Loyola of Los Angeles Law Review

Volume 31
Number 3 *Symposium on Mental Disability Law*

Article 25

4-1-1998

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Recommended Citation

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 (1998).
Available at: https://digitalcommons.lmu.edu/llr/vol31/iss3/25

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BEDS WITH SHEETS BUT NO COVERS: THE RIGHT TO PRIVACY AND THE MILITARY'S REGULATION OF ADULTERY

I. INTRODUCTION

One of the first skills the military teaches its new recruits is how to make the "military" bed: sheets tightly pulled over the mattress, corners crisply folded and ironed, and the covers pulled down and neatly folded at the foot of the bed. Hence, the sheets are left exposed for careful inspection; drill sergeants search for any stain, wrinkle, or improper fold. Interestingly, the "military" bed is not just a training tool; it is symbolic of the bed the new trainees will sleep in for the remainder of their military careers. For in the name of discipline and, ultimately, national security, the military requires its members to set aside their normal covers of autonomy and privacy to expose their personal lives, including their sexual relationships, for military inspection.

Through its criminal proscription of adultery, the military figuratively patrols all service members' bedrooms and closely inspects their choices of sexual partners. Soldiers face criminal prosecution for having sex with someone other than their spouse or with the spouse of another.[1] Importantly, the military believes the active enforcement of its adultery law is necessary to maintain a disciplined and effective military force.[2] Nevertheless, the regulation's intrusion into military members' intimate lives seemingly infringes upon principles of personal liberty and privacy protected as fundamental rights under the Constitution.[3]

This Comment establishes the constitutional validity of the mili-

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1. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 62 (1995) [hereinafter MCM].

2. *See* UNIFORM CODE OF MILITARY JUSTICE, art. 134, 10 U.S.C. § 934 (West 1994) [hereinafter UCMJ]; *see also* United States v. Hickson, 22 M.J. 146, 149 (C.M.A. 1986) (stating "adultery remains a viable offense against military law").

3. *See, e.g.,* Planned Parenthood v. Casey, 505 U.S. 833 (1992); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972).

tary's adultery law. Part II discusses the recent adultery case of Air Force Lieutenant Kelly Flinn and how this young officer propelled the issue of the military's proscription of adultery into the public eye. Part III then analyzes the development of the Supreme Court's privacy precedent under the doctrine of substantive due process and concludes that modern privacy protections include a fundamental right to commit adultery. Finally, Part IV establishes that this privacy right applies with equal force within the military but concludes that the military's adultery law is, nonetheless, constitutional because the regulation of adultery pursues a compelling government interest of maintaining an effective military and is narrowly drawn so as to effectuate this compelling need.

II. TARGETING ADULTERY: THE CASE OF LIEUTENANT KELLY FLINN

Lieutenant Kelly Flinn was a top Air Force Academy graduate and America's first and only female B-52 bomber pilot.[4] She was the Air Force's star public attraction, appearing in countless recruiting films and media events.[5] However, Lieutenant Kelly Flinn attracted the most public attention when her private sexual relationship with a married man landed her in a military courtroom.[6]

Adultery—having sex with someone other than your spouse or having sex with the spouse of another—is a crime in the military.[7] The Uniform Code of Military Justice (UCMJ), a set of federal statutes applicable to all military personnel, provides for the criminal punishment of conduct that threatens "good order and discipline" or "discredit[s]" the professional image of the armed forces.[8] The military includes adultery as such an offense.[9] Moreover, military members convicted of adultery face a maximum punishment of a one-year prison term and a dishonorable discharge from the service.[10]

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4. *See* Gregory L. Vistica & Evan Thomas, *Sex and Lies*, NEWSWEEK, June 2, 1997, at 26.

5. *See id.*

6. *See id.*

7. *See* MCM, *supra* note 1, pt. IV, ¶ 62.

8. UCMJ, *supra* note 2, art. 134.

9. *See* MCM, *supra* note 1, pt. IV, ¶ 62.

10. *See id.* The military utilizes different terminology for punitive discharges from the service, depending on the rank of the convicted military member. *See* MCM, *supra* note 1, R.C.M. 1003(b)(9); U.S. DEP'T OF ARMY PAMPHLET 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK, at 97-99 (30 Sept. 1996). For instance, enlisted members and non-commissioned officers convicted of adultery by a general court-martial can receive a dishonorable discharge, while

Lieutenant Kelly Flinn became a criminal defendant because she fell in love with a married man. The man was Marc Zigo, the civilian husband of an enlisted woman assigned to the same military base as Flinn.[11] When the two began their affair, Zigo assured Flinn that his marriage was breaking up, but Flinn knew Zigo was still legally married and living with his wife.[12] Zigo's wife, Airman Gayla Zigo, soon discovered her husband's affair and complained to her military supervisor, who later informally advised Flinn to stop interfering with the airman's marriage and warned the star pilot that she was risking her career.[13] Nevertheless, Flinn ignored this admonition and continued to see Zigo.[14] Eventually, a formal complaint was filed against Flinn, and the Air Force initiated an investigation that probed into Flinn's private sexual activities.[15] Fearing the loss of her career, Flinn denied having a sexual relationship with Marc Zigo, but, unknown to Flinn, her lover had given the military police detailed accounts of their sexual activities, including her sexual preferences, how often they had sex, and their methods of birth control.[16] Subsequently, Flinn's commander ordered her to have no further personal contact with Marc Zigo.[17] Despite this order, Flinn still hoped to salvage her relationship with Zigo and allowed him to remain living at her off-base house, where he had moved after his wife kicked him out of

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commissioned officers and commissioned officer candidates (cadets and midshipmen) convicted of the same offense can receive a punitive dismissal, the functional equivalent of a dishonorable discharge. *See id.* Both types of discharge characterize the military member's dismissal from the service as "under conditions of dishonor after conviction of serious offenses of a civil or military nature warranting such severe punishment." *Id.* at 98-99.

