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Sex, Stamina, and Politics

Richard H. Chused

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RICHARD CHUSED*

INTRODUCTION

During the run up to the 2016 election, Hillary Clinton's stamina was an issue of some note. It came to a head when she stumbled while departing early from a New York City ceremony marking the fifteenth anniversary of the September 11 attacks.¹ Trump responded later with a mocking imitation of her stumble and decried her lack of physical capacities, saying, "Here's a woman. She's supposed to fight all these different things. And she can't even make it fifteen feet to her car. Give me a break! Give me a break! [Mocking imitation of a person hardly able to walk.] Give me a break! She's home resting right now. She's getting ready for her next speech, which is going to be about fifteen minutes."² Clinton, as it turned out, was in the midst of coping with a case of pneumonia. She rested at her daughter's Manhattan apartment for a brief period before returning home to Chappaqua to recover for a couple of days.

Her health was a common topic of discussion throughout the campaign.³ During the Presidential Debate on September 26, 2016, for example, Trump claimed that Clinton didn't have the stamina to be President, stating in his typical roundabout prose: "She doesn't have the look. She doesn't have the stamina, I said she doesn't have the stamina, and I don't believe she does have the

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1. NewsBlaze World, *Hillary Clinton Stumbles on 9/11*, YOUTUBE (Sept. 11, 2016), <https://www.youtube.com/watch?v=40BLv5ZVu4c> (last visited on Jan. 8, 2022) (one of many videos of the scene from CNN's broadcast).

2. The Telegraph, *Donald Trump mocks Hillary Clinton over her pneumonia outbreak*, YOUTUBE (Oct. 2, 2016), <https://www.youtube.com/watch?v=gT-LfVITE94> (last visited on Jan. 8, 2022) (one of many videos of his reaction).

3. For a small sample of the news items that emerged after she stumbled, see, e.g., Chris Cillizza, *Hillary Clinton's Health Just Became a Real Issue in the Presidential Campaign*, WASH. POST (Sept. 11, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/09/11/hillary-clintons-health-just-became-a-real-issue-in-the-presidential-campaign/> [<https://perma.cc/C6L5-XLSD>]; Niraj Chokshi, *Hillary Clinton Has Pneumonia: What That Means*, N.Y. TIMES (Sept. 11, 2016), <https://www.nytimes.com/2016/09/12/us/hillary-clinton-has-pneumonia-what-that-means.html?smid=em-share> [<https://perma.cc/HM62-J2FE>] (last visited Mar. 3, 2021); Associated Press, *Hillary Clinton's Pneumonia Brings Health Back as Hot Issue in Campaign*, FLA. TIMES UNION (Sept. 12, 2016), <https://www.jacksonville.com/news/national/2016-09-12/story/hillary-clintons-pneumonia-brings-health-back-hot-issue-campaign> [<https://perma.cc/3H3Y-9PSX>]; Lawrence K. Altman, M.D., *How Healthy Is Hillary Clinton? Doctors Weigh In*, N.Y. TIMES (Sept. 18, 2016), <https://www.nytimes.com/2016/09/19/us/politics/hillary-clinton-health.html?smid=em-share> [<https://perma.cc/4UPW-79TM>].

stamina.”⁴ In an Associated Press report posted on the New York Times web site just after her 9/11 stumble, it was said:

Now Clinton is sure to face new questions about whether she’s physically fit for the presidency. Trump and his supporters have been hinting at potential health issues for months, questioning Clinton’s stamina when she takes routine days off the campaign trail and reviving questions about a concussion she sustained in December 2012 after fainting. Her doctor attributed that episode to a stomach virus and dehydration.⁵

Given the tawdry and constantly provocative nature of the 2016 election campaign, it is not surprising that the content of this short Associated Press tidbit went largely unnoticed by commentators. But it actually was remarkable. The little story was part of an ongoing tendency of the media to take seriously Trump’s assertions and those of his supporters that Clinton was not in good health, that she was weak, susceptible to fainting, unrecovered from a concussion sustained four years earlier,⁶ and, therefore, that she lacked the strength and “stamina” required to handle the rigors of the Presidency. And that media tendency was in the teeth of a career entailing eight active years as First Lady, eight years as the peripatetic, successful Senator from New York, four grueling years as President Obama’s Secretary of State visiting 112 countries,⁷ and vigorous participation in two seemingly interminable Presidential election campaigns.

At that point in history her public career had been at least as taxing, if not much more so, than Trump’s during the same time period. And up until the time the Associated Press released its little news clip no one said much of anything about Trump’s tendency toward bad health⁸ and weakness.⁹ Nor did any-

4. Sophie Tatum, *Trump: Clinton ‘doesn’t have the stamina’ to be President*, CNN (Sept. 27, 2016), <https://www.cnn.com/2016/09/27/politics/donald-trump-hillary-clinton-stamina/index.html> [<https://perma.cc/BBQ2-NWQU>].

5. Lisa Lerer & Julie Pace, *Clinton Recovering After Health Episode, Cancels Calif. Trip*, AP NEWS (Sept. 11, 2016), <https://apnews.com/article/05dcba3b4a5b42c1a6409fd85da54e9f> (last accessed Jan. 8, 2022). The brief article was also (but is no longer) available online at <http://www.nytimes.com/aponline/2016/09/11/us/politics/ap-us-campaign-2016-clinton.html> (last visited Sept. 13, 2016).

6. See Cillizza, *supra* note 3.

7. Glenn Kessler, *Hillary Clinton’s overseas diplomacy versus other secretaries of state*, WASH. POST (Jan. 9, 2013), https://www.washingtonpost.com/blogs/fact-checker/post/hillary-clintons-overseas-diplomacy-versus-other-secretaries-of-state/2013/01/08/742f46b2-59f3-11e2-9fa9-5fbd9530eb9_blog.html [<https://perma.cc/ELP4-5X5B>]. Clinton’s response to Trump’s challenge to her stamina at the September 26 debate was:

As soon as he travels to 112 countries and negotiates a peace deal, a cease fire, a release of dissidents, an opening of new opportunities in nations around the world, or even spends 11 hours testifying in front of a congressional committee he can talk to me about stamina.

Tatum, *supra* note 4.

8. He’s borderline obese. This was stated often both on television and in print media during October 2016. See, e.g., Timothy Egan, *Fat-Shamer in Chief*, THE N.Y. TIMES A19 (Oct. 1, 2016), <http://www.nytimes.com/2016/09/30/opinion/campaign-stops-fat-shamer-in-chief.html> [<https://perma.cc/G6QG-P6C2>].

9. His exercise regimen, he quipped during the campaign, consists of waiving his arms at speeches in hot arenas. He talked about this when he was interviewed about his health on TV by Dr. Oz. Gabrielle Olya, *Donald Trump Says He Gets Enough Exercise by Making Hand Gestures During Campaign*

one ask whether he was subject to fainting spells, or slow to recover from accidents, or subject to any other maladies even though he was more than a year older than Clinton.¹⁰ Only after the 9/11 incident and Trump’s mocking response did a few commentators—most notably Amanda Hess in the October 16 *New York Times Sunday Magazine*—begin to call out the “stamina affair” as gendered. She noted that stamina had “a masculine sheen, but its underlying claim—superior mental and physical endurance—has long been associated with women.” As Hess wrote, women excel in endurance sports, they “survive longer than men”, and childbirth, in her telling, is “a saga.” As Hess confirmed, common attitudes about the relationships among gender, aging, and stamina, as well as race and class, are clearly socially defined.

