

**THE OTHER DON'T ASK, DON'T TELL: ADULTERY
UNDER THE UNIFORM CODE OF MILITARY JUSTICE
AFTER *LAWRENCE V. TEXAS***
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I. INTRODUCTION

The U.S. military has a long standing prohibition, punishable by court martial, against adultery committed by service members whether it is between service members of the same rank, different ranks, or with civilians.¹ While the armed forces are a unique body in terms of constitutional jurisprudence and not necessarily subject to the same protections as civilians (generally with regard to the First Amendment right to free speech),² this doctrine is not absolute. The Supreme Court's decision in *Lawrence v. Texas* opened the issue whether consensual sexual activity between two adults is protected under the Constitution, specifically in homosexual relationships.³ The Court of Appeals for the Armed Forces in *United States v. Marcum* sidestepped the issue by finding that *Lawrence* did not apply to the specific facts in that case.⁴ Subsequent military courts have misread *Marcum* in holding that *Lawrence* either: (1) is applied only on a case by case basis,⁵ or (2) does not apply in the military context at all.⁶

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¹ Ian Fisher, *Army's Adultery Rule Is Don't Get Caught*, N.Y. TIMES, May 17, 1997, § 1, at 1.

² *Parker v. Levy*, 417 U.S. 733, 743 (1974); *United States v. Priest*, 21 C.M.A. 564, 570 (C.M.A. 1972).

³ 539 U.S. 558, 578 (2003).

⁴ 60 M.J. 198, 207–08 (C.A.A.F. 2004).

⁵ See *United States v. Bart*, 61 M.J. 578, 582 (N-M. Ct. Crim. App. 2005).

⁶ See *Marcum*, 60 M.J. at 208.

Adultery covers a wide range of conduct from one night stands, relationships with a co-worker, to long-term romantic entanglements.⁷ Adultery among members of the Armed Forces is considered common.⁸ For example, condoms have been made available for both married and unmarried sailors going ashore.⁹ There are no statistics available for the rate of adultery among members of the armed forces. There is, however, what is considered to be an informal amendment to the prohibition of adultery: “[D]o what you want, but don’t do it blatantly and don’t get caught.”¹⁰ In other words, the policy is another form of “Don’t Ask, Don’t Tell.”¹¹

In interviews with soldiers stationed at Fort Bliss in El Paso, Texas, the *New York Times* found one soldier who said, “But everyone is human. It’s going to happen.”¹² Another married soldier spent forty dollars to spend five minutes with a prostitute in a Mexican brothel.¹³ To prosecute any one of these individuals for their conduct becomes almost arbitrary. Critics also argue that the military prosecutors’ willingness to pursue charges against adulterers varies depending on the service and the commanders.¹⁴ Lawrence J. Korb of the Brookings Institute also argues that these prosecutions when they do occur are more aimed at a member of the Armed Forces already in trouble for something else.¹⁵ He likens it to “getting Al Capone on income tax evasion.”¹⁶

However, as this article argues, *Lawrence* applies to the military, and the crime of adultery in and of itself should no longer be barred by the military because it serves to merely enforce a moral code. Rather, adultery between service members of different ranks should be brought under the

⁷ Fisher, *supra* note 1.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ This term is more commonly used to describe the U.S. military’s policy on homosexuality. 10 U.S.C. § 654 (2006).

¹² Fisher, *supra* note 1.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

prohibition against fraternization.¹⁷ While this article does not reach “Don’t ask, Don’t tell,” many of the arguments presented resonate with that issue. This article will: (1) discuss the military’s criminalization of adultery in light of *Lawrence* and *Marcum*, (2) argue that this prohibition serves only to enforce a moral code, and (3) that such prosecutions should be brought as fraternization, not adultery.

II.

The prohibition against adultery arises from British military ethos which was influenced by Christian views on sexuality.¹⁸ The Amendments of 1677 to the Articles of War, including Article 37, made adultery and fornication crimes punishable by expulsion from the army or as decided by court martial.¹⁹ During Victorian times, it was a violation of Standing Orders to enter the accommodations of the opposite sex.²⁰ Sexual intercourse between unmarried soldiers, both heterosexual and homosexual, was also forbidden in military accommodations.²¹ The guards would routinely search the accommodations of single soldiers to ensure such activity did not occur.²²

During the Revolutionary War, the Colonies adopted the British Articles of War adopting all of the same punitive measures.²³ In June, 1775, the Second Continental Congress enacted the Articles of War for the Continental Army.²⁴ Later, the military became governed by statutes designated as the “Articles of War” for the Army and the “Articles for Government of the Navy.”²⁵ Both of these maintained the previous prohibitions on adultery.²⁶ In May 1950, Congress enacted the Uniform

¹⁷ As discussed in this article, *Lawrence* may also not apply in this context because the issue of consent may not be as clear when one of the parties is a commanding officer. See *infra* notes 164–181 and accompanying text.

¹⁸ Stephen Deakin, *British Military Ethos and Christianity*, BRIT. ARMY REV., Winter 2005, at 97, 97, 101.

