ARTICLE

RANK MATTERS BUT SHOULD MARRIAGE?: ADULTERY, FRATERNIZATION, AND HONOR IN THE MILITARY

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ABSTRACT

Legal regulation of sexual conduct typically proves thorny for American courts and legislatures. Criminal sanctions for

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private, consensual sex acts are particularly problematic. The trend in the civilian sector is towards deregulation, including decreasing prosecutions for fornication and adultery. At the same time that civilian criminal trials for marital infidelity dissipated, military adultery prosecutions exploded. In this Article, Quince Hopkins explores this disjuncture, arguing that the increase in military prosecutions for adultery reflects a more general social conservative backlash. This backlash, she contends, reverberates in the civilian sector's more recent trend toward reinstituting fault-based divorce and developing of covenant marriages. Hopkins points out that criminal sanctions for marital infidelity are particularly problematic for victims of intimate abuse because of the close link between domestic violence and jealousy (whether real or constructed). She contends that a legal norm proscribing adultery may bolster a batterer's belief that strong retribution for sexual infidelity is appropriate.

Hopkins then analyzes rationales for the military sanction against adultery and concludes that they are already fully served by existing military sanctions based on something other than marital status. With respect to basing such policy on the notion of military honor, she evaluates honor as the term was deployed by ancient Greek philosophers. Hopkins concludes that the concept of honor is much more pedestrian than some current military theorists would have us believe. She contends that the rhetoric of military honor masks the importation of conservative civilian social norms into the military. Criminal regulation of sexual infidelity is problematic in and of itself. When such regulation is based on fluctuating cultural conceptions of what conduct is honorable, the risks of indeterminacy overshadow any remaining legitimate value sought to be protected.

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I. INTRODUCTION

> O, beware, my lord, of jealousy! It is the green-ey'd monster which doth mock [t]he meat it feeds on. That cuckold lives in bliss [w]ho, certain of his fate, loves not his wronger.[1]

Questions about commitment, honesty, honor, morality, fidelity, and integrity occupy headlines and form the subject matter of dinner table conversations around the country. Taking a step back from the details of those discussions, we can see several related but directly conflicting trends. First, seemingly contradictory law reform movements are taking place. Criminal sanctions for adultery in the civilian sector are nearly obsolete. In contrast, the armed forces recently chose to reaffirm their practice of criminalizing adulterous behavior.[2]

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1. WILLIAM SHAKESPEARE, THE COMPLETE PLAYS AND POEMS OF WILLIAM SHAKESPEARE 1115 (William A. Neilson & Charles J. Hill eds., 1942).

2. On the obsolescence of civilian prosecutions, see, Herbert Jacob, *Silent Revolution, in* LAW & SOCIETY: READINGS ON THE SOCIAL STUDY OF LAW 312 (S. Macaulay ed., 1995). On the military's decision to reaffirm the criminalization of adultery, see *Military Gets New Rules on Adultery: It's Still A Crime, But Not All Cases Will Be Prosecuted,* CHI. TRIB., July 29, 1998, *available in* 1998 WL 2880547. As discussed in this Article, although adultery was subject to prosecution over the past century, in practice this policy laid dormant until the integration of women into the armed forces in the late 1970s. *See infra* Part VI.

It is not without irony, and it has not gone unremarked that President Clinton sits as Commander in Chief of the armed forces, despite his own repeated acts of adultery. *See, e.g., Military Adultery Rules Don't Apply,* DES MOINES REG., Sept. 16, 1998, *available in* 1998 WL 3225436. Despite the fact that President Clinton was impeached for alleged perjury and obstruction of justice connected with his adulterous liaison with former White House intern Monica Lewinsky, military leaders, in-

Second, civil divorce courts are confronting countervailing trends in legislative standards for marital dissolutions. On the one hand, no-fault divorce reform swept the country beginning in the 1970s and continuing thereafter, with only a handful of states retaining fault-based divorce.[3] Prior to this wave of reform, courts could not dissolve marriages unless one spouse asserted and could prove that the other spouse was to blame for the end of the marriage.[4] Typical fault bases included adultery, desertion, and/or extreme physical violence towards the non-blameworthy spouse.[5] No-fault divorce reform reflects the understanding that many marriages end not because of any particular wrongdoing of one or even both parties, but because the love that originally drew them together died, or because irreconcilable differences developed between them.[6]

On the other hand, during the 1990s, state legislatures began considering, and in some states passed, covenant marriage laws providing for more binding marital commitments.[7] Covenant marriage laws allow couples to opt out of a state's regular no-fault divorce scheme, and to choose instead a form of marriage

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cluding Secretary of Defense William Cohen, maintained the public position that Clinton's adultery did not render him unfit to be Commander in Chief. *See, e.g.,* Bradley Graham, *Military Leaders Worry Privately About Impact: Some Troops Offended by Double Standard,* WASH. POST, Sept. 15, 1998, at A10, *available in* 1998 WL 16556190. By contrast, "many in uniform have been quick to note that if Clinton were a service member, he certainly would be facing a court-martial on multiple charges and likely eviction from the military for violating fundamental precepts of fidelity and integrity." *Id.*

3. For an example of a statute retaining fault-based divorces, see MD. CODE ANN., FAM. LAW § 7-103 (1984 & Supp. 1998) (grounds for divorce include, *inter alia,* cruelty, adultery, and irreconcilable differences). Concerning no-fault divorce reform, see generally, Jacob, *supra* note 2. Maryland maintains a dissolution scheme that includes both fault and no-fault bases. *See id.*

4. *See, e.g.,* Jacob, *supra* note 2, at 316 (discussing California's fault scheme).

5. *See id.*

6. *See id.*

7. *See* Jeanne Louise Carriere, *It's Déjà Vu All Over Again: The Covenant Marriage Act in Popular Cultural Perception and Legal Reality,* 72 TUL. L. REV. 1701 (1998); Katharine Biele, *Utah's Unique Take on How to Strengthen Marriages Conference Shows That, Rather Than Focusing on Divorce, Governor Wants to Work at Keeping Couples Happy,* CHRISTIAN SCI. MONITOR 3, Sept. 21, 1998, *available in* 1998 WL 2370818 (discussing covenant marriage proposals in Utah and mentioning the passage of such laws in Arizona and Louisiana). *See, e.g.,* ARIZ. REV. STAT. ANN. § 25-901 (Arizona's covenant marriage law and provisions for dissolving a covenant marriage).

that is less easily dissolved.[8] Additionally, some states that previously followed the no-fault divorce reform movement are re-instituting fault-based divorces.[9]

Third, we can observe a clash in views about whether consensual sexual conduct is a matter of general public concern. On the one hand, the media, the office of independent counsel, and the Congress, in theory responding to public demand for the information, increasingly devote substantial time and resources to the issue, bombarding us with intimate details of various politicos' extra-marital liaisons, including those of a President embroiled in a series of tawdry adulterous affairs. On the other hand, in the face of this onslaught of information the majority of Americans maintain the view that this information is private and not worthy of either publication or investment of investigatory resources.[10]

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8. For example, Arizona's covenant marriage law requires a showing of adultery, conviction of certain crimes, or desertion for a period of time. *See* ARIZ. REV. STAT. ANN. §§ 25-903 to -904 (1998). *See also* Biele, *supra* note 7.

9. *See* Biele, *supra* note 7. I emphasize adultery in heterosexual unions in this Article because they are the only ones at this point that have the legal status fundamental to triggering an adultery charge. *See infra* text accompanying note 12. However, the issues of commitment and faithfulness equally confront those in lesbian and gay relationships, albeit with added complications due to heterosexism.

10. Concerning President Clinton in particular, and the public perceptions and wishes regarding wide public disclosure of consensual adulterous acts, see *And So To Work,* THE ECONOMIST, Sept. 12-18, 1998, at 27-28 (American public opinion); *House, In a Partisan 258-176 Vote, Approves a Broad, Open-Ended Impeachment Inquiry*, N.Y. TIMES, Oct. 9, 1996, at A1; *but see* Lawrie Mifflin, *All-News TV Loses Viewers After Trial,* N.Y. TIMES, Feb. 26, 1999, at A14 (indicating substantial numbers of Americans watched the Senate trial; then, after the trial, the major news networks' Nielsen ratings dropped 25–30%). I do not mean to suggest that public polls indicating Americans' disinterest in hearing this information automatically reflects a belief that adultery itself is acceptable. It seems fair to say that few would suggest that adultery is a good thing, although substantial numbers of Americans admit to having committed adultery. *See* Martin J. Siegel, *For Better or For Worse: Adultery, Crime & the Constitution*, 30 J. FAM. L. 45, 55-56 (1991) (although 50% of husbands and 33-40% of wives admit to having committed adultery, 87% of those surveyed criticize deviations from monogamy, placing this conduct in the category of "wrong or always wrong."). The question in this Article is, rather, what role law should play in responding to adultery, if any?

Even of those who supported an impeachment inquiry of President Clinton, few publicly stated that the sexual acts themselves disturbed them. Rather, they focused on the allegations of perjury and abuse of public office. Connected with the Clinton/Lewinsky matter, the media exposed other Congress members's extramarital affairs (undoubtedly with the assistance of various political factions). Even before that time, we suffered through the media exposure of Gary Hart's possible extramarital activities. Related in their public airing of sexualized conduct, and yet very different in their raising the intertwined issues of race, gender, and power, were the confirmation hearings of Justice Clarence Thomas, where Professor Anita Hill testified about

Keeping in mind the second and third currents, in this Article I focus on criminal law and adultery. In particular, I take the military's review of its policies on fraternization and adultery as a prime site for revisiting the question of what role criminal law should (or should not) play in regulating interpersonal relationships.[11] A sex act is adultery only where there is a marriage; if there is no marriage, there is no adultery.[12] A number of ques-

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the sordid details of his sexual harassment of her. *See, e.g.,* articles by Emma Coleman Jordan, Adrienne D. Davis & Stephanie M. Wildman, and Kim A. Taylor *in* CRITICAL RACE FEMINISM 165-187 (Adrien Katherine Wing ed., 1997).

11. In the interest of full disclosure, I confess I have never served in the military, although in a fit of adolescent disgust with my high school education, parents, or some other target of righteous hormonal pique, I did appear in the office of a military recruiter. For better or worse, however, he suffered the same judgment as had most other authoritarian figures in my life during that typically rebellious time. In addition to that brief encounter, my contact with the military took the form of informal but cutthroat croquet matches between my undergraduate alma mater (St. John's College in Annapolis, Maryland) and our archrivals, the midshipmen at the Naval Academy across the street. As is true for most Americans, I have had tangential contact with the military through various family members including a father who served—albeit prior to my birth, a career military uncle, a number of career military cousins and friends, and a fair number of clients—all victims of intimate abuse—whose husbands were serving. I did not, however, draw any conclusions from the fact that my own legal practice turned up a fair number of these cases, as military facilities were located in the jurisdictions where I practiced. Rather, as outlined in Part III, I base my claim of a high prevalence of domestic violence in law enforcement and the military, on more reliable sources. In any event, I view this Article as sort of a cross-cultural study, a study of a culture within a culture, with the risks and hazards that these efforts necessarily entail.

Few others have addressed the issues of sexual harassment, fraternization, and adultery and the impact military regulations of sexual conduct have on women. Diane Mazur, Associate Professor of Law, University of Florida, USAF 1979-1983, is one of the few scholars currently writing about these issues who also served in the military. *See* Diane H. Mazur, *The Beginning of the End for Women in the Military*, 48 FLA. L. REV., 461, 464-65 (1996). *See also* Martha Chamallas, *The New Gender Panic: Reflections on Sex Scandals and the Military,* 83 MINN. L. REV. 305, 305 n.139 (1998) [hereinafter *Gender Panic*]. Other authors have addressed the issues of fraternization, sexual harassment, and adultery, but they do not address the specific impact of these regulations on women. *See, e.g.,* WILLIAM H. MCMICHAEL, THE MOTHER OF ALL HOOKS (1997); Maj. David S. Jonas, *Fraternization: Time for a Rational Department of Defense Standard*, 135 MIL. L. REV. 37 (1992); James M. Winner, Capt. USAF, Comment, *Beds with Sheets but No Covers: The Right to Privacy and the Military's Regulation of Adultery,* 31 LOY. L.A. L. REV. 1073 (1998).

12. If there is no marriage, the conduct might still be prohibited in the military under the rubric of fraternization. *See infra* Part VI. Civilian criminal laws rarely punish consensual sex acts, other than in the case of sodomy laws or statutory rape laws that imply nonconsent on the part of minors. For the military, fornication (sexual intercourse between two persons not married to each other) is generally not punishable unless it is "under [extreme] conditions of publicity or scandal . . ." Major Hunter, *Pleading Adultery Under Article 134,* ARMY LAW, May, 1992 at 35, 36. *But* see United States v. Hickson, 22 M.J. 146 (C.M.A. 1986) (noting in dicta that

tions spring from here. Why does the existence of a marriage raise otherwise noncriminal activity to the level of a criminal act?[13] To the extent that the specific behavior *is* criminal absent a marriage, is an additional sanction based solely on the parties' marital statuses necessary? What is the nature of the individual and societal or group harm from an adulterous act and does any such harm warrant criminal sanction? Is the harm arising from the act different in military and civilian contexts such that differential handling is appropriate? Are any of the traditional rationales for criminal sanctions—retribution, rehabilitation, deterrence, and incapacitation[14]—served by penalizing adultery in the civilian or military contexts? Even if the military has unique reasons for sanctioning consensual adulterous conduct, are there nonetheless larger countervailing concerns that need to be balanced against these unique needs? Is there anything to be learned from this evaluation that might expose some of the reasons for our country's schizophrenic response to sex in general? These questions and others are addressed in this Article.

Part II presents a brief history of civilian prosecution of adultery, including early patriarchal notions of women as property that undergird adultery sanctions. I also analyze the relationship between rationales for adultery and those for traditional criminal sanctions.

In Part III, I outline the evidence that rates of domestic violence by military personnel are particularly high. Due to the historical rationale for civilian sanctions and the fact that perceived infidelity (whether real or imagined) precedes a substantial number of incidents of physical abuse in intimate relationships, any sanction against adultery must be evaluated with the utmost care and even skepticism.

Part IV provides an initial evaluation of adultery in the military, including a preliminary discussion of relevant aspects of mil-

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two persons who engage in illicit sex in circumstances that are not strictly private are guilty of fornication).

13. *See* MANUAL FOR COURTS-MARTIAL ¶ 62(b) (1998) (elements of the crime of adultery include "that at the time the accused or the other person was married to someone else.") [herinafter MCM]. Thus, marriage is central to the crime of adultery. *But see* discussion, *supra* note 12.

14. *See, e.g.,* Deborah W. Denno, *Gender, Crime, and the Criminal Law Defenses,* 85 J. CRIM. L. & CRIMINOLOGY 80, 120-123 (1994) (Symposium: Gender Issues and the Criminal Law); Toni M. Massaro, *Shame, Culture, and American Criminal Law,* 89 MICH. L. REV. 1880, 1890–1900 (1991).

itary culture, elements that are more fully fleshed out in Parts V through VII.

Part V outlines the underlying legal framework for the proscription against adultery in the armed forces. First, a skeletal structure of the military criminal justice system and its relation to its civilian counterpart is presented. Second, the Section describes the Uniform Code of Military Justice (the "UCMJ") provisions that form the substructure for the criminalization of adultery: Article 133 (Conduct Unbecoming an Officer and a Gentleman) and Article 134 (the "General Article"), which proscribes conduct that disrupts good order and discipline or holds the service up to disrepute. Part V then provides an in-depth discussion of the particular values that Articles 133 and 134 are designed to protect and promote. The interrelated concepts of the chain of command, unit cohesion, and good order and discipline are analyzed. I conclude that, at least on paper, the rationale underlying the military proscription against adultery is different from that put forth in the civilian context.

Part VI addresses the legal and historical development of the proscriptions against consensual sexual conduct.[15] Changes in the structure of the military force, particularly the integration of women into the military, are then explored and analyzed as possible explanations for the 1984 amendment of military criminal provisions to include a proscription against adultery. Comparison is made to the integration of women into the civilian workforce. By way of context and contrast, other types of crimes that the military includes under these two broader provisions are summarized; fraternization in particular is analyzed. Case law and statutory developments on adultery are outlined, including the 1998 proposals for amending the Manual for Courts-Martial (the "MCM").

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15. I want to note that other than briefly in Part IV(C) below, I do not address the legally and socially complex issues that have arisen around same-sex intimate relationships in the military. This contested area, although related to the subject of this paper, is carefully and thoroughly addressed by other scholars, particularly Janet E. Halley. *See* Janet E. Halley, *The Status/Conduct Distinction in the 1993 Revisions to Military Anti-Gay Policy–A Legal Archaeology*, 3 G.L.Q. 159 (1996); Kirsten Nussbaumer, *In the Shadow of the Court-Martial: Corporal Klinger, U.S. Military Homosexuality Policy, and Romer v. Evans* (1998) (unpublished manuscript, on file with the author). Stanford Law School maintains an internet website on the "don't ask/don't tell policy," including links to military regulations and scholarly commentary. *See Don't Ask. Don't Tell. Don't Pursue* (last modified May 13, 1998) <http://dont.stanford.edu/>.

Part VII provides an in-depth discussion of the various legal and sociological rationales or justifications for the existence and continuing viability of a military criminal sanction against adultery. I contend that justification for continued prosecution of adultery in the military sector is based in part on two conflicting arguments: (1) that the military's mission is unique and thereby justifies greater intervention into the interpersonal and moral lives of its members than might be considered appropriate (or even constitutional) by the general American public; and (2) that in order for the American public to have the requisite trust in the armed forces, higher moral standards must apply to soldiers than to civilians. I argue that the latter claim rests on the assumption that the American public finds adultery morally opprobrious, while the former assumes that the American public does not find adultery sufficiently offensive to warrant holding themselves to this "higher" moral standard. I argue that a third asserted basis for adultery sanctions in the military context—that adultery necessarily involves breaking a promise of fidelity, triggering subsequent general distrust of the adulterous service member by other service members—if taken to its logical extension, necessarily sweeps within its scope any service member who divorces, whether or not the cause of the marital dissolution is adultery. Finally, I suggest that these three underlying claims demonstrate a subtler fundamentalist backlash at work, one that we can anticipate will gain strength in the civilian sector as well. In other words, what might appear to be conflicting trends, in fact represent the end of a trend towards Lockeian liberalism, followed by a countervailing movement towards social conservatism.

I conclude that honor and morality are delicate areas for legal regulation in general, and that great care must be taken when criminal sanctions aim to instill values.[16] More specifically, the use of the rhetoric of honor is particularly powerful and can sway us even when we should not be moved. I urge more consid-

16. Martha Chamallas, for one, has addressed the link between morality and law in the context of sexual conduct. *See* Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct,* 61 S. CAL. L. REV. 777 (1988) [hereinafter *Consent, Equality*]. Chamallas articulates three approaches to the regulation of sexual conduct. The first approach she labels the "traditional view," which attempts to regulate morality through law. *Id.* She describes the contrasting "liberal view," which separates morality and law, and regulates consensual sexual conduct only to the extent it causes harm to third parties. *Id.* Finally, she articulates a third approach—the "egalitarian view"—which attempts to foster equality between the sexes. *Id.*

ered analysis of any rationale for adultery provisions based on the concept of honor, particularly since this same notion historically has been used to lessen the seriousness of the murder of an adulterous spouse and her paramour, and currently can be seen reemerging in cultural defense cases.

II. CIVILIAN SANCTIONS FOR ADULTERY: A BRIEF HISTORY

In order to put military sanctions against adultery into perspective, it is helpful first to briefly review the history of civilian adultery sanctions in Anglo-American jurisprudence. First, as a general matter, criminal sanctions for adultery existed at most points in Anglo-American legal history.[17] Sanctions against adultery have ranged from death to a fine.[18] Not only did statutory penalties vary, but the seriousness with which acts of adultery were prosecuted ebbed and flowed depending on the larger moral climate of the times.[19] During periods when adultery was a capital offense, juries often refused to convict precisely because the sentence was so harsh–a foreshadowing of more recent jury nullification issues.[20]

Actual rationales for the sanctions are not always certain, but two main theories can be articulated. One view is that criminal sanctions for adultery were originally based on the state's need to preempt violent and disruptive acts of "blood-vengeance," which were the mode of choice for a cuckold's[21] kinship

17. *See* Jeremy D. Weinstein, Note, *Adultery, Law, and the State: A History,* 38 HASTINGS L. J. 195, 225 (1986).

18. *See* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY, 13, 34-42, 54, 345-46, 125-48 (1993).

19. *See id.*

20. *See id.* at 41. *See also* Weinstein, *supra* note 17, at 228-29. Indications are that this refusal to convict was not limited to charges of adultery, but occurred in any case of a capital crime. *See* FRIEDMAN, *supra* note 18, at 41-44.

21. I choose the name cuckold reluctantly. As Martha Chamallas points out, there is no ungendered, unburdened, or unmarked word in the English language to name the person whose spouse has slept with another person. *See* Chamallas, *Gender Panic*, *supra* note 11, at 339 n.139. Chamallas chooses to call this person the "betrayed" spouse, but this is a cumbersome phrase. *Id.* Chamallas also acknowledges that it is underinclusive, since it excludes those who agreed to their spouse's sex act with another person. *See id.* She explicitly rejects the name cuckold, without giving any reason. *Id.* Although perhaps it is because "cuckold" carries with it a pejorative air deriving as it does from the French for cuckoo. *See* THE OXFORD ENGLISH DICTIONARY, COMPACT EDITION 619 (1971). It also may carry with it patriarchal notions of one whose "manly pride" has been violated by a spouse's infidelity. *Id.* A concept about which both Chamallas and I are skeptical. *See* Chamallas, *Gender Panic*, *supra* note 11, at 340-341; *See also infra* Parts VII, VIII.

group to avenge adulterous acts during the first century C.E. In other words, adultery sanctions were designed to provide an alternate form of vengeance to a cuckold and his family.[22] This line of argument rests in part on notions of marriage as a method of cementing familial alliances, and facilitating property transfers both between spouses' families and from parents to their progeny. Thus, this rationale appears to be secular in nature.[23] Concern with inter-generational property transfer derives from potential doubts about the actual paternity of children, less of an issue since the development of genetic testing in the 1970s and 1980s. The purposes served by state-imposed criminal sanctions were primarily retributive in nature in that they substituted state vengeance for the vengeance of the wronged party or parties, but undoubtedly also had a deterrent effect.

In a different context, that of enslaved women's relationships with the white men who enslaved them during pre- and post-bellum America, Professor Adrienne D. Davis struggles with this lack of appropriate terminology for the women about whom she is writing. *See* Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective,* 51 STAN. L. REV. 221, 229 (1999). "More troubling has been the inability to find satisfactory terms to refer to the black women I will discuss or to describe their relationships with the elite white men who enslaved them. Many phrases which appear descriptive, or which I might use as terms of art, carry too much social baggage to be helpful." *Id.* at 229.

Davis aligns the term "mistress" with privilege, "paramour" with quid pro quo, "lover" with adultery, "partner" with equality, and "sex slave" with the erotics of submission. *Id.* Davis rejects all of these terms as either racially coded and/or insufficient to "capture[ ] . . . the constraints or circumstances under which enslaved women lived and made decisions about their sexuality." *Id.* Davis' equating of "lover" with adultery does not work for the current discussion, however, because it refers to the sexual actors, and not to the second married party not involved in the sexual tryst(s).

22. *See generally,* Weinstein, *supra* note 17, at 201-12. In addition to arguing that adultery sanctions were a preemption of the cuckold's vengeance, Weinstein also argues that mitigation of the seriousness of murder by the cuckold of the wife's paramour is a form of institutionalization of vengeance by the state. *Id.* It is not clear, however, whether Weinstein ultimately is saying that the killing of a paramour is a passion killing, an honor killing, or something closer to the original blood vengeance taken by the cuckold's kinship group. *Cf., e.g.,* Lama Abu-Odeh, *Comparatively Speaking: The "Honor" of the "East" and the "Passion" of the "West,"* 1997 UTAH L. REV. 287 (1997) (arguing the distinction between honor and passion killings is superficial, although she agrees that honor killings are kinship and community based, while passion killings are individual).

23. On interfamily property transfers, see Weinstein, *supra* note 17, at 203-4. On intergenerational property transfers, see Major William T. Barto, *The Scarlet Letter and the Military Justice System,* 1997-AUG ARMY LAW. 3 (1997) (describing the Latin origins of the word adultery, and pointing out that at common law sex with a married woman was thought to "adulterate the blood" of the husband's offspring, thereby endangering inheritance); Siegel, *supra* note 10, at 46-47.