The 2016 election roller coaster was, of course, hardly the first time that white women’s mental and physical capacities¹¹ played a part in the public’s and the legal system’s reluctance or unwillingness to tolerate their efforts to seek out roles traditionally occupied by white men. While Trump was more demeaning and tawdrier about this issue than other prominent political personalities in recent history, the cultural strain of belief that women are not mentally or physically capable of assuming roles long occupied by men has been with us for a very long time. It is ironic that much of this belief structure arises from assumptions about women’s sexual physiology, despite the challenges of birthing and the possibility that if men had to bear children there wouldn’t be any. Trump, in short, tapped into a deep strain in white American male culture. It is a small part of that historical strain I review in this essay.

I

CHANGING EXPECTATIONS: WOMEN’S CAPACITY FOR WORK DURING THE NINETEENTH CENTURY

During the founding decades of the American republic, white women were viewed and treated as legally dependent, seldom seen in important arenas of public life, shunted away from places and activities controlled by men, and legally barred from most commercial arenas.¹² And of course, notice was taken

Speeches, PEOPLE (Sept. 14, 2016), <https://people.com/celebrity/donald-trump-says-he-gets-enough-exercise-by-making-hand-gestures/> [<https://perma.cc/LRK3-34YN>] (last visited Sept. 20, 2021).

10. It’s worth noting that Clinton’s insistence on participating in the 9/11 memorial actually was a sign of her strength, not her weakness. Trump created a zero-sum game for the occasion. If she didn’t show up because she was sick, Trump would have said she was weak and lacked stamina. When she left because she felt lousy, she was weak and lacked stamina—damned if she did and damned if she didn’t.

11. It is notable that race plays a significant role in cultural attitudes about endurance. Given the rigors of slavery and the longtime presence of black women as house servants for white families, it would be odd for America’s ruling patriarchy to make “lack of endurance” claims about black women. Indeed, compare the different ways Hillary Clinton and Kamala Harris were treated during their respective campaigns by opposition politicians. The contrast is striking. See *infra* notes 77, 78 and accompanying text.

12. The literature on legal, civic, and political roles of women in early American history now is voluminous. A few classics suffice for any readers who would like to dip into the topic, see, e.g., LINDA KERBER, *WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN EARLY AMERICA* (1980);

that woman were often physically less muscular and therefore less strong than men; that notion has been common since the dawn of humanity. But that supposed weakness did not have much of an impact in the late eighteenth and early nineteenth centuries on the physical roles women typically played in American culture. That made perfect sense in our early history. Life, largely rural prior to and after independence, was rough and rugged. Like men, women were expected to manage the rigors of living in what was, from our contemporary perspective, an industrially and commercially primitive society. Unless you were very wealthy, maintaining a household took the labor of everyone present. Watching on the sidelines was not an option. Children were pressed into service at a young age. Raising food, making cloth and clothing, molding candles, building homes, and other basic necessities of life required an enormous amount of hard, often back breaking, work.¹³ And after towns began to develop and agriculture became a bit more efficient women were not always told to totally domesticate themselves, but often to find remunerative activity to help support their families or themselves prior to marriage. Alice Kessler-Harris described the trends well:

From a community's viewpoint, marriage was the natural and desirable role for white women, and their economic subordination assured the colonists that most women would follow this path. The typical portrait of the colonial woman depicts a strong, sturdy goodwife, producing household necessities and playing her crafts and her plow beside a yeoman husband. Numerous offspring affirmed the value of homespun mothering. Hard physical labor reaped a visible reward, as it transformed the fruits of the earth into life-sustaining products. The idyllic portrait is not wholly false. There was satisfaction to be gained from family labor.

* * * But by the early eighteenth century in some colonies, a surplus of unwed and widowed women swelled the totals of those in need of support. Simultaneously, advancing technology decreased requirements for women's labor in the home. Women were chastised for idleness and driven to seek useful employment.¹⁴

By the end of the nineteenth century, however, attitudes in many segments of middle- and upper-class society were significantly different. After the Civil War the labor-filled lives of significant numbers of white women homemakers began to ease a bit. Railroads and other efficient means of transportation, rapid urban growth, development of a larger middle class, and a continuous decline in birth rates¹⁵ brought dramatic shifts in the lives of many American families.

NORMA BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH CENTURY NEW YORK* (1982); MARY RYAN, *WOMANHOOD IN AMERICA: FROM COLONIAL TIMES TO THE PRESENT* (1975); MARY BETH NORTON, *LIBERTY'S DAUGHTER'S: THE REVOLUTIONARY EXPERIENCE OF AMERICAN WOMEN, 1750-1800* (1980).

13. A few classics on the topic, *see, e.g.*, NANCY COTT, *BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND: 1780-1835* (1979); BARBARA BERG, *THE REMEMBERED GATE: ORIGINS OF AMERICAN FEMINISM, THE WOMAN AND THE CITY 1800-1860* (1978); ALICE KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE EARNING WOMEN IN THE UNITED STATES* (1982).

14. KESSLER-HARRIS, *supra* note 13, at 4.

15. While the data is subject to the vagaries of early data compilations, it is clear that the birth rate among American white women fell dramatically between 1800 and 1900. According to the Census Bureau the birth rate for women of child-bearing age (fifteen to forty-four years of age) was 278 per

Food preservation and distribution systems, large-scale manufacture of consumer products, the development of electrical grids, and other “modern” conveniences proliferated rapidly in urban centers. And with the arrival of modern commercial life came some leisure time for those with resources, including the arrival of vacation getaways, female “cures” in the countryside, and the notion that women needed to rest once a month.¹⁶ As white men, especially in the growing middle and upper classes, went off to work, women’s responsibility for domestic life and child rearing continued, but the need for physical strength lessened.¹⁷

Rather than rely on greater physical power, socially constructed notions of dependence, and claims about the need for male social control were used to justify imposition of constraints on women. Women’s reproductive capacity, a natural offshoot from the growing spotlight on domesticity, became a focus of attention. Protecting white women’s reproductive systems, taking account of the ways menstruation supposedly limited the *regularity* of their physical or mental capacities, claiming that the periodicity of women’s lives altered their ability to perform long-term physical or mental tasks, and arguing that women’s psyches were flighty and episodic became common tropes. In short, talk about stamina and fortitude, rather than physical power, began to dominate gender discourse.¹⁸ The social construction of gender among middle and upper class families underwent a fairly dramatic shift.

II

DR. EDWARD CLARKE, SCIENCE, AND SOCIAL ATTITUDES ABOUT SEX AND GENDER

Science has long played a critical role in altering social norms. But science itself also has long been socially constructed. For me, there is no better example of this than the ways it embodied changing attitudes about women’s physiology and health that blossomed after the Civil War. Medical “experts” began to claim that women needed to rest when menstruating in order to preserve their health and reproductive capacities.

1,000 in 1800 and 130 per 1,000 in 1900. UNITED STATES BUREAU OF THE CENSUS, 1 THE STATISTICAL HISTORY OF THE UNITED STATES FROM COLONIAL TIMES TO THE PRESENT 49 (1976).

16. The life-style transitions are beautifully described in a wonderful history book, see SUSAN STRASSER, NEVER DONE: A HISTORY OF AMERICAN HOUSEWORK (1982).

17. These directions were much less prominent among the poor. The lack of funds made access to leisure time a luxury. And certainly, white attitudes about black Americans generally could not encompass the idea that work was inimical to their well-being. This included overt hatred, attitudes about physical capacities overwhelming mental capacities, and a whole different structure about gender in the minds of the white elite. Writing in depth about these issues here would take this essay in significantly different directions than Trump’s tropes about women lead us. To do them justice would require work that is beyond the scope of this project.

18. The psychic “power” of women’s sexuality and reproductive systems had long been noted. But they were not deemed to be a source justifying limitations on their social roles. See ROSALIND ROSENBERG, BEYOND SEPARATE SPHERES: INTELLECTUAL ROOTS OF MODERN FEMINISM 5–7 (1982).

