ELIMINATING "BUILT-IN HEADWINDS": STRENGTHENING THE MILITARY BY INTEGRATING THE CONDITION OF PREGNANCY

CAROLINE RAINES GREENFIELD*

In March of 2020, Fox News host Tucker Carlson took direct aim at the military's development of a maternity flight suit by calling the initiative a "mockery" of the U.S. military and suggesting that the feminization of the military will lead to weakness and failure. The Pentagon quickly responded with "revulsion" at the sexist remarks and an unequivocal defense of uniformed military women's contributions. This dramatic exchange highlights the important questions of why and how the military should include the condition of pregnancy, and by extension, potentially all women, within its ranks. In 2020, forty-two years after the adoption of the Pregnancy Discrimination Act of 1978, the Secretary of Defense wrote pregnancy discrimination protection into existence for military women. On the heels of this development, Congress mandated that the military improve policy for pregnant service members by increasing individual determinations, improving accommodations, and eliminating the harmful impacts of stereotyping.

This article makes the case that the integration of pregnancy is necessary for both equality and national security, and illustrates how pregnancy policy can evolve using the example of the United States Air Force pilot. I illuminate how the duty environment is embedded with legacy structures built for the stereotypical male and how it can be redesigned to better fit the needs of the modern force. I use Equal Protection law (which applies differently because of military deference) and statutory discrimination law (which is inapplicable to the military) as a model to tailor policy. In Part One, I trace the history of women in the military through current pregnancy policy and discuss policy implications for the military and for women. In Part Two, I examine the doctrine of military necessity, pregnancy equality law, and the

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* Judge Advocate in the United States Air Force. The views expressed are those of the author and do not reflect the official guidance or position of the United States Government, the Department of Defense or of the United States Air Force. This Article was submitted to partially satisfy the requirements of a Master of Laws degree at The George Washington University Law School. The author expresses sincere gratitude to Lt Col (Ret.) Jessica Ruttenber for her research guidance and for her advocacy on behalf all pregnant service members, and to Professor Naomi Schoenbaum for her thoughtful tutelage and feedback. The author also thanks Col Tara Villena, Mr. Jeremiah Crowley, Maj Taren Wellman, Maj Jennie Patschull, Maj Matthew Mackey, Maj Cary Balser, Mr. Stephen Mortellaro, Mrs. Sheila Margolis, Mr. Louis Greenfield, and Mr. Michael Raines for inspiration, research assistance, editing assistance and/or comments. This article is dedicated to my spouse and children and is in loving memory of my teacher and friend Professor Howard Stravitz.

theory and logic underlying current law. Part Three utilizes this model to design a duty environment that accounts for pregnancy as a normal condition of service. This goes beyond current law in some areas to recommend policy in line with Pregnant Workers Fairness laws, the Americans with Disabilities Act Amendments Act (2008), disparate impact theory, and comparable worth models. I make the analysis tractable by comprehensively upgrading four specific areas of policy: duty, assignment, promotion, and leave.

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INTRODUCTION

Last spring on Fox News, Tucker Carlson took direct aim at the military's development of a maternity flight suit by calling the initiative a "mockery" of the U.S. military and suggesting that the feminization of the military will lead to weakness and failure.[1] The Pentagon quickly responded with "revulsion" at the sexist remarks and offered an unequivocal defense of uniformed military women's contributions. This dramatic exchange highlights the important questions of why and how the military should include the condition of pregnancy, and by extension, potentially all women and

[1] Missy Ryan, *Military Brass Denounced Tucker Carlson's Remarks About a 'Feminine' Force. Women Say Barriers Remain for Pregnant Troops.*, WASH. POST (Mar. 20, 2021, 12:31 PM), https://www.washingtonpost.com/national-security/tucker-carlson-women-military/2021/03/20/7e33c38a-87f4-11eb-8a67-f314e5fcf88d_story.html [https://perma.cc/X4Q7-L785].

pregnant people, within its ranks. There is a legal mandate and a military need for gender parity in the services.[2] Achieving this goal requires integrating the condition of pregnancy with the structures of the service environment. The new ban on military pregnancy discrimination[3] creates an opportunity to think about how to integrate the condition of pregnancy. The new law requires the Department of Defense (DoD) to improve pregnancy policy.[4] The military can do so by utilizing three key concepts: (1) individual consideration for pregnant service members, (2) institutional accommodation sufficient to make service and childbearing fully compatible, and (3) a reprioritization of gender parity over short-term cost-savings. I advocate for restructuring the duty environment to accommodate pregnancy as a "normal condition" of service.[5] Congress and DoD policymakers are my target audience and can adopt this framework.

I use Equal Protection law (which applies differently because of military deference) and statutory discrimination law (which is inapplicable to the military) to tailor policy.[6] I examine how the duty environment, like other workplace environments, is constructed around stereotypically masculine norms.[7] My goal is to illuminate both how these legacy systems impose constraints on interlocking military necessity and equality goals and how to reconstruct[8] the environment for the modern force. My aim is to remove the structures of subordination while recognizing the impact of harmful stereotyping due to special treatment.

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[2] *See* discussion *infra* Section I.b.

[3] DEP'T. OF DEFENSE., DOD INSTRUCTION 1350.02, DOD MILITARY EQUAL OPPORTUNITY PROGRAM § 1.2.a(1) (Sept. 4, 2020) [hereinafter "DoDI 1350.02"].

[4] *See* Nat'l Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 555(a)(2),(4),(5) [hereinafter "2021 NDAA"] (requiring the Secretary of Defense to enforce and implement applicable requirements of the Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 42 U.S.C. § 2000e(k), to increase individual determinations related to pregnant service members' ability to serve, provide training on pregnancy stigma and stereotype, increase readiness measures to fill positions that are vacant due to pregnancy and childbirth, and increase reasonable accommodation measures).

[5] *See* Reva B. Siegel, *Pregnancy as a Normal Condition of Employment: Comparative and Role-Based Accounts of Discrimination*, 59 WM. & MARY L. REV. 969, 972–78 (2018). Professor Siegel traces legal trends and growing public consensus towards full accommodation of the condition of pregnancy in the workplace. *See id.*

[6] I do not address how to improve the reporting and adjudicating of pregnancy discrimination claims. While clear policy standards are a precursor to combating implicit bias and discrimination, proper accountability and redress mechanisms are also necessary.

[7] *See* Vicki Schultz, *Women "Before" the Law: Judicial Stories About Women, Work, and Sex Segregation on the Job*, *in* FEMINISTS THEORIZE THE POLITICAL, 297, 314–22 (Judith Butler & Joan Wallach Scott eds., 1992) (using social science theory to describe how workplaces construct gender and perpetuate sex segregation and how workplace structures can evolve).

[8] JOAN WILLIAMS, RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER 5 (2012) (coining the term "reconstructive feminism" to describe feminist theory that reframes debate "by shifting attention away from women's identities onto the gender dynamics within which identities are forged").

This article predominantly highlights the active-duty United States Air Force pilot as a case study in how policy related to pregnancy can evolve to meet interlocking equality and military necessity goals. Pilot practices drive Air Force culture. As operators, pilots generally have more opportunity than those in other job specialties to ascend the ranks.[9] The pilot example illustrates how the construction of current pregnancy policy limits career opportunity and constrains reproductive and caregiving life choices. Moreover, it does so unnecessarily and to the detriment of national security.

In Part One, I trace the history of women in the military through current pregnancy policy and discuss policy implications for the military and for women and pregnant people of all gender identities. In Part Two, I examine the doctrine of military necessity, pregnancy equality law, and the theory and logic underlying current law. Part Three utilizes this model to design a duty environment that accounts for pregnancy as a normal condition of service, going beyond current law in some areas to recommend policy in line with Pregnant Workers Fairness laws, the Americans with Disabilities Act Amendments Act, disparate impact theory, and comparable worth models. I make the analysis tractable by comprehensively upgrading four specific areas of policy: duty, assignment, promotion, and leave.

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[9] *See* Kimberly Jackson et al., *Raising the Flag, Implications of U.S. Military Approaches to General and Flag Officer Development*, RAND CORP. 117, 126 (2020) [hereinafter "General Officer Development Study"] (noting a pilot-centric culture where over sixty percent of General Officers are fighter pilots, where fighter pilots make up roughly five percent of all officers). A critic of my methodology may fairly point to the fact that I focus on a relatively elite group of women. However, a visible increase in the number of higher-ranking women may "counteract stereotyping and tokenism over time" for all women throughout the ranks. David Pedulla, *Diversity and Inclusion Efforts that Really Work*, HARV. BUS. REV. (Mar. 12, 2020), https://hbr.org/2020/05/diversity-and-inclusion-efforts-that-really-work [https://perma.cc/RC23-4AWY]. Some studies suggest that female-led companies have both better bottom-lines and greater employee satisfaction. Caroline Castrillon, *Why Women-Led Companies are Better for Employees*, FORBES (Mar. 24, 2019), https://www.forbes.com/sites/carolinecastrillon/2019/03/24/why-women-led-companies-are-better-for-employees/?sh=1fd29f673264 [https://perma.cc/P9SJ-ZXHU].

I. *Factual Background*

a. Barriers for Women in the Military[10]*: Focusing on Pregnancy*

i. *History*

The military has a legacy of gradually including women coupled with a deep-seated skepticism about the compatibility of service with maternity.[11] Since the Continental Army, the service has explicitly excluded women, and yet, women served in unrecognized support roles and occasionally as combatants.[12] Women acted as spies, provided support without a formal role or pay, and disguised themselves as men to fight.[13] Many wives laundered and mended uniforms, served as quartermasters, and provided other unpaid support.[14] Congress first formally included women by establishing the Army Nurse Corps in 1901.[15]

The inclusion of women in the military swelled during each world war and then receded in each war's wake. During World War I, the services recruited women to fulfill clerical roles and other positions, such as nurses,

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[10] Military standards are androcentric across multiple dimensions, such as the absence of an in-flight urinary device for the female anatomy and aircraft designed for the average 1967 Caucasian male body. Missy Ryan, *Air Force Takes Steps to Clear Path for Women's Advancement*, WASH. POST (Oct. 30, 2020), https://www.washingtonpost.com/national-security/air-force-women-pilots/2020/10/30/a9b665bc-ec54-11ea-a21a-0fbbe90cfd8cstory.html [https://perma.cc/78UX-22F8]. Many argue exclusion of women should continue, most adamantly when it comes to combat units. *See, e.g.*, Heather Mac Donald, *Women Don't Belong in Combat Units*, WALL ST. J. (updated Jan. 16, 2019, 1:38 PM), https://www.wsj.com/articles/women-dont-belong-in-combat-units-11547411638 [https://perma.cc/WJW6-WA2W] (arguing that women's presence will create overwhelming eros and distraction). For an impassioned response from combat veterans, *see* Jeff Schogal, *Veterans: Women are Already in Combat, So Stop Saying They Shouldn't be in Combat Units*, TASK & PURPOSE (Jan. 15, 2019, 9:03 PM), https://taskandpurpose.com/news/veterans-women-combat-units/ [https://perma.cc/ZZ97-BHUY]. However, national security and equality implications favor inclusion. *See* discussion *infra* Section I.b.

[11] Historically, military policy regarding women responds both to the needs of national security and to shifting cultural attitudes regarding roles in society. Erica M. King & Diana M. DiNitto, *Historical Policies Affecting Women's Military and Family Roles*, 39(5/6) INT'L J. OF SOCIO. & SOC. POL'Y, 427, 434–35 (2019) (finding evidence of both forces operating throughout history and arguing that women became vital to the military after it transitioned to an all-volunteer force (AVF) at the end of the Vietnam War). In the post-AVF era, policy is trending in the direction of expanding accommodations for motherhood. *Id.* at 438.

[12] Linda Strite Murnane, *Legal Impediments to Service: Women in the Military and the Rule of Law*, 14 DUKE J. GENDER L. & POL'Y 1061, 1062–63 (2007).

[13] Murnane, *supra* note 12, at 1062–63. During the Civil War, for example, Dr. Mary Walker volunteered her services to the union as a physician, without pay. *Id*. She received the Congressional Medal of Honor, only to have it redacted, leading to a long dispute and eventual posthumous award in the 1970s. *Id*.

[14] *Id*.

[15] Army Reorganization Act of Feb. 1, 1901, ch. 192, 31 Stat. 753.

draftsmen, translators, and recruiters.[16] After the Armistice was signed on November 11, 1918, the services again restricted women to nursing.[17] During World War II, roughly one thousand women served as test pilots at domestic bases.[18] In 1942, Congress established the Women's Army Auxiliary Corps (WAAC) in the Army,[19] and the Women Accepted for Volunteer Emergency Service (WAVES) in the Navy.[20] Female service members served under a different set of rules and regulations than male service members, receiving less benefits and privileges.[21] A debate began over whether the services should allow women to obtain the rank of flag officer (the equivalent of a General or an Admiral).[22] At the conclusion of WWII and demobilization, society was skeptical of the women in the services.[23]

This military history is consistent with American society's separate spheres ideology. Under the separate spheres belief system, a woman's role is in the home, corresponding to caregiving and domestic responsibilities, and existing outside of public life, such as civic, economic, cultural, and political opportunities.[24]

Reflecting this ambivalence about women's public roles, the Women's Armed Services Integration Act of 1948 made women a permanent feature of the services, although in a discriminatory way.[25] Women could comprise no more than two percent of the force, could not serve as general officers, could not claim dependent benefits (such as an increased housing allowance) absent an affirmative showing of dependency, could not serve absent parental approval (if under age twenty-one), had to satisfy a good moral character requirement, and were subject to other restrictions not applicable

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[16] Murnane, *supra* note 12, at 1064.

[17] *Id.*

[18] ANN B. CARL, A WASP AMONG EAGLES: A WOMAN MILITARY TEST PILOT IN WWII (2010). Additionally, the all-female Soviet 588th Night Bomber Regiment (dubbed Nachthexen or "night witches" by the Nazis) flew dead-of-night bombing sorties in plywood biplanes, without radio or radar, in hand-me-down men's uniforms, while battling sexual harassment from their own force. Brynn Holland, *Meet the Nightwitches, the Daring Female Pilots Who Bombed Nazis by Night,* HISTORY (July 7, 2017, updated June 7, 2019), https://www.history.com/news/meet-the-night-witches-the-daring-female-pilots-who-bombed-nazis-by-night [https://perma.cc/HDX6-P6V3].

[19] Women's Army Auxiliary Corps (W.A.A.C.) Act, Pub. L. No. 77-554, 56 Stat. 278 (1942).

[20] Women's Reserve Act, Pub. L. No. 77-689 (1942).

[21] Murnane, *supra* note 12, at 1065.

[22] *Id.*

[23] *Id.* at 1066.

[24] *See, e.g.*, Muller v. Oregon, 208 U.S. 412, 422 (1908) (concern for a woman's existing or potential offspring recognized as appropriate justification for protective legislation limiting women's work hours); Bradwell v. Illinois, 83 U.S. 130, 142 (1873) (holding that denying women admittance to practice law does not violate equal protection).

[25] Women's Armed Services Integration Act, Pub. L. No. 80-625, 62 Stat. 368, 368 (1948).

to men.[26] Notably, it was policy to discharge any pregnant woman or woman with a child (or stepchild) in the home.[27]

As society's ideas about women's roles advanced and the military transitioned to an all-volunteer force (AVF), discriminatory policies began to fall. Civil rights litigation in the 1970s spurred the end of pregnancy discharges[28] and added the right to equal dependent benefits for female service member households.[29] When the military moved to an AVF in 1973, women were two percent of the enlisted force and eight percent of the officer corps.[30] Congress authorized admitting women to the service academies in 1975.[31] Other military academic institutions declined to admit women until

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[26] *Id.*

[27] Exec. Order No. 10240, 16 Fed. Reg. 3689 (May 1, 1951).

[28] *See* Brief for Petitioner, Struck v. Sec'y of Def., 409 U.S. 1071 (1972) (No. 72-178) (arguing that "benign" classifications to protect mothers operate as "built-in headwinds" that subordinate women in society and that the pregnancy discharge serves no legitimate government purpose) [hereinafter "Struck Brief"]. Prior to the United States Supreme Court hearing the matter involving Captain Susan Struck, the Air Force voluntarily discontinued its pregnancy discharge policy and waived Captain Struck's discharge. Jessica Glenza & Alana Casanova-Burgess, *The Air Force Gave Her a Choice: Your Baby or Your Job*, GUARDIAN (Dec. 13, 2019), https://www.theguardian.com/world/2019/dec/13/us-air-force-pregnancy-susan-struck-abortion-motherhood-america [https://perma.cc/L86Y-4YEK]. *See also* Crawford v. Cushman, 531 F.2d 1114, 1127 (2d Cir. 1976) (striking Marine policy of mandatory discharge for pregnant women). However, courts have upheld gender-neutral exclusions of single parents from serving. *See* Lindenau v. Alexander, 663 F.2d 68, 74 (10th Cir. 1981) (stating that army regulation disallowing enlistment of single-parents upheld despite disproportionate effect on women). The military does not currently allow single parents to sign up for service absent a waiver from the concerned Service Secretary. DEP'T. OF DEF., DOD INSTRUCTION 1304.26, QUALIFICATION STANDARDS FOR ENLISTMENT, APPOINTMENT, & INDUCTION, ENCLOSURE 3, 9 (Mar. 23, 2015, incorporating change Oct. 26, 2018).

[29] *See* Frontiero v. Richardson, 411 U.S. 677, 688, 691 (1973) (finding that equal protection applies to the military and striking a regulatory scheme that drew a gendered distinction for benefits).

[30] COUNCIL ON FOREIGN RELS., DEMOGRAPHICS OF THE U.S. MILITARY (last updated July 13, 2020, 8:00 AM), https://www.cfr.org/backgrounder/demographics-us-military [https://perma.cc/6CDZ-HYKY].

[31] Pub. L. No. 94-106, 89 Stat. 531, 537 (1975). The service academies include the United States Military Academy, the United States Naval Academy, the United States Air Force Academy, the United States Coast Guard Academy, and the United States Merchant Marine Academy. However, the Air Force Academy does not allow parents with dependents to attend but allows a pregnant woman to return if she relinquishes her custody responsibilities and rights. U.S. AIR FORCE ACAD. INSTRUCTION 36-3504, DISENROLLMENT OF UNITED STATES AIR FORCE ACADEMY CADETS, para. 26.1.7 (July 7, 2017) (incorporating guidance memorandum changes dated Jun. 5, 2020). This has an inequitable result as a man does not have to affirmatively disavow parental rights to continue. This policy also sets the wrong tone regarding how the military views the compatibility of caregiving and service. *But see* Cobb v. U.S. Merchant Marine Acad., 592 F. Supp. 640, 643 (E.D.N.Y. 1984) (holding that refusing to admit all temporarily disabled cadets, including pregnant cadets, does not burden a right to procreate because a cadet has no right to commission in the service). For precedent recognizing that men and women are differently situated as to sex, *see* Michael M. v. Superior Ct., 450 U.S. 464, 471 (1981).

ordered to by the Courts in the 1990s.[32] Women first flew combat missions in 1993.[33] In 2015, Defense Secretary Ash Carter opened all combat positions to women.[34]

Despite the abolishment of many discriminatory barriers, the structural impediments embedded in a legacy system that was built for the stereotypical male service member remains. This legacy architecture perpetuates the sidelining of women, especially when pregnancy and career intersect.

ii. *Gender Today*

Today, there is de facto exclusion, lost opportunity, and significant constraints on reproductive life choices. Women are nearly fifty-one percent of the population,[35] fifty-six percent of college graduates,[36] and less than seventeen percent of the active duty military.[37] The lack of women's representation at all levels is itself a barrier and feeds into other barriers such as implicit bias and a lack of institutional competency regarding gender issues.[38] This disparity is a lost opportunity for talent: women earn higher grades than men in all subject areas, including science, technology, engineering, and math.[39]

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[32] *See*, *e.g.*, United States v. Virginia, 518 U.S. 515, 534 (1996) (holding that Virginia's male-only military college denied women equal protection).

[33] John Lancaster, *Aspin to Open Combat Roles to Women*, WASH. POST (Apr. 28, 1993), https://www-washingtonpost-/archive/politics/1993/04/28/aspin-to-open-combat-roles-to-women/78a7f11a-6d29-4539-bc10-ac908cff8498/ [https://perma.cc/7ZUX-HNMX]. For scrutiny of line-drawing to exclude women from combat, *see* Martha McSally, *Women in Combat: Is the Current Policy Obsolete?*, 14 DUKE J. GENDER L. & POL'Y 1011, 1020-29 (2007). For an argument that this exclusion violates equal protection and is an obsolete practice, *see* Tim Bakken, *A Woman Soldier's Right to Combat: Equal Protection in the Military*, 20 WM. & MARY J. WOMEN & L. 271, 272 (2014); *see also* Kyle-Labell v. Selective Serv. Sys.,364 F.Supp.3d 394, 417 (2019) (finding an equal protection claim arising from the male-only draft). In *Rostker v. Goldberg*, the Supreme Court upheld a male-only draft; however, this decision deferred to Congressional findings regarding the military's justification that women were ineligible for combat positions, which is no longer true. 453 U.S. 57, 83 (1981).

[34] U.S. SEC'Y OF DEF., IMPLEMENTATION GUIDANCE FOR THE FULL INTEGRATION OF WOMEN IN THE ARMED FORCES, (Dec. 3, 2015).

[35] STATISTICA, TOTAL POPULATION IN U.S. BY GENDER 2010-2025 (last visited May 4, 2021, 11:05 AM), https://www.statista.com/statistics/737923/us-population-by-gender/ [https://perma.cc/WDL5-BT9L].

[36] WORLD ECON. FORUM, GLOBAL GENDER GAP REPORT 2021 39 (Mar. 2021).

[37] U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-61, FEMALE ACTIVE-DUTY PERSONNEL, GUIDANCE AND PLANS NEEDED FOR RECRUITMENT AND RETENTION EFFORTS 11 (2020) [hereinafter "GAO-20-61"]. This is an increase of under two percent since 2004. *Id.*

[38] *See* Mario L. Barnes, *"But Some of [Them] are Brave": Identity Performance, the Military, and the Dangers of an Integration Success Story*, 14 DUKE J. GENDER L. & POL'Y 693, 747–48 (2007) (arguing that adherence to identity neutral policies allows unconscious bias to thrive in the military limiting inclusion, promotion, and retention of minorities).

