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An Affair To Remember: The State of the Crime of Adultery in the Military

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I. INTRODUCTION

In May 2008, a general court-martial[1] convicted nineteen-year Navy supply officer Lieutenant Commander Syneeda Penland of adultery and sentenced her to sixty days in the brig.[2] As a result of this conviction, the Navy dismissed Penland just a few months short of retirement, causing her to lose her severance pay, health benefits, and military pension.[3] Penland—unsuccessfully—fought her dismissal, alleging that the adultery accusations were made in retaliation for her attempts to expose financial improprieties in her command.[4] The adultery charges stemmed from an alleged sexual relationship between Penland, who is single, and a married junior officer, Lieutenant (junior grade) Mark Wiggan.[5] Wiggan, on the other hand, was not prosecuted.[6]

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1. A court-martial is "[a] military . . . court of officers appointed by a commander to try persons for offenses under military law." THE AMERICAN HERITAGE COLLEGE DICTIONARY 328 (4th ed. 2002). The term can also refer to a trial by a military tribunal. *Id.* The plural form of *court-martial* is *courts-martial*. *Id.*

2. Penland v. Mabus, 643 F. Supp. 2d 14, 16–17 (D.D.C. 2009). The Navy court-martial convicted Penland of adultery, conduct unbecoming an officer and a gentleman, failure to obey a lawful order, and making a false official statement. Petition for Writ of Mandamus at 2, *Penland*, 643 F. Supp. 2d 14 (No. 1:09-cv-01417), 2009 WL 2428408. All of these charges stemmed out of the same event: Penland's sexual relationship with a fellow Navy officer. *See id.* Furthermore, Penland served forty-five days in the brig before being released. *Penland*, 643 F. Supp. 2d at 17. A brig is how the military refers to a jail or guardhouse on a military base. THE AMERICAN HERITAGE COLLEGE DICTIONARY, *supra* note 1, at 180.

3. Penland's forced separation from the Navy was scheduled to take effect on July 31, 2009. *See* Petition for Writ of Mandamus, *supra* note 2, at 3. Penland, in response, filed several motions to delay her separation, first alleging errors in her court-martial proceedings, including unlawful command influence, and in the alternative arguing that separation would cause her to lose her medical benefits that she requires for treatment of her medical condition, thrombocytosis. *See Penland*, 643 F. Supp. 2d. at 17–19, 21. The court denied her motions for injunction and, as a result, allowed her discharge to be carried out as planned. *See id.* at 23. Her discharge took away her severance pay, pension, and health insurance benefits. Steve Liewer, *Navy, Officer Differ over Pending Dismissal*, SAN DIEGO UNION-TRIB., July 18, 2009, at B1.

4. *See* Petition for Writ of Mandamus, *supra* note 2, at 2.

5. Janet McMahon, *Rampant Sexism, Navy Officer Says*, COURTHOUSE NEWS SERVICE (July 31, 2009, 3:33 PM), http://www.courthousenews.com/2009/07/31/Rampant_Sexism_Navy_Officer_Says.htm.

6. Lauren Reynolds, *Court-Martialed Navy Officer Alleges Sex, Lies, Corruption*, 10NEWS.COM (July 22, 2009, 12:39 PM), http://www.10news.com/print/20135300/detail.html.

In 2003, Army Captain James Yee faced a slew of serious criminal charges, including espionage, spying, and aiding the enemy.[7] When these charges fell through, allegedly because the evidence against Yee amounted to nothing, the Army brought significantly less serious charges against him, including mishandling classified documents, possessing pornography, and adultery.[8] At Yee's first hearing on these new allegations, the prosecution did not begin by presenting evidence of the more serious charges but with introducing a witness to the adultery accusation.[9] Yee's parents, his wife, and four-year-old daughter were present and listened as a Navy Lieutenant testified about an affair with Yee.[10] After this hearing, the prosecution asked for a delay and eventually dropped all of the charges.[11] Gary Solis, a former prosecutor for the Marines and current adjunct professor of law at Georgetown University, stated that the Army pursued the adultery charges to "embarrass and humiliate" Yee when the case had "turned to crap."[12]

Under military law, adultery is a crime under Article 134 of the Uniform Code of Military Justice (UCMJ).[13] According to the *Manual for Courts-Martial* (MCM),[14] a servicemember is guilty of adultery under article 134 when the servicemember has sexual intercourse with an individual, and at that time, either of the two is married to someone else.[15] Hence, a servicemember does not need to be married to be found

7. Laura Parker, *The Ordeal of Chaplain Yee*, USA TODAY, May 17, 2004, at A1, *available at* http://www.usatoday.com/news/nation/2004-05-16-yee-cover_x.htm. Yee faced a potential death penalty conviction based on these charges. *See id.*

8. *See* Oliver Burkeman, *'He Is Not Guilty and He Is Not Innocent,'* THE GUARDIAN (London) (Mar. 30, 2004), http://www.guardian.co.uk/world/2004/mar/30/usa.guantanamo/print.

9. Parker, *supra* note 7.

10. *See id.*

11. *See id.* Not only did the prosecution drop all of the criminal charges, but the Army even removed the case from Yee's permanent military record. *See id.*

12. Burkeman, *supra* note 8 (internal quotation marks omitted).

13. *See* JOINT SERV. COMM. ON MILITARY JUSTICE, MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 62, (2008 ed.) [hereinafter MCM], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2008.pdf. Adultery could also be prosecuted against officers under article 133. *See infra* Part IV.B. For a discussion of the history and progression of the UCMJ, see *infra* text accompanying notes 61–68.

14. The MCM is the tool used to implement the articles of the UCMJ and "also includes the Military Rules of Evidence and the procedural Rules for Court-Martial." 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 HAMLINE J. PUB. L. & POL'Y 301, 306 (1997).

15. *See* MCM, *supra* note 13.

guilty of adultery.[16] In addition, the adulterous conduct must be prejudicial of good order and discipline in the armed forces, or be "of a nature to bring discredit upon the armed forces."[17] An officer may be punished for adultery under article 133 as well, as long as the court finds the adulterous conduct meets the standard of conduct unbecoming an officer and a gentleman.[18]

Even though criminal sanctions for adultery in the civilian world have played a role in American jurisprudence, that role has been relatively minor.[19] In fact, the majority of states have now decriminalized adultery.[20] Moreover, even in the states with adultery statutes still on the books, adultery prosecutions are nearly unheard of.[21] And after the Supreme Court's decision in *Lawrence v. Texas*, adultery prosecutions may even violate a citizen's constitutional right to privacy.[22]

In contrast, the military still regularly pursues adultery prosecutions, evidenced by the 900 men and women court-martialed in the 1990s

16. For example, Penland was not married, yet because her sexual partner was married, she was also guilty of adultery. *See* Petition for Writ of Mandamus, *supra* note 2, at 2.

17. MCM, *supra* note 13. This additional element may be easier for the prosecution to establish than it seems. *See infra* Part IV.A.1–2.

18. *See* MCM, *supra* note 13, pt. IV, ¶ 59. For an explanation of how the military prosecutes adultery under article 133, see *infra* Part IV.B.

19. *See* Martin J. Siegel, *For Better or for Worse: Adultery, Crime & the Constitution*, 30 J. FAM. L. 45, 49 (1991). Siegel states that the various laws criminalizing adultery "crept largely unnoticed into the twentieth century." *See id.* He goes on to state that the chief legal deterrent to adultery before World War II was not the criminal sanction but the fault-based divorce system. *See id.*

20. Only less than half of the states still have adultery statutes on the books. *See infra* note 36. *See also* Burke, *supra* note 14, at 309–10 ("Presently, twenty-one states and the District of Columbia continue to criminalize adultery."); Jeremy D. Weinstein, Note, *Adultery, Law, and the State: A History*, 38 HASTINGS L.J. 195, 225–26 (discussing the history of the criminalization of adultery, and noting that even in states where it is still a crime, it is generally only a misdemeanor).

21. *See* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 345–46 (1993). Friedman points out that adultery prosecutions are so rare that when a Wisconsin district attorney actually prosecuted someone for adultery in 1990, the story rated the front page of the *New York Times*. *See id.* at 346. More recently, in 2004 in Virginia, the jilted lover of John R. Bushey Jr. turned him in for violating Virginia's adultery statute. *See* Jonathan Turley, *Of Lust and the Law*, WASH. POST, Sept. 5, 2004, at B1. In response, Bushey planned to take his case to the Supreme Court, and the American Civil Liberties Union agreed to represent him. *See id.* Bushey, however, changed his mind and agreed to perform twenty hours of community service as punishment. *Id.*

22. *See* Lawrence v. Texas, 539 U.S. 558, 572 (2003). The Supreme Court found that a consensual sodomy statute in Texas was unconstitutional, holding that private, consensual, adult sexual conduct is protected under the right to privacy. *See id.* at 578; *see also infra* text accompanying notes 46–50.

alone for charges that included adultery.[23] Concededly, many of these cases also involved other, more serious charges, such as rape.[24] Even so, several high-profile cases in recent years have led observers to criticize the military for what many see as a conscious decision to pursue adultery charges against servicemembers in an effort to publicly humiliate them.[25]

Recognizing the rarity of adultery prosecutions in the civilian world, it may be surprising that adultery is still actively prosecuted under military law. Yet, the American people may be even more surprised to learn that civilians who accompany the United States military to combat zones around the world are now also subject to the UCMJ, and, as a result, possible prosecutions for adultery.[26]

The recent cases against Penland and Yee[27] demonstrate with clarity the military's willingness to pursue adultery prosecutions for questionable motives. In light of this fact, and the obsolescence of these statutes in the public mind, adultery should be removed from the enumerated offenses under article 134. Part II will discuss the history of the crime of adultery in American jurisprudence, including the current state of adultery as a crime, as well as the current public opinion on adultery in light of several recent high-profile adultery scandals in the media.

Part III will delve into the history of adultery prosecutions in the military, first by explaining the origins of the UCMJ and then by showing how the military punishes adultery through the procedures listed in the MCM, including nonjudicial punishment and court-martial.

Part IV will discuss the offense of adultery under articles 133 and 134, including the elements of the crime and the way the military proves the elements at court-martial. It will also illustrate with real-life examples how the military proves its case on adultery, demonstrating that proving

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23. 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).

24. *See, e.g.*, United States v. Hickson, 22 M.J. 146, 146 (C.M.A. 1986) (charging Hickson with rape, sodomy, and adultery), *overruled on other grounds by* United States v. Hill, 48 M.J. 352 (C.A.A.F. 1997); United States v. Tate, NMCCA 200201202, 2005 WL 3111979, at *1 (N-M. Ct. Crim. App. Nov. 21, 2005) (charging Tate with conspiracy, making a false official statement, premeditated murder, sodomy, and adultery); *see also infra* note 236 and accompanying text.

25. Two recent examples include the adultery prosecutions against Penland and Yee. *See supra* notes 2–12 and accompanying text.

26. *See* R. Peter Masterton, *Court-Martial Jurisdiction over Civilians in Contingency Operations: A New Twist*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 65, 65 (2009).

27. *See supra* notes 2–12 and accompanying text.

the crime may be quite easy despite the burden of proof required by the MCM.

Part V will probe into the military's rationale for continuing to prosecute the crime of adultery, despite the fact it has fallen out of favor in the civilian world. This Part will show that even though the military has valid reasons for taking action against some adulterous conduct, the continued prosecution of adultery has the tendency to impede these interests.

Finally, Part VI will explain how removing adultery from the offenses under article 134 would benefit not only servicemembers and the civilians now subject to the UCMJ, but also the public perception of the armed forces.

II. THE HISTORY OF CIVILIAN ADULTERY STATUTES AND THE CIVILIAN APPROACH TO ADULTERY

Adultery has been a crime in most American jurisdictions since the colonial period, with sanctions ranging from death to a fine.[28] Historically, two main rationales justified the punishment of adultery as a crime.[29] One theory for punishing adultery was to preempt violent acts of vengeance by providing an alternative way to right the wrong against the husband.[30] Under this view, adultery was considered a private wrong that invaded a husband's rights over his wife and not as a wrong against society.[31] This rationale for punishment, though influential in early English law,[32] did not carry the same weight with the Puritans in America. Instead, the rationale for prosecuting adultery in early American history

28. *See* FRIEDMAN, *supra* note 21, at 41, 128, 332, 346. Friedman explains that during the colonial period, although an adultery conviction did carry the death penalty in some colonies, an execution for adultery was a rare event. *Id.* at 41. By the time of the American Revolution, the criminal justice system in America paid very little attention to victimless sex crimes, such as adultery, *id.* at 128, and by the twentieth century, enforcement of adultery laws was "patchy and sporadic," *id.* at 332.

29. *See* Weinstein, *supra* note 20, at 202, 225.

30. *See id.* at 204–05; *see also* C. Quince Hopkins, *Rank Matters but Should Marriage?: Adultery, Fraternization, and Honor in the Military*, 9 UCLA WOMEN'S L.J. 177, 187 (1999) ("[C]riminal sanctions for adultery were originally based on the state's need to preempt violent and disruptive acts . . . .").

31. *See* Weinstein, *supra* note 20, at 202.

32. *See id.* at 202–03. Adultery, however, was not a crime under the common law of England. *See* United States v. Hickson, 22 M.J. 146, 147 (C.M.A. 1986), *overruled on other grounds by* United States v. Hill, 48 M.J. 352 (C.A.A.F. 1997). As a result, it was punishable in this country only when a statute prohibited it in that jurisdiction. *See id.*

was mainly ecclesiastical.[33] The Puritans punished adultery because, as an offense against God, it amounted to a threat against society itself.[34] These early Americans made adultery with a married woman a capital offense, but convictions were rare due to views that the sentence for the crime was too harsh.[35]

The Puritan belief lived on in American jurisprudence and most states made adultery an offense by statute.[36] Many of these statutes, however, were poorly enforced and ignored by many Americans,[37] but still provided opportunities for blackmail and extortion.[38] In 1955, drafters of the Model Penal Code recommended that adultery be decriminalized, taking the position that it was merely private immorality, falling outside the scope of criminal law.[39] In response, many states removed adultery statutes from their books.[40] In the states that still have an adultery

33. *See Hickson*, 22 M.J. at 146–47 ("'In the . . . [eyes] of the canon law, adultery violated the marriage vow' . . . ." (quoting ROLLIN M. PERKINS, CRIMINAL LAW 377 (2d ed. 1969))). *See also* FRIEDMAN, *supra* note 21, at 32 ("[I]t would be hard to overemphasize the influence of religion . . . in shaping the criminal codes . . . .").