A second view is that Anglo-American sanctions against adultery were Judeo-Christian in origin. This account proposes that state prohibitions against adultery reflected nonsecular norms.[24] At times civilian courts refrained from intervening when an ecclesiastical court asserted jurisdiction over events relating to the marriage. At other times courts directly enforced those norms.[25] Both ecclesiastical courts and civilian courts established terms for rehabilitation of the offending party that allowed that person to then reintegrate into the community. Imposition of restrictions on contact between the unfaithful spouse and the interloper served incapacitation aims. The imposition of a death sentence served deterrence, retribution, and incapacitation purposes.[26]

Both of these historical accounts are probably accurate, depending on the particular time and geographical frame of reference being considered. Certainly elements of both claims continue to shadow current arguments regarding adultery. For example, in the criminal arena drafters of the Model Penal Code refused to include a sanction against adultery, taking the position that it was mere private immorality and that such acts fell outside the scope of criminal law.[27] In the civil context, states undoubtedly had an easier time passing no-fault divorce statutes in the 1970s, in part because the Church of England at that time issued a report advocating the elimination of fault-based divorce in some situations—including some cases involving adultery.[28]

During the latter half of the twentieth century, the number of adultery prosecutions in the civilian sector diminished significantly.[29] This decrease in criminal cases sometimes results from a rescission of laws proscribing the conduct, and other times simply from an unwillingness of law enforcement personnel to bring a criminal action for adultery.[30] Under Supreme Court and federal court decisions, consensual adultery may even be protected

24. *See* Barto, *supra* note 23, at 4; FRIEDMAN, *supra* note 18, at 31-58.

25. *See* FRIEDMAN, *supra* note 18, at 32-34; Weinstein, *supra* note 17, at 225-26.

26. *See* FRIEDMAN, *supra* note 18, at 41. On incapacitation, as Friedman puts it, from a death sentence there "was no danger of a return." *Id.* Similarly, taking a life is nothing if not retributive. Whether the death penalty is an effective deterrent is more contestable.

27. *See* 2 AM. JUR. 2D § 1.

28. *See* Jacob, *supra* note 2, at 315.

29. *See* FRIEDMAN, *supra* note 18, at 346.

30. *See id.*

under constitutional guarantees of privacy, although this is still a developing area of law.[31]

That said, however, statutory proscriptions against adultery are not extinct (although actual prosecutions may nearly be).[32] Some states are even contemplating broadening their adultery statutes. For example, during its 1998 session, the Maryland legislature not only refused to rescind the state's criminal statute penalizing adultery, but also considered amendments to expand the scope of the statute to sanction same-sex extramarital sexual conduct in an effort to "modernize" the law.[33]

III. A CAVEAT: ADULTERY AND DOMESTIC VIOLENCE IN THE MILITARY

The bald ordinariness and commonality of domestic violence increasingly garners public attention, particularly over the past two decades, swelling to a torrent with the arrest of former professional football player O.J. Simpson for the murder of his ex-wife, Nicole Brown Simpson and her friend, Ron Goldman.[34] In

31. *See* Winner, *supra* note 11, at 1079-93. Winner argues that the Supreme Court cases based on the sanctity of the marital and family relationship do not support a claim for constitutional protection for adulterous behavior. *Id.* In contrast the Supreme Court's autonomy-based privacy decisions do support constitutional protection for adultery. *See* Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972). Winner points out that *Bowers v. Hardwick,* followed by the apparently conflicting decision *Romer v. Evans*, muddied the waters of this developing Supreme Court doctrine significantly. *See* Bowers v. Hardwick, 478 U.S. 186, 204 (1986) (Blackmun, J., dissenting); Romer v. Evans, 517 U.S. 620 (1996). For federal courts following this reasoning and explicitly finding constitutional protection for adulterous acts, Winner cites two pre-*Bowers* and pre-*Romer* cases. *See* Thorne v. City of El Segundo, 726 F.2d 459 (9th Cir. 1983), *cert. denied,* 469 U.S. 979 (1984); Briggs v. North Muskegon Police Dep't, 563 F. Supp. 585 (W.D. Mich. 1983), *aff'd mem.*, 746 F.2d 1475 (6th Cir. 1984).

32. *See, e.g.,* MD. CODE ANN., Art. 27 § 3 (1957); ARIZ. REV. STAT. ANN. § 13-1408 (West 1956) (requiring that no prosecution can be maintained unless the betrayed spouse requests it). *See also infra* note 90 and accompanying text.

33. *See* Marquita Smith, *Bill To Modernize Adultery Law Defeated in House of Delegates,* 214 THE DAILY RECORD (Baltimore) Feb. 12, 1998, *available in* 1998 WL 9507018. (It is somehow ironic, but not unexpected, that the Maryland legislature wants to consider same-sex and opposite-sex extra marital sexual activity as equally harmful to marriage, at the same time that it refuses to recognize same-sex unions). Some states, again with Maryland included, continue to provide for fault-based divorce on the grounds of adultery. *See* MD. CODE ANN., FAM. LAW § 7-103(1). *See, e.g.,* Lorraine Lawrence-Whittaker, *Townsend, Curran Brief House On Domestic-Abuse Divorce Bill*, 214 THE DAILY RECORD (Baltimore) Feb. 5, 1998, *available in* 1998 WL 9507079.

34. Both a criminal trial and a civil wrongful death action connected with these events took place: California v. Simpson, No. BA097211, Superior Ct. L.A. County,

the civilian sector, the prevalence of domestic violence is now well documented. Also well documented is that domestic violence is a very gender specific crime. Ninety-five percent of all domestic violence is committed by men against women.[35]

The rates of domestic violence in the military, as well as in civilian police forces, are at least as high as those in the non-law enforcement sectors of the population, and are probably higher.[36] Reports indicate that as many as forty percent of civilian police officers batter their spouses or partners as compared with ten percent of families in the non-law enforcement population.[37] Similarly, according to recent reports, the rates are much higher in the military context than in the general population.[38] In 1996, Madeline Morris stated:

> Direct measures comparing military and civilian attitudes regarding violence against women are lacking. However, recent

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Dept. 103, and Brown v. Simpson, Nos. SC031947, SC036340, and SC036876, Superior Court, L.A. County. Westlaw maintains databases of the trial transcripts, court orders, and expert commentary on these proceedings. *See* Westlaw databases titled OJCIV-TRANS (civil trial transcripts and related documents), OJ-TRANS (criminal trial transcripts and related documents) and OJ-COMMENT (commentary by experts in various fields).

35. *See* RONET BACHMAN & LINDA E. SALTZMAN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY (Aug. 1995). *But see infra* note 38 for a discussion of the conflicting research of Richard Gelles. Overall crime rates are similarly gendered. *See* Denno, *supra* note 14, at 80-82 nn.1-8 and accompanying text.

36. *See* e-mail communication with Sargeant Anne O'Dell, noted authority and speaker on domestic violence issues, including police domestic violence (Feb. 10, 1999). She reports that there are three rather controversial studies on the issue of domestic violence by police officers, all of which reported between 30% and 40% of officers self-admitting to violence in the home. Two of these studies were from surveys completed at law enforcement conferences. Dr. Eleanor Boulin-Johnson completed the third study. *See generally Man Killed Wife During Rough Sex*, ASSOC-PRESS, Oct. 28, 1998 (Former sheriff's deputy claimed he strangled his wife during rough sex, then tried to cover it up by staging a traffic accident. Both the defendant, Scott Anderson, and his wife, Teresa Anderson, were Los Angeles County Sheriff's deputies); Hans S. Moran, *Case Against Ex-officer Dropped at Wife's Request,* DESERET NEWS, July 17, 1998 *available in* 1998 WL 13862884; Susan Sward & Bill Wallace, *Decorated Cop Violated Court Order, Judge Rules,* S.F. CHRON., Jan. 10, 1998, at A13.

37. *See Feminist Majority Foundation Police Family Violence Fact Sheet* (visited Feb. 10, 1999) <http://www.feminist.org/police/pfvfacts.html>.

38. *See* Ed Bradley, *The War at Home, 60 Minutes* (CBS television broadcast, Jan. 17, 1999); Mark Thompson, *The Living Room War: As the U.S. Military Shrinks, Family Violence Is on the Rise: Can the Pentagon Do More to Prevent It?,* TIME, May 23, 1994, at 48. *But see* Richard Gelles, Editorial, *"60 Minutes" Battered the Truth*, WASH. TIMES, Feb. 4, 1999, at A19. Gelles disputes the figures used by *60 Minutes*, claiming that the report was based on a flawed reading of his own research for the

> studies conducted by the Army do suggest elevated rates of domestic abuse of the female partners of Army personnel as compared with rates of abuse of the female partners of civilian men. This heightened rate in the Army population of violent abuse of women may (though it does not necessarily) reflect underlying attitudes in the Army population that are more accepting of violence against women than are the attitudes in the civilian population.[39]

In January 1999, *60 Minutes* reported that the rate of domestic violence by military service members is five times that of civilians.[40] The Army consistently shows the highest rate followed by

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military, a 1993 study for the Army. *Id.; see also* e-mail communication from Christine Hansen, who provides institutional support and advocacy on behalf of victims of domestic violence in the military context under funding from The Miles Foundation, a private, nonprofit corporation dedicated to these issues (Feb. 10, 1999). Hansen provided information and advice on working with victims to *60 Minutes* for that program. As Gelles' research for the military remains classified, it would have been impossible for *60 Minutes* to have based its own report on Gelles' work. *See id.* Others who provided information to *60 Minutes* for the broadcast dispute that Gelles' study formed the basis for *60 Minutes'* report of high military domestic violence rates. *See* e-mail communication with Christine Hansen (Feb. 5, 1999). *60 Minutes* based its statistics not on Gelles' study, but on internal Department of Defense documents, Department of Justice documents, interviews, and so on. *See* e-mail communication with Christine Hansen (Feb. 10, 1999). Additional unclassified studies conducted for the military are: CALIBER ASSOCIATES, FINAL REPORT ON THE STUDY OF SPOUSAL ABUSE IN THE ARMED FORCES (1994), UNDERSECRETARY OF DEFENSE FOR PERSONNEL (1996), ABUSE VICTIMS STUDY (1996), but they may or may not have been relied upon by *60 Minutes*.

In addition to Gelles' misrepresentation about the connection between his own work and the *60 Minutes* broadcast, his research techniques and results are criticized more generally on a number of levels by others doing research on domestic violence prevalence. In particular, individuals dispute the results of Gelles' civilian domestic violence research because it is based on the development and use of a flawed survey tool, the Conflicts Tactic Scale. *See, e.g.,* ANN JONES, NEXT TIME SHE'LL BE DEAD: BATTERING AND HOW TO STOP IT 154-155 (1994); *Women Abusing Men: Strauss Defends Theory Despite Data - UNH Researcher Defends Theory on Women Abusing Men,* ASSOC. PRESS, Mar. 1, 1998. *But see, e.g.,* Dave Moniz, *Experts Differ on Military Domestic Violence,* THE RECORD, THE STATE-RECORD CO., Jan. 31, 1999, Section: Impact, at D1.

39. Madeline Morris, *By Force of Arms: Rape, War and Military Culture,* 45 DUKE L.J. 651, 719-20 (1996) (citing Eric Schmitt, *Military Struggling to Stem an Increase in Family Violence*, N.Y. TIMES, May 23, 1994, at A1). *See also* William A. Griffin & Allison R. Morgan, *Conflict in Maritally Distressed Military Couples,* 16 AM. J. FAM. THERAPY 14 (1988) (stating preliminary findings that military wives are more likely than civilian wives to be physically abused); Thompson, *supra* note 38, at 48.

40. *See* Bradley, *supra* note 38. Bradley also reported that at Camp Pendleton in California (one locale for the storyline) military commanders did not court-martial a single one of the offenders accused of domestic violence. *See id.* However, it is less clear what steps the military might have taken short of a court-martial and whether less drastic steps were as effective as a full court-martial would have been. *See* e-mail communication from Trish Erwin, Training and Program Development

the Marines, Navy, and Air Force.[41] Increased levels of domestic violence by soldiers during wartime are also documented.[42]

It is instructive to look at a study of another gender-based crime committed by soldiers—the crime of rape. In 1996, Madeline Morris reported her findings on the levels of criminal activity by soldiers as compared with civilians, further comparing statistics of wartime versus peacetime criminal activity by soldiers.[43] Morris first recounts that soldiers commit substantially less crime than civilians during peacetime,[44] although she could not distinguish from the statistics she had available what forms of criminal activity, such as domestic violence, were at issue.[45] She next points out that during wartime soldiers' levels of criminal activity rise substantially, but still do not reach the levels of crime in the civilian sector, with one notable exception—the crime of rape.[46] She discovered that not only do military rape rates increase disproportionately during wartime as opposed to other violent crime rates by soldiers, but also that during peacetime following a time of war, military service correlates with a much lesser diminution in rape than in other violent crimes.[47] The numbers are

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Specialist, Minnesota Domestic Abuse Intervention Project (Oct. 31, 1998) (reporting that the Marine Corps came to MDAIP long before the *60 Minutes* report, and requested assistance in developing and implementing a domestic violence intervention program to use on their bases. Erwin was part of the implementation stage of that project. Subsequent to the *60 Minutes* report military leaders, domestic violence advocates, and members of Congress began meeting to evaluate the situation. *See* telephone interview with Christine Hansen (Institutional Support and Advocacy for Victims, The Miles Foundation) (Jan. 1999). *See, e.g.,* Beth J. Harpaz, *Maloney Seeks Military Abuse Probe,* ASSOC-PRESS, Jan. 18, 1999 ("Rep. Carolyn Maloney on Monday called for Congressional hearings on domestic violence in the military amidst reports . . . ."). Clearly, this is a fluid and evolving situation; I include here the best information available at the time this Article went to the publisher.

41. *See* Hansen, *supra* note 38.

42. *See* Jennifer Turpin, *Many Faces: Women Confronting War, in* WOMEN AND WAR READER 3, 7 (Lois Ann Lorentzen & Jennifer Turpin eds., 1998).

43. *See* Morris, *supra* note 39, at 656-73.

44. *See id.* at 659.

45. As her statement about domestic violence in the military indicates, Morris is aware that domestic violence is a gendered crime. *See supra* text accompanying note 39. However, the categories of statistics available to Morris for the peacetime and wartime studies were murder or non-negligent manslaughter, aggravated assault, and forcible rape. *See id.* Thus, domestic violence might be included in any or all of the categories evaluated by Morris, as well as in lesser degrees of assault. Further, for purposes of her comparison of forcible rape rates, Morris then combines the murder or non-negligent manslaughter category with that of aggravated assault for a category she calls "other violent crime." *Id.* at 661.

46. *See id.* at 664.

47. *See id.* at 672.

significant. She found that during wartime, the military rape rate rose to 260% of the civilian rate (over two and one-half times higher) when soldiers were stationed in allies' territory,[48] and when soldiers were in enemy territory, the rate rose to 366% (almost four times higher than the civilian rate).[49] She concludes:

> The differences between patterns of rape rates and other violent crime rates . . . are of sufficient magnitude to suggest—even accounting for inevitable distortions from reporting, processing, and record-keeping practices—that rape in war is a crime influenced by dynamics at least in part distinct from those influencing other violent crimes in war. If "war factors" such as diminished deterrents, foreign lands, chaos, violence, and terror accounted for violent crimes in war homogeneously, then we would expect the rates of the various crimes such as rape, murder/[non-negligent manslaughter], and aggravated assault to follow similar patterns. But they do not. Rather, rape is distinct from other crimes of violence in war, as is reflected in its far *greater* increase during peak-violent-crime periods.[50]

It is certainly possible that the dynamics underpinning the crime of rape and those leading to the similarly gendered crime of intimate violence are equally exacerbated in the military context, particularly during times of war.[51] Explanations for these phenomena need greater study, but one possibility is that they result from the military's indoctrination of its members with a value of dominance[52] and with the idea that force is a legitimate way to gain compliance.[53] Most domestic violence perpetrators project

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48. *See id.* at 666.

49. *See id.* at 669-670.

50. *Id.* at 673.

51. It might also be the case, however, that rape is intrinsically related to the nature of war in a way that domestic violence is not. Sophie Pirie, Consulting Professor at Standford Law School, made this observation when an earlier draft of this paper was presented at the Stanford Women's Human Rights Forum (May 8, 1998). Pirie has suggested that the project of war in its most simplistic sense can be viewed as the protection by men of their homes, families, and way of life. Losing a war, she argued, thus means losing their families—their women and children—to the other. Winning a war, by contrast, means taking the others' women and children. Rape is an act that carries out this conquest. *Cf.* Sharon A. Healey, *Prosecuting Rape Under the Statute of The War Crimes Tribunal for the Former Yugoslavia,* 21 BROOK. J. INT'L L. 327, 351 (1995) ("Writers have said that '[m]en of a conquered nation traditionally view the rape of "their women" as the ultimate humiliation, a sexual coup de grace.'") (citations omitted). If Pirie is right, then abuse of one's own wife or girlfriend does not fit neatly within this paradigm, and the analogy to rape by soldiers may not hold.

52. *See* Morris, *supra* note 39, at 751.

53. *See* Morris, *supra* note 39, at 702-03 (describing the inculcation of this belief as related to increased military rape rates). Morris and others also discuss the in-

a belief that their wives or partners should be obedient and batter them for their failure to obey. Thus, the military ethos may aggravate the problem of domestic violence.

So, what is the relevance of domestic violence to adultery? Social and legal norms regarding infidelity serve to exacerbate domestic violence. As Martha Chamallas puts it: "[t]he law of sex . . . can operate as a value generating force when those who create or are governed by it perceive in the law an underlying vision of appropriate sexual conduct."[54] In criminalizing adultery, law constructs a vision of sexual conduct where infidelity is deserving of the harshest of legal sanctions—criminal punishment. As I will discuss, battering maintains a unique relationship to jealousy (whether the jealousy is real or constructed, and whether it is based on real or imagined infidelity), in that a batterer's jealousy often forms the context in which physical or emotional violence erupts. Adultery sanctions add fuel to this incendiary situation.

As a general descriptive matter, and regardless of civilian or military context, the behavior of domestic violence perpetrators ranges from name calling, to slaps and punches, to rape, and all too frequently, to murder.[55] Any number of small offenses may trigger a perpetrator to beat his spouse or partner.[56] One phenomenon, however, is common to many victims—their partners' real or constructed jealousy over a real or imagined infidelity frequently underlies the batterers' rationalization for their violence.[57]

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crease of rape by soldiers during wartime. *See id.* at 654 n.5; Turpin, *supra* note 42, at 7.

54. *See* Chamallas, *Consent, Equality, supra* note 16, at 777; *accord* Kathryn Abrams, *Songs of Innocence and Experience: Dominance Feminism in the University*, 103 YALE L. J. 1533, 1555 n.83 (1994) (law encourages certain behaviors).

55. *See* Jones, *supra* note 38, at 81-105.

56. *See id.* at 97. A batterer's rationalization for battering might include: "'She forgot to buy gin,' 'She said she had a headache,' 'She knows I hate macaroni.'" *Id.*

57. *See* Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/ Men Who Kill,* 2 S. CAL. REV. L. & WOMEN'S STUD. 71, 71-72 (1992). *See also* Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence As Torture,* 25 COLUM. HUM. RTS. L. REV. 291, 332 (1994) (arguing jealousy often precedes violence).

My experience working with victims generally epitomized this exact phenomenon. A typical client response to the question, "Was your batterer jealous?" was, "Yes. How did you know?" Studies of motivations for spousal homicide replicate this scenario. *See infra* notes 56-64 and accompanying text. Others have distinguished between different types of batterers, one of which includes the jealous, controlling type most commonly described by my clients. *See, e.g.,* DONALD G. DUTTON WITH SUSAN K. GOLANT, THE BATTERER: A PSYCHOLOGICAL PROFILE

My first client, Sadie C., presented an horrific example of this pattern. Sadie separated from her husband and got an order of protection against him the first time he was physically violent towards her. He had put his hands around her neck, and, using his full six-plus feet of height, lifted her off of the floor shaking her by the neck like a rag doll. Sadie took no chances he would repeat this, and promptly moved out with their children. When he learned that she later started dating someone else, he told a friend: "If I can't have her, no one will." He tracked her down at a laundromat, doused her face, hair, and body with gasoline, and lit her on fire. She suffered massive burns over the entire top half of her body and remains badly disfigured to this day.[58]

At the most extreme and most telling end, women are sometimes beaten when their *batterers* are having affairs and they, the victims, are not.[59] The scenario looks something like this: the batterer returns home from a rendezvous with his lover, launches into accusations against his wife that *she* is having an affair, and begins beating her for her alleged infidelity.[60]

34-35 (1995); Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence,* 39 WM. & MARY L. REV. 1505, 1584 & n.127 (1998) (citing Stephen D. Hart, *The Prevalence of Personality Disorders Among Wife Assaulters*, 7 J. Personality Disorders 329, 330 (1993)).

58. When I met Sadie she arrived in my office with a plastic mask covering her whole face to prevent air and dirt from reaching her still raw wounds. Her six-year-old daughter did not understand that this horribly disfigured person was her mother. She would ask Sadie, "When is my mom coming back?" When her daughter said this to her, it was little consolation that her ex-husband was serving a life sentence for attacking her. Even now, after multiple skin grafts, Sadie's formerly flawless skin remains gnarled, and her hair grows in patchily.

59. Studies of the phenomenon have been replicated in other countries, including Mexico and Peru. *See* MATTHEW C. GUTMANN, THE MEANINGS OF MACHO: BEING A MAN IN MEXICO CITY 212 (1996) (documenting phenomenon in Mexico); Penelope Harvey, *Domestic Violence in the Peruvian Andes, in* SEX & VIOLENCE: ISSUES IN REPRESENTATION & EXPERIENCE 66, 74-78 (Penelope Harvey & Peter Gow eds., 1994) (documenting jealousy issue in one cultural group in Peru). For a related account of gender differences in causes of homicide in Australia, see Kenneth Polk & David Ranson, *The Role of Gender in Intimate Homicide,* 24 AUST. & N.Z. J. CRIMINOLOGY 15 (1991).

60. It might be that the batterer seeks to deflect his wife's attention from his own infidelity or, because of his own unfaithfulness, recognizes that others (including his wife) could also be unfaithful. Alternatively, on a more complicated level, the batterer may correlate his lover's ability to engage in transgressive sexual conduct with a belief in all women's basic deceitfulness, including that of his wife. The rationalization obviously may differ from batterer to batterer and may be different in different cultural contexts. This is an area only recently being investigated and is in need of further study.

Homicidal and non-homicidal domestic violence is gendered, not only in numbers, but also in the intent of the offender and in the extent of damage inflicted. Recent Department of Justice statistics on murder indicate that three-quarters of all homicides committed by current or former spouses or partners are of women, and only one-quarter involve women killing men.[61] This fact exists even though the overall rates of homicide for men are three times that for women.[62] About one-third of all murders of women are by a current or former intimate, and the actual number may be even higher.[63] By contrast, only a little over three percent of homicides of men are committed by women with whom they are or were previously involved.[64]

Closer review of homicide cases reveals clear differences in the reasons women kill men as opposed to the reasons men kill women.[65] Women overwhelmingly kill men after their supposed "victims" inflict repeated beatings, rapes, and other horrors on them. Women most often commit homicide in self-defense and as a last resort.[66] In most cases, women are under direct attack

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61. *See* Bachman & Saltzman, *supra* note 35, at 4.

62. *See id.* In 1992, 5,001 women were murdered; of these, 1,414 were murdered by their current or former partners. During this same year, 21,223 men were murdered; only 637 of these men were murdered by their current or former partners. *See id.* Bachman and Saltzman provide the following caution: "Because in 41% of male homicides and 31% of female homicides the victim-offender relationship was not identified, readers are urged to use caution in interpreting these estimates." *Id.*

63. *See id.* In one-third of female homicides the relationship of the victim to the murderer is not identified. A number of these likely involve a current or former intimate partner. *See id.*

64. *See id.*

65. *See, e.g.,* Angela Browne, WHEN BATTERED WOMEN KILL (1987); ANN JONES, WOMEN WHO KILL (1996). Similar studies have been conducted in Australia with similar results. *See* Kenneth J. Arenson, *Causation in the Criminal Law: A Search for Doctrinal Consistency* 20 CRIM. L.J. 189, 223 (1996) (gender specific response patterns in criminal defenses); Denno, *supra* note 14, at 125-26, 150. Denno critiques the essentialism inherent in the battered woman's syndrome arguments. *See id.* at 148-52. Unfortunately, her argument references earlier uses of battered woman's syndrome testimony, where it was employed to show only why the woman did not leave the battering relationship. This approach, which relied upon Lenore Walker's theory of learned helplessness, has been significantly expanded and reworked. Battered women self-defense cases now tend to emphasize the need to tell the whole story (previously limited by criminal law doctrine), rather than a pathologizing account of the woman's state of mind. *See* Quince Hopkins, *Domestic Violence as Torture: Possibilities and Limits of the Law in Combating the Psychological Harm and Patterned Nature of Domestic Violence*, (L.L.M. Thesis, on file with the author); Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals,* 140 U. PA. L. REV. 379 (1991).

