GENDER STEREOTYPING
IN THE MILITARY

Insights From Court Cases

Rebecca Cook and Cornelia Weiss*

1. INTRODUCTION

This chapter examines how courts in different regions of the world have determined whether stereotyping of women and men in the military contributes to violations of their constitutional and human rights. The term ‘stereotype’ derives from the Greek words ‘stereo’, meaning solid, and ‘type’, meaning mould that imprints a picture. A gender stereotype is ‘a generalized view or preconception of attributes or characteristics possessed by, or the roles that are or should be performed’ by, women and men. Gender stereotypes are concerned with the social and cultural constructions of women and men due to their physical, biological, sexual, cognitive and social attributes. Stereotyping is the process of ascribing to an individual specific attributes, characteristics, or roles by reason only of her or his membership in a particular group.

Understanding how women and men are stereotyped illuminates the hidden nature of gender prejudice. The pernicious effects of gender prejudice are often

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* Rebecca Cook is professor emerita, Faculty of Law, University of Toronto. Cornelia Weiss is a lawyer and a colonel in the US Air Force Reserve. The opinions and views expressed are the authors’ personal views and are not intended to represent in whole or in part the opinions of the US government or any of its components. We are grateful to: Michelle Hayman for her excellent research assistance, Christopher Dandeker for his timely insights on UK developments, Ariella Migdal for helpful discussions on pending US litigation, Tania Sordo Ruz for alerting us to the Colombian court decision, and Mumbi Gathoni for her assistance on Kenyan developments. We thank Simone Cusack and Ralph Earle for their perceptive insights and discussions on an earlier draft of this chapter, and anonymous reviewers for their helpful comments. We are indebted to the 2014 Women's Rights in International Law course of the Academy on Human Rights and Humanitarian Law, American University Washington College of Law for thoughtful discussions on gender stereotyping in the military.

1 Rebecca J Cook and Susanne Cusack, Gender Stereotyping: Transnational Legal Perspectives (University of Pennsylvania Press 2010) 9, 20–31.
2 Ibid 20.
3 Ibid 12.
invisible because their ordinariness blinds societies to such effects, like the proverbial fish that is blind to the water in which it swims.\textsuperscript{4} Stereotyping is one of the quickest ways ‘that prejudice can spread and thrive’:\textsuperscript{5} it is a ‘technology of prejudice.’\textsuperscript{6} Stereotypes ‘gain storage extra easily in the human mind and are extra easy to retrieve.’\textsuperscript{7}

Gender stereotyping happens in all sectors of society, but it plays a particular role in the military. It has been explained that militaries are gendered institutions. They make use of, rely on and perpetuate the assumptions that women and men not only can but must occupy different roles, and that the place which is right and proper for men to occupy is privileged above that of women. This notion of a hierarchy or a privileging of (what is construed as) the masculine over (what is construed as) the feminine is very important because it helps explain why militaries need to preserve their status as distinctively masculine institutions.\textsuperscript{8}

The chapter focuses on court decisions addressing women in the military but not exclusively, because the constraining power of male stereotypes impacts women and the similar power of female stereotypes impacts men. It has been explained that ‘[n]otions of masculinity and femininity are created and reinforced by states, societies and militaries in a wide variety of subtle and reciprocal ways. Accepting the ideas that militaries are distinctively male entities which have nothing to do with women and that it is natural for men to become soldiers makes it easier to accept the privileging of masculinity and men over femininity and women in society at large.’\textsuperscript{9}

The term ‘sex’ in this chapter is used to refer to individuals’ biological sex, and the term ‘gender’ is used to refer to how individuals are socially constructed. Understandings of gender are fluid and can vary according to different contexts. Women can be considered to be ‘masculine’ or to have masculine attributes, and men can be considered to be ‘effeminate’ or to have feminine qualities. What constitute masculine and feminine attributes often depends on fixed notions or stereotypes that are dominant or hegemonic. It has been explained that ‘hegemonic masculinity is the ideal form and is considered to be the most respected, desired, and dominant within society.’\textsuperscript{10} Military institutions have contributed significantly, and sometimes exclusively, to the formulation of hegemonic masculinities.

\textsuperscript{5} Anita Bernstein, ‘What’s Wrong with Stereotyping’ (2013) 55 Arizona LR 665, 678.
\textsuperscript{6} Ibid 665.
\textsuperscript{7} Ibid 678.
\textsuperscript{8} Jennifer G Mathers, ‘Women and State Military Forces’ in Carol Cohn (ed), Women & Wars (Polity 2013) 126.
\textsuperscript{9} Ibid 145.
This chapter explains how courts have served and are serving an important role in naming detrimental gender stereotypes in the armed forces, exposing their harms and in determining how they infringe constitutional and human rights. It has purposely analysed decisions from different national and regional courts because ‘decisions from around the world may provide a much-needed external perspective on the myths and stereotypes that may continue to permeate the values and laws of our own communities and cultures.’

The chapter argues that the ways in which national and international courts are determining constitutional and human rights violations can blunt the spread of stereotyping harms, and contribute to the eradication of gender prejudices in military institutions. This chapter will analyse national and international court decisions and pending cases around the following interconnected themes:

(a) **Exclusion**, such as exclusion from the draft: *Rostker v Goldberg*¹² (*Rostker*), *Alexander Dory v Federal Republic of Germany*¹³ (*Dory*), from full integration including combat: *Gauthier v Canada* (Canadian Armed Forces)¹⁴ (*Gauthier*), *Angela Sirdar v The Army Board and Secretary for Defence*¹⁵ (*Sirdar*), *Tanja Kreil v Bundesrepublik Deutschland*¹⁶ (*Kreil*), *Hegar et al v Hagel*¹⁷ (*Hegar*), and from military training: *Alice Miller v Minister of Defence*¹⁸ (*Miller*), *United States v Virginia*¹⁹ (*Virginia*);

(b) **Unequal treatment**, including discharge for pregnancy: *Struck v Secretary of Defense*²⁰ (*Struck*), *Crawford v Cushman*²¹ (*Crawford*), unequal dependency benefits: *Frontiero v Richardson*²² (*Frontiero*), and unequal parental leave: *Konstantin Markin v Russia*²³ (*Markin*);

(c) **Sexual assault**, including rape, sexual assault and sexual harassment by military personnel of their comrades: *Mary Gallagher et al v United States of

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¹³ Case C-186/01 [2003] ECR I-2508.
²⁰ 460 F2d 1372 (1971) (US Court of Appeals, 9th Circuit).
²¹ 531 F2d 1114 (1976) (US Court of Appeals, 2nd Circuit).
²² 411 US 677 (1973) (US Supreme Court).
²³ (2012) ECHR 514.
America and the U.S. Department of Defense\textsuperscript{24} (Gallagher), and of the civilian population: Rodríguez Bustamente et al v National Army/National Ministry of Defense\textsuperscript{25} (Rodríguez Bustamente), Ines Fernández Ortega et al v Mexico\textsuperscript{26} (Fernández Ortega).

