

Contract, Gender, and the Emergence of the Civil-Military Distinction

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Abstract: This paper examines the social contract theories of Grotius, Hobbes, Pufendorf, and Locke, highlighting the failure of their contractarian defenses of the military and military service. In order to ground the duties of military service, each theorist presumes a chivalric gender order wherein men as men are expected to be willing to sacrifice themselves as violent instruments for the sake of their families and communities. While Grotius, Hobbes, and Pufendorf use the contract method to defend absolute, or near absolute, political authority wherein subject's primary political obligation is to serve the sovereign in war upon command, Locke uses the contract method to create a liberal political order that preserves the natural rights of subjects. Nevertheless, Locke maintains the commitment to self-sacrificial military service. In Locke, then, the military is peeled away from liberal civil society and we see the first statement of the civil-military distinction that persists today.

It is a glorious and manly thing,
To risk one's life in battle with the foe,
Defending loved ones, wife, and native land.
—Tyrtaeus, as quoted in Hugo Grotius, *The Law of Prizes*

This article aims to uncover the origins of the stark political distinction most liberal societies make between civilians and military service members. The focus of the investigation will be the social contract theory that emerged in the seventeenth century and that ultimately produced the first statements of the modern civil-military distinction. On its face, the contract method in political theory rejected inherited status as a basis for political power. Contract theorists sought to treat all men as free and equal by nature and to ground political authority in a contract designed to serve the private interests of those party to it. This method ultimately undermines any attempt to subjugate members of political society to the arbitrary authority of a political sovereign. As John Locke recognized, the natural rights of men cannot be alienated via contract and must constitute permanent constraints on the

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authority of any civil power.¹ Nevertheless, all the great contract theorists of this period, including Locke, assert the right of the sovereign to command the members of the military to engage in self-sacrificial action in war.

This article will argue that, in order to ameliorate this tension between the contract method and the obligations of soldiers, these theorists rely, explicitly or implicitly, on the presumption that those party to the social contract are socially situated men who ought to exhibit virtues attendant to their social position. Most frequently, the virtues they appeal to are constitutive of masculinity, especially the courage to risk one's life in war for the sake of one's family and community.² Instead of grounding the obligations of military service in the social contract, these theorists appeal to the manhood of political subjects. The division of political society into the civilian and the military spheres that ultimately emerged in this period is the expression of the tension between the view of the participants in the social contract as, on one hand, free and equal individuals aiming to protect their natural rights or interests and, on the other, socially embedded men who are bound to sacrifice themselves in war for the protection of particular others.

The article is divided into four parts. First, there is a review of the current legal meaning of the civil-military distinction in the United States. Second, there is a discussion of the challenge traditional contract theory faces defending the subordination of political subjects in military service. Third, there is an examination of the relevant arguments of the first three major contract theorists, Hugo Grotius, Thomas Hobbes, and Samuel von Pufendorf. Fourth, we turn to the work of Locke where we can observe the first statements of the modern civil-military distinction. Last, we briefly explore the possible implications of this argument for the issue of gender integration in the military today.

Civil Society and the Military

Even if we have not served in the military, we probably have a vague understanding that life in the military is more severe than civilian life. Few of us,

¹While Hobbes's social contract theory is not based on the natural rights of the participants but on their natural, overriding interest in self-preservation, it nevertheless faces an analogous limitation on political authority. This will be elaborated in the discussion of Hobbes below.

²There is a substantial body of literature in gender and masculinities studies that finds a profound connection between masculinity and self-sacrificial service in war. For some exemplary statements of this view see Tom Digby, *Love and War: How Militarism Shapes Sexuality and Romance* (New York: Columbia University Press, 2014); Leo Braudy, *From Chivalry to Terrorism: War and the Changing Nature of Masculinity* (New York: Vintage, 2005); Joshua Goldstein, *War and Gender* (New York: Cambridge University Press, 2001); and Jean Bethke Elshtain, *Women and War* (Chicago: University of Chicago Press, 1995).

however, have dwelt seriously upon the ethical and legal nature of the difference between the civilian and military realms. The fact is that members of the military are second-class citizens; their basic civil liberties are radically curtailed in order to maintain discipline and good order within the ranks and, in turn, to provide effectively for the security of the state. In this way, the civilian and military spheres are different *political* spaces; to inhabit one is to have a different political standing from those in the other.

In the United States, this understanding of the civil-military distinction is enshrined in a Supreme Court decision from 1890 known as the *Grimley* decision.³ This decision articulates the nature of the distinction in legal standing between citizens and soldiers. It holds that the enlistment contract changes the “status” of enlistees, binding them to their community in a new way: “By enlistment, the citizen becomes a soldier. His relations to the state and the public are changed. He acquires a new status, with correlative rights and duties.”⁴ Specifically, this new status binds the soldier to obedience. “An army is not a deliberative body. It is the executive arm. Its law is the law of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier.”⁵

Subsequent decisions have reinforced and elaborated upon *Grimley*, underscoring the fact that the military is “separate” from the civilian world. The court has ruled that “the military constitutes a specialized community governed by a separate discipline from that of civilian society.”⁶ This “separate discipline” means that the Constitution does not apply to service members in the way it does to civilians. Service members may legally be treated in ways that would be unconstitutional if they were civilians.⁷ In addition to federal and state laws, service members are also subject to military law, specifically the Uniform Code of Military Justice (UCMJ), which requires behaviors of soldiers that federal or state laws may not require of civilians.⁸ Browsing the punitive articles of this code is illuminating. UCMJ makes it a crime to be absent without leave, disrespectful of superiors, insubordinate, to disobey an order or regulation, to misbehave before the enemy such as displaying cowardice, to malingering, and to engage in misconduct as a prisoner, as well as any conduct unbecoming of an officer. The code also includes an umbrella article (article 134), known as the General Article, which criminalizes “all disorders and neglects to the prejudice of good order and discipline in the armed forces” and “all conduct of a nature to bring discredit upon the armed forces.” The General Article has been understood to prohibit adultery, sodomy, expressions of disloyalty, and indecent language, among other

³In re *Grimley*, 137 U.S. 147 (1890).

⁴*Id.* at 152.

⁵*Id.* at 153.

⁶*Orloff v. Willoughby*, 345 U.S. 83, 94 (1953).

⁷*Parker v. Levy*, 417 U.S. 733 (1974).

