had happened in my life, the end of it all."<sup>181</sup> After basic training, O'Brien contemplates fleeing to Sweden.<sup>182</sup> After a night of vomiting and self-flagellation in a cheap Seattle motel, he returns to base.<sup>183</sup> But it was not

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<sup>178</sup> *Id.*

<sup>179</sup> *United States v. Virginia*, 518 U.S. 515, 533 (1996).

<sup>180</sup> *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973). To be more precise, white women, unlike black men, were placed on both a pedestal *and* in a cage; if Sarah Bradwell was deemed unfit to become a lawyer, she was also not expected to endure the terrors of combat as a military draftee.

<sup>181</sup> TIM O'BRIEN, *IF I DIE IN A COMBAT ZONE, BOX ME UP AND SHIP ME HOME* 22 (Broadway Books 1999) (1975) [hereinafter O'BRIEN, *IF I DIE*].

<sup>182</sup> *Id.* at 52–54, 63–68.

<sup>183</sup> *Id.* at 67–68.

courage that spurred his decision. "I simply couldn't bring myself to flee," he writes.<sup>184</sup>

I feared the war, yes, but I also feared exile. I was afraid of walking away from my own life, my friends and my family, my whole history, everything that mattered to me. I feared losing the respect of my parents. I feared the law. I feared ridicule and censure.<sup>185</sup>

If O'Brien had come from the anti-war communities of Ann Arbor or Berkeley, his resistance to the draft would have been more readily accepted; alas, he came from rural Minnesota.

My hometown was a conservative little spot on the prairie, a place where tradition counted, and it was easy to imagine people sitting around a table down at the old Gobbler Café on Main Street, coffee cups poised, the conversation slowly zeroing in on the young O'Brien kid, how the damned sissy had taken off for Canada.<sup>186</sup>

In conclusion: "Family, the home town, friends, history, tradition, fear, confusion, exile: I could not run. . . . I was a coward."<sup>187</sup> Here is a stereotype of man as courageous that severely restricts his right of self-definition. It is a stereotype that quite literally prevents O'Brien from fleeing the prospect of being killed and the horrors of having to kill.

For patently understandable reasons the military exploited this stereotype to prepare men for battle. Deployed in Vietnam, O'Brien and his college-educated friend receive a blustering public tirade from Sergeant Blyton, whose blue-collar cynicism associated a college degree with a penchant for cowardice. Blyton wants to stigmatize any residual fear of war by the college boys: "'A couple of college pussies' . . . 'You're a pussy, huh? You afraid to be in the war, a goddamn pussy, a goddamn lezzie? You know what we do with pussies, huh? We fuck 'em. In the army we just fuck 'em and straighten 'em out.'"<sup>188</sup> Bristling with irony, Sergeant Blyton does not care whether O'Brien and his friend are courageous; his is not an instruction in virtue. He simply wants for them to kill without hesitation in combat and be prepared to die violent deaths. To do so, Sergeant Blyton does not laud the virtue of valor but the horrors of appearing a coward, a "pussy." Not courage, then, but a certain variety of cowardice is what Sergeant Blyton wants to cultivate in his recruits.<sup>189</sup> His endeavor has unexpected implications for the meaning of manliness. To be a man, as everyone knows, is to

<sup>184</sup> *Id.* at 68.

<sup>185</sup> TIM O'BRIEN, *THE THINGS THEY CARRIED* 48 (1990) [hereinafter O'BRIEN, *THE THINGS*].

<sup>186</sup> *Id.*

<sup>187</sup> O'BRIEN, *IF I DIE*, *supra* note 181, at 68.

<sup>188</sup> *Id.* at 47.

<sup>189</sup> So, too, the historian Richard Holmes observes that for drill sergeants, "[t]he cult of virility is underlined by the employment of terms of abuse which cast doubt upon the recruit's masculinity. There can be few soldiers in the English-speaking world who have

be something other than a pussy, a gendered insult not for women, exactly, but, more accurately, for a male coward.<sup>190</sup> But Sergeant Blyton doesn't mind cowards. In fact, he desires for his male recruit to become the sort of coward who is terrified of appearing terrified. A man who will not succumb to this brand of fear—in other words, he that might pass under different circumstances for brave—would be, ironically, for Sergeant Blyton, a pussy.

