

THE POSSIBILITY OF AMERICAN
MILITARY WOMEN BECOMING
PRISONERS OF WAR: JUSTIFICATION
FOR COMBAT EXCLUSION RULES?

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INTRODUCTION

There is an ever increasing likelihood that, in future armed conflicts involving the United States, American military women will be directly engaged in front-line combat operations. In spite of this fact, there remains a body of United States law and, more importantly, policy which purports to eliminate or at least reduce the risk that American military women will be exposed to direct combat, hostile fire, or capture. For the sake of convenience, I shall refer to this body of law and policy--when viewed in the overall, generic sense--as the United States' combat exclusion rules for women.

We Americans, as a society, have faced very few topics in recent years which have caused as much controversy or stirred as many emotions as do those issues we now face regarding women in combat. Yet, ultimately, we must resolve these issues and then clarify our policy regarding women in combat. In other words, do we want our military women completely excluded from direct

participation in front-line combat operations? Or, in the alternative, do we want to remove all legal and policy restrictions on such participation? Or, perhaps, do we want to continue with a middle-ground approach which does not stand as an absolute prohibition yet still serves to reduce or minimize the combat risks to which women would be exposed?

In our society, there are proponents--often rather vocal--for each of these three policy positions. Those who advocate the total elimination of all legal and policy restrictions do so based on arguments of sexual equality, equal protection, or similar concepts and principles. Those who advocate either a complete exclusion or some level of reduced risk do so based on a wide variety of arguments ranging from national security to religion. Those in this latter group of advocates, however, almost invariably advance the argument at some point that combat exclusion rules are justified based on our concerns that American military women engaged in front-line combat operations may be captured and held as prisoners of war. It is precisely this argument which I shall address in this paper.

The scope of this paper is limited. I shall not adopt any one of the three alternative policy positions outlined above. Instead, I shall look solely at the possibility of American

military women becoming prisoners of war and then address whether our concerns over this possibility justify some form of combat exclusion rule.

This paper is, therefore, limited to a narrowly focused question. Yet, even if one concludes that the possibility of American military women becoming prisoners of war in no way justifies combat exclusion rules, it must be remembered that this conclusion would not exclude arguments that such rules may still be justified on other grounds. Nevertheless, considering both the substantial frequency with which these concerns are voiced as a justification and the apparent force and effect which they often carry in argument, now is certainly the time to assess the argument so as to determine whether it actually advances a justification for combat exclusion rules.

In analyzing this argument, I shall address numerous questions which will likely be presented during future armed conflicts should American military women be confined as prisoners of war--difficult, gut-wrenching questions which will demand concrete, specific answers. However, I believe that none of these questions is so complex or challenging as to be beyond the grasp of capable leadership. Furthermore, I believe that the deontological view, as expressed primarily by Immanuel Kant, provides our American society the best approach to the issue of

American military women in combat. Therefore, having adopted this approach, I intend to show that our concerns regarding women as prisoners of war--despite the troubling nature of these concerns--do not justify combat exclusion rules for women.

Thus, I shall first consider the possibility of American military women becoming prisoners of war and what I believe to be the most important issues presented by this possibility. I shall then adopt a deontological view regarding this problem, believing that it provides the most appropriate approach for our American society. Having done so, I shall then conclude that combat exclusion rules for women are not justified on these grounds. In other words, if we are to justify denying American military women--human beings with dignity and a free will, informed by reason--the freedom of choice to fight and perhaps die for their country as patriots, then we should do so on some basis other than the possibility that they may someday be held captive as prisoners of war.

AMERICAN WOMEN AS PRISONERS OF WAR

Women are not the weak, frail, little flowers that they are advertised. There has never been anything invented yet, including war, that a man would enter into, that a woman wouldnt [sic], too.

Will Rogers¹

Women have become indispensable to America's combat readiness and have already "played key combat support roles in the United States' most recent military operations, in Honduras, Grenada and in bombing Libya, for example." ² As Lawrence Korb, Assistant Secretary of Defense for Manpower during the Reagan Administration's first term described the role of these women: "We couldn't go to war without them, and we couldn't win it without them."³

Such statements reflect the ever increasing likelihood that, in future armed conflicts involving the United States, American military women will be directly engaged in front-line combat operations. Furthermore, as this potential for direct involvement increases, so does the risk that American military women will be captured and made prisoners of war. As set forth in Figure 1, the Acting Chief of the Department of Defense Code of Conduct Training Program has described the situation as follows: "Despite current laws prohibiting military women from

being assigned to combat positions, the possibilities of American military women becoming PWs [Prisoners of War] under the conditions stipulated in Articles 2 and 4 of the 1949 Geneva Conventions Relative to the Treatment of Prisoners of War appear high."⁴

If American military women should ever become prisoners of war in any future conflict, it will not be a historical first. During World War II, for example, eleven Navy nurses and sixty-six Army nurses were captured by the Japanese in the Philippines and held prisoner for thirty-seven months.⁵ During an interview, Mrs. Mary Rose Nelson--then Navy nurse Lieutenant Mary Rose Harrington and one of the eleven Navy nurses captured on New Year's Day 1942--described her captivity for me.⁶ She stated that these Navy nurses had received no training for such a contingency, although they fully expected to get captured at some point. They did not know what type of treatment to expect from the Japanese and "had made a lot of dark jokes about it."⁷ However, they actually received much better treatment than expected. Mrs. Nelson said she never saw any mistreatment of the Navy nurses, although they remained vigilant in that regard. They always strived to retain their dignity and were "always nurses."⁸ They followed an unwritten rule that "you didn't put yourself in a position to have problems."⁹ In other words, she said, "We just looked out after ourselves."¹⁰