66. *See* Lenore Walker, BATTERED WOMAN SYNDROME (1984); Maguigan, *supra* note 65, at 384. *See also* Martha Mahoney, *Legal Images of Battered Women:*

when they strike back.[67] Similarly, in other cases, women who murder have even physically separated from their partners and act in "traditional" self-defense when their partners come after them.[68] In some cases, however, the nature of battered women's self-defense does not reflect self-defense norms at common law, particularly the doctrine's requirement that the defendant be under a reasonable apprehension of imminent harm. Occasionally, battered women are not under direct attack when they act, but nonetheless perceive that they must strike out to protect themselves or their children from imminent bodily harm at their batterers' hands.[69] In recognition of this, many states allow testimony of the history of abuse in the relationship to establish a claim of self-defense.[70] Although scholars currently contest its necessity or even its appropriateness,[71] many states now allow the introduction of expert testimony on battered woman's syndrome.[72] Sometimes experts testify to explain why the woman

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Redefining the Issue of Separation, 90 MICH. L. REV. 1, 68-69 (1991) (describing the case of Francine Hughes, the woman whose life served as the basis for the movie, *The Burning Bed,* starring Farrah Fawcett).

67. *Compare* Maguigan, *supra* note 65, at 384 (estimating that 70% to 90% of women kill in traditional self-defense scenarios); *with* Mahoney, *supra* note 66, at 64-65 (noting that only 10% of men killed by their wives are killed following separation as compared with 50% of women who are killed following separation).

68. *See* Mahoney, *supra* note 66, at 64-65 (noting that 50% of women who separate from their abusers are reassaulted after the separation and 50% of women who are murdered by their husbands are killed following separation; 10% of women kill their husbands after they have separated from them). Mahoney coins the term "separation assault" to describe the situation where a woman is assaulted after leaving her batterer. *Id.*

69. Although only 10% of the homicide cases fall into this category, these situations, nonetheless, present interesting legal, theoretical, and practical challenges. *See generally* Maguigan, *supra* note 65, at 385 (arguing that most cases of battered women who kill fall into the traditional self-defense category); Mahoney, *supra* note 66 (discussing the multiple real life reasons women cannot leave abusive relationships and the multiple unsuccessful attempts many women make to leave, using Francine Hughes as an example of a woman who struck out in her belief that she must kill her abuser despite the fact she was not under direct attack).

70. *See* ARIZ. REV. STAT. ANN. § 13-415 (providing that where there has been a history of domestic violence, a determination of self-defense shall be made using the state of mind of a person who has been a victim of that violence).

71. *See, e.g.,* Maguigan, *supra* note 65, at 386 (arguing that battered women who kill fall under traditional self-defense standards and that battered woman's syndrome theory is, therefore, redundant); Mahoney, *supra* note 66, at 82 (arguing for continued use of expert testimony because of the unique nature of domestic violence).

72. See, e.g., Cal. Evid. Code Ann. § 1107 (expert testimony allowed on the issue of self-defense); *cf.* A.R.S. § 1403 (providing for testimony on battered person's syndrome in the context of clemency cases).

stayed in the abusive relationship. More recently, experts testify to explain the battered woman's state of mind and to demonstrate the reasonableness of her belief that the harm was imminent.[73]

By contrast, men overwhelmingly kill their wives or partners following separation.[74] This separation usually involves her actual physical separation from him or announcing her intention to separate.[75] Sometimes, she may leave because she is involved with someone else. Occasionally, it is a constructive separation, when she "leaves" by sleeping with someone else.[76] In the majority of cases, the typical claim made by men who have killed a wife or girlfriend is that they were "provoked" by her perceived or actual infidelity.[77]

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73. Numerous articles have addressed this evolution. *See, e.g.,* Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195 (1986), *reprinted in* NANCY K.D. LEMON, DOMESTIC VIOLENCE LAW: A COMPREHENSIVE OVERVIEW OF CASES AND SOURCES 645 (1996); Maguigan, *supra* note 65, at 421-31; Mahoney, *supra* note 66, at 34-43.

74. *See* Mahoney, *supra* note 66, at 64.

75. *See* Mahoney, *supra* note 66, at 61. *See generally* Coker, *supra* note 57.

76. *See id.*; *see also* Mahoney, *supra* note 66.

77. *See* Coker, *supra* note 57, at 91 (approximately 60% of men who kill their wives allege sexual infidelity and 50% say she deserted him) (citing George W. Barnard et al., *Till Death Do Us Part: A Study of Spouse Murder,* 10 BULL. AM. ACAD. PSYCHIATRY & L. 271, 274 (1982)). The provocation defense is based on the idea that it is in "human nature" to feel such pain when one's spouse or partner is unfaithful that one is *driven* to murder—that one is so consumed by torment or "passion" that murder is somewhat understandable. *See* Elizabeth M. Schneider, *Resistance to Equality,* 57 U. PITT. L. REV. 477, 492-493 (1996). However, most murders portrayed as crimes of passion in fact obscure relationships dominated by violence coupled with a more general pattern of controlling behaviors exercised by the batterers or murderers against the victims. *See* Coker, *supra* note 57, at 88. In this light, the crime of passion begins to look less like a crime of the heart and more like one of a desperate despot attempting to bring his subject back to heel.

The conceptualization of a batterer as a tyrant is not new. Elaine Scarry describes torture as a comprehensive overtaking of the victim's physical and mental worlds through a combination of acts of psychological and physical violence. *See* Elaine Scarry, THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD (1985). Relying on Scarry's description, Rhonda Copelon argues for the expansion of international torture prohibitions to encompass private domestic violence. *See* Copelon, *supra* note 57. Spinning off of Copelon, Jane Maslow Cohen similarly argues for the creation of a domestic crime of torture to cover cases of domestic violence, describing the acts of a batterer as analogous to a despot. *See* Jane Maslow Cohen, *Regimes of Private Tyranny: What do they Mean to Morality and for the Criminal Law?*, 72 U. PITT. L. REV. 757 (1996). There are interesting issues underlying American law's difficulty in dealing with psychological harm and patterned conduct that would need to be addressed before Cohen's proposal could come to pass. For an analysis of these problematic issues, see Hopkins, *supra* note 65.

Any provisions on adultery must be looked at with this in mind: men and women both commit adultery. Both men and women are unfaithful;[78] but a man's infidelity rarely leads to his death, while even the perception of a woman's infidelity all too often leads to her death.[79] In reviewing any sanctions against adultery, one must also look at the roles that real and imagined

78. *See* Siegel, *supra* note 10, at 55-56 (noting that 50% of husbands and 33-40% of wives admit to having committed adultery).

79. Any evaluation of adultery sanctions, whether in a military or civilian context, must also take into account the relationship between race and adultery in light of the American legal and social norms circumscribing African-Americans' relationships over the last two centuries. Legal bars or limitations to marriage and sexual relationships between enslaved peoples, between enslaved and freedpersons, and between whites and blacks may or may not have prevented spouse-like commitments for African-Americans during that time. This is a subject of fluctuating research and debate. *See* ORLANDO PATTERSON, RITUALS OF BLOOD: CONSEQUENCES OF SLAVERY IN TWO AMERICAN CENTURIES 25-53 (1998). However, these legal provisions certainly express a clear devaluation—in fact, a nonvaluation—of African-Americans' intimate relationships. *See id. See generally* EDWARD BALL, SLAVES IN THE FAMILY 106 (1959) (describing legal prohibition on sex between white women and enslaved blacks); CHARLES JOHNSON & PATRICIA SMITH, AFRICANS IN AMERICA: AMERICA'S JOURNEY THROUGH SLAVERY 46, 89 (1998) (describing legal prohibition on marriages between whites and blacks and mentioning extralegal marriages between slaves); BRENDA E. STEVENSON, LIFE IN BLACK AND WHITE: FAMILY AND COMMUNITY IN THE SLAVE SOUTH 226-257 (1996) describing slave marriages and family relations); Davis, *supra* note 21 (discussing the impact of these restrictions on subsequent inheritance determinations).

In addition to legal barriers to relationships, harsh practical hindrances were imposed by slavery and slave owners. Enslaved people were regularly sold away from their spouses and families, usually with no hope of ever being reunited. *See, e.g.*, PATTERSON at 42; STEVENSON at 231-232. Finding appropriate partners also forced a number of the enslaved to join in "abroad marriages" to people held captive on other plantations. *See* PATTERSON at 36-37; STEVENSON at 229, 233. In these situations, separated spouses would sometimes understandably develop new relationships. *See* PATTERSON at 36-37. Similarly, the disrespect and violation by white men and slave owners inflicted upon enslaved women through the rape and coercion of sex also adds a different nuance to discussions of adultery. *See, e.g.*, JOHNSON & SMITH at 364 (sexual assault on Harriet Jacobs); PATTERSON at 32 (slave men's inability to protect their partners from sexual violation by other men).

What is the meaning of a supposedly adulterous act in this context, or in the wake of this history? On the one hand it is arguably the case that criminal penalties for violating a civil marital bond may further bolster that bond. In light of historical non-recognition of one's relationship, both a civil and criminal law provision supporting that relationship may appear desirable. The analogy to the current status of gay and lesbian relationships is obvious here. On the other hand, one might of course question whether the legal recognition of a relationship is relevant to the solidity of the relationship itself. Strong slave relationships existed despite heavy legal and practical barriers, and strong gay and lesbian unions exist today despite different yet similarly harsh legal and social barriers. It is clear that the continuing reverberations from the real trappings of slavery must be taken into account when deciding whether legal provisions against adultery should be banned, continued, or even strengthened.

infidelity and jealousy play in both homicide and non-homicide domestic violence cases. If imagined adultery triggers battering and sometimes homicide, actual adultery certainly will as well.

Several factors in the military environment further exacerbate this problem: the availability of guns;[80] relative isolation from the rest of society; and each other's spouses (who might also be service members) as the most available partners for actual or imagined adulterous liaisons.[81] If nothing else, the chance of service members killing each other should be of concern to military commanders.[82]

An argument can also be made that the actuality or threat of sexual liaisons between home-based service members and the spouses of soldiers stationed away from home affects the morale of those deployed elsewhere.[83] Adultery sanctions or other controls of consensual sexual behavior, however, are not necessarily the socially best or even most effective way to shore up that morale. That is, if one fears infidelity by one's partner, the existence

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80. For further discussion of military on-base weapons policy, see *infra* Part VII, Section G.

81. I do not mean to say that there are no other potential partners available to military men and women outside of each others' spouses. As Diane Mazur points out, where spouses of service members are present, civilian men and women are also present. *See* Interview with Diane Mazur, Associate Professor of Law, Captain United States Air Force 1979-1983, University of Florida School of Law (Oct. 1998). Rather, my point is simply that spouses will be the most *available* option. Presence or access certainly smoothes the path for action. The availability issue and its impact has been put this way by one commander:

> There is a tremendous difference between a couple of young, unhappy sailors whose marriages have gone on the rocks going off for a weekend and an officer, who during a deployment [is] running around with other officers' wives back in the home port while he's back at a school away from the deployment. There's a tremendous difference in terms of the human dimension of this, in terms of the effect on the morale of the unit and the standards that you expect. . . .

Admiral Blair, Department of Defense News Briefing (July 29, 1998) (discussing 1998 proposed amendments to the MCM) (visited Nov. 16, 1998) <http://www.defenselink.mil/news/Jul1998/t07291998_t0729asd.html>.

82. While actual incidence of this is low, it does happen. For instance, in *United States v. Schap*, Sergeant Stephen Schap brutally killed another service member, Specialist Glover, who became involved with Schap's wife. 44 M.J. 512 (Army Ct. Crim. App. 1996), discussed *infra* Part VII.

83. This was the situation, for instance, in *United States v. Schap*, 44 M.J. 512. Compare the situation of Major General David Hale who had a sexual relationship with the wife of a subordinate while they were both stationed overseas. *See* Mark Thompson, *Sex, the Army and a Double Standard*, TIME, May 4, 1998, 30-32; Bradley Graham, *Hale Case Spurs Tighter Army Retirement Process*, WASH. POST, July 8, 1998, at A4. I do not want to suggest, however, that adultery sanctions are the proper way to deal with this phenomenon.

of a legal sanction proscribing that conduct will not necessarily dispel one's doubt.

As discussed in Part VIII, controlling domestic violence through the control of sex itself, and particularly through criminalizing adultery, is suspect. Instead, should we not rather engage in the larger project of reconstructing social norms that support violent responses to infidelity? It could be argued, for instance, that criminal sanctions for adultery might provide an outlet—an alternative to violent retribution by the cuckold—such that taking away institutionalized vengeance[84] will in fact lead to an *increase* in this retaliatory violence. While this claim at first blush appears to have merit, it rests on an underlying premise that responding to infidelity with violence is unchangeable—that it is an essential aspect of human nature rather than a socially constructed response. My claim is that the opposite may in fact be the case. Violent responses to real or perceived infidelity arise from socially constructed norms, and criminalization of adultery feeds those norms. Legal sanctions can send powerful messages. One of the messages sent by sanctions against adultery is that society views extra-marital affairs as serious enough to warrant not just civil, but criminal penalties.[85] This may give a batterer additional license or rationalization to pursue extra-judicial remedies to penalize suspected or real acts of infidelity through assault or homicide. Perhaps we need to send a different message.

IV. ADULTERY IN THE MILITARY

> Adultery in the military was as commonplace as fleas on a buffalo—and transcended all ranks, from the much married general who bragged that he would seduce a secretary or service woman by sundown on every base in his command—to the pilots who flew [the] "mile high club" (sex at over a mile high) . . . . And many of us have often said that if we had a dollar

84. See generally Chamallas *supra* note 16 (characterizing adultery sanctions as state institutionalization of vengeance). Professor Barbara Atwood also suggested this when an earlier draft of this Article was presented to the faculty at the University of Arizona College of Law in April, 1998.

85. Another implicit message is that heterosexual monogamous relationships are the only acceptable form of relationships. In the event same-sex unions attain legal recognition, the message would be altered somewhat. However, preference for legally blessed monogamous relationships would remain static.

> for every married man that hit on us . . . when we were in the service we'd be living in mansions and driving Rolls ['] . . . .[86]

A. *Background*

Numerous sex-related scandals have rocked the United States military. They include the Tailhook fiasco when, among other incidents, female members of the Air Force were forced to run a gauntlet where they were grabbed and harassed by male members of the Air Force,[87] allegations of widespread sexual harassment of new recruits in military training facilities including military academies,[88] and the possible disparate handling of the adultery charges against Lieutenant Kelly Flinn[89] and General Joseph Ralston.[90] In the wake of these scandals, the United States Secretary of Defense and the Joint Services Committee began reviewing military policies and practices related to various forms of sexual activity in the military.[91] The Task Force's mis-

86. Comments of Captain Barbara Wilson, USAF, (Retired) on her 22 years of active duty service, both as an officer and as enlisted personnel. Minerva website, discussion list of current and former military personnel (visited Nov. 1, 1997) <http://www.h-net.msu.edu/logs/showlog.cgi?ent=0&file=h-minerva.log9705a/16&list=h-minerva>.

87. *See* Lieutenant Commander J. Richard Chema, *Arresting "Tailhook:" The Prosecution of Sexual Harassment in the Military*, 140 MIL. L. REV. 1 (1993); *How to Create Military Leaders without Hazing, Ratlines or (Undue) Terror*, N.Y. TIMES, Oct. 12, 1997; MCMICHAEL, *supra* note 11.

88. *See* LINDA BIRD FRANCKE, GROUND ZERO: THE GENDER WARS IN THE MILITARY 152-182 (1997) (analyzing harassment in the military in general and at the academies); Chamallas, *supra* note 11, at 310-12 (describing the sexual harassment prosecution against Sergeant Major Gene Kinney, among others, including the possible racial bias in military prosecutions for sexual harassment).

89. Flinn was one of the first women to pilot a B-52 bomber. She was dishonorably discharged in connection with her intimate relationship with the spouse of a subordinate in another unit. *See* Nancy Gibbs, *The Wrong Stuff? The Inside Story of Lieut. Kelly Flinn*, TIME, June 2, 1997, at 28. For analysis of a different possible handling of Ralston and Flinn, see discussion of the new nine factor regulations *infra* at Part V(D).

90. Ralston was not discharged upon discovery of an earlier adulterous relationship, though his nomination for Chairman for Joint Chiefs of Staff was rescinded. *See* Office of Assistant Secretary of Defense (Public Affairs), News Release 289-97, Statement by Secretary of Defense William S. Cohen Concerning General Joseph W. Ralston, June 5, 1997 (visited Nov. 1, 1997) <http://www.defenselink.mil/news/Jun1997/b06051997_bt289_97.html> (claiming General Ralston's adultery did not, without more, exclude him from consideration for the position of Chairman of the Joint Chiefs of Staff).

91. Office of Assistant Secretary of Defense (Public Affairs), News Release 296-97, Secretary's Initiatives to Ensure Equity in Policies of Good Order and Discipline, June 7, 1997 (visited Nov. 1, 1997) <http://www.defenselink.mil:80/>. The Department of Defense contends it was planning on reviewing these policies prior to the Flinn and Ralston events, but sped up the process as a result of the media furor.

sion was to address policies and practices around "gender integrated training" (read: sexual harassment and rape), and "related morale and discipline issues" (read: fraternization and adultery).[92] The Task Force presented its report on the first issue, gender integrated training, in early 1998.[93] Secretary of Defense William Cohen issued orders on fraternization and adultery in July 1998.[94] President Clinton's sexual escapades in the Oval Office subsequently brought into greater relief the disjuncture between civilian moral standards and the military's continuing sanctions, not to mention the double standard that applies thereby to soldiers in contrast to their Commander-in-Chief.[95]

Prosecutions of adultery in the military, whether through disciplinary action, discharge, or court-martial, are definitely on the rise.[96] As one author has reported,

> In the past five years, the Air Force, Army, Navy, and Marine Corps have court-martialed 900 men and women for charges that include adultery. In addition, the numbers of such prosecutions are growing within some branches of the service. . . . [A]dultery-related prosecutions in the Air Force grew from 36 in 1990 to 67 in 1996.[97]

See Background Briefing for News Release 296-97, Secretary's Initiatives to Ensure Equity in Policies of Good Order and Discipline, June 7, 1997, (visited Nov. 1, 1997) <http://www.defenselink.mil/news/Jun1997b06071997_bt296-97.html>.

92. *See* Office of Assistant Secretary of Defense (Public Affairs), News Release 342-97, Defense Secretary Press Conferences Announces Gender Integrated Panel, June 27, 1997, (visited Nov. 1, 1997) <http://www.defenselink.mil>.

93. *See* Interviews with Leigh Bradley, Office of General Counsel for the Navy (Nov. 1997, Dec. 1997, and Apr. 1998). The adultery report and recommendations were delayed due to changes in leadership of this branch of the Task Force. *See Military Gets New Rules On Adultery; It's Still A Crime, But Not All Cases Will be Prosecuted,* CHI. TRIB., Jul. 29, 1998, *available in* 1998 WL 2880547.

94. *See Military Revises Adultery Rules*, PROVIDENCE J.-BULL. (R.I.) A10, Aug. 22, 1998, *available in* 1998 WL 12201164.

> In the wake of a series of scandals, Defense Secretary William Cohen has reviewed how the military handles charges of adultery, and has called for changes. . . . Last month, [he] issued sweeping orders for every branch of the armed forces to deal with the problem administratively whenever possible. That means requiring counseling, or punishing the involved parties within their units, rather than letting matters escalate to a full blown court-martial.

Id.

95. This was a matter of some concern in the media since the disclosure of the details of the Clinton/Lewinsky affair followed quickly on the heels of the release of the Task Force's recommendation. *See, e.g., Military Adultery Rules Don't Apply,* DES MOINES REG., Sept. 16, 1998, *available in* 1998 WL 3225436.

96. *See infra* at Part V.

97. Winner, *supra* note 11, at 1077-78 (citations omitted).

At the same time, civilian prosecutions for adultery are becoming obsolete.[98] Why is the military increasingly prosecuting, discharging, or disciplining service members for adultery at the very time when adultery prosecutions in civilian courts have all but disappeared? Is this increased level of emphasis merely the result of integrating women into the armed forces, or does it reflect a slow-bubbling but increasing moral backlash in American society such that we can anticipate a similar wave of increasing civilian prosecutions in the future? Is prosecution of adultery generally consistent with the typical underlying rationales for military criminal prosecutions? We should grapple with how and why the military has come to this place of criminalizing conduct that is essentially no longer seen as criminal in the community it is sworn to protect.

B. *Military Culture: What is at Stake?*

I accept, for purposes of the following argument, that an effective army is necessary to protecting a given society. I also accept as a premise that military culture is fundamentally distinct and different from that of the society it is sworn to protect[99]—that there are justifications and needs for policies in the military that are unique to maintaining a functional fighting force. Even if one contends that there is nothing essentially moral about the military (and I am not suggesting that this is the case), it does have an ethos, a "code" that is necessary to getting the job of peacekeeping done.[100] Three of the core concepts in this code

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98. *See* 2 AM.JUR. Adultery § 1 ("Although prosecutions for adultery or fornication have become rare in modern times, many states continue to have statutory provisions that prohibit adultery."); Jacob, *supra* note 2, at 315 (discussing divorce reform in the United States in the 1970s and religious support for the idea of reducing sanctions for adultery). *See generally infra* Part II.

99. *See* Toth v. Quarles, 350 U.S. 11, 17 (1955). Martha Chamallas reaches a different conclusion, and one that I ultimately also reach but for different reasons. *See infra* Part V (C)(1)(a). I argue that general civilian norms are bootstrapped into the military culture through a misuse of the rhetoric of honor. Chamallas' position is that: "[de]spite these important differences [the military is the last bastion of male culture, has special legal status, and its employees cannot sue for civil rights violations,] my examination of sex regulations within the military leads me to believe that the military is a microcosm of the civilian world." Chamallas, *supra* note 11, at 307. *See also* Mark J. Osiel, *Obeying Orders: Atrocity, Military Discipline and the Law of War,* 86 CAL. L. REV. 939, 953-55 (1998) (presenting differing views on soldiers' morality as distinct from or similar to civilian values, and the impact of these positions on the potential reduction of war crimes).

100. *See, e.g.,* Lieutenant General Paul K. Van Riper, USMC (Retired), *Gender Integrated/Segregated Training,* THE MARINE CORPS GAZETTE, Nov. 1997 (Supp.

are: (1) respect for the "chain of command;"[101] (2) development and maintenance of unit cohesion;[102] and (3) maintenance of good order and discipline in the force.[103] These values and patterns of conduct are developed through a complicated and rigorous physical and psychological re-formation process that occurs during military training.[104] Societal values are unlearned, and military values are instilled in new recruits.[105] Not only does this process create individuals who can kill,[106] but more fundamentally it disintegrates the individual's sense of separateness, of individuality, and replaces it with a stronger group-dependent identity.[107]

Wed., Dec. 10, 1997), at 14 (describing Marine Corps training processes as inculcating recruits with the "common set of values and standards" including "institutional 'rights' and 'wrongs' and what constitutes proper authority"). The U.S. Code provisions governing the military (UCMJ, 10 U.S.C. § 101- § 18502) embody some of these values in their very language: "good order and discipline" (10 U.S.C. § 934, art. 134) and "conduct [ ]becoming an officer and a gentleman" (10 U.S.C. § 933, art. 133).

101. *See infra* Part V(c). *See, e.g.,* MCM § 83(c)(1) (explaining that conduct between officers and enlisted not otherwise considered actionable fraternization might rise to the level of an actionable offense if they compromise the chain of command). Respect for the chain of command means, primarily, obeying a superior's orders.

102. *See, e.g.,* Major James J. Buckley, *The Unit Cohesion Factor*, MARINE CORPS GAZETTE, Nov. 1997 (Supp. Dec. 10, 1997), at 16-17, and Commander Roger D. Scott, *Kimmel, Short, McVay: Case Studies in Executive Authority of Military Law and Commanders Individual Rights,* 156 MIL. L. REV. 52, 74 (1998).

103. 10 U.S.C. § 934.

104. *See generally*, Thomas E. Ricks, MAKING THE CORPS (1997); Peter G. Bourne, *The Military and the Individual, in* CONSCIENCE AND COMMAND: JUSTICE AND DISCIPLINE IN THE MILITARY 137 (1971). *See, e.g.,* Van Riper, *supra* note 100, at 14-15 ("Recruit training is . . . a socialization process. . . . [d]esigned to emphasize the importance of selflessness and teamwork in overcoming adversity. . . . Recruit training [is an] intense transformation process that replaces diverse and confused perspectives of 'right' and 'wrong' with strong and clear Marine standards of behavior. . . ."). While it is outside of the scope of this Article, a question of course arises as to whether there aren't comparable concerns with good order in the civilian sector. Is a particular family structure necessary to an orderly society, though? Similarly, is sexual fidelity central to the order of civilian society? These questions and others need to be confronted in any more general discussion of abolishing adultery provisions in civil and criminal law in the civilain sector.

105. *See* Ricks, *supra* note 104, at 29, 43; Van Riper, *supra* note 100, at 13-14. *But see* NICO KEIJZER, MILITARY OBEDIENCE vi and xxi (1978) (arguing against the idea of soldiers as "human cogs").

106. *See* Ricks, *supra* note 104, at 62. *See, e.g.,* George Will, *A Settled Practice,* MARINE CORPS GAZETTE, Nov. 1997 at 73 (Supp. Wed. Dec. 10, 1997) ("The military mission is not to replicate the civilian society's evolving notions of equity. The mission is to be good at sustained, controlled violence.").