After basic training, expectations for manly “courage” endured. O'Brien says of his battalion's soldiers that “[t]hey carried the soldier's *greatest* fear, which was the fear of blushing. Men killed, and died, because they were embarrassed not to. . . . They died so as not to die of embarrassment.”<sup>191</sup> Nearly all of the soldiers in O'Brien's battalion desperately wished to suffer a debilitating but nonserious wound that would return them to the comforts and safety of America; they were just too scared that such wounds would arouse suspicions of cowardice.<sup>192</sup> The soldiers “spoke bitterly about guys who had found release by shooting off their own toes or fingers. Pussies, they'd say. Candy-asses. It was fierce, mocking talk, with only a trace of envy or awe . . . .”<sup>193</sup>

The terror of being stigmatized a coward had also underwritten manly “courage” in the previous World Wars that visited the generations of O'Brien's father and grandfather. British historian Richard Holmes remarks that the “letters and diaries of soldiers, and interviews with veterans, leave no doubt as to the pervasive nature of fear of failure.”<sup>194</sup> Specifically, the soldiers in both World Wars I and II suggest that they would prefer violent death over the specter of being a coward, or, scarcely less important, being perceived as one.<sup>195</sup> Holmes observes: “Most of the soldiers I interviewed acknowledged that they were very frightened indeed before the battle started, and for many of them the greatest fear was not of being killed or wounded, but of ‘bottling out,’ of showing cowardice.”<sup>196</sup> Captain J.E.H. Neville, for one, wrote to his father in 1917 that “[t]he only thing I'm not certain about is whether I may get the wind up and show it. I'm afraid of being afraid.”<sup>197</sup> Geoffrey Stavert, an English artillery officer in Tunisia from 1942–43, feared that he “‘would let myself or my family down, and [sought] to put up a good appearance in front of the troops.’”<sup>198</sup> In World War II, Raleigh Trevelyan remarked, “‘I don't think even now I really fear

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not, at some time or other, been called the bluntest of all Anglo-Saxon synonyms for what my dictionary terms ‘the female pudenda.’” HOLMES, *supra* note 87, at 46.

<sup>190</sup> MILLER, *supra* note 86, at 234.

<sup>191</sup> O'BRIEN, *THE THINGS*, *supra* note 185, at 20–21 (emphasis added).

<sup>192</sup> *Id.* at 21–22.

<sup>193</sup> *Id.* at 21.

<sup>194</sup> HOLMES, *supra* note 87, at 141.

<sup>195</sup> *Id.* at 142.

<sup>196</sup> *Id.* at 142.

<sup>197</sup> *Id.* at 141.

<sup>198</sup> *Id.* at 141–42.

death, or even the process of dying. It is only the thought of whether or not I shall acquit myself honourably that obsesses me.”<sup>199</sup>

The same, almost reflexive compliance with the expectation for men to be brave was exhibited earlier in the American Civil War. Even those who supported war were often compelled partly by a fear of seeming a coward. Both Union and Confederate soldiers frequently justified their enlistment in terms of avoiding public shame.<sup>200</sup> A sergeant in the 24th Mississippi wrote his sister: “‘Life is sweet but I would alwas [sic] prefer a honorable death to a disgraceful and shameful life . . . .’”<sup>201</sup> On the Union side, Charles Francis Adams, Jr., descendent of the second and sixth presidents, disobeyed his father’s protective wish for him to refrain from enlistment. For a family dedicated to the abolition of slavery, Adams insisted, a refusal to enlist “‘seems to me almost disgraceful.’”<sup>202</sup> A young Rutherford B. Hayes, future president of the United States, remarked, “‘I would prefer to go into it [even] if I knew I was to die or be killed in the course of it, than to live through and after it without taking part.’”<sup>203</sup> Sometimes, the fear of being called a coward motivated even those whose age would limit their utility and make them more vulnerable to injury and death; such were the coercive properties of courage. A thirty-nine-year-old South Carolina planter explained to his daughter: “‘The honor of our family is involved. . . . A man who will not offer up his life . . . does dishonor to his wife and children.’”<sup>204</sup> A farmer from Arkansas, “also in his late thirties, told his wife[:] . . . ‘I would feel that my children would be ashamed of me when in after times this war is spoken of & I should not have figured in it.’”<sup>205</sup> A forty-two-year-old Tennessee planter “admonished his wife” that “‘[n]o man now has a right to stay at home.’”<sup>206</sup>

Against this fear of seeming a coward, it is unsurprising that soldiers, once enlisted, felt behooved to conduct themselves with something that could pass for courage, even as that compulsion could cost them their lives. The Princeton historian James McPherson states that while Civil War soldiers wrote of courage, they “wrote even more about cowardice—the mark of dishonor.”<sup>207</sup> “Many soldiers,” he explains, “lacked confidence in their courage” but “most of them wanted to avoid the shame of being known as a coward—and that is what gave them courage.”<sup>208</sup> The phrase “death

<sup>199</sup> *Id.* at 142.

<sup>200</sup> JAMES M. MCPHERSON, *FOR CAUSE AND COMRADES: WHY MEN FOUGHT IN THE CIVIL WAR* 22–28 (1997).