Although the Japanese did not physically abuse or mistreat Mrs. Nelson and the other Navy nurses, life was still rather Spartan at best. In addition to their nursing duties, the nurses were required to perform camp labors--for example, picking bugs from the rice, cleaning vegetables, cleaning rooms and toilets, and doing laundry. Malnutrition was also a problem and food became a "prize possession"¹¹ so that, by the time they came home, they were "pretty scrawny."¹² In this regard, Mrs. Nelson provided me several photographs--one of which is attached as Figure 2. This official Navy photograph was among the first taken of these nurses after their rescue from Los Banos Camp on 23 February 1945. (Pictured with them is Admiral Thomas C. Kincaid, USN, Commander 7th Fleet and Southwest Pacific Force.) This photograph clearly depicts the undernourished state of these nurses during their captivity.

If American military women were to become prisoners of war today, could they expect similar treatment? It would be most unlikely. Instead, they would probably be subjected to some of the most cruel and inhuman treatment imaginable. In World War II, our captors primarily considered American prisoners of war to be a source of intelligence information. Then, after all useful information had been gleaned, the prisoners were for the most part simply held in captivity and put to work. However,

beginning with the Korean conflict--our first real experience with Communist captors--we saw our prisoners used, not only for intelligence gathering, but also for propaganda and exploitation. Our prisoners in Korea were unprepared for this abuse and, having learned from their experience, President Eisenhower subsequently signed in 1955 the executive order which set forth our Code of Conduct. Today, the applicable Department of Defense Directive offers the following guidance along these lines:

Contrary to the 1949 Geneva Conventions..., enemies which U.S. forces have engaged since 1949 have regarded the PW compound as an extension of the battlefield. The United States Prisoner of War (USPW) must be prepared for this fact.

In disregarding provisions of the Geneva Conventions..., the enemy has used a variety of tactics to exploit PWs for propaganda purposes or to obtain military information. Resistance to captor exploitation efforts is required by the Code of Conduct. Physical and mental harassment, general mistreatment and torture, medical neglect, and political indoctrination have all been used against USPWs in the past.¹³

Thus, any American prisoner of war--male or female--in any future conflict can expect treatment even worse than experienced by those held captive during World War II. Furthermore, there would be at least one more very substantial difference regarding American military women as prisoners of war in future conflicts. These women will probably be combatants--as opposed to noncombatant medical personnel who not only pose no threat but

who, although not regarded as prisoners of war, may lawfully be retained by the enemy so as to care for prisoners of war.¹⁴

However, female combatants who, for example, may have just bombed an enemy's country are not likely to be viewed in quite the same manner--nor receive the same treatment--as the female nurses whom the enemy just captured in a field hospital.

RELEVANT LAWS OF ARMED CONFLICT

The Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, affords certain rights and protections to all prisoners of war. The numerous rights and protections afforded to male prisoners--for example, "respect for their persons and honour"¹⁵--apply equally to female prisoners, although no specific reference to gender may be made. Nevertheless, this Convention also includes several specific references to women, the most notable being Article 14, paragraph 2: "Women shall be treated with all regard due to their sex and shall in all cases benefit by treatment as favourable as that granted to men."¹⁶ In Pictet's classic Commentary on the Geneva Conventions, this provision--and several closely associated provisions--are explained as follows:

It is difficult to give any general definition of the "regard" due to women. Certain points should, however, be borne in mind, whatever the status accorded to women either in the country of detention or in the

country of origin; these points are the following:

- (a) weakness;
- (b) honour and modesty;
- (c) pregnancy and child-birth.

These three considerations must be taken into account in the application of provisions of the Convention.

A. Weakness.--This will have a bearing on working conditions (Art. 49 ff.) and possibly on food.

B. Honour and modesty.--The main intention is to defend women prisoners against rape, forced prostitution [sic] and any form of indecent assault. Provision is therefore made for men and women to be separated in Articles 25 (dormitories), 29 (sanitary installations), 97 and 108 (execution of punishment). The honour and modesty of women prisoner [sic] are also protected by Articles 13, paragraph 2 (protection against insults and public curiosity), 17 (questioning), and if need be, where the clothing available is seriously inadequate, by Article 27.

