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# The Crime Behind the Bedroom Door: Unequal Governmental Regulation of Civilian and Military Spouses

*Krista Bordatto\**

## I. INTRODUCTION

Unbeknownst to soldiers, when they sign on the dotted line, pledging to defend the freedom America stands for, they also sign away their freedom to make decisions regarding their private sex life.<sup>1</sup> The Uniform Code of Military Justice (UCMJ) mandates that a soldier be subject to prosecution for having sexual intercourse with someone who is not his or her spouse. Although a majority of states have done away with the historical norm of criminalizing adultery, choosing instead to simply use evidence of adultery to support divorce petitions, the military continues to vigorously prosecute adulterous acts.<sup>2</sup> In this regard, the military sees itself as a separate entity from the government, capable of ignoring a soldier's fundamental right to procedural due process protection.<sup>3</sup> However, as a separate entity, the military should provide greater protection rather than further deprivation. While the military may have justification to limit the fundamental rights of soldiers in some instances, such as freedom of speech, because of military necessity, the criminalization of adultery represents too great an allocation of power when balancing a governmental interest and the individual protections guaranteed by the Constitution.<sup>4</sup> Military necessity does not justify the criminalization of adultery, nor does the preservation of marriage or upholding societal views of morality provide adequate justification for the

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\*First Lieutenant, Florida Army National Guard; J.D., St. Thomas University School of Law, 2014; M.S., St. Thomas University, 2014; B.S. Psychology, University of Oregon, 2010. This paper is written from my own personal perspective gained from serving in the military. I would like to thank Professor Stephen Plass for providing his insight and confidence in my writing potential and my husband for his love and support.

1. See MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 51 & ¶ 62 (2012) [hereinafter MCM 2012], available at <http://armypubs.army.mil/epubs/pdf/mcm.pdf>.

2. See list of states that currently criminalize adultery *infra* note 38

3. See discussion on "separate society" theory and how the military uses it to justify its refusal to apply the *Lawrence* standards, *infra* notes 191–193.

4. See discussion *infra* section VII.

deprivation of liberty that prosecution under the UCMJ entails.<sup>5</sup> Currently, the expansive language of the UCMJ gives commanders broad discretion to choose which instances of adultery warrant prosecution and which do not.<sup>6</sup> In order to effectuate a balance, this article proposes revising the elements of Article 134 to include an additional element, which would effectively limit a commander's discretion while preserving the military's ability to prosecute under a compelling governmental interest without infringing on the soldier's fundamental right of privacy.<sup>7</sup>

A recent article proposes that the elimination of adultery from the black letter law of Article 134 would benefit not only service members, but also civilians, and improve the public perception of the armed forces.<sup>8</sup> The article further suggests that existing punishments under the UCMJ, such as the punishments against fraternization, are sufficient to achieve the same goals.<sup>9</sup> On the surface, this seems like a viable solution; however, fraternization is limited to inappropriate relationships between service members and does not prohibit relationships between service members and civilians.<sup>10</sup> Moreover, the complete elimination of adultery from the UCMJ would permit instances where sexual relationships are a clear disruption to unit cohesion, such as when a soldier has sex with another soldier's spouse, which is not prohibited under fraternization or any other article.<sup>11</sup> Despite the fact that the current language of Article 134 poses serious problems under the Fifth Amendment, the removal of adultery from the UCMJ would require an overhaul of several other articles in order for the legitimate goals of the military's prohibition on adultery to be met through other means.<sup>12</sup> Therefore, without an extensive overhaul, removing adultery from the black-letter law of the UCMJ is not a feasible option at this time.

Another article suggests that raising the level of scrutiny applied to adultery prosecutions from rational basis to intermediate scrutiny is sufficient to balance the interests of the government and give service

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5. 10 U.S.C. § 934 (2013); see discussion of maximum punishment *infra* note 43.

6. See *infra* note 200 and accompanying text.

7. See proposed revision of the elements required to prosecute adultery under the UCMJ *infra* Part VII.

8. See Katherine Annuschat, *An Affair to Remember: the State of the Crime of Adultery in the Military*, 47 SAN DIEGO L. REV. 1161, 1200 (2010). See also C. Quince Hopkins, *Rank Matters But Should Marriage?: Adultery, Fraternization, and Honor in the Military*, 9 UCLA WOMEN'S L.J. 177, 260 (1999) (finding that the military should remove the general prohibition on adultery and only sanction specific instances such as between service members and with another service member's spouse).

9. Annuschat, *supra* note 8 at 1200.

10. See MCM 2012, *supra* note 1, pt. IV, ¶ 83 (Fraternization policies vary by branch of service, but all branches prohibit inappropriate relationships between service members holding positions of power and their subordinates.)

11. MCM 2012, *supra* note 1, pt. IV, ¶ 83.

12. See Hopkins, *supra* note 8, at 260 (suggesting an overhaul of the UCMJ to add specific offenses while removing adultery generally).

members the same privacy rights as civilians.<sup>13</sup> The author makes the argument that adultery is on the periphery of fundamental rights and, therefore, deserves more protection than afforded by rational basis, but less than the full protection of strict scrutiny.<sup>14</sup> While I agree that adultery prosecutions should be subject to a higher level of scrutiny,<sup>15</sup> without the Supreme Court changing the pattern of giving great deference to the military courts, the disparity will remain.

This article begins in Part I by giving a brief introduction describing the problems the current language of Article 134 creates and other authors' proposed solutions.<sup>16</sup> Part II focuses on tracing the history of the prohibition of adultery in both the civilian sector and the military.<sup>17</sup> Part III investigates how adultery is handled in the military, what constitutes adultery under the Uniform Code of Military Justice, and the disparity in civilian and military prosecutions.<sup>18</sup> Part IV shows how military prosecutions encourage deception in some instances, but punishes it in others.<sup>19</sup> Part V makes the argument that the right to privacy is a fundamental right and, therefore, soldiers are entitled, like civilians, to protection under the Constitution.<sup>20</sup> Part VI investigates how the military justifies prosecuting adultery and why those justifications are insufficient to excuse the encroachment upon a fundamental right.<sup>21</sup> Part VII argues the broad level of discretion given to commanders in prosecuting adultery is inadequate to balance the interests between the soldier and the government and offers a proposed revision to the elements of Article 134.<sup>22</sup>

## II. FROM PAST TO PRESENT ADULTERY LAWS

Intercourse between two consenting adults is generally regarded by modern society as falling outside of governmental jurisdiction.<sup>23</sup> However, when either of the consenting individuals is married to someone else, the issue becomes quite complex.<sup>24</sup> Adultery is one of the most ancient, recognizable cultural norms regulating familial relationships that still exist

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13. See Raul V. Esquivel, III, *Implications of the Military's Proscription of Adultery Upon Individual Privacy*, 47 LOY. L. REV. 835, 854 (2001).

14. *Id.*

15. See discussion on intermediate scrutiny *infra* Part VII.

16. See *infra* Part I.

17. See *infra* Part II.

18. See *infra* Part III.

19. See *infra* Part IV.

20. See *infra* Part V.

21. See *infra* Part VII.

22. See *infra* Part VIII.

23. See discussion on lack of prosecution in most states today, *infra* notes 39–40.

24. See Melissa A. Haggard, *Adultery: A Comparison of Military Law and the Controversy This Causes Under Our Constitution and Criminal Justice System*, 37 BRANDEIS L.J. 469, 469 (1998).

today.<sup>25</sup> While adultery began as an economic regulation, it was integrated into law, religion, and public views of morality in an attempt to preserve the institution of marriage.<sup>26</sup> The first laws to criminalize adultery were biblical<sup>27</sup> and can be traced back to Hebraic times.<sup>28</sup> At common law, adultery was not a crime,<sup>29</sup> but was punishable by the church as an “ecclesiastical offense” against a commandment from God.<sup>30</sup> Generally, adultery was wrong only if the woman was married, due to potential inheritance and property issues if an illegitimate child resulted from the affair.<sup>31</sup> Illegitimate children were unable to inherit the property of the adulterer’s husband and would impede the husband’s bloodline.<sup>32</sup> The inheritance and property concerns stem from the obsolete idea that men owned their wives as chattels<sup>33</sup> and were, therefore, the sole owners of their wives’ sexual services, which included procreation.<sup>34</sup> In 1873, the Supreme Court even went as far as to say,

[t]he constitution of the family organization . . . indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood . . . [where] [t]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother.<sup>35</sup>

Astonishingly, for the purpose of separation or divorce, it was possible to rule that wives had deserted or abandoned their husbands by refusing to

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25. LYNN ATWATER, PH.D., *THE EXTRAMARITAL CONNECTION* 16 (1982).

26. See ATWATER, *supra* note 25, at 16–17. Puritanism made stringent efforts to repress sexuality before and during marriage. ATWATER, *supra* note 25, at 17.

27. Martin J. Siegel, *For Better or for Worse: Adultery, Crime & the Constitution*, 30 J. FAM. L. 45, 46 (1991–1992). See generally Exodus 20:14; Leviticus 20:10; Deuteronomy 22:22 (declaring that adultery is prohibited through a commandment from God and is punishable by death).

28. See ATWATER, *supra* note 25, at 16.

29. *United States v. Hickson*, 22 M.J. 146, 147 (C.M.A. 1986), *overruled by* *United States v. Hill*, 48 M.J. 352 (C.A.A.F. 1997).

30. See R. PERKINS, *CRIMINAL LAW* 377 (2d ed. 1969) (citing FREDERICK POLLOCK & FREDERIC MAITLAND, *HISTORY OF ENGLISH LAW* 543 (2d ed. 1899)); Jeremy D. Weinstein, *Adultery, Law, and the State: A History*, 38 HASTINGS L.J. 195, 225 (1986).