¹⁹ *Id.* at 101.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 101–02.

²³ EDWARD M. BYRNE, *MILITARY LAW 7–8* (2d ed. 1976).

²⁴ *Id.* at 8.

²⁵ *Id.* at 5, 8.

²⁶ See MICHAEL J. DAVIDSON, *A GUIDE TO MILITARY CRIMINAL LAW 87* (1999).

Code of Military Justice (UCMJ),²⁷ which went into effect the following year,²⁸ and made adultery a felony.

The UCMJ, however, does not explicitly use the term adultery. Prosecutions are brought, instead, pursuant to the general article, Article 134,²⁹ along with paragraph 62 of the Manual for Courts Martial (MCM).³⁰ Article 134 prohibits “all disorders and neglects to the prejudice of good order and discipline in the armed forces [and] all conduct of a nature to bring discredit upon the armed forces.”³¹ The elements for a violation of Article 134 for adultery include:

- (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.³²

A violation of Article 134 carries a maximum penalty of “[d]ishonorable discharge, forfeiture of pay and allowances, and confinement for [one] year.”³³

In 1998, a committee appointed by then Secretary of Defense William S. Cohen proposed to change the MCM to reduce prosecutions of adultery and provide commanders guidelines for an appropriate determination of whether the adultery in question violated Article 134.³⁴ The proposed new rules kept adultery as a crime under the UCMJ, but recommended prosecutions only be brought when the adultery interfered with the

²⁷ Act of May 5, 1950, Pub. L. No. 81-506, 64 Stat. 107 (codified as amended at 10 U.S.C. §§ 801–946 (2006)).

²⁸ BYRNE, *supra* note 23, at 9.

²⁹ Uniform Code of Military Justice art. 134, 10 U.S.C. § 934 (2006).

³⁰ MANUAL FOR COURTS-MARTIAL UNITED STATES ¶ 62 (2008 ed.), available at <http://www.jag.navy.mil/documents/mcm2008.pdf> [hereinafter MCM].

³¹ Uniform Code of Military Justice art. 134, 10 U.S.C. § 934.

³² MCM, *supra* note 30, ¶ 62(b)(1)–(3).

³³ *Id.* ¶ 62(e).

³⁴ Steven Lee Meyers, *Military Weighing Changes in Policy Toward Adultery*, N.Y. TIMES, July 19, 1998, § 1, at 1.

operation of the military or disrupted unit morale.³⁵ However, the guidelines were not officially approved until 2002 when President George W. Bush issued an Executive Order incorporating some of the Cohen committee proposals into the MCM.³⁶ Paragraph 62 of the MCM is now accompanied by a detailed explanation of its application to Article 134 of the UCMJ:

(1) Nature of offense. Adultery is clearly unacceptable conduct, and it reflects adversely on the service record of the military member.

(2) Conduct prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces.

To constitute an offense under the UCMJ, the adulterous conduct must either be directly prejudicial to good order and discipline or service discrediting. Adulterous conduct that is directly prejudicial includes conduct that has an obvious, and measurably divisive effect on unit or organization discipline, morale, or cohesion, or is clearly detrimental to the authority or stature of or respect toward a servicemember. Adultery may also be service discrediting, even though the conduct is only indirectly or remotely prejudicial to good order and discipline. Discredit means to injure the reputation of the armed forces and includes adulterous conduct that has a tendency, because of its open or notorious nature, to bring the service into disrepute, make it subject to public ridicule, or lower it in public esteem. While adulterous conduct that is private and discreet in nature may not be service discrediting by this standard, under the circumstances, it may be determined to be conduct prejudicial to good order and discipline. Commanders should consider all relevant circumstances, including but not limited to the following factors, when determining whether adulterous acts are prejudicial to good order and discipline or are of a nature to bring discredit upon the armed forces:

³⁵ *Id.*

³⁶ Exec. Order No. 13262, 67 Fed. Reg. 18773, 18778–79 (Apr. 17, 2002).

- (a) The accused's marital status, military rank, grade, or position;
- (b) The co-actor's marital status, military rank, grade, and position, or relationship to the armed forces;
- (c) The military status of the accused's spouse or the spouse of co-actor, or their relationship to the armed forces;
- (d) The impact, if any, of the adulterous relationship on the ability of the accused, the co-actor, or the spouse of either to perform their duties in support of the armed forces;
- (e) The misuse, if any, of government time and resources to facilitate the commission of the conduct;
- (f) Whether the conduct persisted despite counseling or orders to desist; the flagrancy of the conduct, such as whether any notoriety ensued; and whether the adulterous act was accompanied by other violations of the UCMJ;
- (g) The negative impact of the conduct on the units or organizations of the accused, the co-actor or the spouse of either of them, such as a detrimental effect on unit or organization morale, teamwork, and efficiency;
- (h) Whether the accused or co-actor was legally separated; and
- (i) Whether the adulterous misconduct involves an ongoing or recent relationship or is remote in time.

(3) Marriage. A marriage exists until it is dissolved in accordance with the laws of a competent state or foreign jurisdiction.