C. Pregnancy and child-birth.--If there are mothers with infants among the prisoners, they should be granted early repatriation. Particular "regard" is required in the case of women prisoners who are pregnant when captured or become pregnant in captivity despite the precautions taken, not only for the birth, but also for the care of the child. The best solution would be that which was suggested at the Conference of Government Experts: women who have given birth should be repatriated with their child, while pregnant women should either enjoy special treatment or, if their state of health permits, should also be repatriated.¹⁷

These international laws would, if obeyed, provide sufficient protection for American military women who may become prisoners of war in future conflicts. However, as previously discussed, experience has shown that enemies do frequently ignore the laws of armed conflict. There is no reason to believe that these laws will not likewise be disregarded by future captors--either by the enemy government as a matter of policy or by individual members of the enemy force regardless of governmental policy. After all, even the American soldiers who entered My Lai 4 on 16 March 1968 and committed hundreds of murders and other violations of the laws of armed conflict did so in total disregard of governmental policy to the contrary.¹⁸ Therefore, we must assume that a substantial number of American military women captured in future conflicts would likely be both physically and mentally abused in the most cruel and inhuman ways.

COMBAT EXCLUSION RULES

The United States' combat exclusion rules for women are set forth in a body of law and policy which purports to eliminate or at least reduce the risk that American military women will be exposed to direct combat, hostile fire, or capture. By far, the more restrictive of these limitations have been and continue to be those imposed as a matter of policy rather than law.¹⁹

Secretary of Defense Frank Carlucci adopted the most recent revision of this policy when, in 1988, he adopted the recommendations of the Department of Defense Task Force on Women in the Military.²⁰ This policy, commonly known as the DOD "Risk Rule" is as follows:

Risks of direct combat, exposure to hostile fire, or capture are proper criteria for closing noncombat positions or units to women, when the type, degree, and duration of such risks are equal to or greater than the combat units with which they are normally associated within a given theater of operations. If the risk of noncombat units or positions is less than comparable to air, land, or sea combat units with which they are associated, then they should be open to women. Noncombat land units should be compared to combat land units, air to air, and so forth.²¹

Thus, the policy restriction concerning American military women is a balancing test based on the type, degree, and duration of certain risks--one of which is the risk of capture. Such a rule may perhaps reduce the risk of women being captured, but it does not eliminate it. On the contrary, as previously discussed and as set forth in Figure 1, the risk that American military women may become prisoners of war in any future conflict remains high. Though not expressed, the realization of this fact was at least implied when, on 28 March 1988, President Ronald Reagan signed an executive order revising the Code of Conduct so as to be gender neutral in its wording--even though it had already

technically applied to both men and women in its previous version.²²

Although the DOD Risk Rule is unlikely to prevent American military women from being captured and becoming prisoners of war, it is still important in this regard. It is an official Department of Defense policy pronouncement which states that the risk of capture is among the proper criteria for closing certain positions or units to women. But, why?

Why do we care about American military women becoming prisoners of war any more than we care about American military men being captured? What are our special concerns? Moreover, do these concerns serve as a valid justification for our combat exclusion rules for women?

These combat exclusion rules are certainly not chiseled in stone. On the other hand, America's policymakers are free to modify or to eliminate these rules at any time. Therefore, I suggest that the time has arrived to re-examine our concerns that American military women may someday become prisoners of war, to rethink those issues, and to reconsider whether those concerns do in fact justify combat exclusion rules for women.

OUR CONCERNS

Many Americans are concerned about our military women becoming prisoners of war simply because they believe women should not be subjected to such abuse and mistreatment. Women, they believe, deserve special protection because they are the "weaker sex" and the sex which bears offspring. On the other hand, many Americans--whether or not they share those particular beliefs--are concerned that women prisoners of war will jeopardize national security. In other words, they believe women would be less capable of resisting enemy interrogation and exploitation and perhaps even create a situation in which the male prisoners may likewise be more willing to cooperate with the enemy. For whatever reason--real or perceived--we Americans have, in fact, traditionally been concerned about the possibility of our military women becoming prisoners of war. The DOD Risk Rule reflects this concern.

In analyzing the bases for our concerns, we should begin by assuming that American women who become prisoners of war in future conflicts will be subjected to extreme physical and psychological torture as the enemy attempts to interrogate and exploit them. Such will be the case for the men; it will be no different for the women. However, we should also assume that the enemy's techniques regarding women will also include rape, threats of rape, sexual

assault, or other forms of sexual misconduct. Of course, it is not out of the question that an undisciplined guard or even a male prisoner may also subject the female prisoner to this type of abuse.

The question of pregnancy then arises--whether that pregnancy results from rape or perhaps even from consensual relations with a fellow prisoner. Invariably the question is asked and, for the sake of a complete discussion, it should be addressed. However, it must be emphasized that, from a medical perspective, such pregnancies are most unlikely. Given the extreme stress and poor diet generally associated with the prisoner of war environment, most if not all of these women will likely experience amenorrhea (absence of the menses) and, therefore, be physically incapable of pregnancy.

Amenorrhea is a symptom which may result from any one of several different causes--one which is hypothalamic dysfunction.²³ Although such hypothalamic amenorrhea is not yet fully understood, it is frequently diagnosed among women who are "serious athletes, ballet dancers, women under severe stress, and those with sudden, large losses of body fat."²⁴ (Consider once again the photograph of the World War II Navy nurses at Figure 2.) Amenorrhea is also reported to be common among new female cadets at the service academies. In fact, the Nurse Practitioner in the Air Force

Academy's Cadet Clinic Primary Care has informed me that roughly 80 percent of the female cadets who enter the Academy as freshmen do not experience a menstrual period from the time of arrival in the summer until returning to their respective homes for the Christmas holidays.²⁵ In light of all the above observations and experiences, we can expect that, if any American women do experience pregnancy during captivity, it will probably be because they conceived before capture or were raped shortly after capture. The chance that they could become pregnant at any subsequent time is slim at best--even if the captivity should extend for a period of years.