<sup>201</sup> *Id.* at 23. To provide a flavor of the soldiers’ idiom, I, like Professor McPherson, have left misspellings in their original form.

<sup>202</sup> *Id.* at 25.

<sup>203</sup> *Id.* (alteration in original).

<sup>204</sup> *Id.* at 24.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 77.

<sup>208</sup> *Id.*

before dishonor” appears in Civil War soldiers’ letters “more times than one can count.”<sup>209</sup> A Union soldier from Ohio wrote home that “I cannot boast of much pluck . . . but I have got my full share of pride and could die before I could disgrace the name I bear.”<sup>210</sup> A captain in the Texas infantry wrote his wife that should “he ever show[ ] ‘the white feather’ [of fear] in battle, ‘I hope that some friend will immediately shoot me so that the disgrace shall not attach either to my wife or children.’”<sup>211</sup> A corporal from the 24th Michigan confided in his diary: “‘Feel quite sick. If it were not for being called a Sneak and a coward I would not be in the ranks today.’”<sup>212</sup> McPherson writes that a member of the 155th Pennsylvania refused to go to the hospital because “‘there are so many get off by pretending to be sick that a man is always looked upon with suspicion if he goes to a hospital, especially if there is a fight expected soon.’”<sup>213</sup> Like Tim O’Brien in the Vietnam War, these soldiers in the Civil War had few meaningful options to define themselves within a dichotomy of courage and cowardice that structured the ontology of manliness.

#### IV. SEARCHING FOR CAPTAIN JOHANSEN

If there is a “feminine mystique”<sup>214</sup> whose authenticity no woman can obtain, there is also a masculine mystique that is just as elusive for men. The pursuit of manhood, coerced by the government and expected by society, may very well be an impossible task to realize.<sup>215</sup> Or, phrased interrogatively, when do you know that your feats of courage have made you man enough? Or, can your store of courage be depleted by incidents of cowardice? How does one conduct this moral arithmetic of courage and cowardice where manliness hangs in the balance?

Leave it to Tim O’Brien to furnish a knotty example.<sup>216</sup> In his quasi-fictional book, *The Things They Carried*, O’Brien describes a private, Norman Bowker, in the Vietnam War. Bowker, having returned safely to Iowa, dwells on the theme of “common valor,” that is, “[t]he routine, daily

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 78.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 79.

<sup>213</sup> *Id.*

<sup>214</sup> See BETTY FRIEDAN, *THE FEMININE MYSTIQUE* 20–26, 30–31, 33–34, 36, 66–67, 71, 72 (1963).

<sup>215</sup> Michael Kimmel concurs:

Every single man will, at some point in his life, “fail to qualify.” That is, every single one of us will feel, at least at moments, “unworthy, incomplete, and inferior.” It is from those feelings of inadequacy and inferiority that we often act recklessly—taking foolish risks, engaging in violence—all as an attempt to repair, restore, or reclaim our place in the sacred box of manhood.

KIMMEL, *supra* note 116, at 55.

<sup>216</sup> O’BRIEN, *THE THINGS*, *supra* note 185.

stuff—just humping, just enduring.”<sup>217</sup> At one point Bowker asks himself whether such ordinary courage “was worth something, wasn’t it?” “Yes, it was,” he answers, “[w]orth plenty.”<sup>218</sup> But the affirmations, being prodded first by questions of self-doubt, signal ambivalence. Bowker’s uncertainty causes him to conduct a mental audit of his medals, only to conclude that, while he had earned several, none signified exceptional valor.<sup>219</sup> Even Bowker’s Purple Heart “wasn’t much of a wound and did not leave a scar and did not hurt and never had.”<sup>220</sup> Later, Bowker again attempts to discern his record of courage in war. He consoles himself with ordinary courage, the only courage that he had: “Sometimes the bravest thing on earth was to sit through the night and feel the cold in your bones.”<sup>221</sup>

Yet this respect for relativism gradually sags his bid for courage. Sometimes Bowker thought courage was a matter of degree. “Courage was not always a matter of yes or no,” he surmised.<sup>222</sup> “Sometimes it came in degrees, like the cold; sometimes you were very brave up to a point and then beyond that point you were not so brave.”<sup>223</sup> If courage is a matter of degrees, then what degree was acceptable? How would you know whether your invented “degree” was even a degree and not below the objective threshold of courage? At one point, Bowker concedes that courage is too slippery for anything resembling mathematics:

In certain situations you could do incredible things, you could advance toward enemy fire, but in other situations, which were not nearly so bad, you had trouble keeping your eyes open. Sometimes, like that night in the shit field, the difference between courage and cowardice was something small and stupid.<sup>224</sup>

The latter reference was to the night that Bowker was unable to pull another soldier from a cesspool swamp because of its overpowering and noxious smell.<sup>225</sup> Bowker could not comprehend how, even though he had endured enemy fire, fear of rank filth had made him a useless coward complicit in another soldier’s death, hence his remark that “the difference between courage and cowardice was something small and stupid.”<sup>226</sup> But, as Bowker himself demonstrated, to call the difference small and stupid is an understatement. That one night of failure unmanned him and, in his view, emptied

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<sup>217</sup> *Id.* at 161.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 160–61.