34. FRIEDMAN, *supra* note 21, at 34. Friedman explains the Puritans did not distinguish between a victimless crime and a crime of violence. *See id.* Under this view, crimes were sins, and sins were crimes, and any crime against God constituted a threat to society, such as when God's anger laid waste to Sodom and Gomorrah. *See id.*

35. *See id.* at 41.

36. Weinstein, *supra* note 20, at 226. States with adultery statutes currently on the books include the following: ALA. CODE § 13A-13-2 (LexisNexis 2005); ARIZ. REV. STAT. ANN. § 13-1408 (2010); COLO. REV. STAT. § 18-6-501 (2009); FLA. STAT. ANN. § 798.01 (West 2007); GA. CODE ANN. § 16-6-19 (2007); IDAHO CODE ANN. § 18-6601 (2004); 720 ILL. COMP. STAT. ANN. 5/11-7 (West 2002); KAN. STAT. ANN. § 21-3507 (2007); MD. CODE ANN., CRIM. LAW § 10-501 (LexisNexis 2002); MASS. GEN. LAWS CH. 272, § 14 (2009); MICH. COMP. LAWS § 750.30 (1981); MINN. STAT. ANN. § 609.36 (West 2009); MISS. CODE ANN. § 97-29-1 (2006); N.H. REV. STAT. ANN. § 645:3 (LexisNexis 2007); N.Y. PENAL LAW § 255.17 (McKinney 2008); N.D. CENT. CODE § 12.1-20-09 (1997); OKLA. STAT. TIT. 21, § 871 (2001); R.I. GEN. LAWS § 11-6-2 (2002); S.C. CODE ANN. § 16-15-60 (2003); UTAH CODE ANN. § 76-7-103 (LexisNexis 2008); VA. CODE ANN. § 18.2-365 (2009); WIS. STAT. ANN. § 944.16 (West 2008).

37. *See* FRIEDMAN, *supra* note 21, at 332, 346.

38. Weinstein, *supra* note 20, at 226.

39. Siegel, *supra* note 19, at 49. The American Law Institute went so far as to label adultery laws "dead-letter statutes" that were inevitably ineffective and a waste of law enforcement resources. *Id.*

40. *See* Weinstein, *supra* note 20, at 226. At least eleven states repealed their adultery statutes in the twenty years following the Model Penal Code's recommendation to decriminalize adultery. *See id.* at 226 & n.233; *see also* CAL. PENAL CODE § 269a–b (repealed 1975); IOWA CODE ANN. § 702.1 (repealed 1976); KAN. STAT. ANN. § 21-908 (repealed 1969) (substituting a misdemeanor adultery statute, KAN. STAT. ANN. § 21-3507 (2007)); KY. REV. STAT. ANN. § 436.070 (repealed 1974); ME. REV. STAT. ANN. tit.

statute intact, the crime is usually not more than a misdemeanor, with punishment often only amounting to a small fine.[41]

Even though the crime of adultery still exists in more than twenty jurisdictions,[42] one will be hard-pressed to find a state that will pursue adultery prosecutions.[43] This scarcity of prosecutions reflects an unwillingness by the government to bring a criminal action for adultery.[44]

Moreover, there exists a strong argument that adultery is protected under the constitutional right of privacy.[45] The Supreme Court in *Lawrence v. Texas* stated that "liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[46] Although this decision only applied specifically to sodomy statutes, the language the majority used suggested that any private, adult, consensual, sexual conduct should receive some protection under the constitutional right of privacy.[47] Under this definition, adultery is a type of conduct that would fall under the privacy right.[48] Tellingly, Justice Scalia's dissenting opinion specifically mentioned adultery laws

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17, § 101 (repealed 1975); N.J. STAT. ANN. § 2A:88-1 (repealed 1978); N.D. CENT. CODE ANN. § 12-22-09 (repealed 1973) (substituting a misdemeanor adultery statute, N.D. CENT. CODE § 12.1-20-09 (1997)); OR. REV. STAT. § 167.005 (repealed 1971); S.D. CODIFIED LAWS § 22-22-17 (repealed 1976); VT. STAT. ANN. tit. 13, §§ 201–202 (repealed 1981); WASH. REV. CODE ANN. § 9.79.110 (repealed 1975).

41. *See, e.g.*, MD. CODE ANN. CRIM. LAW § 10-501 ("A person who violates this section is guilty of a misdemeanor and on conviction shall be fined $10."); R.I. GEN. LAWS § 11-6-2 ("Every person who shall commit adultery shall be fined not exceeding five hundred dollars ($500) . . . .").

42. *See supra* note 36.

43. *See supra* note 37.

44. *See* FRIEDMAN, *supra* note 21, at 128, 332. The government's reluctance to pursue prosecutions may be due to the concerns pointed out by the American Law Institute, such as the ineffectiveness of adultery statutes in deterring the act, as well as the waste of law enforcement resources in the investigation of adultery charges. *See* Siegel, *supra* note 19, at 49.

45. *See* Lawrence v. Texas, 539 U.S. 558, 572 (2003).

46. *Id.* This decision addressed the constitutionality of a sodomy statute in Texas. After this decision, the only government entity that may prosecute adults for consensual sodomy is the military. Joseph T. Gasper II, *The Road Not Taken: Decriminalizing Private Consensual Sodomy in the Military*, 49 HOW. L.J. 139, 140 (2005). When article 125, 10 U.S.C. § 925 (2006)—the statute making consensual sodomy illegal—was challenged after the *Lawrence* decision, the U.S. Court of Appeals for the Armed Forces ruled in *United States v. Marcum* that article 125 was constitutional as applied to the appellant, finding that his conduct was outside the protected liberty interest recognized in *Lawrence*. *See* United States v. Marcum, 60 M.J. 198, 200 (C.A.A.F. 2004). For further discussion of how the military has reacted to the Supreme Court's decision in *Lawrence v. Texas*, see Gasper, *supra*.

47. *See Lawrence*, 539 U.S. at 568–72, 578–79.

48. *Adultery* is defined as "voluntary sexual intercourse between a married man and a woman not his wife, or between a married woman and a man not her husband." WEBSTER'S NEW WORLD COLLEGE DICTIONARY 19 (4th ed. 2000).

as being called into question by the decision.[49] Nevertheless, the Supreme Court has not yet expanded the right to privacy to include adultery, and many state adultery statutes remain.[50]

Even though adultery prosecutions have declined significantly in the civilian world,[51] this country has not grown immune to the shock and scandal involved in affairs of the heart. Several high-profile adultery scandals have rocked the American public in recent years. These include former New York Governor Eliot Spitzer's escapade in a prostitution ring[52] and South Carolina Governor Mark Sanford's secret affair with an Argentine woman.[53] Even though both of these men were powerful figures in their respective states—both of which still have adultery statutes on the books[54]—neither faced even a threat of prosecution under his respective state adultery statutes.[55] The reactions to both of these cases suggest that, although Americans still disapprove of adultery, most do not expect an extramarital tryst to merit criminal prosecution, even when committed by some of the most important figures in government.[56]

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49. *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting).

50. *See supra* note 36.

51. *See supra* note 37.

52. A federal wiretap revealed Governor Spitzer to be a client of a high-end prostitution ring. 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. Forty-eight hours later, Spitzer resigned as Governor of New York. *Id.* He faced no charges for adultery.

53. Governor Mark Sanford took several secret trips to Buenos Aires to visit his mistress, leaving his own aides uncertain of his whereabouts for days. *See* Jim Rutenberg & Shaila Dewan, *Back at Work, Governor Puts Apology on Agenda*, N.Y. TIMES, June 27, 2009, at A12, *available at* http://www.nytimes.com/2009/06/27/us/27 sanford.html. On an interesting side note, Sanford is a member of the armed services, a U.S. Air Force reservist, but did not receive any disciplinary action from the military for the affair—another example of the uneven enforcement of the crime of adultery in the military. *See* Schulyer Kopf, *Sanford To Report for Reserve Duty*, POST AND COURIER (Charleston, S.C.), Aug. 12, 2009, at B3, *available at* http://www.postandcourier.com/ news/2009/aug/12/sanford-to-report-for-reserve-duty/. The Governor did not face impeachment either, but rather the South Carolina Legislature opted to censure him for secretly leaving the state to carry on his affair. *See* Shaila Dewan, *Gov. Sanford Won't Face Charges on Ethics*, N.Y. TIMES, May 4, 2010, at A15, *available at* http://www.nytimes.com/2010/ 05/04/us/04sanford.html. In addition, Sanford paid $74,000 to the State Ethics Commission for thirty-seven ethics violations. *See id.*

54. N.Y. PENAL LAW § 255.17 (McKinney 2008); S.C. CODE ANN. § 16-15-60 (2003).

55. *See* sources cited *supra* notes 52–53.

56. Former President Bill Clinton is another example. *See* Richard K. Neumann Jr., *The Revival of Impeachment as a Partisan Political Weapon*, 34 HASTINGS CONST.

III. THE ORIGINS OF THE MILITARY CODE AND ITS APPROACH TO ADULTERY

The purposes of military law, as listed in the MCM, are promoting justice, "maintaining good order and discipline in the armed forces," promoting efficiency and effectiveness in the military, and strengthening the national security of the United States.[57] Military law has jurisdiction over all branches of the armed forces, including the Navy, the Army, the Air Force, the Marine Corps, and the Coast Guard.[58] In addition, civilians who accompany the armed forces during "contingency operations" now fall under the jurisdiction of military law.[59] This includes any contractors and civilian employees who are currently in Iraq or Afghanistan.[60]

Congress first implemented the UCMJ in May of 1950.[61] Congress drafted this legislation during the aftermath of World War II, at a time when lawmakers first and foremost sought to protect the rights of military personnel.[62] The UCMJ protected servicemembers against self-

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L.Q. 161, 273–74 (2007). Clinton's numerous affairs demonstrated that even a man in arguably the most important position in government—not to mention the Commander in Chief of the military—need not fear a criminal prosecution for his affairs. Despite the President's military title, he is not subject to the UCMJ like other servicemembers. *See* Raul V. Esquivel, III, Comment, *Implications of the Military's Proscription of Adultery upon Individual Privacy*, 47 LOY. L. REV. 835, 844 (2001). Even so, some military personnel characterized Clinton as the "hypocrite-in-chief" in reaction to his admissions. *Id.* (internal quotation marks omitted). For a discussion of the American public's reaction to Clinton's affair and impeachment, see Neumann, *supra*, at 288–89.

57. MCM, *supra* note 13, at pt. I, ¶ 3.

58. *See* 10 U.S.C. § 101(a)(4) (2006).

59. 10 U.S.C. § 802(a)(10) (2006). This is a recent development, due to the passage of a law by Congress in 2006, the John Warner National Defense Authorization Act for Fiscal Year 2007. *See* Masterton, *supra* note 26, at 65 & n.1. Before the passage of this act, civilians accompanying the military were subject to the UCMJ and courts-martial only during a declared war, something that has not occurred since World War II. *See id.* at 69. For further discussion of this new development in military justice and the accompanying issues, see *id.*

60. Masterton, *supra* note 26, at 65. The number of civilian contractors currently accompanying the military is uncertain, with the Pentagon in April 2009 estimating 160,000 civilian contractors and the U.S. Central Command recording more than 242,000 a month prior. *No Precise Number for Contractors in Iraq, Afghanistan: US*, AFP, November 2, 2009, *available at* Factiva, Doc. No. AFPR000020091102e5b2008vi.

61. Burke, *supra* note 14, at 305. Congress implemented the UCMJ through its constitutional power "[t]o raise and support Armies, . . . [t]o provide and maintain a Navy; . . . [t]o make Rules for the Government and Regulation of the land and naval Forces; . . . [t]o make all Laws which shall be necessary and proper . . . ." U.S. CONST. art. I, § 8, cl. 12–14, 18.

62. NAT'L INST. OF MILITARY JUSTICE, REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE 2 (2001), *available at* http://www.wcl.american.edu/nimj/documents/cox_comm_report2.pdf?rd=1.

incrimination fifteen years before *Miranda v. Arizona*,[63] "permitted relatively broad access to free counsel, and incorporated many of the best features of federal and state criminal justice systems."[64] This legislation was landmark in that it created the fairest system of court-martial of any country in the world at that time.[65]

When Congress enacted the UCMJ, it incorporated two types of offenses: civilian crimes, such as murder, and special military offenses, such as dereliction of duty.[66] Congress based the definitions of the civilian crimes included in the UCMJ on the laws of Maryland at that time.[67] It included these crimes in order to standardize military law with civilian law, demonstrating a belief that servicemembers should not be exempt from the same crimes for which their civilian counterparts are accountable.[68]

Congress enacted the UCMJ as a series of federal statutes to create the substantive criminal provisions for the military.[69] In contrast, the MCM is a compilation of military common law and court-martial procedural and evidentiary rules.[70] The MCM also creates many substantive crimes not explicitly present in the UCMJ, with the purpose of clarifying the general criminal statutes of the UCMJ.[71] One example is adultery,

63. NAT'L INST. OF MILITARY JUSTICE, *supra* note 62, at 2; *see* Miranda v. Arizona, 384 U.S. 436 (1966).

64. NAT'L INST. OF MILITARY JUSTICE, *supra* note 62, at 2.

65. *Id.*

66. *See* United States v. Harris, 8 M.J. 52, 57 (C.M.A. 1979). In addition, the military courts and the civilian courts have concurrent jurisdiction over offenses that exist in both military and civilian laws, whereas the military has sole jurisdiction over any purely military charge, such as desertion. *See* Hopkins, *supra* note 30, at 210–11.

67. *See Harris*, 8 M.J. at 55. The U.S. Court of Military Appeals explained in this decision that the criminal law of the District of Columbia was a traditionally used source for defining misconduct in the military, and questions of common law that arose in the District of Columbia were often resolved by considering the law in Maryland. *See id.* at 56–57.

68. *See* Gasper, *supra* note 46, at 162.

69. *See* Burke, *supra* note 14, at 305; Hopkins, *supra* note 30, at 211; *see also* 10 U.S.C. §§ 801–934 (2006 & Supp. 2009) (setting forth the Uniform Code of Military Justice, which includes a subchapter entitled "Punitive Articles").

70. Hopkins, *supra* note 30, at 211–12. A committee of all three services drafted the first *Manual for Courts-Martial* issued under the UCMJ in 1951. *See* The Library of Congress, *Manuals for Courts-Martial*, MILITARY LEGAL RESOURCES, http://www.loc.gov/rr/frd/Military_Law/CM-manuals.html (last updated Sept. 30, 2010).