⁸Uniform Code of Military Justice, 64 Stat. 109, 10 U.S.C. Chapter 47.

things. As we can see, there is an altogether “different relationship” between the government and civilians on one hand and the government and service members on the other.⁹

The reason given by the court for this different relationship is that the military has a “different purpose” from the civilian community. According to the court, unlike the civilian community, “it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.”¹⁰ It is believed that in order to achieve this purpose members of the armed forces must be strictly obedient to superiors and that, in order to achieve this, the perpetual good order and discipline of the forces must be maintained. In other words, the purpose of the military requires the denial of civil liberties enjoyed by civilians and the conditioning of service members to stoically endure subordination and the hardships pertaining to war.¹¹ In this way the needs of the service and, in turn, the political community override the interests and rights of the service member. As the court ruled, “the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty.”¹²

Seen in this light, the civil-military distinction delineates a profound political boundary. In becoming a soldier, whether voluntarily or through conscription, one abandons one’s status as an equal citizen and becomes subject to the commands of others. Other employment contracts that attempt to change a party’s political status in such a way are not legally binding; employees may not sign away their basic civil liberties as a condition of their employment. This is because in civil society the rights of citizens may not be alienated. The “status” of citizen is equal to all and, even if one is willing to, one may not assume an alternate status. However, the military today is allowed to offer such contracts and have them strictly enforced. In the military one is legally subordinated to the commands of others and the interests of the state in a way that is legally impossible within the civilian realm. As a description of the civil-military distinction, Huntington’s account of the military realm as fundamentally conservative and the civilian realm as liberal is apt.¹³

The Problem of Military Service in Traditional Social Contract Theory

Prior to the seventeenth century, European philosophers regularly defended soldiering in quasi-Aristotelian terms as a natural part of irreducibly social

⁹*Parker v. Levy*, 751.

¹⁰*Toth v. Quarles*, 350 U.S. 11, 17 (1955).

¹¹See *Parker v. Levy*, 759.

¹²*Burns v. Wilson*, 346 U.S. 137, 140 (1953).

¹³Samuel Huntington, *The Soldier and the State*, rev. ed. (Cambridge, MA: Belknap Press of Harvard University Press, 1985).

political communities. These thinkers saw political society as a natural body and, in turn, individual membership as part of the natural function of people. Individuals were to find their virtue by contributing to the common good in the way most appropriate to their social station. The role of the soldier, as a necessary part of the commonwealth, was thus a position (some) men were naturally bound to occupy. The soldier as such is expected to fight when called upon for the sake of the commonwealth. In this way, the soldier was seen as an instrument of the body politic in the way the limb is an instrument of the biological body.¹⁴

The social contract theory of political society that emerged in the seventeenth century rejects the natural character of the commonwealth and argues, instead, that the political community ought to be understood as a human artifact made voluntarily for human purposes. These theorists do not defend political authority and political obligations as components of men's natural duties. Rather, they conceive of them as the product of contracts between equal, private individuals in a state of nature. As they see it, men (and occasionally women) are by nature free and equal. Out of concern for the security of their natural rights or interests, men agree to form political communities by uniting their strength and wills under a sovereign that, crucially, has the right to command them to participate in violence aimed at protecting them. Simply put, in order to better secure their private rights or interests, men agree to serve as the violent instruments of a sovereign power who uses them for their individual and collective security.

Grotius, for instance, defines the state as "a compleat Body of free Persons, associated together to enjoy peaceably their Rights, and for their common Benefit."¹⁵ In order for these persons to better enjoy their rights, they agree to band together to assist each other in the protection of those rights. As Grotius puts it, "the Design of Society is, that every one should quietly enjoy his own, with the Help, and by the united Force of the whole Community."¹⁶ The parties to the social contract give the power to decide how to use the "united Force of the whole Community" to the political sovereign, or the civil power.¹⁷ This basic vision of the social contract is shared by the subsequent contract theorists in the seventeenth century.¹⁸

¹⁴See Francisco Vitoria, *On Civil Power* (1528), in *Political Writings*, ed. Anthony Pagden and Jeremy Lawrance (New York: Cambridge University Press, 1991), 1.4.2, 11. For a defense of this reading of the tradition, see Graham Parsons, "What Is the Classical Theory of Just Cause? A Response to Gregory Reichberg," *Journal of Military Ethics* 12 (Dec. 2013): 357–69; and Graham Parsons, "The Dualism of Modern Just War Theory," *Philosophia* 45 (June 2017): 751–71.

¹⁵Hugo Grotius, *The Rights of War and Peace*, ed. Richard Tuck (Indianapolis, IN: Liberty Fund, 2005 [1625]), I.1.14, 162.

¹⁶*Ibid.*, I.2.1.3, 184; see also I.4.7, 358.

¹⁷*Ibid.*, I.3.6, 257–59.

¹⁸See Thomas Hobbes, *Leviathan*, ed. Edwin Curley (Indianapolis, IN: Hackett, 1994 [1651]), XVII.13, 109; Samuel Pufendorf, *On the Duty of Man and Citizen*, ed. James Tully

There is a tension at the heart of these conceptions of political society, one that was recognized long ago.¹⁹ On the one hand, the aim of the parties to the social contract is to secure their personal rights or interests. On the other hand, the terms of the contract make them vulnerable to violations of those rights or interests as the instruments of the sovereign. A person who is obligated to act in organized violence against enemies of the state or other parties is vulnerable to being injured or killed by those enemies upon command. The social contract seems to amount to agreeing to allow one's life to be risked in combat for the purpose of having one's life (and, in some theories, other rights) secured. Though the story of the state of nature these theories tell might make it rational to prefer life in the commonwealth over life in the state of nature, it is hard to see how those stories make it rational to risk one's life in fulfillment of the contract in a given act of war when that contract was implemented to provide oneself with security. As Hegel puts it, "It is a grave miscalculation if the state, when it requires this sacrifice [service in war], is simply equated with civil society, and if its ultimate end is seen merely as the *security of the life and property* of individuals. For this security cannot be achieved by the sacrifice of what is supposed to be *secured*—on the contrary."²⁰

This tension may or may not be something that social contract theory is capable of handling. It is not the goal of this article to question the contract approach altogether. Rather, the goal is to show that the tension in the major contract theorists of the seventeenth century was not overcome at the time in a satisfying way. When Grotius, Hobbes, and Pufendorf attempt to address how it is that a subject could be obligated to risk his life in war upon command for the sake of the commonwealth, they do not simply appeal to the terms of the social contract. Instead, they appeal to a variety of presupposed virtues and the interests of persons in specific social circumstances. Grotius appeals to fortitude and charity; Pufendorf to bravery and the interests of one's family. Hobbes, however, appeals to something more specific: masculinity. As will be argued below, the gender-specific character of Hobbes's appeal is not unique within this group. Rather, it merely makes explicit what goes largely unstated in Grotius's and Pufendorf's positions.