31. See Haggard, *supra* note 24, at 471.

32. Haggard, *supra* note 24, at 471.

33. *Hoye v. Hoye*, 824 S.W. 2d 422, 423 (Ky. 1992); see Jacob Lippman, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651, 652–53 (1930) (explaining Anglo-Saxon common law was based on tortious interference with a marriage by a third person). The wife was considered a superior servant to her husband, and because of that he was entitled to compensation if he lost her services due to enticement by another man. See Lippman, *supra*. The husband was entitled to compensation for loss of consortium, which was defined as bundle of legal rights to his wife’s services, society, and sexual intercourse. Lippman, *supra*.

34. *Hoye v. Hoye*, 824 S.W. 2d at 423.

35. *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873).

submit to a sexual relationship.<sup>36</sup> Eventually laws were passed to reflect the Puritan ideals of repressing sexuality and, consequently, morality began to define acceptable sexual behavior.<sup>37</sup>

Although at least thirteen states still maintain adultery laws,<sup>38</sup> the prosecution of adultery is extremely rare today.<sup>39</sup> In the last decade there have been several high-profile adultery scandals that have astounded the American public, but none of the participants faced criminal prosecution despite the fact that their respective states have adultery statutes.<sup>40</sup> This suggests that the public no longer expects adultery to be the subject of criminal prosecution, even when committed by important governmental figures.<sup>41</sup> Moreover, as exhibited by recommendation from the drafters of the Model Penal Code in 1955, adultery was no longer to be considered a criminal offense<sup>42</sup> and criminalization of adultery has been disfavored for quite some time.<sup>43</sup>

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36. See *Hayes v. Hayes*, 78 P. 19 (Cal. 1904); see also *Campbell v. Campbell*, 112 N.W. 481 (Mich. 1907); *Graves v. Graves*, 41 So. 384 (Miss. 1906); *Whitfield v. Whitfield*, 15 S.E. 543 (Ga. 1892); *Stein v. Stein*, 5 Colo. 55 (1879); *Fleegle v. Fleegle*, 110 A. 889 (Md. 1920); *Axton v. Axton*, 206 S.W. 480 (Ky. 1918).

37. ATWATER, *supra* note 25, at 17.

38. ARIZ. REV. STAT. ANN. § 13-1408 (2012); FLA. STAT. § 798.01 (2012); GA. CODE ANN. § 16-6-9 (2012); IDAHO CODE ANN. § 18-6601 (2012); 720 ILL. COMP. STAT. 5/11-35 (2011); MD. CODE ANN., CRIMINAL LAW § 10-501 (West 2002); MINN. STAT. ANN. § 609.36 (West 2012); MISS. CODE ANN. § 97-29-1 (West 2012); N.Y. PENAL LAW § 255.17 (McKinney 2012); N.D. CENT. CODE ANN. § 12.1-20-09 (West 2011); OKLA. STAT. ANN. tit. 21 § 871-72 (West 2012); R.I. GEN. LAWS § 11-6-2 (1956); S.C. CODE ANN. § 16-15-60 (2011); UTAH CODE ANN. § 76-7-103 (West 2012); WIS. STAT. ANN. § 944.16 (West 2012); see, e.g. *United States v. Hickson*, 22 M.J. 146, 147 (C.M.A 1986) (deciding on a matter where states, lacking a common law for adultery, were forced to enact statutes making it a criminal offense in order to deter adulterous conduct in preservation of the marital union rather than compensation for husbands' loss of property).

39. Kathryn R. Burke, *The Privacy Penumbra and Adultery: Does Military Necessity Justify an Adultery Regulation and What Will it Take for the Court to Declare it Unconstitutional?* 19 *HAMLIN J. PUB. L. & POL'Y* 301, 310 (1997) (stating that statutory language of the states that criminalize adultery suggest that prosecution for crimes of adultery occur very rarely, if ever); see also 2 *Am. Jur. Adultery* § 1 (2012) (noting that, although prosecutions for adultery or fornication have become rare in modern times, many states continue to have statutory provisions that prohibit adultery; thus, the lack of prosecutions does not invalidate the statute or make it judicially unenforceable).

40. See Michael M. Grynbaum, *Spitzer Resigns, Citing Personal Failings*, *N.Y. TIMES*, Mar. 12, 2008, <http://www.nytimes.com/2008/03/12/nyregion/12cnd-resign.html?pagewanted=all&r=0>; Jim Rutenberg & Shaila Dewan, *Back at Work, Governor Puts Apology on Agenda*, *N.Y. TIMES*, June 27, 2009, <http://www.nytimes.com/2009/06/27/us/27sanford.html>. For example, former New York Governor Eliot Spitzer was a client of a prostitution ring. See Grynbaum, *supra*. Another example is South Carolina Governor Mark Sanford's secret affair with a woman from Argentina. See Rutenberg, *supra*.

41. See Annuschat, *supra* note 8 at 1169.

42. See MODEL PENAL CODE § 207.5 (Tentative Draft No. 4, 1955) (decriminalizing fornication, adultery, and other sexual crimes not involving violence or children); Siegel, *supra* note 27, at 95 (taking the stance that adultery was a private affair and, therefore, outside the reaches of criminal law).

43. See Steven Lee Meyers, *Military Weighing Changes in Policy Toward Adultery*, *N.Y.*

### III. THE MILITARY'S DEFINITION OF ADULTERY

#### A. BACKGROUND

In sharp contrast to the civilian sector, the military has been actively prosecuting adultery since May 5, 1950, when Congress enacted the Uniform Code of Military Justice (UCMJ) pursuant to Article I of the Constitution.<sup>44</sup> Adultery is prosecutable when committed by soldiers regardless of if it occurs with other soldiers of the same rank, different rank, or with civilians.<sup>45</sup> The provisions of the UCMJ are implemented by the President through an executive order known as the Manual for Courts-Martial (MCM),<sup>46</sup> which governs all members of the armed forces.<sup>47</sup> Although adultery was specifically not listed as an offense under Article 134 until 1984,<sup>48</sup> it was prosecuted under Article 134 generally if it prejudiced good order and discipline, or brought discredit among the armed forces. It was also prosecuted under Article 13, if it was determined to be conduct unbecoming an officer or gentleman.<sup>49</sup> Articles 77 through 134 of the UCMJ are defined as the "punitive articles," which list specific offenses that, if violated, can result in a soldier being punished by court-martial.<sup>50</sup> Adultery is listed as one of the offenses under Article 134, which is known as the General Article.<sup>51</sup> A soldier is guilty of adultery when the following

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TIMES, July 19, 1998, [www.nytimes.com/1998/07/19/us/military-weighing-changes-in-policy-toward-adultery.html?pagewanted=all&src=pm](http://www.nytimes.com/1998/07/19/us/military-weighing-changes-in-policy-toward-adultery.html?pagewanted=all&src=pm). In 1998, a committee appointed by former Secretary of Defense William S. Cohen suggested making changes to the MCM that would lessen the number of convictions for adultery under Article 134, and impose less serious consequences. *Id.* The proposed changes kept adultery as an offense under Article 134, but would limit prosecutions to instances where the adulterous act disrupted the moral or smooth functioning of a military unit. *Id.* In addition, it would discourage commanders from prosecuting past affairs which had no effect on current service. *Id.*

44. *See generally* UCMJ (comprising §§ 801–946 of Title 10, U.S. Code).

45. Ian Fisher, *Army's Adultery Rule Is Don't Get Caught*, N.Y. TIMES, May 17, 1997, [www.nytimes.com/1997/05/17/us/army-s-adultery-rule-is-don-t-get-caught.html?pagewanted=all&src=pm](http://www.nytimes.com/1997/05/17/us/army-s-adultery-rule-is-don-t-get-caught.html?pagewanted=all&src=pm).

46. *See generally* MCM 2012, *supra* note 1 (defining all offenses military members may be charged with and the elements required to prove each offense).

47. MCM 2012, *supra* note 1; RULE FOR COURTS-MARTIAL (R.C.M.) 103 (2012) (Armed forces are defined as Army, Navy, Air Force, Marine Corps, and Coast Guard).

48. MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 62 (1984) [hereinafter MCM 1984], *available at* [http://www.loc.gov/rr/frd/Military\\_Law/pdf/MCM\\_1984-change3.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/MCM_1984-change3.pdf). The MCM was amended in 1984, which added an adultery statute. *Id.*

49. *See* MCM 2012, *supra* note 1, pt. IV, ¶ 59 & ¶ 62.

50. 10 U.S.C. §§ 877-934. There are three different kinds of Courts-Martial in each of the Armed Forces: General Courts-Martial, Special Courts-Martial, and Summary Courts-Martial. *Id.*

51. *Id.* at § 934. Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court. *Id.*

elements are met: (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;<sup>52</sup> and, (3) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces<sup>53</sup> or was of a nature to bring discredit upon the armed forces.<sup>54</sup> If found guilty of adultery, soldiers are subject to court-martial and face the prospect of receiving the maximum punishment of dishonorable discharge, forfeiture of all pay and allowances, and confinement for one year.<sup>55</sup>

#### B. DISPARATE TREATMENT

While adultery prosecution may be almost obsolete in the civilian sector, prosecution in the military is on the rise.<sup>56</sup> During the 1990s alone, over nine hundred men and women were court-martialed for adultery.<sup>57</sup> This trend continues as increasing pressure is placed on the military by Congress to remove a commander's authority to prosecute sex crimes. Not only is the rate at which military personnel are prosecuted extremely high in comparison to the civilian sector, the disparity between the harsh punishments a soldier can receive,<sup>58</sup> and the wide range of reprimands,<sup>59</sup> or

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52. See Fisher, *supra* note 45 (Fisher, in his article, states that the third element is subjective in comparison to the first two, which seem relatively clear.)

53. MCM 2012, *supra* note 1, pt. IV, ¶ 62(c)(2) ("Adulterous conduct that is directly prejudicial includes conduct that has an 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.").

54. MCM 2012, *supra* note 1, pt. IV, ¶ 62(c)(2) "Discredit means to injure the reputation of the armed forces and includes adulterous conduct that 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." MCM 2012, *supra* note 1, pt. IV, ¶ 62(b); see *United States v. Saunders*, 59 M.J. 1 (C.M.A. 2003) (stating that an accused soldier is entitled to fair notice of the elements of the charge, but this does not necessarily require the precise wording of the elements to be given in a published notice).