71. *See* Hopkins, *supra* note 30, at 212. *General statutes* refers to the general articles, article 133 for officers and article 134 for all servicemembers. Uniform Code of Military Justice, 10 U.S.C. §§ 933–934 (2006). The purpose of creating the general

which is included in the MCM as one of more than fifty examples of types of conduct that merit a prosecution under article 134.[72] The MCM also differs from the UCMJ in that it is not enacted by Congress but by the executive branch and members of the Department of Defense and military branches.[73] In that sense, crimes created by the MCM, such as adultery, come directly from the rulemakers in the military, rather than Congress. Perhaps this is one reason why the military has become disjointed from the civilian world in this field.[74]

Adultery has long affected military life.[75] Anecdotal accounts by servicemembers portray adultery in the military as just as common as in the civilian world, if not more so.[76] Their comments range from characterizing adultery as being "as commonplace as fleas on a

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articles was to enforce longstanding military customs by prohibiting conduct not specifically proscribed elsewhere in the UCMJ. *See* Diane H. Mazur, *Is "Don't Ask, Don't Tell" Unconstitutional After* Lawrence*? What It Will Take To Overturn the Policy*, 15 U. FLA. J.L. & PUB. POL'Y 423, 430 (2004) (referring to the purpose of Article 134). These articles have been deemed controversial because any act may be punishable under them, as long as the court finds the act to be prejudicial to good order and discipline or discrediting to the armed forces, or, for officers, constitutes conduct unbecoming an officer and a gentleman. *See* Elizabeth L. Hillman, *Gentlemen Under Fire: The U.S. Military and "Conduct Unbecoming,"* 26 LAW & INEQ. 1, 5–6 (2008); Elizabeth Beard McLaughlin, *A "Society Apart?" The Military's Response to the Threat of AIDS*, ARMY LAW., Oct. 1993, at 3, 11. For further discussion of the general articles, see *infra* Part IV.A–B.

72. *See* MCM, *supra* note 13. David A. Schlueter explains that throughout the years, various offenses commonly associated with article 134 were compiled into the MCM, which describes the offenses and the elements necessary to establish guilt. *See* DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 2-6 (1982).

73. *See* 10 U.S.C. § 121 (2006) ("The President may prescribe regulations to carry out his functions, powers, and duties under this title."); 5 U.S.C. § 301 (2006) ("The head of an Executive department or military department may prescribe regulations for the government of his department [and] the conduct of its employees . . . .").

74. *See* NAT'L INST. OF MILITARY JUSTICE, *supra* note 62, at 2. The military also failed to decriminalize private consensual sodomy after the Supreme Court's decision in *Lawrence v. Texas*. *See supra* note 46.

75. *See* Hopkins, *supra* note 30, at 234; 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, 660 (2009) ("Adultery among members of the Armed Forces is considered common."); *see also* Ian Fisher, *Army's Adultery Rule Is Don't Get Caught*, N.Y. TIMES, May 17, 1997, at A1 **(**describing the informal working rule on adultery in the military as "do what you want, but don't do it blatantly and don't get caught").

76. In the early 1950s, Alfred Kinsey's study of sexual activity reported that one-half of married men and one-fourth of married women committed adultery sometime in their married lives. *See* ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN FEMALE 416 (1953); ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN MALE 585 (1948).

buffalo,"[77] to claims of knowing several high-ranking officers "who are well known to be involved in such activity [as adultery] and it is simply winked at."[78] Despite the long history of adultery in the military,[79] there are very few cases pre-1984 that involve a prosecution for simple adultery under the general article, article 134.[80] A probable explanation for this lack of prosecutions is that the original UCMJ did not include a statute prohibiting adultery.[81] In 1984, however, an amendment to the MCM brought the addition of an adultery offense to the black-letter military criminal law for the first time.[82] Rather than a uniquely military offense, adultery represented a crime originating in the civilian code,[83] and in that area the UCMJ has usually striven to mirror trends in the civilian world.[84] Given that fact, it is perplexing that as adultery prosecutions

77. Hopkins, *supra* note 30, at 202 (quoting Captain Barbara Wilson, United States Air Force (Retired), on her twenty-two years of active-duty service).

78. Petition for Writ of Certiorari to the United States Court of Military Appeals, Johanns v. United States, 474 U.S. 850 (1985) (No. 85-238), 1985 WL 696454, at *14.

79. *See supra* notes 75–78 and accompanying text.

80. Hopkins, *supra* note 30, at 234. Even though a specific adultery offense did not exist until the 1980s in the MCM, military courts have always had the power to punish adultery either as conduct unbecoming of an officer and a gentlemen under article 133 or as conduct that is either prejudicial to good order and discipline or of a nature to bring discredit on the armed forces under the general article, article 134. *See* Uniform Code of Military Justice art. 133–134, 10 U.S.C. §§ 933–934 (2006).

81. *See* Walter T. Cox, III, *Consensual Sex Crimes in the Armed Forces: A Primer for the Uninformed*, 14 DUKE J. GENDER L. & POL'Y 791, 795–96 (2007). Even though the original UCMJ did not include a specific prohibition of adultery, it did include the offense of adultery in its Table of Maximum Punishments in the MCM, authorizing a dishonorable discharge and confinement of up to one year for the offense. *See* United States v. Hickson, 22 M.J. 146, 148 (C.M.A. 1986), *overruled by* United States v. Hill, 48 M.J. 352 (C.A.A.F. 1997).

82. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 62 (1984 ed.), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/manual-1984.pdf.

83. *See* Gasper, *supra* note 46, at 164.

84. One example of the UCMJ's mirroring trends in civilian laws is the addition of stalking to the list of sexual offenses under article 120a in 2006. *See* Uniform Code of Military Justice art. 120a, 10 U.S.C. § 920a (2006). In addition, article 119a, titled "Death or injury of an unborn child," was added in 2004 in response to the Unborn Victims of Violence Act of 2004. *See* Uniform Code of Military Justice art. 119a, 10 U.S.C. § 919a (2006); Unborn Victims of Violence Act of 2004, 18 U.S.C. § 1841 (2006). Another example of a civilian trend showing up in the UCMJ is the addition of the offense of patronizing a prostitute to paragraph 97 of article 134, pandering and prostitution. *See* MCM, *supra* note 13, at pt. IV, ¶ 97; *see also* 63C AM. JUR. 2D *Prostitution* § 14 (2009) (explaining that because courts traditionally interpreted prostitution statutes as inapplicable to patrons, many jurisdictions exacted legislation specifically directed at patrons).

have fallen out of favor in the civilian world,[85] they have gained considerable momentum in the military.[86]

Besides the much greater number of adultery prosecutions in the military than in the civilian justice system, the penalty for adultery is also much harsher for servicemembers. In Maryland, for example, the state punishes adultery as a misdemeanor with a $10 fine.[87] In stark contrast, the MCM lists the maximum penalty for adultery as "[d]ishonorable discharge, forfeiture of all pay and allowances, and confinement for [one] year," essentially equating the offense to a felony.[88] In this area, it appears that the military is holding its personnel to a much higher standard than the rest of the country. Moreover, even if the highest punishment is not meted out when the servicemember is formally charged with adultery, the offense still appears in the servicemember's permanent military record with a negative annotation.[89] This type of mark on a servicemember's record could effectively end a military career by making promotion impossible.[90]

When charged with an offense, a servicemember's commanding officer often has discretion as to whether to punish the offense by court-martial or by nonjudicial punishment.[91] Nonjudicial punishment is a disciplinary measure that is less serious than a trial by court-martial but more serious than administrative corrective measures.[92] Normally, a nonjudicial

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85. *See* Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 VA. L. REV. 1497, 1523–24 (2000). Friedman, while discussing how adultery is rarely used as a ground for divorce, notes that in the states where adultery is still a crime, the statutes are rarely enforced, and adultery is not even treated as a crime. *See id.*; *see also supra* note 28.

86. *See* Melissa Ash Haggard, Note, *Adultery: A Comparison of Military Law and State Law and the Controversy This Causes Under Our Constitution and Criminal Justice System*, 37 BRANDEIS L.J. 469, 473, 476–77 (1998). Haggard states that even though adultery is still a crime in less than half of the states, it is seldom enforced or prosecuted, while the military prosecutes adultery more zealously and at a much higher rate than the civilian world. *See id.*

87. MD. CODE ANN., CRIM. LAW § 10-501 (LexisNexis 2002).

88. MCM, *supra* note 13, pt. IV, ¶ 62(e). Because the maximum punishment includes a dishonorable discharge, an adultery conviction may be interpreted by some state laws as the equivalent of a felony. *See infra* notes 259–60 and accompanying text.

89. *See* Esquivel, *supra* note 56, at 855; *see also infra* notes 91–94 and accompanying text.

90. *See* Esquivel, *supra* note 56, at 855; *see also infra* notes 259–63 and accompanying text.

91. MCM, *supra* note 13, pt. V, ¶ 1(d)(2). Nonjudicial punishment is a means for commanders to regulate and punish the behavior of the members of their unit promptly and without the stigma of a court-martial conviction. *See id.* at pt. V, ¶ 1(c).

92. *Id.* at pt. V, ¶ 1(b). The MCM gives the commander of a unit discretion in determining when to use nonjudicial punishment. When considering which type of punishment is appropriate, commanders should consider "the nature of the offense, the

punishment may only be pursued for a minor offense, and an offense is generally minor when the maximum punishment would not include a dishonorable discharge or confinement for longer than one year.[93] Accordingly, adultery would not usually qualify as a minor offense because it may result in a dishonorable discharge,[94] and therefore it should be tried by court-martial without the option for the lesser nonjudicial punishment.

The other method to punish an offense in the military is by court-martial. Courts-martial may try any offense under the UCMJ and the laws of war to the extent permitted by the Constitution[95] and may try any person subject to the UCMJ.[96] This includes active duty military personnel, certain retired personnel, certain reservist personnel, and civilians who accompany the military on contingency operations.[97]

There are three types of courts-martial: summary, special, and general.[98] Out of the three types of courts-martial, the general court-martial is the

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record of the servicemember, the needs for good order and discipline, and the effect of nonjudicial punishment on the servicemember and the servicemember's record." *See id.* pt. V, ¶ 1(d)(1). Examples of nonjudicial punishment include restriction, forfeiture of pay, or reduction in rank. *See* Uniform Code of Military Justice art. 15, 10 U.S.C. § 815 (2006).

93. MCM, *supra* note 13, pt. V, ¶ 1(e). Whether an offense is minor depends on several factors, including the offender's age, rank, experience, and the maximum sentence allowed for the offense if tried by court-martial. *Id.*

94. *Id.*; *see id.* pt. IV, ¶ 62(e) (listing the maximum punishment for adultery as "[d]ishonorable discharge, forfeiture of all pay and allowances, and confinement for [one] year"). Despite the language of the MCM, however, adultery has been disposed of by nonjudicial punishment before and presumably still qualifies for this special type of punishment. *See* Benjamin G. Davis, *Refluat Stercus: A Citizen's View of Criminal Prosecution in U.S. Domestic Courts of High-Level U.S. Civilian Authority and Military Generals for Torture and Cruel, Inhuman or Degrading Treatment*, 23 ST. JOHN'S J. LEGAL COMMENT. 503, 549 n.135 (2008) ("Of 244 cases since 1999 involving . . . adultery . . . the majority—89 per cent—were disposed of with non-judicial punishment.").

95. MCM, *supra* note 13, pt. II, r. 203. The jurisdiction of a court-martial is not affected by the place where the court-martial sits. *Id.* pt. II, r. 201(a)(3). This means that a court-martial may convene onboard a ship in the middle of the Atlantic Ocean, and the UCMJ would still govern. *See* Gasper, *supra* note 46, at 163.

96. MCM, *supra* note 13, pt. II, r. 202(a).

97. *Id.* pt. II, r. 202(a) discussion; *see also supra* note 59.

98. MCM, *supra* note 13, pt. II, r. 201(f). A summary court-martial exists primarily as a way to "promptly adjudicate minor offenses under a simple procedure." *Id.* pt. II, r. 1301(b). The maximum penalty that can be imposed by a summary court-martial is confinement for thirty days. *Id.* pt. II, r. 1301(d)(1). As stated previously, adultery should not qualify as a minor offense because the maximum penalty includes a dishonorable discharge. *But see supra* note 94 (explaining how the determination of whether an offense is minor depends on a number of factors). Special courts-martial

most serious forum and also the most similar to a civilian court.[99] Any offense and any punishment under the UCMJ has the potential to be tried and adjudged in a general court-martial, though this forum is usually reserved for the most serious crimes.[100]

Due to the severity of its maximum punishment,[101] adultery is considered more serious than a minor offense and thus must be tried by a special or general court-martial.[102] In order to convict a servicemember of adultery at a court-martial, however, the MCM requires that the government prove more than just an indiscretion.[103]

IV. HOW THE PROSECUTION PROVES ADULTERY UNDER ARTICLES 133 AND 134

The MCM lists the crime of adultery under article 134.[104] To establish this crime, the military must prove three 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; and
> (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.[105]

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may try anyone subject to the UCMJ for any noncapital offense under the UCMJ. MCM, *supra* note 13, pt. II, r. 201(f)(2). A capital offense is an offense for which death is a possible punishment. *Id.* pt. II, r. 103(3). These courts are also limited in the penalty they can give in that a special court-martial may provide any punishment except for the most serious penalties, such as death, dishonorable discharge, or dismissal. *Id.* pt. II, r. 201(f)(2)(B)(i).

99. *See* Gasper, *supra* note 46, at 163–64. The general court-martial is similar to a civilian court in that it includes a judge and at least five members—who resemble something close to a civilian jury—appointed by military authorities to try a designated case or series of cases. *See id.*

100. MCM, *supra* note 13, pt. II, r. 201(f); Liewer, *supra* note 3 (referring to general court-martial as typically reserved for serious felonies). Usually, a general court-martial consists of a military judge and not less than five members. MCM, *supra* note 13, pt. II, r. 501(a); *see also supra* note 99. For noncapital offenses, however, the accused may request a general court-martial that consists of only one judge. MCM, *supra* note 13, pt. II, r. 903(a)(2). For both general and special courts-martial, the accused is entitled to defense counsel. *Id.* pt. II, r. 501(b).

101. *See supra* note 94 and accompanying text.

102. *See* MCM, *supra* note 13, pt. II, r. 1301(b); *id.* pt. V, ¶ 1(e). *But see supra* note 94 (explaining that adultery has often been disposed of by nonjudicial punishment).

103. *See infra* Part IV.