107. *See generally* Buckley, *supra* note 102, at 66, 68 (citing with approval LIONEL TIGER, MEN IN GROUPS (1969)); Morris, *supra* note 39, at 651. *See, e.g.,* Ricks, *supra* note 104, at 41, 64; VanRiper, *supra* note 100, at 68-69. Numerous other writ-

A tri-part question remains. First, is any particular value so basic to personal identity that it cannot be rearranged or eliminated through the rigorous, and undeniably transformative, military training and indoctrination process? For instance, if we can agree on no other value, most will agree to the tenet that "killing is wrong."[108] And yet, it is just this value that the military must and is able to undo in the individual.[109] If that central organizing principle of a civilized society can be torn down, certainly our men and women can be "rebuilt" with any number of values through the military training process. One might ask whether inculcating recruits with the value of celibacy (one possible bar to consummation of an adulterous liaison), for example, would be so much more difficult than teaching them to kill. Certainly religious brotherhoods promote this creed without the benefit of the

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ers on the nature of war and military life and the nature of group formation more generally have discussed this phenomena.

108. One might question whether it is true that we can all agree on this. In particular, I point to the existence of the death penalty in the United States and the availability and stubborn persistence of the provocation defense to murder when a spouse catches his wife in bed with someone else and kills one or both of them in a "heat of passion" otherwise known as jealousy. *See generally* Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense,* 106 YALE L J. 1331 (1997); Abu-Odeh, *supra* note 22; notes 53-73 and accompanying text.

On an international level, where there is universal agreement that a particular form of conduct constitutes a human rights violation it is known as "customary international law." The American Law Institute outlines a number of areas as customary international human rights law: "genocide, slavery or slave trade, the murder or causing the disappearance of individuals, torture or other cruel, inhuman, or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination, or a consistent pattern of gross violations of internationally recognized human rights." American Law Institute, Restatement (Third) The Foreign Relations Law of the United States § 702 (1987) *reprinted in* Henry J. Steiner & Philip Alston, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 145 (1996). Interestingly, but perhaps not surprisingly, American courts have only recognized one form of wrongdoing as violating customary international law—torture. *See* Filartiga v. Pena-Irala, 630 F.2d 876 (1980). Given our history of slavery, use of the atomic bomb in Japan, ongoing pervasive racial discrimination, and that a number of states in this country have the death penalty, recognition by U.S. courts of other customary international human rights norms would properly open their doors to human rights lawsuits based on customary international law.

109. I certainly do not mean to suggest that soldiers ever find killing easy even after going through military training. In fact, it would be an overstatement to suggest that military participation is to the exclusion of individual moral action. Trends towards prosecution of lower level actors of war crimes supports this idea that military orders cannot cloak or shield immoral acts. *See, e.g.*, Diane Mazur, *Women, Responsibility, and the Military,* 74 NOTRE DAME L. REV. 1 (1998) (discussing the capacity for moral action in the context of nuclear weapons maintenance); Osiel, *supra* note 99.

rigors of the military training process.[110] Second, is any particular value, other than overcoming a proscription of taking another's life, so fundamental to the group formation process such that without its presence either pre-existing in the individual or instilled through the training process, the requisite killing force will not be created?

The third part of the question forms the particular focus here, and relates to the first and second questions. Is the norm proscribing adultery one of those values that is either core to the individual or fundamental to the group formation process? I contend that it is not. Is it nonetheless a value that should or must be promoted in the military, through sanctions against it, for some other reason(s)? Again, I ultimately contend that it is not.

V. MILITARY DISCIPLINE: PROTECTION AND FURTHERANCE OF RESPECT FOR THE CHAIN OF COMMAND, UNIT COHESION, AND GOOD ORDER AND DISCIPLINE

Several concepts and practices are consistently accepted by military theorists as fundamental to the formation of an effective fighting force. Three of these core concepts are the maintenance of good order and discipline, obedience of orders issued by the chain of command, and development of unit cohesion.[111] These three principles, cultural values if you will, inform legal and theoretical debates about all aspects of sex and the military—whether it be gender integration, sexual harassment, or consensual sexual conduct of service members.[112] These values are implicated in the criminal provisions under which adultery is now prosecuted, Articles 133 and 134 of the UCMJ.

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110. These religious brotherhoods are not without problems in maintaining the vow of celibacy—quite the contrary. *See, e.g., Two Priests Face Sex Allegations,* Miami, Jul. 27, 1998 (UPI) (discussing the cases of one Catholic and one Episcopal priest accused of having improper sexual relations with parishioners); *Sex Abuse Priest Sentenced to Life in Prison,* April 1, 1998, Dallas (Reuters) (reporting a Roman Catholic priest convicted of sexual abuse of a minor); *Rabbi Accused of Sex With Girls,* May 16, 1998, Dallas (UPI); *Preacher Tried Student Sex,* Irving, Texas, April 15 (UPI) (reporting on a 51-year-old Baptist minister accused of trading sex with a minor for the promise of a high school diploma). However, the existence of outliers does not make the policy itself untenable.

111. *See infra* notes 86-89.

112. *See, e.g.,* Halley, *supra* note 15, at 170-1611 (rebutting the unit cohesion argument as used to justify exclusion of gays from the military).

A. *Administrative and Court-Martial Systems as Parallel to the Civilian Criminal Justice System*

The military criminal justice system exists as a separate and parallel system to civilian federal and state courts.[113] It is both "mandated by Congress and recognized by the United States Supreme Court as legitimately unique."[114] A separate system was seen as necessary to meet the particular demands of deploying an efficient and functioning military force.[115] The military criminal justice system includes both the system of criminal court-martial and the powers of commanders to issue nonjudicial punishment. The military criminal justice system was never intended to be a comprehensive criminal justice regime, but was intended to focus only on those issues relevant to the military mission. In one precursor to the modern American military, the ancient Roman military punished cowardice, mutiny, desertion, and doing violence to a Superior—matters clearly implicating military concerns, discussed below.[116]

Several related questions arise here. First, what is the scope of the executive branch's authority to develop new substantive crimes not explicit in the Uniform Code of Military Justice through the mechanism of the MCM? Second, what is the scope of the military tribunal's subject matter jurisdiction in criminal cases involving service members? And third, to the extent there is concurrent "subject matter" jurisdiction between civilian and military courts over criminal actions, which court should hear the matter?[117]

Since it exists parallel to and yet separate from the civilian criminal justice system, the military system theoretically can choose to defer to the civilian sector prosecution of what it determines to be nonmilitary-related offenses. In other words, the military may, within certain constitutional limits, create criminal causes of action that are not present in the civilian sector, and not criminalize conduct that is considered criminal in the civilian sector. The Supreme Court, in *Toth v. Quarles*, determined that military tribunals should be restricted "to the narrowest jurisdic-

113. DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE 176 (4th ed., 1996).

114. *Id.* at 2-3.

115. *Id.* at 3.

116. *Id.* at 15.

117. I use quotes because the rule on subject matter jurisdiction looks every bit like a rule for both personal and subject matter jurisdiction.

tion deemed absolutely essential to maintaining discipline among the troops in active service."[118] That holding argues for the military (or, more precisely, the Executive Branch) having only limited power to create new, substantive, nonstatutory causes of action (such as adultery) via the MCM.[119] It further suggests that, where concurrent jurisdiction exists, deferral to civilian courts for prosecutions should not be the exception but the norm.[120]

Subsequent court action over the subject matter jurisdiction of military courts ended with the rule that military jurisdiction to prosecute is based on the defendant's status, and not on the nature of the conduct charged.[121] This status/conduct distinction is not to be confused with the status/conduct distinction under the military's Don't Ask/Don't Tell/Don't Pursue ("Don't Ask/Don't Tell") policy.[122] Under that policy, the continuing question is whether a service member is subject to discharge or other sanction because of homosexual conduct—sex acts with a member of the same sex[123] that would be constitutionally permissible—or because of the person's status as a homosexual, which may be constitutionally prohibited.[124] The status at issue in the question of military versus civilian court jurisdiction is whether the person is a service member or not, a perfectly permissible categorization for purposes of determining whether the military court has jurisdiction to prosecute that person in the first instance.

In terms of the conduct at issue, military courts have sole subject matter jurisdiction over any charge that is exclusively military in nature (for instance, fraternization),[125] while offenses

118. 350 U.S. 11, 22 (1955) (cited in SCHLUETER, *supra* note 113, at 176).

119. *See id. See also infra* Part V.

120. *See id.*

121. *See* Solorio v. United States, 483 U.S. 435 (1987). *See* SCHLUETER, *supra* note 113, at 176-89.

122. For a full analysis of this distinction, see Halley, *supra* note 15.

123. In her evaluation of the Don't Ask/Don't Tell policy, Halley argues, in part, that the distinction in treatment based on who is doing the acting is a regulation of status rather than conduct: "Fellatio is no longer oral/genital contact but *heterosexual* or *homosexual* conduct, the deed of a certain type of person." Halley, *supra* note 15, at 175.

124. *See id.* Halley further points out the way status can *arise from* conduct, such that penalizing conduct masks impermissible sanction for status.

125. The elements of fraternization for military purposes are outlined in the MCM as the following:

> (1) that the accused was a commissioned or warrant officer; (2) that the accused fraternized on terms of military equality with one or more certain enlisted members(s) in a certain manner; (3) that the accused

that exist both as civilian and military proscriptions are subject to concurrent jurisdiction.[126] Handling these latter situations involves careful negotiation between military and civilian authorities.[127] Nevertheless, there is no absolute prohibition on state or military prosecutors that prevents them from agreeing that states should handle the charging of military members with a particular crime, such as adultery. My point is not just that the military should defer to civilian prosecutions in the area of adultery, although that would be a first step. It would be disingenuous and irresponsible for me to merely suggest shifting the decision on adultery from one judicial system to another. My ultimate suggestion is that adultery should no longer be within the realm of legal intervention—military or civilian.

B. *Substantive Criminal Provisions: The Uniform Code of Military Justice and the Manual for Courts-Martial*

Substantive criminal provisions in the military arise from federal statutes,[128] military common law as created by military court decisions, and from the Commander in Chief's constitutional powers to issue mandates relating to the military.[129] These latter mandates are compiled in the "bible" for military prosecutions, the MCM, which has no direct equivalent in civilian courts.[130] In addition, each branch of the military is authorized to develop its own supplemental rules and regulations, provided they are not in conflict with the UCMJ or MCM.[131] Amendment of the MCM and standardization of the branches' supplemental

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> then knew the person(s) to be (an) enlisted member(s); (4) that such fraternization violated the custom of the accused's service that officers shall not fraternize with enlisted members on terms of military equality; and (5) that under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

MCM ¶ 83. The comments to this section further clarify that each branch can issue regulations to similarly govern relationships between officers of different rank or between enlisted of different rank. *Id.* at § 83(c)(2). Note that there is not a requirement, either in the text, the commentary, or the proposed revisions (*see infra* at Part V(D)), that the nature of the contact be sexual.

126. *See* SCHLUETER, *supra* note 113, at 188.

127. *See id.*

128. *See* 10 U.S.C. § 801, *et. seq.* The United States Code provisions are collectively referred to as the Uniform Code of Military Justice ("UCMJ").

129. *See* SCHLUETER, *supra* note 113, at 4-5.

130. Parker v. Levy, 417 U.S. 733, 739 (1974) (stating that the UCMJ is not the same as the civilian code). .

131. *See* 5 U.S.C. § 301 (1988) and SCHLUETER, *supra* note 113, at 12.

regulations were the focus of the 1998 proposed revisions to military practices concerning adultery discussed in this section.[132]

The MCM contains evidentiary and procedural rules of practice, charging documents, and explanatory notes on substantive criminal provisions, as do any number of nonmilitary criminal practice manuals. What is unique about the MCM in contrast to its civilian counterparts is that it contains a large section in which substantive crimes, not always clearly present in the primary sources, are created.[133] In other words, a number of military crimes, including adultery, were "enacted" not by Congress but by the administrative branch under its rule making authority.[134] No doubt the rationale for these additional provisions is that they are needed to clarify the scope of those sanctions in the UCMJ that are particularly vague or to write into black letter law judicially described offenses.[135] However, this process allows for substantial expansion of the scope of the legislatively enacted and enumerated offenses. In this sense, the criminalization of adultery (and a number of other MCM crimes) in the military context is more a direct expression of the will of the military hierarchy, rather than a legislative creation or an expression of the will of the American public (other than as exhibited through the limited rules and comments procedure). Moreover, the potential punishment for adultery is not mild. Sanctions for adultery can consist of up to one year in prison and dishonorable discharge from the service.[136]

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132. *See* Blair, *supra* note 81.

133. Additional supplements to the MCM are issued by each branch of the service such that the MCM is tailored to the needs of the particular branch. *See* SCHLUETER, *supra* note 113, at 12. Additional discretion vested in individual commanders to pursue nonjudicial remedies rather than to institute a court-martial creates further divergence from unit to unit within branches. *See id.* at 40. The differences in each service's practice has lead to the need for these practices to be reviewed by a Federal Advisory Commission, but the individual practices themselves are not relevant to the more general discussion that forms the subject of this paper.

134. *See* 10 U.S.C. § 121 (President's authority to issue regulations as Commander in Chief); 5 U.S.C. § 301 (Department of Defense and Military branches' general rulemaking authority as executive agencies).

135. *See* Barto, *supra* note 23; Blair, *supra* note 81.

136. *See* Winner, *supra* note 11, at n.10 and accompanying text (citing MCM pt. IV ¶ 62). The sanctions for adultery were not changed in the 1998 amendments to the MCM. Blair, *supra* note 81. On judicially based MCM provisions, see generally, Appendix 23, Analysis of Punitive Articles, and discussion of judicial background of adultery and fraternization provisions *infra* at Part IV(B).

The two UCMJ provisions triggering adultery prosecutions are Article 133, Conduct Unbecoming an Officer and a Gentleman, and Article 134, the so-called "General Article." Two of the requirements for proving a basic adultery charge in the military context mirror civilian standards:[137]

> (1) That the accused wrongfully had sexual intercourse with a certain person;
> (2) That, at the time, the accused or the other person was married to someone else . . . .[138]

An additional factor, however, must be proven in the military context. Under Article 133, proof that the conduct was "unbecoming" is required. Under Article 134, the prosecution must demonstrate:

> (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.[139]

The United States Code provisions are discussed in further depth below.

C. *UCMJ Provisions: Article 133 and Article 134*

1. Article 133: Conduct Unbecoming an Officer and a Gentleman

Article 133, Conduct Unbecoming an Officer and a Gentleman,[140] is a charge in and of itself, but it also requires some underlying conduct that triggers the Article 133 charge. This underlying conduct might, but need not be, a separately actionable criminal offense. "[T]he appropriate standard for assessing criminality under Article 133 is whether the conduct or act charged is dishonorable and compromising . . . this notwithstanding whether or not the act otherwise amounts to a crime."[141] The underlying

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137. *See, e.g.*, MD. CODE ANN., Adultery, Art. 27 § 3 (1957) (outlining that both parties are guilty of adultery when a married person and a person who is not his or her spouse engage in sexual intercourse).

138. MCM pt. IV ¶ 62b.

139. *Id.*

140. *See* 10 U.S.C. § 933 ("Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct."). Ironically, use of the term "gentleman" continues today, although a soldier's femaleness does not exempt her from an Article 133 charge. *See* MCM ¶ 59(c)(1) ("As used in this article, Gentleman includes both male and female commissioned officers, cadets, and midshipmen."). *But see* SCHLUETER, *supra* note 113, at 80 (referring to Art. 133 conduct that "compromises his or her character as a gentleman or gentlewoman. . . .").

141. United States v. Giordano, 35 C.M.R. 135, 140, 15 U.S.C.M.A. 163 (1964).

charge is considered a lesser-included offense of the Article 133 offense.[142] To trigger Article 133, the underlying act must "seriously compromise the officer's ability to command."[143] The nature of the conduct that amounts to conduct unbecoming is described more fully in the MCM:

> [Conduct unbecoming an officer and gentleman] is action or behavior in an official capacity which, in dishonoring or disgracing the person as an officer, seriously compromises the officer's character as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer.[144]

This paragraph describes a symbiotic relationship between public and private conduct. What you do at work reflects on your personal character and what you do at home, in private, reflects on your professional competence.

There are two primary concerns implicit in Article 133. One concern is that officers maintain a higher standard of conduct than the ordinary soldier and the ordinary civilian (so as not to compromise their "character as gentlemen").[145] The second concern is to protect the military mission itself (i.e., by protecting a person's "standing as an officer").[146]

a. An Officer's Honor and Character

Military case law and literature espouse the idea that officers must maintain a higher standard of conduct than the ordinary citizen, and invariably link this claim to the notion of honor.[147] What exactly does honor mean? Does it imply virtuous behavior? As I will demonstrate, honor does not necessarily carry such a moral inflection. Rather, honor reflects a more pedestrian concept.

Using the term honor in a loose manner has consequences. First, coating with an ethical gloss a term that is otherwise ethically neutral places those who invoke it in an apparent, but unwarranted, position of moral superiority on whatever issue is on

142. *See* SCHLUETER, *supra* note 113, at 81.

143. *Id.* at 80.

144. MCM ¶ 59(c)(2).

145. *Id.*

146. *Id.*

147. *See, e.g.,* RICKS, *supra* note 104, at 82-83 (quoting Gunnery Sargeant Hans Marrero); Barto, *supra* note 23, at 8, (quoting Parker v. Levy, 417 U.S. 733, 743, 764-65 (1974) (Blackmun, J., concurring)).

the table. An argument thus cloaked in virtue is more difficult to rebut, as the one attempting to counter it will be seen as speaking in opposition to morality from the outset. Second, as I will discuss, misuse of honor obscures the fact that what is considered honorable is deeply culturally contingent.[148]

On the other hand, returning to honor's roots exposes how some conservative military voices bootstrap conventional civilian cultural norms into military culture, all the while claiming these norms are truly military rather than civilian in nature. Understanding the etymological roots of honor also helps make sense of some otherwise confusing military case law on adultery.

So how do military voices describe honor? One Marine Corps officer says the following:

> Before I teach my [basic training] instructors anything, I teach them the honor code—which is to do the right thing always. . . . A warrior has to be ruthless in combat, but have empathy. My master taught me that fifty percent of a warrior is the skills of how to take a man's life. The other fifty percent is the philosophies engraved on your heart and soul so that you compromise for no one.[149]

Judges and commentators on military culture echo this sentiment. One author, citing Justice Blackmun, takes the following position when specifically addressing adultery:

> [I]t is the unique mission of the military to fight or prepare to fight wars; the demanding nature of that task necessitates that "[i]n military life there is a higher code termed honor, which holds its society to stricter accountability; and it is not desirable that the standard of the Army shall come down to the requirements of a criminal code." The military offense of adultery is simply a recognition of this moral dimension to military service, and is evidence that the military justice system is flexible enough to recognize the judgment of the military community "concerning that which is honorable, decent, and right."[150]

On a more formal level, in its explanation of Article 134 charges, the current MCM states, "[t]here are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of

148. Cultural defense cases less disingenuously track this pattern. *See infra* at Part VI(A).

149. *See* RICKS, *supra* note 104, at 82-83 (quoting Gunnery Sargeant Hans Marrero).

150. *See* BARTO, *supra* note 23, at 8 (quoting Parker v. Levy, 417 U.S. 733, 743, 764-765 (1974) (Blackmun, J., concurring)).

which is indicated by acts of dishonesty, unfair dealing, indecency, indecorum, lawlessness, injustice, or cruelty."[151]

These examples of formal and informal military views of honor appear to reflect what we might call an Aristotelean notion of doing the virtuous or morally right thing.[152] Some even explicitly reference Aristotle.[153] One trio of authors, in lambasting proposals to fully integrate gays and lesbians into the military, cite to Aristotle's *Nicomachean Ethics* as a basis for military honor—and, in turn, as the basis for a ban on gays in the military. They assert the following:

> Moral theology and Aristotelian ethics are examples of what we inartfully refer to as abstract level morality. Their counterpart in the Armed Forces is traditional military morality—a congeries of norms and values regarding what is right and wrong conduct for an American serviceman or woman that is deeply ingrained in the organization and culture of our military. Some norms and values are embedded more deeply and immutably than others. This is certainly true of the martial virtues of duty, loyalty, courage, self sacrifice, patriotism, and honor. This is also true, now and for the foreseeable future, of the moral disapproval of homoerotic conduct.[154]

Reference to Ancient Greek philosophers' views on honor makes some sense; it is generally understood that the modern

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151. MCM ¶ 59(c)(3). Interestingly, one of the examples given for an Article 133 offense is a failing without good cause to support the officer's family. *See* MCM ¶ 59(3).

152. *See* ARISTOTLE, NICHOMACHEAN ETHICS, *Books I – II,* THE BASIC WORKS OF ARISTOTLE, (Richard McKeon, ed.).

153. *See* Osiel, *supra* note 99, at 953 (Aristotle's claim that particular people are suited to particular occupations), at 1028 (Aristotle's argument that practical judgment is comprised of both tactical and moral elements), at 1073 (on military bravery, citing Aristotle's claim that all virtues should be exercised in moderation). On the historical basis of military honor, Oseil cites to the chivalric, nonsecular, and class-conscious code of honor of feudal times. *See id.* at 1045-1050. *See, e.g.,* Arthur A. Murphy, Leslie M. MacRae, William A. Woodruff, *Gays in the Military: What about Morality, Ethics, Character and Honor?* 99 DICK. L. REV. 331, 337 (1995). Mark Osiel, in addressing the possibility of moral action in the context of war, also references Aristotle at several points, although not specifically in connection with military honor.

154. Murphy, MacRae & Woodruff, *supra* note 153, at 337. Their formulation (as it is played out in their reference to what they perceive to be general moral opprobrium about homosexuality) overstates Aristotle's position. Aristotle does begin with a review of prevailing social norms. *See* ARISTOTLE, *supra* note 152, at Book I, ch. viii, lines 5-8. However, as one author puts it, "It would be wrong to imply that [Aristotle's] work consisted simply in reducing to a system the common moral code of his age and race . . ." H. Rackham, INTRODUCTION TO ARISTOTLE, THE NICOMACHEAN ETHICS XIX (LOEB EDITION 1921). For further discussion of the notion of honor, *see infra* Parts V, VI.

American military descends from Greco-Roman origins.[155] A more careful review of both the etymology of honor and of Aristotelian views on it reveals, however, that Aristotle's thesis is more complex than these latter authors' argument suggests. Such a review also reveals that morality does not so heavily inflect the etymology of the word honor as more generally implied by other authors.

Before delving into Aristotle's depiction of honor, it is helpful to first look at the etymology of the ancient Greek term used by him. The ancient Greek word for honor is τιμή (timē).[156] The primary definition of this word, τιμή, is "worship, esteem, honour and in pl. honours [such as are accorded to gods, or superiors, or bestowed, (whether by gods or men) as a reward for services]."[157] Thus, it appears (at least etymologically) that the Greek concept of honor requires the observation and/or participation of another person. The verb form of τιμή reflects this requirement as well: τιμάω (timao) is defined as "to pay honour to, hold in honour, to honour, revere,"[158] and in its passive form, "to be honoured, held in honour."[159] As discussed further below, modern-day definitions of honor mirror this second-person requirement.

If to have honor requires a second person to witness or observe the possibly honorable act and ultimately to do the honoring, two logical consequences follow. First, the act causing honor (or dishonor) must be public and known to that other person. In the context of an officer's adultery, the act must be observed or at least known to another to be dishonoring. Theoretically, this might include an act that *if* it were observed by a second person would cause that person to hold the actor in esteem.[160]

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155. *See, e.g.,* Oseil, *supra* note 99, at 946, n.5 (Roman origins of military codes on punishment for manifestly illegal acts); Jonas, *supra* note 11, at 40-41 (Roman origins of military policies on fraternization).

156. *See* HENRY GOERGE LIDDELL & ROBERT SCOTT, GREEK-ENGLISH DICTIONARY 1793-1794 (1843, New (97th ed., 1940 with 1996 Supp.). *See also* e-mail communication form Jonathan S. Tuck, Tutor, St. John's College, Annapolis, MD (May 14, 1999).

157. *Id.*

158. *Id.* at 1993-1994.

159. *Id.*

160. Ancient Greek deployment of honor very occasionally includes a self-referent variety: τιμουχος (timouchos), a contraction of τιμα–οχος (tima–ochos), meaning "having honor." *See id.* The term οχος (ochos) means "anything which holds . . . ." *Id.* at 1281. However, other than the occasional use of that term, Aristotelean, Platonic, and Homeric discussions of honor typically do not carry this re-

Second, for the actor to be honored or held in esteem by the observer, the latter must rate the specific conduct as worthy of esteem. That is, the observer passes judgment on the act based on her own views of what conduct is and is not honorable.[161] In the case of a hypothetical observer, the job of passing judgment is merely transferred to a third person, but the act of judging does not alter. If the views of the observer or third person are socially determined, then honor itself is socially contingent.