55. MCM 2012, *supra* note 2, pt. IV, ¶ 62(e).

56. See Annuschat, *supra* note 9, 1165-74 (asserting that military prosecutions are gaining momentum in spite of a decline in the civilian sector).

57. James M. Winner, *Beds with Sheets but No Covers: The Right to Privacy and the Military's Regulation of Adultery*, 31 LOY. L.A. L. REV. 1073, 1077 (1998).

58. MCM 2012, *supra* note 1, pt. IV, ¶62(e).

59. See FLA. STAT. § 798.01 (2012) (stating that whoever lives in an open state of adultery shall be guilty of a misdemeanor of the second degree); GA. CODE ANN. § 16-6-199 (2012) ("A married person commits the offense of adultery . . . shall be punished as for a misdemeanor"); IDAHO CODE ANN. § 18-6601 (2012) ("[S]hall be punished by a fine of not less than \$ 100, or by imprisonment in the county jail for not less than three months, or by imprisonment in the state penitentiary for a period not exceeding three years, or in the county jail for a period not exceeding one year, or by fine not exceeding \$1000."); 720 ILL. COMP. STAT. 5/11-35 (2011) (stating that adultery is a Class A misdemeanor); MD. CODE ANN., CRIMINAL LAW § 10-501 (2002) ("A person who violates this section is guilty of a misdemeanor and on conviction shall be fined \$10."); MINN. STAT. ANN. § 609.36 (2012). An individual "may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than \$3,000, or both . . . [n]o prosecution shall be commenced under



lack thereof, in the civilian sector is remarkable.<sup>60</sup> Despite the possibility of strict retribution, service members see adultery as a common occurrence in the military.<sup>61</sup> Adultery has been ignored, and in some instances accepted,<sup>62</sup> because of the nature of military service. Due to the fact that less than one percent of the nation serves in the military, soldiers are often forced to spend long periods away from their family in order to fight the wars abroad and on United States soil.<sup>63</sup> Thus, soldiers should not be placed at a disadvantage for being among the few who defend the nation.

In an effort to reconcile the zealous prosecution of adultery in the military with its rarity in which it occurs in the civilian sector, military courts have generally found that service members should be held to a higher standard than civilians because of their unique commitment of loyalty and duty to the United States.<sup>64</sup> Not surprisingly, the standard is heightened further for officers due to “the nature of an officer’s commission [which] demonstrates that he has been selected from among the populace as a whole to hold a position of trust and honor . . . [and this position] puts him in a different legal status than the enlisted man or the civilian.”<sup>65</sup> “While an enlisted accused is subject to a punitive discharge

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this section except on complaint of the husband or the wife, except when such husband or wife is insane, nor after one year from the commission of the offense.” *Id.*

60. See state statutes cited *supra* note 38. States not listed do not criminalize adultery and, therefore, have no punishment.

61. See Fisher, *supra* note 45.

62. Fisher, *supra* note 45 (noting that brothels flourish around military bases where it is not a secret that many military customers are married).

63. Sam Nunn, *The Fundamental Principles of the Supreme Court’s Jurisprudence in Military Cases*, 29 WAKE FOREST L. REV. 557, 558 (1994).

Military service is a unique calling. It is more than a job. Our nation asks the men and women of the armed forces to make extraordinary sacrifices to provide for the common defense. While civilians remain secure in their homes, with broad freedom to live where and with whom they choose, members of the armed forces may be assigned, involuntarily, to any place in the world, often on short notice, often to places of grave danger, often in the most spartan and primitive conditions.

*Id.* at 558. See also, Karl W. Eikenberry and David M Kennedy, Op-Ed., *Americans and Their Military, Drifting Apart*, N.Y. TIMES, May 26, 2013, <http://www.nytimes.com/2013/05/27/opinion/americans-and-their-military-drifting-apart.html?pagewanted=all>. Some

estimates have been as low as 0.5 percent of the U.S. population. *Id.* Moreover, the Congressional Research Service has documented 144 deployments in the last forty years. *Id.*

64. MCM 2012, *supra* note 1, R.C.M 1003(b)(10); *United States v. Kirksey*, 20 C.M.R. 272, 275 (C.M.A. 1955) (“[T]he ancient ethical traditions of the profession of arms . . . have always dictated a high standard of promissory responsibility.”); see *United States v. Means*, 10 M.J. 162, 166 (C.M.A. 1981) (“Since officers have special privileges and hold special positions of honor, it is not unreasonable that they be held to a high standard of accountability.”).

65. *United States v. Free*, 14 C.M.R. 466, 471 (N.B.R. 1953); see also *United States v. Tedder*, 24 M.J. 176, 182 (C.M.A. 1987) (noting that because of an officer’s special status, a higher standard of conduct may be required of him); *United States v. Johanns*, 17 M.J. 862, 868 (A.F.C.M.R. 1983) (stating officers are held to a higher standard of conduct than enlisted personnel and their conduct should be exemplary).

only when it is specifically authorized for the offense charged, an officer is subject to punitive separation for any violation of the [UCMJ].”<sup>66</sup> While the disparity between officer and enlisted standards is understandable, the fact that many civilians hold positions requiring the same loyalty and duty to our country but are not held to the same standard seems hypocritical.<sup>67</sup>

For example, one would assume that the Commander-in-Chief of the Armed Forces would be held to at least the same standard as military personnel, if not higher; however, this assumption is wholly incorrect.<sup>68</sup> Although the Commander-in-Chief has the final say in all military law, as a civilian he is not subject to the standards in which he creates. The scandals involving former President Bill Clinton, then Commander-in-Chief, highlight the inequality of the standard being applied.<sup>69</sup> Despite the title, former President Clinton was not subject to prosecution under the UCMJ and, therefore, did not face the repercussions a soldier surely would have.<sup>70</sup> Interestingly, it was well known that President Clinton engaged in adulterous conduct before he was elected President; yet, America voted him into office and subsequently acted outraged when he continued his affairs during his Presidency.<sup>71</sup> As with military members, sometimes a blind eye is turned, and sometimes it is not. In addition to the inequality of prosecutions and punishments between soldiers and civilians, the disparate approaches of adultery in the military are also troubling.<sup>72</sup>

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66. United States v. March, 32 M.J. 740, 742 (A.C.M.R. 1991) (citing R.C.M. 1003(b)(10)).

67. See Haggard, *supra* note 24, at 477.

68. *Id.*

69. See Clinton v. Jones, 520 U.S. 681, 682 (1997); Haggard, *supra* note 24, at 477.

70. See Raul V. Esquivel, III *supra* note 13, at 844; Steven Lee Myers, *Ex-general is Charged with Lying and Adultery*, N.Y. TIMES, Dec. 11, 1998, <http://www.nytimes.com/1998/12/11/us/ex-general-is-charged-with-lying-and-adultery.html> (stating that some have argued that the Commander-in-Chief should be held to the same moral standards spelled out by the UCMJ); Joseph Isenbergh, *Impeachment and Presidential Immunity from Judicial Process*, 18 YALE L. & POL. REV. 53 (1999) (discussing Presidential immunity).

71. See Francis X. Clines, *Testing the President: The Accuser; Jones Lawyers Issue Files Alleging Clinton Pattern of Harassment of Women*, N.Y. TIMES, Mar. 14, 1988, <http://www.nytimes.com/1998/03/14/us/testing-president-accuser-jones-lawyers-issue-files-alleging-clinton-pattern.html?ref=genniferflowers&pagewanted=2>; *Bill Clinton: Beyond Scandal and Adultery*, REPORTING FOR THE PUBLIC GOOD (Feb. 24, 2012), <http://publicgoodreporting.wordpress.com/2012/02/24/bill-clinton-beyond-scandal-and-adultery/>; Michael S. James, *Timeline: President Bill Clinton Through the Years*, ABC NEWS (Feb. 11, 2010), [http://abcnews.go.com/Politics/Bill\\_Clinton/timeline-president-bill-clinton-years-life-presidency-post/story?id=247332](http://abcnews.go.com/Politics/Bill_Clinton/timeline-president-bill-clinton-years-life-presidency-post/story?id=247332).

72. Christopher Scott Maravilla, *The Other Don't Ask, Don't Tell: Adultery Under the Uniform Code of Military Justice After Lawrence v. Texas*, 37 CAP. U. L. REV. 659, 666 (2009) (expressing that the differences in the prosecution of Lt. Kelly Flinn and General Kevin Byrnes show how subjective and unfair adultery prosecutions in the military are).

## 1. Gender

The differences can be seen in the outcomes of several high-profile adultery cases spanning the last two decades.<sup>73</sup> Often, female soldiers charged with adultery face much harsher consequences than male soldiers.<sup>74</sup> In a highly publicized case, Lieutenant Kelly Flinn, the nation's first female B-52 bomber pilot, faced a court-martial after being charged with adultery, disobedience, and giving false statements.<sup>75</sup> Lieutenant Flinn found herself in a military courtroom after she fell in love with the civilian husband of an enlisted woman located at the same military base as Flinn.<sup>76</sup> Marc Zigo, the married man, assured Flinn that his marriage was over, even though he was living with the woman he was legally married to.<sup>77</sup> To Flinn, Zigo was her first love, a handsome soccer coach that promised to marry her. After learning of the affair, Zigo's wife, Airman Gayla Zigo, complained to her supervisor about the affair and a formal complaint was filed against Flinn after she refused to stop seeing Zigo.<sup>78</sup> The formal complaint sparked an Air Force investigation that delved deep into Flinn's private sexual life. In an attempt to salvage her career, Flinn denied having a sexual relationship with Zigo, but it was too late; Zigo had already provided the military police with in depth details about their sexual relationship, including how often they had sex, methods of birth control, and Flinn's sexual preferences.<sup>79</sup> Subsequently, based upon Flinn's adulterous affair and her conduct during the investigation, the Air Force initiated court-martial proceedings.<sup>80</sup> However, Flinn refused to remain

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73. See *infra* notes 74–91; United States v. Green, 39 M.J. 606 (A.M.C.R. 1994); see also Frank Bruni, *Adultery Alone Often Fails to Prompt a Military Prosecution*, N.Y. TIMES, Dec. 13, 1998, <http://www.nytimes.com/1998/12/13/us/adultery-alone-often-fails-to-prompt-a-military-prosecution.html?pagewanted=all&src=pm> (discussing factors, such as rank, which influence the harshness of punishments for adultery); Craig Whitlock, *Disgraced Army General, Jeffrey A. Sinclair, Receives Fine, No Jail Time*, THE WASHINGTON POST (Mar. 20, 2014) (discussing the lack of punishment General Sinclair received and the implications of it).