(4) Mistake of fact. A defense of mistake of fact exists if the accused had an honest and reasonable belief either that the accused and the co-actor were both unmarried, or that they were lawfully married to each other. If this defense is raised by the evidence, then the burden of proof is upon

the United States to establish that the accused's belief was unreasonable or not honest.³⁷

Naturally, the first element of adultery may be difficult to prove and may require photographs, a confession, or an eye-witness account. The mere fact that someone stayed over at another's house or even slept with them in the same bed is not necessarily conclusive proof of sexual intercourse. However, as can be seen in the case law, oftentimes these relationships are discovered.³⁸ Additionally, the third element, that the adulterous behavior would "prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces,"³⁹ is subjective. The subjective nature of the offense is a strong criticism for continuing to allow the prohibition in its current form.⁴⁰

Despite these arguments against it, adultery as a crime under the UCMJ has remained an active issue. In the late 1990s, there were two high profile adultery cases with juxtaposed circumstances: Lt. Kelly Flinn and General Kevin Byrnes. Lt. Kelly Flinn, the Air Force's first woman B-52 pilot and an officer,⁴¹ had a sexual affair with a married enlisted man, though he was not in her chain of command.⁴² She later had an affair with a married civilian, Marc Zigo.⁴³ However, Zigo's wife was a junior enlistee.⁴⁴ Gayla Zigo said, "Less than a week after we arrived to the base, Lt. Flinn was in bed with my husband having sex."⁴⁵ At one point, Lt. Flinn's commanding officer who had been made aware of her affair advised her to end it.⁴⁶ Lt. Flinn instead moved in with Marc Zigo,⁴⁷ and, when confronted with the relationship, she lied under oath to investigators.⁴⁸

³⁷ MCM, *supra* note 30, ¶ 62(c).

³⁸ *See, e.g.*, United States v. Bart, 61 M.J. 578 (N-M. Ct. Crim. App. 2005).

³⁹ MCM, *supra* note 30, ¶ 62(b)(3).

⁴⁰ *See* Fisher, *supra* note 1.

⁴¹ Kate O'Beirne, *Bread and Circuses*, NAT'L REV., June 16, 1997, at 22.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

According to Flinn's letters to Zigo, it was an affair of the heart. Flinn wrote: "You have my heart, soul, mind and body . . . you are my soul mate. You make me whole."⁴⁹ However, when Zigo cheated on her too, she attempted to get her career back through the use of a public relations firm,⁵⁰ and aimed at getting a honorable discharge instead of facing a court-martial.⁵¹ Senator Trent Lott even became involved.⁵² Ultimately, Flinn accepted a less than honorable discharge from the Air Force in lieu of a court-martial for adultery among other charges, and potentially serving over nine years in prison.⁵³

In the second case, there was no connection to the military other than the general's status. In 2005, the U.S. Army removed four-star General Kevin Byrnes, a thirty-six-year veteran with a previously unblemished record and just about to retire from his command of Fort Monroe,⁵⁴ for adultery.⁵⁵ The allegations were that he had engaged in an extra-marital affair with a civilian.⁵⁶ The General was separated from his wife pending divorce while engaged in the affair.⁵⁷ Moreover, he was sanctioned on the same day his divorce was final.⁵⁸ The differences between the two cases show the subjective and unfair nature of the prosecutions.

Finally, ten members of the Navy from the aircraft carrier *U.S.S. Abraham Lincoln* were held guilty of sodomy, adultery, and fraternization by the ship's captain for voluntarily participating in an orgy.⁵⁹ While the ship was in port in Hong Kong, ten sailors, seven men and three women, had an orgy in a hotel room.⁶⁰ One of the women rented a hotel room and

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *An Officer and Vixen: The Air Force's Star Female Pilot Falls from Grace Enmeshed in a Tale of Passion*, U.S. VETERAN DISPATCH, June-Aug. 1997, <http://www.usvetdsp.com/story55.htm>.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Josh White, *4-Star General Relieved of Duty*, WASH. POST, Aug. 10, 2005, at A1.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Matt Potter, *America's Finest Felons*, SAN DIEGO READER, July 30, 1998, <http://www.sandiegoreader.com/news/1998/jul/30/americas-finest-felons/>.

⁶⁰ *Id.*

invited the others to a party.⁶¹ A Navy spokesman attempted to discreetly characterize the incident: “Numerous sexual acts were happening in the same place at the same time.”⁶² The orgy was referred to as “an isolated incident.”⁶³ This case may have marred the reputation of the military through the subsequent publicity surrounding the incident.