It is possible to overstate the role gender is playing in these theorists' arguments. Grotius's appeal to charity, for instance, is hard to interpret as a mere

(New York: Cambridge University Press, 1991 [1673]), II.6.9–10, 137; John Locke, *Second Treatise of Government*, ed. C. B. MacPherson (Indianapolis, IN: Hackett, 1980 [1690]), §§87–88, 46–47.

¹⁹G. W. F. Hegel, *Elements of the Philosophy of Right*, ed. Allen Wood (New York: Cambridge University Press, 1991 [1821]), §324, p. 361; see also Michael Walzer, "The Obligation to Die for the State," in *Obligations: Articles on Disobedience, War, and Citizenship* (Cambridge, MA: Harvard University Press, 1970), 77–98.

²⁰*Ibid.*, emphasis in the original.

presumption of gender. This being said, I show that gender is playing a part in Grotius's and Pufendorf's theories as well as Hobbes's. When we consider the specific virtues and interests these theorists appeal to, the other commitments they make about the role of men and women in political society, and the gender studies literature demonstrating the depth of the connection between masculinity and military service across cultures, a compelling argument can be made that all these theorists are, to a significant degree, implicitly or explicitly relying on gender to ground the duties of military service. Hence, the obligations of military service, ostensibly grounded in the social contract, instead turn out to be grounded, in part, in a presupposed gender order.

The civil-military distinction did not emerge in contract theory right away. The contract theories of Grotius, Hobbes, and Pufendorf did not generate civil society understood as a space that protects men as equal persons with basic civil liberties. For these three, the social contract relegated all members to the status of servant of the sovereign whose primary political obligation was to provide violent assistance to the sovereign upon command. For the most part, the social contract was the alienation of all natural rights and the transformation of men into violent instruments of the commonwealth. However, to make this contract appear rational, Grotius, Hobbes, and Pufendorf appeal to natural virtues, especially the virtues of masculinity, not merely the interests of naturally free and equal persons.²¹ In these theories, the parties to the social contract act only out of concern for the security of their personal rights *and* they are men who ought to exhibit masculine virtues, especially the courage to fight and die for their families and communities in war. It was not until Locke's insistence that natural rights could not be alienated by contract and, instead, must constitute limits on the rights of the sovereign that liberal civil society emerged in the contract tradition. But Locke never applied this logic to the military. Like Grotius, Hobbes, and Pufendorf, Locke maintains the centrality of the sovereign's right to command subjects in war in the original social contract. In Locke's theory, civil society is thus peeled away from the military and the status of the citizen is left at odds with the status of the soldier.

Unlike Grotius, Hobbes, and Pufendorf, however, Locke never offers a special defense of the peculiar demands of military service, gendered or otherwise. Locke is largely silent on the problem military service poses for his theory and how it is that free and equal citizens can coexist in the same political society with soldiers. Nevertheless, the absence of an explicit appeal to masculine virtues is not sufficient evidence for the conclusion that Locke is not relying on gender. Locke needs the appeal to gender just

²¹Though they refer to virtues pertaining to social roles, this should not be thought of as a return to Aristotelianism. Among these theorists, there is not an unambiguous commitment to the social holism that is a trademark of Aristotelianism. For this reason, it is best thought of as an ad hoc appeal to virtues rather than an appeal to an Aristotelian system.

as much as do the prior theorists in order to prop up his theory. That Locke can assert the subordination of men in the military without commenting on its apparent conflict with his views on the limits of state authority is, it will be argued, an expression of Locke's implicit attachment to military masculinity.

The Duty to Risk One's Life in War

Grotius

Arguably the first in the modern period to attempt to break from the premodern Aristotelian social ontologies, Grotius ostensibly defends political authority and political obligations, not as the natural duties of the ontological parts of political communities but as the artifacts of contracts made out of self-interest between equal, private individuals.²² Nevertheless, Grotius does not ground all the political obligations he endorses in a social contract. I will argue below that Grotius's theory still relies on the presumption of a number of natural virtues attendant to specific social roles in order to ground certain features of his vision of political society.

Grotius claims that by nature all men have the right not to have their life, limb, liberty, and property interfered with by others.²³ This is only true of men, however. Women are naturally inferior to men. Like children, women are held to lack "a perfect Judgment."²⁴ For Grotius, patriarchal marriage and the family precede the creation of political society. He explicitly describes the formation of the political body as the "Union of many Heads of Families."²⁵ Grotius's political society is thus populated from the beginning by socially situated men.

Without any political community, men as heads of households are of limited strength and are vulnerable to violations of their private rights, including injuries to the families they have sovereignty over. In order to gain greater protection of themselves and their households, men join together in political society by agreeing to protect each other from harm. Under this arrangement the sovereign has the power, in the form of brute force, to

²²See Richard Tuck, *Natural Rights Theories* (New York: Cambridge University Press, 1979) and *The Rights of War and Peace* (New York: Oxford University Press, 1999); Knud Haakonssen, "Hugo Grotius and the History of Political Thought," *Political Theory* 13 (May 1985): 239–65; J. B. Schneewind, *The Invention of Autonomy* (New York: Cambridge University Press, 1998); Stephen Darwall, "Grotius at the Creation of Modern Moral Philosophy," *Archiv für Geschichte der Philosophie* 94 (Autumn 2012): 296–325; for a dissenting voice see Brian Tierney, *The Idea of Natural Rights* (Atlanta: Scholars, 1997).

²³Grotius, *Rights of War and Peace*, I.2.1.3, 184–85; II.17.2, 884–85.

²⁴*Ibid.*, II.11.5.1, 709; see also Helen Kinsella, "Gendering Grotius: Sex and Sex Difference in the Laws of War," *Political Theory* 34 (April 2006): 161–91.

²⁵Grotius, *Rights of War and Peace*, II.5.23, 552.

ensure the peace and security of subjects and their union. For this reason, Grotius holds that the authority to wage war is an essential component of political sovereignty.²⁶ The civil power's decisions regarding matters it has authority over are binding on its subjects and do not require their approval or consent.²⁷ He describes the subject as the instrument of the sovereign who "may naturally be employed in War."²⁸ Generally speaking, for Grotius, the subject is analogous to a servant or slave.²⁹

This defense of the rights of the sovereign over the subject is troubled, however. As noted above, the problem is that the natural rights or interests of men, the very rights or interests that political society is created by men to protect, would seem to also impose limits on the rights of the sovereign over the subject. Because, within the contractarian framework, the protection of natural rights or interests is the aim of the participants in the social contract, the sovereign would seem to lack the right to violate the natural rights, or act contrary to the basic interests, of subjects. Rather, subjects should maintain their natural rights, including the right to defend themselves.