[39] Julie Jargon, *Why Boys Are More at Risk of Falling Behind During Remote School*, WALL ST. J. (Nov. 24, 2020, 8:00 AM), https://www.wsj.com/articles/why-boys-are-more-at-risk-of-falling-behind-during-remote-school-11606222801 [https://perma.cc/GYD9-ZCGH].

Women are twenty-eight percent more likely than men to leave the military before retirement.[40] Family planning is a key contributing factor.[41]

Military women have a distinctive profile. A greater share of women serving are Black, and women serving are more likely to be single.[42] Women service members are more likely to be single parents or to be married to a partner who also serves ("dual military couples").[43]

The Air Force has a similar pattern regarding women in its ranks. Women comprise twenty-one percent of active duty members in the Air Force.[44] However, only approximately six percent of pilots and two percent of fighter pilots in the Air Force are female.[45] As of 2016, women are roughly twenty-one percent of officers in the ranks of O-1 to O-5 (Second Lieutenant to Lieutenant Colonel), fourteen percent of O-6s (Colonels), and seven and one-half percent of the rank of O-7 and above (Brigadier General to General).[46] At roughly the end of their first service commitment period, sixty-three percent of rated[47] male officers remain and thirty-nine percent of rated female officers remain on active duty.[48] Women in the Air Force are less likely to progress to career milestones at the same rate as men, and are clustered at the lower ranks and in less prestigious career fields.[49]

A 2016 qualitative study utilizing focus groups composed of female Air Force officers found that all groups discussed having children or wanting to have children as a retention factor, and eighty-five percent discussed timing a pregnancy to meet rigid career progression timelines as a retention factor.[50]

iii. *Pregnancy Today: Focusing on the Pilot*

The Air Force pilot example illustrates some of the causes and consequences of the structural and individual barriers surrounding pregnancy. The military as a "total institution" regulates pregnancy.[51] To obtain prenatal

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[40] GAO-20-61, *supra* note 37, at 18.

[41] *Id.* at 28–30. The other five factors are work schedules, deployments, organizational culture, sexual assault, and dependent care. *Id.*

[42] Eileen Patten & Kim Parker, *Women in the U.S. Military: Growing Share, Distinctive Profile*, Pew Rsch. Ctr. (Dec. 22, 2011), https://www.pewresearch.org/social-trends/2011/12/22/women-in-the-u-s-military-growing-share-distinctive-profile/ [https://perma.cc/R55E-MFQL].

[43] Defense Advisory Committee on Women in the Services, 2019 Annual Report 62 (2019) [hereinafter "2019 DACOWITS Report"].

[44] *Id.* at 1.

[45] Ryan, *supra* note 10.

[46] Kirsten M. Keller et al., Addressing Barriers to Female Officer Retention in the Air Force, RAND Corp. vii (2018) [hereinafter "2018 RAND Report"].

[47] Rated officers hold flying-related positions such as pilots, remote-piloted aircraft pilots, air battle managers, and navigators.

[48] 2018 RAND Report, *supra* note 46, at 2.

[49] *Id.* at vii.

[50] *Id.* at x.

[51] The Air Force has at least thirty regulations that touch on pregnancy. Telephone Interview with Jessica Ruttenber, Lt. Col., USAF (Nov. 3, 2020) [hereinafter "Ruttenber Interview"]. However, without a central location to find these provisions, there is a lack

care, a pregnant pilot goes to her military healthcare provider and takes a test confirming pregnancy.[52] The public health office then issues a "profile" showing an expiration date of thirty days after the expected due date, which goes immediately to the pilot's commander.[53] The pilot is coded as "non-worldwide deployable," which prevents her from deploying and from participating in certain exercises and duties.[54] Therefore, the boss is effectively immediately notified when a subordinate is pregnant, sometimes before the end of the first trimester, when spontaneous abortion is most likely to occur, or sometimes before the pregnant person has decided whether to terminate the pregnancy.[55]

Pregnancy duty limitations erect obstacles for a pilot's career.[56] The Air Force pilot may continue flying non-ejection seat aircraft between the

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of awareness of what rules apply. *Id.* Under the Uniform Code of Military Justice, command can initiate a criminal investigation against a woman because she is pregnant. *See, e.g.*, Barbarra Starr & Adam Levine, *U.S. Soldiers in Iraq Could Face Courts-Martial for Becoming Pregnant*, CNN (Dec. 22, 2009, 4:46 PM), https://www.cnn.com/2009/US/12/21/iraq.us.soldiers.pregnancy/index.html [https://perma.cc/E4TA-J7Q3] (noting that Major General Anthony Cucolo issued an order that anyone caught getting pregnant or impregnating would be punished by Courts-Martial). Adultery and fraternization are also military crimes. Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. Many women are not informed about birth control options before deployment and birth control is unavailable at some locations. Stephanie Russell-Kraft, *The Double-Standard of Military Pregnancy: What Contraceptive Access Won't Fix*, Rewire News Grp. (Aug. 2, 2016, 11:22 AM), https://rewirenewsgroup.com/article/2016/08/02/double-standard-military-pregnancy-what-contraceptive-access-wont-fix/ [https://perma.cc/5RBT-J2G4]. The issue of pregnancy as it relates to good order and discipline is largely beyond the scope of this article, however, increasing protection for privacy and reproductive rights may alleviate inequality. *See* Jeremy S. Weber, *The Disorderly, Undisciplined State of the "Good Order and Discipline" Term*, (Feb. 16, 2016), https://www.jcs.mil/Portals/36/Documents/Doctrine/Education/jpme_papers/weber_j.pdf?ver=2017-12-29-142200-423 [https://perma.cc/Y4XL-9KE5] (asking whether there is a consistent definition of good order and discipline that serves the modern force or if the term signals a desire to resist reform). I recommend tracking disciplinary actions related to pregnancy as a special interest item.

[52] U.S. Air Force Instruction 44-102, Medical Care Management, para. 4.13 (Mar. 17, 2015, certified current Apr. 22, 2020).

[53] *Id.*; U.S. Air Force Instruction 48-133, Duty Limiting Conditions § 3.5 (Aug. 7, 2020).

[54] U.S. Air Force Instruction 44-102, Medical Care Management (Mar. 17, 2015, certified current Apr. 22, 2020); U.S. Air Force Instruction 48-133, Duty Limiting Conditions (Aug. 7, 2020).

[55] Ruttenber Interview, *supra* note 51. Abortions are not federally funded unless there is rape or incest. 10 U.S.C. § 1093. A woman must coordinate with her command to get leave for an abortion. Depending on her duty station, this could require traveling a far distance.

[56] Jessica Ruttenber, *How the Military is Losing its Top Talent Because of Pregnancy Discrimination and What We Can Do About It*, Hidden Barriers (June 20, 2020), https://hidden-barriers.org/2020/06/20/how-the-military-is-losing-its-top-talent-because-of-pregnancy-discrimination-and-what-we-can-do-about/ [https://perma.cc/7PUU-J76W] (last visited May 4, 2021). *See also* Sec'y of the Air Force Public Affairs, Air Force Reduces Barriers for Pregnant Aviators (Sept. 23, 2019), https://www.af.mil/News/Article-Display/Article/1968299/air-force-reduces-barriers-for-pregnant-aviators/ [https://perma.cc/TLN2-J3BJ] (recognizing the Women's Initiative Team,

twelfth and twenty-eighth weeks of an uncomplicated pregnancy.[57] Before the twelfth week and after the twenty-eighth week, the pilot is prohibited from flying her aircraft.[58] Flying is a perishable skill and simulators lack the risk factor of the operating environment.[59] This loss of flying time during pregnancy is a barrier to career ascension for the pilot because it limits the window of opportunity to perform that is captured in the annual appraisal cycle. The Federal Aviation Administration, by contrast, does not restrict a pregnant person from flying at any point during an uncomplicated pregnancy.[60] Airlines have varying policies, though many restrict flying after thirty-two weeks of pregnancy.[61]

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an internal volunteer group, for advocating for the policy expanding opportunity for pregnant women to continue flying).

[57] Dep't of the Air Force Med. Serv., Aerospace Medicine Waiver Guide 555–574, 556 (2020), https://www.afrl.af.mil/Portals/90/Documents/711/USAFSAM/USAF-waiver-guide-201202.pdf?ver=CFL6CVKyrAbqyXS7A-OX_A%3D%3D [https://perma.cc/78QU-4CWJ] [hereinafter "Aerospace Medicine Waiver Guide"]. The flying exclusion from zero to twelve weeks appears related to concerns of spontaneous abortion, ectopic pregnancy, and radiation exposure. *Id*. The aircraft must also be pressurized to or fly lower than 10,000 MSL. *Id.* In addition, the woman can only fly if accompanied by another qualified pilot. *Id.* Complicated pregnancies, including when a woman is pregnant with multiples or is over the age of thirty-five, exclude women from flying duty. *Id.* For complicated pregnancies that are low-risk, the pilot may seek a waiver, subject to high level review at the MAJCOM level. *Id.* It is the pilot's decision after risk advisement by her physician whether she wishes to continue to fly during the second trimester window in an uncomplicated pregnancy. *Id.* at 559. Ejection seats are a feature of many high-speed military aircraft, especially fighter jets. *See*, *e.g.*, Oriana Pawlyk, *Lawmakers Move to Protect Pilots from Ejection Seat Problems*, Military.com (July 29, 2021), https://www.military.com/daily-news/2021/07/29/lawmakers-move-protect-pilots-ejection-seat-problems.html [https://perma.cc/6EBH-FRNR] (reporting a planned requirement by lawmakers to have the Air Force and Navy notify them when ejection seats are overdue for repair due to a pilot death after malfunction).

[58] Aerospace Medicine Waiver Guide, *supra* note 57, at 556. Prior to 2019, the pilot was grounded immediately and could only fly at any point in her pregnancy if she obtained a waiver. Ruttenber Interview, *supra* note 51.

[59] Sec'y of the Air Force Public Affairs, *supra* note 56.

[60] The guidance provides:

> Pregnancy under normal circumstances is not disqualifying. It is recommended that the applicant's obstetrician be made aware of all aviation activities so that the obstetrician can properly advise the applicant. The Examiner may wish to counsel applicants concerning piloting aircraft during the third trimester. The proper use of lap belt and shoulder harness warrants discussion.

Fed. Aviation Admin., Guide for Aviation Medical Examiners, Item 48. General Systemic – Pregnancy, https://www.faa.gov/about/office_org/headquarters_offices/avs/offices/aam/ame/guide/app_process/exam_tech/item48/amd/pregnancy/ [https://perma.cc/6NUZ-J4RA] (last visited May 4, 2021) [hereinafter "FAA Policy"].

[61] Annalyn Kurtz, *When the Pilot is a Mom: Accommodating New Motherhood at 30,000 Feet*, NY Times (Aug. 16, 2016), https://www.nytimes.com/2016/08/17/business/when-the-captain-is-mom-accommodating-new-motherhood-at-30000-feet.html [https://perma.cc/NC8F-36WN] (describing how these policies force pilots to expend paid leave prior to the baby arriving). *See also* Brooke L. Hauglid, *Pioneering the Right to Breastfeed at 35,000 Feet: Workplace Accommodations for Lactating Employees in the Airline Industry*, 83 J. Air L. & Com. 607, 628 (2018) (describing Delta policy prohibiting flying duties at thirty-two weeks of pregnancy).

The policy choice to disqualify a pilot before twelve weeks of pregnancy aims to eliminate three risks: radiation exposure, ectopic pregnancy, and miscarriage. All three risks accrue to the fetus, to a lesser extent, the woman, and at the margin, the mission. Current military policy however works against this aim because it discourages disclosing the pregnancy and seeking early prenatal care for pilots who want to continue flying during the first twelve weeks of pregnancy. Whether and to what extent radiation exposure from flying affects fetuses is a matter of controversy.[62] Similarly, ectopic pregnancy and miscarriage are not known to increase in frequency due to flying and are risks inherent in every pregnancy.[63] Most miscarriages and initial ectopic pregnancy symptoms are not incapacitating.[64] After twenty-eight weeks of pregnancy (the second period of disqualification), some issues that could arise are difficulty entering and exiting the aircraft and spontaneous labor.[65]

Additional risks to the pregnant person include hypoxia, hypotension, syncope, blood clots, decompression sickness, air embolus, carbon monox-

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[62] *See* Agot Irgens et al., *Pregnancy Outcome Among Airline Pilots and Cabin Attendants*, 29(2) SCANDINAVIAN J. OF WORK, ENVIRON., & HEALTH 94 (2003) (finding no increase of adverse pregnancy outcomes for female pilots and cabin attendants and noting the absence of studies of the offspring outcomes of male pilots). *See also* AM. COLLEGE OF OBSTETRICS & GYNECOLOGISTS, COMM. OP. NO. 746, AIR TRAVEL DURING PREGNANCY (Aug. 2018, reaffirmed 2019), https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2018/08/air-travel-during-pregnancy [https://perma.cc/Q4VT-FYT6] (the American College of Obstetrics & Gynecology notes that aircrew radiation exposure may exceed advisable limits and recommends that aircrew be advised of the increased radiation exposure and health risks) [hereinafter "Op. No. 746"]. The risk to the fetus posed by radiation is highest in the first trimester, typically before a pregnant person knows about the pregnancy. Terence J. Lyons, *Women in the Fast Jet Cockpit—Aeromedical Considerations*, 63(9) AVIATION SPACE & ENVIRON. MED. 809, 816 (Sept. 1992).

[63] There is insufficient causal evidence that flying increases these inherent risks of pregnancy: one study of 514 flight attendants found an increased risk of miscarriage but other studies did not confirm the result. Lyons, *supra* note 62, at 814. Miscarriage symptoms are typically not incapacitating to the woman and may be indistinguishable from menstrual symptoms or have some increased vaginal bleeding and cramping. Ann Pietrangelo, *Period or Miscarriage, Signs to Watch for and What to Do*, HEALTHLINE (Feb. 25, 2019), https://www.healthline.com/health/period-or-miscarriage#see-a-doctor [https://perma.cc/9QS4-3KN6] . Eighty percent of miscarriages occur in the first trimester. *Id.* In a conversation about how a woman could pilot her aircraft while having a miscarriage, Lt Col Ruttenber responded by noting, "most likely, we already are." Ruttenber Interview, *supra* note 51. Many miscarriages happen before a person is aware of the pregnancy. Pietrangelo, *supra*. Ectopic pregnancies occur when the embryo implants outside the uterus. *Id.* Ectopic pregnancies are not viable and must be terminated. *Id.* Approximately one in fifty pregnancies are ectopic. *Id.* Ectopic pregnancies can cause sharp pain, dizziness, and vaginal bleeding, and if untreated, can lead to a medical emergency. Marissa Selner, *Ectopic Pregnancy*, HEALTHLINE (Jan. 8, 2018), https://www.healthline.com/health/pregnancy/ectopic-pregnancy#symptoms [https://perma.cc/DS87-Y2DC].

[64] *See supra* text accompanying note 63.

[65] Op. No. 746 (some airlines prohibit pregnant passengers from flying after thirty-six weeks of pregnancy due to spontaneous labor concern).

ide poisoning, and g-force injury, including from the seatbelt.[66] Certain flight conditions may exacerbate the risk of some of these complications. Some aircraft are unpressurized and require the use of an oxygen mask.[67] Flying exposes pilots to cosmic radiation which may increase cancer and reproductive health risks.[68] Some of these risks may threaten the mission and some may only have effects on the pregnant person in the mission's aftermath.

A pilot who cannot fly due to pregnancy is assigned alternate duty, without loss of pay or benefits.[69] A pilot who is away from flying for too long, however, may have to requalify for the aircraft, slowing career progression and resulting in additional human capital costs and expensive retraining.[70] Although the Air Force theoretically has a "total force" concept, meaning that it pulls from the strength of its reserve, civilian, and contractor personnel, in practice, the Air Force does not backfill or use surge staffing to fill vacancies that arise from convalescent or caregiver leave.[71] The commander decides what alternate duty to assign.[72] There is currently no tracking of what alternate duties and accommodations are provided to pregnant servicemembers, or other service members, such as those with temporary disabilities.[73]

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[66] *See* Richard T. Jennings, *Women and the Hazardous Environment: When the Pregnant Patient Requires Hyperbaric Oxygen Therapy*, 58(4) AVIATION SPACE & ENVIRON. MED. 370 (1987) (reviewing animal studies and anecdotal evidence and concluding that "some activities such as scuba diving, altitude training, hypoxia training, high-G maneuvers or centrifuge training, and exposure to known teratogens should be avoided during pregnancy"). This article concludes by calling for further animal evaluation to define the limits of safe exposure during both early and late pregnancy and for human exposure data evaluation to better understand treatment protocol and fetal health issues. *Id.* Military flights are generally more jarring to a body and turbulent than commercial flights. Ruttenber Interview, *supra* note 51.

[67] Ruttenber Interview, *supra* note 51.

[68] This risk accrues to both male and female pilots. Jeoum Nam Kim & Byung Mu Lee, *Risk Factors, Health Risks, and Risk Management for Aircraft Personnel and Frequent Flyers*, 10 J. OF TOXICOLOGY AND ENVIRON. HEALTH, 223 (2007).

[69] U.S. AIR FORCE, INSTRUCTION 48-133 §3.5, DUTY LIMITING CONDITIONS (Aug. 7, 2020).

[70] Ryan, *supra* note 10.

[71] U.S. DEP'T OF DEF., DEF. ADVISORY COMM. ON WOMEN IN THE SERV., Q. MEETING MINUTES 8 (Mar. 2020), https://dacowits.defense.gov/Portals/48/Documents/Reports/2020/Minutes/DACOWITS%20March%202020%20QBM%20Minutes_Final.pdf?ver=2020-05-05-212705-410 [https://perma.cc/P7BG-RXRH].

[72] U.S. AIR FORCE, INSTRUCTION 1-2, COMMANDER'S RESPONSIBILITIES (May 8, 2014).

[73] *See* 621st Contingency Response Wing, *A Conversation with Lt. Col. Christina Lee*, FACEBOOK (May 4, 2021), https://m.facebook.com/watch/?v=3044350611183375&_rdr [https://perma.cc/W5BN-82NJ] (Air Force tanker pilot describes losing a prestigious assignment because of maternity leave, after delaying pregnancy for the mission, and challenging this result by pointing to several males who also had significant extended absences due to their own medical issues).

A pilot's duties are recorded in an annual appraisal, the Officer Performance Report (OPR),[74] which also captures quarterly and annual awards. An officer's annual accomplishments determine the next duty assignment and whether the officer obtains a favorable stratification (a ranking among peer officers) on the OPR.[75] Promotion boards review OPRs to make promotion decisions.[76] Time away from regular duties and time away from the unit[77] diminish competitiveness for awards and stratifications, and may ultimately limit career trajectory.[78] A failure to promote on schedule may result in separation from service under the "up or out" system.[79]

Anecdotal evidence and comparison to the civilian sector strongly suggest that the military has a problem with discrimination against pregnant women. Women in the Air Force perceive that pregnancy negatively impacts one's career. For example, women refer to their sub-par pregnancy-year appraisals as "pregnancy OPRs."[80] Pregnant women are sometimes dropped from consideration for command positions and other fast-paced and high-profile jobs (that contribute favorably to promotion), based on stereotypes regarding capacity to manage responsibility and stress.[81] Commanders ask

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[74] U.S. Air Force, Instruction 34-2406, Officer and Enlisted Evaluations Systems (Nov. 14, 2019) (incorporating guidance memorandum dated Mar. 19, 2021).

[75] U.S. Air Force, Instruction 34-2406, Officer and Enlisted Evaluations System (Nov. 19, 2019) (incorporating guidance memorandum dated 19 Mar. 2021); Kimberly Jackson et al., *Raising the Flag, Implications of U.S. Military Approaches to General and Flag Officer Development*, RAND Corp. 117, 126 (2020).

[76] U.S. Air Force, Instruction 36-2501, Officer Promotions and Selective Continuation (Aug. 17, 2009) (incorporating guidance memorandum dated May 4, 2020) [hereinafter "Promotion Regulation"].

[77] Time away from the unit is always potentially detrimental for obtaining a stratification because one's proximity to their commander (who determines the stratification) is limited. There are many reasons other than pregnancy that one may be away from the unit, including education, deployment, health issues, regular leave, humanitarian leave, temporary detail, and others.

[78] *See* Cary Balser, *The Effects of Paid Maternity Leave on the Gender Gap: Reconciling Short and Long Run Impacts* (University of Notre Dame, Working Paper, Feb. 11, 2020), http://dx.doi.org/10.2139/ssrn.3536677 [https://perma.cc/5N9D-SZFB] (studying the career outcomes that followed the expansion of maternity leave from six to twelve weeks and finding that women servicemembers with two to fifteen years of service in the Air Force and Army have a two to six percent lower promotion probability than fathers in the year following birth of a child). *See also* Kacie K. Dunn, *Pregnancy or Promotion*, NCO J., (July 17, 2020) https://www.armyupress.army.mil/Journals/NCO-Journal/Archives/2020/July/Pregnancy-or-Promotion/ [https://perma.cc/EAZ6-5YEJ] (describing the problem of lower-than-average promotion probability for mothers than for fathers in the years following the birth of a child as acute for enlisted soldiers in the Army because of mandatory physical training requirements for promotions).

[79] U.S. Air Force, Instruction 36-2501, Officer Promotions and Selective Continuation (Aug. 17, 2009).

[80] Ruttenber Interview, *supra* note 51.

[81] *See* U.S. Dep't. of Def., Def. Advisory Comm. on Women in the Serv. Ann. Rep. (2019) at 88–93 (describing bias and stigma that face pregnant women and the absence of clear policy enabling continued career progression and equal treatment).

women about their intentions to become pregnant and are reluctant to choose them for prestigious jobs.[82]

Maternal bias, well-documented in the civilian realm,[83] is likely more pervasive in the military.[84] Maternal bias includes the assumption that women are "inauthentic workers" who will abandon their careers for domestic responsibility.[85] Pregnancy, historically excluded people from service, and more recently was a predominant rationale underpinning the exclusion of

[82] *See id*. (describing pervasive stigma that pregnant women will be dead weight in the unit); Ruttenber Interview, *supra* note 51 (describing commanders rejecting women for prestigious assignments due to pregnancy).