A. *Lawrence v. Texas*

In striking down the Texas sodomy statute and overturning the Court’s prior holding in *Bowers v. Hardwick*,⁶⁴ the Supreme Court expounded upon the meaning of liberty encompassing “freedom of thought, belief, expression, and certain intimate conduct.”⁶⁵ In other words, consenting adults’ decision with whom to engage in intimate sexual conduct is beyond the pale of the State’s regulatory power.⁶⁶ The case also touched upon a person’s liberty in the home “from unwarranted government intrusions into a dwelling or other private places.”⁶⁷ Thus, the liberty interest at issue was both “spatial” and “transcendent.”⁶⁸

The case arose when police officers entered the private residence of Lawrence in response to a “reported weapons disturbance” and observed him engaging in “deviate sexual intercourse, namely anal sex, with [another man].”⁶⁹ Following the fact that the petitioners were adults engaged in otherwise private and consensual sexual intimacy, the Court held that homosexuals had a liberty interest under the Due Process Clause to enter into a consensual intimate relationship with another person of the same sex.⁷⁰ The Court rejected the notion of the majority imposing their views on a minority through criminal sanctions.⁷¹ As the Court stated:

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁶⁵ *Lawrence*, 539 U.S. at 562.

⁶⁶ *Id.* at 578.

⁶⁷ *Id.* at 562.

⁶⁸ *Id.*

⁶⁹ *Id.* at 562–63.

⁷⁰ *Id.* at 578.

⁷¹ *Id.* at 577–78 (citing *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting), *overruled by* *Lawrence*, 539 U.S. 558).

“Our obligation is to define the liberty of all, not to mandate our own moral code.”⁷²

According to the Court, *Planned Parenthood of Southeastern Pennsylvania v. Casey* reaffirmed the Court’s prior holdings that the Constitution affords “protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.”⁷³ The Court in *Lawrence* did not mince words with the liberty of the individual to self determination in their private life and personal identity:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.⁷⁴

“It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.”⁷⁵ The Court’s prior decision in *Bowers* was explicitly overturned.⁷⁶ Accordingly, the consensual nature of an adulterous relationship in private should be afforded the same constitutional protections regardless of the context.

The military has long regulated relationships among service members in order to avoid preferential treatment, undermine good order and discipline, or diminished unit morale.⁷⁷ By contrast, in *Griswold v. Connecticut*, the Supreme Court held that the Due Process Clause protected individuals’ right to privacy in their marital bedroom.⁷⁸ The

⁷² *Id.* at 571 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

⁷³ *Id.* at 574 (citing *Casey*, 505 U.S. at 851).

⁷⁴ *Id.* (quoting *Casey*, 505 U.S. at 851).

⁷⁵ *Id.* at 578 (quoting *Casey*, 505 U.S. at 847).

⁷⁶ *Id.*

⁷⁷ *United States v. McCreight*, 43 M.J. 483, 485 (C.A.A.F. 1996) (citing *United States v. Boyett*, 42 M.J. 150, 154–55 (C.A.A.F. 1995)).

⁷⁸ 381 U.S. 479, 481, 485–86 (1965).

Court later extended *Griswold* to cover the liberty of unmarried couples.⁷⁹ Drawing on this tension, there is a constitutional deference to military regulations even in the marital context that would otherwise be constitutionally protected.⁸⁰ Despite this deference, adultery should not be an offense subject to prosecution in the military context. Most cases involving adultery, in light of the holding in *Lawrence*, should be brought as fraternization cases instead in which sexual intercourse is not necessarily the issue.

The Supreme Court has stated that “the military is, by necessity, a specialized society separate from civilian society.”⁸¹ It “depend[s] on a command structure that . . . must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself.”⁸² The First Amendment right to free speech is, for example, more limited in the military context.⁸³ The Court of Military Appeals has held that “the right of free speech in the armed services is not unlimited and must be brought into balance with the paramount consideration of providing an effective fighting force for the defense of our Country.”⁸⁴ Conversely, the same court has recognized that “men and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service.”⁸⁵

B. *United States v. Marcum*

In *Marcum*, the court held that the “[a]ppellant’s actions in the military context fell outside the zone of autonomy identified by the Supreme Court as a protected liberty interest.”⁸⁶ The person in question, “A,” saw airmen from his own flight group on a social basis when off-duty at parties.⁸⁷ Often, A would allow some of these airmen to spend the night at his off-

⁷⁹ *Eisenstadt v. Baird*, 405 U.S. 438, 454–55 (1972).

⁸⁰ *Parker v. Levy*, 417 U.S. 733, 757–58 (1974).

⁸¹ *Id.* at 743.

⁸² *Id.* at 759 (quoting *United States v. Priest*, 21 C.M.A. 564, 570 (C.M.A. 1972)).

⁸³ *See id.* at 758; *Priest*, 21 C.M.A. at 570.

⁸⁴ *Priest*, 21 C.M.A. at 570.

⁸⁵ *United States v. Mitchell*, 39 M.J. 131, 135 (C.M.A. 1994) (quoting *Weiss v. United States*, 510 U.S. 163, 194 (1994) (Ginsburg, J., concurring)).

⁸⁶ *United States v. Marcum*, 60 M.J. 198, 200 (C.A.A.F. 2004).