Grotius attempts to address the issue of the subject's obligation to risk his life in war and other matters upon command. To justify the relegation of men to the status of violent instruments of the sovereign he relies, in part, on natural virtues, not the voluntarily assumed terms of the social contract. Though Grotius permits soldiers to refuse to participate in wars that are not certainly just,³⁰ he clearly argues that facing the peril of combat is a duty required by virtue. As he says, "some Acts of Virtue may by a human law be commanded, though under the evident Hazard of Death. As for a Soldier not to quit his Post. . ."³¹ The relevant virtue is charity. It would be uncharitable for a person to refuse military service in order to avoid harm to himself when the community or others are in need. When only one or a few individuals' lives are at stake, men are not obligated to risk their lives to help.³² But if the state or a great number of people are threatened, men are obligated to risk their own safety to protect others.

Grotius argues that in general subjects ought to patiently endure injuries done to them by the sovereign.³³ However, resistance could be justified in cases of "the most extreme and inevitable Danger."³⁴ But even in such extreme cases, including the soldier at his post, if resistance would endanger the state or many innocents, then the subject ought to face the danger without

²⁶Ibid., I.3.6, 257–59.

²⁷Ibid., I.3.7, 259–60.

²⁸Ibid., I.5.4, 386.

²⁹Ibid., I.5.3, 386; II.5.23, 552; II.26.1, 1167.

³⁰Ibid., II.26.3–4, 1167–80. Hobbes and Pufendorf reject his position.

³¹Ibid., I.4.7, 357.

³²Ibid., II.25.7, 1158.

³³Ibid., I.4.1, 338.

³⁴Ibid., I.4.7, 356.

resistance. This is “what Charity recommends.”³⁵ In another passage, Grotius says, “there are many Duties, not of strict Justice but of Charity, which are not only very commendable . . . but which cannot be dispensed with without a Crime.” Among these duties is the duty “to prefer the Lives of a vast Number of innocent Persons before [one’s] own.”³⁶ Moreover, Grotius insists that the sovereign has the right to compel subjects to do what virtue requires.³⁷

The virtue of charity is not normally associated with masculinity. Subsequent theorists will more clearly appeal to gendered virtues. Still, even Grotius, in an early work, appeals more clearly to gender. Rather than being a matter of charity, Grotius here praises risking one’s life for the state as an expression of fortitude, one of the virtues “most beneficial [to others], both in private and in public life.”³⁸ He claims that all states foster this virtue by honoring those who face peril for their native land while crushing with contempt cowards and deserters of battle.³⁹ Fortitude, especially in the context of war, is more closely associated with masculinity. Indeed, Grotius’s defense of fortitude simply appeals to masculinity. As he often does throughout his works, he appeals to tradition to defend his position. In support of the value of fortitude, he turns immediately to an “impressive and well-known” passage from Tyrtaeus: “It is a glorious and manly thing, / To risk one’s life in battle with the foe, / Defending loved ones, wife, and native land.”⁴⁰ It seems Grotius expects readers to be familiar with this passage and that its sentiments regarding manliness will resonate strongly with them.

This defense of the obligation to risk one’s life in war does not ground the obligation in the social contract. Instead, it makes the obligation a matter of virtue independent of the social contract. It would seem then that the social contract is irrelevant to the soldier’s duty to risk his life for the commonwealth. In the end, the theory underpinning the subordination of the soldier’s life to the commonwealth is based on men’s natural social obligations rather than the voluntarily assumed obligations of a contract.

Hobbes

Hobbes differs from Grotius in that he asserts, at least in some passages, a natural equality between the sexes. For Hobbes, the household and authority within it are not natural but are based on contracts between the husband and

³⁵Ibid., I.4.7, 358.

³⁶Ibid., II.25.3.3, 1153. See also II.1.9.3, 405.

³⁷Ibid., II.25.3.4, 1154–55.

³⁸Hugo Grotius, *Commentary on the Law of Prize and Booty*, ed. Martine Julia van Ittersum (Indianapolis, IN: Liberty Fund, 2006 [1868]), 440.

³⁹Ibid., 441.

⁴⁰Ibid., 440.

wife. In some works, he even allows conjugal contracts between the sexes to vary in terms. He refers to partnerships “in which neither [partner] is subject to the power of the other.”⁴¹ However, the egalitarian potential of his contract theory of sex and marriage fails to come to fruition in the commonwealth. While there is significant philosophical material in Hobbes that could pose a threat to patriarchy, Hobbes nevertheless seems to leave women out of the commonwealth and relegates them to wives and mothers in the family under the dominion of a male head of household. The only reason he gives for this turn of events is that “for the most part commonwealths have been erected by the fathers, not by the mothers of families.”⁴²

Hobbes argues that men—now transformed into heads of families—constitute political society because, without it, they are in greater danger. Men see that they would be safer if they agreed with others to forswear their willingness to do what they think necessary to preserve themselves and subject themselves to the absolute authority of a sovereign so that he may use them as his violent instruments. For Hobbes, the commonwealth is “one person, of whose acts a great multitude, by mutual covenants one with another, have made themselves every one the author, to the end he may use the strength and means of them all, as he shall think expedient, for their peace and common defense.”⁴³ Because this is the design of the commonwealth, the sovereign has absolute authority to determine what is necessary for peace and the common defense.⁴⁴

Many of Hobbes’s contemporaries argued that this defense of political subjection is self-defeating.⁴⁵ If men constitute political society solely for the sake of their self-preservation, then, as political subjects, they cannot be bound to do anything contrary to their self-preservation. But, according to Hobbes’s understanding of the social contract, the sovereign must have the right to threaten the lives of subjects in order to provide security.

⁴¹Thomas Hobbes, *On the Citizen*, ed. Richard Tuck (New York: Cambridge University Press, 1998 [1642]), IX.6, 109.

⁴²*Leviathan*, XX.4, 129. For discussion of Hobbes’s views on women and marriage see Teresa Brennan and Carole Pateman, “‘Mere Auxiliaries to the Commonwealth’: Women and the Origins of Liberalism,” in *Feminist Interpretations of John Locke*, ed. Nancy Hirschmann and Kirstie McClure (University Park: Pennsylvania State University Press, 2007), 51–73; and Gordon Schochet, “Thomas Hobbes on the Family and the State of Nature,” in *Feminist Interpretations of Thomas Hobbes*, ed. Nancy Hirschmann and Joanne Wright (University Park: Pennsylvania State University Press, 2012), 105–24.