Even if pregnancy during captivity is only a remote possibility, we must still consider that possibility. It, then, generates numerous problems and policy issues which we must at some point resolve. For example, how well will the women be treated during pregnancy? Will there be sufficient nutrition and prenatal care? What are the chances of miscarriage? What effect would such a miscarriage have on the prisoner of war? What arrangements, if any, will be made for the child if carried to full term? Will the enemy allow early repatriation for the child and mother? What will be the official United States policy position if the woman desires an abortion under these circumstances (especially if, for example, the pregnancy resulted from rape)? Would such an abortion create dissension among her

fellow prisoners of war? Would such an abortion be performed by enemy personnel? By fellow prisoners? Or, would it have to be self-induced?

There are precious few historical examples to provide us any guidance on these issues. Yet, there have been some analogous circumstances. For example, Jewish women interned in World War II Nazi concentration camps often had abortions "performed on them in secret by Jewish prisoner doctors when it was learned that diagnosis of pregnancy in Jewish women meant immediate gassing."²⁶ On the other hand, "[s]ome said no, I don't want it. They [would] rather die together with the children."²⁷ Furthermore, in spite of any criminal laws or sanctions which may exist to the contrary, we may wish to create and afford a legal defense of necessity²⁸ to those women who do abort under such circumstances and to those who assist in the abortion. For example, consider the "doctor who perform[ed] an abortion upon a young-girl rape victim in order to prevent her from becoming a physical and mental wreck [and was] held not guilty of the crime of abortion under a statute punishing one who 'unlawfully' produces a miscarriage."²⁹ Were these matters handled rightly or wrongly? To what extent, if any, do these examples provide guidance regarding female prisoners of war? If we expect American military women to become prisoners of war someday, then these issues should concern us today.

The possibility that American military women may someday become prisoners of war does indeed concern us for a variety of reasons. However, the most important of those concerns are perhaps those which relate directly to national security. Many contend that, in an actual prisoner of war situation under a skilled captor having the full range of exploitation techniques available, women would be more prone to--or perhaps merely be perceived as being more prone to--collaborating with the enemy, accepting special favors, failing to keep faith with fellow prisoners, or failing to follow orders. Our training experiences to date, however, have not shown such inclinations on the part of women.

The United States Air Force level-C SERE [Survival, Evasion, Resistance and Escape] Training Program located at the Air Force Academy provides some insight in this regard. Each summer, the Air Force conducts three 3-week periods of such Code of Conduct training at the Academy. Although no detailed records of student performance are retained after each summer, my personal observations as one of the Officers-in-Charge of the Resistance Training Lab (i.e., prisoner of war compound) and my discussions with members of the permanent SERE staff indicate that the female students are generally outstanding performers and are very adept at resistance techniques--perhaps even better than their male counterparts. More specifically, during the three SERE training

periods of 1989, female students distinguished themselves by winning the following performance awards: (1) during 1st period, one "Best Student in Squadron" award--a squadron consisting of 100-120 male and female students, (2) during 2nd period, one "Best Student in Squadron" award, and (3) during 3rd period, two "Best Student in Squadron" awards, one of whom went on to win the "Best Overall Student" award--in other words, the best among 450-480 male and female students. Looking back over the experience of recent years, the SERE staff confirm that these 1989 awards are representative of the numbers and types of awards presented to their female students in previous years.³⁰

Thus, it is doubtful that the performance of American military women as prisoners of war will adversely affect national security--either through interrogation or exploitation--at least not any more so than the performance of their male counterparts. Nevertheless, the presence of women in the prisoner of war environment may present problems in other respects.

Many are concerned that overly protective male prisoners may be adversely affected in their judgment because women are present, thus causing them to take a course of action or to refrain from taking a course of action (for example, an escape attempt) which they otherwise would have done differently. Furthermore, if the enemy should become aware of such protective

tendencies, many fear the enemy will capitalize on the situation, using torture and threats against the females as a technique to break the males' resistance.

Questions also arise concerning the potential for love affairs and sexual relations among the male and female prisoners of war and the effects of these relationships. Of course, when one's very survival is threatened, sex is not necessarily one's highest priority. However, in a less threatening environment, such relationships may very well be formed. For example, among the Army and Navy nurses held captive by the Japanese during World War II, some of these women eventually married men whom they had initially met while imprisoned.³¹ In any event, if love affairs or sexual relations among prisoners do occur in future conflicts, what will be the effect on fellow prisoners? Will it create dissension? Will we see fights--physical or otherwise--over a woman? Or, over a man? Will morale and unity be threatened by the creation of the classic "love triangles"? What will be the effect on the prisoners' spouses back home who either learn of these relationships or merely suspect such relationships? Of course, to the extent that any of these relationships involve adultery, conduct unbecoming an officer, fraternization, or any other violation of the Uniform Code of Military Justice, the participants will probably find themselves subject to discipline upon repatriation. However, the more immediate concern would

again have to be exploitation of the relationship by the enemy. Therein lies the potential threat to national security in this regard.