2. ANALYSIS OF CASES

This section analyses how select domestic and international courts have addressed whether the social practices of gender in militaries are in compliance with their obligations under constitutional and human rights law. The term ‘select’ is used because this analysis does not intend to be comprehensive, but rather only an introductory overview. Other decisions are referenced where they impact issues concerning exclusion, unequal treatment or sexual assault.

Discussion of each area of case law, exclusion, unequal treatment, and sexual assault, will conclude by exploring what has been learned about how courts:

- name the degrading stereotypes prevailing in the military;
- discuss their individual and group harms; and
- determine how those harms contribute to violations of human and constitutional rights.

Particular attention will be given to how courts analyse the facts about women’s actual military performance in order to better understand how courts’ analyses contribute to dismantling stereotypes.

2.1. EXCLUSION CASES

Court cases have challenged a range of restrictions on women’s military recruitment, including exclusion from the draft (Rostker, Dory), from full integration in the military including combat (Gauthier, Sirdar, Kreil, Hegar), and from military training (Miller, Virginia).


\textsuperscript{25} Consejo de Estado de Colombia (Council of State of Colombia) No 29033 of 9 November 2014, per Ramiro Guerrero Pazos.

\textsuperscript{26} IACtHR, Judgment of 30 August 2010, Series C No 215.
In *Rostker*, the US Supreme Court held that the Military Selective Service Act’s authorisation of male-only registration did not violate the constitutional due process guarantee. The Court explained that:

> [s]ince women are excluded from combat, Congress concluded that they would not be needed in the event of a draft, and therefore decided not to register them … Men and women, because of the combat restrictions on women, are simply not similarly situated for the purposes of a draft or registration for a draft [and therefore the male only draft registration did not] violate the Due Process Clause.

The dissent disagreed: ‘The Court today places its imprimatur on one of the most potent remaining public expressions of “ancient canards about the proper role of women”’. The dissent explained that the male-only draft registration ‘categorically excludes women from a fundamental civic obligation – inconsistent with the Constitutional guarantee of Equal Protection’, and continued:

> Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing sexual stereotypes about the ‘proper place’ of women and their need for special protection … Where, as here, the [Government’s] … purposes are as well served by gender-neutral classification as one that gender classifies, and therefore carries with it the baggage of sexual stereotypes, the [Government] cannot be permitted to classify on the basis of sex.

In line with the *Rostker* result, the European Court of Justice (ECJ) held in *Dory* that member states could restrict the draft to men. Because of the compulsory nature of conscription as opposed to the voluntary nature of the professional service, the ECJ considered that conscription fell outside the scope of European Community law on sex discrimination, especially the Equal Employment Directive. In focusing on the scope of European Community law, the ECJ regrettably avoided any discussion on the discriminatory aspects of an all-male

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27 *Rostker* (n 12) 83.
28 Ibid 77, 78–79.
30 Ibid.
32 *Dory* (n 13) para 111.
draft.\textsuperscript{34} In contrast to the US and Germany, Norway in 2015 started conscripting both men and women.\textsuperscript{35}

The cases addressing exclusion from full integration in the military include \textit{Gauthier}, \textit{Sirdar}, \textit{Kreil} and \textit{Hegar}. In \textit{Gauthier}, the Canadian Human Rights Tribunal addressed whether operational effectiveness of the Canadian Armed Forces (CAF) constitutes ‘a bona fide occupational requirement of such a nature that the exclusion of women from combat-related occupations is justified, even though it is, on its face, a discriminatory practice.’\textsuperscript{36} The three female plaintiffs argued that the categorical employment of men to the exclusion of women was not a bona fide occupational requirement for operational effectiveness. As a result, the female plaintiffs contended that the policy of excluding women from combat training and positions was unjustifiable sex discrimination under the Human Rights Act.\textsuperscript{37} The male plaintiff, a retired military pilot, argued that the exclusion of women from the risks assumed by men of flying fighter aircraft and fulfilling combat duties was sex discrimination under the same Act.\textsuperscript{38} The CAF did not deny that its policy of excluding women constituted sex discrimination, but argued that it was justifiable under the Human Rights Act as a bona fide occupational requirement to ensure operational effectiveness.\textsuperscript{39}

The Tribunal recognised that the ‘principle of operational effectiveness in time of war or national emergency is the fundamental criterion against which the CAF has developed and continually assesses its personnel policies. Operational effectiveness, or combat readiness and preparedness, determines personnel policy, and that policy by logical extension must seek to minimize the risk or hazards to life and limb that combat readiness might, or usually, entails.’\textsuperscript{40} The issue is ‘whether the occupational requirement is justifiable only if it increases safety by a substantial amount and whether the evidence is sufficient to show that the risk is real and not based on mere speculation.’\textsuperscript{41} To guard against the risk of speculation about women’s capacities, the Tribunal meticulously considered the factual record. This record included evidence from the SWINTER (Servicewomen in Non-Traditional Environments and Roles) trials which CAF had initiated in

\textsuperscript{36} \textit{Gauthier} (n 14) 5.
\textsuperscript{37} Ibid 2–4.
\textsuperscript{38} Ibid 2.
\textsuperscript{39} Ibid.
\textsuperscript{40} Ibid 23.
\textsuperscript{41} Ibid 27.
1980 to determine the physical, psychological and social problems that might arise ‘if all military occupations were opened to women without restriction of any kind.’\(^\text{42}\) The factors that the Tribunal deemed essential for operational effectiveness included physical capability, environmental conditions, social relationships, cohesion, and motivation.