⁴³*Leviathan*, XVII.13, 109.

⁴⁴*Ibid.*, XVIII.8, 113.

⁴⁵See Mark Goldie, “The Reception of Hobbes,” in *The Cambridge History of Political Thought: 1450–1700*, ed. J. H. Burns (New York: Cambridge University Press, 1991), 589–615. For a contemporary version of this critique, see Jean Hampton, *Hobbes and the Social Contract Tradition* (New York: Cambridge University Press, 1986).

Though, as Deborah Baumgold notes, it does not preoccupy him,⁴⁶ Hobbes nonetheless senses this tension in his theory. He attempts to address it directly in chapter XXI of *Leviathan* and returns to it in the book's "Review and Conclusion." Recognizing the logic of his social contract Hobbes admits that the right to defend oneself against harm is inalienable and subjects have the right to resist sovereigns who threaten their lives.⁴⁷ Hobbes explains that subjects are not obligated to obey orders to commit suicide, to accuse themselves of a crime, or to execute a dangerous or dishonorable office such as the office of soldier. Such actions cannot be political obligations because the very end of the social contract is to preserve the parties to it and subjects are free to refuse commands that "frustrate . . . the end for which the sovereignty was ordained."⁴⁸ How then can Hobbes justify the duties of military service at all? As we will see, Hobbes's view is convoluted, requiring military service of some and allowing a limited permission to refuse to others.

Hobbes permits refusal to face combat in two instances. First, when one can "substituteth a sufficient soldier in his place" one can be excused from service. Although it opens the door to concerns about exploitation of the poor, this is a reasonable exception within the Hobbesian project since it poses no hindrance to the interests of the sovereign. Second, one is excused from service if one is afflicted with "natural timorousness," or the condition of fearing death to the extent that one will not engage in combat. Hobbes asserts all women are naturally timorous and are therefore excused from any "dangerous duty" such as military service. However, some men "of feminine courage" are excused as well. While avoiding battle out of fear is not strictly speaking wrong, it is, at least for men, an ethical failing. As Hobbes says, it is "not injustice, but cowardice."⁴⁹

There is an unstated view of the virtues of masculinity implied by this passage: men ought to be willing to die for the sake of the commonwealth upon command. For a man to fail to do this is a failure of character. Truly masculine men will not seek to avoid combat out of concern for their lives. But unlike Grotius, who gave the sovereign the right to compel virtuous behavior, Hobbes offers a qualified permission to subjects to engage in such dishonorable activity. Still, Hobbes is not exactly granting feminine male subjects the political liberty to avoid fighting in war. He is merely granting them

⁴⁶Deborah Baumgold, "Subjects and Soldiers: Hobbes on Military Service," *History of Political Thought* 4, no. 1 (Spring 1983): 43–44.

⁴⁷*Leviathan*, XXI.11, 141. This is an interesting reversal for him. Hobbes asserts the alienability of the right of self-defense in his earlier *Elements of Law*. See the discussion of the evolution of Hobbes's views on natural rights and the social contract in Baumgold, "Subjects and Soldiers."

⁴⁸*Leviathan*, XXI.15, 142.

⁴⁹*Ibid.*, XXI.16, 142.

the moral right to refuse. He still insists that the sovereign has “right enough to punish his refusal with death.”⁵⁰ In this sense, it is not much of a liberty.

Hobbes’s appeal to gender here is remarkable and important. It solves a problem for his theory. The presupposition of masculine men in the social contract, as opposed to those merely seeking self-preservation, provides the commonwealth with the labor it needs to carry out its basic social function, that is, to provide for the common defense. Without these men, there is a real danger that the commonwealth would not be able to muster the forces necessary for its defense and would thus set society on a slippery slope back to the state of nature.

Hobbes goes on to provide two types of cases where the excuse of femininity no longer permits refusal to serve. The first is when a subject has enlisted in the military or been hired as a mercenary. As he says, “he that enrolleth himself a soldier, or taketh imprest money, taketh away the excuse of a timorous nature, and is obliged, not only to go to the battle, but also not to run from it without his captain’s leave.”⁵¹ The second is when the commonwealth needs all subjects, or, we can add, the talents of a particular subject, to come to its defense in war. The reason Hobbes provides that subjects must come to the defense of the commonwealth in such a situation is that otherwise “the institution of the commonwealth . . . would be in vain.”⁵² But it seems that Hobbes has forgotten his own argument here. Again, the commonwealth was instituted in order to provide security to the subjects, not to preserve the commonwealth. This is why, according to Hobbes’s own view, subjects are not obligated to die for the commonwealth. Thus, even in a supreme emergency, the social contract struggles to justify the duty to risk one’s life in war.

The former case, of the enlisted soldier or mercenary, is more complicated. Hobbes claims that a subject who engages in the enlistment or mercenary contract is bound to risk his life in war even if he has a timorous nature. While men institute the commonwealth for the sake of their self-preservation, such an enlistment contract presupposes that men are willing and able to engage in contracts that subordinate their self-preservation to other interests. As Susanne Sreedhar has pointed out, Hobbes’s allowance for such contracts in this passage conflicts with many readings of his view of human nature.⁵³ For many, Hobbes is committed to the view that self-preservation is the highest end for human beings. Sreedhar, however, argues that this passage, as well as others, shows that Hobbes has a more sophisticated view of human nature. Hobbes’s reliance on the enlistment contract as a solution to

⁵⁰Ibid.

⁵¹Ibid.

⁵²Ibid., 143.

⁵³Susanne Sreedhar, “In Harm’s Way: Hobbes on the Duty to Fight for One’s Country,” in *Hobbes Today: Insights for the 21st Century*, ed. S. A. Lloyd (New York: Cambridge University Press, 2012), 209–28.

the problem of self-sacrificial military service would also seem to conflict with his insistence on the inalienability of the right of self-preservation. As Baumgold argues, the enlistment contract entails the alienation of the right of self-preservation, something that Hobbes has already rejected, thereby setting up the very problem of self-sacrificial military service that the appeal to the enlistment contract is attempting to solve.⁵⁴

We can nevertheless put aside the question whether Hobbes's claims about the importance of self-preservation to human beings can be made coherent. The central point for our purposes is simply that Hobbes relies on the existence of subjects in the commonwealth who are willing and able to risk their lives in war upon command for the commonwealth. Given that men only join the commonwealth out of concern for their self-preservation, why should Hobbes be so confident that there will be a sufficient number of such men to provide for the common security in any given commonwealth? Sreedhar points to two ways Hobbes might ensure the presence of martial subjects. First, Hobbes might be able to utilize the transcendent interests presupposed by Christian faith. As some have argued, subjects could have an interest in risking their lives in defense of the commonwealth when doing so is perceived as necessary for their salvation.⁵⁵ Second, Sreedhar suggests that Hobbes's political society relies on a pool of vulnerable poor subjects who are forced to give away their right to self-preservation for wages.