104. MCM, *supra* note 13; *see* Uniform Code of Military Justice art. 134, 10 U.S.C. § 934 (2006); *supra* notes 81–82 and accompanying text.

105. MCM, *supra* note 13, pt. IV, ¶ 62(b)(1)–(3).

For officers, the government may also charge adultery under article 133, the only difference being that in place of the third element, the prosecution must prove that the conduct "constituted conduct unbecoming an officer and a gentleman."[106]

A. The Offense of Adultery Under Article 134

To be found guilty of adultery under article 134, the prosecution must not only prove that adultery took place but also that the conduct was prejudicial to good order and discipline or was of a nature to bring discredit upon the armed forces.[107] The MCM explains prejudice as 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 . . . respect toward a servicemember."[108] It further stipulates that, in order to qualify as behavior that discredits the service, the conduct must be sufficiently open or notorious in nature "to bring the service into disrepute . . . or lower it in public esteem."[109] The MCM makes clear that private adulterous conduct may be found by a court to be prejudicial to good order and discipline, but it does not explain how.[110]

To assist a military judge or commanding officer in determining whether the adulterous conduct is prejudicial to good order and discipline or is of a nature to bring discredit upon the armed forces, the MCM provides a list of eight factors to consider: (1) the accused's and the coactor's marital status and rank or relationship to the Armed Forces; (2) the military status or relationship to the military of the accused or coactor's spouse; (3) the impact of the relationship on either's performance in the military; (4) the misuse of government time or resources to facilitate the relationship; (5) whether the conduct persisted despite orders to desist, "the flagrancy of the conduct," and whether the adultery was accompanied by other UCMJ violations; (6) the negative

106. *Id.* pt. IV, ¶ 59(b)(2); *see* Uniform Code of Military Justice art. 133, 10 U.S.C. § 933 (2006); *see also infra* Part IV.B.
107. MCM, *supra* note 13, pt. IV, ¶ 62(b)(3).
108. *Id.* pt. IV, ¶ 62(c)(2).
109. *Id.*
110. The text of the MCM states: "While adulterous conduct that is private and discreet in nature may not be service discrediting . . . under the circumstances, it may be determined to be conduct prejudicial to good order and discipline." *Id.*

impact of the conduct on the units of the accused, the coactor, or the spouses of either; (7) whether the accused or coactor were legally separated; (8) whether the adultery was an ongoing relationship or more remote in time.[111] These factors, added to the MCM in 2002, are just that—factors.[112] Even though the addition of these factors demonstrates a desire by the military to limit the circumstances of adultery that merit a judicial intervention, they have not yet been effective at stopping the arbitrary prosecution of adultery in the military.[113] They are not additional elements that the prosecution must prove but only issues that the court may consider when determining whether the conduct was sufficiently detrimental to good order and discipline or to the reputation of the armed services.[114] The court-martial is still free to convict for adulterous conduct that meets only a few of these factors or even none of them, as long as the court decides that the conduct was in some way prejudicial or discrediting to the service.

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111. *Id.* pt. IV, ¶ 62(c)(2)(a)–(i).

112. Exec. Order No. 13,262, 67 Fed. Reg. 18,773 (Apr. 11, 2002). The U.S. Navy-Marine Corps Court of Criminal Appeals discussed these factors in detail in *United States v. Orellana*, while determining whether the right to privacy as defined in *Lawrence* v. *Texas* applied to the military's proscription of adultery. *See* United States v. Orellana, 62 M.J. 595, 599–601 (N-M Ct. Crim. App. 2005). The court found that, in light of the application of the factors, the appellant's conduct was prejudicial to good order and discipline as well as service discrediting, and as a result, the conduct was removed from the protection of the Constitution. *See id.* at 600–01. Other recent decisions contain little to no discussion of the factors in determining whether the adultery was sufficiently service discrediting or prejudicial. *See, e.g.*, United States v. Velazquez, NMCCA 200602421, 2007 WL 2340612, at *6 (N-M. Ct. Crim. App. Aug. 16, 2007). The addition of these factors also helps promulgate the purported view of Congress that article 134 is not meant "to regulate . . . wholly private moral conduct." United States v. Hickson, 22 M.J. 146, 149 (C.M.A. 1986), *overruled on other grounds by* United States v. Hill, 48 M.J. 352 (C.A.A.F. 1997) (quoting United States v. Snyder, 4 C.M.R. 15, 19 (C.M.A. 1952)).

113. This statement takes into account the recent prosecutions of Penland and Yee. *See supra* notes 2–12 and accompanying text.

114. This is apparent from the fact that these factors are not included in the elements but listed in the accompanying discussion of the offense as relevant circumstances to help determine whether the conduct was prejudicial to good order and discipline or was of a nature to bring discredit upon the service. *See* MCM, *supra* note 13, pt. IV, ¶ 62(b)–(c)(2).

1. Prejudicial to Good Order and Discipline

The language of the MCM makes clear that, in order for adulterous conduct to merit a prosecution under the prejudice prong, it must be directly prejudicial to good order and discipline.[115] This means the conduct must have some measurable effect "on unit or organization discipline, morale, or cohesion, or is clearly detrimental to the authority or stature of or respect toward a servicemember."[116]

The court-martial in *United States v. Johnson* reflected these same sentiments, stating that article 134 prosecutions are "confined to cases in which the prejudice is reasonably direct and palpable."[117] This same court, however, held that "offenses involving moral turpitude are *inherently* prejudicial or discrediting" to the service but failed to supply an exact definition of what constitutes moral turpitude.[118] Many courts-martial using this same language have found that conduct involving moral turpitude is inherently prejudicial, consequently allowing the prosecution to fulfill its burden of proving this essential prong just by alleging that the conduct of the accused was immoral.[119] A definition of moral turpitude based on court-martial case law, however, is hard to come by.[120]

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115. MCM, *supra* note 13, pt. IV, ¶ 62(c)(2).

116. *Id.*; *see also* United States v. Johnson, 39 M.J. 1033, 1037 (A.C.M.R. 1994) ("Conduct to the prejudice of good order and discipline refers only to acts directly prejudicial to good order and discipline and not to acts which are prejudicial only in a remote or indirect sense.").

117. *Id.*

118. *See id.* at 1038 (emphasis added).

119. *See, e.g.*, United States v. Greene, 34 M.J. 713, 714 (A.C.M.R. 1992) ("'Some acts by their very nature are prejudicial to good order and discipline . . . . They generally are offenses that involve a degree of moral turpitude.'" (quoting United States v. Light, 36 C.M.R. 579, 584 (A.B.R. 1965))).

120. The court-martial decisions that have used the language of moral turpitude offer no discernable pattern to help predict which conduct will be defined as immoral. The U.S Army Board of Review in *United States v. Hunt*, for example, found that negligent homicide was not immoral, *see* United States v. Hunt, 27 C.M.R. 557, 559 (A.B.R. 1958), while finding less than ten years later in *United States v. Light* that accepting a bribe was immoral, *see Light*, 36 C.M.R. at 584. The phrase "moral turpitude" is not unique to military law, however, and has also been used in civilian statutes. *See, e.g.*, Hunter v. Underwood, 471 U.S. 222, 226 (1985). In *Hunter*, the Supreme Court explained that the Alabama Supreme Court's interpretation of moral turpitude was an act that was "'immoral in itself, regardless of the fact whether it is punishable by law. The doing of the act itself, and not its prohibition by statute fixes, the moral turpitude.'" *See id.* (quoting Pippin v. State, 73 So. 340, 342 (Ala. 1916)). Like the language in the

The absence of a clear definition of immoral conduct could be explained in many ways. First, there are presumably hundreds of punishable acts that a judge could find to be morally reprehensible, and it would be nearly impossible to list them all. Second, when courts have attempted to define conduct involving moral turpitude, they often resort to listing examples of immoral conduct rather than endeavoring to describe what actually makes conduct morally wrong.[121] Because of this, no discernable pattern emerges in case law from which one could predict what the court will deem as immoral and what will require additional proof that the conduct is prejudicial.[122] For example, the court in *United States v. Light* stated that accepting a bribe and cheating were examples of immoral conduct, whereas borrowing money from a subordinate was an acceptable act.[123] By contrast, in *United States v. Hunt*, the court found that negligent homicide did not involve moral turpitude because it was a misdemeanor under the local civilian law.[124] Furthermore, even when the courts-martial have addressed the same conduct, they still have not agreed on whether it is immoral. This is exemplified by the courts' treatment of false swearing.[125] The court in *United States v. Greene* stated that false swearing is an offense that involves a degree of moral turpitude,[126] whereas the court in *United States v. Johnson* stated that lying may be dishonest but is not "per se wrongful or discreditable."[127]

All of these cases illustrate the problem with basing punishment on morality: morality is intrinsically subjective. This is especially problematic

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court-martial decisions, this definition of moral turpitude is also vague, demonstrating that this problem of predictability follows the phrase moral turpitude regardless of where it appears. In *Hunter*, the Supreme Court struck down as unconstitutional a provision of the Alabama Constitution that disenfranchised any person convicted of any crime involving moral turpitude. *See id.* at 233.

121. For instance, the U.S. Army Board of Review in *United States v. Light* listed examples of conduct involving moral turpitude: "Examples are where a sergeant accepts money from a member of his platoon as compensation for a pass, wrongfully receiving money as compensation for transporting a Korean female in a Government vehicle, cheating on an examination, [and] receiving money for calling false numbers at a bingo game." 36 C.M.R. at 584 (citations omitted).

122. *See supra* note 120.

123. *Light*, 36 C.M.R. at 584.

124. *See Hunt*, 27 C.M.R. at 559–60. Using this court's definition, adultery would not involve moral turpitude because in many states it is a misdemeanor. *See supra* note 41 and accompanying text.

125. Two decisions that discuss false swearing are *United States v. Greene*, 34 M.J. 713, 714 (A.C.M.R. 1992), and *United States v. Johnson*, 39 M.J. 1033, 1038 (A.C.M.R. 1994).

126. *Greene*, 34 M.J. at 714.

127. *Johnson*, 39 M.J. at 1038.

for adultery, a type of conduct defined from the beginning of American jurisprudence by its immoral character.[128] Even though recent decisions have defined adultery as not involving moral turpitude and thus not inherently prejudicial,[129] the U.S. Navy Court of Military Review in *United States v. Ambalada* declared that adultery was an offense against the morals of society.[130] This inconsistency is troubling, given that a finding that adultery is immoral automatically makes the act prejudicial to good order and discipline, thus significantly relieving the government's burden of proof in establishing the crime of adultery under article 134 and essentially eliminating the necessity of the factors.[131] This might also provide an explanation as to why, in some cases, the court has not required much in the way of proof of the prejudicial effect of the adultery, suggesting that it has instead relied on its own private finding that adultery is immoral and thus inherently prejudicial.[132]

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128. *See supra* notes 28–35 and accompanying text.

129. *See, e.g.*, United States v. Poole, 39 M.J. 819, 821 (A.C.M.R. 1994) ("[N]ot only must the government prove the existence of a valid marriage and an act of sexual intercourse with another by one of the parties to the marriage, but also that the act of sexual intercourse constituted conduct that was prejudicial to good order and discipline."); United States v. Perez, 33 M.J. 1050, 1054 (A.C.M.R. 1991) ("We are not prepared to state a *per se* rule that sexual intercourse with a person not his or her spouse by a married soldier under any circumstance constitutes the offense of adultery under Article 134, UCMJ.").

130. United States v. Ambalada, 1 M.J. 1132, 1137 (N.C.M.R. 1977). The court made this statement in an effort to clarify that adultery is not an offense against the person of one of the participants and thus cannot be included as a lesser charge within a charge of rape. *See id.*

131. *See Johnson*, 39 M.J. at 1038 ("Generally, offenses involving moral turpitude are inherently prejudicial."). For a discussion of the factors used by courts-martial to help determine whether the adultery was prejudicial, see *supra* notes 111–12 and accompanying text.

132. *See, e.g.*, United States v. Velazquez, NMCCA 200602421, 2007 WL 2340612, at *6 (N-M. Ct. Crim. App. Aug. 16, 2007). In *Velazquez*, the U.S. Navy-Marine Corps Court of Criminal Appeals accepted a statement by the appellant, admitting that his conduct was prejudicial "because others knew about the adultery" and it "generated some notoriety in a foreign country" as sufficient proof that the adultery was prejudicial. *See id.* This does not seem to comply with the MCM's requirement that there be some measurable effect to find the conduct prejudicial to good order or discipline. *See supra* note 116. In addition, in *United States v. Greene*, the U.S. Army Court of Military Review noted that it is not necessary for the accused to explain how his offense was prejudicial to good order and discipline or was service discrediting, but only that he admit that the conduct was prejudicial or service discrediting, again demonstrating the lack of initiative by the court to find some measurable effect of the conduct. 34 M.J. 713, 714 (A.C.M.R. 1992).

2. Discrediting to the Military

The MCM allows the prosecution an alternative way to prove the damaging effect of an adulterous act—by proving that the act had a tendency to discredit the armed services.[133] The MCM describes *discredit* as meaning "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."[134] The very language of the MCM states that the prosecution does not need to prove any actual damage to the service's reputation but only that the conduct had the tendency to produce that damage.[135]

By not requiring the prosecution to prove any definitive damage to the military's reputation, this element becomes relatively easy to satisfy. The court in *United States v. Velazquez* found that because others were aware of the adultery, it was sufficiently service discrediting.[136] The court did not require any proof that this knowledge led to a condemnation of the service or the servicemember, only that outside knowledge of the conduct existed.[137] This type of logic assumes that anyone who knows about adulterous conduct automatically disapproves of both the act and the entire organization associated with the adulterer, and consequently this knowledge brings the entire military into disrepute. Based on the evident disapproval of criminal prosecutions for adultery in the civilian world, it does not seem to fit that prosecuting adulterers is the way to win the approval of the American public.[138] In any case, the *Velasquez* decision demonstrates that any proof of knowledge of the affair is sufficient to find the conduct as tending to discredit the armed services.[139]

Disagreement has arisen among the courts, however, on whether proof of awareness of the conduct is necessary to prove a tendency to damage the service's reputation. One line of decisions states that civilians must be aware of the behavior and military status of the offender in order to

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133. *See* MCM, *supra* note 13, pt. IV, ¶ 62(c)(2).

134. *Id.*

135. *Id.*; *see also* United States v. Mead, 63 M.J. 724, 728 (A.F. Ct. Crim. App. 2006) ("Article 134, UCMJ, does not require direct injury.").