With respect to physical capacities, the Tribunal explained that ‘until the recent past, it was widely assumed that women as a class lacked the physical capability for certain jobs which demanded strength or stamina. This stereotype assumption has been set aside in favour of a gender-neutral occupational physical standard in which individuals are, without respect to gender, tested for the specific job demands.’\(^\text{43}\) Based on the evidence from many tests in Canada and beyond, the Tribunal concluded that ‘there is no risk based on physical capability to the inclusion of qualified women in presently all-male units and occupations.’\(^\text{44}\) The Tribunal also concluded that ‘pregnancy was not an issue in the definition of risk to operational effectiveness but simply a matter of temporary “disability” or medical condition for which leave was appropriate. The birth of a child to a servicewoman is not a cause for dismissal from the Forces.’\(^\text{45}\)

Regarding environmental conditions, the Tribunal concluded that ‘the environmental factor in operational effectiveness of mixed units was less significant and less problematic than it had once been, largely because first, it could be ‘managed’ by minimal structural arrangements in existing facilities, and second, unisex environments and facilities for mixed-gender use are now common in civilian life.’\(^\text{46}\) The Tribunal did limit one occupational field, finding that ‘privacy constitutes a significant factor in operational effectiveness and the exclusion of women from occupations which serve in submarines exclusively is a bona fide occupational requirement.’\(^\text{47}\) When the privacy concerns were resolved, women started serving in submarines.\(^\text{48}\)

On social relationships, the Tribunal addressed CAF’s allegation that ‘gender adds a complicating element to the performance of individuals and of the group when women are added to an all-male unit.’\(^\text{49}\) The Tribunal explained that ‘social factors do not themselves compromise operational effectiveness, where the gender relationships are built on shared commitment to a set of work standards

\(^{42}\) Ibid 12.
\(^{43}\) Ibid 29.
\(^{44}\) Ibid.
\(^{45}\) Ibid.
\(^{46}\) Ibid 29–30.
\(^{47}\) Ibid 30.
\(^{49}\) *Gauthier* (n 14) 30.
and performance levels, and on shared training’.

The Tribunal elaborated that ‘education, work experience, leadership, all play a part in removing or modifying stereotypes held by one gender of another, and in this case, particularly held by males in the service about women’.

The Tribunal addressed cohesion as ‘an essential ingredient of the drive to reach a goal, to perform well and to die for one another, if necessary’. The Tribunal found that ‘Having considered the evidence at length, we concluded that there was no, or not sufficient evidence of an indisputable kind, to suggest that a mixed gender unit could not develop that cohesion necessary to put in a better than adequate performance. There have been no studies of units during real combat and perhaps never can be. Nevertheless the SWINTER trials … suggested that the first step to cohesion, social tolerance or acceptance can be managed by good leadership and indeed would develop normally as unit members shared common occupational concerns, experience and training.’

Regarding motivation, the Tribunal took the view that ‘a variety of motivational elements can be made subject to a management process or will grow out of common service training and experience. No one suggested that women resist discipline any less or more than men, or that those who are determined to succeed have no will.’

The Tribunal discussed the historical record of women in all-female or mixed gender units in both regular and partisan forces from various countries, especially during World War II, and concluded that ‘the record of women in all female or mixed gender units in both regular and partisan forces … is reasonably clear. Women fought beside men in combat and combat support units, were armed, suffered both loss of life and limb, inflicted death and injury on others. In short, women were indistinguishable from men in terms of performance.’

The Tribunal concluded overall that ‘there is no risk of failure of performance of combat duties by women sufficient to justify a general exclusionary policy. Such policy cannot, therefore, constitute a bona fide occupational requirement under the Canadian Human Rights Act.’ Since 1989, with the exception of excluding women from submarines, which exclusion was subsequently rescinded, CAF excludes neither women nor men from any CAF positions, including combat.

About a decade after Gauthier, Canada’s Commonwealth cousin, the UK, argued in Sirdar that it could deny employment to women in the Royal Marines ‘by reason of the ‘interoperability’ rule established for the purpose of ensuring combat

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50 Ibid 31.
51 Ibid 30.
52 Ibid 31.
53 Ibid 32.
54 Ibid.
55 Ibid 9–11.
56 Ibid 34.
57 Bradley and Pestell (n 48) 198–199.
effectiveness’.

The policy of the Royal Marines excluded women on the ground that ‘their presence is incompatible with the requirement of ‘interoperability’, that is to say, the need for every Marine, irrespective of his specialization, to be capable of fighting in a commando unit’. The European Community’s Equal Treatment Directive requires equal access for women and men to employment, vocational training and promotion, and working conditions. Upon being made redundant as a female chef in the Royal Artillery, the plaintiff received the offer to join the Royal Marines, subject to the condition of passing the commando training course. The UK rescinded the offer when it realised that the plaintiff was female. The ECJ held that ‘the specific conditions for deployment of the assault units of which the Royal Marines are composed, and in particular the rule of interoperability to which they are subject, justified their composition remaining exclusively male’.

Unlike the Gauthier Tribunal, the ECJ did not examine whether the categorical exclusion of women from the Royal Marines was ‘necessary and appropriate’ to ensure combat effectiveness. In deferring to the government’s determination that exclusion was necessary and appropriate, the ECJ assumed, without questioning, that the male sex is the essential criterion for ensuring combat effectiveness. Had it followed the reasoning in Gauthier, it might have required the government, through its military, to establish ‘objective standards of competence … as the universal and ubiquitous reference point for all service personnel, whatever their race, ethnicity, gender, religion, or sexuality.’

In the following years, the antipodean Commonwealth cousins, New Zealand and Australia, have followed Canada’s lead in revoking their respective combat exclusion policies, by establishing objective standards of competence irrespective of sex. The UK exclusion policy is currently under review.