But both of these possibilities ignore the solution to the problem of available fighters that Hobbes's own discussion suggests. That solution relies on gender. When he tells us that "there is allowance to be made for natural timorousness, not only to women (of whom no such dangerous duty is expected), but also to men of feminine courage," and adds that men of feminine courage are cowards, he clearly implies that the moral nature of men (and not women) requires the willingness to risk one's life for the commonwealth upon command. Though he allows that some men will fail to live up to their duties as men, he can be confident that given their nature a significant percentage of men will fulfill the natural duties of manhood and fill the ranks of the military.

Hobbes's defense of the duties of soldiers to risk their lives thus relies, not on the terms of the social contract, but on the virtues of masculinity. This appeal to masculinity may appear to come out of nowhere. However, it is not the only place where Hobbes asserts these norms of masculinity. Hobbes argues that the succession of the throne should go to the monarch's male offspring over his female offspring. The reason for this provided in *Leviathan* is that "men are naturally fitter than women, for actions of labour and danger."⁵⁶ In *De Cive* the reason is stated as "usually (though not always) [men] are better equipped to manage great affairs and especially

⁵⁴Baumgold, "Subjects and Soldiers," 60–61.

⁵⁵Sreedhar, "In Harm's Way," 227.

⁵⁶*Leviathan*, XIX.22, 126.

wars.”⁵⁷ And in *The Elements of Law* the reason given is “generally men are endued with greater parts of wisdom and courage, by which all monarchies are kept from dissolution, than women are.”⁵⁸ In each of these statements, men are said to be better suited to martial exploits. In particular, they are said to have the courage necessary for war. This is roughly the same notion of masculinity to which Hobbes appeals to ground the duties of soldiers.

Pufendorf

Though he does not go quite as far as Hobbes, Pufendorf is less certain than Grotius that men are naturally superior to women. For Pufendorf, men’s mastery of women does not occur naturally. He leaves open the possibility of egalitarian conjugal arrangements in the state of nature.⁵⁹ However, this seems to merely be a logical possibility. Given the natural superiority of men in strength of body and mind, women will always see that they ought to submit to men and voluntarily agree to engage in patriarchal marriage. In the end, like Grotius, Pufendorf holds that patriarchal marriage precedes the social contract.⁶⁰ The parties to the social contract are again male heads of households.

As Pufendorf notes, though men enter civil societies in order to better secure their estates and lives, the sovereign must have the right to sacrifice the subject in war in order to guard other members and the commonwealth. The basic terms of the social contract give the state the right to “employ the forces and capacities of every individual for the common peace and security.”⁶¹ Pufendorf argues clearly that the sovereign has the right to risk the lives of subjects in war. It is a capital crime for a soldier to abandon his appointed post to save his life.⁶² Moreover, it is a crime to malingering, that is,

⁵⁷*On the Citizen*, IX.16, 113.

⁵⁸Thomas Hobbes, *The Elements of Law Natural and Politic*, ed. J. C. A. Gaskin (New York: Oxford University Press, 2008), XXIII.14, 134.

⁵⁹Samuel Pufendorf, *The Law of Nature and Nations*, trans. Basil Kennett (Clark, NJ: Lawbook Exchange, 2005 [1672]), VI.1.9, 567.

⁶⁰There is little sustained commentary on Pufendorf’s view of the role of women in political society. Though their discussions are focused mainly on matters pertaining to gender, marriage, and equality, this reading of Pufendorf on the gender of the parties to the social contract is affirmed by Susanne Sreedhar, “Pufendorf on Patriarchy,” *History of Philosophy Quarterly* 31, no. 3 (July 2014): 209–27; Maria Drakopoulou, “Samuel Pufendorf, Feminism, and the Question of ‘Women and Law,’” in *Feminist Encounters with Legal Philosophy*, ed. Maria Drakopoulou (New York: Routledge, 2015), 66–91; and Carole Pateman, *The Sexual Contract* (Stanford, CA: Stanford University Press, 1988), 50–51.

⁶¹Pufendorf, *On the Duty of Man and Citizen*, II.6.9, 137.

⁶²Pufendorf, *The Law of Nature and Nations*, VIII.2.1, 757.

to intentionally wound oneself in order to be deemed unfit for military service.⁶³

Yet when Pufendorf explains why soldiers should face death in war, he does not appeal to the terms of the contract directly. Pufendorf's arguments clearly appeal to masculinity. He gives two arguments in defense of the soldier's duty. The first is a straightforward appeal to the virtue of bravery. It would be cowardly for a man to put his life above his duty as a soldier. Indeed, a brave man will not only face death but will praise his commander for ordering him to do so. A soldier "is bound to defend the Post his Commander appoints him to, tho' perhaps he foresees he must in all probability lose his Life in it. . . . And no Man of Bravery or Spirit will ever complain that he is commanded upon such Duty, but will rather commend his General's Judgment and Conduct in it."⁶⁴ Bravery is also the issue at stake in the matter of malingering, which he condemns as an act of cowardice.⁶⁵

Pufendorf's second argument is more complex. Unlike the first argument, this one seems to appeal to the subject's interests in making the social contract. According to him, it is not irrational to risk one's life in war in service of the commonwealth even though the objective in joining the commonwealth is to preserve one's life. For "'tis by the Protection of the commonwealth that we enjoy our Lives for a long space of time, which, if we had been exposed to a State of Nature, we should soon have been deprived of." And should one find oneself in battle as a member of the commonwealth, "the hopes of Victory are greater" because of the assistance of comrades that would not be available in the state of nature. Furthermore, dying in war for the commonwealth is better for oneself than dying in war in the state of nature because "by the protection of the Commonwealth his Goods and Fortunes will be preserv'd for his Relations; which in a State of Nature there could be no hopes of."⁶⁶

Upon scrutiny, the final appeal to the interests of one's family is what gives this argument any power. Without this appeal, the argument is quite weak. In this sense, the argument does not ultimately rely on one's interest in self-preservation but on the virtues of a chivalrous head of household. Like the appeal to bravery, it is an appeal to gender norms.