136. *See Velazquez*, 2007 WL 2340612, at *6. In *Velazquez*, the appellant admitted his conduct was service discrediting because others knew about the adultery. *Id.*

137. *See id.*

138. *See supra* notes 51–56 and accompanying text; *see also* United States v. Green, 39 M.J. 606, 609 (A.C.M.R. 1994) ("Indeed, it is our sense that imposition of punishment for adultery has become alien to the civilian's concept of criminal law.").

139. *See Velazquez*, 2007 WL 2340612, at *6.

establish that the conduct is service discrediting.[140] *United States v. Perez* represents this view.[141] In *Perez*, the court held that the government did not meet its burden of proving that the defendant's adultery was prejudicial to good order and discipline.[142] Furthermore, the court found that because the government did not show that civilians knew about the affair, the conduct was not of a nature to bring discredit on the armed forces.[143] This paradigm seems logical. In order for the actions of one servicemember to tend to cause the public to look down on the entire military, there reasonably must be some public awareness of this conduct.

Another line of cases exists, however, that does not require any notoriety to find that the conduct had a tendency to bring the service into disrepute.[144] In *United States v. Mead*, for example, the court emphasized the language of the MCM by pointing out that the court was only concerned with conduct that was "*of a nature* to bring discredit upon the armed forces because of its *tendency* to bring the service into disrepute or lower it in public esteem."[145] Based on this language, the court found there was no requirement that the public be aware of the conduct or the accused's military status in order to establish the conduct as tending to bring the service into disrepute.[146] Similarly, in *United States v. Nygren*, the Coast Guard Court of Criminal Appeals, when presented with the argument that the public must be aware of the appellant's underage drinking in order for it to tend to bring the service into disrepute, stated that it knew of "no binding authority to that effect" and believed "the

140. *See, e.g.*, *Green*, 39 M.J. at 609 ("[T]o prove service discrediting conduct, the public must be aware of the behavior and the military status of the offender."); United States v. Perez, 33 M.J. 1050, 1054 (A.C.M.R. 1991) ("Civilians must be aware of the behavior and the military status of the offender. Open and notorious conduct may be service discrediting, while wholly private conduct is not generally service discrediting." (citations omitted)).

141. *Perez*, 33 M.J. at 1054.

142. *Id.*

143. *See id.* The *Perez* court also found that there was no evidence that the alleged adultery in this case offended local law or community standards, even though the court pointed out that adultery still is a criminal offense in Massachusetts. *See id.* at 1054 & n.3.

144. *See, e.g.*, United States v. Brown, ACM 36695, 2007 WL 4259582, at *3 (A.F. Ct. Crim. App. Nov. 16, 2007), *vacated*, United States v. Brown, 67 M.J. 176 (C.A.A.F. 2008); United States v. Mead, 63 M.J. 724, 729 (A.F. Ct. Crim. App. 2006).

145. *Mead*, 63 M.J. at 729.

146. *See id.*

contrary [was] true."[147] Admittedly, the cases in *Mead* and *Nygren* dealt with prosecutions under the general offense of article 134, for possessing child pornography[148] and for underage consumption of alcoholic beverages,[149] respectively, and not a specific enumerated offense under article 134, like adultery. Thus, the cases that specifically require public awareness of adultery to find the conduct discrediting to the service may be controlling on this issue.[150] Regardless, this disagreement among the courts creates uncertainty about what facts the prosecution must establish to prove this element, allowing the court to give the prosecution leeway when it deems the conduct immoral.

Even with the two separate approaches to proving that the adultery is damaging enough to justify a criminal prosecution under article 134, in reality, the courts-martial often view these approaches as one and the same and discuss the two elements interchangeably.[151] By not requiring any specific showing of fact for these two disparate elements, the courts-martial give the prosecution great latitude to prove them both. This

147. United States v. Nygren, 53 M.J. 716, 718 (C.G. Ct. Crim. App. 2000). The court explained that article 134 criminalizes all conduct that is of a nature to bring the service into disrepute and all conduct that tends to lower the service in the public esteem, and therefore the statute did not require any proof of awareness of the appellant's military status. *See id.* The court also emphasized that at his providence inquiry—a hearing at which the military judge inquires into the soundness of the accused's guilty plea—the appellant had stipulated that he believed his conduct was of a nature to bring discredit to the armed forces, perhaps explaining why the court did not find further evidence of the service discrediting nature of his conduct necessary. *See id.*

148. *Mead*, 63 M.J. at 725.

149. *Nygren*, 53 M.J. at 716–17.

150. *See, e.g.*, United States v. Green, 39 M.J. 606, 609 (A.C.M.R. 1994); United States v. Perez, 33 M.J. 1050, 1054 (A.C.M.R. 1991). The current offense of adultery, last amended in 2002, specifies that adulterous conduct that is private and discreet in nature may not be service discrediting. *See* MCM, *supra* note 13, pt. IV, ¶ 62(c)(2); MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 62(c) (2000 ed.), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/manual-2000.pdf (giving a limited explanation of the crime of adultery prior to the 2002 amendments). Still, the courts have not specifically stated that an adultery prosecution has special rules for proving it is discrediting to the service, so the prosecution could cite to either line of cases when presenting its case and could potentially not have to show any public awareness or public disapproval of the adultery to prove that it is service discrediting.

151. *See, e.g.*, United States v. Velazquez, NMCCA 200602421, 2007 WL 2340612, at *6 (N-M. Ct. Crim. App. Aug. 16, 2007) ("The appellant admitted during providence that his conduct was prejudicial to good order and discipline and was service discrediting because others knew about the adultery, it became a topic of discussion, and generated some notoriety in a foreign country."); United States v. Johnson, 39 M.J. 1033, 1038 (A.C.M.R. 1994) ("[O]ffenses involving moral turpitude are inherently prejudicial or discrediting."); United States v. Collier, 36 M.J. 501, 512 (A.F.C.M.R. 1992) ("That his conduct supplied such a powerful incentive to commit another crime surely makes it discrediting to the service and prejudicial to good order.").

tends to suggest that the court will apply its own imprecise standard on a case-by-case basis, thereby providing no predictability as to which adulterous conduct will actually violate article 134.[152]

B. Prosecuting Adultery Under Article 133

An officer may also be convicted of adultery under article 133.[153] This article, unlike article 134, applies only to commissioned officers, cadets, and midshipmen in the armed services.[154] To present a successful case under article 133, the prosecution only needs to prove that the individual officer committed the predicate acts and that those acts, under the circumstances, "constituted conduct unbecoming an officer and gentleman."[155] When an officer is charged with a crime already included under other articles, such as adultery, the burden of proof for conviction under article 133 is distinct, requiring, in addition to elements of proof under the other offense, that the conduct constitutes *unbecoming* conduct.[156] Consequently, no matter the charge, the appropriate standard

152. *See supra* note 132 and accompanying text.

153. Uniform Code of Military Justice art. 133, 10 U.S.C. § 933 (2006). The prosecution of Lieutenant Commander Penland is an example of an article 133 adultery prosecution. *See supra* notes 2–6 and accompanying text.

154. MCM, *supra* note 13, pt. IV, ¶ 59(a).

155. *Id.* pt. IV, ¶ 59(b). Note that the word *gentleman* includes both males and females. *See id.* pt. IV, ¶ 59(c)(1). When Congress first implemented the UCMJ and article 133 in 1951, it utilized the word *gentleman* of the old Article of War 95, even though more than 350,000 women served in the military during World War II. *See* Hillman, *supra* note 71, at 43. For further discussion on how applying the word *gentleman* to women in the military is confusing and at times preposterous, see *id.* at 43–47.

156. MCM, *supra* note 13, pt. IV, ¶ 59(c)(2). Some decisions suggest that the only burden of proof for an article 133 conviction, whether or not the conduct is already a crime under a separate article, is whether it amounted to conduct unbecoming an officer and a gentleman. *See, e.g.*, United States v. Giordano, 35 C.M.R. 135, 140 (C.M.A. 1964) ("[I]t is evident that the essence of an Article 133 offense is not whether an accused officer's conduct otherwise amounts to an offense . . . but simply whether the acts meet the standard of conduct unbecoming an officer . . . ."). Based on the language of the most current MCM, however, it is clear that an officer may be convicted under article 133 of a crime that is codified under another article only if the prosecution meets the same burden of proof required under the other article and demonstrates that the conduct amounted to conduct unbecoming. *See* MCM, *supra* note 13, pt. IV, ¶ 59(c)(2); *see also* United States v. Frelix-Vann, 55 M.J. 329, 331 (C.A.A.F. 2001) (recognizing that when another crime is "alleged as the sole basis for the unbecoming an officer specification," the MCM now dictates that the elements of the underlying offense are "required elements of the conduct unbecoming offense").

for conviction is whether the conduct is dishonorable enough to constitute conduct unbecoming an officer and a gentleman.[157]

The explanation in the MCM provides that every officer must have certain moral attributes, but it does not spell out what these attributes are.[158] It further explains that an officer who lacks the expected level of morality exhibits this by "acts of dishonesty, unfair dealing, indecency, indecorum, lawlessness, injustice, or cruelty."[159] It goes on to provide a list of examples that would constitute conduct unbecoming an officer, including cheating on an exam, public association with known prostitutes, failing to support the servicemember's family without good cause, and committing any crime involving moral turpitude.[160]

The type of conduct that amounts to unbecoming conduct is further described by the MCM as any acts in an official capacity that compromise the officer's character and any acts in an unofficial capacity that compromise his standing as an officer.[161] Stated more succinctly, conduct unbecoming includes any behavior at work that reflects badly on one's personal character or any behavior at home that indicates an officer is professionally incompetent.[162] Thus, article 133 regulates both public and private conduct.

Article 133 focuses on how the conduct reflects upon the officer not only as an individual but also as a representative of the armed services.[163] First, an officer, unlike most enlisted servicemembers, is in a position of power over many.[164] As a result, in order for the military institution of chain of command[165] to function properly, the officer must command

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157. *See supra* note 156.

158. *See* MCM, *supra* note 13, pt. IV, ¶ 59(c)(2) ("There are certain moral attributes common to the ideal officer and the perfect gentleman . . . .").

159. *Id.*

160. *Id.* pt. IV, ¶ 59(c)(3). See *supra* notes 118–32 and accompanying text for a discussion on how the military courts have treated crimes involving moral turpitude.

161. MCM, *supra* note 13, pt. IV, ¶ 59(c)(2).

162. *See* Hopkins, *supra* note 30, at 214 (describing a "symbiotic relationship" between the public and private conduct of the officer).

163. *See id.* at 213–14.

164. *See* United States v. Means, 10 M.J. 162, 165–66 (C.M.A. 1981) (explaining that officers have special privileges and hold special positions of honor, so it is not unreasonable to hold them to a higher level of accountability); *see also* SCHLUETER, *supra* note 72, § 2-5 ("[A]ll military systems place special responsibilities and status upon officers.").

165. See Hopkins, *supra* note 30, at 224, for an explanation of the chain of command. Hopkins explains:

> 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.

respect from his subordinates. Otherwise, the military is not operating as a single force because one of the links in the chain is weakened.[166] An officer who lacks the complete respect of lower-ranked servicemembers in his unit faces the possibility that his orders will be questioned or disobeyed.[167] Once any disobedience begins, the entire unit's structure, and consequently the entire military operation, is in jeopardy.[168] Second, an officer also acts as a representative of the military to the public,[169] and those perceived to be untrustworthy undermine the legitimacy of the armed services to the public.[170] Officers are centrally and very publicly involved in the primary functions of the military, including transforming civilians into soldiers and directing the military's operations here and abroad.[171] Owing to an officer's important role as a leader in the military, the civilian perception of an individual officer's conduct in theory becomes the perception of the entire military itself.[172]

Based on these rationales for article 133, it would seem that in order to justify an article 133 prosecution of adultery, the court should find that the conduct either undermined the officer's ability to command her unit or undermined the public confidence in the officer. The standard under this article, however, is not so clear. In fact, the actual standard for

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> If a military force is to operate effectively . . . 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 . . . of the Commander-in-Chief.

Id. (footnote omitted).

166. *See id.* at 224–25.

167. *See* Winner, *supra* note 23, 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.").

168. *See* Jonathan Turley, *The Military Pocket Republic*, 97 NW. U. L. REV. 1, 57 (2002) (explaining the important role officers play in maintaining the system of the chain of command, a system on which the military heavily relies); *see also supra* note 165.

169. Petition for Writ of Certiorari to the United States Court of Military Appeals, *supra* note 78, at *11–12 (quoting WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 711–12 (2d ed. 1920)) (stating that an officer represents the military profession).

170. *See* Winner, *supra* note 23, at 1105–06 (explaining how the Navy Tailhook sex scandal involving more than 100 Navy and Marine Corps officers deeply scarred the professional reputation of the Navy and the entire military).

171. *See* Hillman, *supra* note 71, at 8.

172. *See id.* at 8–9 ("[T]he 'officer subculture' dominates civilian perceptions of military society because of officers' public leadership roles, longevity in the service, and strong connections to American society.").

determining which conduct is unbecoming is exceedingly and purposefully vague.[173]

The phrase "conduct unbecoming an officer and a gentlemen" is language that originated in British military law and was later borrowed by the Continental Army during the Revolutionary War to advertise the "gentility of officers."[174] The first "conduct unbecoming" offense in America appeared in the Massachusetts Articles of War in 1775,[175] and the crime remains today as a codified statute in the UCMJ.[176] The language itself does not reveal which conduct specifically is unbecoming and thus criminal. This vagueness allows the standard to mold itself according to the prevailing standard of what is proper and moral.[177] As a result, the development of "conduct unbecoming" over time reflects the cultural changes in the American military by revealing what conduct has been determined to be improper for an officer and thus subject to criminal prosecution.[178] The introduction of women into the armed forces posed challenges to the article, as it is defined by the notion of officers as gentlemen and not gentlewomen.[179] And even though officers' sexual improprieties have long been subject to prosecution as conduct

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173. *See* Keithe E. Nelson, *Conduct Expected of an Officer and a Gentleman: An Ambiguity*, 12 A.F. JAG L. REV. 124, 124–25 (1970) (describing the inherent ambiguity of article 133 as purposeful in order to encompass the many moral attributes expected of an officer).