In Kreil, the ECJ interpreted the European Community’s Equal Treatment Directive to preclude ‘the application of national provisions, such as those of German law, which impose a general exclusion of women from military posts involving the use of arms and which allows them access only to medical and

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58 Sir Dar (n 15) para 29.
59 Ibid para 7.
60 Directive 76/207/EEC.
61 Sir Dar (n 15) para 31.
62 Ibid para 28; Trybus (n 34) 646–647.
military-music services. The ECJ explained that ‘were the contrary view to be adopted, women would continue to be marginalized by being confined to certain sections of the Bundeswehr only – with the risk that the old stereotypical division between the sexes would be perpetuated.’ The ECJ ruled that the Equal Treatment Directive does not allow women to be precluded from such employment ‘on the ground that public opinion demands that women be given greater protection than men against risks which affect men and women in the same way.’

The ECJ explained that ‘the exclusion of women from the Bundeswehr is not restricted to specific units but covers, without distinction, all sections other than the medical and military-music services.’ The German government tried to justify its exclusion because all combat units have to be capable of ‘interoperable deployment without any distinction between front-line duties (which present a greater risk) and duties behind the lines (which present a lesser risk).’ The ECJ did not accept this justification because the interoperability rule applied to all sections, not just, as in Sirdar, to the Royal Marines. Moreover, the Court said that the German authorities, unlike the UK authorities, failed to prove that this rule is actually enforced in all combat units outside the medical and military-music services. The reaction to Kreil was swift. The German parliament amended its Basic Law to read: ‘The [women] may on no account be forced to render services involving the use of arms.’

Similar to the Kreil Court’s reliance on the facts as a way of addressing gender bias, the European Court of Human Rights held that the discharge of individuals on grounds of their homosexuality from the armed forces was an unjustifiable violation of their right to privacy. The Court noted that there was a lack of concrete evidence to substantiate the alleged damage to morale and fighting power that any repeal of the ban on homosexuals in the military would entail. The Court elaborated:

To the extent that they represent a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot, of themselves, be considered by the Court to amount to sufficient justification for the interferences with the applicants’ rights [of privacy], any more than similar negative attitudes towards those of a different race, origin or colour.
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The Court explained that ‘even if it can be assumed that the integration of homosexuals would give rise to problems not encountered with the integration of women or racial minorities, the Court is not satisfied that the codes and rules [of conduct] which have been found to be effective in the latter case would not equally prove effective in the former.’

The *Hegar* case, currently pending in a US federal district court, alleges that the combat exclusion policy of the US Department of Defense (DoD) violates the constitutional equal protection guarantee. The plaintiffs, two of whom ‘were awarded the Purple Heart after being wounded while serving in combat,’ ask the Court to ‘require the [DoD] to allow women to apply for all combat related positions and schools and to be considered on their individual merit’. They explain that ‘women – as a class and solely because of their gender – are currently barred from nearly 20 percent of jobs across the active duty force, including all or nearly all positions in the infantry units, armour units, artillery units, reconnaissance units, Special Forces Units and all other units below the battalion level that have direct ground combat as a primary mission. Women are also categorically excluded from combat arms schools, courses, and training programs, such as Ranger School and Special Forces.’ Shortly before the DoD’s answer to the complaint was due in court, the combat exclusion policy was revoked. The case is still pending because the Services have yet to actually integrate women into combat units and positions.

The Amended Complaint contends that the ‘categorical exclusion of women from combat units, occupational specialties and schools is based on outdated stereotypes of women and ignores the realities of the modern military and battlefield conditions’. The Complaint explains how the exclusionary policy and practice harm servicewomen in significant ways:

In addition to explicitly prohibiting women from serving in certain positions and career specialties, the DoD’s current exclusionary policies put servicewomen at a disadvantage in the promotion process, even within career specialties that are open to women. Formal assignment to combat arms units and positions is an important factor in promotion to leadership positions in the officer corps and among enlisted personnel, particularly in the Army and the Marine Corps. For example, more than 80 percent of the general officers in the Army came from the

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77 Ibid para 94.
78 *Hegar* (n 17) paras 1–8. See also Martha E McSally, ‘Defending America in Mixed Company: Gender in the US Armed Forces’ (Summer 2011) 140 Daedalus 148, 149.
79 *Hegar* (n 17) paras 13, 17, 22.
80 Ibid para 8, ibid ‘Prayer for Relief’ 27, para 2.
81 Ibid para 52.
82 Ibid para 2.
84 *Hegar* (n 17) para 4.
combat arms, from which women are largely excluded. Chances for promotion to senior enlisted positions are likewise enhanced for those who have served in combat arms positions and career specialties. Further, even in open specialties, servicewomen are prevented from being assigned to as many units as their male counterparts, and these restrictions can limit their ability to gain career-broadening assignments and attend leadership and other schools. The DoD combat exclusion policy and practice thus serve as a structural barrier to the advancement of women with the Armed Forces.85

The Complaint explains that the exclusionary policy and practice imply that women are not capable of serving in the same manner as men, thus relegating them ‘literally and figuratively, to a “supporting role” in our Armed Forces based on stereotypes about women and assumptions about battlefield conditions that do not reflect the reality that women, including the individual Plaintiffs, are already serving in combat situations, and doing so with distinction’.86 In short, the military should use its basic training period to evaluate potential recruits, and include or exclude them based on their individual performance, not on the premise that all women cannot adequately perform.87

The Israeli Supreme Court in *Miller* and the US Supreme Court in *Virginia* have addressed exclusion of women from certain kinds of military training. The Israeli Supreme Court held that the Ministry of Defence general exemption of women from aviation courses could not be justified by planning considerations.88 A perceptive concurring opinion explained that the harm of deprecating stereotypes is degradation: ‘closing a profession or a position to a person because of his sex, race or the like sends a message that the group to which he belongs is inferior, and this creates a perception of inferiority of the men and women in the group. This creates a vicious cycle that perpetuates the discrimination. The perception of inferiority, which is based on the biological … difference, causes discrimination, and the discrimination strengthens the deprecating stereotypes of the inferiority of the victim of discrimination. Therefore the main element of discrimination because of sex … is the degradation of the victim.’89

This same concurring opinion explained that equality ‘permits, and even necessitates, different treatment when the “difference” is relevant, but it does not contain criteria for determining that relevance. In the absence of such criteria, there is a danger … that the criteria applied in each case will reflect the degrading stereotypes which the prohibition of discrimination was originally intended to