So how does Aristotle explain honor? For Aristotle, honor is one of many desirable virtues the exercise of which will lead us to the highest aim of human kind—happiness, or εὐδαιμονια (eudaimonia) in Greek.[162] Practice of intellectual virtue (διανοητικη) (dianoeitikei) and moral or ethical virtue (ἠθικὴ ἀρετή) (eithikei aretei) is the means to that end.[163] For Aristotle, the intellectual virtues include science, art (technical skill), practical wisdom (prudence), rational intuition (intelligence), and philosophic wisdom.[164] Moral virtues include, among others, courage, temperance, liberality, gentleness, and truthfulness.[165] The virtue of courage includes within it an aspect of honor,[166] as is discussed further below. To become good (ἀγαθος γενεσθαι) (agathos genesthai), one 'must act in conformity with right principle' (ὀρθὸν λογον) (orthon logon).[167] Acting rightly consists of

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flexive gloss, but instead emphasize honor's external origin. *See* Jon S. Tuck e-mail (May 14, 1999), *supra* note 156.

161. Obviously I draw here on postmodern ideas of relativistic morality, which is perhaps incongruous when evaluating a now dead language. Toni Masarro gives more careful attention to modern arguments of innateness concerning the analogous experience of shame. *See* Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform,* VOL. 3, NO. 4 PSYCHOL. PUB. POL'Y, AND L. 655, 661 (1997).

162. *See* ARISTOTLE, NICHOMACHEAN ETHICS, Book I, ch. vii, line 8 (1961, H. Rackham transl.) (Loeb Classical Series) (hereinafter "Aristotle, Loeb Edition."). In contrast, Plato (Aristotle's mentor) appears to criticize those who lust for honor. *See* PLATO, The Republic, Book IX, lines 581-583 in THE COLLECTED DIALOGUES OF PLATO (Edith Hamilton & Huntington Cairns eds., 1961). By "ones who seek honor," Socrates clearly means soldiers and statesmen, in contrast to his other two categories of people he discusses in this section of the dialogue, philosophers and merchants. Socrates ranks philosophers at the top of the moral heap, with soldiers and statesmen ranked in the middle, and merchants gracing the lowest level. The only other prominent discussion of honor in the Dialogues occurs in *Laws,* a later, minor work. *See id.* In *Laws*, honor is presented as a quite different thing, much more akin to Aristotle's conception—as something worthy rather than base. *Laws*, Book V, in COLLECTED DIALOGUES OF PLATO.

163. *See* Aristotle, Loeb Edition, *supra* note 162, at Book I, ch. ix (line 15).

164. *See id.* at Book VI, ch. iii-vii.

165. *See id.* at Book III, ch. v-Book IV

166. *See id.* at Book III, ch. vii, lines 3-9.

167. *See id.* at Book II, ch. ii (lines 1-2).

practicing each of the virtues in moderation, neither to excess nor deficiently.[168]

Aristotle counts among the moral virtues several qualities specifically bound up with the notion of honor (τιμή) (timē).[169] First, as mentioned above, Aristotle views the virtue of courage as encompassing, in part, aspects of honor. Specifically, courage can be prompted by a desire for honor and a wish to avoid disgrace or shame.[170] As was demonstrated by the etymological analysis of Greek honor, disgrace and shame require the observation of the act by another person, and a judgment made by that person about the act's shamefulness.[171]

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168. *See id.* at Book II, ch. ii, line 6-ch. vii, line 16. Thus, courage exists as the mean between rashness and cowardice. *See id.* at ch. vii, lines 2-3. Temperance (relating to pleasure and pain) is the mean between profligacy and the deficient exercise of pleasure. *See id.* at ch. vii, lines 3-4. Liberality is concerned with money and lies between prodigality and meanness. *See id.* at ch. vii, line 4. Gentleness exists as the mean between irascibility and spiritlessness. *See id.* at ch. vii, line 10. Truthfulness sits between boastfulness and self deprecation. *See id.* at ch. vii, line 12.

169. *See id.* at Book II, ch. vii, lines 7-9.

170. *See id.* at Book III, ch. vii, lines 1-3. A more difficult question is which word in Greek equates with dishonor. The word ατιμια (a-timia) from the root ατιμος (a-timos) means dishonor or disgrace, *See* LIDDELL & SCOTT, *supra* note 156, at 270-71, and is the word chosen by Aristotle at this point. *See* Aristotle, Loeb Edition, *supra* note 162 at Book II, ch. vii, line 7. However, it appears more typically in Homeric Greek and was not of common usage in Attic Greek, the dialect in use during the time or Plato and Aristotle. *See* Jon S. Tuck email communication (May 14, 1999), *supra* note 156. More typically employed in Attic Greek is the word αισχυνη (auschuné), meaning "shame done one, disgrace, [or]dishonor." *See id. See also* LIDDELL & SCOTT, supra not 156 at 43. The Homeric version of auschunéos is αισχος (aischos), although a closer Homeric antonym for timé is αιδος (aidos), meaning "the feeling of shame or deference to public opinion." *See* Jon S. Tuck email communication (May 14, 1999), *supra* note 156; LIDDELL & SCOTT, supra note 156 at 18. In the *Iliad*, for example, Hector explains to Andromache why he must fight even though he knows that he will die and Troy will ultimately fall, saying "αιδοεομαι Τροιας" (aideomai Troas): "I would feel deep shame before the Trojans [if I did not fight]." *See* HOMER, THE ILIAD BOOK VI, lines 435-450 (transl. Richard Lattimore) (1961 ed.). *See also* Jon S. Tuck email communication (May 14, 1999), *supra* note 156 (translating the phrase as "I am ashamed before the Trojans"). For an analysis of Homeric culture as a "shame culture," see E.R. DODDS, THE GREEKS AND THE IRRATIONAL 28-63 (1951).

For a thorough modern analysis of shame and shame sanctions, see Massaro, *supra* note 161. Somewhat in contrast to my argument that honor and dishonor require an observer who observes a public action, Massaro takes the position that shame may involve the invasion of privacy—that is, "to shame a person, one must invade the shamed person's privacy and autonomy in a manner that departs from cultural norms about privacy and concealment." *Id.* at 667.

171. *See, e.g.,* Massaro, *supra* note 161, at 683-688; *but cf.* Massaro, *supra* note 161, at 656-661 (describing internally experienced shame absent external observation of and reaction to the supposedly shameful conduct).

Second, Aristotle outlines two virtues not listed above that specifically relate to honor and dishonor. Aristotle identifies one virtue related to honor but to which he cannot give a name—that which lies as the mean between honor-loving (φιλοτιμος) (philotimos) and "not-honor-loving" (ἀφιλοτιμος) (aphilotimos).[172] Some authors translate philotimos and aphilotimos as ambitious and unambitious, respectively.[173] The literal translation of these terms is "honor-loving" and "not-honor-loving:" φιλο- meaning "love," -τιμος meaning "honor," and ἀ- meaning "not" (in this context modifying "love"). Aristotle's definition of this honor-related virtue is in essence to love honor, but not overly. Under its literal translation, this virtue that lies between honor-loving and not-honor-loving clearly provides us no guidance in understanding that to which honor points.

Aristotle labels the third of the virtues related to honor literally "greatness of soul" (μεγαλοψυχία) (megalopsuchia).[174] It is this final characterization of honor to which military ethicists refer when describing military honor as morally tied. Despite its sound, this virtue does not mean "magnanimity or high-mindedness (in the modern sense of the word),"[175] rather, it refers to "proper pride"[176] or "lofty pride and self-esteem."[177] Greatness of soul exists as the mean between empty vanity (χαυνότης) (chaunoteis)[178] and, literally, smallness of soul (μικροψυχια) (mikropsuchia).[179] As is the case with μεγαλοψυχία (megalopsuchia), some translate μικροψυχια (mikropsuchia) less literally,

172. Aristotle, Loeb Edition, *supra* note 162, at Book II, ch. vii, lines 8-9.

173. H. Rackham provides this translation in the Greek-English Loeb edition. *See id.* W.D. Ross similarly translates these terms in the McKeon edited volume, THE BASIC WORKS OF ARISTOTLE, *supra* note 152, at 960.

174. Aristotle, Loeb Edition, *supra* note 162, at Book II, ch. vii, lines 7-8. In this Loeb edition, H. Rackham chooses the literal translation of the Greek term. The first half of the Greek word, μεγαλο (megalo) translates literally as "great," while the second half of the word, ψυχία (psuchia), translates literally as "soul." *Id.* at 212, note b.

175. Aristotele, Loeb Edition, *supra* note 162, at 212, note b.

176. W.D. Ross chooses this translation. *See* THE BASIC WORKS OF ARISTOTLE, *supra* note 152, at 960.

177. H. Rackham explains that μεγαλοψυχία (megalopsuchia) "means lofty pride and self-esteem rather than magnanimity or high mindedness (in the modern sense of the word)." Aristotle, Loeb Edition, *supra* note 162, at 213, note b.

178. Rackham points out that χαῦνος "does not apply to a man who deserves much but claims even more, nor to one who claims little but deserves even less." *Id.* at p. 214, n. a.

179. Aristotle, Loeb Edition, *supra* note 162, at Book II, ch. vii, lines 7-8.

as "undue humility."[180] For Aristotle, this honor-related virtue "greatness of soul" identifies one who is worthy of great things and claims that which he deserves, not more or less.[181] Aristotle further states, however, that the greatest-souled possesses and practices well all of the other virtues.[182] Aristotle's stance on the relation between honor and goodness is actually somewhat more convoluted. Although he states that "[t]he truly great-souled man must be a good man," earlier in the *Ethics* he argues that honor does not equate with goodness:

> But honour after all seems too superficial [επιπολαιοτερον (epipolaioteron)] to be the Good for which we are seeking; since it appears to depend on those who confer it more than on him upon whom it is conferred, whereas we instinctively feel that the Good must be something proper to its possessor and not easy to be taken away from him.[183]

Do more modern definitions of honor continue to reflect this notion of honor as describing one who is good both inherently and through practice? Derivation of the Anglo-American word, honor, traces to a fairly functional Latin root, honos.[184] Honos means "repute, esteem, [or] official dignity."[185] The contemporary meaning of honor is similar, "high respect, esteem, or reverence, accorded to exalted worth or rank; deferential admiration or approbation,"[186] or "reputation; good name."[187] Under current definitions of honor, then, any moral gloss is sanded from the term. Honor is now reduced to an etymological meaning similar to that for the Greek term for honor (although not Aristotle's views on it). It is based on how one is viewed by others, rather than on some inherent goodness or morality. In turn, it is

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180. THE BASIC WORKS OF ARISTOTLE, *supra* note 152, at 960. This, again, is Ross' chosen translation.

181. Aristotle, Loeb Edition, *supra* note 162, at Book IV, ch. iii, lines 3-9.

182. *See id.* at Book IV, ch. iii, lines 14-16.

183. Aristotle's claim about the "truly great-souled man" appears at Book IV, ch. iii, line 14. Aristotle's claim about the superficiality of honor appears at Aristotle, Loeb Edition, *supra* note 162, at Book I, ch. v, line 4. On the complexity of Aristotle's argument, *see* H. Rackham, INTRODUCTION, *supra* note 154; E-mail communication from Jacques Duvoisin, Tutor, St. John's College, Santa Fe, New Mexico (May 14, 1999).

184. *See* THE OXFORD ENGLISH DICTIONARY, COMPACT EDITION 1326 (Vol. 1 1971). *See also* OXFORD LATIN DICTIONARY 801-03 (P.G.W. Glare ed., 1982) (defining honos as "[h]igh esteem or respect accorded to superior worth or rank, honour . . . . A (high) public or political office . . . . The honor due to military prowess or sim[ilar] virtues.").

185. *See id.*

186. *Id.* at def. 1.

187. AMERICAN HERITAGE DICTIONARY 632, def. 2 (William Morris ed., 1969).

based on the observer's particular socially determined view of what conduct is worthy of respect and what is not.[188]

In the military context, this same process allows conservative military voices to bootstrap conventional social norms concerning adultery through deployment of the notion of military honor. When these speakers say that adultery is anathema to military honor, they obscure the fact that a determination of what is honorable or dishonorable requires the prior imposition of a cultural norm upon the underlying conduct. Those arguing that military honor abhors adulterous conduct do not provide us with any actual evidence of widespread acceptance of the norm they claim exists.

And they would be hard-pressed to meet this challenge, regardless of whether the relevant cultural context for the norm was civilian or military. As I demonstrate, large-scale adultery prosecutions in the military context are recent in origin rather

188. Thus, to carry a moral flavor, a more appropriate word to cover the notions that military theorists and judges assume are subsumed in the term honor, might be something like virtue, although it too has its own problems. Virtue derives from the Latin root, virtut-, meaning "manliness, valour, [or] worth." 1 THE OXFORD ENGLISH DICTIONARY, COMPACT EDITION 3639 (1971). The comparable Greek word for virtue is ἀρετέ (areté), perhaps deriving etymologically from Ares, the Greek god of war. Areté has a meaning similar to the Latin virtus: "*goodness, excellence,* of any kind, esp. of *manly* qualities, *manhood, valour, prowess* . . . (like Lat. vir-tus, from vir[, meaning man]." LIDDELL & SCOTT, *supra* note 156 at 115 (emphasis in original). *See* Jon S. Tuck e-mail communication (May 14, 1999) (on file with author). Jon Tuck ironically points out that "the genders of both arete and virtus are feminine, even though virtus means 'manliness' from 'vir' man." Jon S. Tuck e-mail communication (May 14, 1999) (on file with author). "Manliness," on its face, tends to exclude from consideration that women might be virtuous. To get around this obvious problem, one could use the same "logic" as the military employs for the term gentleman in the phrase "officer and a gentleman" as "includ[ing] both male and female." MCM ¶ 59(c)(1). In its more modern usage, virtue seems to fit a moral billing more closely: "[C]onformity of life and conduct with the principles of morality; voluntary observance of the recognized (recognizing, thus, that morals are socially contingent, and therefore still rejecting an Aristotelean appeal to a universal good) moral laws or standards of right conduct; abstention on moral grounds from any form of wrongdoing or vice." THE OXFORD ENGLISH DICTIONARY, COMPACT EDITION 3639, at def. I(2) (1971). Disturbingly, but perhaps reflecting *virtue's* roots in manliness, another of Oxford English Dictionary's definitions for virtue is "chastity, sexual purity, esp. on the part of women." *Id.* at def. I(2)(c). The American Heritage Dictionary depicts a similar gender specificity for honor, defined as, "[a] code of principally male dignity, integrity, and pride, maintained in some societies, as in feudal Europe, by force of arms. . . . A woman's chastity. . . ." AMERICAN HERITAGE DICTIONARY , *supra* note 187, at 632, def. 9. If not for the long history of honor tied to soldiering, perhaps virtue should be substituted for honor in military legal norms. *See, e.g.,* Plato's discussion of honor as relating to soldiering. *See* PLATO, THE REPUBLIC, *supra* note 162, at Book IX.

than deeply historically embedded.[189] Further, as I discuss in Part VI, military culture historically is rife with adulterous conduct.[190] On the civilian side we see historical opprobrium, but recent softening of views towards adultery.[191] Thus, whether we look at the military or civilian cultural context, we can find no confirmation of the claim that adultery is dishonorable per se. Thus, the claim that adultery is anathema to military culture is merely conservative military voices expressing their own views of acceptable and unacceptable conduct, cloaking these views in the rhetoric of military honor.

Some judges discussing adultery subscribe to the Aristotelean notion of honor.[192] Where courts focus more on the nature of the conduct itself, and less on the actual compromising impact of that conduct, the decisions demonstrate the indeterminacy of the concept.[193] For instance, one court held that visiting a house of prostitution (although not engaging in sexual acts there) is not conduct unbecoming an officer and a gentleman despite public knowledge of the behavior.[194] Conversely, another court held that negligently writing bad checks is conduct unbecoming an officer and a gentleman, despite the *lack* of public knowledge about the conduct.[195]

If the concept of honor, and thus what conduct is dishonorable, is unclear, it is subject to differential imposition depending on the particular court, judge and prosecutor, the culture of the particular branch of service, and the overall moral tenor of the times. Further, in the absence of clear parameters, differing social expectations and norms of men and women, particularly with regard to sexual conduct, might lead to discriminatory results. Would a female officer's presence at that same house of prostitution, for instance, yield a different result? By contrast, where courts abide by a more utilitarian notion of honor by requiring that the adulterous conduct take place in the presence of or with the knowledge of others, they cling more closely to the actual contemporary meaning of honor by focusing on whether or not

189. *See infra* Part III.

190. *See infra* Part VI.

191. *See supra* Part III.

192. *See supra* Part III.

193. *See, e.g.,* Giordano 25 C.M.R. at 139, 15 U.S.C.M.A. at 168.

194. *See* United States v. Guaglione, 27 M.J. 268 (C.M.A. 1988) (finding that inadequate notice prevented conduct from being conduct unbecoming an officer and a gentleman).

195. *See* United States v. Jenkins, 39 M.J. 843 (A.C.M.R. 1994).

the officer's standing was in fact compromised by his or her conduct.[196] This doctrinal ambiguity, as well as the differing policies issued by each branch, led to the potential for disparate enforcement. These factors drove the military's study of adultery policies discussed in the Introduction. As a result of the reevaluation, proposed revisions to the MCM outlined nine factors that commanders were to consider in deciding whether to pursue an adultery charge.[197]

To the extent adultery is of merely utilitarian concern to the military, the real issue then is whether the officer's behavior impacts the military mission directly. The manner that an officer's adulterous act might compromise his or her ability to command is discussed below.

b. An Officer's Ability to Command the Unit: Chain of Command and Unit Cohesion

Let us now move to the second and more practical aspect of Article 133, acts that impact the service member's "standing as an officer." As the following discussion demonstrates, this practical aspect ties more closely to the "respect" meaning of honor. The interrelated concerns of respect for the chain of command[198] and unit cohesion play a role here.

The chain of command argument goes something like this. A military force is a well-greased, unified machine that operates under a clear line of authority. Through this hierarchical structure, the overall military strategic plan comes to fruition. For this to work, individual actors cannot unilaterally decide to stop spinning, but must turn synchronously on the order of the driver.[199] If a military force is to operate effectively, the argument continues, it must function as a single force such that one branch, unit, or individual does not act in a manner that undercuts the work of another branch or unit. They must all be working towards the same ultimate end, under the orchestration (in theory) of the Commander-In-Chief. The overall plan is implemented through

196. *See, e.g.,* notes 216-219 *supra*, cases cited therein, and accompanying text. This dishonored-in-fact idea relates more closely to the tort offenses against dignity or reputation—consistent with my analysis of the etymology of honor.

197. *See infra* Part V(D).

198. For purposes of this argument, I accept the claim asserted by military theorists that respect for the chain of command and unit cohesion are necessary to a successful fighting force. *See supra* notes 92–102 and accompanying text.

199. *See* Oseil, *supra* note 99, at 1063-65 (arguing that there is space for individual moral choice within the constraints imposed by the need for unit cohesion).

orders passed down (and obeyed), in increasing levels of specificity and detail. Top military leaders develop the overarching strategy that is disseminated to the various branches. Leaders in each branch, in turn, issue appropriate orders to units in their branch. Commanders of those units ultimately issue implementing orders to the most junior service members. If one link in that chain is weakened, the machine ceases to run.

Such is the case when soldiers lose respect for their superiors. If a lower ranked member does not respect a higher ranked officer, then the junior member might question that superior's orders. The junior member might disobey the order outright or obey it only halfheartedly. Once a pattern of disobedience starts, the structure of the unit begins to dissolve. The dissolution of a single unit jeopardizes the entire military operation.

Thus, the officer's ability to maintain the chain of command depends in large part on the degree to which those below the officer respect him or her. If the officer is not respected, the officer's orders are less likely to be heeded, thus endangering the effectiveness of the military in carrying out its purpose.

Adultery, the argument continues, can trigger this chain of events. If an officer commits adultery and those under the officer's command learn of it, they may cease to hold the officer in high regard because "there is widespread moral disdain for adulterous behavior."[200] The natural consequence of this disregard is disrespect for the officer's orders, breakdown in the chain of command, and dissolution of the fighting force.[201] If, however, there is not widespread opprobrium surrounding adultery, then there is no reason to believe that unit cohesion or the chain of command will dissolve in the face of subordinates learning of their superior's adultery. When we create a hard-edged legal norm proscribing adultery, however, two things happen. First, the legal norm gives the appearance of reflecting a previously existing social norm proscribing adultery, whether or not such a norm existed. If it did exist, the legal norm does not reflect whether the social norm was deeply held or not. Second, even assuming that the legal norm circumscribes an existing social norm, the legal norm continues to stand despite any subsequent

200. Winner, *supra* note 11, at 1103. "[A]dultery undermines a soldier's 'moral beacon' image that is vital to commanding the respect of peers and subordinates in critical situations." *Id.* Indeed, military leaders acknowledge that "it's tough to follow a moral maggot, especially in combat." *Id.*

201. *See id.*

softening of the social norm. This latter point is exemplified by the divergent civilian and military practices around adultery.

The second way that a service member's standing as an officer, and thus the effectiveness of the military might be impacted, is tied to ensuring unit cohesion. Unit cohesion refers to the internal workings of a single military unit and particularly how the individuals within the group work as a unified whole. Maintaining junior service members' respect for superior officers is necessary to protect a unit's cohesion to the extent that the commanding officer provides the superstructure giving the unit its form. In addition, however, the commanding officer plays a significant role in maintaining the bonds between the individual members of the unit. Similarly, she or he may play an equally powerful role in disintegrating those bonds.

The demise of Captain Linda Bray is an example of this sort of breakdown of unit cohesion.[202] Captain Bray commanded a Military Police unit in 1989 during the United States' invasion of Panama. Her unit was ordered to secure a K-9 compound and their mission was successful. The media learned that shots were fired during this mission and that a female officer led the unit. The military command attempted to direct and orchestrate the ensuing media frenzy over the incident. During this process, Captain Bray was at first paraded by the military as a poster child. "The military then got scared" about what this might mean for women in combat and began a deliberate process of discrediting Bray.[203] Military leaders sought out small errors in the story told by Bray and circulated them to the media.[204] Based on interviews with military personnel not even present at the scene, a toned-down version of the events was developed–including a denial that her unit engaged in combat. This new story was presented to reporters and Bray was prohibited from rebutting it.[205]

In this process, men in Bray's unit became demoralized by all of the attention paid to Bray and the other women in the unit, while they received no credit for the mission in which they

202. Francke recounts Captain Bray's story in her book, *Ground Zero*. FRANCKE, GROUND ZERO, *supra* note 88, ch. 2, *Panama, the Press, and Army Politics: The Sacrifice of Captain Linda Bray*. The irony of Bray's situation is that, in many ways, it was the military itself that caused the breakdown of the unit's cohesion.

203. *Id.* at 58 (quoting Carolyn Becraft, a military policy analyst).

204. *See id.* at 58-59.

205. *See id.* at 59-62

equally participated. Additional work was assigned to the unit, perhaps as part of the military's attempt to defuse the attention heaped on Bray. In the end, unit cohesion dissolved.[206] Male soldiers resented the attention paid to the female soldiers, so the bonds linking them evaporated. Because of the campaign to discredit Bray, her authority over her unit eroded, making it impossible for her to pull them back together. The unit was disbanded.[207] Here, unit breakdown was not necessarily due to a failing of the particular commander. Rather, it resulted either from the military establishment's conscious fomenting of disrespect (the cynical view) or the impact of the media's handling of the issue (a less cynical view). Nonetheless, the dynamic is clear. If members of the unit do not respect the commanding officer, there is no unit.

An argument can be made that a commanding officer's adultery could similarly lead to the dissolution of unit cohesion. First, when the unit members learn that their commander is engaging in an extra-marital affair within the unit, they may believe that the officer's loyalty to the paramour may supercede that to the unit. However, the same thing could happen even if both parties to the "illicit" relationship were single. Second, if the officer commits adultery with a member of the unit, intra-unit resentment may arise—the remaining unit members may fear that the officer will exhibit favoritism towards the person with whom he or she is having an affair. Again, however, this would be the case even if neither party to the relationship were married to someone else. Third, if members of the unit believe (either individually or en masse) that adultery is morally wrong, their respect for the commanding officer would diminish upon learning of the liaison. Only in this last case, resting as it does on a socially contingent valuation of marriage, would unit cohesion be affected by adultery in a way different from a sexual relationship between two unmarried persons. These issues are addressed further in Parts VI and VII.

2. Article 134: The General Article

The second grounds for an adultery charge is Article 134, the so-called "General Article." The General Article sanctions conduct not proscribed by the other punitive articles.[208] As with

206. *See id.* at 67.
207. *See id.* at 70-71.
208. *See* Art. 134, UCMJ, 10 U.S.C. § 934.