174. Hillman, *supra* note 71, at 10.

175. Nelson, *supra* note 173, at 127.

176. Uniform Code of Military Justice art. 133, 10 U.S.C. § 933 (2006).

177. *See* Hopkins, *supra* note 30, at 223 (describing the doctrinal ambiguity of article 133); Nelson, *supra* note 173, at 137 ("The customs of the community which shaped the common law through its development and finally resulted in the written statutes found in many jurisdictions also shaped the military articles."). The vagueness of article 133 was challenged to be unconstitutional in *United States v. Lee*, 4 C.M.R. 185, 189 (A.B.R. 1952), and again up to the Supreme Court in *Parker v. Levy*, 417 U.S. 733, 752 (1974). The court in *Lee* found the article was not unconstitutional because the language of conduct unbecoming had been long accepted as applied to the military. *See Lee*, 4 C.M.R. at 189–90. The Court in *Parker* came to a similar conclusion, holding that there was a strong presumption of validity that attached to an act of Congress, such as the UCMJ, and that statutes are not automatically invalidated simply because it may be difficult to determine whether marginal offenses fall within their scope. *Parker*, 417 U.S. at 756–57. This same type of reasoning has also been utilized to explain any ambiguity challenges to all of the general articles, such as article 133. *See* Nelson, *supra* note 173, at 137. For an in-depth discussion of the doctrine of military deference, see generally John F. O'Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161 (2000).

178. *See* Hillman, *supra* note 71, at 7 ("The strategic vagueness of 'conduct unbecoming' . . . makes this peculiar statute a telling register of social conflict, cultural change, and military evolution.").

179. *See id.* at 10; *see also supra* note 155.

unbecoming, controlling the sexuality of officers seems to have become the recent primary goal of article 133 prosecutions.[180]

Because of the introduction of subjective issues, like morality and character, into the analysis of whether adulterous conduct qualifies as unbecoming, a prosecution under this article is subject to the same pitfalls as article 134, namely that the results can be unpredictable and invariably tied to the personal beliefs of the courts.[181] For instance, in *United States v. Guaglione*, the court found that an officer who visited a brothel, but did not engage in sexual acts there, did not commit conduct unbecoming.[182] The court justified this finding by explaining that his conduct was lawful according to the prevailing morals of the Frankfurt, Germany community, where the conduct took place.[183] Compare this result to *United States v. Jenkins*, where the court found that the officer did engage in conduct unbecoming by negligently writing bad checks, holding that these acts were disgraceful to him personally and "compromised his standing as an officer."[184]

Based solely on the definition of "conduct unbecoming" in case law, an officer's extramarital affair may be unbecoming for an article 133 conviction, even though it is wholly private.[185] Moreover, unlike article 134, the court-martial does not need to engage in any kind of analysis as

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180. *See* Hillman, *supra* note 71, at 10. For examples of recent article 133 prosecutions that focused on regulating the sexual behavior of officers, see Sutton v. United States, 65 Fed. Cl. 800, 803 (2005) (adultery prosecution); Kindred v. United States, 41 Fed. Cl. 106, 108 (1998) (discharge for homosexual conduct). *See also supra* notes 2–6 and accompanying text.

181. *See supra* notes 128–32 and accompanying text.

182. *See* United States v. Guaglione, 27 M.J. 268, 272–73 (C.M.A. 1988). In *Guaglione*, the U.S. Court of Military Appeals also recognized that "an officer's conduct may be 'unbecoming' for purposes of Article 133 even though it is private," demonstrating that wholly private conduct may be regulated under this article with no required showing of public awareness. *Id.* at 272.

183. *Id.*

184. United States v. Jenkins, 39 M.J. 843, 846 (A.C.M.R. 1994). The different results in *Jenkins* and *Guaglione* may be explained by a common interpretation of moral turpitude as crimes that involve some sort of fraud or deceit. *See* Jordan v. De George, 341 U.S. 223, 228 (1951) ("[C]rimes involving fraud have universally been held to involve moral turpitude."). However, it is unclear whether military courts have ever adopted this definition of moral turpitude because a clear definition of moral turpitude is difficult to locate within a military court opinion. *See supra* notes 118–20 and accompanying text. For further discussion on the vexing ambiguity of the phrase "moral turpitude," see Joseph G. Jarret, *Of Morals, Mores & Malt Liquor: Denying Beer Permits Based on Moral Turpitude*, TENN. B.J., Dec. 2009, at 26, 26–27.

185. *See supra* note 182.

to the damaging effects of the affair but needs only to determine for itself whether the adultery amounted to conduct unbecoming. This is due to the inherently subjective nature of the definition of conduct unbecoming.[186] As the U.S. Army Court of Military Review stated, "It is unnecessary that the conduct amount to an offense otherwise, but 'it must offend so seriously against law, justice, morality or decorum, as to expose to disgrace, socially, or as a man . . . .'"[187] By not listing any specific standards in the statute, the method and the decision as to whether the conduct offends morality or decorum are left up to the individual courts. Viewing the lack of consistency in the analysis of conduct unbecoming and the lack of any definitive standards to demarcate this elusive concept, it is not surprising that a court-martial could convict Lieutenant Commander Penland of conduct unbecoming without any finding of notoriety of the affair or any effect it had on her competency at work.[188]

To begin, Penland was not married and was a high-ranking officer in the Navy.[189] Her coactor, Wiggan, was also an officer but belonged to a separate chain of command, so the relationship presented no apparent fraternization issues.[190] The prosecution offered no evidence of misuse of government time or resources to commit the affair, nor any evidence that the affair had a detrimental effect on either's unit or individual performance.[191] In fact, the only evidence of the affair was pictures of

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186. *See supra* note 173 and accompanying text.

187. United States v. Jefferson, 14 M.J. 806, 808–09 (A.C.M.R. 1982) (quoting WINTHROP, *supra* note 169, at 711–12), *aff'd in part and rev'd in part*, 21 M.J. 203 (C.M.A. 1986).

188. *See* Chris Amos, *O-4 Sentenced to 60 Days in Adultery Case*, NAVYTIMES, May 27, 2008, http://www.navytimes.com/news/2008/05/navy_penland_052508/ ("[T]he prosecution's only evidence of an affair were close-up pictures of sexual activity between two people whose faces were not visible, and several e-mails purportedly between the husband and wife that the husband denied writing.").

189. *See* Petition for Writ of Mandamus, *supra* note 2, at 2.

190. *See id.* Fraternization is the comingling of an officer and an enlisted servicemember that is prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces. *See* MCM, *supra* note 13, pt. IV, ¶ 83(b). However, the Navy may have a separate regulation on fraternization that may have been implicated by the conduct. *See infra* note 249 and accompanying text. In addition, Wiggan was legally separated, which is one factor that the court should have considered when determining whether Penland's adultery was prejudicial or service discrediting. *See* Petition for Writ of Mandamus, *supra* note 2, at 2; MCM, *supra* note 13, pt. IV, ¶ 62(c)(2)(h).

191. *See* Amos, *supra* note 188. Lieutenant Commander Kevin Messer, a Navy prosecutor, stated that despite the adultery charge and conviction, the prosecution's case was not about adultery and was about Penland using her rank to try to persuade Wiggan's wife, an enlisted servicemember, to divorce Wiggan. *See* Chris Amos, *Reprisal Allegations in*

sexual activity between two unidentifiable persons, whom Wiggan claimed to be himself and his ex-wife, not Penland.[192] Based on the limited information available about the prosecution's case, it is unclear exactly how the government proved that the affair was prejudicial or amounted to conduct unbecoming. Regardless of how the prosecution accomplished this conviction, this case demonstrates that the factors[193] meant to determine whether an adulterous act merits punishment have little to no effect on limiting adultery prosecutions in practice, especially in the context of an article 133 prosecution.

V. THE JUSTIFICATIONS FOR CONTINUING TO PUNISH ADULTERY IN THE MILITARY

In the past twenty years, while adultery prosecutions have almost completely fallen out of favor in the civilian justice system in America,[194] the American military has clung to the crime of adultery by continuously and actively pursuing criminal prosecutions of adultery.[195] These facts give one pause to consider why the military has deviated from the civilian code in this respect.[196] Several possible explanations arise. They include the value of maintaining a high level of morality and honor in the armed services, the importance of upholding good order and discipline among servicemembers, and the necessity of preserving the support of the American people.[197] Despite the persuasiveness of these

Adultery Case Disputed, NAVYTIMES, June 16, 2008, http://www.navytimes.com/news/2008/06/navy_penland_061408w/.

192. *See id.* *But see* Reynolds, *supra* note 6 (quoting Penland, not Wiggan, as saying the pictures used had been taken of her with a previous boyfriend).

193. *See supra* note 111 and accompanying text.

194. *See supra* notes 37–41 and accompanying text.

195. *See* Winner, *supra* note 23, at 1077 ("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 U.S. Army Court of Military Review in *United States v. Green* acknowledged that adultery prosecutions are "not alien to the soldier's concept of criminal law" and that "courts-martial for criminal adultery are not infrequent." 39 M.J. 606, 609 (A.C.M.R. 1994).

196. This is especially troubling considering that the drafters of the UCMJ attempt to mirror trends in the civilian world when updating the military's statutes. *See supra* note 84.

197. An additional unstated motive for pursuing adultery charges may be that it is a way for the military to get around the policy of "Don't Ask, Don't Tell" (DADT) by prosecuting the adulterous conduct and not revealing its perhaps truer antigay motivation. Coincidentally, the military alleges the same justifications for continuing the policy of

principles, prosecuting adultery in today's military is no longer necessary to further these values and, in many cases, actually hinders their advancement.

A. Preserving Honor in the Armed Services

First, one of the oldest and most basic concepts of military life is that "there is a higher code termed honor, which holds [the military's] society to stricter accountability; and it is not desirable that the standard of the [military] shall come down to the requirements of a criminal code."[198] Members of the military have long been expected to uphold a higher standard of morality and honor than civilians.[199] The reasoning behind this idea is that servicemembers are in positions of great responsibility: commanders must order soldiers and marines into harm's way to carry out missions, and officers hold the keys to missiles that could start a war. Moreover, members of the military must constantly choose to put service to their employer ahead of their personal lives and even their own safety.[200] As a result, due to the demanding nature of being a servicemember, the military justice system accepts that it must carry a separate moral dimension not present in the civilian code.[201]

Given the military's high regard for morality and honor, it is plain to see why the military criminalizes immoral behavior. Nevertheless, the

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DADT—to prevent sexual misconduct and preserve "'the armed forces' high standards . . . of good order and discipline, and unit cohesion . . . ." *See* C. Dixon Osburn, *A Policy in Desperate Search of a Rationale: The Military's Policy on Lesbians, Gays and Bisexuals*, 64 UMKC L. REV. 199, 202 (1995) (quoting 10 U.S.C. § 654(a)(14) (2006)). DADT continues to be litigated, and a complete discussion of the implications of DADT is beyond the scope of this Comment. For further information, see *id.* For a defense of DADT, see Eugene R. Milhizer, *"Don't Ask, Don't Tell": A Qualified Defense*, 21 HOFSTRA LAB. & EMP. L.J. 349 (2004).

198. Fletcher v. United States, 26 Ct. Cl. 541, 563 (1891), *rev'd*, 148 U.S. 84 (1893). This famous quotation first appeared in the *Fletcher* decision in 1891 while discussing whether an officer may be found guilty of a crime that does not constitute a crime in the civilian code. *See id.* at 562–63. This same quotation has been used many times over when explaining the compelling special interest of the military in the application of the Constitution. *See, e.g.*, Parker v. Levy, 417 U.S. 733, 765 (1974) (Blackmun, J., concurring).

199. *See* United States v. Mead, 63 M.J. 724, 728 (A.F. Ct. Crim. App. 2006) ("Roderick admitted during the providence inquiry that he 'failed to live up to' the 'higher standard' that applies to members of the military."); *Parker*, 417 U.S. at 748 (discussing "the military's 'higher code termed honor' . . . with which those trained only in civilian law are unfamiliar" (quoting *Fletcher*, 26 Ct. Cl. at 563)).

200. *See* Winner, *supra* note 23, at 1092–93. Members of the military can be separated from their families for long periods of time without notice and, when called upon, have the ultimate duty to sacrifice their lives to protect the security interests of the nation. *Id.* at 1093.

201. *See* William T. Barto, *The Scarlet Letter and the Military Justice System*, ARMY LAW., Aug. 1997, at 3, 8.

courts-martial have not been able to agree on whether adultery is an inherently immoral activity.[202] This illustrates one of the main difficulties in creating a code based on morality and honor: it is inherently subject to the whims and private moralities of the individual judges and juries involved in each case.[203] Perhaps a better route would be for the military to steer away from laws based solely on morality and focus on criminalizing conduct with a quantifiable detrimental effect on the performance of military duties, such as fraternization.[204]

Adultery also brings into the discussion the preservation of the family and marriage, another central aspect to the military's definition of honor.[205] Adultery often leads to marital strife and sometimes the dissolution of the marriage, and the courts-martial have expressed that the military has a "particular interest in promoting the preservation of marriages within its ranks."[206] The view is that because the military requires spouses to be separated for extended periods of time, prosecuting adultery will help ensure that the morale of the military will not be affected by concerns over the fidelity of a faraway spouse.[207] The criminalization of adultery, however, does little to help this cause. First, only the military spouse can be prosecuted, while the civilian spouse is free to be unfaithful without any legal recourse.[208] Second, the MCM allows punishment for adultery

202. *See supra* notes 128–32 and accompanying text.

203. *See supra* notes 128–32 and accompanying text.

204. Fraternization is an example of an offense that focuses on conduct that has a quantifiable detrimental effect on the service as opposed to adultery, whose main harm is to the private marital relationship. *See* MCM, *supra* note 13, pt. IV, ¶ 83; Hopkins, *supra* note 30, at 260. The offense of fraternization requires that "[t]he acts and circumstances must be as such to lead a reasonable person experienced in the problems of military leadership to conclude that the good order and discipline of the armed forces has been prejudiced." *See* MCM, *supra* note 13, pt. IV, ¶ 83(c)(1). For further discussion of why punishing fraternization is preferable to punishing adultery, see *infra* notes 246–53 and accompanying text.

205. For example, in the MCM's discussion of conduct unbecoming an officer and a gentleman, article 133, although describing its version of ideal moral attributes, lists failing to support one's family as an example of an immoral offense. MCM, *supra* note 13, pt. IV, ¶ 59(c)(3).

206. United States v. Orellana, 62 M.J. 595, 601 (N-M. Ct. Crim. App. 2005); *see also* United States v. Green, 39 M.J. 606, 609 (A.C.M.R. 1994) ("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.").

207. *See Orellana*, 62 M.J. at 601.