74. Bruni, *supra* note 73.

75. See Bruni, *supra* note 73; Elaine Sciolino, *A Rigidity Flexible Notion of Truth*, N.Y. TIMES, July 20, 1997, <http://www.nytimes.com/1997/07/20/weekinreview/a-rigidly-flexible-notion-of-truth.html?ref=kellyjflinn>; Gregory L. Vistica & Evan Thomas, *Sex and Lies: The Strange Case of Lieutenant Flinn Is Over, but in the Military the War over Women Goes On*, NEWSWEEK (June 2, 1997), <http://www.newsweek.com/sex-and-lies-173464>; Tony Capaccio, *Pilot Errors*, AM. JOURNALISM REV. (Oct. 1997), <http://www.ajr.org/article.asp?id=336> (summarizing the entire Lt. Flinn case).

76. See Elaine Sciolino, *From a Love Affair to a Court-Martial*, N.Y. TIMES, May 11, 1997, <http://www.nytimes.com/books/97/12/14/home/airwoman-court-martial.html>.

77. *Id.*

78. See Nancy Gibbs, *Wings of Desire: The Air Force's Star Female Pilot Finds Herself Enmeshed in a Tale Full of Passion and Lies*, TIME, (June 2, 1997), <http://www.time.com/time/magazine/article/0,9171,986448,00.html>

79. See Vistica & Thomas, *supra* note 75.

80. See Gibbs, *supra* note 78.

silent and did everything in her power to let the American public know that the Air Force had intruded into her private, personal life in order to enforce an outwardly antiquated prohibition on adultery.<sup>81</sup> Facing the end of her accomplished career, a federal conviction and possible prison sentence, Flinn had nothing else to lose. Her story won over the American public, with many expressing their opinion that the military had no right to interfere with soldiers' off-base, off-duty conduct and must get out of soldiers' private bedrooms.<sup>82</sup> Flinn was granted a general discharge after the Air Force succumbed to the public and political pressure of prosecuting an American hero.<sup>83</sup> In the end, Flinn avoided a dishonorable discharge and federal conviction for adultery, but at what cost? She endured an abusive relationship, lost her career and benefits, and publicly became the fallen star of the Air Force, all because she believed a man who lied.

Around the same time, Navy officials refused to subject Admiral Scudi to a court-martial and possible prison sentence, and instead opted to give him a much less severe closed administrative hearing.<sup>84</sup> After serving in the Navy for over three decades, Scudi was accused of improperly steering military contracts, worth roughly \$150,000, to a woman with whom he was having an adulterous affair, of obstructing justice, and of giving false statements, among other UCMJ charges.<sup>85</sup> Flinn's charges seem far more innocuous to the government than Scudi's, but Flinn was saved from a court-martial and given a general discharge only because the Air Force wanted to avoid intense criticism and charges of sexism.<sup>86</sup> Instead of the general discharge Flinn was given, Scudi was allowed to retire at a lower rank with the full benefits of leaving the military on honorable terms.

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81. See 60 Minutes: The Court-Martial of Lt. Flinn; First Woman Bomber Pilot on Trial for Adultery (CBS television broadcast, May 11, 1997); Jamie McIntyre, *Female Bomber Pilot Trial on Hold*, CNN.COM (May 20, 1997), <http://www.cnn.com/US/9705/20/flinn.trial/index.html?s=PM:US>.

82. See *Internight* (NBC television broadcast, July 7, 1997) (discussing the Lt. Kelly Flinn case and soliciting public views).

83. See Gibbs, *supra* note 78. Lieutenant Kelly Flinn first submitted a request to resign but conditioned on receiving an honorable discharge; the Secretary of the Air Force quickly denied Flinn's request. Gibbs, *supra* note 78. However, the secretary did accept Flinn's subsequent request to resign conditioned on a general discharge. See Gibbs, *supra* note 78.

84. See Frank Bruni, *Admiral Accepting Guilt in Ethics Case, Will Retire*, N.Y. TIMES, Dec. 3, 1998, <http://www.nytimes.com/1998/12/03/us/admiral-accepting-guilt-in-ethics-case-will-retire.html>; Bruni, *Adultery Alone*, *supra* note 73; Sciolino, *supra* note 75; Mark Thompson, *Sex, the Army and a Double Standard*, TIME, May 4, 1998, at 30. (noting that Lt. Flinn would have faced almost 10 years in prison if convicted).

85. See Myers, *supra* note 70; *Admiral Charged with Adultery and Ethics Violation*, CNN.com (Nov. 25, 1998), <http://www.cnn.com/US/9811/25/navy.adultery.01/> (noting he served for 32 years).

86. See Bruni, *Admiral Accepting Guilt*, *supra* note 73.

## 2. Rank

Disparity in the consequences of committing adultery may also be attributed to high-ranking officers receiving more leniency than those of lower ranks.<sup>87</sup> Major General David Hale was allowed to retire, with an honorable discharge, in February 1988 after the wife of another officer filed a complaint that he coerced her into a sexual relationship.<sup>88</sup> It was only after public criticism that Army officials decided to charge General Hale with seventeen counts of misconduct, including adultery, obstructing justice, and making false statements.<sup>89</sup> In the face of General Hale's confession during his court-martial that he had adulterous affairs with the wives of four subordinates, his punishment merely consisted of a formal reprimand, a \$10,000 fine, and forfeiture of \$1,000 per month pay for twelve months.<sup>90</sup> Although the Secretary of the Army subsequently demoted General Hale to Brigadier General, many critics maintain he should have received a prison sentence.<sup>91</sup>

Most recently, Brigadier General Jeffrey A. Sinclair was recently spared a jail sentence after admitting to carrying on a three-year affair with a female officer under his direct command and having two other inappropriate relationships.<sup>92</sup> Instead, he was given a reprimand, fined \$20,000, and will be able to retire.<sup>93</sup> After pleading guilty to adultery, maltreatment of his accuser, and the two additional unacceptable relationships, Brig. Gen. Sinclair was permitted to retire honorably.<sup>94</sup> While he was reduced by two ranks to Lieutenant Colonel, his attorney felt that Brig. Gen. Sinclair's fate was too harsh given "[o]ther senior military leaders who committed the same indiscretions, and worse, have faced far fewer consequences."<sup>95</sup> Nevertheless, precedent shows that an enlisted

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87. See Bruni, *Admiral Accepting Guilt*, *supra* note 73.

88. See Thompson, *supra* note 84.

89. Bruni, *Admiral Accepting Guilt*, *supra* note 73.

90. See David Stout, *Retired General is Penalized, Not Jailed, in Adultery Case*, N.Y. TIMES, Mar. 18, 1999, <http://www.nytimes.com/1999/03/18/us/retired-general-is-penalized-not-jailed-in-adultery-case.html>. General Hale was originally ordered to pay \$1,466 per month for twelve months, but it was reduced to \$1,000. *Id.* His monthly pension at the time was \$6,312. *Id.* General Hale could have faced up to eleven years in prison. *Id.*

91. See Elizabeth Becker, *Army Demotes Retired NATO Commander Who Admitted Affairs With Wives of Subordinates*, N.Y. TIMES, Sept. 3, 1999, <http://www.nytimes.com/1999/09/03/us/army-demotes-retired-nato-commander-who-admitted-affairs-with-wives-subordinates.html>; Paul Richter, *Army Demotes by 1 Rank Retired General in Sex Case*, L.A. TIMES, Sept. 3, 1999, <http://articles.latimes.com/1999/sep/03/news/mn-6364>.

92. Whitlock, *supra* note 73.

93. *Id.*

94. *Id.*; Paul Woolverton, *Brig. Gen. Jeff Sinclair to Receive Reprimand, \$20K Pay Forfeiture*, FAYETTEVILLE OBSERVER, Mar. 20, 2014, [http://www.fayobserver.com/military/article\\_ea741779-ceab-5f12-a20d-19b2fd42e3a6.html?mode=jqm](http://www.fayobserver.com/military/article_ea741779-ceab-5f12-a20d-19b2fd42e3a6.html?mode=jqm).

95. Drew Brooks, *Army Strips Brig. Gen. Jeffrey Sinclair of Two Ranks, Reducing Retirement Benefits*, FAYETTEVILLE OBSERVER, Jun. 20, 2014, [http://www.fayobserver.com/military/article\\_f55e6aa7-6bae-5c9b-a264-c095bf101bb7.html](http://www.fayobserver.com/military/article_f55e6aa7-6bae-5c9b-a264-c095bf101bb7.html).

soldier would have been dishonorably discharged and would have lost all benefits, rather than mere reduction in retirement pension.

One commentator highlighted the punishment disparity among ranks in her statement: “The military’s promises of ‘zero tolerance’ for sexual offenses continues to ring hollow as yet another high ranking official is let off the hook.”<sup>96</sup> These cases provide a look into the two distinctly different standards of military prosecutions: one that applies to the high-ranking, and the other that applies to the “grunts.”<sup>97</sup> Where is the equality and who is responsible for setting the standard?<sup>98</sup>

#### IV. DECEPTION ENCOURAGED

Before the repeal of 10 U.S.C. § 654—colloquially known as “Don’t Ask, Don’t Tell”—on September 20, 2011,<sup>99</sup> non-heterosexual soldiers were forced into living a life of deception in order to serve in the military.<sup>100</sup> The choice was simple: lie to everyone and pretend to be heterosexual,<sup>101</sup> or face punishment under the UCMJ.<sup>102</sup> In other words, do what you want, but do not do it blatantly and do not get caught.<sup>103</sup> After the repeal, an active-duty Air Force officer, who had kept his sexual orientation a secret, revealed: “I always had the feeling that I was lying to them and that I couldn’t be part of the

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96. Woolverton, *supra* note 94.