⁸⁷ *Id.*

base home after these parties.⁸⁸ The charges brought against A by some of these airmen involved allegations that they engaged in both “consensual and nonconsensual sexual activity” with A.⁸⁹

The court rejected A’s facial challenge to the constitutionality of Article 125’s prohibition of sodomy.⁹⁰ Article 125 sanctions both forcible and non-forcible sodomy, thus a facial challenge, the court reasoned, would reach further than the issue presented in the case.⁹¹ The court used this to sidestep the larger question of the constitutionality of sanctioning sodomy between consenting adults in light of the Supreme Court’s holding in *Lawrence* by focusing on the case as “a discrete criminal conviction based on a discrete set of facts.”⁹² Taking this approach, the court broke down the analysis in *Lawrence* into a three-part test.⁹³

First, the court deliberated whether A’s conduct was within the liberty interest established in *Lawrence*.⁹⁴ If the answer to the first question was in the affirmative then the court would inquire whether A’s conduct involved any of the explicit behavior identified in *Lawrence* as falling outside the liberty interest identified.⁹⁵ Actually, this is a superfluous query since any of the enumerated behavior would mean that the answer to the first question was negative. Nonetheless, the court analyzed the second question by further asking whether A’s conduct involved any person who might have been coerced into engaging in sodomy with him.⁹⁶ The court did not have to reach the last question, that is whether additional factors relevant to the military environment affect the application of the *Lawrence* liberty interest,⁹⁷ when it held that A’s conduct did not involve the liberty interest identified in *Lawrence*.⁹⁸ By not reaching *Lawrence* in the sodomy context, the issue of adultery was also left open for the lower courts to determine.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 206.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 206–07.

⁹⁴ *Id.* at 207.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 208.

The court noted that there was a risk involved in A's socializing with subordinates that their relationship could become unprofessional.⁹⁹ The definition is that "[r]elationships are unprofessional, whether pursued on or off-duty, when they detract from the authority of superiors or result in, or reasonably create the appearance of, favoritism, misuse of office or position, or the abandonment of organizational goals for personal interests."¹⁰⁰ As the Court recognized: "The fundamental necessity for obedience and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally permissible outside it."¹⁰¹

While servicemen and women "retain a liberty interest to engage in certain intimate sexual conduct, 'this right must be tempered in a military setting based on the mission of the military, the need for obedience of orders, and civilian supremacy.'"¹⁰² Accordingly, A could not sustain a facial challenge to Article 125 and the court upheld his conviction based on the particular facts of the case.¹⁰³ This decision left the larger question of *Lawrence's* application to the UCMJ unresolved. By declining to apply *Lawrence* to adultery prosecutions, even in dicta, the *Marcum* court allowed lower military courts to misapply and even not apply altogether the rule of law on this issue.

III.

By declining to apply *Lawrence* to adultery prosecutions, the military courts have continued to enforce a constitutionally circumspect moral code. The prohibition against adultery is aimed at regulating individual moral behavior, rather than good order and discipline. One commentator, Major Drew D. Jeter, USAF, has observed that "the MCM makes a value

⁹⁹ *Id.* at 207 (citing Dep't of the Air Force Instruction 36-2909, Professional and Unprofessional Relationships, ¶¶ 2.2, 3.1 (1996), *superseded by* Dep't of the Air Force Instruction 36-2909, Professional and Unprofessional Relationships (1999), *available at* <http://www.e-publishing.af.mil/shared/media/epubs/AFI36-2909.pdf>).

¹⁰⁰ *Id.* (quoting Dep't of the Air Force Instruction 36-2909, Professional and Unprofessional Relationships, ¶ 2.2 (1996), *superseded by* Dep't of the Air Force Instruction 36-2909, Professional and Unprofessional Relationships (1999), *available at* <http://www.e-publishing.af.mil/shared/media/epubs/AFI36-2909.pdf>).

¹⁰¹ *Id.* (quoting *Parker v. Levy*, 417 U.S. 733, 758 (1974)).

¹⁰² *Id.* at 208 (quoting *United States v. Brown*, 45 M.J. 389, 397 (C.A.A.F. 1996)).

¹⁰³ *Id.*

judgment that adultery . . . is unacceptable to the extent of being punishable by law.”¹⁰⁴ He goes on to state that “[b]ased on this country’s strong Judeo-Christian roots, which condemn adultery as immoral, it is reasonable to assume that this value judgment was established based on traditional moral principle, such as is expressed in the seventh of the [B]ible’s ‘Ten Commandments.’”¹⁰⁵

In reviewing the case law, the issue of adultery was often not really the primary issue, but instead was usually secondary to a more serious crime. In *United States v. Meredith*, the appellant, an aviation electronics student, was convicted on three charges: disobeying a lawful general regulation, rape, and adultery.¹⁰⁶ Aviation Electronics Technician Third Class (AT3) “B” went out for an evening with her colleagues including the appellant, a married senior enlisted man.¹⁰⁷ She became very intoxicated and the group decided to leave her in appellant’s room to sleep.¹⁰⁸ Her only memory was “awaking in the middle of the night, naked and spread-eagled on the bed, with the appellant (also naked) on top of her, engaged in sexual intercourse.”¹⁰⁹ The next morning she awoke in the bed both her and the appellant naked.¹¹⁰ As she left the room, he said “‘How about a good morning fuck?’”¹¹¹ By definition, while the appellant was married, his conduct was not adultery.¹¹² The case also does not raise a *Lawrence* defense because the interaction was not consensual. Accordingly, the appellant should never have been charged with adultery under either the definition or in light of *Lawrence*.