All of the above concerns--real or perceived--present issues which we must address and, to some extent, they all impact upon national security. However, the primary threat to national security is not likely to be found within the prisoner of war compound itself--but, instead, on the home front. In other words, what will be the effect on public support for the war--i.e., the national will³²--when the American public realizes that our military women are being held captive as prisoners of war? Will we as a society be capable of accepting that our women are being physically and mentally tortured and abused in the cruelest and most inhuman ways? Can we cope with that fact? Or, will it cause such a public outcry that our leaders will be forced to terminate the conflict under less than desirable terms and in spite of any national goals which may not have been attained? Or, in the alternative, will the outcry incite us to conduct reprisal-type operations which, in turn, may unnecessarily escalate the conflict? Unless we, as a society, fully appreciate what it means for women to be prisoners of war and are prepared to face those facts, then these issues are likely to be the most troublesome and the most significant threat to national security.

ETHICAL PERSPECTIVES

Our concerns regarding the possibility of American military women becoming prisoners of war are, as previously discussed, often voiced as a justification for combat exclusion rules. These concerns apparently carry substantial force and effect in argument because, as also noted, we even recognize in our official Department of Defense policy that risk of capture is one of the proper criteria for closing certain positions or units to women. Yet, is it right that we do so? In other words, do our concerns regarding risk of capture actually provide a valid ethical justification for these combat exclusion rules?

In addressing this question of justification, there are numerous alternative approaches from which to choose. Most, if not all, of these approaches have some merit to one degree or another. However, I believe that the deontological view, as expressed primarily by Immanuel Kant, provides the analysis which is most appropriate for our American society. Yet, I am likewise persuaded that, in our analysis, we should not entirely disregard the utilitarian view--especially that aspect of it which emphasizes consequences.

If one could demonstrate that American military women serving as prisoners of war would have substantial adverse consequences

for our national security, then I would take the position that a valid justification for combat exclusion rules has been found. Perhaps one may someday be able to show that the psychological or physiological differences between men and women would somehow adversely affect our prisoners of war.³³ Or, perhaps we may determine that there would be such a detrimental effect on the national will to wage war that it, in turn, would adversely affect national security. If these--or any other--adverse consequences for national security were shown, then I believe there would be a valid justification for combat exclusion rules. However, we cannot currently demonstrate that any of these adverse consequences would result. To say otherwise is speculation. Thus, we face one of the classic objections to utilitarian theory--i.e., that "[w]e usually don't know enough to calculate all of the consequences beforehand."³⁴

In response to those who would speculate as to such adverse consequences, we should point out that women serving in combat roles--even serving as prisoners of war--may, on the other hand, actually improve national security. Such is the nature of speculation. It could go either way. For example, many in the United States at one time argued that ~~Negroes~~^{Blacks} should not be allowed in combat roles. Based on their prejudices, they said that ~~Negroes~~^{Blacks} were inherently inferior and were mentally unsuited for the role--or, that they were easily frightened and would run

when faced with the dangers of combat. Today, from the Chairman of the Joint Chiefs on down, we know that these speculative arguments have proven to be utterly without merit and that ~~Blacks~~ ^{Blacks} in combat roles have tremendously enhanced our national security. Likewise, those who would make similar arguments regarding women in combat roles may be equally surprised by the positive results. Perhaps the popular novelist Stephen Coonts said it best in his book Final Flight. There, through the character Jake Grafton--the hero throughout Coonts' novels--Coonts addressed the question, "Do you think the law should be changed so that women can serve on all navy ships, in all career specialties?"³⁵ Grafton responded as follows:

Why not? There isn't a job in the navy that a woman couldn't do.... It would be different.... But so what? We need their talent and brains, same as we need the abilities of the blacks and Chicanos. Sexual segregation is the same as racial segregation. People use the same arguments to justify it. People will see that someday.³⁶

In light of the above objection to the utilitarian approach as it applies to this analysis--i.e., the consequences are much too speculative--I am persuaded that utilitarianism does not provide an appropriate approach to this issue. I thus turn to Immanuel Kant and his deontological approach, which "continues to be one of the two basic starting points of most modern ethical theories (the other being utilitarianism)."³⁷ Kant, I believe,

offers the most appropriate approach for Americans as we analyze the issue of military women as prisoners of war.

I am not suggesting that Americans are Kantians. America is not a Kantian society. Nor am I suggesting that Americans should adopt Kantian ethics for all purposes. However, America is a society which has traditionally emphasized human rights. We take pride in our sense of justice, equality, freedom, and responsibility. Therefore, as we approach this issue of women as prisoners of war, there are certain aspects of Kantian ethics which we Americans should find particularly appealing.

Perhaps the most instructive aspect of Kant on this particular issue is his view that we should treat human beings with dignity. Accordingly, in discussing alternative formulations of his categorical imperative,³⁸ Kant offered the following practical imperative: "So act as to treat humanity, whether in thine own person or in that of any other, in every case as an end withal, never as a means only."³⁹ Here, Kant was emphasizing that human beings are different from animals in that we have a free will. We are free to choose. Therefore, rational human beings--in other words, human beings informed by reason--should be treated with dignity and allowed to make those choices. They should never be treated, or used, as a means to an end.