A small but highly influential and very popular book authored by Dr. Edward H. Clarke in 1874 entitled *SEX IN EDUCATION; OR, A FAIR CHANCE FOR GIRLS* is a perfect exemplar. Clarke was a member of the Harvard Board of Overseers, a former member of the school's medical faculty, and a highly respected physician. Thought of by liberal women in Boston as their friend because of speeches he had made in 1870 criticizing men who had driven women out of medical classrooms in Philadelphia, he was invited in 1873 to speak at the New England Woman's Club of Boston on the education of women.¹⁹

The talk took place during an ongoing controversy about whether women should be admitted to Harvard College.²⁰ Women and education were tightly linked from early in American history. Rational discourse in a civil society was considered a critical feature of a functional society by early American political movements. As growing town and city life in the northeast led men to take on more tasks outside the home, women, increasingly linked to homelife, became tightly associated with the training of children to participate in civil society. Boys needed schooling to undertake commercial and political life and girls required learning to be able to teach their own children when they became mothers. That, in turn, led a significant number of young women to become tutors and, as schools opened in the early nineteenth century, teachers. By the 1830s women began to participate in public debates, write novels, and publicly petition for social and legal reforms.²¹ Colleges first opened to women in the 1830s.²² Literacy rates among white women reached the same as that of men by the middle of the century.²³ It therefore was not surprising that old, well-established, and sometimes conservative, eastern universities began to feel pressure to admit women to their student bodies.

Despite Clarke's apparent receptiveness in 1870 to the admission of women to major educational programs, his 1873 speech was a disappointment to the liberal women of Boston. A year after Clarke's criticism of male students' treatment of women in Philadelphia, Charles Darwin's *THE DESCENT OF MAN, AND SELECTION IN RELATION TO SEX* was released. Darwin already was famous as a result of his publication in 1859 of *ON THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION, OR THE PRESERVATION OF FAVOURED RACES IN THE STRUGGLE FOR LIFE*. His 1871 explication of the notion that sexual divergence was a critical feature of evolution, and that a species flourished when men competed for women with whom to reproduce, became a ma-

19. ROSENBERG, *supra* note 18, at 5.

20. For a detailed history of the controversy and the founding years of Radcliffe College, see Sally Schwager, *Taking Up the Challenge: The Origins of Radcliffe*, in Laurel Ulrich ed., *YARDS AND GATES: GENDER IN HARVARD AND RADCLIFFE HISTORY* 87–116 (2004).

21. COTT, *supra* note 13, at 200–04.

22. Oberlin was the first college to admit women. The school was coeducational from its founding in 1833 and first admitted women to its standard baccalaureate degree program in 1837. See OBERLIN COLLEGE & CONSERVATORY, *Oberlin History*, <https://www.oberlin.edu/about-oberlin/oberlin-history> [<https://perma.cc/2DYN-9CCA>] (last visited Mar. 15, 2021).

23. KERBER, *supra* note 12, at 193.

major influence on Clarke's scientific perspective. Clarke's use of Darwin's theories in his 1873 speech at the New England Women's Club of Boston became an important moment in the cultural and legal history of women in the United States.

In that speech, Clarke focused on the physiological and psychological nature of women as an inherent, natural limitation on their ability to tolerate the typical structure of male educational regimes. The need to protect the reproductive capacities of women was a critical part of Clarke's use of "sexual divergence." The open-minded women in the Woman's Club audience received his words with a degree of hostility, a reception that led Clarke to pen his ideas at greater length²⁴ in *SEX IN EDUCATION; OR, A FAIR CHANCE FOR GIRLS*. The book was very widely read. A second edition was demanded when the first sold out in a week. Its influence at the time was significant,²⁵ and the cultural strands it helped unleash linger to this day.

Clarke and other "scientists" of his period opined that every person had three basic, God-given systems in their body—a "trinity in our anatomy" as he called it.²⁶ The first was the "nutritive system" including the digestive, circulatory, and other basic life sustaining structures. The nervous and intelligence system was number two. And the third, not surprisingly, was the reproductive system "by which the race is continued." Only the first two were the same in men and women. And so Clarke professed:

Woman, in the interest of the race, is dowered with a set of organs peculiar to herself, whose complexity, delicacy, sympathies, and force are among the marvels of creation. If properly nurtured and cared for, they are a source of strength and power to her. If neglected and mismanaged they retaliate upon their possessor with weakness and disease, as well of the mind as of the body. God was not in error, when, after Eve's creation, he looked upon his work, and pronounced it good. Let Eve take a wise care of the temple God made for her, and Adam of the one made for him, and both will enter upon a career whose glory and beauty no seer has foretold or poet sung.²⁷

And a bit further on Clarke continued:

[W]hen the divergence of the sexes becomes obvious to the most careless observer, the complicated apparatus peculiar to the female enters upon a condition of functional activity. * * * The growth of this peculiar and marvelous apparatus, in the perfect development of which humanity has so large an interest, occurs during the few years of a girl's education life. No such extraordinary task calling for such rapid expenditure of force, building up such a delicate and extensive mechanism with the organism,—a house within a house an engine within an engine,—is imposed upon the male physique at the same epoque. The organization of the male grows steadily, gradually, and equally, from birth to maturity. The importance of having our methods of female education recognize this peculiar demand for growth, and of so adjusting themselves to it, as to

24. ROSENBERG, *supra* note 18, at 5.

25. According to the Preface to the Second Edition, demand led to a second edition being sent to press only one week after the first was released. EDWARD H. CLARKE, *SEX IN EDUCATION; OR, A FAIR CHANCE FOR GIRLS* 8 (5th Ed. 1874). The edition I own, purchased as a curiosity at a flea market many years ago long before I knew its significance, is from the fifth edition; it contains a "NOTE TO THE FIFTH EDITION" in its prefatory pages. *Id.* at 9.

26. *Id.* at 32.

27. *Id.* at 33-34.

allow a sufficient opportunity for the healthy development of the ovaries and their accessory organs and for the establishment of their periodical functions cannot be overestimated.²⁸

Clarke went on at great length to remind his readers that the three great systems of the human body must function on a limited bundle of energy and bodily fluids, that when one system is overtaxed or expending excess fluids the others will wither, that when the female reproductive system is maturing, and later in adulthood when it exercises its “periodical functions,”²⁹ women must use the other two systems in limited ways in order to accommodate the extensive energy and the amounts of fluid expended by their reproductive systems.³⁰ It, therefore, was clear to Clarke that the daily rigors of a male education system were inappropriate for women of childbearing age, especially when they were experiencing puberty. Indeed, if young women learned and studied like men, he argued, they were likely to become sterile, or to get sick and die. And yes, he spun tales of such events actually occurring in his little influential tome. Here is just one of a number of examples described by Clarke:

Miss G— worked her way through New England primary, grammar, and high schools to a Western college, which she entered with credit to herself, and from which she graduated, confessedly its first scholar, leading the male and female youth alike. All that need be told of her career is that she worked as a student, continuously and perseveringly, through the years of her first critical epoch, and for a years after it, without any sort of regard to the periodical type of her organization. It never appeared that she studied excessively in other respects, or that her system was weakened while in college by fevers or other sickness. Not a great while after graduation she began to show signs of failure, and some years later died under the writer’s care. A post-mortem examination was made, which disclosed no disease in any part of the body, except in the brain, where the microscope revealed commencing degeneration.³¹

This was called an instance of death from overwork.³²

Almost immediately after Clarke’s book was released and became a hot seller, Julia Ward Howe edited an anthology of essays responding to *SEX IN EDUCATION*. She, an author, abolitionist, and well-known suffragist, had extended the 1873 offer to Clarke to speak at the Women’s Club of Boston and was not pleased by the content of his lecture. Her own essay graced the pages of the book she edited. Surprisingly, much of her retort did not differ significantly from Clarke’s theories. But, she concluded, both women and men could abuse their reproductive systems, causing Clarke’s gendered theory to fall apart. She nonetheless warned young women of the risks of over taxing themselves:

I have known of repeated instances of incurable diseases and even of death arising from rides on horseback taken at the critical period. I have known fatal pulmonary consumption to arise from exposure of the feet in silk stockings, at winter parties. Every matron knows and relates these sad facts to the young girls of her charge. They are sometimes heeded, oftener not. Nothing in our knowledge of youth would lead us to consider them as a rare occurrence. And yet Dr. Clarke attributes most failures of

28. *Id.* at 36–38 (footnote omitted).