[83] *See* Joanna L. Grossman, *Expanding the Core: Pregnancy Discrimination Law as It Approaches Full Term*, 52 IDAHO L. REV. 825, 847 (2016) (describing a "motherhood penalty," citing social science research finding animus towards pregnant women that results in adverse employment actions); Joan Williams, *Double Jeopardy? An Empirical Study with Implications for the Debates over Implicit Bias and Intersectionality*, 37 HARV. J.L. & GENDER 185, 192 (2014) (summarizing research regarding "maternal wall" bias, finding that "motherhood triggers powerful negative competence and commitment assumptions" and that women are judged for displaying too much ambition and not behaving as a mother *should*) (internal citations omitted); Deborah A. Widiss, *The Interaction of the Pregnancy Discrimination Act and the Americans with Disabilities Act After Young v. UPS*, 50 U.C.D. L. REV. 1423, 1433 (2017) (citing pervasive research on conscious and unconscious stereotypes about pregnant workers' lack of commitment to work); Julie Manning Magid, *Cloaking: Public Policy and Pregnancy*, 53 AM. BUS. L.J. 439, 441 (2016) (citing research revealing that much of the gender wage gap is attributable to a motherhood penalty).

[84] *See generally* Magin A. Day, *Maternity Experience of Active Duty Service Members* (2020) (Ph.D. Dissertation, University of North Carolina at Charlotte) (a qualitative study of work-related experiences of active duty United States Air Force servicemembers finding a strong central theme of negative stereotype and stigma). The military environment is rife with pervasive sex-based hostility generally. *See, e.g.*, Brittany L. Walter, *Women in Special Operations Forces: A Battle for Effectiveness Amidst the Pursuit of Equality*, 52 U.S.F. L. REV. 175, 191 (2018) (quoting special forces members saying women are mothers and will not kill an enemy, women are a danger to the unit because "knuckle-dragging dudes" will rape them, and special forces shouldn't have to be politically correct and refrain from calling people "pussies" and "gay"); Elizabeth M. Troubaugh, *Women Regardless, Understanding Gender Bias in U.S. Military Integration*, 88 JOINT FORCE Q. 46, 49 (2018) (describing empirical survey results confirming bias against the integration of women in all career fields, with men ranking "logistical problems" as the biggest negative factor of integration). The history of overt discrimination and pregnancy discharge also makes it more likely that the problem is more pronounced in the military context. Note, *Pregnancy Discharges in the Military: The Air Force Experience*, 86 HARV. L. REV. 568 (1973). For studies showing a pattern of sex-based harassment in the military, *see* Dana Kabat-Farr & Lilia M. Cortina, *Sex-based Harassment in Employment: New Insights into Gender and Context*, 38 LAW & HUM. BEHAV. 58 (2014); Emily A. Leskinen, et al., *Gender Harassment: Broadening our Understanding of Sex-Based Harassment at Work*, 35 LAW HUM. BEHAV. 25 (2011).

[85] *See supra* note 83 and accompanying text.

women from combat positions.[86] Women who perceive this bias sometimes delay prenatal care to close-hold pregnancy news longer.[87]

Women who integrate male-dominated professions often experience hostility[88] and resulting insufficient accommodation. An insidious myth in the military is that women use pregnancy to malinger, get out of deployment, and be put on light duty.[89] Recently, the United States has been enmeshed in "forever wars" and its AVF is at times stretched thin.[90] Units may be understaffed and the loss of a body, even temporarily, increases the burden on other members of the unit.[91] Pregnancy is a visible scapegoat, occurring in the body of a minority, for a systemic issue. Animus towards pregnant people and mothers explain the resistance to accommodating preg-

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[86] *See, e.g.*, Kingsley R. Brown, *Women at War: An Evolutionary Perspective*, 49 BUFF. L. REV. 51 (2000) (arguing that women should not be allowed to be fighter pilots because their pregnancies pose readiness concerns and women have lesser spatial reasoning abilities). *See also* Katrine A. Waterman & James C. Miller, *Women in Military Aviation*, U.S. AIR FORCE ACAD. (2000) (reviewing studies and literature to debunk the theory that women have less inherent ability to be successful military aviators).

[87] Ruttenber Interview, *supra* note 51.

[88] *See* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1756–61 (1998) (describing the link between occupational segregation and sex-based harassment).

[89] 2019 DACOWITS Report, *supra* note 43, at 88–93. *See also* Duke Law, *Colonel Martha McSally, Women in Combat: Is Current Policy Obsolete?*, (Apr. 10, 2007), https://web.law.duke.edu/video/colonel-martha-mcsally-women-combat-current-policy-obsolete/ [https://perma.cc/GV52-XGTT] ("We have some people, especially the young enlisted right now . . . that either they're not being responsible in their sexual activity or they think 'well I can have a baby whenever I want,' . . . There's some, there's a few but I tell you it permeates people's attitudes about all of us."). These comments highlight pervasive views that women bear sole responsibility in timing their pregnancies appropriately. However, pregnancy may be the result of rape, may occur despite preventative measures, may be caused by the unavailability of reproductive health care (such as birth control), cannot be ensured to occur in any given window of opportunity, and may be delayed by military women with resulting infertility issues. *See* David Roza, *No, Military Women Are Not Getting Pregnant to Avoid Deployment*, TASK & PURPOSE (Sept. 29, 2020), https://taskandpurpose.com/news/military-pregnancy-deployment/ [perma.cc/BB43-LYZS]. Perpetuating this view ignores structural barriers for both sexes to enjoy successful military careers and family lives. The choice to carry a child is one that benefits all society:

> While there is a personal component to child raising, and while the care of children may be personally rewarding, this "choice" is a choice unlike any others. This "choice" is one from which all of society benefits, yet much of the burden remains on the shoulders of women. Women "choose" to participate in an activity which is not for their benefit alone, and in so doing, they undertake a function on behalf of all society.

Symes v. Canada, [1993] 4 S.C.R.695 (dissent L'Heureux-Dube J).

[90] *See* Meghann Myers et al., *The Military is Growing but Some Services are Getting Smaller*, MIL. TIMES (Feb. 10, 2020), https://www.militarytimes.com/news/your-military/2020/02/10/the-military-is-growing-but-some-services-are-getting-smaller/ [perma.cc/ZFA4-X5NL] (reporting that after years of flying combat missions, the Air Force is stretched thin).

[91] Increased secondary caregiver leave (primarily used by men) has had a greater impact on staffing shortages than increased primary caregiver leave (primarily used by women). 2019 DACOWITS Report, *supra* note 43, at 63.

nancy in the workplace: if a pregnant woman is a secondary worker and primary caregiver, she is not valuable enough to accommodate.[92]

It is often incorrectly assumed that a pregnant person will withdraw from work responsibilities due to a lack of interest in career opportunities and therefore is less motivated.[93] This assumption can overshadow structural barriers, such as arbitrary duty and assignment limitations during pregnancy, the primary/secondary caregiver leave distinction, and narrow inflexible time windows to meet career milestones, to these opportunities. The lack of representation means there are fewer available role models and mentors with direct experience navigating the roles of both servicemember and mother. Seeking less responsibility is by no means unique to women or motherhood. Many personal circumstances affect career decisions. So too, men devalue career advancement in positions with structural barriers to opportunity.[94]

Organizational blindness to structural barriers is underpinned by the narrative that a woman is an inauthentic servicemember whose nature is to choose family over career.[95] Indeed, current policy reinforces this heteronormative assumption by allowing a pregnant woman to separate from service because she may view "pregnancy or the expectations of motherhood as incompatible with continued military service."[96]

Fathers are subject to the corollary life-choice limiting stereotype that they do not desire caregiver responsibility. Expectant fathers are not allowed to separate for caregiving reasons.[97] The Air Force also allows only the birthing parent to decline temporary assignments requiring travel and permanent changes of station in the twelve-month period after giving birth to a child.[98] These policies potentially does not address the infant caregiving realities of non-binary, trans, or same-sex individuals or couples because the policy assigns caregiving accommodations based on the traditional notion that it will be the woman giving birth and performing the majority of all carework. Dual military couples are forced to choose which partner plays

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[92] *See* Grossman, *supra* note 83, at 849 (citing studies showing mothers are evaluated more harshly and less leniently than fathers and concluding that this bias and animus causes employers to resist accommodating pregnancy).

[93] This assumption is the basis of the "maternal wall" bias. *See* Williams, *supra* note 83, at 192 (noting the maternal wall bias is both descriptive — powerful negative assumptions about the commitment and competency of mothers — and — prescriptive — mothers should abandon their career goals for family).

[94] Schultz, *supra* note 7, at 315.

[95] *Id.* at 307–10 (describing this as the conservative story with a related liberal story that a woman should "ungender" herself to fit a job that has been gendered masculine).

[96] U.S. Air Force Instruction 36-3208, Administrative Separation of Airmen §3.17 (July 9, 2004, incorporating guidance memorandum dated July 1, 2020); U.S. Air Force Instruction 36-3207, Separating Commissioned Officers § 2.4.14 (July 2004, incorporating guidance memorandum dated July 1, 2020).

[97] *Id.*

[98] U.S. Air Force Instruction 36-2110, Total Force Assignments § 5.18.4 (Oct. 5, 2018, incorporating guidance memorandum dated Jan. 26, 2021). The DoD has recently standardized the policy for all services in the 2020 NDAA but carves an exception for when the deployment is necessary for national security. 10 U.S.C. § 701(l).

which gender role with regard to caregiver leave without flexibility to account for how the couple actually wishes to allocate caregiver work. This reinforces gendered-role assignment in traditional couples and could be psychologically harmful to non-traditional couples.

Because early and mid-career success defines long-term outcomes,[99] pregnancy is a barrier for career ascent. This narrow early-career opportunity window coincides with the peak reproductive years for people with uteruses. There is an unwritten rule that a servicemember should delay pregnancy until she has safely navigated these early career milestones to remain competitive with her brothers, who are not similarly situated in terms of constraints on their choice of when to procreate.[100] If pregnancy takes one away from duties during this window, and this absence is reflected in the promotion record (either because there is insufficient structural accommodation for the time loss or because negative stereotypes attach), then career ascent becomes increasingly unlikely. Additionally, negative stereotypes attach to the expectant parent that further stymie career ascent. However, people who choose to delay pregnancy risk infertility and various maternal and fetal health issues associated with advanced maternal age (over thirty-five).[101]

Examples of structural exclusions include the limited availability of all maternity uniforms and until very recently, the absence of maternity flight suits.[102] Pregnant pilots have used extra-large uniforms, which can catch on aircraft controls.[103] The lack of a pregnancy flight suit is both a cause and consequence of gender discrimination: its non-existence makes it harder for a pregnant person to do the job, and it does not exist because so few have done the job.

Recently, there has been increased attention to pregnancy policy. In July 2020, the Air Force lifted restrictions for attending primary military education (PME) (a prerequisite to promotion) so that pregnant and postpar-

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[99] General Officer Development Study, *supra* note 9, at 116; Balser, *supra* note 78, at 18; *see also* Dunn, *supra* note 77 (discussing delay in promotion associated with pregnancy).

[100] Ruttenber Interview, *supra* note 51.

[101] Military women are three times as likely as civilian women to experience infertility. Caitlin Foster, *Military Women are 3 Times More Likely to Suffer Infertility than Civilians, but the Pentagon is Forcing Nearly All of Them to Pay for their Own Treatment*, BUS. INSIDER (Dec. 20, 2018, 4:39 PM), https://www.businessinsider.com/military-women-suffer-infertility-at-3-times-the-rate-of-civilians-2018-12?utm_source=copy-link&utm_medium=referral&utm_content=topbar [perma.cc/4QLH-H8YZ]. The reasons for this disparity are not clear. *See id.*

[102] 2019 DACOWITS Report, *supra* note 43. Maternity uniforms are out of stock at many uniform stores, and back orders are frequently delayed. Also, available maternity uniforms may be treated with chemicals harmful to pregnant women or the fetus. *Id.*

[103] Ruttenber Interview, *supra* note 51. Plans for a first-ever maternity flight suit are currently underway with an expected roll-out of 2023. Ryan, *supra* note 10. Many of the recent improvements were spearheaded by the Women's Initiative Team, a volunteer team in the Department of the Air Force. *Id.*

tum individuals can attend without a waiver and without passing a physical fitness test in the preceding twelve months.[104]

Congress recently amended the leave policy and codified a primary/secondary caregiver distinction for military members, the effects of which are beginning to be studied.[105] After delivery, there is six weeks of convalescent leave, which can be extended by a physician if needed, and then the new parent may utilize either primary or secondary caregiver leave consecutively.[106] Primary caregiver leave is six weeks.[107] Secondary caregiver leave is twenty-one days.[108] The twelve-week maternity leave period has positive effects on maternal health, but negative career consequences.[109] This effect is consistent with research comparing the United States, unique in its lack of mother-friendly policies, to other OECD nations that provide greater allowances for mothers: while women's total labor force participation remains stagnant in the United States, a greater share of U.S. women are in full-time and upper-level positions.[110] This evidence suggests that policies providing benefits only to mothers have the unintended consequence of clustering women at the bottom of the labor force.

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[104] Sec'y of the Air Force Pub. Affairs, Air Force Removes Administrative Burden, Allows Pregnant, Postpartum Women to Attend PME (July 29, 2020), https://www.af.mil/News/Article-Display/Article/2292821/air-force-removes-administrative-burden-allows-pregnant-postpartum-women-to-att/ [perma.cc/A35T-E22M]. Prior to this change, waivers were almost always granted by the school, however, commanders at times did not approve the waivers. Ruttenber Interview, *supra* note 51.

[105] 10 U.S.C. § 701. Federal civilian employees now have twelve weeks of paid caregiver leave regardless of gender. Eric Yoder, *Starting Thursday, Most Federal Employees are Eligible for Paid Family Leave*, Wash. Post (Oct. 1, 2020), https://www.washingtonpost.com/politics/federal-paid-parental-leave/2020/09/30/ac8e36c8-0335-11eb-b7ed-141dd88560ea_story.html [perma.cc/DDN5-QYD]. Since this article was written, Congress abolished the primary/secondary caregiver distinction (effective by the end of 2022) and provided each parent with twelve weeks of caregiver leave to be used in the year following the birth of a child. The National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 621. However, Congress has left it to the services to draft and implement policy providing for twelve weeks of parental leave in the one-year period following the birth of a child. *Id.* While this is a big step forward towards limiting harmful gender-stereotyping with regard to infant caregiver roles, the considerations outlined in this article should guide decisionmakers in the services in implementing this provision to ensure that there is not discrimination in decisions approving/disapproving this leave for members.

[106] U.S. Air Force Instruction 36-3003, Military Leave Program § 3.2 (Aug. 24, 2020, incorporating changes in guidance memorandum dated Apr. 7, 2021) [hereinafter "Leave Instruction"].

[107] *Id.*

[108] *Id.*

[109] *See supra* note 77 and accompanying text.

[110] Deborah A. Widiss, *The Hidden Gender of Gender-Neutral Paid Parental Leave: Examining Recently Enacted Laws in the United States and Australia*, 41 Comp. Labor L. & Pol'y J. 723 (2021). *See also* Francine D. Blaue & Lawrence M. Kahn, *Female Labor Supply: Why is the US Falling Behind?*, Nat'l Bur. of Econ. Rsch. (Jan. 2013) (revealing that leave policies that have special treatment for mothers tend to cluster mothers at the bottom of the labor force and in part-time work, whereas the United States, with gender-neutral parental leave policies, sees more women rise to the top of the labor force).

Men may also utilize primary or secondary caregiver leave, if approved by their commander.[111] Commanders do not apply this policy in a gender-neutral manner and sometimes require men to prove their primary caregiver status.[112] Thus, the current leave scheme constrains cis men's opportunity, as well as non-birthing parents who are non-binary, trans, or homosexual, to assume a greater caregiving role and to bond with their children.

This system assigns one partner to the role of primary caregiver, with its corollary of secondary worker, and the other partner to the opposite roles. Parents develop patterns during the first year of a child's life that are difficult to disrupt. Raising a child, like all human endeavors, requires competency and skill gained through experience. The cumulative daily tasks include learning a child's temperament, interests, and responses, scheduling appointments, communicating with external care providers and specialists, monitoring growth and development, inspecting and correcting the environment for safety risks, maintaining, sorting, and laundering weather-appropriate clothes, and of course, feeding, diapering, soothing, putting to bed, and other associated tasks. Year One is critical for a parent in terms of both bonding with the child and gaining experience.[113] It is also when a couple determines who will be primarily responsible for what.

When a man wants to assume a greater caregiving role, he lacks the same regulatory protections as a woman and may be greeted with stereotypical attitudes and assumptions about his lesser role in caregiving.[114] Fathers increasingly want more caregiving opportunities.[115] The system is both limit-

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[111] *See* Leave Instruction, *supra* note 106, at § 3.2.2.4-5.

[112] *See* 2019 DACOWITS Report, *supra* note 43 (noting that the Army policy allows males to take primary caregiver leave only if they can prove by extenuating circumstances that they are actually the primary caregiver, and that males mostly take secondary caregiver leave).

[113] *See* Abraham Z. Melamed, *Daddy Warriors: The Battle to Equalize Paternity Leave in the United States by Breaking Gender Stereotypes: A Fourteenth Amendment Equal Protection Analysis*, 21 UCLA WOMEN'S L. J. 53, 58 (2014) (outlining the psychological research on the importance for fathers of bonding with their child during the first year).

[114] "Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination." Nevada Dep't of Human Res. v Hibbs, 538 U.S. 721, 736–37 (2003).

[115] *E.g.*, Gretchen Livingston & Kim Parker, *8 Facts About American Dads*, PEW RSCH. CTR. (June 12, 2019), https://www.pewresearch.org/fact-tank/2019/06/12/fathers-day-facts/ [https://perma.cc/V9XL-WRDQ]. This trend is likely to continue along with the general trend among the millennial workforce—where the military must compete for its talent—of desiring flexibility and greater work-life balance. *See* Franziska Alesso-Bendisch, *Millennials Want a Healthy Work-Life Balance. Here's What Bosses Can Do,* Forbes (July 23, 2020), https://www.forbes.com/sites/ellevate/2020/07/23/millennials-want-a-healthy-work-life-balance-heres-what-bosses-can-do/?sh=141856e47614 [https://perma.cc/M5YP-SVXP].

ing for men and structurally reinforces women's primary role as caregivers within cis-gender, heterosexual relationships.[116]

b. Implications for the Military and for Women and Pregnant People

Gender integration, or lack thereof, has implications for national security strategy, organizational effectiveness, talent recruitment and retention, unit cohesion, operations, and tactics. The 2018 National Defense Strategy (NDS) acknowledges the United States' need to integrate its diplomatic and economic prowess with its military might to compete with China and Russia.[117] All domains—air, land, space, cyberspace, and sea—are contested.[118] Rapidly advancing new technologies, including artificial intelligence, big data analytics, robotics, autonomy, and biotechnology, are also changing the character of war.[119] Strategic security objectives include advancing U.S. influence and interests, defending allies, bolstering partners, and modernizing culture to deliver performance with affordability and speed.[120]

Aligned with the NDS, the Air Force's strategic vision emphasizes collaboration, both within the Air Force and with external stakeholders, and empowering Airmen[121] to accelerate change and maintain air superiority.[122] Empowering Airmen means enabling all Airmen to reach their full potential and improving both quality of service and quality of life.[123]

In 2017, the United States was the first country to adopt a law on Women, Peace and Security (WPS),[124] committing the U.S. to gender equality in

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[116] Melamed, *supra* note 113 and accompanying text.

[117] Dep't of Def., Summary of the 2018 National Defense Strategy of the United States of America.

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] Airmen is the term used to describe members of the Air Force regardless of gender. The Australian Air Force recently upgraded its terminology from the gendered "Airmen" to gender-neutral "Aviators." Reuters, *'We* are All Aviators': Australian Air Force Replaces Term 'Airmen,' US News (Apr. 8, 2021), https://www.usnews.com/news/world/articles/2021-04-08/we-are-all-aviators-australian-air-force-replaces-term-airmen [[https://perma.cc/THA3-MR93]. I believe gender integration requires the U.S. Air Force to follow suit. It is interesting to note that the regulations and press releases related to pregnancy policy frequently use the term "pregnant women in the Air Force" or "Pregnant Aviators" instead of "pregnant Airmen." This showcases the cognitive dissonance inherent in this language.

[122] Gen Charles Q. Brown, Jr., Air Force Chief of Staff, Accelerate Change or Lose (Aug. 2020), https://www.airforcemag.com/app/uploads/2020/09/CSAF-22-Strategic-Approach-Accelerate-Change-or-Lose-31-Aug-2020.pdf [https://perma.cc/H32G-5MUD].

[123] *Id.*

[124] Women, Peace, & Security Act of 2017, 22 U.S.C. § 2151. *See also* U.S. Civil Soc'y Working Gr. on Women, Peace, & Security, *Advancing Women, Peace, & Security,* U.S. Inst. of Peace, https://www.usip.org/programs/advancing-women-peace-and-security [https://perma.cc/8D2N-YC5S] (last visited May 5, 2021, 1:32 PM) (noting the history of the WPS, beginning with U.N. Security Council Resolution 1325 (2000), continuing with the proliferation of National Implementation Plans, and developing into

national security decision-making.[125] WPS is premised on research indicating that peace is more sustainable where women are involved in the peacemaking and peacekeeping processes at all levels, including security and decision-making.[126] WPS includes two desired end-states, gender-balancing (the integration of women) and gender-mainstreaming (the integration of gender perspectives).[127] Many U.S. allies are adopting the WPS agenda into their military organizations, with accompanying operational success.[128]

Our national defense has a blind spot when it comes to gender,[129] and we must address it as a matter of national security. The DoD recognizes three levels of warfare—the strategic (why we fight), the operational (what we fight with), and the tactical (how we fight).[130] The gender blind spot operates at all three levels. The following discussion, while not all specific to the Air Force pilot,[131] paints a picture of the scope of risk in leaving the blind spot unaddressed and of the necessity of working toward gender balance.[132]

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the first-ever National WPS law in the United States in 2017). The U.S. WPS law had bipartisan support, which is a fascinating development given that the United States declined to ratify ERA or CEDAW.

[125] *See* UNITED STATES NATIONAL ACTION PLAN ON WOMEN, PEACE, & SECURITY (Dec. 2011) (calling for women to be equal partners in security decision-making).

[126] UN Women, *Peace & Security*, https://www.unwomen.org/en/what-we-do/peace-and-security [https://perma.cc/E9FU-9TK5] (last visited May 5, 2021, 1:40 PM).