85 Iib id para 59.
86 Ib id para 63. See also Helen Thorpe, Soldier Girls – The Battle of Three Women at Home and at War (Scribner 2014).
89 *Miller* para 4 (Dorner J).
prevent. In our case, the prohibition against the discrimination of women is likely to be rendered meaningless by a determination – based on accepted degrading stereotypes – that the difference between women and men justifies, and even necessitates, different treatment of women.90

A year after the *Miller* decision, the US Supreme Court in *Virginia* overturned a law preventing women from attending an all-male military institute because Virginia had relied on unsubstantiated generalisations about the talents, capacities, or preferences of women that have impeded women’s progress toward ‘full citizenship stature’.91 The Court explained that ‘generalizations about “the way women are,” estimates of what is appropriate for most women, no longer justify denying opportunity to women whose talent and capacity place them outside the average description’.92 Similar to the concurrence in *Miller, Virginia* emphasised the degrading nature of generalisations about women as a class: sex ‘classifications may not be used, as they once were … to create or perpetuate the legal, social and economic inferiority of women’.93

With the exception of the *Rostker* and *Dory* decisions on the exclusion of women from the draft and the *Sirdar* interoperability decision, the exclusion decisions stand for the proposition that women can no longer be categorically excluded from the military, its particular operations or its training. Women must be given the opportunity to prove they can meet objective standards of military performance. *Gauthier* meticulously analysed the facts about women’s capabilities to find generalisations about women’s physical, emotional and cognitive inabilities to serve in combat roles to be unsubstantiated. In so finding, the decision contributed to the dismantling of prejudices of women as incapable of being combatants or successfully completing military institutes or training programmes.

The exclusion decisions did not elaborate on the sex role stereotypes and gender prejudices. The sex role stereotype of men is that they are and should be warriors and military leaders. The prejudice about women is that they do not have the capacities to be warriors and military leaders and as a result should be limited to support roles. The hesitancy to analyse the stereotypes and prejudices might be due to a lack of awareness of the gender dimensions of the military. It has been explained that ‘military organizations and war itself [are] inherently gendered and “naturally” masculine, so that women are seen as fundamentally not suited to soldiering and warfare’.94 Militaries ‘construct, rely on, and perpetuate beliefs

90 *Ibid* para 6 (Dorner J).
91 *Virginia* (n 19) 533 (Ginsburg J).
93 *Ibid* 534.
about gender, and they depend on women and men to accept, internalise, and act on those beliefs’.95

The exclusion cases discussed the individual and group harms to include marginalisation and degradation of women, disadvantaging them in their military careers, and denying them their full citizenship. Miller, Virginia, Kreil and the dissent in Rostker all pointed to individual and group harms of gender classifications. Virginia specified that gender classifications ‘may not be used, as they once were … to create or perpetuate the legal, social and economic inferiority of women.’ Miller explained that the harm of deprecating stereotypes is ‘degradation’.

The Hegar complaint perceptively addressed the effects of the combat exclusion policy on women’s inability to rise to the top levels of military leadership.96 The complaint explained that currently ‘more than 80 percent of the general officers in the Army came from the combat arms’. The dissent in Rostker and the majority in Virginia specified the harm of exclusion policies limiting women’s chances of becoming civilian leaders.97 The Virginia majority eloquently explained that the Virginia Military Institute’s exclusion policies impeded women’s progress toward ‘full citizenship stature’, challenging the assumption that men’s ‘military service defines citizenship.’98

2.2. UNEQUAL TREATMENT CASES

Equal treatment of men and women is essential for gender-integration to be effective in the military. Court decisions that address stereotypes embedded in unequal treatment by the military include those on the discharge of pregnant military personnel (Struck, Crawford), the unequal treatment of dependents of female military personnel (Frontiero), and denying military men parental leave on an equal basis with military women (Markin).

In Struck, a US Court of Appeals held that the Air Force regulation providing for the discharge of pregnant officers did not deny liberty or property without due process, equal protection or right to privacy. Captain Struck appealed this decision to the US Supreme Court, but because the Air Force thought its chances of success were slim, it agreed to waive her discharge and abandon its policy of automatically discharging its pregnant personnel.99

95 Mathers (n 8) 124.
Consistently with Gauthier’s treatment of pregnancy as a temporary disability, a US Court of Appeals in Crawford found that a US Marine Corps regulation that mandated the discharge of female Marines for pregnancy was unconstitutional. The Court reasoned that the distinction between pregnant personnel and other personnel with other temporary disabilities was irrational. The Court determined that the ‘regulation as a tool for insuring mobility and readiness is applied in a manifestly underinclusive fashion. As the District Court found, at the time of appellant’s discharge, pregnancy was the lone disability subjected to the rather drastic treatment. The Marine Corps left all other temporary disabilities, which undeniably undermined the ability of all personnel to respond like quicksilver to duty’s call, free from the mandatory discharge “solution”. The Court stated that: ‘In short, we can regard the regulation here only as one based on unsubstantiated generalizations about the sexes, in the class of those ‘archaic and overbroad’ premises which have been rejected as unconstitutional’. The Court continued: ‘Not the least of these outmoded generalizations are the taboos inherent in connection with pregnancy, whether as a result of Victorian embarrassment at its physical capacity or as a presumption of physical incapacity.’

Both Struck and Crawford challenged the presumption embedded in military regulations that pregnant women as a group, and without regard to their individual capacities for service during pregnancy, are unfit for service. This presumption subordinated pregnant women as a group because they were assessed as a class of pregnant women, rather than on the basis on their individual fitness to serve. Moreover, women in the military were supposed to fit into ‘the stereotypical vision … of the “correct” female response to pregnancy’. These pregnancy regulations ‘prohibited the employment of officers who became mothers, while allowing the employment of officers who became fathers,’ thus constraining women’s family life while privileging men’s. As a result, ‘mandatory pregnancy discharge reinforces societal pressure to relinquish career aspirations for a hearth-centered existence.’