29. *Id.* at 94.

30. *Id.* at 40–49.

31. *Id.* at 102–03.

32. *Id.*

the function and its concomitant, maternity, to the school education received by our girls. * * *

The accusation then of systematic neglect of the periodic function by the educators of youth amongst us cannot be admitted without more evidence than Dr. Clarke has thus far given us. That women in America particularly neglect their health, that women violate the laws of their constitution as men cannot violate theirs, and that the love of intellectual pursuits causes them to do so,—this is the fable out of which Dr. Clarke draws the moral that women must not to college with men. Fable and moral appear equally unsubstantial.³³

In short, physical activity might not be appropriate for women while menstruating, but more proof was needed before Howe was prepared to believe that exercising *mental* acuity had the same negative effects on women's reproductive capacities as physical activities.

Howe's notions, like Clarke's, were widely accepted in their time and in the following decades. Whether because of concerns about the "survival of the race" among the white middle and upper classes, the felt need to protect white women's reproductive capacities, the fear of men's inability to concentrate when women were around, the desire to protect the educational, professional, and cultural prerogatives of white men, or some other cultural factors, there was general agreement among many women and men that white human bodies were zero sum games, that overtaxing one system endangered another, and that the task of protecting women was quite a different undertaking than that of protecting men. For such believers it often was a truism that it was better to educate women in a different institution and in a different way than men. The widespread acceptance of such beliefs reflected a prevalent sense that science of the time—then commonly thought to be the potential savior of mankind³⁴—correctly described the operation of our physiological systems.³⁵

As noted, Clarke's theories did not go uncontested. Though the President of Harvard at the time, Charles W. Eliot, opposed admitting women to the college because of lack of knowledge about their mental capacities, a variety of pressures arose from members of his own faculty and from the creation of the Woman's Education Association of Boston in 1872—an organization with many members related in some way to academics working on the Harvard campus. Eventually a series of lectures at an off-campus site given by members of the Harvard faculty led to the creation of the Harvard Annex in 1879, offering the

33. Julia Ward Howe, *Sex and Education*, in Julia Ward Howe ed., *SEX AND EDUCATION. A REPLY TO DR. E. H. CLARKE'S "SEX IN EDUCATION"* 19–20 (1874).

34. The faith in science is understandable. The number of new inventions and technologies developed after the Civil War though the beginning of the twentieth century was staggering—electricity, interior plumbing systems, sanitation, automobiles, high speed printing presses, industrial systems, medical treatments, telephones, record players, and radio, to name some of the changes. Darwin and Freud revolutionized notions about the development of living things and the mind. Einstein's major theories appeared in 1904 and 1916. It was a remarkable era.

35. It is worth noting that the racism of the Jim Crow Era was also based on "science"—a further indication that the discipline was heavily subject to the whims and currents of cultural preferences. A notable book on this subject is STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* (1981).

same curriculum to women that men took at the College. The Annex eventually matured into Radcliffe College in 1894.³⁶

Though Clarke's physiological theories about limited bodily capacities were widely influential and accepted, his prescriptions were not always taken as gospel to be routinely and completely followed. Harvard eventually succumbed only in part to the pressure to admit women to college. But it did so reluctantly, admitting many fewer women to Radcliffe than to Harvard, and segregating them in separate quarters with strict parietal rules.³⁷

III

DR. CLARKE AND *MULLER V. OREGON*

Since much of Clarke's rhetoric must seem outlandish to twenty-first century readers, you might assume that his attitudes about the limitations imposed by fluid loss and the unstable capacities of women of child bearing age quickly fell by the wayside during the decades before and after the turn of the twentieth century. Though always disputed, his views actually continued to have significant influence in public discourse about protective labor legislation, the Equal Rights Amendment, factory work during and after World War II, and combat service in the military, among an array of other issues.

An early, important, example arose in the statutory structure and legal discourse about women in the workplace during the final decades of the nineteenth and the opening decades of the twentieth centuries. The enormous array of protective labor legislation adopted in Massachusetts during that epoch exemplifies the trends.³⁸ The initial acts, some discussed and enacted before the Civil War, linked school attendance for children with limits on their hours of labor. As education in public schools became more common and desirable in the middle of the century, limits were placed on the amount of time children could spend at work and on the ages at which they could begin to seek out wage labor. Over time, claims that women needed some freedom to participate in public life, to sustain their reproductive vigor, and to manage their domestic duties³⁹ were raised to seek limits on their labor as well. Concerns over health also began to be voiced to seek limits on the amount of time women and children could

36. The dates in the text can be found in a beautiful essay by Laura Thatcher Ulrich in the *HARVARD MAGAZINE*. Laura Thatcher Ulrich, *Harvard's Womanless History*, 121 *HARV. MAGAZINE* 53 (Nov.–Dec. 2018), https://www.harvardmagazine.com/sites/default/files/womanlesshistory_sm.pdf [<https://perma.cc/RPV7-F6GH>].

37. This sort of a system was still present when I attended Brown between 1961 and 1965. Many fewer women were admitted to Pembroke than to Brown, and supervision of the women was strict. The denouement of this sort of system began in the 1960s. Perhaps its death knell occurred at Columbia with the celebrated case of Linda Leclair. See Deirdre Carmody, *Barnard Considering Decision on Student Living With Man*, *N.Y. TIMES* (Apr. 17, 1968), <https://timesmachine.nytimes.com/timesmachine/1968/04/17/77097258.html?pageNumber=51> (last accessed Jan. 9, 2022).

38. A summary of the legislation and the motivations for adopting the statutes may be found in RICHARD CHUSED & WENDY WILLIAMS, *GENDERED LAW IN AMERICAN HISTORY* 899–917 (2016).

39. The issue is noted in KESSLER-HARRIS, *supra* note 13 at 182–84.

work. Throughout the last three decades of the nineteenth century the legislative debates were devoted mostly to women and children, not to men. Even the first minimum wage legislation in Massachusetts, adopted in 1912, was limited to women and children.⁴⁰ The legislature was moved mostly by concerns for women and the well-being of their children.⁴¹ Attitudes about their dependence and weaker constitutions led to new laws that were not made available to men. Echoes of Dr. Clarke abounded.

The gender variations eventually found their way to the United States Supreme Court in the famous cases of *Lochner v. New York*⁴² and *Muller v. Oregon*,⁴³ decided only three years apart early in the twentieth century. *Lochner* involved the constitutionality of a New York act limiting the hours of employees working in baking establishments (in reality all men)⁴⁴ to sixty per week. It typically is read in introductory Constitutional Law courses as a prominent example of the way the Due Process Clause of the Fourteenth Amendment was used in that era to limit the authority of state legislatures to control the contractual relationships between employers and employees. *Muller* involved the legality of an Oregon statute limiting the hours of women working in any “mechanical establishment, or factory, or laundry” to no more than ten hours per day.