[127] UNITED STATES NATIONAL ACTION PLAN ON WOMEN, PEACE, & SECURITY (Dec. 2011). Gender-mainstreaming can be accomplished by men as well as women. A woman is not necessarily superior at gender-mainstreaming in a culture of assimilation to views that gender issues do not exist or are not important.

[128] NATO was first out of the gate with doctrine; Norway and Sweden are leading with gender-mainstreaming efforts, but no one has put it all together successfully with gender-balancing and gender-mainstreaming. WOMEN AND GENDER PERSPECTIVES IN THE MILITARY, AN INTERNATIONAL COMPARISON (eds. Robert Egnell & Mayesha Alam 2019) (comparing international WPS implementation efforts). The United States first wargamed gender-mainstreaming as part of the Talisman Sabre 2015 exercise with Australian forces. Brenda Oppermann, *Women & Gender in the US Military*, in WOMEN AND GENDER PERSPECTIVES IN THE MILITARY, AN INTERNATIONAL COMPARISON 122 (eds. Robert Egnell & Mayesha Alam 2019). The United States also achieved increased operational effectiveness by employing gender perspectives in Iraq (Lioness Teams) and Afghanistan (Female Engagement Teams and Cultural Support Teams). *Id.* at 120.

[129] For a proposal to establish a gender staff position to assist with providing gender input at all levels of planning and executing operations, *see* Kiersten H. Kennedy, *Gender Advisors in NATO: Should the U.S. Military Follow Suit*, 224 MIL. L. REV. 1052 (2016). *But see* Catherine Powell, *How Women Could Save the World If Only We Let Them: From Gender Essentialism to Inclusive Security*, 28 YALE J.L. & FEMINISM 271 (2018) (noting methodology concerns to studies supporting arguments that increasing women's participation will improve security and examining the friction between this view and the ways in which it reinforces gender role social constructs; the author ultimately argues for a democratic participation model instead).

[130] U.S. AIR FORCE, AIR FORCE DOCTRINE PUBLICATION 1 (10 Mar. 2021).

[131] For an example of incorporating gender perspectives into air operations see the Australian Royal Air Force's doctrine, AIR POWER DEV. CTR., AFDN 1-18, GENDER IN AIR OPERATIONS (Jun. 25, 2018), https://airpower.airforce.gov.au/publications/afdn-1-18-gender-air-operations.

[132] Brenda Oppermann, *Women and Gender in the US Military in* WOMEN AND GENDER PERSPECTIVES IN THE MILITARY, AN INTERNATIONAL COMPARISON, 132 (2019). "If we are going to use international frameworks to encourage culturally-appropriate mechanisms for gender integration abroad, we must do so at home." Keleanne Hunter, *Shoul-*

At the strategic level, improving gender integration reinforces democratic ideas, strengthens our alliances with partners who share these ideas, and enhances our ability to exert influence around the world by propagating a successful model of integration.[133] Strengthening these ideas and alliances is crucial in a global competition with China and Russia.[134] We may also gain better insight into gender-related implications in our adversaries' human terrain.[135]

At the operational and tactical levels, gender-balancing can improve results. In the information age, creating a clear picture of society with data requires an understanding of the ways in which gender notions influence individuals and groups. Operations must account for gender dynamics both in the human terrain of our adversaries and in order to draw from all of our own population's talent. The examples of recruitment issues, military artificial intelligence (A.I.) capabilities, and lessons learned in recent conflicts regarding gendered issues that may arise in an adversary's human terrain illustrate this overarching point. The military will be disadvantaged if it continues to recruit primarily from the population of men because women outpace men in gaining advanced degrees.[136] The pool of Americans eligible to serve is small.[137] Military A.I. coders also code homogenous biases into algorithms, which creates vulnerability.[138] Incorporating gender perspectives in recent conflicts, such as utilizing female engagement teams in Afghani-

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der to Shoulder Yet Worlds Apart: Variations in Women's Integration in the Militaries of France, Norway, and the United States," 274 (2019), https://digitalcommons.du.edu/etd/1665/ [https://perma.cc/GN32-FAEH].

[133] DEP'T OF STATE, PLAN TO IMPLEMENT THE U.S. STRATEGY ON WOMEN, PEACE, & SECURITY 2020–2023.

[134] The nature of war has changed in modern times "from the pursuit of concrete military strategic objectives to the establishment of certain conditions from which political outcomes can be decided." *See* Robert Egnell & Mayesha Alam, *Introduction*, *in* WOMEN AND GENDER PERSPECTIVES IN THE MILITARY, AN INTERNATIONAL COMPARISON (eds. Robert Egnell & Mayesha Alam 2019). Many operations now involve "activities aimed at achieving more far-reaching political goals of stabilization, democratization, economic growth, and the implementation and maintenance of respect for human rights and the rule of law." *Id.* Critical tasks include "protection of civilians—including against sexual and gender-based violence—humanitarian and diplomatic activities, and the establishment of order." *Id.*

[135] Recent news is full of examples of gender issues coming to the forefront in China and Russia. *See, e.g.*, Lucina Di Meco & Kristina Wilfore, *Gendered Disinformation is a National Security Problem*, BROOKINGS (Mar. 8, 2021), https://www.brookings.edu/techstream/gendered-disinformation-is-a-national-security-problem/ [https://perma.cc/THA3-MR93] (noting the connection between gendered disinformation, the suppression of women's rights, and authoritarianism).

[136] Jargon, *supra* note 39.

[137] Seventy-one percent of young adults do not qualify to enlist. Nolan Feeney, *Pentagon: 7 in 10 Youths Would Fail to Qualify for Military Service*, TIME (June 29, 2014), https://time.com/2938158/youth-fail-to-qualify-military-service/ [https://perma.cc/9L92-LC45].

[138] Mark Pomerleau, *Top Intel Official Warns of Bias in Military Algorithms*, C4ISRNET (Nov. 18, 2020). For instance, some algorithms do not account for physical differences between males and females. Caroline Criado-Perez, INVISIBLE WOMEN: DATA BIAS IN A WORLD DESIGNED FOR MEN 119 (Abrams Press, 2019).

stan, enabled success.[139] Diverse organizations perform better;[140] the military has doctrinally embraced this concept, although implementation is inconsistent.[141] A cultural awareness of women's leadership capacity in times of crisis is rising.[142] A gender-balanced organization will improve unit cohesion by decreasing sex-based harassment and assault.[143] The culture of hegemonic masculinity stalls the desired acceleration of change.[144]

While recognizing the military necessity of inclusion, it is important to also recognize what inclusion means for gender equality, lest the rationale devolve into mere instrumentality.[145] Inclusion of women in the military advances gender equality goals. First, military experience bedrocks broader claims to authority in the areas of foreign affairs and military strategy, and buttresses social and political rights.[146] Second, military service affects social and economic rights by providing access to military benefits; the military is

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[139] *See* Hunter, *supra* note 132, at 128 (describing how French integration of women and gender perspectives in its military directly contributed to tactical success in Kapsia Valley, Afghanistan). *See also* Miemie Winn Byrd & Gretchen Decker, *Why the U.S. Should Gender its Counterterrorism Strategy*, MIL. REV. (2008), https://www.armyupress.army.mil/Special-Topics/Hot-Topics/Gender-Equality/Gender-Counterterrorism/ [https://perma.cc/EL3F-2KXM].

[140] Anna Powers, *A Study Finds That Diverse Companies Produce 19% More Revenue*, FORBES (June 27, 2018), https://www.forbes.com/sites/annapowers/2018/06/27/a-study-finds-that-diverse-companies-produce-19-more-revenue/?sh=75349759506f [https://perma.cc/G7G2-3PAK]; Vivian Hunt et al., *Delivering Through Diversity*, MCKINSEY & CO. (Jan. 2018), https://www.mckinsey.com/~/media/mckinsey/business%20functions/organization/our%20insights/delivering%20through%20diversity/delivering-through-diversity_full-report.ashx [https://perma.cc/77N9-2CBL].

[141] *See, e.g.*, Nelson Lim, Abigail Hadddad, & Lindsay Daugherty, *Implementation of the DoD Diversity & Inclusion Strategic Plan*, RAND CORP. (2013).

[142] *See, e.g.*, Uri Friedman, *New Zealand's Prime Minister May Be the Most Effective Leader on the Planet*, ATLANTIC (Apr. 19, 2020), https://www.theatlantic.com/politics/archive/2020/04/jacinda-ardern-new-zealand-leadership-coronavirus/610237/ [https://perma.cc/F2HM-8525] (examining Prime Minister Jacinda Ardern's and Chancellor Angela Merkel's effective leadership during the coronavirus crises).

[143] Gabriella Lucerao, *From Sex Objects to Sisters-In-Arms: Reducing Military Sexual Assault Through Integrated Basic Training and Housing*, 26 DUKE J. GENDER L. & POL'Y 1 (2018). I use the term "sex-based" instead of "sexual" in recognition of the social and legal research documenting that this phenomenon is rooted in the preservation of sex-segregation and not necessarily in the expression of sexuality. *See* Schultz, *supra* note 88.

[144] *See* Kenneth L. Karst, *The Pursuit of Manhood and Desegregation of the Armed Forces*, 38 U.C.L.A. L. REV. 499 (1991) (describing the belief system that power belongs to the masculine and arguing that this is a disservice to individuals and to democracies).

[145] A human rights rationale alone has historically failed to gain traction. "[M]ilitaries tend to be deeply skeptical organizations resistant to change." Egnell & Alam, *supra* note 134, at 12–13. Arguments that equality for women is "'the right thing to do' . . . often fall on deaf ears within military organizations. The functional imperative of fighting and winning wars . . . remains too strong, and while military leaders might very well support the general notion of increasing gender equality in their society, equality is simply not perceived as having anything to do with military operations." *Id.*

[146] Diane H. Mazure, *A Call to Arms*, 22 HARV. WOMEN'S L.J. 39 (1999) (arguing full female citizenship requires integration of women in the military).

traditionally a stepladder for upward mobility.[147] Third, the military, as a prestigious institution of our democracy, should represent its people, and women may be viewed as second-class citizens until it does.[148]

II. Legal Background

To effectuate the interlocking goals of military necessity and gender equality, I use the model of antidiscrimination law and its underlying theory to reconstruct Air Force policy regarding duties, assignments, promotion, and leave. I expand the parameters of individual consideration to counter stereotypes, increase institutional accommodation to update legacy systems that insufficiently account for the condition of pregnancy, and push back against the shortsighted cost-savings rationale with the long-range vision that gender parity at all levels is essential to building tomorrow's force.

This approach combines antisubordination[149] with accommodationist theory and pays close attention to negative stereotyping effects of special treatment for pregnancy. I accept the antisubordination goal of substantive equality but tweak its methodology to abate stereotypes. I take current antidiscrimination law as a model, although it is (mostly) not strictly applicable.[150]

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[147] *See, e.g.*, Massachusetts v. Feeney, 442 U.S. 256 (1979) (upholding state veteran's preference hiring statute despite disparate impact on women).

[148] Karst, *supra* note 144, at 501 (arguing that the military holds a special place in society and should embody our democratic ideas of equality); Mazure, *supra* note 146, at 58 (arguing women must serve to achieve factual credibility in a democracy).

[149] Antisubordination theory holds that law should produce actual equality, and that social context is relevant and can justify dissimilar treatment of groups that are differently situated. Catharine A. MacKinnon, *Toward a New Theory of Equality* in Women's Lives, Men's Laws 22, 44–57 (2005). A critique of this theory is that different treatment delegitimizes the accomplishments of the favored minority and that the special treatment is unfair to the group not receiving its benefit. *See* Naomi Schoenbaum, *The Case for Symmetry in Antidiscrimination Law*, 2017 Wis. L. Rev. 69, 86 (2017).

[150] Policy is the focus of this article. However, I recognize that policy and adequate standards are necessary but not sufficient conditions to eradicate the problem of pregnancy discrimination in the military. Cultural change and institutional enforcement are also necessary.

Title VII relief is unavailable to servicemembers. *See, e.g.*, Jackson v Modly, 949 F.3d 763 (D.C. Cir. 2020) (holding that marine corp. member was not a covered employee under Title VII); Overton v. N.Y. State Div. of Mil. & Naval Aff., 373 F.3d 832 (2d Cir. 2004) (denying coverage for a Black aircraft electrician employed both as a military member and a civilian because allowing the claim to go forward would affect the military relationship with the Master Sergeant who was both his civilian supervisor and in his military chain of command).

The current enforcement mechanisms include complaints through the chain of command, such as military equal opportunity complaints and internal investigations. DoDI 1350.02, *supra* note 3; *see also* U.S. Air Force Instruction 36-2710, Equal Opp. Program (Jun. 18, 2020, incorporating guidance memorandum dated Sept. 9, 2020). However, these avenues have built-in incentives that favor the command perspective, especially where implicit bias is the issue. This is a compound problem in the realm of pregnancy because of the twin problems that pregnancy bias can be cloaked in the window dressing of benign familial concern and that romantic paternalism is part of tradi-

Antidiscrimination law reveals design choices that balance competing goals and is an appropriate starting point for military policy. Equal Protection law takes a strong stance against stereotypes and eschews administrative convenience justifications. Disparate treatment theory has many helpful lessons for contesting bias, although it struggles with proving motive. In the military, the disparate treatment model is useful to establish bright line rules that limit discretion, and therefore, the associated potential for biased decision-making. I also go beyond current law in some areas to advocate for policy in line with Pregnant Workers Fairness laws, the Americans with Disabilities Act Amendments Act (ADAAA),[151] disparate impact theory, and comparable worth models.

Tracing the development of pregnancy discrimination law, I note its advantages and deficiencies, and highlight legal considerations specific to the military. While the DoD wrote pregnancy discrimination protection into existence for military women on September 4, 2020,[152] the term lacks contextual definition. As Justice Antonin Scalia famously quipped in dissent, "[J]ust defining pregnancy discrimination as sex discrimination does not tell us what it means to discriminate because of pregnancy."[153] Here, I introduce the foundations for advancing pregnancy integration.

a. The Constitution and the Military

The Constitution provides overarching protection against sex discrimination by the federal government and states.[154] Initially, the Supreme Court upheld a state regulation denying a married woman license to practice law because of the "divine ordinance" that a man is a woman's protector and in charge of her rights, with the corollary that a woman's nature is delicate and relegates her to domestic matters.[155] In 1971, the Court began to recognize a

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tional military culture. For recommendations for improving accountability measures and individual grievance systems, *see* Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17 (2018–2019).

[151] Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

[152] DoDI 1350.02, *supra* note 3. As one of his final acts prior to being dismissed, Secretary of Defense Mark T. Esper sent a memorandum to Pentagon leadership directing a comprehensive review of policy "to identify and remove unnecessary obstacles to career development or progression." SEC. OF DEF., CAREER ENHANCEMENT OF PREGNANT U.S. SERVICE MEMBERS (Nov. 3, 2020). The 2021 NDAA requires the DoD to improve policy by increasing "individual determinations," providing accommodations, minimizing stereotype bias, and implementing enforcement mechanisms. 2021 NDAA, *supra* note 4.

[153] Young v. UPS, Inc., 575 U.S. 206, 245 (2015) (Scalia, J., dissenting).

[154] U.S. CONST., amend. V (requiring the Federal Government to provide equal protection); U.S. CONST., amend. XIV, § 1 (requiring the states to provide equal protection).

[155] Bradwell v. Illinois, 83 U.S. 130, 141 (1873) (Bradley, J., concurring) (finding that Illinois's refusal to admit a woman to the practice of law did not violate the privileges and immunities clause and was justified under the separate spheres ideology). The Supreme Court also rejected an equal protection challenge to an Oregon statute protecting

woman's place in the Constitution and held that a statutory scheme preferencing fathers over mothers in administering a deceased child's estate violated the Equal Protection Clause, and that administrative convenience was an insufficient justification for the arbitrary distinction.[156]

Frontiero v. Richardson[157] moved the dial further for gender equality. Lieutenant Frontiero served in the Air Force and although married, could not claim her husband as a "dependent" for benefits (absent a showing of actual dependency).[158] Male servicemembers did not have to make this showing to obtain benefits for their wives.[159] In overturning this statutory scheme on Equal Protection grounds, the Court once again eschewed the administrative convenience justification and explicitly rejected the "romantic paternalism" espoused in *Bradwell*, noting that it "put women, not on a pedestal, but in a cage."[160] This cemented sex as a suspect class when applied to draw a distinction without regard to individual characteristics.[161]

United States v. Virginia[162] articulates the current standard for sex-based Equal Protection cases. The Court specified that sex-based distinctions must have an "exceedingly persuasive justification" serving an "important governmental objective[ ]" that is substantially related to the justification.[163] The Commonwealth of Virginia argued that its unique education model for citizen-soldiers was dependent upon an all-male environment without any modifications to accommodate females.[164] The Court dismissed this circular reasoning.[165] The Court recognized instead that valid distinctions may be drawn based on celebrated differences between the sexes, such as the one drawn in *California Federal Savings & Loan Ass'n v. Guerra*,[166] which upheld a statute requiring an employer to provide pregnancy disability leave and to reinstate an employee at the conclusion of the leave.[167] Although the *Virginia* Court assumed that there are benefits to single-sex education, the record lacked proof that this "benign" justification was the actual reason that the legislature established the military school.[168] Equal Protection re-

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women (but not men) from working more than ten hours a day on grounds that a woman's maternal function and physical stature disadvantage her in the workforce, and therefore her quality of life must be protected from overreaching employers. Muller v. Oregon, 208 U.S. 412, 422–23 (1908).

[156] Reed v. Reed, 404 U.S. 71, 74–77 (1971) (holding statutory classifications that distinguish between male and female are subject to scrutiny under the Equal Protection Clause).

[157] 411 U.S. 677 (1973).

[158] *Id.* at 680.

[159] *Id.*

[160] *Id.* at 684.

[161] *Id.* at 687–88.

[162] 518 U.S. 515 (1996).

[163] *Id.* at 524.

[164] *Id.*

[165] *Id.* at 545.

[166] 479 U.S. 272 (1987).

[167] *Virginia*, 518 U.S. at 533–34.

[168] *Id.* at 535–36.

quires a "hard look" at the stereotypes embedded in sex-based classifications that deny opportunity.[169]

Pregnancy involves constitutional protections in addition to sex discrimination. Pregnancy implicates the right to privacy, including the freedom to choose whether and when to procreate.[170] Establishing arbitrary cutoff dates based on presumptions that determine when a pregnant person becomes unfit for her occupation infringes on this privacy right.[171]

To be constitutional, pregnancy distinctions must be based on the physical facts of pregnancy and cannot stereotype regarding capacity or proper role. Pregnancy discrimination may not be an available theory where a state denies insurance coverage of pregnancy-related risks.[172] In *Geduldig v. Aiello*, the Court held that this denial was not sex discrimination because the pregnancy-related risk exclusion was too far removed from gender.[173] The *Geduldig* holding, however, may be narrowly construed to its facts and is undermined by recent (and resurgent) legal developments.[174] *Nevada Dept. of Human Resources v. Hibbs* marks an evolution in the Court's thinking by recognizing that pregnancy-related legislative line-drawing is sex discrimination where it perpetuates "mutually reinforcing" stereotypes that women are responsible for care work and that men lack family responsibility.[175] *Hibbs* and *Geduldig* read together stand for the proposition that pregnancy-related distinctions, even those that ostensibly appear to favor pregnant people, run afoul of the Constitution where they are based on the stereotype that women are caregivers first and workers second.[176]

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[169] *Id.* at 541.

[170] *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (right to privacy protects use of birth control for married couples); Eisenstadt v. Baird, 405 U.S. 438 (1972) (right to privacy protects use of birth control for unmarried persons).

[171] *See* Cleveland Bd. of Ed. v. LaFluer, 414 U.S. 632 (1974) (mandatory discharge of pregnant teachers imposes unnecessary burden on protected freedoms).

[172] Geduldig v. Aiello, 417 U.S. 484 (1974) (held excluding insurance coverage of pregnancy constitutional because excluded risk distinguishes between pregnant and non-pregnant persons and not between the sexes).

[173] *Id.* at 496–97 n.20 (explaining the state's denial of insurance coverage is not sex discrimination because all risks covered are for non-pregnant persons, which include both men and women).

[174] *See* Bostock v. Clayton Cnty., 140 S.Ct. 1731 (2020) (test for determining if discrimination involves sex requires analysis of whether the same outcome would occur if the sex of the individual is switched). *See also* Struck Brief, *supra* note 28, at 37 (arguing military pregnancy discharge policy violates Equal Protection because limiting opportunity reinforces societal pressure on women to abandon career aspirations, perpetuating subordination). *See also* Neil S. Siegel & Reva B. Siegel, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. 771, 774–75 (2010) (demonstrating that the Struck Brief presents a vision of equality where woman's reproductive role is not used as cause to perpetuate her exclusion).

[175] 538 U.S. 721, 736 (2003) (holding that the Family Medical Leave Act was valid prophylactic legislation to overcome a pattern of gender discrimination).

[176] Reva B. Siegel, *You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in Hibbs*, 58 STAN. L. REV. 1871, 1891–95 (2006).

Military deference adds another layer to this analysis.[177] Courts defer to military policy because the military is a society-apart with a specialized mission requiring "instinctive obedience, unity, commitment and esprit de corps."[178] *Schlesinger v. Ballard* upheld a gender-based distinction providing women with more time to promote than men because at the time, women were excluded from combat and other roles that lead more readily to promotion.[179] The Court distinguished *Reed* and *Frontiero* as based on overbroad generalizations whereas here the situation was grounded in the "demonstrable fact" of dissimilar opportunity.[180]

From this constitutional jurisprudence, several threads emerge that can be woven into either individual challenges or policy. First, administrative convenience is insufficient to justify arbitrary sex-based distinctions that fail to account for individual capabilities.[181] Second, a male-oriented military environment may have to change to accommodate females and allow for their equal participation.[182] Third, irrebuttable presumptions, including those regarding the physical capacity of a pregnant person, are disfavored under the law.[183] Fourth, pregnancy-related distinctions that reinforce stereotypes about men and women's family roles are constitutionally suspect.[184] Finally, for service members, individual rights must sometimes succumb to military necessity. For example and to the point here, in the context of gender, the

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[177] Rostker v. Goldberg, 453 U.S. 57 (1981) (upholding male-only draft, emphasizing traditional deference to Congress in matters of the military); Schlesinger v. Ballard, 419 U.S. 498 (1975) (upholding Navy rule allowing women more time to promote based on purpose of remedying disadvantageous conditions for women in economic and military life); Goldman v. Weinberg, 475 U.S. 503 (1986) (using deferential standard of review of military in upholding regulation challenged as violating First Amendment); Orloff v. Willoughby, 345 U.S. 83, 93 (1953) ("judges are not given the task of running the Army"); Orloff v. Willoughby, 345 U.S. 83, 92 (1953) (emphasizing "the subordination of the desires and interests of the individual to the needs of the service"). *But see* Bakken, *supra* note 33 (arguing that this deference is nowhere mandated and that women should continue to challenge this doctrine by asserting Equal Protection challenges to combat exclusions). For a prescient argument that strict judicial deference to the military in matters related to democratic rights and norms threatens democracy by sanctioning servicemember assimilation to a "patriotism of blind obedience," and by inhibiting servicemember ability to engage in democratic participation, *see* Kirstin S. Dodge, *Countenancing Corruption: A Civic Republican Case against Judicial Deference to the Military*, 5 YALE J.L. & FEMINISM 1, 2 (1992). Notably, a link between right-wing extremism and the military was on display in the recent events of the January 6, 2021 Capitol Riot. Tom Dreisbach & Meg Anderson, *Nearly 1 in 5 Defendants in Capitol Riots Cases Served in the Military*, NPR (Jan. 21, 2021), https://www.npr.org/2021/01/21/958915267/nearly-one-in-five-defendants-in-capitol-riot-cases-served-in-the-military [https://perma.cc/UGX6-QQDX].