97. *See generally* Part III.B; Thompson/Washington, *supra* note 84.

98. *See* proposed revision to Article 134, *infra* Part VII.

99. 10 U.S.C. § 654 (repealed 2010).

100. Sciolino, *supra* note 75. *See also*, Kayla Webley, *Brief History of Gays in the Military*, TIME (Feb. 2, 2010), available at <http://www.time.com/time/magazine/article/0,9171,1960257,00.html>. Former President Bill Clinton attempted to unilaterally lift the ban that prevented gays and lesbians from serving in the military, but was prevented from doing so when Congress passed “Don’t Ask, Don’t Tell.” *Id.* As a result, this kept openly gay or lesbian people from serving. *Id.* “Don’t Ask, Don’t Tell” prevented new recruits from being asked about sexuality on recruitment forms and during interviews, but it did not prevent investigations to determine whether those serving were gay. *Id.*

101. *See* United States v. Eggen, 51 M.J. 159 (A.M.C.R. 1999) (reasoning that a soldier may say he was forcibly sodomized in order to protect his own military career, instead of facing the consequences of having committed a homosexual act); James Dao, *Discharged for Being Gay, Veterans Seek to Re-enlist*, N.Y. TIMES, Sept. 4, 2011, <http://www.nytimes.com/2011/09/05/us/05reenlist.html?pagewanted=all> (discussing how soldiers sometimes lived shadow lives in the military, afraid that disclosure of their sexuality would ruin carefully plotted careers).

102. *See* U.S. DEP’T OF ARMY, REG. 600-20, ARMY COMMAND POLICY, 4–19 (26 July 1999) [hereinafter AR 600-20 1999]; United States v. Modesto, 39 M.J. 1055 (A.M.C.R. 1994). Before “Don’t Ask, Don’t Tell” was repealed, under AR 600-20, homosexuals were subject to mandatory separation for engaging in, or soliciting another to engage in, homosexual acts. AR 600-20 1999, *supra*. Colonel Edward Modesto was convicted by court-martial for eight counts of conduct unbecoming of an officer for committing sodomy, engaging in mutual masturbation, indecently touching another male, cross-dressing in public, performing as a female impersonator in a night club, and being photographed imitating fellatio with two other men. *Modesto*, 39 M.J. at 1055. He was sentenced to dismissal, confinement for nine months, and forfeiture of \$3,000.00 pay for a period of nine months. *Id.*

103. *See* Fisher, *supra* note 45.

military family.”<sup>104</sup> In the eighteen years the “Don’t Ask, Don’t Tell” policy was in effect, more than 13,000 soldiers were discharged for being gay.<sup>105</sup> With its repeal, the Department of Defense has now declared that sexual orientation is a personal and private matter.<sup>106</sup> Conversely, despite the attempt of several individuals to decriminalize consensual sex, all other aspects of soldiers’ sexual conduct remains a public matter subject to criminal prosecution.<sup>107</sup> Which is worse: having an affair or lying about having an affair? The military seems to take the stance that, in matters of the heart, such as sexuality, certain forms of deception are encouraged, but others are not.<sup>108</sup> Although the long running double standard promoting deception about sexual orientation has ended, stigma regarding other sexual matters remains.

Under the UCMJ, any person who knowingly deceives, “signs any false record . . . or other official document, knowing it to be false, or makes any other false official statement knowing it to be false, shall be punished as a court-martial may direct.”<sup>109</sup> Accordingly, Former President Clinton was impeached with a charge of perjury, not adultery.<sup>110</sup> The cases of Brigadier General Sinclair, Lieutenant Flinn, Admiral Scudi, and General Hale are instances where soldiers attempted to conceal their affairs to prevent being criminalized, but did not go out of their way to cause disgrace to the Armed Forces.<sup>111</sup> While the difference between a lie and the truth can mean life or death on the battlefield,<sup>112</sup> under normal circumstances, hiding an affair may be accepted in the name of privacy.<sup>113</sup>

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104. Elisabeth Bumiller, *Out and Proud to Serve*, N.Y. TIMES, Sept. 20, 2011, <http://www.nytimes.com/2011/09/20/us/after-toiling-in-shadows-to-end-dont-ask-dont-tell-1st-lt-josh-seefried-greets-a-new-era.html?pagewanted=all>.

105. *See id.*; Dao, *supra* note 101.

106. Memorandum from Clifford L. Stanley on the repeal of “Don’t Ask, Don’t Tell” (Sept. 20, 2011), *available at* [http://www.defense.gov/home/features/2010/0610\\_dadt/USD-PR-DADT\\_Repeal\\_Day\\_Memo\\_20Sep.pdf](http://www.defense.gov/home/features/2010/0610_dadt/USD-PR-DADT_Repeal_Day_Memo_20Sep.pdf).

107. Rowan Scarborough, *Gays Use Adultery Issue as Military Springboard*, WASH. TIMES, June 18, 1997, at A1. An example is Representative Barney Frank who unveiled an Amendment that would decriminalize consensual sexual acts such as adultery and sodomy. *Id.*

108. Sciolino, *supra* note 75.

109. MCM 2012, *supra* note 1, pt. IV, ¶ 31.

110. *See* James Bennet, *Impeachment: The President Impeached; President Digs In*, N.Y. TIMES, Dec. 20, 1998, <http://www.nytimes.com/1998/12/20/us/impeachment-the-president-clinton-impeached-president-digs-in.html?pagewanted=all&src=pm>; Allison Mitchell, *Impeachment: The Overview – Clinton Impeached; He Faces a Senate Trial, 2D in History; Vows to do Job Till Term’s ‘Last Hour’*, N.Y. TIMES, Dec. 20, 1998, <http://query.nytimes.com/gst/fullpage.html?res=9907EFDE143CF933A15751C1A96E958260&pagewanted=all>.

111. Sciolino, *supra* note 75 (noting that if an affair is discreet, it hurts no one, and concealment is a means to prevent becoming a criminal).

112. *See* United States. v. Sanchez, 39 M.J. 518, 521 (A.C.M.R. 1993) (stating that false official statements can potentially interfere with mission accomplishment or result in the loss of life); United States. v. Coates, 25 C.M.R. 559, 562 n.1 (A.C.M.R. 1958). “The reason for this rigid requirement for personal integrity is that the critical test comes on the battlefield when the lives of individuals are involved in the decisions which are made—based on information accepted without question by those who have to make such decisions.” *Id.* at 562 (noting a letter from Commanding General, XVIII Airborne Corps and Fort Bragg).

113. *See* discussion on privacy *infra* Part V.A.

## V. FUNDAMENTAL RIGHTS

### A. RIGHT TO PRIVACY

The right to be free from government intrusion is the most comprehensive right and the right most valued by civilized men.<sup>114</sup> Although the Constitution does not expressly state that individuals are entitled to the right of privacy,<sup>115</sup> the Supreme Court has recognized that an individual right to personal privacy has existed under the Constitution since 1891.<sup>116</sup> The right to personal privacy can be found in: the First Amendment,<sup>117</sup> the Fourth and Fifth Amendments,<sup>118</sup> the Ninth Amendment,<sup>119</sup> the Bill of Rights,<sup>120</sup> and in the Fourteenth Amendment's concept of personal liberty and restrictions on state action.<sup>121</sup> Accordingly, there is a valid argument that intimate affairs should be protected from governmental intrusion.<sup>122</sup>

In *Griswold v. Connecticut*,<sup>123</sup> the Supreme Court established a right of marital privacy when it held that the Connecticut law prohibiting the use of

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114. *Olmstead v. United States*, 277 U.S. 438, 478-79 (1928) (Brandeis, J., dissenting).

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.

*Olmstead*, 277 U.S. at 478-79.

115. *Roe v. Wade*, 410 U.S. 113, 152 (1973).

116. *See Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891) (“No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”).

117. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (“For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.”).

118. *Terry v. Ohio*, 392 U.S. 1, 8–9 (1968); *Katz v. U.S.*, 389 U.S. 347, 350 (1967); *Boyd v. U.S.*, 116 U.S. 616, 621 (1886).

119. *See Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

120. *See Id.* at 484–85.

121. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

122. *See Planned Parenthood Se. Pa. v. Casey*, 505 U.S. 833, 848 (1992); *Roe*, 410 U.S. at 170; *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold*, 381 U.S. at 485; *see also* Major Eugene E. Baime, *Private Consensual Sodomy Should Be Constitutionally Protected in the Military By the Right to Privacy*, 171 MIL. L. REV. 91 (2002) (arguing that because soldiers have a Constitutional right to privacy, they should not face criminal prosecution for engaging in private consensual sodomy with another adult); Maravilla, *supra* note 72 at 669 (arguing that under the holding in *Lawrence v. Texas*, adulterous charges should be brought under fraternization).

123. *Griswold*, 381 U.S. at 485-86.



contraceptives was an unconstitutional intrusion into the private lives of married couples.<sup>124</sup> The same freedoms were later guaranteed to unmarried couples, under the Equal Protection Clause, in *Eisenstadt v. Baird*.<sup>125</sup> In *Eisenstadt*, the Supreme Court found the right to be free from governmental intrusion is the right of the individual, regardless of their marital status, because every individual has their own emotions and intellectual abilities.<sup>126</sup>

Subsequently, the Supreme Court confirmed that the Constitution guarantees protection for personal decisions relating to marriage, procreation, contraception, abortion, bodily integrity, familial relationships, and education.<sup>127</sup> In *Lawrence v. Texas*<sup>128</sup> the Supreme Court struck down the Texas sodomy statute and overturned the Court's prior decision in *Bowers v. Hardwick*,<sup>129</sup> which made it clear that the Court cannot control the actions of individuals by making their private sexual conduct a criminal offense.<sup>130</sup> Consequently, the protection guaranteed by the Constitution limits the government's right to intrude upon an individual's right to make personal decisions relating to familial relationships and parenthood.<sup>131</sup> Furthermore, the Supreme Court has never accepted that the substantive and procedural liberties protected by the Fifth and Fourteenth Amendments and recognized by the Bill of Rights are limited to the express provisions of the first eight Amendments to the Constitution.<sup>132</sup> Instead, precedent shows that the breadth of liberty guaranteed by the Due Process Clause is not limited to or constrained by the text of the Constitution.<sup>133</sup>

Individual liberty is one of the most fundamental rights protected by the Constitution.<sup>134</sup> Although the Supreme Court has never explicitly stated that a fundamental right to privacy exists, the Court's reading of

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124. *Griswold*, 381 U.S. at 485-86.