The gendered characteristics of the language used by Justice Peckham in *Lochner* to invalidate the New York hours statute as well as by Justice Brewer in his *Muller* opinion validating Oregon’s statute are critically important. Peckham’s opinion, written for a *slim 5-4 majority*, was liberally strewn with discourse about rights, liberties, contractual freedoms, independence, and individualism⁴⁵—yielding to the belief that male workers had the inherent power and right to bargain for their own well-being and that their health was not a serious public policy issue in the case. Justice Holmes in dissent concentrated on the wisdom of granting legislatures power to exercise their discretion in the interests of the well-being and health of workers, eschewing discussion of male liberty and fortitude. By contrast, in *Muller* Justice Brewer focused on the public welfare benefits of Oregon’s statute and the importance of maintaining women’s health for the “well-being of the race.”⁴⁶ The contrast between the language of Justice Peckham in his *Lochner* opinion and that of Justice Brewer in his *unanimous* opinion in *Muller* were profound and deeply reflective of the attitudes of Dr. Clarke.

40. *An Act to Establish the Minimum Wage Commission and to Provide for the determination of Minimum Wages for Women and Minors*, Ch. 706, ACT AND RESOLVES OF THE GENERAL COURT OF MASSACHUSETTS 780 (June 4, 1912).

41. *Id.*

42. 198 U.S. 45 (1905).

43. 208 U.S. 412 (1908).

44. The statute was not gendered but there were no women working at the bakeries in issue. See *Lochner*, 198 U.S. at 46, n. †.

45. This vocabulary is used more than seventy times in the opinion.

46. *Muller*, 208 U.S. at 419.

Though the *Muller* case was not the first⁴⁷ in which a Supreme Court brief marshaled social science materials in support of workplace claims,⁴⁸ the famous “Brandeis Brief” filed by its namesake played a particularly important role in the resolution of the dispute. The brief actually was assembled mostly by Brandeis’ sister-in-law Josephine Goldmark—a very well-known Progressive Era reformer, and her colleague Florence Kelley of the National Consumers League.⁴⁹

Goldmark, Kelley, and Brandeis of course as a counsel of record, had a bit of a legal conundrum to resolve. *Lochner* was decided in 1905, just two Court terms before *Muller v. Oregon* was added to the tribunal’s docket. The Justices had to be convinced that hours legislation protecting Oregon’s women and children was in a different category from the similar rules in New York dealing with male bakers. That issue was raised by *Muller*, the owner of a bakery charged with violating the hours law. The brief filed on his behalf took the straightforward position that the freedom of contract result in *Lochner* governed the Oregon dispute as well.⁵⁰ By then the civil law rights of women to enter into contracts, bargain individually for their wages, and own property were fairly well established across the country. In the absence of some gender-based distinction, the civil legal reforms of the nineteenth century raised the possibility that the Court’s reasoning in *Lochner* applied here as well. Focusing on the physiological differences between men and women was the obvious strategy for Goldmark, Kelly, and Brandeis to adopt in response.

While the brief filed by the Oregon Attorney General’s Office was a traditionally composed document, the Brandeis Brief filed on behalf of the state had virtually no legal argument in its one-hundred-and-thirteen pages. One of the short argumentative passages, though hardly legal in any traditional sense, graced the opening page of a section on “The Dangers of Long Hours.” It read:

The dangers of long hours for women arise from their special physical organization taken in connection with the strain incident to factory and similar work.

47. The notion that it was the first instance in which lawyers marshaled social science evidence in support of a legal argument was falsely nurtured by Brandeis’ then young colleague Felix Frankfurter. Felix Frankfurter, *Hours of Labor and Realism in Constitutional Law*, 29 HARV. L. REV. 353, 364 (1916), Frankfurter claimed that *Muller* “was the first case presented to our courts on the basis of authoritative data. For the first time, the arguments and briefs breathed the air of reality.”

48. A smaller instance of this strategy was submitted in support of those who successfully challenged the New York hours limitation law in *Lochner*. Brief for Defendant in Error at 18, *Muller v. State of Oregon*, 208 U.S. 412 (1908) (No. 107) [hereinafter Defendant Brief in *Muller*]. That brief took the positions that bakery work was quite safe despite the dust it created and that no protections beyond those afforded by the business owners were needed for the men who worked in such environments. 198 U.S. 45 (1905). For information on the briefing in the case, see David E. Bernstein, *Brandeis Brief Myths*, 15 GREEN BAG 2D 9 (2011). The appendix of the brief filed on behalf of the bakeries in *Lochner* contained summaries of an array of British workplace studies to argue that bakeries were not unhealthy. Brief for Plaintiff in Error, *Lochner v. New York*, at 47–61 (1908). But the *Muller* filing was significantly larger and, in contrast to the *Lochner* effort, had virtually no legal argumentation.

49. See EILEEN BORIS, *HOME TO WORK: MOTHERHOOD AND THE POLITICS OF INDUSTRIAL HOMEWORK IN THE UNITED STATES* 119 (1994); KESSLER-HARRIS, *supra* note 13, at 186–87.

50. Brief for Plaintiff in Error at *, *Muller v. State of Oregon*, 208 U.S. 412 (1908) (No. 107).

Long hours of labor are dangers for women primarily because of their special physical organization. In structure and function women are differentiated from men. Besides these anatomical and physiological differences, physicians are agreed that women are fundamentally weaker than men in all that makes for endurance; in muscular strength, in nervous energy, in the powers of persistent attention and application. Overwork, therefore, which strains endurance to the utmost is more disastrous to the health of women than of men, and entails upon them more lasting injury.⁵¹

Following this short “legal” contention, the brief presented quotations from a lengthy series of publications and studies. The tone of a number of them mirrored that of Dr. Clarke. Here, for example, are the stunning words quoted in the brief of Dr. George M. Price, a Medical Sanitary Inspector for the Health Department of the City of New York:

The injurious influences of female labor are due to the following factors: (1) The comparative physical weakness of the female organism; (2) The greater predisposition to harmful and poisonous elements in the trades; (3) The periodical semi-pathological state of health of women; (4) The effect of labor on the reproductive organs; and (5) The effects on the offspring.⁵²

Or peruse the statements of Dr. W. Chapman Grigg in a report to the British Parliament found in the Brandeis brief:

I believe that [sterility] is one of the greatest evils attached to * * * prolonged hours. I have seen many cases in families where certain members who have pursued the calling of shop-girl assistants⁵³ have been sterile, while other members of the family have borne children. I know of one case where four members of a family who were shop-girls were sterile, and two other girls in the family, not shop-girls, have borne children * * *. It appears to be a most common condition.⁵⁴

The National Consumer League strategy for the Brandeis Brief worked like a charm. The Supreme Court took the rare step of citing the brief⁵⁵ and adopting its basic theory whole cloth. The opinion was remarkably short at only three pages and bereft of any sharp analysis of prior Due Process cases—a statement of how obvious it was to the Court that men and women were situated differently in their physiology and therefore in their workplace capacities. The result ineluctably followed. Legislatures must be given ample space to consider the particular needs of women and their importance for maintenance of “the race.” The primary paragraph in Justice Brewer’s opinion is a stunning affirmation of Dr. Clarke’s thesis. Indeed, Clarke could have written it:

* * * Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right. Doubtless there are individual exceptions, and there are many respects in which she has an advantage over him; but looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality. Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection

51. Defendant Brief in *Muller*, *supra* note 47, at 41–42.

52. *Id.* at 22–23.

53. This refers to store clerks, not factory workers.

54. Defendant Brief in *Muller*, *supra* note 47, at 36–37. A litany of similar quotes may be found in pages 18–55 of the brief.

55. *Muller v. Oregon*, 208 U.S. 412, 419 (1908).

may be sustained, even when like legislation is not necessary for men, and could not be sustained. It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him. Even though all restrictions on political, personal, and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man. The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation, and upholds that which is designed to compensate for some of the burdens which rest upon her.