Article 133, Article 134, by its nature, requires some separate conduct in order for there to be an offense.[209] The three different categories of conduct proscribed under the General Article are as follows: (1) disorders and neglects prejudicing "good order and discipline,"[210] (2) conduct bringing "discredit upon the armed forces,"[211] and (3) "crimes and offenses not capital" (federal crimes).[212] Each of these is discussed in turn.

a. Conduct that Prejudices Good Order and Discipline

The first category of proscribed conduct, acts that "prejudice . . . good order and discipline,"[213] protects a core need of the military in furthering its mission. We can see precedents to current practices in ancient Roman military proceedings where punishable offenses included cowardice, mutiny, desertion, and doing violence to a superior.[214] A 1960 military report described discipline as follows:

> Discipline—a state of mind which leads to a willingness to obey an order no matter how unpleasant or dangerous the task to be performed—is not a characteristic of a civilian community. Development of this state of mind among soldiers is a command responsibility and a necessity.[215]

Any number of scenarios may jeopardize good order and discipline, but the intent of this provision is to be limited to those situations where the negative impact is real rather than imagined.[216] On the other hand, military courts have held that in some cases, conduct is service discrediting regardless of public awareness of it: "Some acts by their very nature are prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces. They generally are offenses that involve a degree of moral turpitude. False swearing is such an offense."[217]

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209. *See id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*
214. *See* SCHLUETER, *supra* note 113, at 15.
215. *Id.* at 5 (quoting the 1960 Powell Report to the Secretary of the Army on the status of the UCMJ at 11, 12).
216. *See* United States v. Greene 34 M.J. 713 (A.C.M.R. 1992) (discussing cases wherein the conduct must be publicly known in order to be service discrediting, but then distinguishing cases where the conduct is such that only if it were known, it would be service discrediting).
217. *Id.* (citing United States v. Light, 36 C.M.R. 579, 584 (A.B.R.1965)).

In one case, however, the military court found that simply making a false statement was not, in and of itself, prejudicial to good order and discipline:

> I cannot say that when a service member makes a false statement to a state official investigating a crime or any other matter encompassed by that official's responsibilities, he inherently prejudices good order and discipline or discredits the armed forces. Although lying is an act of dishonesty that reflects a degree of moral turpitude, I can find no authority holding it to be per se wrongful or discreditable. Even the proscription against lying in the Ten Commandments applies only to 'bearing false witness against thy neighbor.'[218]

In another case, a military court held:

> In the case at bar, we find adequate proof of prejudice to good order and discipline in appellant's admission that he, a noncommissioned officer, knowingly violated the law in a situation where other soldiers could see or find out about it. The direct and obvious injury to good order and discipline which can be inferred from these facts is twofold. First, the appellant's conduct would tend to reduce the other soldiers' confidence in his integrity, leadership, and respect for law and authority. Second, the example he provided would tend to cause the other soldiers to be less likely to conform their conduct to the rigors of military discipline.[219]

As can be seen from these cases, it was (and perhaps remains) unclear whether conduct that takes place in secrecy will subject a service member to an Article 134 charge. Adulterous conduct taking place in private, with no outside awareness, is not actionable under the framework that sanctions only known wrongdoing.[220] Ultimately, if the test is whether the crime is morally

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218. United States v. Johnson, 39 M.J. 1033, 1038 (A.C.M.R. 1994).

219. United States v. Green, 39 M.J. 606, 610 (A.C.M.R. 1994).

220. Putting aside for the moment the possibility that sexist assumptions by military leaders were at work in the case of Lieutenant Kelly Flinn, we can envision situations that might trigger military concern even where the conduct takes place in private. Even if Flinn's adulterous relationship took place in private, and even if the cuckolded spouse had not cried foul, the military might rightly still be concerned about Flinn's conduct because of her specific position. She was entrusted to fly B-52 airplanes loaded with nuclear weapons. In other words, Flinn's failure to cease her relationship with Marc Zigo after being ordered to do so indicates that she was either not in control of her feelings or that she judged following her personal wishes more important than obeying orders. If it is the case that Flinn's emotions or convictions were that strong, it is not too great a stretch to understand that military leaders (or civilians for that matter) would not want her to fly a B-52 or, for that matter, handle nuclear weapons in any capacity. Characterizing Flinn as overemotional feeds into stereotypes of women, so I question if that in fact was the case. My point is that her position as a B-52 pilot (rather than, say, a helicopter pilot) made it more likely the military would come down on her harshly.

reprehensible, the same indeterminacy concerns arise as were discussed in connection with Article 133 charges. Responding to this concern, the proposed revisions to the MCM outlined evaluative factors, discussed in a later section, that commanders in all units and branches should consider when faced with a case of adultery.[221]

b. Conduct Bringing Discredit to the Armed Forces

As to the second category, acts that bring discredit to the armed forces,[222] the concern is similar to, and yet different from, the code of honor that attaches to an officer. The concern that an officer maintain a high standard of conduct is both practical, to deepen the strength of the chain of command, and more theoretical, the concept that officers should be honorable and do the right thing.[223]

By contrast, the General Article's sanction against conduct bringing discredit to the armed forces is primarily practical in origin. If the public at large does not have respect for the military, there will not be public support for the military's mission.[224] The Vietnam War illustrated the negative effects caused by the lack of public support for the military. To say that the lack of public support was complex in origin is to state the obvious. It was related in part to the actual purpose of the mission.[225] However, this negative public reaction may also be attributed to the public's witnessing for the first time, in full photographic detail, specific acts of the true horrors of war as they unfolded.[226] The Vietnam experience, regardless of its complexity, demonstrates that public support for the military must be maintained for its successful operation. The experience of the lack of public support for the Vietnam War continues to reverberate in military public relations practice, exemplified most clearly by the tightly

221. *See infra* Part V(D).

222. *See* 10 U.S.C. § 934.

223. *See supra* notes 130–134 and accompanying text.

224. *See, e.g.,* Winner, *supra* note 11.

225. *See, e.g.,* BERTRAND RUSSELL, WAR CRIMES IN VIETNAM 9 (1967) (arguing that U.S. racism undergirded our country's involvement).

226. *Id.* at 53 (noting *Life* Magazine's 1963 publication of photos of napalm bombings in Vietnam); Bruce W. Watson, *Cardinal John J. O'Connor on the Just War Controversy*, in MILITARY LESSONS FROM THE GULF WAR 194-201 (1993) (Bruce Watson ed.). *See generally,* Bruce W. Watson, *The Issue of Media Access to Information*, in MILITARY LESSONS FROM THE GULF WAR 202-211 (1993) (Bruce E. Watson ed.) (calling Vietnam news coverage "tantamount to a television miniseries").

controlled news coverage of the Gulf War.[227] The provision, conduct bringing discredit to the armed forces, is aimed at protecting public support for the military establishment in general and, by extension, its mission.

Despite claims by some pro-adultery-sanction writers,[228] the particular concern with the general public's support for the military currently argues against sanctioning adultery. That is, the civilian sector has demonstrated a decreased desire to legally penalize adulterous conduct.[229] There is no concrete evidence to indicate that the general public holds or would hold the military in disrepute when service members engage in adulterous conduct that the public in general does not find so reprehensible. Additionally, as can be observed from the public outcry over the discharge of Lieutenant Kelly Flinn (at least when it appeared that her discharge was based on the adultery alone), the military can actually lose public support when it sanctions adultery.[230] Further, if public opinion shifts on this issue, as it has done repeatedly during the last few centuries,[231] should military policy change accordingly? The need for public support of the military was amply demonstrated by the Vietnam War experience. When the issue under debate is only tangentially related to the military's purpose in the first place (as is the case with adultery), however, public support is unlikely to be significantly enhanced by a military policy proscribing it.

c. Crimes and Offenses not Capital

The third category of conduct, "crimes and offenses not capital,"[232] is designed to address those situations where the military code does not specifically proscribe a particular form of conduct, but federal law does. In these situations, the military can, in a sense, piggyback the federal crime onto an Article 134 charge. For instance, under this provision and prior to Congress' creation of a separate military offense for this conduct, drug offenses were often prosecuted.[233] This third category, however, does not sup-

227. *See, e.g.,* FRANCKE, *supra* note 88, at 74-75.

228. *See e.g.,* Bruce Watson, *Media Access*, *supra* note 226, at 202-11.

229. *See supra* Introduction and Part II.

230. *See* Part II *supra*.

231. *See generally supra* discussion in Part II.

232. 10 U.S.C. § 934.

233. *See* SCHLUETER, *supra* note 113, at 86-87.

port the military's prosecution of adultery because no separate federal crime of adultery exists.

As seen from the foregoing discussion, a number of rationales underlie the military proscription against adultery. At least on paper, these various justifications for the military sanction are clearly different from those put forward in the civilian context. In Parts VI and VII, however, I discuss some of the less visible and unspoken bases for the military's sanction.

D. *Determination of Prejudicial and Service Discrediting Conduct Under the 1998 Proposed Revisions to the Manual for Courts-Martial*

While the military recommended in its proposed revisions to the MCM that adultery be handled as informally as possible,[234] it solidified its stance on adultery. The proposed revisions stated: "Adultery is clearly unacceptable conduct, and it reflects adversely on the service record of the military member."[235] The guidelines further explicate that adultery is actionable where the conduct "has an immediate, obvious and measurably divisive effect on unit or organization discipline, morale or cohesion, or is clearly detrimental to the authority or stature of or respect toward a service member."[236] Adultery is service discrediting where it "injure[s] the reputation of the armed forces . . . [or] has a tendency, because of its open or notorious nature, to bring the service into disrepute, make it subject to public ridicule, or . . . lower[ ] it in public esteem."[237] "Private and discreet" adultery may not be actionable under this standard.[238]

The proposed revisions further outline nine factors that commanders are to consider when faced with a case of adultery.[239] Shadows of prior cases linger at the edges of this nine-

234. Department of Defense Proposed Changes for the MCM pt. IV ¶ 62 art. 134 (Adultery) (visited 11/16/98) <http://www.defenselink.mil/pubs/adultery072998.html>.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. The nine factors that cammanders are to consider are as follows:
(a) The accused's marital status, military rank, grade, or position; (b) the coactor's marital status, military rank, grade, and position, or relationship to the armed forces; (c) the military status of the accused's spouse or the spouse of the coactor, or their relationship to the armed forces; (d) the impact, if any, of the adulterous relationship on the ability of the accused, the coactor, or the spouse of either to perform their duties in support of the armed forces; (e) the misuse, if any, of government

factor test. Under the test, commanders are to consider all parties' marital statuses, including if legal separation had been entered, and all parties' military statuses, including military rank, grade, position, or the other party's "relationship to the armed forces."[240] No guidance, however, is given on how these facts should weigh in the decision whether or not to prosecute. The impact of the adultery on any of the parties' abilities to perform their duties should be evaluated.[241] Commanders are also to determine if the parties misused "government time and resources to facilitate the commission of the conduct" (e.g., the sex in the barracks situation).[242] Kelly Flinn's case is encapsulated in the sixth factor of the nine factor test: "Whether the conduct persisted despite counseling or orders to desist; the flagrancy of the conduct, such as whether any notoriety ensued; and whether the adulterous act was accompanied by other violations of the UCMJ."[243] General Ralston's case is encapsulated in the ninth factor: "Whether the adulterous misconduct involves an ongoing or recent relationship or is remote in time."[244] Presumably this means that old flings should be considered less serious than present-day affairs. Finally, under the seventh factor, commanders are to consider any "negative impact of the conduct on the units or organizations of the [parties] such as a detrimental effect on unit or organization morale, teamwork, and efficiency."[245] Whether this enumeration of factors will actually lead to greater clarity and evenhanded determinations of what conduct is prejudicial or service discrediting, or will instead do the reverse as a

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time and resources to facilitate the commission of the conduct; (f) whether the conduct persisted despite counseling or orders to desist; the flagrancy of the conduct; such as whether the adulterous act was accompanied by other violations of the UCMJ; (g) the negative impact of the conduct on the units or organizations of the accused, the coactor or the spouse of either of them, such as a detrimental effect on unit or organizational morale, teamwork, and efficiency; (h) whether the married accused or coactor was legally separated; and (i) whether the adulterous misconduct involves an ongoing or recent relationship or is remote in time.
(visited Jan. 10, 1999) <http://www.defenselink.mil/pubs/adultery072990.html>.

240. Presumably this would cover, for example, civilian military employees. More attenuated connections might also be relevant—say, where one of the parties is a son or daughter of a military connected person.

241. *See id.* at (d).

242. *Id.* at (e).

243. *Id.* at (f). This is clearly in response to the Flinn case, as the individual factors lumped together in this one paragraph are not intrinsically connected to each other in any other way.

244. *Id.* at (i).

245. *Id.* at (g).

result of the preference for informal resolution of charges proposed in the revisions, only time will tell.

VI. HISTORICAL AND LEGAL DEVELOPMENT OF MILITARY SANCTIONS AGAINST ADULTERY

A. *Historical Development of Military Sanctions against Adultery*

By all anecdotal accounts, although adultery was not typically prosecuted, it has long infected military life.[246] Few pre-1984 published cases involving a prosecution for simple adultery exist.[247] Military commanders only recently deemed adultery a sufficiently serious offense to warrant a written provision against it.[248] Adultery and fraternization were first included in black letter military criminal sanctions as part of massive amendments to the MCM in 1984. Of particular curiosity is that at the same time that military disciplinary actions, discharges, and court-martials for adultery increased, civilian prosecutions of adultery were becoming obsolete.[249] On a simple level, adultery (and fraternization) prosecutions increased because the MCM was amended in 1984 to include adultery as an Article 134 crime. But on a deeper level, one must ask why the MCM was amended to include it in the first place. To answer this question, we first look to any legislative or similar history documenting the reasons for changes in the law. The actual notes and records of the discussions of the committee that revised the MCM, however, which might have given us insight on this question, have been destroyed.[250] One must, therefore, look to the surrounding circumstances to try to get a handle on why and how the military began to conceive of adultery as a problem worth including as a prosecutable offense under the UCMJ.

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246. *See infra* Part IV(A).

247. *See* United States v. Butler, 5 C.M.R. 213 (1952). This is one of only a few published opinions that involve adultery exclusively, indicating that although adultery is being sanctioned more frequently today, these sanctions are happening at the administrative rather than court-martial level.

248. *See* MCM ¶ 62.

249. *See supra* notes 17-20, 42 and accompanying text.

250. *See* Jonas, *supra* note 11. Jonas indicates that records were destroyed after the President signed the MCM into law, and since he never got to read them prior to signing it, it would be "unfair" for others to use them in interpreting the MCM. One still must ask whether the explanation for the destruction of the records is plausible.

One of the biggest changes that took place at this time was the integration of women into the main body of the military.[251] Although women have participated in American military life since the American Revolution, the disbanding of the Women's Army Corp and gender integration of the forces in 1979 greatly increased both the total number of women in the services and the number of potential intimate relationships between service members.[252] As a historical matter, the integration of women into the force in 1979 coincides with this revision of the MCM. That fact standing alone, however, cannot continue to justify increased military prosecutions of adultery, an act that the services has traditionally ignored, even if it may have been the initial trigger for heightened attention. Nonetheless, it is somewhat helpful to understand some of these broader issues to clarify the context in which the adultery issue arose.

The integration of the military force brought what were formerly accepted military practices into question and led to the development of proscriptions against some of those practices. The development of these various changes was somewhat by trial and error. There is no practice left uncontested. This heated debate continues within the military establishment as well as between the military and the civilian sectors.[253] It is because of the haphazard development of policies that arose upon the integration of women into the military that the Federal Advisory Commission was charged with its mission to review these policies.[254] In any event, understanding the larger debate helps put the debate over adultery into greater context.

The military is grappling with multiple problems related to the integration of women into the armed forces, including whether or not training should be gender-integrated, women should be permitted to participate in combat, or women should be included in a conscription-based (versus all volunteer) force.[255] This debate over the role of women in the military, in

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251. For a scathing look at the integration of women into the forces, see generally BRIAN MITCHELL, WOMEN IN THE MILITARY: FLIRTING WITH DISASTER (1998).

252. *See* DAVID E. JONES, WOMEN WARRIORS: A HISTORY (1997); HELEN ROGAN, MIXED COMPANY: WOMEN IN THE MODERN ARMY 15 (1981).

253. *See* Lieutenant General Bernard E. Trainor, USMC (Retired), *Women in the Military,* THE MARINE CORPS GAZETTE, Nov. 1997 (Supp. Wed., Dec. 10, 1997) at 10.

254. *See infra* Part IV(A).

255. It is possible this debate is more fraught with conflict and less productive in part because the Commander In Chief, President Clinton, does not have a military

all its various permutations, takes place both between the military and the civilian sectors and within the military itself. There are strong differences of opinion at both levels of the debate.

The opinions of both liberal feminists and the conservative military establishment tend to be polemic.[256] Conservative/anti-integration/anti-women-in-combat advocates argue that the primary concern of the military is putting forward the best fighting force possible, and civilian notions of equality and arguments about "rights" are exterior to this primary mission.[257] This group combines active and retired career military commanders and a small but vocal group of civilian women who agree with the philosophies and ideals of Phyllis Schlafly.[258] Conservative rhetoric points to men's greater average size and physical strength, unit cohesion (in essence, male bonding), and sexual tensions and jealousies that "naturally" and disruptively arise between men when(ever) women are present.[259] One can see in these claims shadows of arguments made during the 1960s around women's integration into the formerly primarily male work force.[260] During this time, wives of executives and businessmen no doubt played a role similar to the role played by the conservative women in the current debate. The voices of military wives underlie some of what is happening, as did those of stay-at-home wives concerned with their husbands running off with their secretaries.[261]

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background, so must defer to those currently in command. Halley discusses the impact Clinton's lack of knowledge (for instance, of military resistance to eliminating antigay policies) had on his ability to implement promised reforms. *See* Halley, *supra* note 15, at 165-69.

256. *See generally* Trainor, *supra* note 253 (describing both sides of the debate).

257. *See, e.g., Women in Combat? Insights Worth Repeating,* MARINE CORPS GAZETTE, Nov. 1997 (Supp. Dec. 10, 1997) at 22 (quoting various editorials by a collection of conservative authors).

258. Authors cited by the Marine Corps in *Women in Combat? supra* note 257, include George Will, Major Daniel B. Streich (quoting Jean Yarbrough, an academician at Loyola University of Chicago), Thomas Wilson of the Washington Times, and Major General Jarvis D. Lynch, USMC (Retired).

259. *See* Buckley, *supra* note 102, at 17-19; Chamallas, *supra* note 11, at 358 (citing Anna Simons, *In War, Let Men be Men,* N.Y. TIMES, Apr. 23, 1997 at A23); FRANCKE, *supra* note 88, at 158-61;Trainor, *supra* note 253, at 12.

260. *See, e.g.,* Chamallas, *supra* note 11, at 315-16. *But see* Jacob, *supra* note 2, at 312-13.

261. For a description of the active role of military wives in military life, see Barbara Marriott, *The Social Networks of Naval Officer's Wives: Their Composition and Function,* WIVES AND WARRIORS: WOMEN & THE MILITARY IN THE UNITED STATES & CANADA 19 (Laurie Weinstein & Christie White eds., 1997).

In addition to the average physical differences in size between men and women, conservatives point to the long historical pattern of exclusively male military forces as indicative of an underlying genetic or biological difference between men and women.[262] One commentator goes so far as to state that women and men have different brain development because of this long historical pattern.[263] Conservatives generally see the problem as biological and therefore immutable, rather than as cultural and therefore mutable.[264]

The feminist/pro-integration/pro-women-in-combat rhetoric is based in notions of equality and full citizenship rights. These advocates counter the conservative approach by arguing that the claims of difference and of sex-related problems are nothing but smoke screens for good old-fashioned sexism.[265] The feminist approach defines the problem as exclusively cultural (albeit a deeply entrenched and powerful norm) rather than biological, and therefore mutable.[266]

A middle-of-the-road view is taken by some who accept that there may be average differences in size and strength between women and men, but argue that fundamental notions of equality dictate that women be allowed to succeed or fail based on their individual strengths through a nonexclusionary competitive system.[267] Although those taking the middle approach accept for the most part the physical difference aspect put forth by conservatives, they stand with the hard-line feminists in rejecting the conservative claim that integration will dissolve unit cohesion and trigger sex rivalries.[268]

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262. *See, e.g.,* Will, *supra* note 106.

263. LIONEL TIGER, MEN IN GROUPS (1969) (cited with approval in Major James J. Buckley, *The Unit Cohesion Factor,* MARINE CORPS GAZETTE, Nov. 1997, 66, 68).

264. There certainly are debatable issues about mutability and immutability of traits that are essentially cultural and those viewed as essentially biological. For an interesting discussion of the naturalization of gender and kinship through the symbol of blood, see Sylvia Yanagisako & Carol Delaney, *Naturalizing Power,* in NATURALIZING POWER: ESSAYS IN FEMINIST CULTURAL ANALYSIS 1 (Sylvia Yanagisako & Carol Delaney eds., 1995).

265. *See* Trainor, *supra* note 253.

266. For a good outline of the various and competing "feminist" positions taken by women, see Trainor, *supra* note 253, at 60-62. There are also multiple other factions, including antiintegration men and women who agree that the "problem" is cultural, but who then reify this cultural practice. There seems to be no acceptance by this group of possible bad cultural practices or behaviors that we should consciously strive to change.

267. *See* Trainor, *supra* note 253.

268. *See id.*

With this background in mind, I want to return to the phenomenon of increased prosecutions of adultery in the military sector directly contrasting with the diminution of adultery prosecutions in the civilian sector. The reasons for the denouement of adultery prosecutions in the civilian sector are attributable to a number of factors, including relaxed attitudes about sex in general,[269] a change in the nature of marriage from contractual to companionate,[270] and perhaps also to an increasingly politically conservative libertarian culture in which individual rights are valued over community norms. Even as libertarian values garner greater support, there has begun a socially conservative backlash in the civilian sector. This socially conservative movement, in part made up of fundamentalist religious groups, presses for the reinstitution of fault-based divorce in states where fault had long been abolished.[271] It seems fair to say that members of the military are anti-individualist by training and necessity and also reflect more socially conservative values. This means that for reform of military policies[272] on adultery and fraternization to be successful, reformers need to look less to libertarian arguments for individual autonomy (e.g., pushing privacy claims) and more to an approach that aims at replacing male in-group norms with those that are more compatible with the presence of women in the service.[273]

In the following section, the current provisions on adultery are laid out and the historical background of those provisions is further discussed.

B. *Manual for Courts-Martial: Amendment to Include Adultery and Fraternization*

As previously discussed, there were massive amendments in 1984 to the original 1969 MCM. These revisions included the ad-

269. *See, e.g.,* FRIEDMAN, *supra* note 18, at 345-46.

270. *See, e.g.,* RICHARD POSNER, SEX AND REASON (1996); BERTRAND RUSSELL, *Do I Preach Adultery,* BERTRAND RUSSELL: ON ETHICS, SEX AND MARRIAGE (Al Seckel ed., 1987); Jacob, *supra* note 2.

271. Louisiana passed legislation to this effect, sometimes referred to as covenant marriage legislation, although it is an opt-in rather than a mandatory provision. Arizona passed a similar provision, see ARIZ. REV. STAT. ANN. § 25-901 (1998).

272. *See infra* discussion of 1998 reform proposals at Part V(D).

273. Martha Chamallas discusses this issue further in Chamallas, *supra* note 11. *See also supra* text accompanying notes 218-21.

dition of a number of new substantive criminal provisions.[274] The primary emphasis of these provisions is outlining offenses actionable under the two general provisions in the UCMJ—primarily Article 134, and by extension, Article 133. As of 1995, fifty-four substantive crimes in the MCM could trigger an Article 133 or 134 court-martial.[275] These offenses include wrongful cohabitation,[276] drinking with a prisoner,[277] gambling with a subordinate,[278] indecent acts with another,[279] making disloyal statements,[280] kidnapping,[281] straggling,[282] and jumping off a ship.[283] Adultery was one of these new MCM-created offenses.[284] Prior to this time, there was no specific written provision for the court-martial of a service member for adultery, and few published cases where the underlying charge was exclusively adultery.[285]

At the same time that the military included adultery as a charge, they also added fraternization to the list of actionable offenses.[286] Unlike adultery, however, sanctions against fraterniza-

274. Beginning in 1984, the MCM was totally reorganized and is now revised. As of 1994, the MCM was reissued annually in paperback as opposed to loose-leaf. *See* SCHLUETER, *supra* note 113, at 11-12.

275. *See generally* MCM. As the sampling following demonstrates, the range of offenses includes those familiar to civilians (sexual assault of a minor and kidnapping), and ones clearly unique to the military (straggling, making disloyal statements, or gambling with a prisoner).

276. *See* MCM ¶ 69 (unmarried persons living publicly as husband and wife). Sexual intercourse need not have taken place, but the parties must have acted in a way that leads others to believe they are married. *See* MCM ¶ 69(c).

277. *See* MCM ¶ 74.

278. *See* MCM ¶ 134.

279. *See* MCM ¶ 90 (committing a "wrongful" act that was "indecent"). Indecent is defined as "that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprave the morals with respect to sexual relations." MCM ¶ 90(c)

280. *See* MCM ¶ 72 (making a statement to another person with the intent to promote "disloyalty or disaffection toward the United States").

281. *See* MCM ¶ 92.

282. *See* MCM ¶ 107 (Elements include that "the accused, while . . . on a march, maneuver[ ], or similar exercise, straggled . . . and the straggling was wrongful"). Straggling means "to wander away, to stray, to become separated from, or to lag or linger behind." MCM ¶ 107(c).