<sup>220</sup> *Id.* at 160.

<sup>221</sup> *Id.* at 166.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 166–67.

<sup>225</sup> *Id.* at 166–69.

<sup>226</sup> *Id.* at 166–67.

his reserve of courage. Feeling like an irredeemable failure, he hanged himself in the locker room of an Iowa YMCA.<sup>227</sup>

A counterpoint to the tragic Bowker was the enigmatic Captain Johansen, the one man whom the young Private O'Brien regards as courageous in the battalion.<sup>228</sup> In O'Brien's memoir, *If I Die in a Combat Zone*, Johansen is described as follows: "He was blond. Heroes somehow are blond in the ideal. He had driven racing automobiles as a civilian and had a red slab of scarred flesh as his prize. He had medals. One was for killing the Viet Cong, a Silver Star."<sup>229</sup> The scar and the racing might be supportive of O'Brien's assessment, but did fear of seeming cowardly cause Johansen, as a young man, to race? Or, being so young and wild, was he recklessly unmindful of the dangers, and thus lacking courage, when he raced? As for the medals, did Johansen make a preemptive kill because he was suffocated by the fear of *being* killed? Was Johansen's attack prompted by his terror of being regarded a coward by his battalion (or being charged under Article 99) for fleeing? We do not know the answers to these crucial questions and their absence creates narrative space for O'Brien to imagine Johansen as brave.

O'Brien's reference to Johansen being blond may seem the most trivial of details but it gives us perhaps the best insight into the ontology of courage and its correlate, manliness. "Heroes somehow are blond in the ideal," O'Brien had thought.<sup>230</sup> The blond hair is the initial attribute that elevates Johansen into the regions of the mysterious, and O'Brien appears to suggest that it is only in this rarefied air that courage can exist. "Johansen was separated from his soldiers by a deadfall canyon of character and temperament."<sup>231</sup> Unlike most soldiers, "[h]e had no companions."<sup>232</sup> No one knew him; no one therefore could fathom his bouts of cowardice or the flawed motivations behind his ostensive acts of courage. Besides, O'Brien himself acknowledges that in war, "when you are afraid you must hide it to save respect and reputation."<sup>233</sup> O'Brien compares Johansen to Captain Vere in Melville's *Billy Budd*, to Humphrey Bogart's Rick Blaine in *Casablanca*, and to Alan Ladd in *Shane*.<sup>234</sup> Like Johansen, they were all brave and "companionless among herds of other men."<sup>235</sup> "To a man," O'Brien continues, "they were removed from other men, able to climb above and gaze down at other men."<sup>236</sup> O'Brien's last glimpse of Johansen, as the latter left for

<sup>227</sup> *Id.* at 177.

<sup>228</sup> O'BRIEN, *IF I DIE*, *supra* note 181, at 144–45.

<sup>229</sup> *Id.* at 144.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 133.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 208.

<sup>234</sup> *Id.* at 142–44.

<sup>235</sup> *Id.* at 144.

<sup>236</sup> *Id.* at 143.

America, produces a description fitting any Hollywood leading man: the captain was “blond, meticulously fair, brave, tall, blue-eyed.”<sup>237</sup>

He was also a cipher to whom other soldiers could ascribe an ideal of manly courage that was probably impossible to obtain in real life. Yet society, Congress, and some judges, as I’ve shown, expect men to dedicate themselves to the fulfillment of this vaunted idea. It is an expectation that is unmindful of the Constitution’s protection of the right of self-definition and one that should be reconsidered.

#### CONCLUSION

We are justifiably well aware of the myriad injuries that men have inflicted upon women as a group. Without ignoring the importance of acknowledging such injuries, I have sought to argue in this Article that men have also been subject to forms of discrimination because of their gender. Whereas women have had to suffer the discrimination that derives from being perceived as physically and emotionally weak, men have had to endure the discrimination that derives from being perceived as bearers of physical courage. Various laws and judicial opinions, I have suggested, have drawn upon the latter image in a manner that urges men to conform to an ideal of manliness that celebrates violence, militarism, and an obsessive refusal to admit fear. This ideal of manliness, with the support of the law, has unduly burdened men’s right of self-definition, a right that I have argued is protected by the Equal Protection Clause.

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<sup>237</sup> *Id.* at 148.