208. The UCMJ and the offenses listed in the MCM only have jurisdiction over the military branches and civilians who accompany the military on its missions abroad. *See supra* notes 58–59 and accompanying text. Consequently, a civilian spouse who is not a

even when it does not actually impact the marital relationship, such as when the accused is technically married but legally separated from his spouse.[209]

Regardless of the reasons behind desiring servicemembers to have a high moral character, it is unfair to subject military personnel to criminal sanctions for failing to live up to "a higher, unreachable standard."[210] The MCM itself even states that "[n]ot everyone is or can be expected to meet unrealistically high moral standards."[211] Given that adultery is not uncommon in the general population,[212] it seems unrealistic to require servicemembers to always remain faithful and unfair to subject them to criminal penalties for being only as moral as their civilian counterparts.

B. Upholding Good Order and Discipline

Maintaining good order and discipline provides another justification for the military to proscribe adultery.[213] Discipline is crucial to maintaining the morale of servicemembers, preserving unit cohesion, and, ultimately, sustaining an effective military.[214]

Members of the military need to be able to count on others in their unit.[215] If one cannot trust his peer to control himself in his personal life,

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contractor for the military will not be subject to the military's adultery offense, unlike the military spouse.

209. One example is the case against Lieutenant Commander Penland, who was single and whose coactor was legally separated. *See supra* notes 189–92 and accompanying text; *see also* Hopkins, *supra* note 30, at 250–51 (noting that criminalizing adultery in situations in which the spouses are separated is illogical seeing that the adultery "does not actually impact the marital relationship"). Furthermore, the *Green* court stated that "[p]roof of prejudice to good order and discipline in criminal adultery cases does not . . . require that an accused's marital relationship . . . be affected or potentially affected." 39 M.J. at 609.

210. Gasper, *supra* note 46, at 162.

211. MCM, *supra* note 13, pt. IV, ¶ 59(c)(2).

212. *See supra* note 76.

213. *See* Esquivel, *supra* note 56, at 856–57. The Supreme Court in *Parker v. Levy* recognized that the military is a "specialized society separate from civilian society" because of the necessity to maintain obedience and discipline within the command so that the armies and navies can carry out their primary business of fighting wars, if it becomes necessary. Parker v. Levy, 417 U.S. 733, 743–44 (1974).

214. *See* Sam Nunn, *The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases*, ARMY LAW., Jan. 1995, at 27, 29 ("It is called unit cohesion, and in my 40 years of Army service in three different wars, I have become convinced that it is the single most important factor in a unit's ability to succeed on the battlefield." (quoting S. REP. NO. 103-112, at 274–75 (1993) (statement of General H. Norman Schwarzkopf, U.S. Army (Retired)))).

215. *See* Burke, *supra* note 14, at 322. The view is that if a soldier cannot trust another within his unit, then when he is faced with a life or death situation, the soldier is more likely to surrender or fail because he cannot trust his fellow soldier. *See id.* As a

then some believe it follows that he also cannot be trusted in combat.[216] One can easily think of scenarios in which someone's promiscuous sexual conduct could cause disorder within a unit, such as when a superior and a subordinate within the same unit have a sexual relationship, or if a soldier is carrying on an affair with the wife of another in his unit. Both of these situations would create distrust and conflict. In the former scenario, many within the unit would become suspicious of favoritism by the superior toward his lover, and the subordinate could also feel enormous pressure to maintain the relationship for fear of retaliation.[217] In the latter scenario, once the unit found out about the affair, besides the natural feelings of anger and jealousy of the jilted spouse, others would most likely lose their ability to trust the cheating soldier. On the other hand, the same type of disruption in unit cohesion could result if a soldier had an affair with the girlfriend of his peer or merely if two members of the same unit had an intense personal rivalry. There is no law under the UCMJ, however, requiring personnel to be kind to each other, even though this would promote the important interest of unit cohesion.[218]

Furthermore, adultery prosecutions have not been limited to cases in which the primary concern is maintaining discipline and order within a unit.[219] Adultery can and has been prosecuted in cases involving a servicemember and a civilian with no attachment to the military.[220] It is

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result, in order to maintain maximum military efficacy, members of the unit must be able to rely on another member as if he were a brother. *See id.*

216. *See* Winner, *supra* note 23, at 1104 (arguing that flaws in a soldier's moral character interrupt the necessary instinctive unity and *esprit de corps* within a unit and, therefore, put the mission and the servicemembers' lives at risk); *see also* Beller v. Middendorf, 632 F.2d 788, 811–12 (9th Cir. 1980) (finding that because some members of the military might find homosexuality morally wrong, this would undermine the ability of a homosexual to command the respect necessary to perform duties and might cause disruption of unit cohesion), *overruled by* Witt v. Dep't of the Air Force, 527 F.3d 806 (9th Cir. 2008).

217. *See infra* notes 246–53 and accompanying text. This type of scenario would be prosecuted under fraternization, and adultery charges would be unnecessary to stop these types of relationships. *See infra* notes 246–51 and accompanying text.

218. *See* 10 U.S.C. §§ 801–934 (2006); MCM, *supra* note 13, pt. IV.

219. One example is the case against Captain Yee. *See supra* notes 7–12 and accompanying text. Yee was not part of any unit but was a minister to Muslim prisoners at Guantanamo Bay, Cuba. *See* Parker, *supra* note 7.

220. In *United States v. Green*, for example, the court found a married, noncommissioned officer guilty of adultery for having sex with a civilian in the barracks. 39 M.J. 606, 609 (A.C.M.R. 1994); *see also* United States v. Butler, 5 C.M.R. 213, 213

unclear why the military would feel the need to regulate these relationships under this rationale.[221] In fact, continuing to prosecute adultery could have an adverse rather than uplifting effect on morale. The truth is that servicemembers are subject to harsh penalties when they are unfaithful to their spouses but have no resort to justice when their civilian spouses have extramarital relationships.[222] This unfair result is a "demoralizing double standard"[223] that would be eliminated by the deletion of adultery as a criminal offense.

C. Maintaining the Trust of the American People

The final rationalization for criminalizing adultery is that the military needs to maintain the trust and support of the American people.[224] The proposition is that if the military loses the respect and trust of the general public, it will correspondingly lose support for its missions.[225] The military has already experienced the negative effects of losing public support.[226] The Vietnam War provides an unsettling illustration of how a lack of public support can seriously harm the military.[227] Moreover, it is ultimately

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(A.B.R. 1952) (discussing a situation in which a married Lieutenant was found guilty of "conducting himself in a manner unbecoming an officer and a gentleman . . . by wrongfully occupying a bed with a German female" who was not his wife).

221. *See* Hopkins, *supra* note 30, at 248. Whereas there may be a need to regulate relationships between servicemembers because of the chance for abuse of authority or the danger to unit cohesion, these same interests do not apply in the context of sex between a servicemember and a civilian. *See id.*

222. *See supra* note 208 and accompanying text. For a discussion of the potential punishments for adultery for servicemembers, see *supra* notes 88–90 and accompanying text.

223. Esquivel, *supra* note 56, at 856.

224. The military has long had as one of its main goals capturing the support of the American public. *See* Douglas W. Moore, *Twenty-First Century Embedded Journalists: Lawful Targets?*, ARMY LAW., July 2009, at 1, 4–5. Ever since the Civil War when journalists first began reporting the news from the battlefield to the public, the military has striven to utilize the media to garner public support for the war. *See id.* at 6. The use of the press in earning public support has culminated currently in the practice of embedding journalists with units in combat. *See id.* at 10. For a complete discussion on the risks and benefits of the modern embedded war correspondent system, see *id.*

225. *See* Winner, *supra* note 23, at 1105.

226. *See* Hopkins, *supra* note 30, at 230 (discussing the negative effects on the military caused by the lack of public support during the Vietnam War).

227. *See id.*; *see also* Richard B. Jackson, *Stick to the High Ground*, ARMY LAW., July 2005, at 2, 9 ("It is also axiomatic in strategic thinking, since the Vietnam War, that retaining public support is critical to military decision-making."). The lack of support for the Vietnam War was so devastating that the military changed its force structure to place greater reliance on the reserves, thinking that this would require civilian leaders to gain public support before committing the military to hostilities abroad. *See* Glenn Sulmasy & John Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 UCLA L. REV. 1815, 1828 (2007).

the American people who provide the personnel and funds necessary to maintain the military infrastructure.[228] Therefore, if the military loses the public's support, it also risks losing these critical resources.[229]

With adultery, the presumption promoted by the military is that whenever Americans discover that a servicemember is engaged in adultery, this knowledge erodes their trust not only in that individual but in the entire organization. Some argue that because the public entrusts the military with great responsibilities, Americans closely scrutinize the conduct of its members, even their personal sexual conduct, and any discovered impropriety will lead to a loss of trust and support.[230] An examination of the state of adultery prosecutions in the civilian world, however, suggests that the general public is against, rather than for, sanctioning adultery criminally.[231]

To start with, in at least two instances military courts have found that committing adultery did not offend local civilian law and, as a result, that adultery was not inherently discrediting to the service.[232] In addition, the almost total absence of criminal adultery prosecutions in the civilian sector, even in the wake of numerous high-profile adultery scandals by government officials, demonstrates the reluctance of the American public to legally penalize adultery.[233] And finally, the public reaction to previous high-profile adultery prosecutions in the military illustrates that the public may even have contempt for these prosecutions and consequently contempt for the institution that advances them. For instance, the outcry in reaction to the discharge of Lieutenant Kelly Flinn for adultery,[234]

228. *See* Winner, *supra* note 23, at 1105 ("[T]he American people are the foundation of the armed forces' strength . . . .").

229. *See id.*

230. *See supra* note 170.

231. *See supra* notes 51–56 and accompanying text.

232. *See* United States v. Green, 39 M.J. 606, 609 (A.C.M.R. 1994) ("[T]here was no indication that the appellant's [adultery] offended either local civil law or community standards. . . . [I]mposition of punishment for adultery has become alien to the civilian's concept of criminal law."); United States v. Perez, 33 M.J. 1050, 1054 (A.C.M.R. 1991) ("The government presented no evidence that the [adultery] offended local law or community standards.").

233. *See supra* notes 28, 51–56 and accompanying text.

234. Lieutenant Kelly Flinn, a pilot in the Air Force who had become somewhat of a poster girl for Air Force recruitment, carried on an affair with the civilian husband of an enlisted woman at the same military base. *See* Winner, *supra* note 23, at 1075–76; 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, at 26. The Air Force prosecuted Flinn for adultery based on this affair, and her story

echoed today in the media frenzy surrounding the discharge of Penland for her adultery charge,[235] may indicate that the public believes criminalizing adultery charge is unnecessary and even archaic. If the military is genuinely concerned about preserving public support, perhaps it should examine how the public actually feels about criminal sanctions for adultery and abolish the offense of adultery.

VI. WHY THE MILITARY WOULD BE BETTER OFF WITHOUT THE CRIME OF ADULTERY

Even with the military's numerous justifications for continuing to criminalize adulterous conduct, the military's interests would be better advanced by removing adultery from the black-letter law of article 134.

First, usually when the military chooses to pursue an adultery charge, the adultery is merely one of a slew of more serious charges, such as rape or assault.[236] In those cases, the adultery is unnecessary to convict the servicemember of the crime and may even be duplicitous.[237] In *United States v. Jefferson*, for example, the U.S. Court of Military Appeals overturned the adultery charges against the defendant, finding that they were "multiplicious" because they were based on the same

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garnered the full attention of the American public. *See* Winner, *supra* note 23, at 1076. For an in-depth discussion of the background of the case and a defense of the choice to prosecute Flinn for adultery by the Air Force, see *id.* at 1074–79.

235. Penland's story was the subject of several articles in the *Navy Times*, *see, e.g.*, Amos, *supra* note 188, featured in the *San Diego Union Tribune*, *see* Steve Liewer, *supra* note 3, and on San Diego's *Channel 10 News*, *see* Reynolds, *supra* note 6. Besides the media frenzy, Penland's story is also a popular subject of many Internet forums, most of them calling her story an injustice. *See, e.g.*, *Height of Hypocrisy—Is There Really Justice in the Military Courts*, MILITARYTIMES FORUM, http://militarytimes.com/forum/showthread.php?t=1578663. Penland herself alleged that the Navy discharged her avoid any further media coverage. *See* Petition for Writ of Mandamus, *supra* note 2, at 2.so quickly because of the amount of negative publicity generated by her story, hoping to

236. *See, e.g.*, United States v. Velazquez, NMCCA 200602421, 2007 WL 2340612, at *1 (N-M. Ct. Crim. App. Aug. 16, 2007) (adultery, breaking restriction, and indecent assault); United States v. Flores, ACM 36218, 2006 WL 3895072, at *1–2 (A.F. Ct. Crim. App. Dec. 15, 2006) (rape, indecent acts, conspiring to wrongfully use cocaine, burglary, and adultery). Lawrence J. Korb of the Brookings Institute stated that when adultery prosecutions occur, they are more "aimed at a member of the Armed Forces already in trouble for something else," likening it to "'getting Al Capone on income tax evasion.'" Maravilla, *supra* note 75, at 660 (quoting Fisher, *supra* note 75).

237. The MCM requires that what is substantially one transaction not be charged as two or more offenses. MCM, *supra* note 13, pt. II, r. 307(c)(4). Therefore, an offense and a lesser-included offense for the same transaction should never be separately charged. *See id.* pt. II, r. 307(c)(4) discussion. For a complete discussion of the challenging aspect of double jeopardy in military practice, see generally Christopher S. Morgan, *Multiplicity: Reconciling the Manual for Courts-Martial*, 63 A.F. L. REV. 23 (2009).

incidents as the fraternization charges.[238] In that case, the adultery charges were not only unnecessary but even hurt the government's case by exposing it to reversal on appeal for potential overreaching.[239]

When adultery is prosecuted as an unrelated charge or as the leading charge—cases that are the exception[240]—the armed services have shown a propensity to use adultery as a means of humiliation and retaliation.[241] An example of this is the case against Captain John Yee, whom the Army humiliated with an adultery charge tacked on after its original case fell apart.[242] Even the Cox Commission, a group brought together by the National Institute of Military Justice in 2001 to evaluate and recommend changes to the UCMJ,[243] pointed out that the majority of adulterous acts in the military are not prosecuted, and when they are, they create a "powerful perception" that the prosecution of adultery "is treated in an arbitrary, even vindictive, manner."[244] The military justice system itself has urged that adultery be dealt with informally by nonjudicial punishment

238. United States v. Jefferson, 21 M.J. 203, 204 (C.M.A. 1986).

239. *See id.* The court in *Jefferson* decided not to remand the case for sentencing after concluding that the appellant suffered no prejudice as to his sentence from the multiplicity. *Id.* Multiplication of charges is an ever-present danger in military law because many offenses are not the product of statutes but come from orders or customs of the armed services. *See* United States v. Quiroz, 55 M.J. 334, 337, 347–48 (C.A.A.F. 2001) (discussing the history of and the standard for an unreasonable multiplication of charges in the unique context of military law).