¹⁰⁴ Drew D. Jeter, *Moral Leadership in an Increasingly Amoral Society: Is the United States Military Value System Suitable in Contemporary America* 21–22 (Apr. 1998) (unpublished research report, Air Command and Staff College, Air University), available at <http://www.au.af.mil/au/awc/awcgate/acsc/98-137.pdf>.

¹⁰⁵ *Id.* at 22.

¹⁰⁶ No. 200100985, 2006 WL 1500001, at *1 (N-M. Ct. Crim. App. May 30, 2006).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Adultery is defined as: “[v]oluntary sexual intercourse between a married person and someone other than the person’s spouse.” BLACK’S LAW DICTIONARY 56 (8th ed. 2004). In this case, there was no question that the conduct was not consensual.

The problem raised by *Marcum's* non-application of *Lawrence* to the UCMJ is also well illustrated by the decision in *United States v. Bart*.¹¹³ Following *Marcum*, the court upheld the conviction of a servicewoman court-martialed for consensual sodomy, adultery, conspiracy to obstruct justice, and making a false official statement.¹¹⁴ This case well illustrates the problem with *Marcum* because the court interpreted that decision to mean that adultery and sodomy should be decided on a case by case basis in light of *Lawrence*.¹¹⁵ On the contrary, the convictions for adultery and consensual sodomy¹¹⁶ should have been overturned as violating the liberty interest established in *Lawrence* while the ancillary crimes the adulterous conduct gave rise to should have been prosecuted.

In *Bart*, two service members, appellant "A" and Hospital Corpsman Second Class (HM2) "T," were assigned to the same department at Marine Corps Base Camp Pendleton and commenced an adulterous affair.¹¹⁷ At the time of the affair, A resided in base quarters with her son while at the same time seeking a divorce from her estranged civilian husband who resided in another state.¹¹⁸ The two engaged in sexual intercourse along with oral and anal sodomy several times a week in A's base quarters.¹¹⁹ T was married to a civilian and had two children living on base.¹²⁰ In order to facilitate their affair, T arranged to spend time with A by telling his wife he had roving patrol duty in which he could not be contacted.¹²¹ On

¹¹³ 61 M.J. 578 (N-M. Ct. Crim. App. 2005).

¹¹⁴ *Id.* at 579.

¹¹⁵ *Id.* at 582.

¹¹⁶ In *United States v. Stocks*, 35 M.J. 366 (C.M.A. 1992), the Court of Military Appeals reviewed the convictions for adultery and indecent acts of performing oral sex on the vagina of a female soldier prior to sexual intercourse. *Id.* at 366-67. The court affirmed the adultery conviction but reversed the conviction for an indecent act. *Id.* Oral sex was considered "consensual sexual touching that amount[s] to mere foreplay," not sodomy. *Id.* at 367.

¹¹⁷ *Bart*, 61 M.J. at 581.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

February 13, 1999, the affair went awry when T murdered his wife.¹²² A had earlier imposed a deadline for T to leave his wife for her.¹²³

The court found that the affair had a negative impact on unit morale.¹²⁴ T and A worked in the same department and their co-workers knew about the close personal relationship between them.¹²⁵ To complicate matters further, during an investigation, A “provided several false statements concerning her adulterous affair.”¹²⁶ In this case, the adultery instigated a very serious crime, but should not have been charged as a criminal act. Pursuant to *Lawrence*, the remaining charges could have still been brought with the affair being an integral part of the prosecution’s case without being a charge itself.

In some cases the courts explicitly used the rationale of enforcing a moral code to support their decision. In *United States v. Orellana*, the appellant was convicted of adultery, conspiracy to commit adultery, making a false official statement, assault and battery, and obstructing justice.¹²⁷ The appellant argued that his adultery was constitutionally protected.¹²⁸ The court “specifically [held] that *Lawrence v. Texas* does not bar the prosecution of adultery under the UCMJ.”¹²⁹

The appellant in *Orellana* was a married, non-commissioned Marine officer who met “E,” a nineteen-year old civilian, and “V,” also a civilian but the fourteen-year old step-daughter of another Marine non-commissioned officer, near the base exchange.¹³⁰ The appellant had sexual intercourse with E at least five times the same month in his quarters while his wife and children were away.¹³¹ Four months later, he invited V to his quarters for sexual intercourse.¹³² In addition to those incidents, he also later invited Corporal Daniel J. Villanueva to go out with him, E, and V on

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 582.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ 62 M.J. 595, 596 (N-M. Ct. Crim. App. 2005).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 596–97.