Adopting this Kantian view, I am prepared to state what I certainly hope will be the obvious--that American military women are human beings with a free will. Furthermore, I believe that, when that free will is informed by reason, those women who choose to expose themselves to the risk of capture should be treated with dignity and allowed to make that choice. Our current combat exclusion rules, however, deny American military women that freedom of choice.

Many American military women would further argue that our combat exclusion rules not only deny them this freedom of choice--i.e., to choose to risk capture and to face the other dangers of combat--but also argue that these rules impose upon them feelings of frustration and guilt. They are frustrated by the idea of training for missions which would be denied in combat and they feel guilty knowing that, in combat, they would probably be removed from their respective units when most needed. These women would contend that they are being treated as second-class members of the military and, moreover, are losing opportunities for command and promotion as a result.

What, on the other hand, do we say to those men who perceive that males have an inherent or natural duty to protect women? By allowing women to risk capture and to face the other dangers of combat, we would be denying these men the opportunity to fulfill

their perceived moral obligation. We would then be faced with conflicting duties. Such conflicts are often put forth as a criticism of Kant. In other words, duties sometimes conflict and we simply cannot do both. We, therefore, must then determine which is the overriding duty. In this case, for all the reasons outlined above, I believe that the prevailing duty should be to treat our patriotic military women with dignity and thereby allow them the freedom to risk capture and perhaps death if they so desire. They are rational human beings with full knowledge of the risks involved. Let them choose.

CONCLUSION

Many have voiced their concerns about the possibility of American military women becoming prisoners of war as a justification for our combat exclusion rules. These arguments have apparently been persuasive in shaping our government's official policy in this regard--as evidenced, for example, by the reference to risk of capture within our Department of Defense Risk Rule.

It is likely that the mere passage of time--and the continued social advances one can expect to accompany it--will mitigate many of these concerns. As Americans' views toward traditional male and female roles continue to change, our society's views toward women in combat roles will probably change as well. In the meantime, however, I believe that none of the expressed concerns nor any of the issues they present is so complex or challenging as to be beyond the grasp of capable leadership within the prisoner of war environment. We, of course, can--and should--simplify these leadership challenges in advance through intensified education and training of our military members regarding the problems they may face when men and women are together as prisoners of war. Furthermore, our government should provide guidance through official policy pronouncements which address the more difficult issues which these prisoners of war may face--for

example, abortions. We should not force our future prisoners of war to make such difficult decisions while under the stress of the prisoner of war environment without at least some guidance.

In any event, the concerns which many have voiced regarding women as prisoners of war do not justify combat exclusion rules for women. Therefore, if we are to justify denying American military women--human beings with dignity and a free will, informed by reason--the freedom of choice to fight and perhaps to die for their country as patriots, then we should do so on some basis other than the risk of capture.

FOOTNOTES

1. Bryan B. Sterling, *The Best of Will Rogers* 160 (1979).
2. Transcript, CBS News 60 Minutes, Jan. 1, 1989, at 6-7.
3. Id. at 6.
4. Letter from John M. Mitchell to Major Wayne E. Dillingham (Aug. 16, 1989) (supporting research efforts regarding American military women as prisoners of war in future conflicts). Article 2, referenced by Mr. Mitchell, states the applicability of the Geneva Conventions; Article 4 defines prisoner of war for the purposes of the Geneva Conventions. This letter, in its entirety, is attached as Figure 1.
5. Holm, *Women in the Military: An Unfinished Revolution* 91 (1982). At least one other account, however, states the Army numbers as "67 nurses, 3 dieticians and 1 physical therapist." Major Mary E. V. Frank, *Army and Navy Nurses Held As Prisoners of War during World War II* 3-4 (April 1985) (DOD paper by Army Nurse Corps Historian, distributed by the Office of the Assistant Secretary of Defense for Manpower, Installations and Logistics). Five other Navy nurses were captured by the Japanese in Guam on 10 December 1941. However, they were repatriated on 25 August 1942. Id. at 2. In addition, one Army nurse on an air evacuation mission in Europe was captured when, on 27 September 1944, the airplane crashed. After being hospitalized for seven days, she was then imprisoned by the Germans until released in a prisoner of war exchange on 26 January 1945. Id. at 7.
6. Telephone interview with Mary Rose (Harrington) Nelson (Mar. 27, 1989).
7. Id.
8. Id.
9. Id.
10. Id.
11. Id.
12. Id.

13. Department of Defense Directive 1300.7, Training and Education Measures Necessary to Support the Code of Conduct, 19 Dec 84, Encl. 2, paras B(3)(a) and B(3)(a)(1).
14. Art. 28, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field of August 12, 1949.
15. Art. 14, para 1, Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949.
16. Id. at Art. 14, para 2.
17. III The Geneva Conventions of 12 August 1949 Commentary 147-48 (J. Pictet ed. 1960) (footnote omitted).
18. See generally W. R. Peers, The My Lai Inquiry (1979) (discussing the United States Army's inquiry into the events at My Lai).
19. The statutory limitation regarding United States Air Force women is set forth in 10 U. S. C. Sec. 8549 (1982) as follows:

Female members of the Air Force...[except medical, dental, veterinary, nursing, judge advocate, chaplain, and other specific categories of officers] may not be assigned to duty in aircraft engaged in combat missions.