283. *See* MCM ¶ 91. Although the soldier must have jumped off the ship into water, it is not necessary that the boat in fact have been under way. *See* MCM ¶ 91(c).

284. *See* MCM ¶ 63.

285. *See infra* subsection D, discussing United States v. Butler, 5 C.M.R. 213 (1952) and United States v. Ambalada, 1 M.J. 1132 (1977).

286. *See* MCM ¶ 83.

tion existed in military contexts for centuries.[287] Commentators explain the addition of fraternization to the written list of actionable offenses in the explanatory notes of the MCM: "This paragraph is new to the Manual for Courts-Martial, although the offense of fraternization is based on long-standing custom of the services, as recognized in the sources [listed]."[288] The commentators go on to list six cases and two law journal articles from which the provision was derived.[289] Subsequent scholarship extensively documents the long and deeply embedded tradition of sanctioning fraternization.[290] By contrast, as discussed previously, there is no similar tradition concerning adultery. Perhaps reflecting this, the comments to the adultery provision list only two cases, one of which is actually a rape case where the discussion of adultery was merely whether or not it was a lesser-included offense of rape.[291] Following the amendment of the MCM, taking a given five year period of approximately 1992 to 1997, 3.7% of the approximately 27,000 court-martials involved a charge of adultery, an estimated seventy-four cases during that time frame alone.[292] Of that 3.7%, the majority contained charges in addition to adultery; only eighteen were stand-alone adultery cases.[293] The number of simple adultery cases may be small, but what is more important is that not a single one of those stand-alone adultery cases resulted in a dishonorable discharge.[294] This indicates that

287. *See infra,* subsection C, discussing the historical development of the fraternization doctrine.

288. MCM, Appendix 23, Analysis of Punitive Articles, p. A23-18, ¶ 83(c).

289. "This paragraph is new and is based on United States v. Pitasi, 20 U.S.C.M.A. 601, 44 C.M.R. 31 (1971) and United States v. Free, 4 C.M.R. 466 (N.B.R. 1953). *See* Nelson, *Conduct Expected of an Officer and a Gentleman: Ambiguity*, 12 A.F. JAG. L.R. 124 (1970). *See also* W. Winthrop, Military Law and Precedents 41, 716 n. 44 (2d ed. 1920 reprinting); Staton v. Froehlke, 390 F.Supp. 503 (D.D.C. 1975); United States v. Lovejoy, 200 U.S.C.M.A. 18,42 C.M.R. 210 (1970); United States v. Rodriguez, ACM 23545 (A.F.C.M.R. 1982); United States v. Livingston, 8 C.M.R. 206 (A.B.R. 1952)." *Id.* at A-23.

290. *See, e.g., supra* note 131.

291. The two cases, discussed below in Subsection D, are United States v. Ambalada, 1 M.J. 1132 (1977) and United States v. Butler, 5 C.M.R. 213 (1952). It is possible, of course, that the citation to these two cases is meant to be illustrative rather than exhaustive, but it appears to reflect an actual difference in the numbers of cases formally charged. A WESTLAW search of reported cases on adultery and fraternization reflects a prevalence of fraternization cases and a dearth of those on adultery.

292. *See* Captain Mike Doubleday and Senior Defense Officials, Background Briefing (visited Nov. 16, 1998) <http://www.defenselink.mil/news/Jul1998/x07301998_x729goad.html>.

293. *See id.*

294. *See id.*

even where facts were so egregious as to warrant prosecution, military judicial decision-makers do not find in practice that adultery warrants a harsh penalty. If this is the case, why is a separate criminal sanction warranted? A discussion of the legal and historical framework follows.

C. *Fraternization: Relationships between Service Members*

1. Rank Differences

Historically, military forces around the world regulated relationships between officers and enlisted service members, or now more generally between those of different rank, under the rubric of fraternization.[295] The distinction between officers and enlisted service members likely originated in the actual different class backgrounds of officers, who were typically from the upper class, and enlisted personnel, who were typically from lower classes. The rationale for prohibiting undue familiarity between officers and enlisted shifted somewhat from a classist notion to concern with maintaining the chain of command.[296] Lower ranked personnel must obey those of a higher rank without question.[297] Being friends, socializing, or becoming financially involved might jeopardize that dynamic.[298] Originally, an officer becoming financially involved with enlisted personnel was deemed improper.

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295. *See* Major Kevin W. Carter, *Fraternization,* 113 MIL. L. REV. 61, 62-74 (1986) (describing prohibitions on fraternization type conduct beginning with the early Roman military, and continuing with the British and American military forces). *See also* Jonas, *supra* note 11, at 40-44 (briefly summarizing Carter's research) at 60-66 (overviewing fraternization policies in the Canadian, Kenyan, Australian, Royal Netherlands, Turkish, Thai, and British armies). In China, which has an all male military, regulation extends to civilian conduct. Seduction of a service member's wife while he is away on duty subjects a civilian to severe criminal penalties. *See* Interview of Simon Hing Yan Wong, Professor, Hong Kong University (Jan. 1998). It should be noted at this point, that there are several other methods of regulating intimate sexual conduct, particularly through prohibitions against fornication (sex between unmarried persons) and sodomy ("unnatural" sex acts between any two people, regardless of gender or relationship–typically referring to anal and sometimes oral sex). Fornication, per se, is not directly criminalized under the UCMJ although it is clearly implicated in the cohabitation and indecent acts prohibitions in the MCM. Sodomy is criminalized in its own section of the code. Gay and lesbian sexual relationships clearly and sometimes are addressed under these provisions in the same way as heterosexual relationships, but administrative and criminal actions typically are exacerbated by the military's obsession with sexual orientation.

296. *See, e.g.,* Carter, *supra* note 295, at 66-67 (quoting MAXIMS OF [GEORGE] WASHINGTON; POLITICAL, SOCIAL, MORAL AND RELIGIOUS (1854)); Jonas, *supra* note 11, at 37.

297. *See id.*

298. *See id.*

Occasionally, simply sharing a drink or playing cards with an enlisted member would have constituted "undue familiarity" sufficient to trigger a court-martial for fraternization.[299] More recently, fraternization cases typically involve romantic relationships between those of different rank, but are not necessarily limited to relationships between officers and enlisted personnel.[300] As outlined in the explanatory notes on fraternization in the MCM, "relationships between senior officers and junior officers and between noncommissioned or petty officers and their subordinates may, under some circumstances, be prejudicial to good order and discipline."[301] When the relationship is romantic rather than friendly, the potential for problems is obviously greater but not qualitatively different.

Although the line for what conduct is prohibited has shifted over time, the general posture of military commanders and policymakers has been relatively consistently that relationships between service members of different rank in certain circumstances may jeopardize discipline by negatively affecting unit morale and cohesion. One might think that the military adopted this policy in recognition of the potential abuse of power to coerce sex.[302] Although fraternization is conceptualized as a consensual offense, feminists writing on the phenomenon of sexual harassment in the workplace have argued that apparently consensual relationships may actually be non-consensual (both in their inception and in their continuation) when there is an external power differential between partners, such as in the case of a supervisor and supervisee.[303] A similar situation may exist where the romantic relationship is between service members of different rank. Further examination, however, of the historical motivation for prosecutions of fraternization, or at least court decisions in this area, reveals that the military establishment is primarily concerned with favoritism by the higher ranked member *on behalf of* the lower ranked member, and the damage that this favoritism causes to discipline.[304] Of only secondary concern

299. United States v. Giordano, 35 C.M.R. 135, 15 U.S.C.M.A. 163 (1964). *See* SCHLUETER, *supra* note 113, at 93.

300. SCHLUETER, *supra* note 113, at 93-94.

301. MCM Appendix at 23, Analysis of Punitive Articles, #83.

302. For a discussion of this aspect, see Chamallas, *supra* note 11, at 332-334.

303. *See generally,* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979).

304. *See* Carter, *supra* note 295, at 97. *See, e.g.*, Carter, *supra* note 295, at 90, 93, 96-97 (citing evolving Army policies against fraternization); Jonas, *supra* note 11, at

is the potential abuse of power by the higher ranked member in a negative way *against* the lower ranked member if the lower ranked member either does not comply with the sexual demands or subsequently unilaterally ends the relationship.[305]

It may be that this focus on favoritism rather than coerced sex made sense in the context of an all male military (although it would be wrong to assume that all-male groups are free of coerced sex),[306] but in the modern gender-integrated military, the possibility of sexual harassment certainly increases.[307] That is, in a single-sex military, relationships between an officer and an enlisted member of the unit under the officer's command could conceivably trigger charges of favoritism on a regular basis. It is arguably less likely that claims of coercion or sexual harassment would be lodged against a superior (at least under the early conception of sexual harassment).[308] By contrast, in a gender-integrated force the latter (coercion) will more likely dominate, although both still will be present. On the one hand most male military service members cannot hope to compete equally with female service members for job-related benefits deriving from romantic relationships with superior officers who are primarily male.[309] On the other hand, the potential for the negative use of power against a lower ranked member, in the form of quid pro quo sexual harassment, can now and often does play a serious role in constructing relationships between lower ranked (primar-

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73, n. 194 (citing Message, COMNAVAIRPAC, 250010z Feb. 88, subject: Fraternization). However, the Army's policy on fraternization during the mid 1980's could encompass coercion of sexual favors from subordinates.

305. *See* Carter, *supra* note 295, at 90 (relationships prohibited where they give the "appearance of, partiality, preferential treatment, or the improper use of rank or position for personal gain," (citing the Army's first written policy on superior-subordinate relationships). This is not to say that the military ignores the problem of sexual harassment. Rather, I simply point out that the motivation for fraternization sanctions was everything but concern for the less powerful partner in the romantic relationship.

306. *See, e.g.,* Chamallas, *supra* note 11, at 357.

307. For instance, it was not until women became more fully integrated into the work force that the concept of sexual harassment was developed. *See generally*, MACKINNON, *supra* note 303.

308. *See* MACKINNON, *supra* note 303 (discussing sexual harassment as gender specific and as a patriarchal tool for control of women by men in the work place); *cf.* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 118 S.Ct. 9988, 140 L. Ed. 2d 201 (1998) (finding same-sex sexual harassment actionable); Katherine Franke, *What's Wrong with Sexual Harassment?* 49 STAN. L. REV. 691 (1997) (discussing same-sex sexual harassment as a gender norming process); Blair, *supra* note 81.

309. The percentage of men who engage in homosexual activity is certainly less than the percentage who engage in heterosexual activity.

ily female) service members and higher ranked (primarily male) service members.[310] Even when female soldiers are of a higher rank, they are at risk of being coerced into sex through lesbian-baiting.[311]

> The MCM describes the offense of fraternization as follows:
> The gist of this offense is a violation of the custom of the armed forces against fraternization. Not all contact or association between officers and enlisted persons is an offense. . . . . Factors to be considered include whether the conduct has compromised the chain of command, resulted in the appearance of partiality, or otherwise undermined good order, discipline, authority, or morale . . . [and the surrounding circumstances are such that they tend] to compromise the respect of enlisted persons for the professionalism, integrity or obligations of the officer.[312]

One particular problem caused by the focus on the "custom" of the branch of service is the emergence of divergent policies and practices from branch to branch (Army, Navy, Air Force, or Marines)[313] and unit to unit (divisions within each branch). In the absence of a clear directive from the Secretary of Defense or a directive that anticipates or is subject to individual branch interpretation and implementation, each branch has its own policies on dealing with specific problems. Additionally, individual commanders of units within each branch might interpret and carry out these policies in varying ways. This divergence makes defining custom all the more problematic. Some commanders adopted an increasingly liberal attitude about relationships between those of different ranks, while other commanders take a more restrictive view.[314] Differences in practice also exist in situations where parties are not in the same unit or chain of command, thereby rendering concerns with unit cohesion and morale more attenuated.[315] In light of this, part of the work of the Task Force was to develop guidelines for all commanders to follow and ensure consistent handling of fraternization cases from unit

310. Given the fact that women were only recently integrated into the armed services, this seems a fair assumption.

311. *See* discussion of lesbian baiting and the "Don't Ask/Don't Tell/Don't Pursue" policy *infra* Part VI (2).

312. MCM pt. V ¶ 83.

313. *See* Blair, *supra* note 81.

314. FRANCKE, *supra* note 88, at 14-15 (describing one commander's facilitation of intimate relationship between service members).

315. *See* MCM ¶ 83(c)(2). The particular concerns of lesbian baiting due to the "Don't Ask, Don't Tell" policy, however, make suspect even relationships between service members of the same rank. *See infra* notes 139-141 and accompanying text.

to unit and branch to branch.[316] One factor necessarily confronting the Task Force was that sex between those of different ranks implicates not only civilian sector concerns with sexual harassment and coercive uses of power, it may also trigger a breakdown in the chain of command.

2. No Rank Differences

Even when there is no difference in rank between two romantically involved service members, concerns for good order and discipline may nonetheless arise.[317] First, same-ranked personnel serving in the same unit may have divided loyalties in battle. One of the involved parties may choose to protect their love interest, rather than another unit member, or take other risks to protect their sweetheart that simultaneously jeopardize the unit. Second, if the relationship ends, undoubtedly there will be friction between the parties. This is invariably the case, even in the most civil breakdown of a relationship. That kind of friction is just what unit cohesion cannot withstand.

Third, of more recent public attention are issues arising from the military's anti-gay policies under which an allegedly gay or lesbian service member can be kicked out of the military.[318] Under the most recent incarnation of the military's anti-gay platform, the Don't Ask/Don't Tell policy, women are discharged from service substantially out of proportion to their representation in the service.[319] This over-representation of women discharged under the policy results, in part, from a phenomenon known as "lesbian-baiting."[320] All too often, charges of women under the policy arise when a woman rejects the advances of a male colleague.[321] Lesbian-baiting occurs when he tries to coerce sex by saying she must be a lesbian if she refuses to sleep

316. *See* Blair, *supra* note 81.

317. In practice, it may be that cases involving service members of equal rank are of no concern. Problems could arise, however, if a jilted service member became violent towards the other service member upon her ending the relationship—an all too frequent event in relationships that did not previously involve battering. *See generally* Mahoney *supra* note 66, at 1.

318. The current incarnation is dubbed the Don't Ask/Don't Tell/Don't Pursue policy. For a full discussion of the policy and its precursors, *see* Halley, *supra* note 15.

319. *See* Servicemembers Legal Defense Network, UPDATE ON THE DON'T ASK/DON'T TELL/DON'T PURSUE POLICY (giving statistics of women and men discharged under the policy).

320. *Id.* at 23.

321. *See id.*

with him.[322] A woman, recognizing the implicit threat should she not submit, may submit to sex in order to eliminate the threat.[323] Through lesbian-baiting, women are thus forced to choose between coerced sex and potential discharge proceedings. Not only a higher ranked service member, but also a lower ranked one can impose this double-bind on them. In this way, the Don't Ask/Don't Tell policy exemplifies the way military rules themselves can lead to the dissolution of unit cohesion. Elimination of the Don't Ask/Don't Tell policy or the complete ban on sex between service members would certainly ameliorate the concerns expressed in this section, but these changes are unlikely to happen.

The next question is whether the same kinds of justifications for controlling sex apply when the sex is between a service member and a civilian. I argue below that they do not.

D. *The Military's Conception of Adultery*

The MCM delineates the elements of the crime of adultery as follows: (1) the accused wrongfully had sexual intercourse with a person; (2) at the time, the accused or the other person was married to someone else; and (3) under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.[324] The language in elements one and two mirror those of civilian criminal adultery statutes. In both contexts, both parties are guilty of adultery, even if only one of them is married. Element three, prejudice to good order and discipline, clearly mimics the language of Article 134. I, therefore, focus on the central nature of adultery outlined in elements one and two–sexual acts between a married person and someone not his or her spouse.

One of the few published cases that focuses exclusively on adultery between a service member and a civilian is *United States v. Butler*.[325] In that case, the service member had sexual relations in the barracks with a civilian. The court held that such conduct was likely to bring discredit upon the armed forces, and made reference to the fact that the military should at least match

322. *See id.*

323. *See id.*

324. *See* MCM ¶ 62. The only explanatory comment is that adultery is not a lesser included offense of rape.

325. Butler, 5 C.M.R. 213 (1952).

the levels of morality that exist in the civilian sector.[326] In this light, the reduction of public opprobrium against adultery in civilian society theoretically should be followed by the military's elimination of the sanction against it. In upholding the conviction, the court was no doubt influenced by the location of the sexual activity—an aggravating element that might be covered by one of the factors in the 1998 proposed revisions, "[t]he misuse, if any, of government time and resources to facilitate the commission of the conduct."[327] The court found "[t]hat the accused's alleged conduct is considered prejudicial to good order and discipline in the armed forces may be inferred from the fact that from the earliest times there has been a well established custom to separate the sexes in bachelor quarters maintained by the Army."[328] It is also important to note that the sanction received by Butler for this offense was a $200.00 fine, not imprisonment or dishonorable discharge—both allowable penalties for the offense.[329]

A second case prior to the 1984 amendments that tangentially addresses the nature of adultery states that "adultery and fornication are offenses against the morals of society rather than the person of one of the participants."[330] As such, "[t]hey do not involve an element of assault, such as is implicit in the heinous crime of rape and the offenses commonly recognized as lesser included offenses in a charge of rape."[331] From this, one can similarly conclude that a change in the morals of society should be mirrored by a change in military policies and provisions that purport to reflect those morals.

Prosecutions for adultery soared after the passage of the 1984 amendments to the MCM.[332] The majority of published cases, however, involve behavior beyond just the adulterous act or involve particularly outrageous behavior that clearly falls under some other category of prohibited behavior.[333] The conduct at issue in current cases ranges from public sex[334] to adulter-

326. *See id.* at 215.
327. *See* Proposed Regulations *supra* note 239.
328. *See* Butler, 5 C.M.R. at 215.
329. *See id.* at 213.
330. United States v. Ambalada, 1 M.J. 1132, 1137 (1977).
331. *Id.*
332. *See infra* note 344.
333. *See generally* cases and cites accompanying note 289.
334. *See, e.g.,* Butler, 5 C.M.R. at 213 (adulterous acts in the barracks would support a conviction); *accord* United States v. Green, 39 M.J. 606 (1994); United States v. Berry, 6 U.S.C.M.A. 609, 20 C.M.R. 325 (1956) (witnessing of sex act by third persons supports guilty finding); *cf.* United States v. Carr, 28 M.J. 661 (1989)

ous sex when the service member infected a woman with the HIV virus.[335] Published opinions exclusively involving adultery are virtually nonexistent. This indicates that adultery is not as service discrediting or disruptive of good order and discipline as some commentators claim. In addition, it is reported that most cases involving adultery alone do not warrant official attention other than either a reprimand or a transfer; many cases do not even get that far.[336] This indicates that the problematic behavior continues to be not adultery, but some other conduct of concern to the military. Nonetheless, possible rationales for sanctioning adultery are important; I outline them below.

VII. POSSIBLE RATIONALES FOR MILITARY PROSECUTION OF ADULTERY

A. *Sex between a Service Member and a Civilian: Is it Sex that is of Concern?*

While it is understandable that the military needs to regulate relationships between service members precisely because of both the heightened chance of abuse of authority and the danger to unit cohesion and military readiness,[337] it is less clear why regulation of sexual conduct between a service member and a nonservice member is necessary. Historically, the military has been anything but a haven of chasteness and virtue. The sexual exploits of service men on leave overseas are legendary. Particularly when overseas, but also in some officers' clubs, the use of "comfort women," prostitutes, "hospitality girls," and strippers was and continues to be typical.[338] The military hierarchy both officially and unofficially encouraged this practice as a way of diverting and fulfilling the sexual impulses of sailors.[339] Tailhook, in some views, was a natural outgrowth of this underlying cul-

(sex on a public beach that took place under conditions where the act was not open and notorious would not sustain conviction).

335. *See* United States v. Perez, 33 M.J. 1050 (A.C.M.R. 1991).

336. *See, e.g.,* Frank Bruni, *Adultery Alone Often Fails to Prompt a Military Prosecution,* N.Y. TIMES, Dec. 13, 1998 at 25.

337. It is also here that the line between sexual harassment and consensual sex looms nearer.

338. KATHERINE MOON, SEX AMONG ALLIES (1997); FRANCKE, *supra* note 88, at 163-64; MCMICHAEL, *supra* note 11, at 19-28. It is also not a great extension to suggest that rape by military men is an outgrowth of this "culture." *See* Morris, *supra* note 39.

339. *See, e.g.*, CYNTHIA ENLOE, BANANAS, BEACHES, AND BASES: MAKING FEMINIST SENSE OF INTERNATIONAL POLITICS (1990) .

ture.[340] Sex, provided it is not between service members, has been very much an accepted part of military life. It cannot be said that sex, per se, has been of particular concern to the military, at least until recently.

B. *Is the Military Protecting the Sanctity of the Marital Relationship?*

Perhaps because of the military culture's acceptance of rampant sex with civilians, the military's attitude towards adultery between a service member and a civilian has been almost schizophrenic. Commanders winked at adulterous activity for most of the twentieth century and suddenly began censuring it beginning in the early 1980s.[341]

Consider, for example, the Korean and Vietnam wars. It was not unusual for military men to keep both a wife in the U.S. and a "TDY wife" (or at least a TDY girlfriend) overseas.[342] Certainly much of the less structured, but more typical sexual activities with prostitutes were not exclusively the domain of single military men. During the investigation into the events of the 1991 Tailhook Convention, which (at least prior to the scandal) was considered to be "a single man's paradise[, m]ore than a few fliers . . . told investigators: You had to be crazy—or stupid—to bring your wife to Tailhook."[343] Although statistics for prosecutions or administrative actions for adultery are not available prior to 1990, anecdotal accounts of both current and retired ser-

340. *See* MCMICHAEL, *supra,* note 11.

341. *See* Minerva website, (visited Nov. 1, 1997) <http://www.h-net.msu.edu/~minerva/> (The website discusses adultery among current and former military personnel in the military, e.g., the comments of Karen McClimon, Major, USAF (retired), "During my 21 years I too saw the flagrant adultery committed by the men in Korea, and seemingly condoned by the Air Force. . . . Just as a point of interest, I noticed during my time in the Air Force (1972-1993) fraternization was not a big deal to most people, including commanders until the mid to late 80's."). As discussed previously, the inclusion of a specific provision sanctioning adultery in the revisions to the MCM took place at this time. Certainly these new specific antiadultery provisions made prosecution easier than it had been previously, leading to an increase in cases based upon adultery. The deeper question, then, taken on in this Article, is for what reasons the sanction was included, and whether it made and continues to make sense to include it.

342. *Id.* "TDY" is shorthand for temporary duty assignment–referring to temporary job assignments in other locales. *See also* ENLOE, *supra* note 339, at 81-92; MCMICHAEL, *supra* note 11, at 26-27 (using the term "TDY wife" in describing similar situations in Panama and Subic Bay, the Philippines); MOON, *supra* note 338 (describing contract wives in Korea).

343. *See* MCMICHAEL, *supra* note 11, at 25.

vice members consistently state that adultery prosecutions were virtually unheard of until the early 1980s.[344] Thus, even adulterous sex, provided it is not between service members, has been very much accepted as part of military life.[345] Therefore, protection of the sanctity of the marital relationship, per se, has not been of particular concern to the military, at least until recently.

C. *Is the Military Protecting Military Families?*

1. Protection of Military Wives

The military establishment recognizes the role that military wives play in maintaining an effective fighting force, although they may at the same time create divided loyalties for soldiers.[346] The proscription of adultery could be seen as a protectionist move on behalf of military wives. The frequent separations necessitated by military service may cause these important players to be concerned about their husbands' fidelity.[347] One court, however, addressing the possible harm to the marriage from adulterous conduct, concluded that where the marital relationship is not actually affected, adultery does not impact good order and discipline.

> It appears from the appellant's plea admissions that his marital relationship was not affected by his act of adultery and this was substantiated by his estranged wife's testimony on sentencing. Hence, there appears no actual or potential for marital discord and strife–the typical sort of prejudice to good order and discipline seen in cases of criminal adultery. Proof

344. Prior to 1990, neither the Navy nor Marine Corps maintained records of prosecution, or administrative actions against service members accused of adultery. *See* Letter from Chief Judge W.F. Grant, Navy-Marine Corps Trial Judiciary to Mark Thompson, of *Time* magazine, in response to a Freedom of Information Act request for these records (on file with author). Attempts have been made to track down this information, but no concrete, reliable data has been compiled to date. *See, e.g.,* Minerva website discussion, *supra* note 110.

345. An argument, of course, could be made that this kind of adultery—with prostitutes, exotic dancers, and comfort wives—does not impact the good order and discipline of the military. My point in this Section, however, is simply that protecting service members' marriages, while sometimes seen as significant to maintaining a strong force, is not a blanket rule since some sexual liaisons that might disrupt the heart and home nonetheless are allowed (and some might say even encouraged) to continue.

346. *See* ENLOE, *supra* note 339, at 71-75. The concern with divided loyalties might drive some to push for an all single force.