¹³² *Id.* at 597.

a “double date.”¹³³ The couples proceeded to take turns having sexual intercourse in his car.¹³⁴ The appellant’s wife, upon discovering his adulterous conduct, “struck him in the head.”¹³⁵ In turn, he “push[ed] his wife and punch[ed] her on the side of her head with his closed fist.”¹³⁶

The court declined to extend *Lawrence*’s constitutional protection to adultery between consenting adults.¹³⁷ The court stated: “[W]e note that neither *Lawrence* nor *Marcum* expressly considered the constitutional validity of a criminal prosecution for adultery.”¹³⁸ The distinction between a criminal prosecution for adultery and a criminal prosecution for sodomy is enough to distinguish *Lawrence* from *Orellana*. In fact, the argument to apply *Lawrence* is actually stronger on the facts involving consensual sexual intercourse between adults, even in an adulterous relationship.

Moreover, not only did the *Orellana* court not apply *Lawrence* to adultery, but it explicitly based its holding on a rationale based on a moral code.¹³⁹ The court emphasized the importance of “fostering the fundamental social institution of marriage.”¹⁴⁰ The court further stated:

[T]he military has a particular interest in promoting the preservation of marriages within its ranks. Because military families are often required to endure extended separations from a spouse due to operational commitments, commanders have a unique responsibility to ensure that the morale of their deployed personnel (and that of the spouses left behind) is not adversely affected by concerns over the integrity of their marriages.¹⁴¹

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 598. The adulterous behavior between appellant and E would come under the purview of *Lawrence* since E was a consenting adult. *Id.* at 596. Appellant’s conduct with V, however, was outside the scope of *Lawrence* because V was a minor at the time of their relationship. *Id.*

¹³⁸ *Id.* at 598.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 601.

This is precisely the type of rationale the decision in *Lawrence* explicitly rejected.¹⁴² Finally, the prosecution did not have to demonstrate actual harm to the reputation of the military.¹⁴³ Instead, the court made their decision on the totality of the circumstances.¹⁴⁴ While the adultery between consenting adults charge should not have been brought, the remaining charges, including the appellant's conduct with V, could be brought against appellant particularly because of the impact on morale since he involved another Marine.¹⁴⁵

The prohibition against adultery demonstrates that the military is out of touch with society. Dr. Martin L. Cook, an ethics professor at the U.S. Army War College, has said: "There is the risk that the military may come to view itself as too set apart from, and morally superior to, the civilian culture it is charged to protect."¹⁴⁶ He goes on to point out that "[o]nly a military that daily lives out its values and feels its connection to the citizens is a military that engenders the respect and loyalty of the nation and keeps it from being feared."¹⁴⁷ The Kelly Flinn case underscored the gap between civilian views of adultery prosecutions in the military and the sanctions under the UCMJ itself.¹⁴⁸ A CNN/USA Today/Gallup poll found Americans nearly evenly split on the issue: forty-three percent thought Flinn was treated fairly while forty-seven percent thought the treatment was unfair; moreover, forty-seven percent said treatment was worse for Flinn than for a man, twenty-seven percent answered the treatment was the same, and seventeen percent thought that Flinn was treated better than a man.¹⁴⁹ If there is no justification on the side of order and discipline (like the case with fraternization), the prohibition against adultery tends to undermine the military's relationship with civil society more than the conduct itself.

¹⁴² *Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (stating that the moral considerations behind the condemnation of homosexual conduct "do not answer the question before us").

¹⁴³ *Orellana*, 62 M.J. at 599.

¹⁴⁴ *Id.* at 600 ("We do not . . . consider the appellant's actions in a vacuum.")

¹⁴⁵ *Id.*

¹⁴⁶ Martin L. Cook, *Moral Foundations of Military Service*, PARAMETERS, Spring 2000, at 117, 128.

¹⁴⁷ *Id.*

¹⁴⁸ See Poll: Many Believe Air Force Treated Flinn Unfairly, CNN, May 23, 1997, <http://www.cnn.com/US/9705/23/flinn.poll/index.html>.

¹⁴⁹ *Id.*

IV.

Many adultery cases, because of *Lawrence*, should be brought under the prohibition against fraternization. Fraternization should not be confused with sexual intercourse.¹⁵⁰ Fraternization “occurs when there is a personal relationship between enlisted members that is unduly familiar and does not respect differences in grade when the conduct is prejudicial to good order and discipline or of a nature to bring discredit on the [armed forces].”¹⁵¹

In *United States v. Jackson*, the appellant was convicted of “fraternizing with four different female enlisted Marines who were junior to him in grade.”¹⁵² In June 2003, the appellant attempted to organize a fashion show at his base as a fundraiser for the Marine Corp Ball.¹⁵³ Through this endeavor he met several enlisted Marine Corp women, and asked them to fill out “profiles” for the show.¹⁵⁴ He invited them to his quarters under the auspices of the fashion show and to fill out their profiles.¹⁵⁵ One woman, Lance Corporal R, went to his room and later returned at his invitation “to watch movies and to spend time together outside of normal working hours.”¹⁵⁶ The fashion show never happened, and the appellant admitted that he “hoped that his contacts with the four women would develop into sexual relationships.”¹⁵⁷ They never did.¹⁵⁸ Jackson was convicted of fraternization.¹⁵⁹ Under *Lawrence*, even if sexual conduct had occurred between Jackson and any of the women, so

¹⁵⁰ See *United States v. Jackson*, 61 M.J. 731, 733 (N-M. Ct. Crim. App. 2005) (showing charges of fraternization do not require sexual intercourse to have occurred).