The statutory limitation regarding United States Navy and Marine Corps women is set forth in 10 U.S.C. Sec. 6015 (1982) as follows:

[W]omen may not be assigned to duty on vessels or in aircraft that are engaged in combat missions nor may they be assigned to other than temporary duty on vessels of the Navy except hospital ships, transports, and vessels of a similar classification not expected to be assigned combat missions.

On the other hand, Congress was apparently willing to forego any and all statutory combat restrictions on United States Army women, leaving the matter entirely to policy. This willingness was based at least in part on the mere testimony that it would be futile to establish an exclusion based on "combat areas"--given the prediction that, in future conflicts, the entire

United States would be vulnerable as a combat area. See Binken & Bach, Women and the Military 26 (1977). It is also important that Congress has never defined combat mission for the purposes of either of the above statutes. However, the current Department of Defense definition for these purposes appears to be that which the Assistant Secretary of Defense for Force Management and Personnel set forth in his Memorandum for the Secretary of the Air Force, dated 25 February 1988, defining combat mission as a "task together with the purpose, which clearly requires an individual unit, naval vessel or aircraft to individually or collectively seek out, reconnoiter and engage the enemy with the intent to suppress, neutralize, destroy, or repel that enemy."

20. Memorandum from the Secretary of Defense to the Secretaries of the Military Departments (Feb. 2, 1988) (discussing "Women in the Military").
21. Memorandum from the Assistant Secretary of Defense for Force Management and Personnel to the Secretary of the Air Force (Feb. 25, 1988) (emphasis added) (discussing "Women in the Military"). See also Adams, DoD opens 24,000 positions to women, Air Force Times, Jan. 2, 1989, at 18, col. 3.
22. Warrick, Code of Conduct Now Gender Neutral, Air Force Times, Apr. 18, 1988, at 2, col. 1.
23. See generally K. Burke & T. Lin, A Systematic Laboratory Approach to Amenorrhea, Physician Assistant, Aug. 1988, at 102-07 (explaining tests and evaluative procedures regarding amenorrhea's many possible causes).
24. Id. at 106.
25. Interview with Major Alma Guzman, USAF, Nurse Practitioner, Cadet Clinic Primary Care, United States Air Force Academy (Nov. 21, 1989).
26. Robert Jay Lifton, The Nazi Doctors: Medical Killing and the Psychology of Genocide 149 (1986).
27. Id. at 225.
28. See generally W. LaFave & A. Scott, Handbook on Criminal Law 381-89 (1972). There, at 381, the legal defense of necessity is discussed in these terms:

The pressure of natural physical forces sometimes confronts a person in an emergency with a choice of two evils: either he may violate the literal terms of the criminal law and thus produce a harmful result, or he may comply with those terms and thus produce a greater or equal or lesser amount of harm. For reasons of social policy, if the harm which will result from compliance with the law is greater than that which will result from violation of it, he is justified in violating it. Under such circumstances he is said to have the defense of necessity, and he is not guilty of the crime in question--unless, perhaps, he was at fault in bringing about the emergency situation....

29. Id. at 383-84.
30. Interview with Master Sergeant Michael Baird, USAF, NCOIC SERE Resistance Training, United States Air Force Academy (Sep. 25, 1989).
31. Frank, supra note 5, at 8.
32. See, e.g., Harry G. Summers, Jr., On Strategy: A Critical Analysis of the Vietnam War (1982) (discussing throughout the book, in particular in chapters 1 & 2, the importance of mobilizing the national will).
33. For a good general discussion taking the position that men and women are in fact different and that some of these differences simply cannot be discounted, see Wolgast, Women are Different, in Morality in Practice 219 (J. Sterba ed. 1988).
34. Robert C. Solomon, Morality and the Good Life 24 (1984).
35. Stephen Coonts, Final Flight 173 (1988).
36. Id.

37. Solomon, supra note 34, at 26.
38. Kant set forth his categorical imperative as follows: "Act only on that maxim whereby thou canst at the same time will that it should become a universal law." Id. at 267 (emphasis in the original) (quoting Kant from The Groundwork of the Metaphysics of Morals).
39. Id. at 274 (emphasis in the original) (quoting Kant from The Groundwork of the Metaphysics of Morals).



DOD CODE OF CONDUCT TRAINING PROGRAM
FORT BELVOIR, VIRGINIA 22060-5791

16 AUG 1989

REPLY TO
ATTN OF:

AF/INUA

SUBJECT:

Female Prisoner of War (PW) (Your ltr, 28 Jul 89)

TO:

USAFA/DFL
Attn: Major Dillingham
USAF Academy, CO 80840-5701

1. We support your desire to research issues affecting American military women becoming PWs in future conflicts. Despite current laws prohibiting military women from being assigned to combat positions, the possibilities of American military women becoming PWs under the conditions stipulated in Articles 2 & 4 of the 1949 Geneva Conventions Relative to the Treatment of Prisoners of War appear high.

2. As the DOD Executive Agent for Code of Conduct related training, we are concerned with all moral and policy issues relative to women in captivity and have identified some of these issues in attachment 1. Research in these areas would benefit this office.