[178] Goldman v. Weinberg, 475 U.S. 503, 507 (1986).

[179] *Schlesinger*, 419 U.S. at 508.

[180] *Id.*

[181] *Reed*, 404 U.S. at 76.

[182] *Virginia*, 518 U.S. at 545–46.

[183] *Cleveland Bd. of Ed.*, 414 U.S. at 644–46.

[184] *Hibbs*, 538 U.S. 721 at 736–37.

military can favor the disadvantaged sex where the sexes do not have equality of opportunity and doing so is justified by a military necessity.[185]

b. Title VII and The Pregnancy Discrimination Act

Title VII of the Civil Rights Act of 1964,[186] as amended by the Pregnancy Discrimination Act (PDA),[187] provides statutory pregnancy discrimination protection. Sex discrimination is discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions" where the individual is treated differently than "other persons not so affected but similar in their ability or inability to work."[188] The PDA prevents employers from singling out pregnancy for worse treatment,[189] and affirms that both men and women should be able to combine work and family.[190] However, the PDA falls far short of effectuating this goal because of its requirement of a comparator employee and its failure to specify affirmative accommodation measures.[191]

A plaintiff may prove pregnancy discrimination by showing disparate treatment or disparate impact. Under disparate treatment, a plaintiff must prove that (1) she is a member of a protected class, (2) she suffered an adverse employment action, and (3) she was qualified for the position (or that others were not subjected to the same treatment).[192] Then, the burden shifts to the employer to show a non-discriminatory reason for its action.[193] The plaintiff can then prevail if she shows that the employer's justification is pretextual.[194]

Under a disparate impact theory, the plaintiff must show that she is a member of a protected group and that members of her group are disqualified at a significantly higher rate than members of the most privileged group.[195]

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[185] *Schlesinger*, 419 U.S. at 508.

[186] 42 U.S.C. §§ 2000e, et. seq.

[187] Pregnancy Discrimination Act, Public Law 95-555; 42 U.S.C. § 2000e(k). Congress enacted the PDA in response to the holding of *Gen. Elec. v. Gilbert*, 429 U.S. 125 (1976) (following *Geduldig* in holding that an employer could exclude pregnancy from coverage in its disability plan).

[188] 42 U.S.C. § 2000e(k).

[189] Deborah L. Brake, *On Not Having It Both Ways and Still Losing: Reflections on Fifty Years of Pregnancy Litigation under Title VII*, 95 B.U. L. Rev. 995, 999 (2015) (describing PDA's design choice reflecting a limited equal treatment model because of the fear of backlash if women are provided with greater accommodation than other groups).

[190] Siegel, *supra* note 5, at 993.

[191] Brake, *supra* note 189, at 999.

[192] *See* McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973).

[193] *Id.*

[194] A showing of pretext alone may not be enough and the ultimate burden of proof on the issue of discrimination remains on the plaintiff. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 514 (1993).

[195] *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971). A rate of four-fifths or less will generally be regarded as evidence of an adverse impact. Equal Empl. Opp. Comm'n, Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §1607.4(D), Information on Impact.

Then the employer must prove a business necessity for the discriminatory standard.[196] If the employer does so, the plaintiff can prevail if she shows that the employer's standard was not the least restrictive means to meet the business need.[197]

In *Young v. UPS*, a disparate treatment case, the Court held that the employer was required to provide a pregnant worker with light-duty accommodations where an employer accommodates a large percentage of nonpregnant workers but fails to accommodate many pregnant workers.[198] This comparator analysis blends disparate impact and disparate treatment theories.[199] It also leaves in place the status quo structures that result in de facto inequality.[200]

To address this gap, many states have gone beyond the PDA to enact Pregnant Workers Fairness Act (PWFA) legislation.[201] The PDA is a floor, not a ceiling, and states may require that an employer provide greater accommodations for pregnancy-related conditions than the employer provides to male workers who are similar in their ability or inability to work.[202] Additionally, the disparate impact theory may be available to a plaintiff where she can show that a neutral standard impacts a pregnant person at a statistically significant rate as compared to the group with the highest benefit rate.[203]

Under Title VII, an employer has a bona fide occupational qualification (BFOQ) defense where it expressly excludes pregnant people. An employer may exclude pregnant women if necessary to its business's essence and if all or substantially all pregnant women would not be able to perform the job safely or effectively.[204] Fetal safety decisions, however, are appropriately left

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[196] *Griggs*, 401 U.S. at 431–32.

[197] *Id.* Notably, disparate impact challenges under the PDA have not met with success because of manipulation of comparators to make the impact look less and the difficulty pinning the impact to a specific practice. Brake, *supra* note 189, at 1000.

[198] 135 S. Ct. 1338 (2015).

[199] *Id.* at 1365 (Scalia, J., dissenting).

[200] Brake, *supra* note 189, at 1004.

[201] Siegel, *supra* note 5, at 974 (PWFAs, which mandate accommodations for pregnancy in the workplace, have been enacted in nearly half of the states and notably, in a combination of red and blue states). For argument for the adoption of a federal PWFA to create a right for a woman to continue working safely with accommodations throughout her pregnancy, *see* Deborah A. Widiss, *supra* note 83.

[202] California Federal S. & L. Ass'n v. Guerra, 479 U.S. 272, 297 (1987). These state statutes operate by putting pregnant women in the same position as disabled employees under the ADA. Siegel, *supra* note 5, at 974–75.

[203] L. Camille Hebert, *Disparate Impact and Pregnancy: Title VII's Other Accommodation Requirement*, 24 Am. U. J. Gender Soc. Pol'y & L. 107, 109 (2015). *But see*, Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 647 (1989), superseded by statute, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, as recognized in Raytheon Co. v. Hernandez, 540 U.S. 44 (2003) (requiring that the plaintiff show the practice that resulted in the adverse impact unless impractical). Disparate impact challenges under the PDA have not fared well because of the difficulty proving the practice at issue and finding appropriate comparators. Brake, *supra* note 189, at 1000.

[204] Dothard v. Rawlinson, 433 U.S. 321, 333 (1977).

to the mother.[205] An old line of cases upheld the airlines' exclusion of pregnant flight attendants under the BFOQ defense.[206] Whether the employer can make an individual determination, such that a class distinction is not a reasonable proxy, is a question of fact.[207] In the flight attendant cases, the courts were deferential to the airlines' safety concerns. However, a modern court will likely scrutinize a pregnancy-dating proxy for safety determinations because of the stereotyping implications.[208]

III. Analysis

Policy addressing pregnancy in the Air Force should start with an affirmative statement about values and goals, such as the following:

> Including women at all ranks is the law, advances equality, and is critical to obtaining strategic objectives in national security. We must build a system that accounts for our Airmen's humanity, including their reproductive health and roles. Pregnancy and reproductive health-related absences and duty limitations should not hinder an Airman's ability to reach full potential and career progression.[209] Pregnancy policy must also address and advance full inclusion of non-binary, transgender,[210] and same-sex couples' reproductive experiences and should affirm the goal that all Airmen, irrespective of gender, should have the opportunity to combine career and caregiving.

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[205] United Automobile Workers v. Johnson Controls, Inc., 499 U.S. 187, 188 (1991) (noting fetal safety concerns are properly left to the parents).

[206] Harris v. Pan American World Airways, Inc., 649 F.2d 670, 676 (9th Cir. 1980); Burwell v. Eastern Air Lines, Inc., 633 F.2d 361, 373 (4th Cir. 1980), cert. denied 450 U.S. 965 (1981); Condit v. United Air Lines, Inc., 558 F.2d 1176, 1176–77 (4th Cir. 1977), cert. denied, 435 U.S. 934 (1978); *In re* National Airlines, Inc., 434 F. Supp. 249, 263 (S.D. Fla. 1977). These are old cases, and the use of a proxy is essentially a stereotype. It is unlikely that a modern factfinder or court would follow this stereotyping rationale. For further discussion, see Section III.a., *infra*.

[207] Criswell v. Western Airlines, 472 U.S. 400, 401 (1985).

[208] Phillips v. Martin Marietta Corp., 400 U.S. 542, 544–45 (1971).

[209] DoD data shows that at any time roughly three to eight percent of the service is non-deployable, non-deployable pregnant members are barely one percent of any branch. Roza, *supra* note 89. Additionally, the non-deployable service member figure does not account for those service members who were able to time their pregnancy for a period where they were unlikely to be scheduled to deploy anyway; those members would still be counted as non-deployable. *Id.* The non-deployable category includes various reasons such as medical issues, legal issues, and humanitarian issues like divorce or the death of a family member. *Id.*

[210] President Biden repealed the Trump-era ban on transgender troops on January 25, 2020. Laurel Wamsley, *Pentagon Release New Policies Enabling Transgender People to Serve in the Military*, NPR (Mar. 21, 2021), https://www.npr.org/2021/03/31/983118029/pentagon-releases-new-policies-enabling-transgender-people-to-serve-in-the-milit [https://perma.cc/FD64-WYJD].

Recognizing these values and goals prime various duty, assignment, promotion, and leave policies for revision. But first, a word regarding policymaking methodology is in order. Policy can be made either by incrementalism or comprehensive rationality.[211]

> [I]ncrementalism is policymaking characterized by: considering a limited number of familiar policy options, mixing goals and values with empirical analysis, emphasizing the limited social ills to be cured rather than a grand goal to be achieved, proceeding slowly through trial-by-error and correction, examining only some of the potential effects of a policy alternative and providing space for partisan interest groups to influence policymaking through negotiations.[212]

Incrementalism theoretically allows balancing of stakeholder interests and minimizes risks of backlash and unforeseen consequences from more radical change.[213] However, it is slow, unlikely to solve complex problems, and "may lull the public into thinking the problem is being effectively addressed," thereby releasing political pressure for correction but leaving the systemic flaws.[214]

Comprehensive rationality, in contrast, proceeds through four stages:

> The first stage involves specifying a particular goal. Second, the policymaker identifies the possible methods of attaining that goal. Third, the effectiveness of those mechanisms must be assessed. In the fourth phase, the policymaker selects the method or methods 'that will make the greatest progress toward the desired outcome.'[215]

Critics point to the overburdening of limited resources, difficulty in reasoning through complex problems, and disagreement regarding values and goals.[216]

The military has an opportunity and a challenge in addressing pregnancy discrimination. The opportunity is that the military has the organizational mandate, self-interest motivation, and policymaking authority to address this issue comprehensively and effectively. There is also a rich body

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[211] C.S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 394–95 (1981) (tracing historical use of both methods and arguing for a comprehensive rationality approach when voices would likely be ignored in an incremental process).

[212] SUSAN BISOM-RAPP & MALCOLM SARGEANT, LIFETIME DISADVANTAGE, DISCRIMINATION AND THE GENDERED WORKFORCE 16–17 (2016) (internal citation omitted).

[213] *Id. But see* Kathryn Abrams, *Gender in the Military: Androcentrism and Institutional Reform*, 56 LAW & CONTEMP. PROBS. 217, 220–22 (1993) (detailing how problem-specific solutions have backfired with the zero tolerance sexual harassment policy and the lift on the ban of service for homosexual individuals).

[214] Bisom-Rapp & Sargeant, *supra* note 212, at 17 (internal citation omitted).

[215] *Id.*

[216] *Id.*

of scholarship that shows what does not work and what can. The challenge is that "accelerating change" requires radical moves, resources, sustained focus,[217] and agreement regarding values and goals.

a. Duty

Air Force policy should allow pregnant pilots to engage in duties, including flying, throughout the entire term of pregnancy if they choose to do so, after risk advisement by their physician, and if their military treatment provider finds that they are medically capable.[218] Concerns pertinent to this policy are (1) At what point are pregnant people substantially all unable to fly safely or efficiently?; (2) Who decides when it is no longer safe for a pregnant person to fly?; (3)Who decides whether to assume fetal safety risks?; and (4) Does the unique military environment justify romantic paternalism? In the context of the military, we must also consider the effects on good order and discipline, specifically, the goal of empowering commanders of the squadron.

Examining when a pregnant person can no longer fly safely or efficiently requires clarifying risks. An interwoven inquiry is whether the safety and efficiency concerns are colored by paternalistic notions. There are three distinct safety concerns: (1) flying the aircraft safely and efficiently, (2) the risk to the woman's health, and (3) the risk to the fetus. Risks that are structural in nature (i.e., risks that result from a mismatch between design choices and the body of a pregnant person) are correctable. Distinguishing which risk is at play aids in the clarity of analysis and diminishes the opportunity to conflate and overemphasize risks based on stereotypical notions. The risks are, however, interrelated as an incapacitated pilot poses risk to safe and efficient flight.

Historically, the law perpetuated beliefs that a woman, whose nature is "delicate and timid," is destined for domestic responsibility and that "a man is woman's natural protector and defender."[219] The law did this by foreclosing opportunities that were outside the pre-ordained roles.[220] This ethos is in many ways more pronounced in military culture where it motivates men to serve their country in war.[221] Integrating pregnancy requires a merging of socially-constructed roles, specifically, the roles of pilot and servicemember

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[217] For a recommendation that the DoD create a single office to investigate and implement gender-integration plans, *see* DEFENSE ADVISORY COMMITTEE ON WOMEN IN THE SERVICES, 2020 ANNUAL REPORT (2020).

[218] *See* Jessica Ruttenber, BULLET BACKGROUND PAPER ON USAF POLICY BARRIERS TO AIRCREW FLYING WHILE PREGNANT (Jul. 10, 2019) (proposing this policy).

[219] *See supra*, note 155 and accompanying text.

[220] *Id.*

[221] Karst, *supra* note 144, at 501 (recognizing this does not necessitate denigration of the men who heroically served based on this belief system). The military can honor these men, its tradition, and adopt a different ideological framework going forward.

with the role of pregnant person. This merging is new territory that risks the default limitations of romantic paternalism.[222]

The ejection seat concern illustrates both the pitfalls of default romantic paternalism and the conflation of various risks: there is no evidence that the ejection seat is more harmful to a pregnant person or the mission. Rather, the inclination to limit one's opportunity to be in that seat because of pregnancy strengthens the romantic paternalistic instinct, despite countervailing factual circumstances.

Aircraft are designed for cis-gender men's bodies and carry additional risks to cis women regardless of pregnancy.[223] These are primarily structural risks that could be lessened through research and development improvements. Women often weigh less than men and may therefore be more likely to suffer spinal fracture or death when using an ejection seat.[224] There are not likely to be any studies regarding how pregnancy affects the risk of death to the woman using an ejection seat; however, it seems plausible that pregnancy could increase the likelihood of survival of the woman by adding weight to her body.[225] At any rate, the likelihood that a pilot will need to use the ejection seat during a flight is exceedingly low.[226]

In an old line of cases litigated against the airlines, courts were more likely to side with the employer's exclusions of pregnant people as flight attendants after a certain cutoff date, typically lying somewhere in the second trimester. This is so despite *Cleveland Bd. of Education v. LaFleur*'s mandate that individual consideration is appropriate for teachers (who also must provide physical assistance) throughout their pregnancy. Reconciling these divergent cases requires closer examination of context and logic. Several pertinent questions emerge: (1) are pilots different from flight attendants in terms of physical requirements for safety and efficiency?; (2) does having a flight medicine program that clears the pilot to fly change the analysis

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[222] Pregnant women of color, particularly, may be subject to the expectation that they work even when it may be dangerous or when they may be risking their health to do so. The history of slavery and subordination of black women contributes to this expectation. Brake, *supra* note 189, at 1002. I address this concern *supra* in this Section by arguing that the appropriate intervention is prohibiting this treatment as a form of discrimination.

[223] Designing aircraft to fit the Caucasian male is the cause of most of the anthropometric and strength problems encountered by women in aviation. Lyons, *supra* note 62, at 816. "The issues are political, economic, and engineering rather than medical." *Id.*

[224] *Id.*

[225] This engineering situation for women is analogous to the social model of disability, which views nothing inherently disabling about conditions, rather it is the mismatch between environmental design and the person's condition that is disabling. *See, e.g.*, Michelle A. Travis, *Disabling the Gender Pay Gap: Lessons from the Social Model of Disability*, 91 DENV. U. L. REV. 893, 914–16 (2014).

[226] The risk of having to use the ejection seat is .0084 per 1,000 hours of flying. Ruttenber, *supra* note 218. For an analogous discussion of ordinary risks, such as driving a car (while pregnant, perhaps) that we accept as part of everyday life and therefore do not meet the threshold showing of a "significant risk" permitting regulation under the Occupational Health Safety Act, *see* Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 617–18 (1980).

from the flight attendant line of cases?; (3) are the factual inferences and rationale of the flight attendant cases persuasive?

The flight attendant cases look at the risk to commercial airline passengers in the event of an emergency. Courts have generally deferred to the airlines' judgment that a pregnant flight attendant cannot assist commercial passengers because she cannot kick open windows and doors, climb out of tight spaces, apply forty-five pounds of pressure to an emergency exit door, help people onto life rafts, and evacuate sleeping, intoxicated, incapacitated, and minor passengers.[227] The *Burwell* Court acknowledged that there is no empirical data regarding how pregnant flight attendants actually perform in such emergencies.[228] The *Burwell* Court also did not cite any evidence showing that the airline had procedures to check any employee's ability to perform these tasks.[229] It is likely, however, that fit pregnant workers could perform these tasks and many less fit nonpregnant workers could not. Additionally, this analysis assumes that keeping calm in an emergency and directing others is not something of equal or greater utility in a crisis. The *Burwell* Court ignored the absence of any evidence showing that all pregnant people would be unable to perform during an emergency, which suggests that pregnancy is an unreasonable proxy for fitness.

The airlines' justification for the exclusion of pregnant women was shifting and inconsistent. Notably, the airlines defended pregnancy exclusion policies at the same time that they defended policies seeking to exclude men from flight attendant positions.[230] The airlines also raised concerns regarding fatigue, nausea, vomiting, and incapacitation due to spontaneous abortion in flight.[231] Courts hearing these cases varied in where the permissible cutoff date should lie, ranging from the moment an individual becomes aware of the pregnancy through the twenty-sixth week of pregnancy.[232]

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[227] *Burwell*, 633 F.2d at 373. These cases, however, are relatively old, and there is a lack of new cases reflecting advances in scientific knowledge because the airlines have employed a strategy of settlement rather than litigation. *See* Jennifer Staton, *What's Wrong with Pregnancy in the Airline Industry and What to Do About It: Balancing Public Safety Interests, Disability Rights, and Freedom from Discrimination*, 77 J. AIR L. & COM. 403, 422 (2012).

[228] *Burwell*, 633 F.2d at 366–67.

[229] *Id.*

[230] The airlines proffered that men could not be flight attendants because they lacked competence soothing anxious passengers. *See, e.g.*, Diaz v. Pan American World Airways, 442 F.2d 385, 388 (5th Cir. 1971) (holding that being female was not a bona fide occupational qualification for the position of flight attendant). Airlines also sought to impose weight restrictions on female flight attendants to "create the public image of an airline which offered passengers service by thin, attractive women . . ." Gerdom v. Cont'l Airlines, Inc., 692 F.2d 602, 604 (9th Cir. 1982).

[231] *See Burwell*, 633 F.2d at 366. A study of 514 flight attendants found a relative risk increase of 1.9 of spontaneous abortion for flight attendants compared to the general population but no increased risk of other pregnancy health outcomes. Lyons, *supra* note 62, at 815.

[232] *In re* Nat'l Air Lines, Inc., 434 F. Supp. 249, 263 (S.D. Fla. 1977) (holding that policy could not prevent women from flying the first thirteen weeks of pregnancy, could condition flying in weeks thirteen to twenty on physician approval, and could prohibit

The Air Force pilot is different from a commercial flight attendant. First, an Air Force pilot is always subject to conditions on her ability to fly. If an Air Force pilot knows she has a physical ailment that could prevent her from flying safely, she grounds herself until she visits a flight doctor and gains approval to return to flying duties.[233] This happens frequently in the case of a common cold, for example.[234] Second, there are no commercial passengers to consider, although there could be passengers, including high-level dignitaries, or valuable assets on board. However, the primary duty of a pilot in an emergency is not evacuation of a large volume of commercial passengers but rather landing the aircraft as safely as possible. Tellingly, the FAA does not mandate that a pregnant pilot cease flying at any point during pregnancy.[235]

As the flight attendant cases show, worst-case scenario risks tend to be unduly emphasized when it comes to pregnant people. Comparable risks and risks inherent in the ordinary course of the activity itself are dwarfed by the risks posed by a particular aspect of womanhood, especially in a traditionally male occupation.[236] Of course, flying itself is an inherently dangerous activity. Accidents can and do happen with devastating consequences for many reasons, the most common being human error.[237] There are unlikely to be studies regarding how pregnancy impacts the innate risk of flying the aircraft safely and efficiently.[238]

Comparing the contours of non-disqualifying medical risks with disqualifying pregnancy risks for pilots reveals discrimination. Heart disease, which is more common in men, is the leading cause of inflight incapacitation in civilian aviation and the second leading cause in military aviation (below seizures).[239] Men are generally at a higher risk for inflight incapacitation than women and "male pilots have a higher rate of both fatal and non-fatal aviation accidents."[240] Another aviation risk for men is kidney stones. Men be-

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flying after week twenty. More recently, the airlines have extended this cut-off date). *See, e.g.*, Cont'l Airlines, Inc. v. Ohio Dep't of Fam. Servs., 878 N.E.2d 647, 648 (Ohio Ct. App. 2007) (noting the collective bargaining agreement setting mandatory maternity leave at the twenty-seventh week of pregnancy).