125. *Eisenstadt*, 405 U.S. at 453.

126. *See Id.*

127. *See* Planned Parenthood Se. Pa. v. Casey, 505 U.S. 833, 846 (1992); *Roe*, 410 U.S. at 170; *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541-42 (1942); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

128. *Lawrence v. Texas*, 539 U.S. 558 (2003).

129. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

130. *See Lawrence*, 539 U.S. at 578.

131. *See Planned Parenthood*, 505 U.S. at 849.

132. *See id.* at 847-48.

133. *See Poe v. Ullman*, 367 U.S. 497, 543 (1961).

[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . .

*Id.*

134. *See Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

precedent in *Lawrence* proves otherwise.<sup>135</sup> The right to privacy provides all individuals, regardless of marital status, sexual orientation, or military service, the right to make certain decisions and engage in certain acts regarding their private lives.<sup>136</sup> An individual's right to privacy should include an adult's right to make decisions regarding all types of private, consensual relations without government intrusion.<sup>137</sup> Assuming the right to privacy is fundamental and includes these consensual relations, the Due Process Clause prevents the government from intruding on the private sexual lives of individuals unless the intrusion is narrowly designed to serve a compelling government interest.<sup>138</sup>

Wearing a military uniform does not strip the men and women of the armed forces of the constitutional safeguards and judicial protection afforded to civilians.<sup>139</sup> Accordingly, there are no individuals "more entitled to the protection of their constitutional rights than the servicemen engaged in protecting the sovereignty of the United States."<sup>140</sup> The Supreme Court has consistently applied the protections of the Bill of Rights to military personnel, except in instances where the express terms of the Constitution are plainly inappropriate.<sup>141</sup> While the nature of being in the armed forces may limit those rights, the government must justify the limitations.<sup>142</sup> The government contends that military necessity is a compelling interest because the military must remain a strong fighting force;<sup>143</sup> however, "[t]he background material on the adoption of the UCMJ indicates Congress made no findings as to the possible harmful consequences of privately performed sexual acts upon the military

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135. See *Lawrence v. Texas*, 539 U.S. 558, 565 (2003). The Court expressly states that statutes seeking to control personal relationships are within the liberty guaranteed by the Constitution of individuals to choose which sexual relationships to partake in without being punished as criminals. *Id.* at 567. The implications and consequences of these statutes touch upon the most private human contact in the most private of places, the home. *Id.*

136. Baime, *supra* note 122, at 126.

137. Baime, *supra* note 122, at 126. *Contra Oliverson v. W. Valley City*, 875 F. Supp. 1465, 1482 (D. Utah 1995). The claim to the right to commit adultery cannot be fundamental because the historical development of the criminalization of adultery is in direct opposition to any aspect of a historical right. *Oliverson*, 875 F. Supp. at 1482.

138. See *Roe v. Wade*, 410 U.S. 113, 155 (1973); Baime, *supra* note 122, at 126.

139. See *United States v. Mitchell*, 39 M.J. 131, 135 (C.M.A.1994) (citing *Weiss v. United States*, 510 U.S. 163, 194 (1994) (Ginsberg, J., concurring)).

140. *Constitutional Rights of Military Personnel: Summary-Rep. of Hearings by Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 88th Cong. III (1962), available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/const-rights-mil-pers.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/const-rights-mil-pers.pdf).

141. See *United States v. Marcum*, 60 M.J. 198, 205–06 (2004).

142. See *id.*; *United States v. Allen*, No. ACM 32727, 1999 CCA LEXIS 116, 6 (A.F.Ct. Crim. App. Apr. 22, 1999), *aff'd*, 53 M.J. 402 (2000); Baime, *supra* note 121, at 132.

143. See *Parker v. Levy*, 417 U.S. 733, 743 (1974). The Supreme Court highlighted that "the military is, by necessity, a specialized society separate from civilian society . . . [and in order] to maintain the discipline essential to perform its mission effectively, the military has developed what 'may not unfitly [sic] be called the customary military law' or 'general usage of the military service.'" *Id.* at 743–44.

community.”<sup>144</sup> Under Article 134, the adulterous act must be prejudicial to good order and discipline or service discrediting in order to constitute an offense under the UCMJ.<sup>145</sup> The language of Article 134 only expressly identifies adulterous acts, which are “obvious” or “open and notorious” as conduct that warrants prosecution.<sup>146</sup> Yet, Article 134 does not expressly state that private and discreet acts are prejudicial to good order and discipline or service discrediting.<sup>147</sup> Furthermore, the United States Army Court of Criminal Appeals recognized that a right to privacy in the martial relationships exists in the military context.<sup>148</sup> In light of this, military necessity should only encompass acts that hinder a soldier’s military function,<sup>149</sup> rather than a complete ban, which comes very close to infringing on a soldier’s right to privacy.<sup>150</sup>

#### B. RIGHT TO DUE PROCESS

Adultery was not prohibited until women were integrated into the armed forces, emphasizing the argument that all soldiers deserve due process protection.<sup>151</sup> In the late 1970s, the Women’s Army Corp disbanded, and consequently the number of women serving in the main body of the military increased.<sup>152</sup> This integration corresponds with the inclusion of adultery under Article 134 in the 1984 amendment of the MCM.<sup>153</sup> Since there is no civilian equivalent to the military’s broad

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144. *United States v. Scoby*, 5 M.J. 160, 165 (C.M.A. 1978); *see also* 144 CONG. REC. H11.776 (1998) (“Sexual misconduct and adultery are private acts and are none of Congress’ business.”).

145. *See* MCM 2012, *supra* note 1, pt. IV, ¶ 62(c)(2).

146. *See* MCM 2012, *supra* note 1, pt. IV, ¶ 62(c)(2). Adulterous conduct is directly prejudicial to good order and discipline is conduct that has an 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. MCM 2012, *supra* note 1, pt. IV, ¶ 62(c)(2). “Discredit” is defined as injuring the reputation of the armed forces, including adulterous conduct that 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. MCM 2012, *supra* note 1, pt. IV, ¶ 62(c)(2).

147. *See* MCM 2012, *supra* note 1, pt. IV, ¶ 62(c)(2). While adulterous conduct that is private and discreet in nature *may not* be service discrediting by this standard, under the circumstances, it *may* be determined to be conduct prejudicial to good order and discipline. MCM 2012, *supra* note 1, pt. IV, ¶ 62(c)(2).

148. *See* *United States v. Arab*, 55 M.J. 508, 518 (Army Ct. Crim. App. 2001) (suggesting that there is a right to martial privacy in the military; however, it will not apply in cases where there is violence).

149. Esquivel, *supra* note 13, at 854. For example, “proscriptions against adultery with a subordinate, or with the spouse of a service-member, or during deployment would reasonably satisfy the requirement of an important governmental interest.” Esquivel, *supra* note 13, at 857.

150. *See* Burke, *supra* note 39, at 337.

151. *See* Hopkins, *supra* note 8, at 235.

152. *See* Michael J. Hargis, *The Password is “Common Sense”: The Army’s New Policy on Senior - Subordinate Relationships*, 1999 ARMY LAW 12 (Mar. 1999).

153. *See* Hopkins, *supra* note 9, at 234–35.

punishment for adultery,<sup>154</sup> adultery should only be considered a crime when it affects a service member's ability to perform their military duties.<sup>155</sup> In essence, because the military is able to prosecute adultery in any instance under this amendment, soldiers are being denied due process under the Fifth Amendment.<sup>156</sup> This is especially apparent in marriages where one spouse is a service member and the other is not.<sup>157</sup> Due to the general lack of enforcement and prohibition in the civilian sector, a civilian spouse is typically free to commit adultery without criminal consequence.<sup>158</sup> Even if a civilian spouse were to face adultery charges, the punishment is by no means equal.<sup>159</sup> It is not to say that soldiers must be treated just like civilians, but rather, soldiers must be given more protection in light of the lack of punishment in the civilian sector.

In this instance, because an adultery investigation only begins when adulterous activity is reported,<sup>160</sup> a soldier may fall prey to a vindictive spouse<sup>161</sup> seeking retribution.<sup>162</sup> Consequently, the complete prohibition against adultery creates nothing more than a double standard.<sup>163</sup> A service member can be investigated simply because a vindictive spouse wants to gain leverage, whereas a service member has no legal recourse if a civilian spouse has an extramarital affair, except to file for divorce.<sup>164</sup> This is not to say that the military's prohibition on adultery serves no purpose in marriages, where one spouse is a soldier and one is not. The prohibition serves as a tool to give spouses peace of mind, especially during times of deployment, that there is a consequence for breaking marriage vows.

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154. See discussion on the lack of criminalization compared to the harsh punishment under the UCMJ *supra* Part II.