Consider the argument without the final appeal to the security of the family. Even assuming that the only two options are life in the commonwealth and life in the state of nature and that the former is much safer, it is hard to see why it would be rational to die for the commonwealth in a given instance. The argument would seem to make joining the commonwealth and agreeing to submit to the sovereign rational, but it would not seem to make obeying a specific life-risking order rational. Given the disparate risks involved, it is best for us to abandon the state of nature and assume the obligations of

⁶³Ibid., VIII.2.3, 758.

⁶⁴Ibid., VIII.2.4, 759.

⁶⁵Ibid., VIII.2.3, 758.

⁶⁶Ibid., VIII.2.4, 759.

citizenship in the commonwealth. Yet, at the moment the sovereign demands that we face imminent death in battle, it is no longer in our best interests to be citizens of the commonwealth. At this moment, we would be better off abandoning the commonwealth and returning to the state of nature. Our chances of living to see another day would be greater.

But the appeal to the interests of one's family adds something important to Pufendorf's argument. He suggests that one should face death for the commonwealth not because it is in one's egoistic interests to do so but because one's family is better off in one's death in war than it would be in one's death in the state of nature. If one dies resisting an attacker in the state of nature, one's family and property will be pillaged. But if one dies to protect the commonwealth, assuming the commonwealth survives, one's family will likely be spared. Thus, one may live to see another day if one abandons the commonwealth rather than face battle but, given the high likelihood of subsequent death in battle in the state of nature, abandoning the commonwealth is to abandon the interests of one's family.

Pufendorf's second argument merely appeals to the interests of "his Relations." While it does use a masculine pronoun, when read in isolation, this passage need not be interpreted as construing the soldier as an occupant of a specific gender role, such as husband or father. However, when we read the passage in the context of Pufendorf's discussion of the role of women in the household and the gendered nature of the participants in the social contract discussed above, it is reasonable to read Pufendorf as conceiving of the soldier as a male head of household. For this is how he understands all the parties to the social contract.

Seen this way, Pufendorf's second argument is not simply an appeal to the interest in self-preservation that motivates the social contract. Rather, the argument appeals to one's duties as a male head of household. According to the argument, one does not participate in the social contract simply to preserve one's life but, instead, to preserve the household of which one is the patriarch. As with his first argument, the duty to risk one's life in war is based on masculinity.

Locke and the Emergence of the Civil-Military Distinction

As we have seen, the early social contract theorists did not envision civil society as a liberal arrangement wherein the natural rights of all citizens were secured by the sovereign. Rather, these theorists saw the social contract as the submission of the subject to the sovereign primarily as violent instruments to be used for the common defense. Yet the subject is supposed to join in the social contract in order to secure his life and, in some theories, other rights. The tension at the heart of this arrangement problematizes the justification of the subject's duty to risk his life in combat upon the sovereign's command. The appeal to the natural virtues of men ameliorates this tension.

Moreover, we have seen that, although some of these theorists deny that the subordination of women to men in the family is natural, they nevertheless presuppose that the parties to the social contract are male heads of households.

Locke challenged the patriarchal character of marriage more than most of his predecessors.⁶⁷ Responding directly to Filmer's patriarchal theory of political authority, Locke rejected the idea that authority of any kind was based on the reproductive power of the father. He argued that authority over and responsibility for children was shared by the biological parents.⁶⁸ Regarding marriage, he argued that the terms of the association can be negotiated by the parties and that, once fulfilled, the marriage could be dissolved.⁶⁹ Locke says clearly that the purposes of marriage do not require the male party to have dominion over the female. As he says, "the ends of matrimony requir[e] no such power in the husband, the condition of *conjugal society* put it not in him, it being not at all necessary to that state."⁷⁰ Despite this, Locke appears to assert a (limited) male supremacism in marriage. When the husband and wife disagree about matters that fall within the purview of the marriage, it is the husband whose judgment has priority over the wife's. Locke claims that this is based in a natural inequality between the sexes. As he says, rule within the marriage "naturally falls to the man's share, as the abler and the stronger."⁷¹ Locke had very little to say about what this means for women's political role. While Locke deserves credit for providing many important antipatriarchal philosophical resources, he nevertheless fails to directly challenge the philosophical and social status quo regarding the standing of women in political society.

Locke shares the same basic vision of the intentions and terms of the social contract with Grotius, Hobbes, and Pufendorf. People join in the social contract to preserve their natural rights and agree to enforce the executive's judgments regarding how best to secure those rights, including participating in military action.⁷² Unlike Grotius, Hobbes, and Pufendorf, however, Locke argues emphatically that the social contract is not the alienation of natural

⁶⁷See Mary Lyndon Shanley, "Marriage Contract and Social Contract in Seventeenth-Century English Political Thought," in Hirschmann and McClure, *Feminist Interpretations of John Locke*, 17–50; and Melissa Butler, "Early Liberal Roots of Feminism: John Locke's Attack on Patriarchy," in *ibid.*, 91–130.

⁶⁸Locke, *Second Treatise*, §56, 31–32.

⁶⁹*Ibid.*, §81, 44.

⁷⁰*Ibid.*, §83, 45.

⁷¹*Ibid.*, §82, 44; see also the *First Treatise*, §47, in *Two Treatises of Government*, ed. Peter Laslett (New York: Cambridge University Press, 1988). For discussion of Locke's views on women and marriage, see Butler, "Early Liberal Roots of Feminism," and Jeremy Waldron, "Locke, Adam, and Eve," in Hirschmann and McClure, *Feminist Interpretations of John Locke*, 241–68.

⁷²*Second Treatise*, §88, 47. Hobbes, unlike the others, holds that the purpose of the contract is simply to better secure the participant's lives.

rights but, rather, natural rights limit the authority of the commonwealth over its members. The natural rights of men cannot be violated by the sovereign.⁷³ This is why those party to the social contract become not merely subjects of the sovereign, as they do in the earlier theorists, but citizens of a civil society who are equally entitled to civil liberties and the majority of which constitute the sovereign itself. The social contract thus securitizes for men their status as free and equal citizens, not as the mere instruments of an arbitrary power. Locke was the first to fully utilize the social contract theory to ground a civil society composed of free and equal citizens. However, if this is the sort of civil society the social contract requires, the security apparatus that, according to the terms of the social contract, is the condition for civil society now cannot be incorporated into civil society. The duty to obey the command of the supreme power to participate in war that is a crucial condition of the social contract would seem to require more of subjects than the social contract allows.