[233] Ruttenber Interview, *supra* note 51.

[234] *Id.*

[235] FAA Policy, *supra* note 60 and accompanying text.

[236] *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 332–37 (1977) (holding that the state could prohibit women from serving as prison guards in an unconstitutionally dangerous male penitentiary because of the risks to prison security posed by her potential rape). Justice Marshall, dissenting in part, argued that this decision ignored how dangerous it is for anyone to be a prison guard under these conditions, that prison guards rely on effective psychological deterrents rather than brute strength to deter potential attacks, and that the only reason for this concern is Alabama's unconstitutionally dangerous prison conditions. *Id.* at 343–44 (Marshall, J., concurring in part and dissenting in part).

[237] Lyons, *supra* note 62, at 815.

[238] This is an area of controversy. The two main "concerns are the effects of pregnancy on ability to perform and the effects of the aviation environment on the fetus." Lyons, *supra* note 62, at 815.

[239] Lyons, *supra* note 62, at 814.

[240] *Id.*

tween the ages of twenty and fifty risk developing kidney stones, the passage of which can be incapacitating, causing symptoms of severe pain and dizziness, much like an ectopic pregnancy.[241] This risk peaks at age thirty.[242] However, the aeromedical procedures do not require men to obtain a waiver to fly when a kidney stone is detected and trusts each individual to properly manage the condition.[243]

This treatment of male comparators shows that the limits for pregnant pilots are arbitrary and discriminatory. Regarding the risk pre-term labor poses to flying the aircraft safely and efficiently, it may be that for most pregnancies, a physician would find a significant risk of incapacitating labor at thirty-six weeks, thirty-eight weeks, or forty weeks. However, some people may be able to fly safely and efficiently throughout their pregnancy and effectively manage the risk of pre-term labor. A physician could also determine that the pre-term labor risk is insignificant for shorter flights.[244] A preg-

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[241] *Avoiding the Pain of Kidney Stones*, HARV. HEALTH PUB. (July 2018, updated Feb. 12, 2021), https://www.health.harvard.edu/diseases-and-conditions/avoiding-the-pain-of-kidney-stones, [https://perma.cc/EYX4-C2UW] (kidney stones can be more painful than childbirth). Lt. Col Ruttenber suggested the kidney stone comparison in her interview.

[242] *Id*.

[243] Sonya Horwell, *Kidney Stones*, ARMY AVIATION MAG., http://armyaviationmagazine.com/index.php/archive/not-so-current/1160-kidney-stones, [https://perma.cc/N3VE-DSEU] (kidney stones are common and occur in one out of eleven people). In the Air Force, heart disease diagnosis is disqualifying for flying duty. Aerospace Medicine Waiver Guide, *supra* note 57, at 181. Depending on the severity of the heart disease condition, a pilot may be able to obtain a waiver for flying duties in low performance aircraft. *Id.* Pregnancy, by comparison, is subject to additional restrictions: "aircrew are allowed to fly in non-ejection seat aircraft, pressurized to at least or which naturally do not fly higher than 10,000 MSL, *with another qualified pilot*. For aircraft and pregnancies that do not meet all of the above guidelines, waiver will not be considered." *Id.* at 556 (emphasis added). Thus, there is no ability to obtain a waiver after twenty-eight weeks of gestation. To continue flying prior to twenty-eight weeks, the pregnancy must be uncomplicated, specifically defined, including the conditions that the pregnancy be a singleton and that the mother be under the age of thirty-five. *Id.* at 557. A history of seizures is generally disqualifying, with the possibility of waiver for truly provoked seizures. *Id.* at 670. However, "aviators with isolated epileptiform EEG abnormalities and no history of seizure or epilepsy" continue flying for a year, and thereafter, if they do not develop seizures. *Id.* FAA regulation of commercial airlines excludes pilots from flying after a heart attack or testing evidence of ischemia unless and until specific testing criteria are met. *Coronary Artery and Heart Disease*, AVIATION MED. ADVISORY SERV., https://www.aviationmedicine.com/article/coronary-artery-and-heart-disease/#:~:text=the%20diagnosis%20of%20coronary%20artery,classes%20of%20FAA%20medical%20certification [https://perma.cc/C9KW-JCM4] (last visited May 13, 2021, 3:55 PM). FAA regulation of flying after evidence of seizures is similarly regulated and conditioned upon testing and examination criteria. FED. AVIATION ADMIN., GUIDE FOR AVIATION MEDICAL EXAMINERS, ITEM 46. NEUROLOGIC – NEUROLOGIC CONDITIONS, https://www.faa.gov/about/office_org/headquarters_offices/avs/offices/aam/ame/guide/app_process/exam_tech/item46/amd/nc/#:~:text=Rolandic%20seizures%20may%20be%20eligible,Consultation%20with%20FAA%20required [https://perma.cc/5YYP-YJUU] (last visited May 13, 2021, 3:59 PM).

[244] While labor can begin at any time and its precise course is often unpredictable, most labors begin with mild irregular contractions. *Labor and Delivery, Postpartum Care*, MAYO CLINIC, https://www.mayoclinic.org/healthy-lifestyle/labor-and-delivery/in-

nant person can easily self-monitor whether the abdomen has grown too large to safely ingress and egress the aircraft and to reach the controls.

Individual consideration is also appropriate for the risk of miscarriage in the first trimester, which may present with symptoms like an ordinary menstrual cycle and therefore will not pose a risk to the individual or the mission.[245] The possibility of an ectopic pregnancy, like the possibility of passing a kidney stone, is manageable, and therefore insufficient to justify a blanket flying prohibition. Every pregnant person's body adapts to pregnancy differently.[246] It is practical to assess these risks with individual consideration given that the aeromedical program makes similar assessments for other physical ailments without arbitrary mandatory cutoff dates. Furthermore, as the *Crawford* Court noted, this flying prohibition rule may be "counterproductive because the penalty . . . can lead women to ignore or conceal pregnancy as long as possible to avoid diagnosis" and the loss of flying privileges.[247]

An arbitrary gestation cutoff date is not a reasonable proxy for safe and efficient flying. In *Western Airlines v. Criswell*, the Court upheld a jury verdict determining that mandatory retirement of flight engineers at age sixty was not reasonably necessary to safe and efficient flying.[248] The Court relied on three factual circumstances in reaching its conclusion. First, Western Airlines provided individual consideration to others, including those suffering from alcoholism and those who had experienced a cardiovascular event.[249] Second, the FAA did not mandate that engineers retire at age sixty due to safety concerns.[250] Third, other airlines in the industry allowed flight engineers to fly beyond age sixty.[251]

In the U.S., the military provides individual consideration in comparable situations, such as with kidney stones, and the FAA states that pregnancy

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depth/stages-of-labor/art-20046545 [https://perma.cc/ZK46-Y95X] (last visited May 5, 2021, 9:44 PM).

[245] *See supra* note 62 and accompanying text.

[246] For many women, the risk of inflight incapacitation due to spontaneous labor is not significant until week thirty-six and can be managed throughout the pregnancy. For this reason, airlines vary widely in their policies allowing late-term pregnant passengers to fly, with some imposing no restrictions on pregnant women and others waiving restrictions with medical documentation. Barbara Woolsey, *Here are 14 Major Airlines Policies for Flying Pregnant*, USA TODAY (Aug. 8, 2015). https://www.usatoday.com/story/travel/roadwarriorvoices/2015/08/08/here-are-14-major-airlines-policies-for-flying-pregnant/83846106/v [https://perma.cc/3TSH-77MY].

[247] *Crawford*, 531 F.2d at 1125.

[248] 472 U.S. 400 (1985). The Court did not review the mandatory retirement of pilots at age sixty, but noted that FAA regulation mandated retirement for pilots at age sixty due to concerns of subtle and undetectable debilities that come with age and that could manifest in flight. *Id*. at 404. The fact that the FAA bars age but not pregnancy further supports that pregnant pilots can safely fly at any week of the pregnancy.

[249] *Id.* at 407.

[250] *Id.*

[251] *Id*.

is not disqualifying under normal circumstances.[252] Israel's military, by contrast, does not limit flying in the first trimester and instead disqualifies the pilot at twenty-five weeks of pregnancy.[253] The airlines have varying policies, many setting their cutoff at thirty-two weeks.[254] The fact that cutoff dates vary so widely supports the conclusion that these limitations are arbitrary. In line with its robust flight medicine program, the Air Force can provide individual consideration at any week of pregnancy. An arbitrary cutoff date is unnecessary and inefficient because it stops capable pilots from performing their duties. It is also a discriminatory barrier to the pilots who desire to continue working and who are capable of doing so.

A pregnant pilot should be allowed to decide whether a risk to her own health is one worth taking. Generally, in the civilian context, individuals are free to assume risks inherent in an occupation and employers cannot exclude them from opportunities on the basis of their assumption of personal risk.[255] But in the military context, the pilot is not merely a private citizen, but also an asset of the Air Force which the Air Force has an interest in preserving. It may be difficult to make a causal determination about whether risks that may affect the health or life of a pregnant person are related to the activity of flying. Carrying and delivering a child entail several risks, and the cause of a particular maternal health outcome is often unclear.[256] Flying itself carries risks to the health of all pilots, pregnant or not. An individual can judge whether to assume any incremental additional risk to her health from flying while pregnant.

Pregnant pilots also can employ risk management techniques such as using oxygen in flight, avoiding acrobatic maneuvers requiring g-forces, and

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[252] *See* Hauglid, *supra* note 61. Flight attendants and pilots are currently involved in litigation with the airlines raising allegations of discrimination regarding policies that limit flying duty after thirty-two weeks. *Id.* at 630.

[253] Mitch Ginsburg, *IAF Female Pilots Cleared to Fly While Pregnant*, TIMES OF ISRAEL (Jan. 9, 2014), https://www.timesofisrael.com/female-iaf-pilots-cleared-to-fly-while-pregnant/ [https://perma.cc/4ZFV-PAPM].

[254] Frontier's thirty-two week pregnancy cutoff is currently the subject of litigation. Freyer, et al. v. Frontier, Complaint, District of Colorado (2019), Case 1:19-cv-03468.

[255] *See, e.g.*, *Dothard*, 433 U.S. at 335.

[256] *See supra* note 62 and accompanying text. In most cases, the cause of spontaneous abortion or ectopic pregnancy is unknown and there is insufficient evidence linking these events to flying activity. CTRS. FOR DISEASE CONTROL & PREVENTION, NAT'L INST. FOR OCCUPATIONAL SAFETY AND HEALTH, REPRODUCTIVE HEALTH (last visited May 13, 2021), https://www.cdc.gov/niosh/topics/aircrew/reproductivehealth.html [https://perma.cc/NH9U-4WQD]. For a review of medical literature of flying risks to the woman and fetus concluding that in many instances, the studies are deficient in methodology and that many perceived risks were not quantifiably substantiated, *see* Everett F. Magann et al., *Air Travel and Pregnancy Outcomes: A Review of Pregnancy Regulations and Outcomes for Passengers, Flight Attendants, and Aviators*, 65 OBSTETRICAL & GYNECOLOGICAL SURV. 396 (June 2010). A spontaneous abortion typically has mild symptoms and no long-term effect on the woman's health. Ectopic pregnancies often carry early warning signs, such as light vaginal bleeding and pelvic pain, and require destruction of the embryo to protect the life of the woman, which will ordinarily occur early in the pregnancy. *See supra* note 62 and accompanying text.

performing isometric contractions when required to sit for long periods of time.[257] The interventions of self-monitoring and physician approval further mediate the risks of flying while pregnant without the need for an arbitrary cutoff date. The pilot knows her aircraft and will understand the effects that turbulence can have on her body. The woman, after medical clearance, can be trusted to make judgment calls about her own health, just as all military pilots are trusted to make judgment calls under pressure in the ordinary course of their duties.[258]

Fetal safety is another concern properly left to the pregnant woman after appropriate risk disclosures. The logic of *International Union, UAW v. Johnson Controls, Inc.* [259] is persuasive, and there are no fetal safety factors unique to the military context that make it different from the civilian context. Johnson Controls manufactured batteries that exposed its workers to lead.[260] Johnson Controls adopted a fetal protection policy that prohibited women who were pregnant or who could become pregnant from working jobs with lead exposure.[261] After finding the policy facially discriminatory, the Court analyzed it under the BFOQ test, asking whether the requirement was related to the essence of Johnston Controls' business.[262]

For the BFOQ analysis, the concern for third parties must relate to the "essence" or the "central mission of the employer's business."[263] The Court dismissed as "word play" the notion that Johnson Controls' mission was to make batteries without harming fetuses.[264] Although the court recognized the dissent's concern regarding the employer's potential state tort liability for injury to fetuses, it rejected the conclusion that this possible incremental cost alters Title VII's anti-discrimination mandate.[265]

Although Title VII does not apply to servicemembers, there are good reasons why the military should adopt the *Johnson Controls* holding in policy. First, its logic is persuasive. The Air Force mission is to "fly, fight and win . . . in air, space, and cyberspace." It bears no mention of protecting

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[257] Kim, *supra* note 68 and accompanying text.

[258] Notably, male pilots, too, have risks of cancer and reproductive health issues from radiation exposure. *See* Lyons, *supra* note 62 and accompanying text.

[259] 499 U.S. 187 (1991).

[260] *Id.* at 190.

[261] *Id.* at 192.

[262] *Id.* at 200. The Court rejected the Court of Appeals' determination that the policy was facially neutral because Johnson Controls' policy was not equally concerned with the reproductive health of men, which could also be affected by exposure to lead. *Id*. at 198. The Court found this was true despite the "benign" fetal protection motive. *Id.* Similarly, "exposure of male pilots to high-g stress is suspected to decrease the proportion of male offspring produced." Lyons, *supra* note 62, at 815. Thus, the reproductive capacity concern here is also addressed only to the female population despite evidence that exposure also affects male pilots' offspring.

[263] *International Union, UAW*, 499 U.S. at 203.

[264] *Id*. at 207. *Accord* E.E.O.C. v. Cath. Healthcare W., 530 F. Supp.2d 1096, 1108 (C.D. Cal. 2008) (transfer of pregnant radiologist to alternate duty did not satisfy the BFOQ test and was discriminatory).

[265] *International Union, UAW*, 499 U.S. at 208.

fetuses from the risk of birth defects from radiation exposure.[266] In other words, it is not essential to core operations. Second, the military as a state actor must respect its members' Constitutional right to privacy.[267] Although that right may yield to military necessity, here military necessity is served by allowing the individual to judge fetal risk because the full inclusion of women and other childbearing people is critical to national security. Third, even if a suit could theoretically arise from injury to the fetus,[268] this potential incremental cost should not usurp the overarching anti-discrimination and military necessity justifications.[269] This concern is also mitigated by efforts to engineer the environment in ways that reduce radiation exposure and by careful advisements to pregnant persons regarding the scope of their risk of exposure.[270]

Although the concern for fetal health is not more or less important based on the mother's status as military or civilian, the political calculus surrounding decisions related to maternal health might be different for the military than for private employers. If there is a negative outcome affecting the mother or fetus, public opinion might scrutinize any military policy that allowed the negative result to occur. However, the possibility of public scrutiny should not deter the military from making sound policy decisions that advance the interests of women and military necessity. The military can expand opportunities for women and pregnant people while improving safety conditions in its aircraft.

Individual consideration also should be increased for combat and deployment opportunities. Combat typically involves greater risk than flying, but this is not always the case. Remote piloted aircraft pilots can fly combat

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[266] Aerospace Medicine Waiver Guide, *supra* note 57.

[267] *See supra* note 170. The right to privacy is interlaced with antidiscrimination: "laws intervening in major life decisions and enforcing status roles may simultaneously implicate both equality and liberty—equal protection and due process. Restricting women's liberty may be a means to the end of communicating inequality, and discriminating against women may diminish their opportunities to fashion fulfilling lives." Siegel, *supra* note 174, at 787. The relatedness of equality and liberty is on full display in the regulation of the military pilot: her liberty to procreate is constrained by policy (military women are delaying pregnancy and experience infertility), as is her opportunity for equality (if she becomes pregnant she will not be able to advance in her career). *See also,* Struck Brief, *supra* note 28, at 7.

[268] *See* Feres v. United States, 340 U.S. 135 (1950) (active duty members barred from suing under Federal Tort Claims Act). However, this may not apply to the fetus. *See, e.g.*, Brown v. United States, 462 F.3d 609, 615–16 (6th Cir. 2006).

[269] I acknowledge that it does not eliminate this concern entirely as it is not clear the mother's waiver applies to a claim by the fetus. Nonetheless, this potential for liability does not justify the restriction on women. Pregnant women make similar decisions during the ordinary course of pregnancy, including whether to drive a car, take prescribed medications, or have a home birth. Pregnant pilots, properly informed of the nature and extent of the risk to the fetus, are in the best position to determine whether a particular risk is acceptable.

[270] If the woman and her family feel they have been treated fairly under the circumstances, she/they will be less likely to criticize or sue the military. The military should endeavor to take reasonable precautions rather than issue a discriminatory blanket prohibition on flying.

missions safely at any point in a pregnancy. Combat position definitions are murky, and some entail little additional risk.[271] Similarly, deployment may not increase safety risks. Some deployments occur in place, and some routine exercises are categorized as deployments because they require specific travel orders.[272] Currently, a pregnant person may not be able to participate in a prestigious exercise because it is technically defined as a deployment, even though she could participate if the exercise took place at her home station.[273]

The prenatal care concern can be addressed by expanding the availability and portability of prenatal care options. For instance, at remote locations, the military could provide care through the private market. Shortening deployments where feasible is another option. One program, for instance, authorizes medical evacuation of pregnant civilian spouses who have accompanied their active-duty spouse to remote duty locations lacking adequate prenatal or emergency care.[274]

Instead of applying an overbroad blanket exclusion to pregnant women, the Air Force can address the issue of coercive pressure on women directly. Pregnant people should be exempt from combat and deployment where there is a high level or risk or where prenatal care is unavailable. Pregnancy is a medical condition, and a pregnant person needs access to medical care and regular health monitoring. The military's practice of accommodating pregnant people with alternate duties and combat and deployment exemptions should continue, just as other temporary medical conditions are similarly accommodated. The military is a coercive environment. There should be safeguards in place to curtail abuse. Policy can clarify that exerting undue pressure on a subordinate to perform dangerous activities is a form of pregnancy discrimination. Superiors and medical providers should be trained to support their pregnant Airmen and to understand pregnancy bias.

It is possible that the visibility of pregnant pilots performing their duties could increase expectations of all pregnant people in the ranks, including enlisted members who may not be positioned to assert themselves fully in response. As a result, some pregnant members might be pressured to perform activities they judge to be unsafe. But if these expectations already exist, then the visibility of some pregnant people flying cannot be a root cause of the problem. The solution, therefore, lies in efforts to eliminate biases against and hostility towards pregnant people,[275] not in arbitrarily curtailing pilots' opportunities. Furthermore, expanding opportunities for preg-

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[271] Ruttenber Interview, *supra* note 51.
[272] *Id.*
[273] *Id.*
[274] *Id.*
[275] Studies in the civilian employment sector show that low-wage workers are the recipients of hostility and outrage at work when they become pregnant, "reveal[ing] a total hostility to the idea that a low-wage female worker should become pregnant." Stephanie Bornstein, *Work, Family, and Discrimination at the Bottom of the Ladder*, 19 GEORGIA J. ON POVERTY LAW & POLICY 1, 16 (2012).

nant pilots allows more women to ascend the ranks, improving conditions for all women and making the military more representative of the society it protects.

Commanders should not evaluate risks for the pregnant person or decide whether that person is medically capable of flying (unless perhaps where she personally observes a safety concern, such as extensive vomiting prior to flight). The commander is unlikely to have relevant medical knowledge; instead, he is likely to base his decisions on stereotypical assumptions about women and pregnancy, resulting in unfair and inefficient determinations regarding pilot safety and capacity.[276] Empowering the squadron and commanders is an important goal, but it is not aided by arbitrary controls that lack evidence-based justifications. The issue of medical readiness for duty is one best left to the pregnant person in conjunction with a physician.

None of this is to say that policy should ignore the concerns of parental and fetal safety. There are many ways, other than an unnecessary blanket prohibition or commander decision-making control, that policy can advance these goals. Physicians should fully advise women concerning any risks to the pregnant person or to the fetus. Their advisements should draw as complete a picture as possible of what is known and what is unknown and should be tailored to the specific pilot's aircraft. The pregnant person needs this information to monitor her condition, decide whether she should ground herself, and determine whether the risks to herself or to her fetus are beyond what she is willing to accept. Scientists and engineers should improve aircraft design for women's bodies generally, including the pregnant form, and for fetal safety. Engineers who ask the right questions may find many ways that they can make aircraft safer for pregnant people and for fetuses.

There are, of course, costs associated with the inclusion of pregnant people as pilots. Consideration of individual cases will pose administrative costs, and full inclusion will entail research and development costs. These costs suggest that it would be easier to keep the status quo and to maintain the arbitrary cutoff of flying duties during pregnancy. Adding to the gravity of the status quo is the fact that many women provided with individual consideration are likely to be medically unqualified for flying duties or to ground themselves based on health concerns or risk tolerance at some point during their pregnancies.

The courts, however, have rightly viewed the administrative convenience justification with suspicion.[277] Normalizing the condition of pregnancy as part of the mission can help to create a more inclusive environment for women. Eradicating overbroad blanket prohibitions will create more ave-

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[276] *See, e.g.*, Roe v. Dep't of Def., 947 F.3d 207, 212, 228, 234 (4th Cir. 2020) (upholding a preliminary injunction and finding a likelihood of prevailing on the merits that the decision to discharge service members because of HIV status is irrational because it is based on outmoded notions of HIV status and fails to provide individual consideration in contravention of DoD's own policy).