3. We look forward to reviewing your research effort. Please contact Mr John Mitchell, AV 354-4562, for any further assistance you may require.

A handwritten signature in cursive script, reading "John M. Mitchell", is positioned above the typed name and title.

JOHN M. MITCHELL, GM-13, DAF
Acting Chief, Code of Conduct
Division

1 Atch
Research topics

Potential Policy Issues Regarding American Military Women
as Prisoners of War (PW)

1. Are there physical and/or psychological problems unique to women in a PW environment? If so, identify and discuss means to successfully cope with these problems.
2. Currently, DOD Level C Code of Conduct training includes extensive instruction on the communist method of exploiting PWs, coercive pressures used to support this process, and methods for effectively resisting these efforts. We expect women PWs to be exposed to the same process. Are there additional pressures that women could expect as PWs, i.e. the threat and/or act of rape or other forms of sexual abuse? What are the short and long term effects of these unique pressures and how can the female PW, as well as her fellow PWs, cope with these conditions.
3. What is the probability of a woman becoming pregnant in captivity? If this were to occur, does she have the legal and moral right to abort the pregnancy? If she elects abortion, are her fellow PWs obligated to support her in this decision? If the enemy permits and she elects to maintain the pregnancy, to what degree do her fellow PWs support her? What is the legal status of the child after birth?

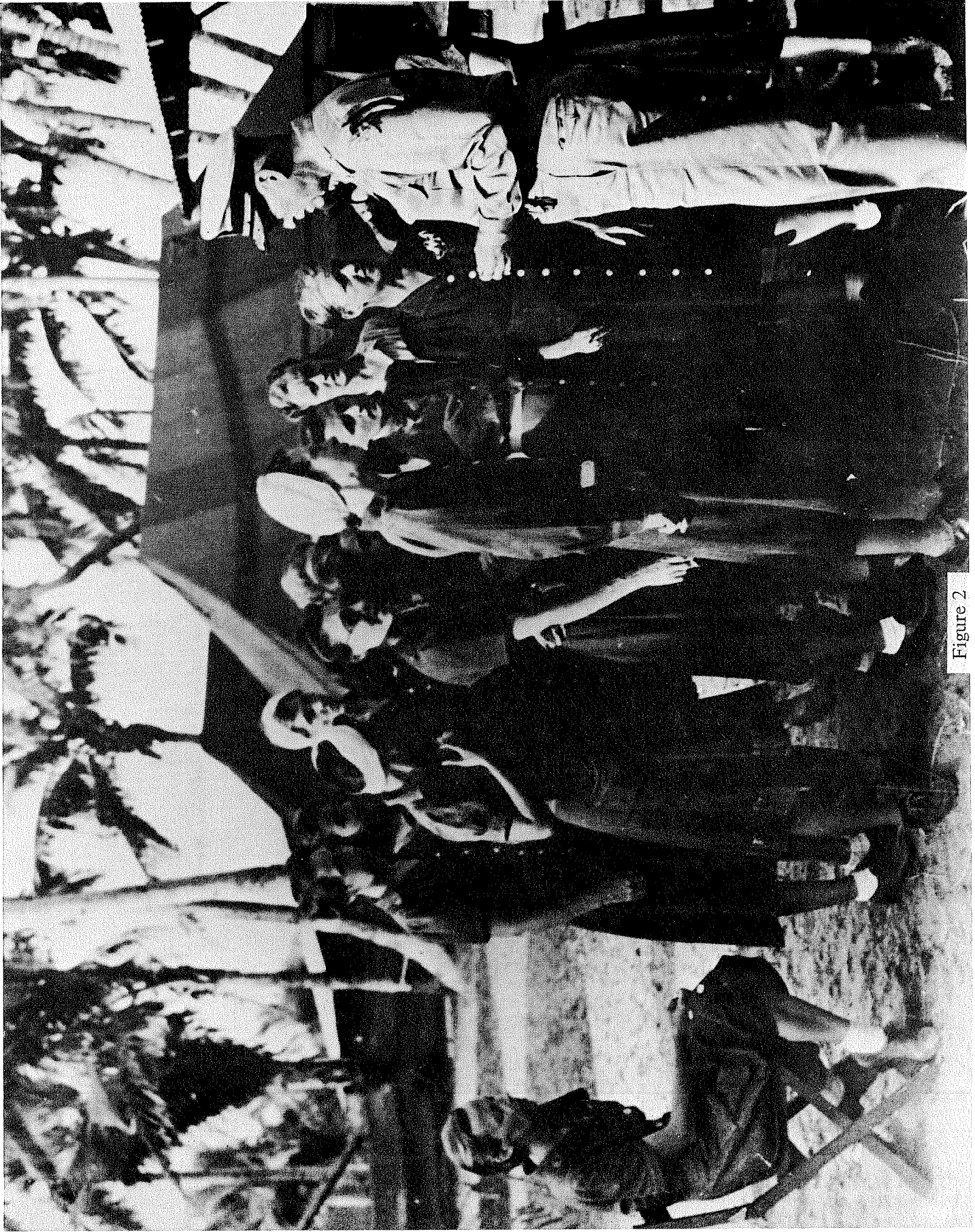


Figure 2