IV

CONTINUING IMPACT OF DR. CLARKE IN THE TWENTIETH CENTURY

By the 1920s, Clarke's views about the *mental* capacity of women being negatively affected by their reproductive cycles were largely out of favor among experts in the recently created discipline of psychology. Studies, many organized by women working at the University of Chicago, demonstrated no difference in educational performance at various stages of a woman's menstrual cycle.⁵⁶ Death and diseases of women were shown to be unrelated to exercise of the mind during menstruation but to other common features of existence on the planet. And, of course, women's suffrage had become a reality. But somewhat modified aspects of Clarke's theories kept surfacing through the rest of the century. Debates about the Equal Rights Amendment, the roles of women working during and after World War II, and the gradual opening of more dangerous aspects of military service to women are particularly revealing examples.

A. The National Women's Party and the Equal Rights Amendment

Despite the waning influence of Dr. Clarke and the virtual disappearance of references to his book on education, claimed differences in the physical capacities of men and women, and the episodic qualities of women's mental acuity continued to appear in public discourse. The demise of much of Clarke's "science" did not result in the disappearance from American culture of the notion that women were inherently less stable and physically capable than men. The contours of the debate over the proposed Equal Rights Amendment (ERA) made that clear. The early version of the ERA, written by Alice Paul and Crystal Eastman of the National Women's Party, was first introduced in Congress in 1923, three years after the Nineteenth Amendment affirming the right of wom-

56. ROSENBERG, *supra* note 18, at 62–83.

en to vote became part of the United States Constitution. The proposed amendment read:

Section 1. No political, civil, or legal disabilities or inequalities on account of sex or on account of marriage, unless applying equally to both sexes, shall exist within the United States or any territory subject to the jurisdiction thereof.

Section 2. Congress shall have power to enforce this article by appropriate legislation.⁵⁷

Women were divided in their opinions about the proposal, though most progressive reformers opposed it. They feared it would lead to the demise of protective labor legislation adopted during the years before and after the decision in *Muller*.⁵⁸ Though opponents of the Equal Rights Amendment did not use a Clarke-style argument that women's minds and bodies worked in zero-sum ways that barred them from traditionally male activities, they came close. A famous exchange between Rheta Childe Dorr, a well-known writer, journalist, and member of the National Women's Party, and Mary Anderson, the director of the Women's Bureau in the Department of Labor, was published in the September 1925 issue of *Good Housekeeping*.⁵⁹

Dorr took the position that the most important issues did not involve the hours women worked but the "unequal wages and bad factory conditions" afflicting all workers. Anderson, on the other hand, wrote that she was a "practical" rather than "theoretical" feminist.⁶⁰ The real issues for her and others opposing the work of the National Woman's Party—then a quite small but vocal reform group—and its Equal Rights Amendment were the lack of union protections for women, the fatigue they suffered on the job because they held down two full-time jobs—one at home and the other on the factory floor, the inevitable differences arising out of reproductive capacities, pregnancy and childbirth, and the weaker nature of women's physiques. Protective labor laws for women, were advisable, Anderson argued:

57. This version was itself a variation of earlier versions proposed at meetings of the National Women's Party earlier in the 1920s. The language of these provisions may be found at *Equal Rights Amendment*, WIKIPEDIA, https://en.wikipedia.org/wiki/Equal_Rights_Amendment [<https://perma.cc/7L7X-DGU2>] (last visited Mar. 14, 2021). The Equal Rights Amendment version approved by Congress in 1972 and sent to the states for ratification read differently:

Sec. 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Sec. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Sec. 3. This amendment shall take effect two years after the date of ratification.

S.J. Res. 15, 92nd Cong. (1972).

58. See, KESSLER-HARRIS, *supra* note 13, at 206–12.

59. Rheta Childe Door, *Should There be Labor Laws for Women? No*, GOOD HOUSEKEEPING 52 (Sept. 1925); Mary Anderson, *Should There be Labor Laws for Women? Yes*, GOOD HOUSEKEEPING 53 (Sept. 1925). The magazine issue has been made available by the Cornell University Library. See CORNELL UNIVERSITY LIBRARY, http://reader.library.cornell.edu/docviewer/digital?id=hearth6417403_1382_003#page/156/mode/1up [<https://perma.cc/RQZ4-5FJH>] (last visited Mar. 15, 2021).

60. The distinction is echoed today by debates between "difference" and "equal-rights" feminists.

[B]ecause women's special needs were more evident to the public than were the needs of other workers, and there was a widespread appreciation of the importance of conserving the health of the actual and potential mothers of future generations. A similar demand for laws for men did not exist for several reasons. Chief of these was and is the fact that men in general work under much better conditions than women; where they work at night they can sleep in the day, and there are in any event no such double demands upon their energies as upon the wage-earning wife and mother; and, though men's wages are too often very low, they are never, I think we can safely say, as low as women's.⁶¹

William Chafe summarized the arguments of the two sides in his classic 1972 book *THE PARADOX OF CHANGE*:

Reformers and feminists * * * held diametrically opposite conceptions of female equality. The Woman's Party and its allies were convinced that protective legislation discriminated against women and that women could not be free until they achieved absolute identity with men in all areas of public policy regulated by law. Reformers, in turn, believed that difficulties of physical and psychological makeup prevented women from ever competing on a basis of total equality with men and that special labor laws were required if women were to be protected against exploitation and given just treatment in their economic activities. One side was committed to the philosophy that women were exactly the same as men in all attributes relevant to law and public policy; the other, to the position that women were so different that their rights would be destroyed unless safeguarded by special legislation.⁶²

Such views about the lives of women and their reproductive capacities wove a varied tapestry throughout the rest of the twentieth century. They were culturally manipulable, much as in the contrasting opinions of *Lochner* and *Muller*, depending on understandings of cultural needs. Sometimes notions of women's physical limitations surged to the foreground; at other times notions of women's enormous capacity for work dominated. The continuing sense that notions of gender equality were in cultural tension with the limits of women's physical constitutions played out in the movement of women into and out of the factory work force during and after World War II, the bitter debates over the Equal Rights Amendment in the 1970s, and in more contemporary arguments about combat service of women in the military, among a variety of other controversies.

B. Women, Work, and World War II

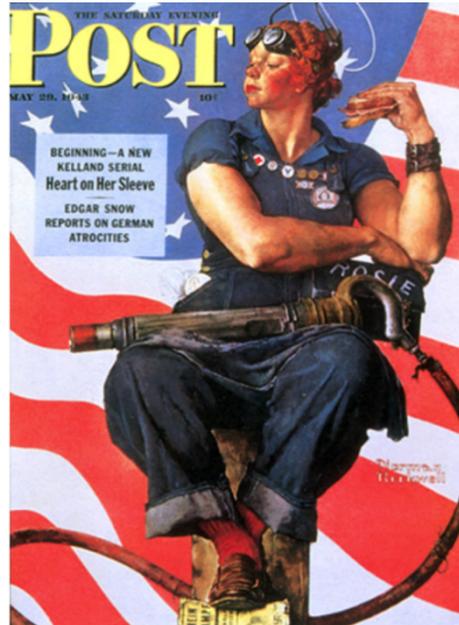
That fears about women's capacity for strenuous work were subject to dispute and manipulation were made totally clear by the contrasting actions of government and business during the Great Depression and World War II. After discouraging women from going to work during the 1930s to save jobs for men, the opposite trends appeared during the war. Despite public relations efforts, it is not clear the public discourse made an enormous difference in demographic trends. Most women who worked during the war were already in the work force and simply altered job patterns. And of the increase of women working during the war of four to five million people, it is not clear how many of those would

61. Anderson, *supra* note 58, at 170.

62. WILLIAM CHAFE, *THE PARADOX OF CHANGE* 57-58 (1972, 1991 ed.).

have entered the labor pool anyway. That increase was at least partly due to a continuation of the long-term increase in the proportion of women working that began well before the war.⁶³

Despite the trends, both government and business entities felt the need to publicly encourage women to aid in the war effort by going to work and taking on tasks they previously eschewed or were barred from undertaking. And to a limited extent both government and private organizations made efforts to ease the way by initiating day care and other programs.⁶⁴ The felt need to find workers for the manufacturing sector and other workplaces short of men because of their service overseas led government and business to consciously mold and manipulate public attitudes to encourage the movement of women workers into wartime factories. Some of the public relations efforts are well known. Two of the most famous, displayed below, are the Howard Miller “We Can Do It” poster made for Westinghouse Electric in 1943, and the Norman Rockwell painting of Rosie the Riveter that graced the cover of the SATURDAY EVENING POST on May 29 of the same year.⁶⁵ Other graphic campaigns were waged to encourage women to work on farms, or more domestically, to raise foods at home.