There is one place where Locke seems to address this tension. Immediately following his insistence that the rights of men, particularly the right to property, limit the rights of the commonwealth, he attempts to explain how this is consistent with the institution of the military. As he explains, "the preservation of the army, and in it of the whole common-wealth, requires an absolute obedience to the command of every superior officer, and it is justly death to disobey or dispute the most dangerous or unreasonable of them." For instance, "the serjeant . . . could command a soldier to march up to the mouth of a cannon, or stand in a breach, where he is almost sure to perish." And "the general . . . can condemn [the soldier] to death for deserting his post, or for not obeying the most desperate orders." According to Locke, military leaders "can command any thing, and hang for the least disobedience" their subordinates "because such a blind obedience is necessary to that end, for which the commander has his power, viz. the preservation of the rest." Still, Locke says, this does not give such authorities the right to take a soldier's property because "the disposing of his goods has nothing to do with" protecting the commonwealth.⁷⁴ His general principle here is that the sacrifices demanded of soldiers are limited only to what is necessary to protect the commonwealth. While the needs of the commonwealth could require the death of the soldier, in Locke's view they could not require the taking of the soldier's property.

Clearly, this fails to reconcile the demands of military service with the natural rights of men. On this account, the soldier remains a violent instrument of the commonwealth to be used and sacrificed for its needs and upon command of its executive power.⁷⁵ The fact that the supreme power

⁷³*Ibid.*, §§135–38, 73–74.

⁷⁴*Ibid.*, §139, 74.

⁷⁵This problem for Locke cannot be avoided by construing the meaning of "property" in the above passage in the sense that Locke often uses it so as to

may not use the soldier for ends other than the needs of the commonwealth does not change this. Moreover, given the fact that the soldier is absolutely bound to obey “even the most dangerous or unreasonable” commander, the soldier is deprived of any standing to resist commands that do not serve the needs of the commonwealth. We are left with a radical conflict between civil society and the military, between the citizen and the soldier. Locke’s relevant innovation to deal with the tension between the social contract and military service is to allow the liberal thrust of contract theory to create a civil society of free and equal citizens but simultaneously cut the military out of that society and thereby divide political society into the civilian and military realms.

Aside from the above passage, Locke never offers a substantive defense of the soldier’s duty to risk his life in war in the way the earlier contract theorists do. Nor does Locke discuss how one moves from the status of citizen to the status of soldier, or vice versa. Given the conflict between his contract argument for political obligations and military service, the duties of military service lack a clear basis in Locke. How can Locke attribute such burdensome duties to soldiers yet insist that the social contract preserves the natural liberties of subjects? Prior contract theorists attribute gendered expectations to the parties to the social contract to fill the gap between the aims of the contract and its terms. Locke is silent not only about the problem but also about his predecessors’ solution. The gendered expectations of men that prior theorists use to ground the duties of military service are left unchallenged by Locke.

Locke did more than his predecessors to bring the liberal potential of contract theory to fruition. He acknowledges the contractual possibility of egalitarian conjugal relations and he envisions the social contract as creating a civil society wherein men have their freedom and equality protected. Still, Locke does little to directly threaten the vision of political society as an arrangement among male heads of households. At the same time, he embraces the subordination of men in the military. Unlike his position on the place of women in political society, this accommodation of men in the military requires some innovation on his part because of his liberal vision of civil society. In particular, Locke produces the distinction in status between civilian and military service member that persists today.

Locke’s relative silence about the theoretical support for this civilian-military distinction is similar to his silence about the patriarchal vision of the social contract. Despite his many progressive strides, there is in Locke what Carver calls a “residual patriarchy.”⁷⁶ Similarly, while he provides

include one’s life and body. In the above passage Locke can only be understood as referring to “property” in the narrower sense to exclude one’s life. Hence, in the above passage one can be bound to give one’s life in war but not one’s “goods.”

⁷⁶Terrell Carver, *Men in Political Theory* (New York: Manchester University Press, 2004), 156.

many theoretical tools to challenge the subordination of members of the military, he leaves military authority unquestioned. Despite his strident defense of the liberty of men in civil society, there is also a residual military masculinism in Locke.

Still, Locke's failure to provide a substantive defense of the civil-military distinction is in some ways more remarkable than his failure to fully challenge the subordinate political standing of women. First, Locke is the one who uses the tools of social contract theory to attack absolute political sovereignty, arguing for the inalienability of natural rights and thereby creating the conflict between civil society and the military. Second, while it has no clear need for patriarchal households, Locke's theory seems to need military subordination. This is because Locke describes the purpose of the social contract to be to create an executive with the right to command military action.⁷⁷ Were he to challenge military subordination he would challenge the terms of his social contract. For these reasons, Locke's theory cries out for a defense of military subordination and the civil-military distinction in a way it does not for patriarchalism.

While Locke's predecessors in contract theory make more direct appeals to gender and the interests of persons socially situated in certain ways to defend the obligations of military service, Locke seems to rely on these positions as unstated premises. Thus, in Locke, the "individuals" who enter the social contract are explicitly free and equal persons who seek to secure their personal rights *and* they are implicitly men who ought to exhibit masculine virtues, especially the courage to fight and die for their families and communities in war. We are left to infer that gender is quietly doing the work in Locke that it did less quietly in Grotius, Hobbes, and Pufendorf.

Conclusion

In Locke, then, we see emerge the contours of civil society that roughly mirror the picture captured in the *Grimley* decision. In civil society, men's freedom and equality is protected by the state while the military is a different political space. Following the explicit language in *Grimley*, it is through the enlistment contract that men can be separated from civil society and subordinated to the will of the executive and the needs of the commonwealth. This discussion has shown how central gender is in accounting for the separation of the military from civil society in early modern political thought.

The patriarchal vision of political society has been gradually undermined since the nineteenth century. Women have been fully incorporated into civil society juridically. Interestingly, however, the traditional civil-military distinction persists. In fact, since the 1960s, in the same period that vast improvements were made in the political standing of women and the household,

⁷⁷*Second Treatise*, §88, 47.

the civil-military division has arguably grown more pronounced in the United States.⁷⁸ This being said, the gender exclusivity of military service has been challenged, albeit with much less success when compared with attacks on other traditionally male-only occupations. While some gender identities have recently been formally banned, cisgender women at least have been incorporated into the military formally. But if this discussion is correct, more might need to be done to undermine the gendered character of military service than simply opening the ranks to genders other than cisgender men. If the very nature of military service, with its peculiar obligations that separate it from civil society, is based on the presumption of a natural gender order, then the civil-military distinction itself will have to be reconsidered. Beyond merely permitting women and other genders to serve, we need to ask ourselves how, if at all, the traditional civil-military distinction can be justified in a gender-inclusive way.

⁷⁸See, for instance, Diane Mazur, *A More Perfect Military: How the Constitution Can Make Our Military Stronger* (New York: Oxford University Press, 2010).