155. See Esquivel, *supra* note 13, at 855–56.

156. See U.S. CONST. amend. V, § 1 (2012). “No person shall be . . . deprived of life, liberty, or property, without due process of law . . .” *Id.*

157. See discussion on the inequality between civilian and military spouses *infra* notes 167–171.

158. See *supra* Part II.

159. See *supra* notes 58, 64.

160. See Sciolino, *supra* note 75.

161. See Major Guilford, *Family Law Note Counseling Clients About Extramarital Sex Prior to Divorce*, 1989 ARMY LAW 41 (July 1989); Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1488 (2000). The vindictive wife was used as a defense to marital rape in order to prevent wives from pursuing false rape charges in order to gain leverage in a divorce suit, however; there is no empirical evidence showing that wives were specifically prone to make false charges of marital rape. See Hasday, *supra*. Infidelity typically engenders hurt, embarrassment, and anger, especially when the adultery is public knowledge. See Guilford, *supra*. A relationship while the divorce is pending can create these feelings, and the risk is that the spouse will seek vindication or revenge. See Guilford, *supra*.

162. See Esquivel, *supra* note 13, at 855–56 (the author discusses this issue in terms of a service-member's spouse being preyed upon by a civilian, but the same rules apply in this instance).

163. *Id.*

164. *Id.*

However, what can be used for good can also be used for evil. Under the plain language of Article 134, soldiers are subject to prosecution for adultery unless they are legally divorced.<sup>165</sup> Yet, under the Fifth Amendment, no person shall be deprived of his or her liberty.<sup>166</sup> Thus, if a separation occurs during a deployment, or other training separating the soldier from his or her family, the civilian spouse is free to conduct himself or herself as a single person, while the soldier remains trapped by the confines of marriage.

The language of Article 134 does not afford due process to service members when only the service member, and not their spouse, is subject to the harsh consequences under the UCMJ.<sup>167</sup> For instance, if a civilian spouse wants to contest a divorce for a number of years, the language of Article 134 mandates that a service member must abstain from all sexual relationships until the divorce is finalized, or face serious consequences.<sup>168</sup> Likewise, a soldier with a civilian spouse cannot mutually decide to partake in an open marriage without facing unequal consequences, because the soldier remains subject to the provisions of Article 134, regardless of spouse approval.<sup>169</sup> In light of the clear disadvantage that the plain language of Article 134 entails, the government should not be allowed to enforce laws that “abridge the privileges” of soldier citizens<sup>170</sup> unless they are provided with enough protection under the Due Process Clause to prevent the injustice of false accusations from harming their career. In this instance, service members are treated differently solely due to the fact that they are members of the armed forces.<sup>171</sup> This author does not argue that soldiers should not be treated differently; they are different. But their willingness to serve their country should not place them at a disadvantage. For this reason, the prohibition against adultery should only be limited to

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165. See MCM 2012, *supra* note 1, pt. IV, ¶ 62(c)(3); See Guilford, *supra* note 161, at 41. “A marriage exists until it is dissolved in accordance with the laws of a competent state or foreign jurisdiction.” MCM 2012, *supra* note 1, pt. IV, ¶ 62(c)(3). Unless the marriage is terminated, sexual relations with anyone other than a spouse constitutes adultery. This is true whether or not a separation agreement has been executed and regardless of any language it may include about how each party is entitled to live free of interference from the other. See Guilford, *supra* note 161, at 41.

166. See *supra* note 156; see *infra* note 171.

167. See discussion on disparate treatment *supra* Part III.B.

168. See MCM 2012, *supra* note 1, pt. IV, ¶ 62(c)–(d).

169. MCM 2012, *supra* note 1, pt. IV, ¶ 62(c)–(d).

170. See *Olympic Arms v. Magaw*, 91 F. Supp. 2d 1061, 1069–70 (E.D. Mich. 2000). Although, there is no textual support to in the Constitution itself that the Fourteenth Amendment’s Equal Protection Clause applies to the federal government, if the federal government acts in a manner that would violate the Equal Protection Clause, it will be in violation of the implied equal protection guarantees under the Fifth Amendment’s Due Process Clause. *Id.*

171. See E. Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 188 (1962). This idea is consistent with the idea that “our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes.” *Id.*

instances where it is clearly detrimental to a service member's role in the military.<sup>172</sup>

## VI. JUSTIFYING NECESSITY

While the military maintains that “military necessity” justifies the complete prohibition on adultery, that is not the only rationalization it relies on.<sup>173</sup> The complete prohibition against adultery is also aimed at regulating individual moral behavior<sup>174</sup> and preserving marriage.<sup>175</sup> Many courts-martial have found that moral turpitude is innately prejudicial, which allows the prosecution to fulfill its burden of proof by simply declaring the alleged conduct was morally reprehensible.<sup>176</sup> Nevertheless, the military has offered no clear definition of what constitutes immoral behavior,<sup>177</sup> and courts-martial have been unable to consistently agree.<sup>178</sup> For example, in *United States v. Greene*,<sup>179</sup> the court found that false swearing was immoral, but in *United States v. Johnson*,<sup>180</sup> lying was not. If military courts cannot agree on whether synonyms constitute immoral behavior, how can an individual soldier? Without a clear definition, the military is free to choose from an unknown number of acts that could be considered immoral.<sup>181</sup> Furthermore, the remarkable number of individuals who are currently having, or have previously had, extramarital relationships clearly illustrates the futility of continuing a battle on morality.<sup>182</sup> Recognizing

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172. See *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986). In Justice Stevens' dissent, he makes it very clear that the government's traditional view that a particular practice is immoral is not a sufficient compelling interest and, therefore, upholding a law that prohibits the practice is not justified. *Id.* He also notes that neither history, nor tradition, could save laws prohibiting miscegenation from being held unconstitutional. *Id.*

173. See discussion on military necessity *supra* notes 143–146.

174. See Maravilla, *supra* note 72, at 671. See generally Jeremy D. Weinstein, *Adultery, Law, and the State: A History*, 38 HASTINGS L.J. 195, 225–26 (1986) (explaining that adultery has been seen as entirely an offense against morality and chastity since the beginning).

175. See *United States v. Brown*, 2005 WL 2381094 at \*4 (N.M. Ct. Crim. App. 2005).

176. See Annuschat, *supra* note 8, at 1179.

177. According to Black's Law Dictionary, in the military context moral turpitude is “any conduct for which the applicable punishment is a dishonorable discharge or confinement not less than one year.” BLACK'S LAW DICTIONARY 1101 (9th ed. 2009).

178. See *infra* notes 179–80.

179. *United States v. Greene*, 34 M.J. 713, 714 (A.M.C.R. 1992).

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

181. See Annuschat, *supra* note 8, at 1180; William Sherman, *The Civilianization of Military Law*, 22 MAINE L. REV. 3, 81 (1970) (noting that in a pluralistic society, such as ours, it is difficult to find universal agreement as to the meaning of subjective terms).

182. See Phyllis Coleman, *Who's Been Sleeping In My Bed? You, Me, and the State Makes Three*, 24 IND. L. REV. 399, 401 (1991); see also Siegel, *supra* note 27, at 45. While adultery laws may have served a legitimate purpose when they were enacted, they fail to reflect the current reality that societal views of imposing morality have changed. Coleman, *supra*, at 401. Despite societal views on morality, adultery affects most marriages. Siegel, *supra* note 27, at 45.

this, the Supreme Court recently held that promoting morality is not a sufficient compelling interest to justify the prohibition of sodomy.<sup>183</sup> Moreover, military courts recognize that it is not the military's place to regulate the wholly private moral conduct of individuals.<sup>184</sup> Consequently, morality does not justify the prohibition of adultery when it is outside the scope of the soldier's military role.<sup>185</sup>

Because a soldier's pay and housing benefits are directly related to the status of their dependents, the military justifies the broad prosecution of adultery in the name of preserving the sanctity of marriage and protecting the innocent spouse.<sup>186</sup> There is no argument that adultery is a victimless crime.<sup>187</sup> Like any act that is contradictory to the traditional view of marriage, adultery has the potential to cause emotional harm to family members.<sup>188</sup> The Supreme Court has traditionally held the intimate relationship of a marriage in the highest regard.<sup>189</sup> However, there is a strong argument that the government's interest in preserving the marital relationship is sufficient neither to justify the intrusion necessary to discover the affair, nor to trample the fundamental right of privacy guaranteed by the Constitution.<sup>190</sup>

## VII. BALANCING INTERESTS

Certain acts that are considered "prejudicial to good order and discipline," or are "service discrediting," are not protected under the Constitution. With this in mind, the governmental interest of redressing the harm caused by adultery must be balanced against the intrusion into an

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183. *See* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding the sodomy statute furthers no legitimate state interest to justify intrusion into personal and private lives of individuals).

184. *United States v. Snyder*, 4 C.M.R. 15, 19 (C.M.A. 1952).

185. *See generally* Gabrielle Viator, *The Validity of Criminal Adultery Prohibitions after Lawrence v. Texas*, 39 SUFFOLK U. L. REV. 837, 855 (2006) (reasoning that adultery prohibitions cannot stand after *Lawrence v. Texas* because state intrusion into the private sexual lives of marriage individuals is analogous to the experiences of homosexuals).

186. *See* *United States v. Brown*, 2005 WL 2381094 at \*4 (N.M. Ct. Crim. App. 2005) (noting the military has an interest in the determination and preservation of marriage and since adultery has a direct effect on the sanctity of marriage, the military has a justified interest); *Oliverson v. W. Valley City*, 875 F. Supp. 1465, 1484 (D. Utah 1995) (noting the social costs of adultery on spouses and children).

187. *See Oliverson*, 875 F. Supp. at 1484.

188. *Id.*; *see* Viator, *supra* note 185, at 856 (noting that adultery can lead to divorce in many instances). *But see* Siegel, *supra* note 27, at 56–57 (suggesting extramarital relationships may happily co-exist with or even enhance marriage).

189. *See* Viator, *supra* note 185, at 839 (explaining the state has a justifiable interest in intruding into the private sexual acts of individuals in order to protect the institution of marriage and the innocent spouse).