[277] *E.g.*, *Reed*, 404 U.S. 71.

nues for pregnant people to get to climb to the top of the military ladder. National security and the goal of equality require the inclusion of women and justify additional administrative costs. Unlike *LaFleur* and the flight attendant cases, the pregnant military woman is not going to immediately lose pay or her job when she is excluded from duty.[278] However, she may never be able to make up for the missed gates, effectively establishing women as a subordinate class with less opportunity. This loss of talent, expertise, ability, and diversity undermines the military and national security. Greater individual consideration and freedom to operate can address many of the harsh outcomes experienced by military women. Employers can combine the individual consideration approach with changes to underlying structures to make pregnancy and career progression compatible in all career fields.

b. Assignment

Current DoD policy prohibits assignment discrimination because of past maternity leave:

> No member will be disadvantaged in her career, including limitations in her assignments (except in the case where she voluntarily agrees to accept an assignment limitation), performance appraisals, or selection for professional military education or training, solely because she has taken maternity leave.[279]

The recent policy amendment added the phrase "including pregnancy," and now defines prohibited discrimination as,

> >Discrimination, including disparate treatment,[280] of an individual or group on the basis of race, color, national origin, religion, sex (including pregnancy), gender identity, or sexual orientation that is not otherwise authorized by law or regulation and detracts from military readiness.[281]

However, current policy lacks clarity: namely, there is no direct guidance to commanders regarding how to handle career disadvantages (such as canceled assignments) that accrue due to the anticipation of maternity or parental leave, present maternity or parental leave, duty limitations, or other circumstances attendant to pregnancy. Defense Secretary Esper's recent memorandum recognizes both the omission of and the reality that women

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[278] At least not initially, although there is an "up or out" promotion system. *See generally* Promotion Regulation, *supra* note 76.

[279] Dep't. of Defense., DoD Instruction 1327.06, Leave and Liberty Policy and Procedures (June 16, 2009, Incorporating Change 4, effective January 15, 2021).

[280] As a practical matter, a service member has little chance of successfully mounting a disparate impact challenge given the constraints of the complaint mechanisms. *See supra* note 150 and accompanying text.

[281] DoDI 1350.02, *supra* note 3, at 40.

are vital to force readiness and lethality.[282] The memorandum directs the services to review policy to eliminate unnecessary obstacles and to provide clear paths for career advancement to pregnant service members.[283] Regarding assignments, the memorandum calls for the services to take a hard look at "the timing of opportunities for career-enhancing assignments and professional military education."[284]

New policy must address two assignment issues: (1) temporary assignments during pregnancy (when a member cannot perform her usual duty) and (2) the permanent duty assignment for which she must compete while pregnant. If policy creates new accommodations for pregnancy, will the policy be perceived as unfair special treatment? If so, will that perception reinforce the stereotype that women and other pregnant people are inauthentic servicemembers? Finally, how do we balance concerns for gender equality and pregnancy fairness with the immediate readiness needs of the Air Force? Stated another way, assuming that fair treatment for pregnant service members is an important goal, at what cost do we achieve such fairness?

The Supreme Court wrestled with similar issues in *Young v. U.P.S.*,[285] and interpreted the PDA to require a comparison between the new cost of accommodating pregnancy with costs the firm already undertakes for others.[286] A pregnancy discrimination plaintiff can use comparator evidence to make a prima facie case, which the employer can rebut by showing it had a legitimate reason for excluding pregnancy that was more than mere expense and inconvenience.[287] The plaintiff then has an opportunity to show the stated reason is pretextual, either by direct evidence or with a sufficient quantum of comparators.[288] This standard is widely criticized both for its lack of clarity and because it does not go far enough to make the workplace equitable for pregnant persons.[289] Scholars suggest various remedies for these shortcomings, including the adoption of a federal Pregnant Workers Fairness Act (PWFA)[290] and the development of a judicial regime anointing qualified individuals with disabilities, as defined by the ADAAA, as the relevant comparator group.[291]

To elucidate the policy considerations, it is helpful to apply the *Young* paradigm to the military context. In *Young*, the pregnant employee sought light duty due to a lifting restriction. UPS denied her request but had a

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[282] SecDef Memo. 2021 NDAA, *supra* note 4.
[283] 2021 NDAA, *supra* note 4.
[284] *Id.* The 2021 NDAA goes further and requires the DoD to increase flexibility for pregnant service members to satisfy PME requirements. *Id.*
[285] 575 U.S. 206 (2015).
[286] *Id.* at 228.
[287] *Id.* at 229.
[288] *Id.* at 229–30.
[289] *E.g.*, Brake, *supra* note 189, at 999.
[290] *See supra*, note 158 and accompanying text.
[291] Eliza H. Simon, *Parity by Comparison: The Case for Comparing Pregnant and Disabled Workers*, 30 COLUM. J. GENDER & L. 254, 291 (2015).

"pregnancy-blind" policy that allowed light duty accommodation for some (but not all) other groups, namely, individuals who could not drive a truck due to loss of certification, employees injured at work, and qualified individuals with disabilities whom the employer was required to accommodate under the ADAAA.[292] The plaintiff argued that the PDA required UPS to accommodate a pregnant employee if it provided an accommodation to anyone else.[293] UPS argued that the PDA required no more than a facially neutral policy that does not single out pregnancy for unique treatment.[294]

The Court rejected both arguments—the plaintiff's because the PDA does not require an employer to provide "most-favored nation" status to pregnancy, and the employer's because the PDA explicitly overruled *Gilbert* and therefore requires greater protection than mere neutrality.[295] The court modified the *McDonnell-Douglas* framework by requiring that the employer's legitimate non-discriminatory reason be more than a claim of greater expense and less convenience and by allowing the plaintiff to rebut the legitimate non-discriminatory reason with statistical comparator evidence.[296]

In crafting assignment policy, the Air Force could look to statistical comparator information to determine if there is a practice of discrimination against pregnant servicemembers and to decipher which policies enable this practice. Alternatively, the Air Force could adopt a policy in line with the PWFA approach by determining what is needed to effectively accommodate pregnancy.[297] The Air Force should adopt policy in line with the PWFA accommodationist schema, but also track and analyze data.

The Air Force can accommodate pregnancy and maternity leave in assignments through two mechanisms. First, the pregnant pilot unable to perform her regular duties can be temporarily assigned to a career-enhancing assignment of a limited duration. Such assignments could include serving as a commander, a deputy commander, an executive officer to a prominent commander, a student in PME or a civilian program (perhaps outside the

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[292] *Young*, 575 U.S. at 207.
[293] *Id.* at 220.
[294] *Id.* at 221.
[295] *Id.* at 221–23.
[296] *Id.* at 229–30. It is important to note that the current DoD policy does not contain the critical clause on which the *Young* decision hinged, "other persons. . .similar in their ability or inability to work." Additionally, the pregnant service member has no access to a court to construe the meaning of the current protection and provide binding precedent. Further, even if a commander tried to apply the *Young* framework to decide the merits of a complaint, the complaint mechanisms lack adequate discovery rights and an aggrieved servicemember will not be able to fully explore the relevant statistical information. In short, while current policy is a symbolic step in addressing the issue, clear standards and enforcement mechanisms are required for the policy to have significant effect in practice. This article addresses some of the issues surrounding standards. The issue of appropriate enforcement mechanisms should be addressed in future research.
[297] *See, e.g.*, U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 397 (2002) (holding that under the ADA reasonable accommodation provisions, neutral policies sometimes must give way to accomplish equality goals).

ordinary cycle of eligibility), or as a classroom instructor, among others. Second, the Air Force can create a reasonable accommodation provision, modeled in part on PWFA and on the ADAAA, prohibiting unreasonable assignment denial due to pregnancy or anticipation of maternity leave.[298] A solution for the assignment dilemma requires a combination of both approaches and an expansion of eligibility to counter the potential negative effects of stereotyping.

But first, applying *Young* to the military context illuminates (1) missing data points and (2) approach flaws to address in drafting better policy. To apply *Young*, the Air Force must analyze who is already being accommodated. This is not an easy task as the military is generally structured so that its active duty force is presumptively capable of performing assigned duties.[299] Some potential categories of comparators include (1) persons with temporary disabilities, (2) individuals taking another form of leave (such as humanitarian leave to care for a family member or appear at a paternity, child support, or child custody proceeding, annual leave, rest and recuperation leave after a deployment, secondary caregiver leave, and other leave), (3) individuals whose next assignment will be interrupted either by school or training, and (4) individuals under criminal investigation.

All categories present challenges because the Air Force may not have retained a record of how individuals in these groups have been accommodated, if at all. We may only be able to glean that they were accommodated in some respect by measuring subsequent career outcomes.[300] This suggests that an initial intervention is to start tracking how individuals are accommodated to understand where discrimination is occurring and to aid in the consistent application of accommodations.

The first three categories could provide useful comparator information; however, currently it is unrecorded. Nonetheless, there could be some interesting data on career effects following humanitarian, convalescent, and other forms of leave that prove instructive regarding how outcomes from a group

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[298] Many courts have found that the PDA does not require an employer to accommodate maternity leave, thus reaffirming a work-world that puts maternity and career in tension. *See, e.g.*, Marshall v. AHA, 157 F.3d 290 (7th Cir. 1998) (upholding termination of probationary employee who required eight weeks of maternity leave during an annual conference where there was no comparator evidence that others would have been treated more favorably). *But see* Lulaj v. Wackenhut Corp., 512 F.3d 760 (6th Cir. 2008) (holding that the employee established a prima facie case by alleging that she was offered a lesser promotion after the employer learned she was pregnant). The FMLA, however, guarantees twelve weeks of unpaid caregiver leave to covered employees. Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2612 (1993).

[299] For instance, persons with permanent disabilities are ordinarily excluded from service. DEP'T. OF DEF., DoD INSTR. 6130.03-V1, MED. STANDARDS FOR MIL. SERV.: APPOINTMENT, ENLISTMENT, OR INDUCTION (Mar. 30, 2018, Change 1 effective Sept. 4, 2020).

[300] The accommodation for these non-pregnant individuals may also have had less to do with an assignment or assignment modification and more to do with the rater's decision not to hold the time away from primary duties and the unit against the person in ranking the person in comparison to peers on an annual appraisal. *See infra* Section III.c.

comprised primarily of males compares to pregnancy outcomes. The fourth group may not be as useful of a comparator because unlike *Young*, here we are not dealing with the question of the baseline right of being allowed to continue to work and receive pay, but rather the question of how to preserve career trajectory and upward mobility, and presumptively, upward mobility is not the paramount concern for a member under criminal investigation.

A research challenge applicable to all three categories is that the comparator analysis is not necessarily comparing "like to like" because accidents, injuries, paternity proceedings, and criminal investigations do not ordinarily come with an expected due date, nor does a twelve-week absence period automatically follow the occurrence. With pregnancy, there is potential for the accommodation decision-making process to become infected with maternal bias, whereas in other circumstances the reason for the accommodation will not carry stigma.

Questions of feasibility aside, the *Young* methodology is problematic for a more important reason—it addresses the question at hand only by proxy. It asks what is fair only by reference to a male standard. It does not change the standard to account for the female condition. Therefore, a more equitable standard is one that accounts for pregnancy as a normal condition of service and then expands to include other conditions and situations that may likewise require or benefit from accommodation. This second part of the equation is critical because to the extent that a benefit is provided only to pregnancy, a woman becomes a more costly employee than a man, and there is a powerful market incentive to perpetuate her exclusion in practice, if not by design.[301]

As a matter of law, it appears to be constitutionally permissible to provide an assignment accommodation exclusively for pregnancy[302] (provided it is due to the physical facts of pregnancy and not stereotype); however, doing so is not optimal. This conclusion flows from two related theoretical models. First, singling out pregnancy fails to "disrupt" the workplace mechanisms that signal that pregnant workers (and all cis women as potentially pregnant

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[301] Naomi Schoenbaum, *The Case for Symmetry in Antidiscrimination Law*, 2017 Wis. L. Rev. 69, 86–87 (2017).

[302] *Geduldig* classifies pregnancy as relevant to a constitutional sex-based discrimination analysis but not itself a class for which discrimination is prohibited because the group of those not affected by pregnancy includes both men and women. 417 U.S. at 496. Additionally, *Cal Fed* states explicitly that regulation can provide protections for pregnancy beyond those the PDA mandates. 479 U.S. 272. Finally, to the extent this could be interpreted as a sex-based benefit, *Schlesinger v. Ballard* holds that doing so is Constitutionally permissible where the regulatory scheme favors the sex that has unequal access to opportunity. 419 U.S. 498 (1975). While I believe special accommodations related to the medical condition of pregnancy itself are most likely constitutional, I reach the opposite conclusion regarding caregiver schemes that differentiate based on sex roles, i.e., primary/secondary caregiver.

workers) are a different group that should be subject to different treatment.[303] Second, this is an asymmetrical design choice with important implications in terms of "purpose, practice, and politics."[304]

According to disruption theory, antidiscrimination policy should "target workplace structures . . . that operate to single out certain groups for differential treatment, and in so doing make their prohibited characteristics more salient than they should be, creating divisions among coworkers and leading to segregation and stereotyping."[305] Disruption theory advances the idea that the more policy focuses on relatedness instead of difference, the better it will be at fostering inclusivity.

Similarly, a symmetrical design choice ensures (1) that increased costs of accommodation are not attributable to a singled-out group, (2) that the needs of pockets of advantaged groups who experience discrimination (such as male caregivers)[306] are not excluded from protection, (3) that individuals with intersecting group identities are also protected, and (4) that the system is viewed as equitable because it applies to everyone.[307] Further, a commander is less likely to view the pregnant pilot as inauthentic or uncommitted for availing herself of a universal accommodation.[308] This theory is grounded in the "bounded rationality" model: if a policy is designed for (and disproportionately used by) a disadvantaged group, and the policy is symmetrical, an individual decision-maker may not attach the "special treatment" perception to the disadvantaged group because drilling down to this level of detail is time consuming, both in terms of accessing this information and processing it.[309]

The Air Force should adopt a policy that neither temporary medical conditions, such as pregnancy, nor the expectation of leave, including convalescent, humanitarian, or caregiver leave, are disqualifying for any assignment, including education and training, unless the essential functions of the assignment cannot be accomplished with or without a reasonable accommodation, and accommodation would not impose an undue hardship on mission effectiveness.[310] It should further be clear that denying an assignment because of temporary medical conditions, such as pregnancy, or the anticipa-

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[303] Simon, *supra* note 291, at 284 (attributing disruption theory to Vicki Schultz's *Antidiscrimination Law as Disruption: The Emergence of a New Paradigm for Understanding and Addressing Discrimination*).

[304] Schoenbaum, *supra* note 301, at 74–75.

[305] Simon, *supra* note 291.

[306] Studies suggest that men, too, are penalized at work for their caregiving activities. Stephanie Bornstein, *The Law of Gender Stereotyping and the Work-Family Conflicts of Men*, 63 HASTINGS L.J. 1297, 1334 (2012).

[307] Schoenbaum, *supra* note 301, at 74–75 (describing these design-choice effects as purpose, practice, and politics, respectively).

[308] *Id.* at 86–97 (describing antisubordination goals of achieving effective equality and utilizing economic models to show that asymmetrical approaches subvert these goals).

[309] *Id.* at 90–91.

[310] This tracks the language from the ADA.

tion of leave, including convalescent, humanitarian, or caregiver leave, is prohibited discrimination.

This regulation should provide common examples of situations that illustrate how to draw these lines. For example, in most situations a physical training component of the assignment should not be essential and should be accommodated. Also, where the assignment is of a significant duration, somewhere around six to twelve months, an anticipated leave of twelve weeks or less should ordinarily not impose an undue hardship on mission effectiveness. An undue hardship on mission effectiveness must be viewed as more than mere expense and inconvenience. This policy should be accomplished in tandem with streamlining total force assistance in filling temporary absences.

If leave interrupts education or training, the Air Force should allow accommodation for the completion of the course work at the conclusion of the leave through correspondence, remote attendance, or in person at a later time. While it will no doubt be argued that bifurcation of in-residence education and training programs reduces the quality of the education, as the Covid-19 experience exemplifies, the world of work and service can be more flexible than previously imagined without a breakdown of quality.[311]

Regarding temporary alternate assignments for pregnant persons who cannot perform their primary duties, there should be paths to accomplish PME out of turn and to participate in other temporary details that are career broadening. Here also, the Air Force should ensure that others have access to these paths to address symmetry and disruption concerns. Any temporary assignment program should be created to serve the broader goal of developing future leaders and should be open to everyone on a competitive basis. If not, such a program could become code for "pregnancy assignment" and have little of the positive impact and instead carry stigma. Commanders should be required to find and provide a meaningful alternate assignment that aids the mission and ensures that the member remains competitive in the unit for awards and stratifications.[312] Further, outcomes must be tracked to ensure that commanders' decisions are not discriminatory.

Successful implementation requires guarding against commander discrimination against women (as pregnant or potentially pregnant workers) when interviewing for prestigious assignments. Research-supported methods to advance this goal include increasing gender blindness in selection

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[311] Philippa Fogarty et al., *Coronavirus: How the World of Work May Change Forever,* BBC: Unknown Questions, How We Work, https://www.bbc.com/worklife/article/20201023-coronavirus-how-will-the-pandemic-change-the-way-we-work [https://perma.cc/7NKB-8M4C] (last visited May 13, 2021, 9:04 PM).

[312] In theory, this could be an effective option; however, implementation is key, and as previously discussed, the enforcement mechanisms currently are weak and there lacks effective visibility and accountability measures. *See supra* note 150 and accompanying text.

processes, such as by having a written process with relevant pronouns and names redacted,[313] and utilizing a structured interview process.[314]

Providing accommodation carries cost and administrative inconvenience. This proposal requires adequate staffing and integration of the total force concept so that the active-duty ranks are supplemented by reserve, guard, civilian, and/or contractor personnel when a member takes leave or is unable to perform non-essential duties. The Air Force will also have to work with Congress to obtain resources to develop and implement effective policy. This may be a significant expense.[315] The administrative inconvenience lies in the fact that this is a change of business as usual requiring a careful balancing of countervailing policy considerations.

However, if we proceed from the premise that equality of opportunity is both the law and a military necessity, it is clear that the costs and inconveniences of calibrating the service environment are justified. Furthermore, it may even be less than the costs the military incurs now because of missed opportunities in recruiting and retaining talented women and childbearing people.[316]

c. Promotion

To further equality of opportunity, promotion policy must resolve tension embedded in the current system. This tension holds a narrow problem and a broader one. The narrow issue is how to fairly evaluate an employee who lost time from standard duties due to pregnancy. The broader problem is that there is insufficient research and analysis of the promotion system in general to determine where it has discriminatory implications for pregnant people and primary caregivers.

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[313] *See* John Feldman, *The Benefits and Shortcomings of Blind Hiring in the Recruitment Process*, FORBES (Apr. 3, 2018), https://www.forbes.com/sites/forbeshumanresourcescouncil/2018/04/03/the-benefits-and-shortcomings-of-blind-hiring-in-the-recruitment-process/?sh=4bf2e31d38a3 [https://perma.cc/CDA5-MBBL]. *See also* Schultz, *supra* note 149, at 32–34 (proposing limiting subjective unchecked supervisory authority in favor of more objective systems).

[314] Joan C. Williams & Sky Mihalo, *How the Best Bosses Interrupt Bias on Their Teams*, HARV. BUS. REV. (Dec. 2019) https://www.insaonline.org/wp-content/uploads/2021/02/How-the-Best-Bosses-Interrupt-Bias-on-Their-Teams.pdf [https://perma.cc/FYB2-CM3S].

[315] *See supra* Section III.d. (expanding leave entitlements). However, in the long run, these investments are likely to be necessary and make conditions better for all. This is evidenced by analogy to disability accommodations. Samuel R. Bagenstos, *Rational Discrimination, Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 890–93 (2003) (disputing the argument that employers who resist accommodating disabled employees spare social resources by pointing out that this argument fails to account for long-run implications of removing disabled individuals from the welfare rolls and increasing productivity overall over time by encouraging human capital investments).

[316] Accommodations may improve conditions for everyone by eliminating harmful societal effects of group-based subordination. Bagenstos, *supra* note 315, at 839–40.

The narrower issue of evaluation after time away from standard duties arises due to current system constraints and a lack of transparency. The promotion record is comprised of annual appraisals, the OPR for officers. Stratifications, or rankings amongst peer officers, are included on OPRs.[317] The rater and senior rater subjectively decide who is favorably stratified.[318] Quarterly and annual awards also impact promotion and are captured on the OPR. Although there is policy that says a woman should not incur negative career effects because of past pregnancy or maternity leave, there is no definition of what this means or how to apply it.

In practice, pregnant people may not be able to travel or perform normal duties for some of the pregnancy. Following childbirth, they typically take twelve weeks of combined convalescent and primary caregiver leave. This means that for at least one-quarter of the annual appraisal (or possibly half of two consecutive quarters), they have no inputs for their appraisal and are not in the running for a quarterly award. They may not have flown for two-thirds of her pregnancy (or at all). This amounts to thirty-six to fifty-two weeks of detour from normal flying duties. They may then have to attend requalification training before they can fly again.

Should a commander stratify them as if they were on flying duty the entire time based on observed accomplishments in the alternate duties and perceptions of innate ability and leadership potential? Will this perception include some of the assumptions and biases that attach to pregnant people about career commitment? Should the commander lower the pregnant pilot's stratification because it would not be fair to pilots who are flying to be ranked below someone who is not? Will their teammates resent their higher stratification because of the pervasive attitude that pregnancy is a mere personal choice? To be sure, pregnancy is not the only circumstance that causes these tensions. However, in the context of pregnancy, there is greater danger that time lost will be coupled with assumptions regarding commitment, ability, and worth, resulting in lost career advancement opportunities.

A rater has no guidance on how to resolve this tension. What does it mean to ensure that a childbearing person is not denied promotion opportunities due to past pregnancy and maternity leave? How is the rater to view the lost time? Attentive commanders accomplish this sort of planning around other absences, such as time at school and other convalescent leave. Supervisors can, for instance, time work assignments so that the individual has a record of success in the time windows available, thus increasing competi-

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[317] U.S. Air Force, Instruction 34-2406, Officer and Enlisted Evaluations Systems (Nov. 14, 2019), (incorporating guidance memorandum, dated Mar. 19, 2021).