¹⁵¹ *United States v. Klinger*, No. 200500688, 2006 WL 235329, at *3 (N-M. Ct. Crim. App. Jan. 31, 2006) (referring specifically to naval regulations).

¹⁵² *Jackson*, 61 M.J. at 732.

¹⁵³ *Id.* at 733.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 734. However, the appellate court reversed appellant’s fraternization conviction because appellant did not enter into the type of relationship prohibited by the fraternization provision. *Id.* at 735–36.

long as that conduct was consensual and between adults, the charge should have remained at fraternization.

The intersection of fraternization and sexual conduct was recognized in *United States v. Klinger*.¹⁶⁰ In that case, the appellant was convicted of forcible sodomy after an evening of drinking at his home.¹⁶¹ The court observed that the incident occurred in the context of fraternization.¹⁶² The evening included “socializing and drinking alcohol in which neither participant respected their differences in grade.”¹⁶³ This case is outside of *Lawrence* because the conduct was not consensual, but remains illustrative of the intertwining of fraternization and sex.

In *United States v. McCoy*, the appellant was convicted of failure to obey a general regulation, consensual sodomy, and conduct unbecoming an officer and a gentleman.¹⁶⁴ The appellant, a married captain, asserted that his sexual encounters with Lance Corporal “H” were constitutionally protected.¹⁶⁵ They met at “Bosses Night” at an enlisted club.¹⁶⁶ The appellant introduced himself by his first name, and was not wearing his wedding ring.¹⁶⁷ The two eventually left the club and H performed fellatio in appellant’s car.¹⁶⁸ They then drove to another parking lot for intercourse.¹⁶⁹ A second encounter occurred a week later in the appellant’s quarters,¹⁷⁰ and a third time in H’s barracks.¹⁷¹

The court held that under the facts of the case, the sexual conduct at issue fell within the exceptions to *Lawrence*.¹⁷² While all of the sexual conduct was consensual between two adults,¹⁷³ their relationship touched on factors the Supreme Court identified as outside the scope of

¹⁶⁰ No. 200500688, 2006 WL 235329 (N-M. Ct. Crim. App. Jan. 31, 2006).

¹⁶¹ *Id.* at *1.

¹⁶² *Id.* at *3.

¹⁶³ *Id.*

¹⁶⁴ No. 200101209, 2006 WL 1029163, at *1 (N-M. Ct. Crim. App. Apr. 20, 2006).

¹⁶⁵ *Id.* at *9.

¹⁶⁶ *Id.* at *1.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at *2.

¹⁷¹ *Id.*

¹⁷² *Id.* at *9.

¹⁷³ *Id.* at *10.

Lawrence.¹⁷⁴ There was no question that the sexual conduct was consensual, however, because of the difference in rank, the court hypothetically concluded that H may not have been able to decline the appellant's advances even if she had desired.¹⁷⁵ Under the facts of the case, the issue should have been fraternization, not adultery.

A similar rationale, one more applicable to the case, was made on the ability to consent in *United States v. McClellan*.¹⁷⁶ In that case, a base psychiatrist entered into a sexual relationship with a patient he was treating for "addictive sexual behavior."¹⁷⁷ The court noted that the relationship was such to fall outside the scope of *Lawrence* because "consent might not easily be refused."¹⁷⁸ *Lawrence* here was inapplicable because of the patient-physician relationship.

In *McCoy*, the conviction was also for violating the general rule against personal relationships between members of the military of different rank.¹⁷⁹ When H thought she was pregnant, she lied about the relationship to her superiors and implicated a sergeant.¹⁸⁰ The court found that this coupled with appellant's misconduct undermined good order and discipline.¹⁸¹ This case demonstrates that the adultery can be brought as a fraternization or an unbecoming conduct issue and still result in a conviction while preserving the rights granted by the *Lawrence* decision.

V. CONCLUSION

Lawrence's impact on the UCMJ follows that the criminal sanctions for sodomy and adultery, to the extent they involve consenting adults, in and of themselves should constructively be stricken from the UCMJ. However, in practical terms, this application of *Lawrence* to the UCMJ does not result in a free pass to military servicemen and women.¹⁸² As the Supreme Court has observed, "the military is, by necessity, a specialized

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ No. 200101300, 2006 WL 228927 (N-M. Ct. Crim. App. Jan. 24, 2006).

¹⁷⁷ *Id.* at *1.

¹⁷⁸ *Id.* at *3 (quoting *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)).

¹⁷⁹ *McCoy*, 2006 WL 1029163, at *10.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *See, e.g., United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004).

society.”¹⁸³ The rights guaranteed under the Constitution may in certain circumstances apply differently to servicemen and women.¹⁸⁴ The adulterous behavior itself may lead to other violations of the UCMJ, and may be a relevant fact in prosecutions.

¹⁸³ *Parker v. Levy*, 417 U.S. 733, 743 (1974).

¹⁸⁴ *Id.*