190. *See* Coleman, *supra* note 182, at 401 (the government cannot justify a moral interest because the battle is long lost, as extramarital affairs are a reality of current times.).

individual's fundamental right of privacy.<sup>191</sup> The military incorrectly uses the "separate society" theory articulated in *Parker v. Levy*<sup>192</sup> to justify limiting *Lawrence's* influence and application on military cases.<sup>193</sup> Although the Supreme Court has consistently granted constitutional deference to discretionary military decisions when the military punishes soldiers for conduct that would otherwise be protected under the Constitution,<sup>194</sup> these cases never contemplated a broad military necessity for regulating the fundamental right of privacy concerning consensual sexual acts.<sup>195</sup> It is challenging to imagine a special military necessity or justifiable link between consensual adult private sexual conduct and service credibility, or good order and discipline.<sup>196</sup> For that reason, *Lawrence* should be applied to all military cases dealing with adulterous acts.<sup>197</sup>

In lieu of prosecuting all instances of adultery, or the instances when a commander deems fit, the military must only prosecute when the

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191. See *United States v. Orellana*, 62 M.J. 595, 599–601 (N.M. Ct. Crim. App. 2005); see Viator *supra* note 185, at 857. The court found that the appellant's conduct was prejudicial to good order and discipline as well as service discrediting, and consequently, the conduct was removed from the protection afforded by the Constitution. *Orellana*, 62 M.J. at 600–01. In order for the criminalization of adultery to survive after *Lawrence*, the interests between the state and the intrusion into private lives, must be balanced. See Viator, *supra* note 185, at 857; Andrew Tilghman, *Making a sex tape a crime for troops, court rules*, ARMY TIMES, May 29, 2013, <http://www.armytimes.com/article/20130529/NEWS/305290002/Making-sex-tape-crime-troops-court-rules> (discussing the recent change making sex tapes against military law).

192. See *Parker v. Levy*, 417 U.S. 733, 743 (1974).

193. See Major Steven Cullen, *Prosecuting Indecent Conduct in the Military: Honey Should We Get a Legal Review First?*, 179 MIL. L. REV. 128, 130 (2004).

194. *Id.* at 160; see e.g., *Parker*, 417 U.S. at 743; *Goldman v. Weinberger*, 475 U.S. 503, 509–10 (1986) (holding the military is not required to accommodate religious practices such as wearing a yarmulke when it detracts from the uniformity sought by dress regulations).

195. See *Parker*, 417 U.S. at 751; Cullen, *supra* note 193, at 160. *Parker* is a clear example where deference to military decisions should be used, in instances like freedom of speech limitations for military members. *Parker*, 417 U.S. at 751.

196. *Parker*, 417 U.S. at 751; See generally Sherman, *supra* note 181, at 79. The power to court-martial under vague standards tends to encourage an arbitrariness of command, which is undesirable in itself and which can have an adverse effect upon morale. Sherman, *supra* note 183.

197. See Sherman, *supra* note 181 (reasoning that the military may not impose a different criminal standard than is applied to civilians). See generally *United States v. Marcum*, 60 M.J. 198, 206–07 (2004); *United States v. Stirewalt*, 60 M.J. 297, 304 (C.A.A.F. 2004). The court determined that military courts must apply an "as applied" analysis to determine whether the act is within the liberty interest of *Lawrence*. *Marcum*, 60 M.J. at 206–07. The "as applied" analysis consists of three questions the court must consider:

First, was the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court? Second, did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in *Lawrence*? Third, are there additional factors relevant solely in the military environments that affect the nature and reach of the *Lawrence* liberty interest?

*Marcum*, 60 M.J., at 206–07.



adulterous act affects a soldier's military role.<sup>198</sup> In order to ensure the rights of the soldier are balanced with the interests of the military, the elements required to prosecute must be revised in order to better define the instances where adulterous acts are prejudicial to good order and discipline or service discrediting.<sup>199</sup> The justification for defining specific instances lies within the broad power of commanders to choose when adulterous acts are prejudicial to good order and discipline or service discrediting and when they are not.<sup>200</sup> The selective enforcement due to broad commander discretion is clear in the disparity of prosecutions and punishments that soldiers receive.<sup>201</sup> In light of this disparity, the current lack of specificity allows commanders to file adultery charges in almost any instance, which is inapposite to the protections guaranteed by the Constitution.<sup>202</sup> Highlighting this issue in a discussion about the recent increase in sexual crimes in the military, Anu Bhagwati, executive director of the Service Women's Action Network, noted that "a major problem is that military commanders are responsible for deciding what cases should move forward."<sup>203</sup> In the military, perception is everything; the mere perception that a soldier has committed adultery is going to tarnish his reputation and hinder his career.

While the explanation for conduct that is prejudicial to good order and discipline is relatively specific, the expansive definition of service discredit indubitably includes all adulterous acts, which allows commanders to enforce their own moral standards or pacify a spouse seeking retribution.<sup>204</sup> In essence, the expansive definition moves Article 134 into the category of a "statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."<sup>205</sup> Thus, in order to guarantee that the adulterous acts are

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198. See reasoning for only applying to a soldier's military function, *supra*, Part V.

199. See discussion *infra* note 207.

200. See MCM 2012, *supra* note 1, pt. IV, ¶ 62(c)(2). The MCM does not mandate a commander to consider particular factors in determining whether the adulterous act justifies prosecution, but instead, it uses the language of "should consider all relevant circumstances." MCM 2012, *supra* note 1, pt. IV, ¶ 62(c)(2). This broad language allows the commander to use as little or as much proof as deemed fit to justify adultery charges, as well as how much credence to give each factor. MCM 2012, *supra* note 1, pt. IV, ¶ 62(c)(2).

201. See discussion on disparate treatment and punishment *supra* Part III.B.

202. See discussion Part V.B.

203. Lolita C. Baldor, *Sex Is A Major Reason Military Commanders Are Fired*, ASSOC. PRESS, Jan. 20, 2013, <http://bigstory.ap.org/article/sex-major-reason-military-commanders-are-fired>.

204. See discussion on morality and spousal revenge *supra* Part VI. It is not the place of the military to ensure a soldier's spouse is vindicated when a soldier commits adultery. See *supra* Part VI.

205. *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926); see also *International Harvester Co. v. Kentucky*, 234 U.S. 216 (1914); *Collins v. Kentucky*, 234 U.S. 634 (1914).

actually interfering with a soldier's duty and not at the sole prosecutorial discretion of the commander, an additional element should be added to specify the types of interferences with duty that warrant a soldier being punished.<sup>206</sup> My proposed revision of the elements is as follows:<sup>207</sup>

b. *Elements.*

- (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;
- (3) That the sexual intercourse create an actual or clearly predictable adverse impact on discipline, authority, unit morale, unit cohesion, the ability of the command to accomplish its mission, or the ability of the accused to perform their duties to support the armed forces; and
- (4) 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.

The additional element would eliminate the subjective nature of the circumstances a commander should consider, and would force the commander to abide by the specifics of the elements.<sup>208</sup> Therefore, sub-elements (a)–(i), which describe the circumstances a commander should consider, would no longer serve a purpose and should be deleted.<sup>209</sup> Additionally, since officers are also subjected to the expansive elements of Article 133, which allow for punishment in almost any instance the military deems fit, officers should not be prosecuted under Article 133 for adultery unless the adulterous acts meet the requirements of the proposed revision of Article 134.<sup>210</sup> Under this revision, the elements themselves achieve the balance between the military's interest and the preservation of the soldier's fundamental right to privacy.<sup>211</sup>

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206. See MCM 2012, *supra* note 1, pt. IV, ¶ 62(c)(2).

207. *Id.*; U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY, 4-14(b) (Sept. 20, 2012) [hereinafter AR 600-20]. The proposed additional element and sub-elements include the circumstances a commander should consider. (See MCM 2012, *supra* note 2, pt. IV, ¶ 62(c)(2)), as well as instances when fraternization is punishable under the UMCJ. See AR 600-20, *supra*.

208. See discussion *supra* note 200.

209. *Id.*

210. See MCM 2012, *supra* note 1, pt. IV, ¶ 59(b).

211. See discussion on balancing the interests between the government and military personnel *supra* Part VII.

### VIII. CONCLUSION

As it currently stands, the military uses necessity, morality, and the preservation of marriage to justify limiting a soldier's fundamental right to privacy for adulterous acts, regardless if they actually hinder a soldier's military function.<sup>212</sup> While the scope of an individual's liberty interests are being continually expanded in the civilian sector, the military uses an "as applied" analysis to justify removing the conduct from the protections established in *Lawrence*.<sup>213</sup> Furthering the inequality, the ambiguous language of Article 134 gives commanders the broad range of authority to punish soldiers for any and all adulterous acts, even if the acts occur after duty hours and in the privacy of a soldier's home.<sup>214</sup> This expansive authority places soldiers at a potentially life-altering disadvantage, as the potential for commanders to initiate an investigation according to their own standards of morality or at the request of a vengeful spouse is grave.

Because service members voluntarily relinquish the privilege to exercise their fundamental liberties in the capacity that civilians do, service members should be allowed to exercise their right to privacy under the Constitution without fear of prosecution in every instance.<sup>215</sup> More than that, soldiers should be given additional due process protection to ensure justice is served for the accused and the accuser. There is no legitimate reason to deny the very people who have sworn to protect the freedom America stands for of the right use their own judgment to determine which behaviors will compromise their military role.<sup>216</sup> Following this rationale, under the proposed revision, Article 134 would still serve as a deterrence mechanism, just in a different capacity.<sup>217</sup> Service members would be subject to a more logical basis for prosecuting adultery: if the adultery interferes with the military role, the soldier is punished.<sup>218</sup> If the adultery has no bearing on the service members' ability to perform their military role, there is no criminal consequence.<sup>219</sup> Allowing service members to be afforded the same right of sexual privacy does not hinder the purpose of the military: to serve and protect.<sup>220</sup>

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212. *See supra* Part V.A and Part VI.

213. *See* discussion on "as applied" analysis *supra* Part VII.

214. *See* discussion on commander's discretion *supra* notes 204–206.

215. *See supra* notes 198–200.

216. *See* Burke, *supra* note 39, at 336; Nunn, *supra* note 63, at 558.

217. *See* Esquivel, *supra* note 13, at 857.

218. *Id.*

219. *Id.*

220. *See* United States v. Brown, 2005 WL 2381094 at \*4 (N.M. Ct. Crim. App. 2005).