347. *See, e.g.,* United States v. Green, 39 M.J. 606, 609 (A.C.M.R. 1994) (citing United States v. Collier, 36 M.J. 501 (A.F.C.M.R. 1992)) (discussing the issue of separations of spouses due to military service and the impact separations may have on good order and discipline).

> of prejudice to good order and discipline in criminal adultery cases does not, however, require that an accused's marital relationship (or the marital relationship of a married partner) be affected or potentially affected. It may, for example, involve discord and strife with a sexual partner who is not made aware that one is married to another.[348]

This same rationale applies to spouses who are separated but not yet divorced. In such cases, where the adultery is technical in nature, but does not actually impact the marital relationship, and by extension does not actually impact good order and discipline, proscribing it in the military context makes little sense.

2. Fiscal Concerns: Military Benefits for Families

One mundane but real concern that the military may have in protecting the marital relationship is the cost of disbursing substantial benefits to families of service members.[349] Service members with families are given even greater financial remuneration in the form of larger supplements to their pay for housing and providing for family members than those received by single service members.[350] In addition, base housing, medical care, and access to the military commissary extend to family members.[351] If the military provides these benefits to the family under the theory that a secure home life aids the service member and thus the force,[352] while at the same time the service member disrespects that very relationship through the commission of adultery, the provision of these benefits seems fiscally unproductive. Ad-

348. United States v. Green, 39 M.J. 606 (A.C.M.R. 1994).

349. *See* ENLOE, *supra* note 339, at 71-76.

350. The military provides a Basic Allowance for Subsistence ("BAS"), which is payment for meals for military personnel who do not receive meals at the base. *See* Clukey v. Piscataquis County Sheriff's Dept., 696 A.2d 428, 429 (Me. 1997) (citing 37 U.S.C. § 402 (1996)). A Basic Allowance for Quarters ("BAQ") is provided to military personnel who do not receive military housing and is calculated according to marital status and number of dependents. *See id.*, (citing 37 U.S.C. § 403 (1996)). A Variable Housing Allowance ("VHA") is provided to personnel who do not receive military housing as a supplement to the BAQ. The VHA is calculated according to actual housing costs that the employee must certify annually. *See id.*, (citing 37 U.S.C. § 403a (1996)). A service member is entitled to a BAS or VHA "when either he or his dependents reside outside of military quarters." Alexander v. Armstrong, 415 Pa.Super. 263, 609 A.2d 183 (Pa. 1992) (citing 37 U.S.C.A. § 403 & Arquilla, *Family Support, Child Custody, and Paternity*, 112 Mil. L. Rev. 17, 40 (1986)).

351. The military issues identification cards to dependents of military members that allow them to access services on the base, including the base commissary where prices tend to be lower than in civilian stores.

352. *See* ENLOE, *supra* note 339, at 71-74 (regarding military concern for wives of soldiers).

ditionally, if the military member creates a second family through the adulterous conduct, the issue of military benefits becomes more complex.

D. *Is Prosecution of Adultery in the Military a Necessary Reflection of Civilian Society?*

The military's increasing prosecutions of adultery are clearly at odds with the civilian trend. Military courts recognize this. One military court, reviewing a case involving such conduct, reasoned:

> While the appellant admitted his conduct was service discrediting, we are not convinced this could have been so. As in Perez, there was no indication that the appellant's conduct offended either local civil law or community standards. Indeed, it is our sense that imposition of punishment for adultery has become alien to the civilian's concept of criminal law. . . . In any case, to prove service discrediting conduct, the public must be aware of the behavior and the military status of the offender.[353]

And yet, the court concluded:

> Prejudice to good order and discipline is easier to find in this case. Again, there was no indication of a violation of local civil law. Adultery is not, however, alien to the soldier's concept of criminal law. Close working and living conditions and frequent family separations characteristic of military service give it the potential for serious impact on good order and discipline.[354]

Certain conservative military voices who argue that adultery should continue to be criminalized do so under the guise that it is morally wrong and that the military should not be less moral than the society it is protecting.[355] Morality, however, is not necessarily the basis of civilian adultery proscriptions. In the civilian sector, most states have historically had criminal prohibitions against adultery.[356] Similarly, adultery was grounds for divorce in many jurisdictions. In some cases, it was the only way to nul-

353. United States v. Green, 39 M.J. 606, 609 (A.C.M.R. 1994) (citing United States v. Hickson, 22 M.J. 146, 147 (C.M.A. 1986); United States v. Kirksey, 6 U.S.C.M.A. 556, 20 C.M.R. 272, 275, *available in* 1955 WL 3564 (1955)).

354. *Id.* (citing United States v. Collier, 36 M.J. 501 (A.F.C.M.R. 1992)). The court goes on to say that adultery is becoming an increasing problem for the military. *See id.*

355. *See infra* Part V(c)(1)(a).

356. *See infra* Part II; Chamallas, *supra* note 11, at 333-34.

lify a religious marriage.[357] Adultery prosecutions and divorces granted on the grounds of adultery arose from several related concerns. Protecting the sanctity of marriage was seen as fundamental to preserving a husband's property interest in his wife, preserving lines of inheritance (by knowing one's own genetic progeny), and generally to maintaining civil society.[358] Following on the heels of reduced enforcement of these provisions, states have begun repealing these statutes.[359]

In those states where adultery sanctions still exist, adultery is rarely prosecuted. Even when it is prosecuted, the punishment is typically a small fine, such as Maryland's fine of $10.00[360]—hardly considered serious. And yet, during the last several years, a conservative movement has begun in some states to reinstitute fault based divorce schemes, and in some more extreme cases, limit those grounds for divorce to cases of adultery.[361] It is certainly possible that the conservative backlash in civilian society has spilled over into the debate over adultery in the military. The typical justification for civilian prosecutions is protection of

357. Hendrik Hartog describes parallel legal and extralegal lives of husbands and wives who chose to live apart in antebellum America. *See* Hendrik Hartog, *Marital Exits and Marital Expectations in Nineteenth Century America,* 80 GEO. L. J. 95 (1991). Extralegally, separating spouses created contracts to outline their separate rights and obligations; legally, they were still seen as married. *See id.* The contracts were not recognized by nineteenth century courts. *See id.* Even parties who wished to divorce in some states could not do so because judges might refuse to grant a divorce even if one spouse would admit to adultery. *See id.* In their extralegal lives, the "ex" spouses would "remarry" and live new lives regardless of the illegality of the new marriage—in essence, living their lives regardless of the absence of an official legal sanction. *Id.* Despite these parallel lives, in the courts' eyes, adultery was an actionable wrong. *See id. See also* Russell, *supra* note 225. Russell makes a simple claim that husbands and wives should do the right thing. His conception of the right thing is more realistic: if the marriage is over, it is time for both parties to move on. *See id.*

It is interesting to note that in the postemancipation South, former slaves' first battle was to establish a right to marry. Their success in garnering this right, in large part, was due to conservative southern lawmakers' express concern about "unmarried" mothers and their children becoming wards of the state in the absence of a male head of household who would be legally responsible for their care. *See* Laura F. Edwards, *The Marriage Covenant is at the Foundation of all Our Rights: The Politics of Slave Marriages in North Carolina After Emancipation,* 14 L. & HIST. REV. 81 (1996).

358. *See infra* Part II.

359. *See* Jacob, *supra* note 2.

360. *See, e.g.,* MD. CODE ANN., Adultery, Art. 27 § 3 (providing for a fine of $10.00).

361. *See infra* Part II. The Christian fundamentalist movement is generally associated with the South, particularly the southern coastal states of North and South Carolina, and the Gulf States of Alabama, Louisiana, and Texas.

the sanctity of marriage,[362] while the typical rationale for subjecting particular conduct to military criminal or administrative disciplinary proceedings is that it disrupts the good order and discipline of the military.[363] Thus, the question really is: what is it about the sanctity of marriage that implicates good order and military discipline? Sanctions for adultery when society at large no longer sanctions it cannot be justified on the grounds of public condemnation or the service being held up to disrepute.[364]

E. *Is it Otherwise a Question of Morality?*

An argument can and has been made that the military (and particularly officers) should be held to a higher moral standard.[365] Because the commission of adultery is an immoral act, the argument continues, the surrounding community's gradually lowering standard should not guide the development and enforcement of military sanctions. Rather, the military should develop and enforce only those policies that adhere to the strictest moral order. But in light of the historical customary acceptance of rampant sexual conduct both adulterous and not, basing a proscription against adultery on the higher moral standards that must be maintained is hypocritical. Military court decisions further demonstrate that higher moral standards are not always expected of the military. One court states:

> The military community cannot expect, nor ought it to be expected of them, to preserve a higher tone of moral conduct than what is sustained by the higher orders of society. But they may fairly be expected to preserve one which is in no degree lower.[366]

Rhetoric about the military being honorable, decent, and moral is appealing. But the real test appears to be whether the military's public image is one of morality, rather than an actual concern for ensuring a truly virtuous force.

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362. *See, e.g.,* Captain Mayer, *Satisfying All Elements of Adultery: Was the Act Service Discrediting?,* ARMY LAW. 38, 39 (1992) (adultery's repugnance to moral society and marriage, (citing United States v. Hickson, *supra* note 12, and United States v. Ambalada, 1 M.J. 1132)); *cf.* Chamallas, *supra* note 11, at 333-41 (adultery is traditionally supported by notions of sexual morality, but lawfulness of sex acts shifted in the 1970s from an emphasis on marriage to an emphasis on whether or not the acts were consensual).

363. *See* 10 U.S.C. § 934; all MCM defined crimes under Art. 134.

364. Butler, 5 C.M.R. 213 (1952).

365. *See infra* notes 86-87 and accompanying text.

366. Butler, 5 C.M.R. 213 (1952) (citing GO 41 of 1852, at 5 (Winthrop, Military Law and Precedents (2d ed. 1920 reprint)) n.14, at 711).

F. *Does the Military Prosecute Adultery Because of Concerns about Honesty?*

Other than in a mutually "open" marriage, adultery usually requires lying to one's spouse. Some claim that honesty is highly valued by the military and is arguably necessary to its mission. If this is the case, adultery is inconsistent with honesty and must be sanctioned. Military policy, however, is replete with contradictions. First, an explicit contradiction exists in the form of the Don't Ask/Don't Tell policy.[367] Under that policy, service members are, in essence, mandated not to be honest regarding their sexual conduct if it is with a same-sex partner: "Don't tell." Second, if the only harmful part of adultery is the dishonesty it entails, this bad behavior can be dealt with more easily and directly through the already existing sanction against dishonesty. A separate sanction against adultery, based on adultery's inherent dishonesty, is thus both duplicative and disingenuous.

G. *Is there a Problem Inherent to Gender Integration in General?*

Does integration of women into the armed forces necessarily lead to increased levels of adultery? Does any increased level of adultery impact the core values of military service such that it must be criminalized? The answer to the first question is no. Prevalence of adultery might actually decrease as a result of integration, because more service members might marry other service members and potentially then be stationed with their spouses, rather than resorting to TDY wives or visiting prostitutes. Even if service members did not marry each other, it is hard to imagine that the levels of adultery would exceed those already taking place in the form of TDY wives and visits to prostitutes. Separate from the hypocrisy of criminalizing adultery now after its historical condonation by the military, if integration of women in the forces and the corresponding increased potential for sex between service members is handled through the military's mechanism for penalizing fraternization, then there is simply no need to additionally criminalize adultery. Sanctioning adultery in the military context begins to look like simply nothing more than a fundamentalist-inspired imposition of morality (e.g., preservation of marriage regardless of the quality of the marriage, traditional heterosexual mores, and so on) that does not

367. *See infra* notes 318-323 and accompanying text.

substantially implicate the military's ability to establish a fighting force. If this is the case, and if society at large wishes to take that moral stance, the place to do it is in the civilian courts and not through military court-martial.

H. *Is it a Concern with Violence Against Adulterous Service Members at the Hands of the Cuckolded Spouse?*

Living on a military base places service members and their families in close and confined proximity to each other. Weapons are ever present, although on-base regulation of them is designed to be strict.[368] One very real concern of the military may be that the combination of easy access to weapons, high domestic violence rates, and increased opportunities for, or at least suspicion of, adultery due to the close personal contact between married service members will lead to homicide. A military force with members who are killing each other is distracted, ineffective, and quite simply, smaller in size.

The case of Sergeant Stephen Schap is just one such example.[369] Schap and his wife married in 1989.[370] She moved with him when he was assigned to a German base after joining the Army in 1992. In early 1993, the couple became friends with Specialist Glover. During the summer, while Schap was away at a military training course, his wife and Glover began having an affair. By the fall of 1993, Schap and his wife discussed either separating or divorcing. Upon learning that his wife was pregnant, although he had a vasectomy, Schap set out to determine the name of her lover and to track him down. Upon finding Glover, Schap stabbed and slashed him in the neck multiple times with an eight-inch double-edged knife, practically decapitating him. Schap then kicked Glover in the head, separating his head from his body, and picked the head up by the hair. Witnesses reported that Schap held the head up and said, "[t]his is what happens when you commit adultery."[371] He took the head to his wife, who was in the hospital, and forced her to look at it, and said, "I did this for you, because I love you."[372] Numerous

368. *See* Interview with Diane Mazur, *supra* note 81.

369. *See* United States v. Schap, 44 M.J. 512.

370. *See id.* Schap's wife is never referred to by name in the court opinion, but is merely referred to as the "appellant's wife," or "she."

371. Schap, 44 M.J. at 515.

372. *Id.*

witnesses described him as calm and methodical in the killing, and as calm when he presented the head to his wife.[373]

There is no indication, however, that concern with this type of violence is the driving force behind military proscriptions against adultery. Further, even if it were, we should question seriously if regulating the sex is the proper solution, rather than pursuing a different, and more logical approach that focuses on punishing the violent behavior.

I. *Is it a Question of Honor?*

One unique aspect of military culture that remains to be discussed is the value placed on honor. The concept, however, is somewhat amorphous and thus hard to pin down. In ordinary usage alone, we employ the term in various forms. The terms "Your Honor" and "the Honorable" are, for example, used as a simple title of respect for judges. We refer to honoring or dishonoring checks or letters of credit in business.[374] We also have academic Honor Codes and allow someone who does well in school to graduate with Honors.

The military's conception of an officer's honor is both similar to and yet distinct from the notion at work when we talk of honor killings in criminal law or offenses against honor (now dignity) in tort law. The ideas are similar in that they all reference a sort of right-acting behavior (regardless of whether the right- or wrong-acting behavior is thought to be culturally relative or universal).[375] The notions are distinct in that the criminal and tort law concepts typically involve a third party acting in a way that dishonors the offended party by lowering the standing of the offended party (an individual, or sometimes, an entire family) in the eyes of the relevant community.[376] In the military context, an

373. *See id.* at 514, 515, 517.

374. Contract law might well have developed as a replacement of a dissolving faith in one's "word of honor" in business transactions. Query: if a breach of one's promise to be sexually faithful to one's spouse is criminal, should breach of one's contract promise be criminal as well?

375. *See, e.g.,* Elene G. Mountis, *Cultural Relativity and Universalism: Reevaluating Gender Rights in a Multicultural Context,* 15 DICK. J. INT'L L. 113, 133 (1996) (discussing the "honor defense" in Brazil); Richard Lowell Nygaard, *Is Prison an Appropriate Response to Crime?* 40 ST. LOUIS U. L. J. 677, 684 (1996) (discussing the culture of prison and its "own violent code of honor"); Abu-Odeh, *supra* note 22 (comparing "honor killings" in Jordan and "passion killings" in the United States).

376. *See, e.g.,* Angela P. Harris, *Rereading Punitive Damages: Beyond the Public/Private Distinction,* 40 ALA. L. REV. 1079, 1102-1109 (1989) (discussing punitive damages vis-a-vis honor or reputation tort actions); Alison Dundes Renteln, *A Justi-*

officer's dishonorable act is both self-referential (the offender offends his or her own honor) and externally damaging to the military as a living institution. In the civilian context, any self-dishonoring aspect of an act, in contrast to the other-dishonoring or institution-dishonoring or promise-dishonoring aspects of that act, may lead to social opprobrium but not to legal sanctions.

The philosophical roots of the concept of honor in the military context may be traced to the work of ancient Greek philosophers.[377] The use of honor as a code of behavior in the military developed more fully during the Middle Ages, the age of chivalry, when knights "vowed . . . to uphold the values of honor, virtue, loyalty, and courage."[378] This link is further evidenced in the Swedish Military Code of 1621, which was "grounded on the need for honor, high morals, order, and discipline in a time when soldiers were generally considered barbarians and opportunists seeking the booty of war."[379] The use of the concepts of honor and morality can thus be seen historically as public relations campaigns—to rescue the image of soldiers from the gutters. Perhaps a similar public relations campaign takes place today.

If what we mean by honor is something broader than simply respect, something more akin to the Aristotelian concept of acting rightly,[380] perhaps cheating on one's spouse falls under its rubric. On a simpler level, keeping one's word might be seen as a sub-set of this sort of code of honor. Marriage is, if nothing else, a promise. One part of the promise is fidelity, to forsake all others. Breaking that promise by committing adultery results in a loss of the integrity of one's word, and is thus perhaps inconsistent with military service.

Fostering honorable conduct, however, does not come without consequences. First, honor historically has meant different

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fication of the Cultural Defense as Partial Excuse, 2 S. CAL. REV. L. & WOMEN'S STUD. 437 (1993) (discussing the cultural defense in murder cases in the United States); Peter Meijes Tiersma, *The Language of Defamation,* 66 TEX. L. REV. 303 (1987) (defamation as injury to reputation).

377. *See, e.g.,* ARISTOTLE, *supra* note 152. *See also* discussion in Part V(C)(1)(a) *infra.*

378. SCHLUETER, *supra* note 113, at 16. One of the precursors to the modern day military court, the Court of Chivalry, was developed during this time. *See id.*

379. *Id.* at 16. The roots of these concepts may be traceable, in part, to the fact that King Adolphus, who promulgated this code, was deeply religious. *See id.* In the context of mercenary armies it was sometimes understood that raping women was not only part of the spoils of war, but was also considered part payment for services.

380. *See infra* Part V(C)(1)(a).

things for women than for men.[381] Honor has meant many things when applied to men, only a few of which related to his sexual actions. A man's honor was tied to courage and valor[382] (implicitly in a battle context) in addition to maintaining a high level of moral conduct. By contrast, a woman's honor was typically limited to maintaining a celibate sexual self. Women's honor thus existed only in their relation to men.[383] At times, women were seen as entirely incapable of honor.[384] Second, as discussed in Part II, a woman's infidelity has been seen historically as a violation of her husband's honor justifying his murder of her, her paramour, or both. Although the crime of honor defense mutated into a crime of passion defense in American criminal law, more recently it has seen a revival in the form of cultural defenses to murder.[385] Honor has thus been used against women specifically in the context of real or suspected adultery, yet its positive aspects denied to them historically. Because of this, grounding a criminal sanction against adultery on the basis of honor alone should be rejected.

The military's decision not to rescind its policy of criminalizing adulterous acts by service members, but balancing that stance by moving towards more informal responses to these acts might well be the best middle road. Given the rhetoric that blossomed on both sides of the issue, withdrawing from its stance on sanctioning adulterous behavior would have drawn fire from many in the military arena. The opposite decision would have drawn the same from the civilian sector (and from some within the military arena) but for the mollifying aspect of the resolution. Nonetheless, the problems of indeterminacy and unfair variation in sanctions from unit to unit, branch to branch, and gender to gender, will continue and perhaps be aggravated by this move towards more informal responses.

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381. *See infra* Part V(C)(1)(a).

382. *See infra* note 384.

383. *See infra* at note 384; Abu-Odeh, *supra* note 22.

384. *See* AMERICAN HERITAGE DICTIONARY 632 (William Morris ed., 1969) (The ninth definition of honor states: "(a) A code of principally male dignity, integrity, and pride, maintained in some societies of feudal Europe, by force of arms . . . (c) A woman's chastity; a reputation for chastity.").

385. *See, e.g.,* Leti Volpp, *(Mis)Identifying Culture: Asian Women and the 'Cultural Defense,'* 17 HARV. WOMEN'S L. J. 57 (1994).

VIII. CONCLUSION

Although a front runner in some areas such as racial integration, the military is deeply conflicted about sex. It is clear, however, that if the military is going to prosecute, it should be for those things that only impact military cohesion. With respect to policies pertaining to the consensual sexual conduct of individual service members, the one that appears most outside of the typical structural and behavioral concerns of military disciplinarians is adultery. Even if the military establishment were to develop a hard line restricting integration of men and women in the forces, proscriptions on sexual harassment, sexual relations between service members, and sexual relations with the spouses of other service members, it should put aside the sanction against adultery. Subjecting a service member to sanctions, whether through administrative action or court-martial, for adulterous sex with a civilian who is not in any way related to the military furthers no arguable military justification and should, therefore, be left exclusively to the civilian domain to penalize or not. Existing sanctions against fraternization or other acts that more clearly disrupt good order and discipline are sufficient to penalize any conduct harmful to the military mission, without resorting to penalizing conduct the sole harm of which is to the marital relationship. To the extent that adulterous conduct may implicate good order and discipline, such as causing the adulterating service member to have marital problems that distract from his or her military duties, this should be dealt with as is any other personal problem. A criminal penalty is unnecessary and is out of step with the military's primary aims.

Further, justification of continued prosecution of adultery in the military sector is based in part on the following two conflicting arguments: (1) that the military mission is unique and thereby justifies greater intervention into the interpersonal and moral lives of its members than might be considered appropriate (or even constitutional) by the general American public, and (2) that in order for the American public to have the requisite trust in the armed forces, higher moral standards must apply to soldiers than to civilians.[386] The latter claim rests on the assumption that the American public finds adultery morally opprobrious, while the former assumes the American public does not find adultery sufficiently offensive to warrant holding themselves to

386. *See* Winner, *supra* note 11.

this "higher" moral standard. Finally, a third asserted basis for adultery sanctions in the military context—that adultery necessarily involves breaking a promise of fidelity, triggering subsequent general distrust of the adulterous service member by other service members—if taken to its logical extension, necessarily sweeps within its scope any service member who divorces whether or not the cause of the dissolution is adultery.

These three underlying claims demonstrate a subtler fundamentalist backlash at work. There are early signs of this in the civilian sector as well in the form of state legislatures considering (and passing) covenant marriage laws, and in rhetoric bandied about in the impeachment inquiry and trial concerning President Clinton's sexual conduct. Although the military may indeed be a unique culture with distinct needs, we cannot ignore the historical influence of military norms and rules on American culture more generally.[387] Consider, for instance, the military's early racial integration, and the gradual impact this had in undercutting racism in society at large.[388] We can anticipate, therefore, that spillover of these norms into civilian life is inevitable, even if they were ostensibly aimed only at soldiers. We can anticipate a resurgence of civilian criminal actions for adultery, further return to fault-based divorce, and other enhanced legislative restrictions and mandates of inter-personal relationships. Is this truly what we want?

Morality is a delicate area for legal regulation, and great care must be taken when criminal sanctions aim to instill values.[389] Once a position is established as the moral high ground, such as is happening with the military around adultery, it becomes much more difficult for other institutions, such as state legislatures, to take an affirmative opposing stance without appearing morally weak. Moreover, once these norms are in place, they are difficult to back away from for the same reasons.[390]

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387. This is no doubt due to, in part, the fact that the military is one of the largest employers in the country.

388. *See* ENLOE, *supra* note 340 (discussing dating between black service members and white civilians, and the resulting racist responses of white service members).

389. Although others previously addressed this issue, a recent exchange between Richard Posner and Ronald Dworkin on the relationship of law to morality can be found in *Harvard Law Review*, Vol. 111 (1998).

390. I would like to thank Professor Toni Massaro for this idea. Her thought strikes me as accurate.

Finally, we must undertake a more considered analysis of any rationale for adultery provisions based on the concept of honor. There is nothing intrinsically wrong with honor as a value worthy of fostering and protecting.[391] In fact, the United Nations Declaration of Human Rights includes reputation and honor as core rights worthy of protection.[392] This same notion of honor, however, was historically used to lessen the seriousness of the murder of an adulterous spouse and her paramour, and currently can be seen re-emerging in cultural defense cases. It was historically invoked in relation to different characteristics in men than it was for women–for men, honor meant valor, honesty, and integrity, while for women it denoted chastity or other forms of sexual purity. Given its potential for such misuse, we should approach with skepticism any legal provision citing honor as its justification. We should be clear on what it is that we are valuing when we reify honor in law, and ensure that we are not using the concept of honor to mask some less worthy notion.

391. Plato, however, took a dim view of glorifying honor when equated with respect. *See, e.g.*, THE COLLECTED DIALOGUES OF PLATO INCLUDING THE LETTERS, Republic Book 1 ¶ 346e-347b (Edith Hamilton & Huntington Cairns eds., 1963).

392. *See* U.N. Declaration on Human Rights, 1948, Art. 12 (U.N. Doc. A/811) *reprinted in* BASIC DOCUMENTS ON HUMAN RIGHTS, 3d. ed. at 24 (Ian Brownlie ed., 1971, 1994) ("No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.").