63. An easy to read and fairly complete telling of the labor story during the Depression and World War II is available in KESSLER-HARRIS, *supra* note 13, at 273–99.

64. *Id.* at 290–95.

65. The “We Can Do It” poster is now in the public domain. The original Rosie the Riveter painting is held by the Crystal Bridges Museum of Art in Bentonville, Arkansas. See THE CRYSTAL BRIDGES MUSEUM OF AMERICAN ART, <https://collection.crystalbridges.org/objects/585/rosie-the-riveter> [<https://perma.cc/4ZVC-Q754>] (last visited Mar. 24, 3031).

Not surprisingly, the reverse strategy was used to convince women to give up jobs once the emergency ended so men returning from the fronts could go back to work. That may have succeeded in a limited way, especially because day care and other programs designed to entice women to work were ended. But by a few years after the war was over, labor force participation rates of women returned to their wartime levels and continued rising over time. Nonetheless, strategies designed to allow men to return to work by replacing women were adopted, including a number of veterans preference statutes.⁶⁶

While some women protested the loss of their jobs, the United States Supreme Court, with Felix Frankfurter again eagerly carrying the flag of male privilege, brusquely cast aside their objections. In Michigan, legislation was adopted barring women from holding bartending jobs they happily filled during World War II. Writing for the Court in *Goesaert v. Cleary* in 1948, he opined that bartending by women may “give rise to moral and social problems,” leading him to conclude that:

We are, to be sure, dealing with a historic calling. We meet the alewife, sprightly and ribald, in Shakespeare, but centuries before him she played a role in the social life of England. * * * The Fourteenth Amendment did not tear history up by the roots, and the regulation of the liquor traffic is one of the oldest and most untrammelled of legislative powers. Michigan could, beyond question, forbid all women from working behind a bar. This is so despite the vast changes in the social and legal position of women. The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes, certainly, in such matters as the regulation of the liquor traffic. * * * The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards.⁶⁷

Without being explicit about the “scientific” basis for this conclusion, Frankfurter’s *Goesaert* opinion in fact reaffirmed arguments he had made somewhat more starkly while a Professor at Harvard in 1924. He then opined, “Nature made men and women different; the Woman’s Party cannot make them the same. Law must accommodate itself to the immutable differences of nature.”⁶⁸

C. The ERA Round Two and Military Service

Debate over the physical capacities of women and their relationship to their legal capacities and protections reemerged in the debates over the 1970s era Equal Rights Amendment. Phyllis Schlafly—almost surely the major antagonist opposing the amendment—and the Eagle Forum she ran, crafted arguments

66. Though some women served voluntarily in the military during the war, the vast bulk of veterans were men. The contemporary federal rules are based on the Veterans Preference Act of 1944, 58 Stat. 387 (June 27, 1944). A state preference statute was later upheld by the United States Supreme Court despite Equal Protection Clause challenges. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979).

67. *Goesaert v. Cleary*, 335 U.S. 464, 465–66 (1948). For more on Frankfurter and *Goesaert*, see Judith Olans Braun, Lucy A. Williams, & Phyllis Tropper Bauman, *The Mythogenesis of Gender: Judicial Images of Women in Paid and Unpaid Labor*, 6 U.C.L.A. WOMEN’S L.J. 457, 496 (1996).

68. Editorial, *Equal Rights Amendment Arrives*, 58 A.B.A. J. 604, 605 (1972).

against ratification that echoed the tone of the Brandeis Brief, but with a twist. She elevated both the homemaking role of women, and their “privileges” as mothers, child bearers, and moral guardians of the family. She claimed that the E.R.A. would deprive women of family law protections such as alimony, child custody preferences, and husbands’ duty of support, and limit their ability to carry out their God-given roles as mothers and moral guardians in society.⁶⁹

Schlafly’s claims involved spatial as much as familial and physiological arguments. Protecting the reproductive necessities of life required that women’s bodies be protected and that their daily lives should often unfold in places isolated from those men normally operated in. She therefore crafted arguments claiming that the E.R.A. would require unisex bathrooms and combat-level military service— notions that catered to then widespread fears about protecting women from aggression by the men that surrounded them. Such contentions were decisive in the failure of the E.R.A. to gain ratification.⁷⁰

Such notions also played a critical rhetorical role for those opposing, not only the ERA but also combat service by women in the military. The familial obligations of women and their weaker physical constitutions, until recently,⁷¹ doomed efforts to fully integrate women into all levels of military life. The debate was once again fueled in part by Phyllis Schlafly. She replayed the same themes used during her anti-ERA campaign, using norms of masculinity and femininity, the dangers of close working relationships in risky settings, and the tendency of many to recoil at the thought of women being wounded or killed in battle. Rephrased, it appears that women’s bodies need to be preserved to enhance “the survival of the race.” Her views were stated with language designed to garner attention and convince both women and men that allowing women to serve in combat roles was unwise. In an essay entitled *Women Should Not Serve in Military Combat*⁷² she wrote:

How did we get into our present situation, in which our military officers are issuing maternity uniforms, opening nurseries on army posts, and pretending that women can

69. See, e.g., Phyllis Schlafly, *The Precious Rights ERA Will Take Away From Wives*, Volume 7, No. 1, Section 2, THE PHYLLIS SCHLAFLY REPORT (Aug. 1973), https://www.realmrsamerica.com/wp-content/uploads/2020/04/PSCA_PSR_07_01_197308.pdf [<https://perma.cc/2PTK-MYA9>]. Her major tome in the ERA era was PHYLLIS SCHLAFLY, *THE POWER OF THE POSITIVE WOMAN* (1973). The basic structure of her arguments is summarized *id.* at 22–28.

70. See, e.g., Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto Era*, 94 CALIF. L. REV. 1323 (2006).

71. The combat ban was lifted in 2015 during the Obama administration. A significant number of women now serve in combat level roles. See Emma Moore, *Women in Combat Roles: Five-Year Status Update*, CENTER FOR NEW AMERICAN SECURITY (Mar. 31, 2020), <https://www.cnas.org/publications/commentary/women-in-combat-five-year-status-update> [<https://perma.cc/98HB-NQLU>]; Lori Robinson & Michael E. O’Hanlon, *Women Warriors*, *The Ongoing Story of Integrating and Diversifying the American Armed Forces*, BROOKINGS (May 2020), <https://www.brookings.edu/essay/women-warriors-the-ongoing-story-of-integrating-and-diversifying-the-armed-forces/> [<https://perma.cc/BH55-VJQ2>].