The Frontiero and Markin decisions dismantled the sex role stereotypes of men as breadwinners and women as dependent homemakers in the military sector. Frontiero concerned a female military member’s right to create automatic entitlements (such as increased housing allowances and medical and dental benefits) for her husband that a military husband already could provide for his wife. The US Supreme Court found that a federal law allowing wives of male military members automatically to become dependents, while husbands of

100 Gauthier (n 14) 45.
101 Crawford (n 21), para 24.
102 Ibid para 30.
103 Siegel and Siegel (n 99) 780, quoting from the Ginsburg brief in Struck (n 20).
104 Ibid.
105 Ibid.
female military members were not considered dependents unless they relied on
their wives for over one-half of their income support, violated the due process
guaranty. In so finding, the Court enabled women to be providers in the military
sector.

*Frontiero* explained that laws that restrict women’s rights have historically
been rationalised as benign protections of women, in that wives were afforded
protection of their husbands’ support that wives could not afford their husbands.
The Court elaborated that the nation’s ’long and unfortunate history of sex
discrimination’ was ‘traditionally … rationalized by an attitude of “romantic
paternalism” which in practical effect, put women not on a pedestal, but in a
cage.’\(^{106}\) Due to notions of benign paternalism, the Court explained, ‘our statute
books gradually became laden with gross, stereotyped distinctions between the
sexes’\(^{107}\). The Court continued:

what differentiates sex from such non-suspect classes as intelligence or physical
disability, and aligns it with the recognised suspect criteria, is that the sex
characteristic frequently bears no relation to ability to perform or contribute to
society. As a result, statutory distinctions between the sexes often have the effect
of invidiously relegating the entire class of females to inferior legal status without
regard to the actual capabilities of its individual members.\(^{108}\)

In *Markin*, the Grand Chamber of the European Court of Human Rights
(ECtHR-GC) held that the exclusion of servicemen from entitlement to parental
leave, while servicewomen are so entitled, amounted to sex discrimination in
family life. The ECtHR-GC addressed the decision of the Constitutional Court of
Russia holding that the Military Service Act granting female military members
three years of parental leave, while granting their male military colleagues
only three months special leave to arrange for childcare, was constitutionally
compliant.\(^{109}\) In rejecting the request for parental leave, the Constitutional Court
did not envision a need to accord men a better way to balance the demands of
family life and military work. The Constitutional Court said: the ‘purpose of such
a leave is to give the serviceman a reasonable opportunity to arrange for the care
of his child and, depending upon the outcome, to decide whether he wishes to
continue the military service. If the serviceman decides to take care of his child
himself, he is entitled to early termination of his service for family reasons’\(^{110}\). The
Constitutional Court explained that the legislature took account of the limited

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\(^{106}\) *Frontiero* (n 22) 684 (Brennan J).
\(^{107}\) Ibid 685.
\(^{108}\) Ibid 686–687.
\(^{109}\) *Markin* (n 23), para 34.
\(^{110}\) Ibid (citing para 2.2 of the Russian Constitutional Court decision of 15 January 2009).
participation of women in the military and the special role of women associated with motherhood. The applicant responded:

Far from mitigating any historic disadvantage suffered by women, a policy whereby only women were entitled to take parental leave perpetuated gender stereotypes, inequality and hardship arising out of women’s traditional role of caring for the family in the home rather than earning money in the workplace. As a result, that policy discriminated both against men (in family life) and against women (in the workplace).

In finding a breach of the right to non-discrimination on grounds of sex in relation to family life, the ECtHR-GC concluded that: ‘traditional distribution of gender roles in society cannot justify the exclusion of men, including servicemen, from entitlement to parental leave.’ It explained:

gender stereotypes, such as the perception of women as primary child-carers and men as primary breadwinners, cannot, by themselves, be considered to amount to sufficient justification for a difference in treatment, any more than similar stereotypes based on race, origin, colour or sexual orientation.

In enabling military men to take parental leave (as opposed to ‘special leave’), the Court dismantled the myth of men as inadequate parents and began to build a norm of men as nurturers.

A concurring opinion would have also found discrimination on the ground of military status, because servicemen were treated less favourably than civilian men, since the latter were entitled to parental leave. The concurrence explained that no factual evidence was presented of any risk to operational effectiveness of the armed forces due to the possible parental leave taken by servicemen.

The unequal treatment decisions explicate the prejudicial nature of military regulations with regard to pregnancy and parental leave and dependency benefits. They name the stereotypes, discuss their individual and group harms and explain why generalisations violate military women’s rights. Markin’s naming of the sex role stereotypes of men as breadwinners and women as homemakers shows how such stereotypes unjustifiably denied Mr Markin, and other similarly situated men, parental leave and thus infringing their family life in the military sector. Frontiero explains the harms of the stereotypes of military women as a group: ‘invidiously relegating the entire class of females to inferior legal status without

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111 Ibid.
112 Ibid para 104.
113 Ibid para 143.
114 Ibid.
116 Markin (n 23) 62–63 (Pinto de Albuquerque J).
regard to the actual capabilities of its individual members.’ Crawford determined that the generalisations about pregnant women were ‘unsubstantiated’ and ‘underinclusive’ because pregnancy was the only temporary disability subject to discharge. The courts showed how sex role stereotypes deny military men the equal benefits of family life and how generalisations about military women are under-inclusive, thus obstructing their military careers. In so doing, the courts have enabled military personnel, irrespective of gender, to enjoy family life consistently with their military duties.

2.3. SEXUAL ASSAULT CASES

This section addresses pending and decided cases on sexual harassment, assault and rape by male military personnel of their military comrades (Gallagher), and by male military personnel of civilian women (Rodríguez Bustamente, Fernández Ortega).

The Gallagher case against the US is pending before the Inter-American Commission on Human Rights on behalf of 20 military personnel (17 women and 3 men) who had been subjected to sexual violence, in most cases rape, by their military comrades. In ignoring petitioners’ subjection to sexual assaults and in overlooking the retaliation against them for reporting the assaults, the case alleges that the US violated petitioners’ rights under the American Declaration of Human Rights to life and security of the person, to be free of inhumane treatment, to privacy and protection of honour and reputation, to special protection, and to inviolability of the home. The case further claims that the US failure to investigate petitioners’ complaints and provide them with appropriate remedies violated their rights under the American Declaration to equal protection before the law on the basis of military status, gender and sexual orientation, and their rights to truth, to resort to the courts, and to petition the government and receive a prompt decision.\(^{117}\)

The claim alleges violations of the right to work for all the petitioners who experienced sexual harassment in the workplace and for those petitioners who had to leave the military because of, for example, physical injuries, military sexual trauma-related post-traumatic stress disorder (PTSD), and being discharged under the ‘Don’t Ask Don’t Tell’ policy on sexual orientation.\(^{118}\)

Consistently with the Commission’s previous decision that military justice systems, including investigations and trials, are considered ineffective remedies to address human rights violations,\(^{119}\) the petition requests that:


\(^{118}\) Ibid 10, 18, 20, 22, 66–69.