[318] Informal networks often lead to opportunity that lends to a favorable stratification. General Officer Development Study, *supra* note 9, at 142. Or, as former Chairman of the Joint Chiefs of Staff, Admiral (ret.) Michael Glenn Mullen puts it, "ducks pick ducks" for opportunity and thereby erect a brass ceiling. *Lloyd Austin breaks 'brass ceiling' as first Black defense secretary*, PBS NewsHour (Jan. 22, 2021), https://www.pbs.org/newshour/show/lloyd-austin-breaks-brass-ceiling-as-first-black-defense-secretary [https://perma.cc/TC3Y-L9W8].

tiveness on the annual appraisal overall. In other situations, however, there may be less pushback regarding fairness because these circumstances are not viewed as "personal choice" the way procreation is. Raters in the current system have wide discretion and much depends on their subjective view of worth. A subjective system often self-replicates: leaders pick future leaders who have similar identities and backgrounds as themselves.

The scope of this narrow problem suggests that the solution is linked to increasing objectivity and transparency, increasing accountability for disparate treatment, and loosening arbitrary time constraints. The stratification methodology (if continued at all) needs increased objectivity and transparency to ensure that it does not reflect self-replicating implicit bias. There should be a rubric so that everyone knows at the start how the stratification is determined. The stratifications should be published so that it is transparent how individuals were stacked and whether there has been disparate treatment in the stacking. I anticipate the concern that transparency will undermine unit cohesion because of the resulting tension from public stratification. If that is the case, then it is an argument for eliminating the stratification generally, and not for less transparency, because the tension remains in the fogged system and only anxiety and uncertainty is increased by the veil.

There should be standards for how to factor time away from primary duties into the appraisals. Those absent due to pregnancy, caregiver leave, deployment, temporary disability, PME, humanitarian leave, et cetera, should not lose out on advancement opportunities. We also want to ensure that pregnant women and mothers—as well childbearing parents who are trans, non-binary, or gender-nonconforming—are not treated differently because of implicit bias. We must take care to expand beyond the pregnancy category so that disruption and symmetry concerns are addressed. Similarly, a system design where the appraisal record reveals a pregnancy or caregiver-related absence from primary duty will provide yet another infiltration point for bias and must be avoided.

A possible solution that fits this mold is to extend the time of the evaluation period from one year to one assignment, which is typically a two to three-year period, with an adequate feedback system to allow for course corrections along the way. Expanding the OPR timeframe would also allow for the final product to be based on inputs from multiple evaluators (whose assignments overlapped during the ratee's rating period), which may lessen the impact of implicit bias from one rater. It would also be helpful to track and have visibility and accountability for the raters, linked to demographic data. The rater's career success should be linked to the absence of discrimination with respect to ratees.

Regarding the broader concern of analyzing the promotion system to discern bias infiltration points, I recommend analysis utilizing two methodologies: (1) disparate impact analysis (to ensure merit-based promotion and equal opportunity) and (2) a reexamination of criteria and policies that un-

necessarily put the idea of the fundamental service person in tension with the idea of the pregnant person.[319]

Under disparate impact analysis, the Air Force can examine the career impacts of pregnancy and rewire the system to make it more equitable and to ensure the promotion of the best talent. Considerations in performing this type of analysis include (1) difficulty in isolating problematic aspects of the system, (2) difficulty in ensuring that system adjustments also aid in merit-based selection, (3) (perceptions of) fairness, (4) constitutionality, and (5) cost.

The disparate impact model looks at whether there is a significant imbalance of a facially neutral standard on an identifiable group. The first step asks whether there is a significant imbalance.[320] The primary definition of significant imbalance is the four-fifths ratio: if the disadvantaged group is affected at four-fifths the rate of the most-advantaged group, then there is a disparate impact.[321] The second step examines whether there is a job-related business necessity for the standard.[322] If so, the third step looks at whether there is an equally effective less restrictive alternative.[323]

Under step one, there is a statistically significant disparity in retention rates between men and women. This raises the question of whether there is an imbalance in promotion rates (and the likelihood of promotion for members who separate), especially after pregnancy, childbirth, and maternity leave. Social scientists can test this hypothesis through disparate impact analysis. As the Supreme Court has recognized, disparate impact theory is a powerful tool to detect implicit bias and patterns of segregation rooted in "covert and illicit stereotyping" and "unconscious prejudices and disguised animus that escape easy classification as disparate treatment."[324]

The results of promotion boards, the records submitted to the promotion boards, and the records that would have been submitted to promotion boards had members not separated from service,[325] are arable grounds for this inquiry. A researcher could study the OPRs of pregnant people as compared to an advantaged group, such as new cis-gender fathers or perhaps white males generally. Researchers could isolate some of the salient characteristics of the OPR to determine which factor or factors contribute to disparities (if such exist). If isolation is not possible but a disparate impact exists, it may be that

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[319] Schultz, *supra* note 7.

[320] Griggs v. Duke Power Co., 401 U.S. 424 (1971); EQUAL EMPL. OPP. COMM'N, UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES, 29 C.F.R. §1607.4, INFORMATION ON IMPACT.

[321] EQUAL EMPL. OPP. COMM'N, UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES, 29 C.F.R. §1607.4, INFORMATION ON IMPACT.

[322] *Id*.

[323] *Id.*

[324] Te. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519 (2015).

[325] It is important to include this last group because, if they are omitted, one misses the pattern of those who saw the "writing on the wall" of less opportunity and therefore rationally chose to leave service.

the entire system warrants overhaul. A researcher could also study how an individual's OPR(s) encompassing pregnancy and maternity leave periods compare to the overall record of that individual. For the sake of further discussion, I accept the hypothesis that the stratification criterion and the twelve-month rating period have a disparate impact on pregnant people (and people who have given birth).

Evaluating the job-related business necessity under step two requires a systematic look at what skills, traits, knowledge, and abilities the Air Force needs and an examination of whether the current promotion system is an effective way to sift for those attributes. Taking the stratification criteria, what does it say about the candidate? Subjective assessment locks-in and perpetuates implicit bias. The counterpoint that raters and promotion boards need some method of distinction does not lead to the conclusion that the stratification method is necessary. The stratification method may be convenient and efficient, but that alone does not diminish the more paramount necessity of utilizing everyone's talents in the services. The twelve-month rating period similarly is convenient and efficient. It is sufficiently long to give a picture of aptitude and short enough to provide opportunity for adjustment and growth. However, it also creates a significant bind for those taking maternity leave and does not appear to be necessary to achieving the laudable aims.

Under step three, a comparable worth-like approach[326] could lead to finding reasonable less-restrictive alternatives. One could devise a point system based on the relative worth of each of the attributes desirable in leaders, such as strategic thinking, emotional intelligence, ability to communicate, ability and inclination to mentor, judgment and decision-making, teamwork, morale enhancement, display of internal ethics and control, job performance, institutional knowledge, et cetera. In evaluating the categories and value of various leadership attributes, care should be taken to reexamine assumptions about what is important.[327] The team tasked with listing and valuing attributes should be explicitly tasked with questioning androcentric norms to achieve better merit-based leadership standards.[328]

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[326] *See* Deborah L. Rhode, *Occupational Inequality*, 1988 DUKE L.J. 1207, 1229 (1988) (highlighting the comparable worth approach to identify gender bias in evaluation systems, aid in consistency, and critically examine the social forces and workplace values that constrain choices).

[327] We may also ask whether there is a need to have greater promotion opportunities for operators, such as pilots. Given the expansive 2018 NDS, and the new merging of economic, diplomatic, and military power, it may be that other career fields (with less occupational segregation) could produce the leaders needed to meet these future challenges.

[328] *See* Abrams, *supra* note 213, at 228–32 (describing how androcentric norms are embedded in the model of the "good soldier" and how these norms replicate the characteristics of the current composite of leaders but overlook and undervalue traits that predominate in disadvantaged groups). *See also* Lucinda Finley, *Choice and Freedom: Elusive Issues in the Search for Gender Justice*, 96 YALE L.J. 914, 937–40 (1987) (recognizing that stereotypical male job descriptions such as that at issue in the famous case of

One could then score the past promotion board records based on the new system after redacting subjective indicators (such as stratifications, quarterly and annual awards, and praising adjectives)[329] and gender and race[330] information. Did the Air Force promote the leaders who have the attributes it needs? Alternatively, the OPRs may be so infected with bias that even rescoring yields disparate results. That would reveal the need to rework accountability for inputs on OPRs, perhaps requiring raters to explain where there is disparate impact amongst the OPRs in the unit.

If this analysis is too onerous, we could just ask the question directly: where does the promotion system overvalue masculine-coded traits and undervalue feminine-coded traits, in contrast to what skills and abilities are required for success?[331] As we clarify answers, we can amend the system accordingly.

Studying disparate impact and discerning stereotypes embedded in success metrics carries cost, fairness, and constitutionality considerations. The military necessity of inclusion justifies costs and pales in comparison to the lost opportunity in failing to retain, recruit, and utilize the talents and abilities of women and other childbearing people.[332] Regarding fairness and perceptions of fairness, the focus should be dual-hatted because the inclusion and military necessity goals are mutually reinforcing. Messaging should focus on how the new system is merit-based and objective.

The constitutionality issue (whether remedying disparate impact constitutes disparate treatment)[333] is not problematic here for three reasons. First,

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EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264 (N.D. Ill. 1986), tend to perpetuate job segregation, as women may not see themselves as a natural fit and may perceive that the environment will be adverse to their participation).

[329] For a foundational study showing that listeners display more negative affects towards women leaders than male leaders for proposing the same ideas and arguments, *see* Dore Butler & Floris L. Geis, *Nonverbal Affect Responses to Male and Female Leaders: Implications for Leadership Evaluations*, 58 J. OF PERSONALITY & SOCIAL PSYCH. 48 (1990). Other studies provide compelling evidence that people, both male and female, penalize women for success and that this issue is compounded by other barriers in male-dominated career fields. *See* Marie-Line Germain, Mary Jean Ronan Herzog & Penny Rafferty Hamilton, *Women employed in male-dominated industries: lessons learned from female aircraft pilots, pilots-in-training and mixed-gender flight instructors*, 15(4) HUMAN RES. DEV. INTERNAT'L, 435 DOI: 10.1080/13678868.2012.707528 (2012).

[330] Although this article is concerned primarily with pregnancy discrimination, in undertaking a disparate impact analysis it would be wise to expand the parameters of study to other disadvantaged groups and intersectionality issues.

[331] This is due in part to the biases and stereotypical notions of the system architects. Schultz, *supra* note 7.

[332] *See* Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 691 (2001) (demonstrating through economic analysis that when discriminatory barriers are removed, the previously disadvantaged group supplies more labor and arguing that there is significant overlap between antidiscrimination and accommodation in terms of costs).

[333] Ricci v. DiStefano, 557 U.S. 557, 594 (2009) (Scalia, J., concurring) (cautioning that race-based decision-making to avoid disparate impact could run afoul of Equal Protection). *See also* Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341 (2010) (describing three possible readings of *Ricci*, two of which do not place disparate impact and Equal Protection in conflict).

the system can be prospective so that no reasonable expectations are disrupted. Second, the focus is to strengthen the military promotion system and therefore it is defendable as a military necessity, which receives deference. Third, the standard for gender discrimination is intermediate scrutiny and courts are even more concerned with stereotype. Promotion system modifications here are not based on stereotype but rather set to remedy stereotype and implicit bias.

Before moving on, a cautionary note regarding complacency and the lack of interest argument is appropriate. Imagine a future with a new and improved promotion system, and the military still fails to promote and retain mothers. The pervasive default argument will be that mothers-to-be and mothers lack interest in promotion and hard work, and instead choose to limit themselves to achieve greater work/life balance and to care for others. However, this is both stereotype and false choice. All individuals make incentive-based decisions in response to system constraints.[334] To the extent the military is still underutilizing the talent of women and perpetuating de facto inequality, the appropriate conclusion is that integration efforts have not gone far enough towards "that measure of institutional accommodation necessary to bear children without forfeit of [service] opportunities."[335]

d. Leave

Men who act as primary caregivers also face discrimination under the current system. The reflexive property of vectoring women to the domestic sphere is vectoring men away from it. There are two critical points when this happens: following, and before, childbirth.

In *Weinberger v. Wiesenfeld*, New Jersey denied Social Security income benefits to a widower desiring to stay home to care for his infant after the death of his wife, the family's primary wage-earner, because such benefits were only available to widows.[336] The Supreme Court found the statutory scheme unconstitutional because it is equally important to the infant to be cared for by a parent — regardless of whether that parent is male or female — and men, no less than women, have the right to care for their offspring.[337] *Weinberger* cited approvingly to *Frontiero* for the principle that "archaic and overbroad generalization[s]" are not constitutional under the Equal Protection Clause.[338]

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[334] Stender v. Lucky Stores, Inc., 803 F.Supp. 259 (N.D. Cal. 1992) (demonstrating that plaintiffs' statistics showed disparity in job distribution and promotion). Where evaluative criteria are clear and decision-making processes are public, sex is less likely to be a factor in selection. *Id.* The Court rejected the lack of interest defense as an explanation for the statistical disparity. *Id.* So too here, we should reject that explanation.

[335] Reva B. Siegel, *Employment Equality under the Pregnancy Discrimination Act of 1978*, 94 YALE L. J. 929, 929 (1985).

[336] *Wiesenfeld*, 420 U.S. at 637–38.

[337] *Id.* at 652.

[338] *Id.* at 643.

The primary and secondary caregiver leave scheme is out of step with antidiscrimination law, perpetuates de facto discrimination, and is based on archaic and overbroad generalizations.[339] For these reasons, the military should abandon this scheme and "level up"[340] to provide twelve weeks of leave to any new parent, with bonuses in the form of an additional two weeks of leave for single parents and dual military couples (to be distributed at their discretion). Under this new system, exceptions can be carved out for national security interests and emergencies that require the deferral or fragmentation of caregiver leave. The exceptions should be applied in a gender-neutral manner.

To illustrate, a person who gives birth would have a convalescent leave period immediately following delivery. After a convalescent leave, they could take caregiver leave, which would be twelve weeks less than the convalescent leave period. The parent who did not give birth would get twelve weeks of caregiver leave. Any caregiver leave could be deferred or fragmented for a national security interest. Single parents would get an extra two weeks of caregiver leave, as would dual military couples, who could decide how to split it.

Cis-gender men and children benefit when men have time to bond with and care for their infants.[341] Men increasingly desire to be more engaged fathers.[342] However, men who desire caregiver leave face discrimination.[343] Although primary/secondary caregiver leave is dressed in gender-neutral

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[339] This is essentially the inverse of *Frontiero v. Richardson*, as commanders require men to prove they are primary caregivers to take advantage of the benefit. 411 U.S. at 677. *See* Keith Cunningham-Parmeter, *(Un)Equal Protection: Why Gender Equality Depends on Discrimination*, 109 NW. U. L. REV. 1 (2014) (secondary caregiver schemes, although facially neutral, are challengeable because gender-based effects are a foreseeable and intentional result of a gender-neutral policy); Deborah A. Widiss, *Equalizing Parental Leave* (2020), Indiana L. Studies Rsch. Paper No. 3587979, 40, SSRN: https://ssrn.com/abstract=3587979 [https://perma.cc/DS3D-63LT] (105 MINN. L. REV., Vol. (forthcoming in 2021)) ("the EEOC and courts have consistently taken the position that Title VII requires that employers provide new mothers and fathers equal periods of time off to care for a new baby"); Federal Employee Paid Leave Act, Pub. L. 116-92, 5 U.S.C. § 6382(d) (providing federal employees up to twelve weeks of paid leave after the birth or adoption of a child). *See also* Melamed, *supra* note 113 (noting facially neutral caregiver laws are apt to be read in a discriminatory fashion by "society's typecasting eyes" and arguing that this is an Equal Protection violation for both women and men). Regarding justiciability, most circuits follow the Fifth Circuit's test on whether to review military action. *See* Mindes v. Seaman*,* 453 F.2d 197 (5th Cir. 1971).

[340] The term "level up" refers to the constitutional remedy to expand the benefit to the disadvantaged group, but I use it here to broaden policy. *See* David Fontana & Naomi Schoenbaum, *Unsexing Pregnancy*, 119 COLUM. L. REV. 309, 343 (2019). I note that these same concerns apply to the twelve-month travel deferment policy for mothers after childbirth, and the separation proviso. To the extent these policies are based on caregiving concerns (and not postpartum physical fitness issues), I would also recommend leveling up policy to apply to all caregivers. To increase feasibility, I would continue the waiver option and the national security exception.

[341] Widiss, *supra* note 339, at 49 (extensive research shows parental leave laws provide big emotional, health, and bonding benefits to the child and the parent that cares for them). Men who utilize leave are also more involved fathers years later. *Id.*

[342] *See supra* note 115.

terms, it is not in practice and this result was clearly foreseeable.[344] In crafting childcare policy, there is a design choice between conforming to or disrupting gender norms.[345] The military caregiver leave policy typecasts and reinforces gender norms to the detriment of men, women, and non-binary individuals.

The gendered implications of this primary/secondary caregiver scheme are clear. A man who wants primary caregiver leave must self-identify to his commander as the primary caregiver. To do so, he will have to internally challenge the social messaging he has received since childhood. Next, he will have to make his caregiver status public in a culture of hegemonic masculinity, attracting visibility and drawing suspicion from his subordinates, peers, and superiors, especially if his spouse is a woman. If his female spouse is in the military, it is statistically likely she will take the primary caregiver leave entitlement.[346] Primary/secondary caregiver leave is not gender-neutral in design because if this were the case, then the only men routinely excluded would be those in a dual military relationship, a group that is comparatively small, and therefore less significant in terms of cost/benefit analysis. It also fails to account for homosexual couples, couples with a non-binary partner, and all couples, regardless of gender, who desire an equal caregiving partnership.

The primary/secondary caregiver distinction is detrimental to women in three ways. First, it reaffirms a worldview of a woman's primary role as caregiver and thus her secondary role in the service. Second, it makes women more expensive to a commander and unit, thereby playing to the view that women are less committed and less deserving of advancement and opportunity than men. Third, married military women are disproportionately likely to be married to military men, and this sets a pattern in those relationships that makes career ascent for the woman more challenging.

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[343] *See, e.g.*, Shafer v. Bd. of Public Educ., 903 F.2d 243 (3d Cir. 1990) (holding that a male teacher denied caregiver leave); Knussman v. Maryland, 272 F.3d 625, 628 (4th Cir. 2001) (demonstrating an employer's view that a man cannot be a primary caregiver unless his wife is "in a coma or dead"); Johnson v. Univ. of Iowa, 431 F.3d 325, 328 (8th Cir. 2005) (providing disability leave to new mothers did not discriminate against fathers); Wells v. City of Montgomery, No. 1:04CV425, 2006 WL 1133300 (S.D. Ohio Apr. 25, 2006) (showing an employer commenting on father's caregiver leave by stating, "congratulations for taking the most time off for having a baby and not actually having the baby"). EEOC guidance is that it is generally disparate treatment to deny men the same caregiver leave as women. U.S. Equal Emp. Opportunity Comm'n, *Enforcement Guidance 915.003: Pregnancy Discrimination and Related Issues*, Part I.C.3 (June 25, 2015); U.S. Equal Emp. Opportunity Comm'n, *Enforcement Guidance 915.002: Unlawful Disparate Treatment of Caretakers*, Part II.C (May 2007).

[344] The numbers lead to this conclusion. Men are approximately eighty percent of the service and, when married, are married predominantly to civilians. *See supra* discussion in Section I.a.ii.

[345] Widiss, *supra* note 339.

[346] Parents are more likely to share public leave benefits for infant care under the U.S. model. *See* Widiss, *supra* note 111. This model provides equal individual-benefit caregiver leave. *Id.* The Australian model, in contrast, like the military model, adopts the primary/secondary caregiver distinction. *Id.*

Partners in dual military relationships and single parents are the categories of individuals that need the most accommodation and support. Dual military couples may spend significant time geographically separated, effectively becoming single parents at times, and figuring out childcare for short notice and odd hour duties, as well as deployments. Single parents, who are disproportionately women, have the same obstacles but may lack the "secondary caregiver" support.[347] An additional two weeks of optional leave within the first year would bring more help to dual military couples and single parents.

Finally, policy addressing caregiver equality only after birth is likely to be "too little because it is too late."[348] A couple's caregiver dynamics coalesce during the period of pregnancy and much of the preparation work that occurs during a pregnancy is caregiving work that does not involve the woman's body.[349] By recognizing this dynamic, enlightened policy can support the nonpregnant caregiver role during the pregnancy.[350] Prospective nonpregnant parents should be provided more leave to attend appointments, assist with daycare provisions, attend smoking cessation classes, install car seats, and perform other prenatal carework.[351] Commanders should be trained and scrutinized to ensure that leave for these purposes is not being applied in a discriminatory fashion. Additionally, the nonpregnant parent should be allowed to decline travel (or to be sent home) towards the end of the pregnancy to enable his participation in prenatal and postpartum carework for the pregnant parent and baby.[352] Moving forward in this direction reduces discrimination against all parents.

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[347] For an examination of various models providing sole parent leave, *see* Widiss, *supra* note 339, at 51–54. For an examination of policy-expanding benefits for extended and chosen families, *see id.* at 54–57.

[348] David Fontana & Naomi Schoenbaum, *supra* note 340, at 313 (interlocking role stereotypes become more difficult to dismantle once fixed during pregnancy, which undermines equality between men and women, as well as for homosexual and transgender parents).

[349] *Id.* at 362–67 (carework occurs outside the woman's body and recognizing this distinction diminishes bodily autonomy concerns and reserves space to protect the autonomy rights recognized in Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992)).

[350] *Id.* at 343–51 (recognizing that policy should account for the physical facts of pregnancy occurring in the woman's body, but arguing that disaggregating the parenting aspects from pregnancy serves equality). This recognition encourages investment in human capital related to parenting for both parties and disrupts messages to third parties that the woman will carry the responsibility of childrearing and thus be a less authentic worker. *Id.* at 328, 348.

[351] *Id.* at 328–30 (describing pre-birth carework in terms of human capital investments that enable more efficient and proficient carework after birth).

[352] I would include the same waiver proviso and exception for national security interests.

CONCLUSION

Pregnancy and caregiver discrimination can be fixed with policy and effort. It will require a change in thinking and a change in business as usual. If the military upgrades its legacy policies in accordance with these proposals, it will benefit, as will national security, women, children, the United States, and society. Bringing a child into the world is a profound act of bravery with casualty risks. Similarly, those who choose to terminate their pregnancies make the very kind of weighty decisions that men have historically made for society. The humans who make these decisions and carry out these acts should be included at the helm of our nation's defense. In this work, I make the case for change and sketch ideas and methods grounded in the law of equality and military necessity. My hope is both that we do the hard work and that the architects ask how the duty environment should be structured to reach the interlocking goals of equality and military necessity.