72. BIBLE RESEARCH, *Women Should Not Serve in Military Combat*, <http://www.bible-researcher.com/women/women-in-combat.html> [<https://perma.cc/2GVW-JUQ2>] (last visited Mar. 16, 2021); see also SCHLAFLY, *POSITIVE WOMAN*, *supra* note 68 at 121–30.

do anything that men can do? For the answer to that, we must look at two feminist fantasies.

The first is that there really is no difference between the sexes (except those obvious ones we need not discuss) and that all those other differences you think you see are not inherent, but are due merely to cultural stereotyping which can and must be erased by sex-neutral education, laws, and changed attitudes.

* * * *

The great and powerful U.S. military has been pretending there is no difference between men and women, even if they are mothers, and that giving birth to a baby is only a temporary disability like breaking a leg. To carry on this pretense, official U.S. military policy has been ignoring common sense, family integrity, and the American culture. The deception appeared to some to be satisfactory in the peacetime military when women were pursuing their career opportunities for upward social mobility, as the feminists like to say. Then came a real war.

The politicians have brought this embarrassment on our nation because they allowed themselves to be henpecked by the militant feminists. The whole idea of men sending women, including mothers, out to fight the enemy is uncivilized, degrading, barbaric, and embarrassing. It's contrary to our culture, to our respect for men and women, and to our belief in the importance of the family and motherhood. No one respects a man who would let a woman do his fighting for him.

Rostker v. Goldberg,⁷³ the 1981 Supreme Court decision affirming the male only registration system, was heavily influenced by the debates over both the E.R.A. and military service. Justice Rehnquist, writing for the Court, claimed there could not possibly be any serious issue of gender discrimination in male only registration. Since, according to the proponents of the E.R.A., the amendment itself would not have required combat service by women, an Equal Protection violation under the extant Constitution was simply impossible. In writing about this conclusion thirty-one years ago, I claimed:

It is hard to take seriously the notion that *Rostker* represents a carefully thought-out rule about intentional gender discrimination. Rehnquist's presumption that the previously enacted restrictions on women serving in combat roles were constitutional hardly was commanded. Nothing in the underlying framework of discrimination law prevented either the parties or the Court from assuming that the combat restrictions were invalid. Rather, the fact that the plaintiffs in building their lawsuit, Justice Rehnquist in composing his majority opinion, and * * * [the Justices composing their dissents] all assumed that the battlefield bar was valid strongly suggest that the cultural norms frowning upon women in the trenches were too powerful to ignore. There is, therefore, little to support the result save the quite obvious stereotypes that women cannot shoot guns, drive tanks, fly airplanes, push missile buttons, or die as well as men.⁷⁴

CONCLUSION

The longtime tropes about the stamina and fortitude of women did not appear during the 2020 presidential election campaign as they did four years earlier. Challenges to the stamina – including the mental fortitude – of a white female presidential candidate like Hillary Clinton were unavailable against a male running for President with a black-Asian female running mate. Though Trump

73. 453 U.S. 57 (1981).

74. Richard H. Chused, *Gendered Space*, 42 FLA. L. REV. 125, 150 (1990).

is notorious for using gendered and racist tropes against his opponents, he had to change his approach for 2020. He picked on *Biden's* mental fitness, calling out his well-known history of stuttering (now very well managed) and word gaffes. Going directly after his age was risky for Trump was himself an elder. But he selected age related tropes without directly mentioning the underlying issue. And his taunts of Harris presented her as unlikable and nasty—trying to picture her as a scary person of color who shouldn't be sitting a heartbeat away from the Presidency, rather than as lacking stamina. Trump used her race and supposed physical capacities to make her scary rather than weak.

The Trump campaign's questioning of Biden's mental fitness began very early in 2020, when he coined the epithet "Sleepy Joe" during the primary season. Using a clip of Biden gaffes, Trump tweeted in March, "WOW! Sleepy Joe doesn't know where he is, or what he's doing. Honestly, I don't think he even knows what office he's running for!"⁷⁵ The theme continued for months. Just before the first debate, Trump spoke in Pittsburgh saying, "This guy doesn't have a clue. He doesn't know where the hell he is. * * * This guy doesn't know he's alive."⁷⁶

Trump's Harris insults also were indirect, but equally pointed—this time about race. A perfect example was a comment he made in September, 2020. "She was supposed to win, problem was she went from 15 to 14 to 12 to 10 to 7 to 4. It's like a freefall. You know what? People don't like her. Nobody likes her. She could never be the first woman president. She could never be. That would be an insult to our country."⁷⁷ The following month, he stooped even lower during an interview with the Fox Business Channel the day after the vice-presidential debate, calling Harris "this monster that was onstage with Mike Pence who destroyed her last night, by the way."⁷⁸ Labeling Harris as a monstrous insult to the country can only be read as a dog whistle to Trump's white supporters.

The absence of commonplace insults about stamina and physical capacity to withstand the rigors of the Presidency only emphasizes the cultural importance

75. Chris Cillizza, *The Trump Team is Now Working Overtime to Question Joe Biden's Mental Fitness*, CNN (Mar. 12, 2020), www.cnn.com/2020/03/12/politics/donald-trump-joe-biden-mental-fitness/index.html [https://perma.cc/8247-QTZZ].

76. Will Steakin, Katherine Faulders & John Santucci, *Trump Targets Biden's Mental Health in Debate Lead-Up, Despite Aides' Efforts to Raise Expectations*, ABC NEWS (Sept. 26, 2020), <https://abcnews.go.com/Politics/trump-targets-bidens-mental-health-debate-lead-aides/story?id=73264525> [https://perma.cc/SXZ7-UD9Y]; see also Kay Nolan & Michael D. Shear, *Trump Questions Biden's Mental Abilities and Call Harris Biden's 'Boss'*, N.Y. TIMES (Aug. 17, 2020), <https://www.nytimes.com/2020/08/17/us/politics/trump-campaign-biden-harris.html> [https://perma.cc/4AUB-LJ5A].

77. Chris Cillizza, *Donald Trump's Vague Attack on Kamala Harris Has a Clear Point*, CNN (Sept. 9, 2020), <https://www.cnn.com/2020/09/09/politics/donald-trump-kamala-harris/index.html> [https://perma.cc/V532-TPP5].

78. Juana Summers, *Trump Calls Harris a 'Monstger,' Reviving a Pattern of Attacking Women of Color*, NPR (Oct. 9, 2020), <https://www.npr.org/2020/10/09/921884531/trump-calls-harris-a-monster-reviving-a-pattern-of-attacking-women-of-color> [https://perma.cc/JF2E-A6CG].

and power of the gendered tropes Trump used against Clinton in 2016. Indeed, when Biden stumbled climbing the steps to Air Force One on March 19, 2021, nothing was said about his stamina or physical capacity. That replicates the general reaction to male Presidential stumbles over the years, of which there have been a number. President Ford, who had a bad knee, stumbled a number of times during his public life, giving rise to a frequent characterization of him as subject to pratfalls. Trump walked up airplane steps with toilet paper stuck on a shoe and seemed to hold on for dear life when walking down a ramp. Obama also stumbled on the Air Force One steps, as did Mike Pence.⁷⁹ While some humor emerged about all of these events, none matched the ways in which Hillary Clinton was subjected to gendered stereotyping after getting pneumonia. And that, of course, is the point of this essay. Seemingly old-fashioned and out-of-date tropes about white women seem to hang on for dear life in the threads of American culture. Dr. Clarke lives.

79. Suzanne Rown Kelleher, *Biden's Fall Ranks Among the Top Air Force One Gaffes—But It's Not Number One*, FORBES (Mar. 20, 2021), <https://www.forbes.com/sites/suzannerowankelleher/2021/03/20/bidens-fall-ranks-among-the-top-air-force-one-gaffes—but-its-not-number-one/?sh=55c22785a6bc1> [https://perma.cc/PCF5-EDC6].