\(^{119}\) IACtHR, Márcio Lapoente da Silveira v Brazil, Case 4524-02 Report No 74/08, OEA/Ser L/V/II 130 Doc 22, rev 1 (2008), para 64.
the decision whether to investigate, prosecute, and punish alleged perpetrators be removed from the military Chain of Command;

– an independent reporting procedure is established to encourage victims to come forward without fear of reprisal from their Chain of Command; and

– victims have access to US federal courts so they may sue for civil relief when the US Military violates their human and United States constitutional rights, which they are currently unable to do under US law.120

The petition requests that the US Uniform Code of Military Justice be amended to include provisions that prevent retaliation, prohibit prosecuting perpetrators of sexual violence with adultery instead of the more appropriate charge of rape, and prohibit punishing perpetrators of sexual violence under lesser provisions on non-judicial punishment, such as docking the perpetrators’ pay. Ultimately, the petitioners seek an Advisory Opinion from the Inter-American Court of Human Rights regarding the nature and scope of the US obligations under the American Declaration in light of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women and the Convention on the Elimination of All Forms of Discrimination against Women.121

The complaint explains how the petitioners in basic training were described as: ‘weak or incompetent,’122 ‘bitch, pussy, fag or a cunt’,123 or how the petitioners who reported rape were labelled as ‘trouble makers’,124 ‘difficult’,125 ‘liars’,126 ‘whores’,127 or ‘sluts’.128 Such hostile labelling often takes place when an out-group joins an in-group.129 When left unchecked, such degradation contributes to a culture of impunity that encourages sexism and misogyny,130 and ‘condones a culture that allowed sexual harassment, sexual assault and rape.’131

The complaint explains that the consequences of military sexual trauma are multiple, including PTSD. The complaint elaborates that:

According to Department of Veterans Affairs ... statistics, in 2012, 85,000 veterans sought treatment for military sexual trauma. One study of female veterans found that those with military sexual trauma had higher rates of PTSD than those

120 Gallagher (n 24) 4–6, 78–79.
121 Ibid.
122 Ibid 8.
123 Ibid.
124 Ibid 15, 19.
125 Ibid 11.
126 Ibid 11, 13.
127 Ibid 11, 15.
129 Gallagher (n 24) 13.
130 Ibid 23.
131 Ibid 22.
who had experienced other forms of trauma. Sixty percent of those who had experienced military sexual trauma suffered from PTSD. 132

Yet despite these higher rates, disability claims for military sexual trauma-related PTSD for both women and men are granted at significantly lower rates than other PTSD claims. 133 Litigation regarding this unequal treatment is pending. 134

Sexual violence and rape by male military personnel extend to the civilian population, for example rapes of Somali women and girls by the African Union military force. 135 Much of it happens with impunity, as was the case in Kenya where British male military personnel sexually violated Kenyan women. Despite calls by Amnesty International 136 and by the Kenyan Truth, Justice and Reconciliation Commission 137 for investigation, neither the British nor the Kenyan governments have established commissions of inquiry, suggesting that women’s sexual bodies are expendable and crimes against women are lesser crimes that do not warrant state investigation. 138 In contrast, the Colombia Council of State in Rodríguez Bustamente held its military accountable for sexual violations of civilian women. Where national courts have not held militaries responsible for sexual violence by military personnel against civilian women, international tribunals, such as the Inter-American Court of Human Rights in the Fernández Ortega decision, have done so.

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132 Ibid 37.
138 CookandCusack (n 1) 57.
In Rodríguez Bustamente, the Colombian Council of State ordered the National Ministry of Defence to pay moral damages to the young victim, Mónica Marisol Rodríguez Bustamente, her mother and three siblings, damages to Ms Mónica for harm to her life plan, payment for her psychotherapeutic treatment, and damages to compensate her for loss of profits and other material harms. Finally, in order to achieve full reparation and non-repetition, the Council ordered non-pecuniary measures, such as dissemination of its decision to relevant governmental bodies for adoption of preventative and corrective measures, training programmes in women’s rights, including of women affected by internal armed conflict, for the national army in the area where this violation took place, and the development of guidelines for the military for the prevention, investigation and punishment of violence against women. The Council of State called for the prevention of gender prejudice and stereotyping, such as in the treatment of women as the sexual property of men, and the biased treatment of women in investigations and prosecutions.

The Inter-American Court of Human Rights in Fernández Ortega held Mexico responsible for the rape of an indigenous woman, Mrs Fernández Ortega, by military personnel. The Court found that this rape entailed a violation of her right to personal integrity constituting an act of torture, her rights to personal integrity and dignity, and to private life, and an abusive interference with her family residence. Because the state did not act with due diligence in the investigation of the rape, the Court found a violation of her rights to judicial guarantees and to judicial protection. Moreover, because of Mrs Fernández Ortega’s inability to file a claim in her own language, the Court found unequal treatment in her access to justice. It also held that the rape and the facts related to the pursuit of justice, and the perpetrator’s impunity, involved a violation of the right to personal integrity of her husband and children. While the Court did not expose the operative stereotypes, its decision helped to overcome the prejudice against indigenous people as lesser citizens by finding a violation of the right to equal access to justice of Mrs Fernández Ortega and her immediate family.