240. In an interview with Navy Region Southwest Spokesman Doug Sayers, in response to a question about how many people have been court-martialed for adultery, Sayers responded, "[I]t's probably fair to say that not many people (almost none) have been court-martialed for adultery alone." *Navy Spokesman Answers I-Team Questions*, 10NEWS.COM, http://www.10news.com/print/20135940/detail.html (last visited Nov. 15, 2010); *see also* Maravilla, *supra* note 75, at 672 ("[A]dultery [is] often not really the primary issue, but instead [is] usually secondary to a more serious crime.").

241. The adultery charges against Lieutenant Commander Penland and Captain Yee are two examples in which the military has pursued adultery prosecutions under suspicious circumstances. *See supra* notes 2–12, 189–93 and accompanying text.

242. *See supra* notes 7–12 and accompanying text.

243. *See* NAT'L INST. OF MILITARY JUSTICE, *supra* note 62, at 2.

244. *See id.* at 11; *see also* Petition for Writ of Certiorari to the United States Court of Military Appeals, *supra* note 78, at *13–14 ("I believe statistics will demonstrate that at least 50% of the males in the Air Force have experienced extra-marital relationships. I can name names of high ranking officers who are well known to be involved in such activity and it is simply winked at." (quoting Colonel Lipscomb)).

as much as possible,[245] showing that even the military realizes that the law is unpopular and unnecessary.

The needlessness of the crime of the adultery is further illustrated by the fact that existing sanctions provided by the UCMJ are sufficient to accomplish the same goals.[246] Inappropriate relationships that harm unit cohesion and disrupt good order and discipline are already criminalized under article 134's offense of fraternization.[247] Fraternization punishes any improper relationship between an officer and an enlisted member that is prejudicial to good order and discipline or of a nature to discredit the armed forces, regardless of whether either actor is married.[248] Moreover, the UCMJ allows each military branch to determine its own regulations on fraternization, and as a result, each branch can also proscribe improper relationships between enlisted personnel of different ranks or officers of different ranks.[249] Additionally, dishonesty itself is already sanctioned by article 107—the article for punishing false official statements.[250] Therefore, two of the most troubling issues about a servicemember who commits adultery—that the servicemember is labeled as untrustworthy or that the affair tends to disrupt order within

245. *See* Hopkins, *supra* note 30, at 259 (explaining how the military decided not to rescind its policy of criminalizing adultery but balanced that move by encouraging more informal responses to adultery charges).

246. *See* NAT'L INST. OF MILITARY JUSTICE, *supra* note 62, at 11.

247. *See supra* note 190. In addition, fraternization, unlike adultery, has traditionally always been a military offense, providing another reason why prosecuting fraternization would be preferable to prosecuting adultery in the military. *See* Cox, *supra* note 81, at 792, 795.

248. MCM, *supra* note 13, pt. IV, ¶ 83. To determine if the relationship is improper, the MCM lists several circumstances that commanders and judges should consider when determining whether the interaction amounted to fraternization. These include "whether the conduct has compromised the chain of command, resulted in appearance of partiality, or otherwise undermined good order, discipline, authority, or morale." *Id.* pt. IV, ¶ 83(c)(1).

249. *See* Uniform Code of Military Justice art. 92, 10 U.S.C. § 892 (2006); Martha Chamallas, *The New Gender Panic: Reflections on Sex Scandals and the Military*, 83 MINN. L. REV. 305, 352 (1998). Article 92 allows the punishment of any person who "violates or fails to obey any lawful general order or regulation." 10 U.S.C. § 892(1). Therefore, each branch may create its own regulation on fraternization and punish any violation of that regulation under article 92 as an act of disobedience. *See* Chamallas, *supra*, at 352. For a discussion of each service branch's separate regulations on fraternization, see Paul H. Turney, *Relations Among the Ranks: Observations of and Comparisons Among the Service Policies and Fraternization Case Law, 1999*, ARMY LAW., Apr. 2000, at 97, 99–103.

250. Uniform Code of Military Justice art. 107, 10 U.S.C. § 907 (2006). The statute punishes any person subject to the UCMJ who, "with intent to deceive, signs any false record, return, regulation, order, or other official document, knowing it to be false, or makes any other false official statement knowing it to be false." *Id.*; MCM, *supra* note 13, pt. IV, ¶ 31.

the unit—can be corrected without the use of the adultery offense.[251] Fraternization also addresses the serious problem that although some sexual conduct in the military appears to be consensual, it may actually be coercive sexual misconduct in the military context of rank, even if both servicemembers are unmarried.[252] The Cox Commission agrees that even though some instances of adultery amount to criminal conduct in the military context, "[v]irtually all such acts . . . could be prosecuted without the use of provisions specifically targeting . . . adultery."[253] In addition, these proscriptions promote military effectiveness with clear offenses that punish specific acts without delving into subjective and unclear factors, such as whether the public would disapprove of the conduct or whether it is immoral.[254]

Moreover, although the military promotes the crime of adultery as a method to increase troop morale, these prosecutions may indeed have the opposite effect on servicemembers. First, the unfair and arbitrary fashion with which the military pursues adultery prosecutions today cannot have any positive effect on the confidence and camaraderie

251. *See* Winner, *supra* note 23, at 1103–04 ("Flaws in a soldier's moral character . . . put the mission and additional lives at risk. . . . [A]dultery entails an additional harmful element . . . . Namely, an adulterous affair 'inevitably involves deceit,' and, most likely, deceit of one's own spouse and children." (quoting Evan Thomas, *Shifting Lines: After Cracking Down on an Adulterous Female Pilot, the Brass Shields an Adulterous Male General*, NEWSWEEK, June 16, 1997, at 32, 38 (quoting General Charles Krulak, Commandant of the Marine Corps))).

252. Because of the increased number of women in the armed forces, fraternization has become increasingly concerned with social and sexual relationships between officers and enlisted members. *See* SCHLUETER, *supra* note 72, § 2-8; *see also* NAT'L INST. OF MILITARY JUSTICE, *supra* note 62, at 12 (describing the potential for coercive sexual misconduct in the military); Hopkins, *supra* note 30, at 241–45 (discussing the motivations for prosecuting fraternization as eliminating potential favoritism in the chain of command and potential abuses of power by a higher ranked servicemember if the lower-ranked member does not comply with sexual demands).

253. NAT'L INST. OF MILITARY JUSTICE, *supra* note 62, at 11.

254. *See supra* Part IV.A.1–2. However, some believe that fraternization has the same pitfalls as the prohibition of adultery—that the offense is vague, unclear, and subjective—because it is also a sample offense under article 134. *See* Chamallas, *supra* note 249, at 350–51. On the other hand, many commentators believe that fraternization, unlike adultery, focuses more on military issues of order and discipline because of its emphasis on rank, and therefore does not impact morale or conflict with civilian views in the way that adultery does. *See* Maravilla, *supra* note 75, at 676 (noting that the prohibition against adultery undermines the military's relationship with civilian society more than the adulterous conduct itself because there is often "no justification on the side of order and discipline").

among servicemembers.[255] To allow adultery to carry on all around without any repercussion[256] and then to turn around and reprimand Lieutenant Commander Penland with a general court-martial for the same conduct[257] seems like a very strange way to promote morale.[258] Additionally, the punishment for adultery is exceptionally harsh, especially considering the amount of the general population that engages in adultery.[259] First, whenever a servicemember receives a punishment, a negative annotation appears in the servicemember's permanent military record.[260] These records are examined for purposes of a promotion, and as a result, an adultery conviction could effectively end a military career.[261] In addition, because adultery can be prosecuted by a general court-martial, a conviction is essentially equivalent to a felony for purposes of state law,[262] which also means that it can be reported to the Federal Bureau of Investigation's Criminal Justice Information System.[263] This

255. *See supra* notes 241–44 and accompanying text.

256. *See supra* notes 80–83, and accompanying text.

257. *See supra* notes 2–6 and accompanying text.

258. In addition, servicemembers face a double standard when they are subject to harsh penalties for adultery, whereas their civilian spouses will not face criminal liability for the same type of adulterous conduct. *See supra* notes 222–23 and accompanying text.

259. *See supra* note 81. Even though she did not receive the maximum punishment available, Lieutenant Commander Penland's sentence is especially severe because she suffers from thrombocytosis and would have received continued free healthcare if she had been allowed to carry out the last few months of her twenty years of service and retire with benefits. *See supra* note 3. For others, the punishment's effects are even more deeply felt, as in the case of Air Force Lieutenant Colonel Karen Tew, who committed suicide after pleading guilty to an affair and being dismissed from the service one year short of retirement. *See* Fisher, *supra* note 75.

260. *See* Esquivel, *supra* note 56, at 855.

261. *See id.* ("Because the military has a policy of attrition for servicemembers who do not attain certain levels of promotion, any judicial or non-judicial punishment can effectively end a military career." (footnote omitted)).

262. Amos, *supra* note 188 (quoting Penland's defense lawyer, Marine Captain Patrick Callahan, who stated that an adultery conviction in a general court-martial is equivalent to a felony conviction in civilian courts).

263. Army Regulations only require the reporting of certain offenses to the Criminal Justice Information System, including murder, robbery, and rape, but not including adultery. *See* U.S. DEP'T OF THE ARMY, ARMY REGULATION 190–45, LAW ENFORCEMENT REPORTING, § 4–10 (2007), *available at* http://www.army.mil/usapa/epubs/pdf/r190_45.pdf; Gasper, *supra* note 46, at 175. But military confinement facilities also report criminal information to the Criminal Justice Information System and must report criminal information about a prisoner whose sentence is for an offense that carries a possible sentence of confinement of one year or more, thus including an adultery conviction as an offense that requires reporting. *See* U.S. DEP'T OF THE ARMY, ARMY REGULATION 190–47, LAW ENFORCEMENT REPORTING, § 10–2 (2006), *available at* http://www.army.mil/usapa/epubs/pdf/r190_47.pdf. Consequently, if sentenced to the brig for adultery, this information will make it into the Criminal Justice Information System. *See id.*

means the conviction stays with the servicemember long after that individual leaves the service, and thus, any court-martial conviction should not be taken lightly. Depending on the particular state's definition of a felony, a conviction could affect the servicemember's voting rights, the right to own a weapon, and could even lead to a denial of retirement and Veteran's Affairs (VA) benefits.[264] Furthermore, if a servicemember loses retirement benefits, there would be no recourse to appeal that decision.[265] The benefits are simply gone forever.

Civilians who accompany the military on its missions abroad are now also subject to the statutes under the UCMJ, due to a law enacted by Congress in 2007.[266] As of yet, there have not been any reported adultery prosecutions of civilians under the UCMJ, presumably because civilians have less risk of prejudicing good order and discipline and their conduct does not usually reflect upon the armed services.[267] Moreover, adultery prosecutions against civilians may be unconstitutional,[268] assuming that the special interest[269] afforded to the military when regulating its personnel is not applicable to civilians who accompany the military abroad. Even if the military decides never to prosecute civilians for adultery to avoid potential constitutional issues, it will create another double standard under the UCMJ by allowing some to philander while others subject to

264. *See* Jeff Walker, *The Practical Consequences of a Court-Martial Conviction*, ARMY LAW., Dec. 2001, at 1, 9. Penland will lose her retirement and health benefits, even though she is suffering from a serious disorder, thrombocytosis, which requires intensive medical treatment. *See* Petition for Writ of Mandamus, *supra* note 2, at 3. Access to other medical insurance will be difficult because she has this preexisting condition. *See id.* at 4. Admittedly, Penland will still have access to VA hospitals but will not have the same level healthcare she would have received had she been allowed to retire. *See supra* note 3 and accompanying text.

265. *See* Walker, *supra* note 264, at 12.

266. *See supra* notes 59–60 and accompanying text.

267. Nothing is certain in the area of military adultery prosecutions, however, and given the tendency of military prosecutors to pursue adultery charges in retaliation and with the intent to humiliate, it is clear that not even civilian contractors are completely safe from such a charge. *See supra* notes 241–44 and accompanying text. Plus, should a civilian's affair invoke the wrath of a military commander, an adultery prosecution is certainly foreseeable. *See* Dan E. Stigall, *An Unnecessary Convenience: The Assertion of the Uniform Code of Military Justice ("UCMJ") over Civilians and the Implications of International Human Rights Law*, 17 CARDOZO J. INT'L & COMP. L. 59, 67 (2009).

268. *See supra* notes 45–50 and accompanying text; *see also* Maravilla, *supra* note 75, at 668 ("[T]he consensual nature of an adulterous relationship in private should be afforded the same constitutional protections regardless of the context.").

269. *See supra* note 198.

the same set of laws must face severe penalties for the same actions.[270] To avoid these potential conflicts, the entire armed services would be better served by eliminating the offense of adultery and only proscribing conduct that directly affects the proper function of the military.[271]

VII. CONCLUSION

It is without question that the crime of adultery has fallen out of favor in the civilian justice system. Why, then, does the military cling to this outdated law? The claim is that the regulation of some adulterous conduct is necessary to maintain the support of the American people, to uphold good order and discipline, and to preserve the concept of honor among servicemembers. Assuming the validity of these interests, they all can be furthered by prosecuting the conduct through other existing offenses. Moreover, some of these interests are actually hindered by the continued exploitation of the adultery offense by military prosecutors, the uneven application of the statute to servicemembers, and the many double standards created by the presence of the crime of adultery. To maintain troop morale and the support of the civilian world, the military should do the honorable thing and eliminate the crime of adultery.

270. *See supra* notes 260–65 and accompanying text.

271. Proscribing fraternization is an example of an offense that focuses more on the effect of the conduct on good order and discipline. *See supra* notes 204, 254 and accompanying text. Concededly, even if the government eliminated adultery from the MCM, prosecutors could still pursue adultery charges under the general article, article 134, which allows prosecutions of any conduct deemed to prejudice good order and discipline. Uniform Code of Military Justice art. 134, 10 U.S.C. § 934 (2006). However, because adultery prosecutions were rare before the addition of the adultery offense in 1984 and their popularity did not catch on until after the appearance of the enumerated offense, most likely the prosecutions would decline steadily again after the deletion of the crime of adultery. *See* Hopkins, *supra* note 30, at 247 ("Prosecutions for adultery soared after the passage of the 1984 amendments to the MCM.").