Consistently with its previous rulings, the Court held that the military justice system does not have jurisdiction to determine whether its military personnel violated the human rights of civilians, because of the lack of independence and impartiality within the system. It ordered appropriate changes in the Mexican

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139 Rodríguez Bustamente (n 25) paras 67–73.
141 Fernández Ortega (n 26) para 128.
143 Ibid para 159.
144 Ibid para 198.
145 Ibid para 201.
146 Ibid para 149.
147 IACtHR, Radilla Pacheco v Mexico, Judgment of 23 November 2009, Series C No 209.
148 Fernández Ortega (n 26) paras 176–177.
Code of Military Justice,\textsuperscript{149} and establishment of procedures to contest the inappropriate intervention of the military justice system.\textsuperscript{150}

In ordering pecuniary and non-pecuniary damages, the Court emphasised the need to continue with the federal and state training programmes on the diligent investigation of sexual violence against women, applying a gender and ethnicity perspective by governmental officials who are the first responders to female victims of violence.\textsuperscript{151} The Court further asked the state to implement a training programme on human rights for all members of the Mexican Armed Forces.\textsuperscript{152} Research is needed to determine whether these training programmes have been undertaken and whether they are effective in dismantling patriarchal structures, such as the socio-cultural practices of gender including hostile gender stereotyping, in order to achieve women’s equality.\textsuperscript{153}

Militaries are realising that they have to be far more effective in preventing and remedying sexual assault.\textsuperscript{154} Failure to do so will spur further litigation against them, exacerbating reputational and budgetary costs and compromise operational effectiveness. Explanations about the prevalence and persistence of sexual violence in the military abound, including lack of military leadership,\textsuperscript{155} tolerance of an unprofessional work environment, hypermasculinity,\textsuperscript{156} power dynamics,\textsuperscript{157} rigid sex roles and hostility toward women who transgress gender boundaries.\textsuperscript{158} Elaboration of these and other explanations is beyond the scope of this chapter, except to say that more research is needed on how military policies and practices spawn prejudices and degrading stereotyping that can facilitate sexual violence.

\textsuperscript{149} Ibid paras 178, 179, 239.
\textsuperscript{150} Ibid para 240.
\textsuperscript{151} Ibid para 260.
\textsuperscript{152} Ibid para 262.
\textsuperscript{153} Ibid para 79.
\textsuperscript{156} Ibid 306.
Lessons from these cases are preliminary because one case is pending and only two decided cases are discussed. The explication of the degrading labelling, whether it concerns professional competence, sexuality, or truthfulness in the *Gallagher* brief and the naming of women as the 'sexual property of men' in *Rodríguez Bustamente*, illuminate the prejudices about women. The hostile labelling suggests that women are less than human, justifying their sexual assaults. Moreover, in failing to adequately address such assaults, the military is sending a message that it is permissible to ignore women’s individual values. In delivering justice for Mrs Fernández Ortega and her family, the Inter-American Court overcame prejudices against indigenous people as lesser citizens. In so doing, the Court ensured that individuals, regardless of their sex and, for example, their indigenous status, ‘should be able to rely on a [legal] system free of myths and stereotypes, and judiciary whose impartiality is not compromised by … biased assumptions.’

3. CONCLUSION

Where women take on warrior and leadership roles that have traditionally belonged to men, hostile stereotyping emerges to keep women out of, invisible in, or relegated to support roles in, the military rather than embraced by it. This phenomenon is not unique to the military. When women joined other professions, such as law, medicine, and religious ministries, hostile stereotyping emerged, and with the help of courts, has been or begun to be addressed. As female participation in defence forces grows (approximating 9% in the UK, 12% in the US, 13% in Australia, and 17% in Canada) militaries will have to address hostile gender stereotyping to ensure that professional competence, irrespective of gender, is given priority.

The lessons learned from this analysis of select court cases on women’s exclusion from the military, the unequal treatment of women and men, and sexual assault, are multiple. Courts’ deference to presumptions constituting military expertise, evident in *Rostker, Dory* and *Sirdar*, is being replaced by

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159 *R v Ewanchuk* [1999] 1 SCR 330 (Supreme Court of Canada) para 95 (L’Heureux-Dubé J).
161 Cook and Cusack (n 1) 20, 34.
163 Cook and Cusack (n 1) 96.
164 Australian Human Rights Commission (n 155) 187.
165 Christopher Dandeker, ‘Selling Army 2020: The British Army and society after the wars of 9/11’ (commissioned by the Chief of the General Staff of the Army, Sir Peter Wall, 9 May 2014) 15, 33–38, 42 (on file with authors).
fact-based assessments, as was meticulously done in *Gauthier*. The fact that the US Department of Defense did not appeal the *Hegar* case suggests that the Department understood that it would not have been able to substantiate the generalisations about women’s inability to meet combat standards in part because, as the complaint explains, women have successfully served in combat as acknowledged by combat decorations awarded by the military to women.

As to the debate about whether claims involving the human and constitutional rights and obligations of military personnel should be litigated in the military or the civilian justice system, all the cases analysed in this chapter were brought in the civilian system. The *Gallagher* complaint, pending before the Inter-American Commission on Human Rights, exhausted all remedies before both the US military and civilian systems to no avail, as did the complaint in *Fernández Ortega* in the Mexican systems. To better overcome gender prejudice and to eliminate detrimental gender stereotypes, further research is necessary of military laws and policies and court judgments about equal treatment of men and women in the military, similar to analyses of civilian law.166

In the unequal treatment and the sexual assault cases, the naming of the hostile stereotypes was well done in part because consciousness had already been raised about the prejudices in those issue areas outside the military. In the exclusion decisions, stereotypes were less well articulated in part because consciousness had not been raised. Moreover, ‘[w]hen one sex is disproportionately represented, there is a danger of seeing this as some naturally occurring pattern, rather than questioning the socially constructed norm. Asking why there is disproportion is critical, as well as how that informs the structure and goals of the system.’167

The judicial exposition of harms of stereotyping, as was pointedly done in *Miller*, is essential: “The presence of unacknowledged harms means a silencing that harms individuals and their relationships, and their communities.”168 The individual and group harms of stereotypic generalisations varied according to kinds of decisions discussed in this chapter. Exclusion cases addressed unsubstantiated generalisations, while the unequal treatment decisions focused on under-inclusive generalisations. Sexual harassment cases exposed false stereotyping. How well courts articulate the individual and group harms, and explain how they violate human and constitutional rights, matters. Legal language shapes and reinforces social meaning. Courts are playing a critical role by articulating how the substitution of individual assessment for inappropriate stereotypes denies the military and civil society, more generally, particular capacities of both men and women.

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167 Dowd (n 115) 9–10.
168 Dowd (n 115) 10.