11. *See* Nancy Gibbs, *Wings of Desire: The Air Force's Star Female Pilot Finds Herself Enmeshed in a Tale Full of Passion and Lies*, TIME, June 2, 1997, at 28, 31.

12. *See* Vistica & Thomas, *supra* note 4, at 28.

13. *See* Gibbs, *supra* note 11, at 32.

14. *See id.*

15. *See id.* In addition to the affair, the investigation revealed that, during a party thrown at her house, Flinn had sex on the front lawn of her private residence with an enlisted man. *See id.* at 31. The Air Force prohibits private relationships between all officers and enlisted personnel under the UCMJ. *See* MCM, *supra* note 1, pt. IV, ¶ 83. Accordingly, this encounter as well as a subsequent instance of sex with the same enlisted man gave rise to additional charges of fraternization against Flinn. *See* Colonel Jack L. Rives, *It Works For Us: A Guide to the Military's Rules on Fraternization and Adultery*, THE REPORTER, Dec. 1997, at 3, 6 (Colonel Rives is the Commandant of the Air Force Judge Advocate General School (AFJAGS) at Maxwell Air Force Base, Alabama).

16. *See* Vistica & Thomas, *supra* note 4, at 29.

17. *See* Gibbs, *supra* note 11, at 32.

their home.[18] Based upon Flinn's adulterous affair and her related misconduct during the investigation, the Air Force initiated court-martial proceedings against their once heralded star.[19]

Lieutenant Flinn, however, did not allow her court-martial to proceed quietly. She hired a highly skilled team of civilian attorneys[20] and a high-profile public relations firm to fight for her defense.[21] Flinn wanted the American public to know that the Air Force had intruded into her private and personal life to enforce a seemingly archaic adultery law.[22] Kelly Flinn's plight appeared in countless major newspapers, magazines, and television programs; they all told the story of an accomplished officer who faced the end of her career as a pilot, a federal conviction, and a possible prison term all because the military disapproves of certain private sexual conduct and, consequently, prosecutes "Scarlet Letter" offenses.[23]

Kelly Flinn's story won over the civilian public. Many people with little first-hand military experience felt the Air Force had no right to interfere in members' "off-base, off-duty conduct," and, accordingly, the military must "get out of the bedroom."[24] Moreover, congressional leaders came to Flinn's defense. Senator Trent Lott berated the Air Force for "picking on Flinn by enforcing . . . abusive, outdated moral standards."[25] Other representatives sent letters directly to the Secretary of the Air Force, urging her to call off Flinn's court-martial.[26]

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18. *See id.* A week after Flinn received the order to cease contact with Marc Zigo, Flinn took Zigo home to Georgia for Christmas to meet her parents. *See id.*

19. *See id.* at 33. The Air Force charged Lieutenant Flinn with the following offenses under the Uniform Code of Military Justice: (1) failure to obey an order; (2) making a false official statement; (3) conduct unbecoming an officer; (4) fraternization; and (5) adultery. *See* Rives, *supra* note 15, at 6.

20. *See* Gibbs, *supra* note 11, at 32-33.

21. *See Duffey Communications: Flying High?*, PR NEWS, June 23, 1997, at 4.

22. *See id.* Flinn hired Duffey Communications, whose publicity tactic was to portray Flinn's case as a "victimization by a system that has been called obsolete, biased, and unjust." *Id.*

23. *See 60 Minutes: The Court-Martial of Lt. Flinn; First Woman Bomber Pilot on Trial for Adultery* (CBS television broadcast, May 11, 1997).

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

25. *Flinn Case Polarizes Military, Civilians*, FLA. TODAY, May 25, 1997, at 1A.

26. *See* Gibbs, *supra* note 11, at 33. Representative Nancy Johnson wrote to the then Secretary of the Air Force, Sheila Widnall, that "[i]t is disgraceful that Lieut. Flinn's career as a [bomber] pilot will be over simply because overzealous prosecutors targeted her case over numerous others with more egregious circum-

In response to growing public criticism, Air Force officials attempted to explain that Flinn's court-martial was warranted by her more serious offenses of lying and disobeying orders in relation to the affair, and not the adultery itself.[27] Nonetheless, the criticism continued. Opponents of the court-martial maintained that had the military abandoned its adultery law, Flinn would never have felt compelled to take such questionable actions to defend her privacy and her career.[28] Facing continued public and political pressure, the Secretary of the Air Force granted Lieutenant Flinn a general discharge from the Air Force instead of proceeding to trial and continuing the grueling public debate.[29] Although her military flying career was finished, the general discharge allowed Flinn to escape a punitive dismissal from the Air Force and a federal conviction for adultery.[30]

Notably, Kelly Flinn's case does not represent an isolated incident within the military justice system. 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.[31] In addition, the numbers of such prosecutions are growing within some branches of the service.[32] For instance, adultery-related prosecutions in the Air Force grew from 36 in 1990 to 67 in 1996.[33] Moreover, Kelly Flinn's pun-

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stances." *Id.*

27. *See id.* at 31. The then Air Force Chief of Staff, General Ronald R. Fogleman, told an investigating Senate committee, "[t]his is not an issue of adultery .... This is an issue about an officer, entrusted to fly nuclear weapons, who lied. That's what this is about." *Id.*

28. *See generally id.* at 28-34 (describing Kelly Flinn's desperate attempts to salvage her relationship with Marc Zigo and her pilot career).

29. *See id.* at 33. Military regulations afford commissioned officers the opportunity to submit a request to their respective service secretary to resign "for the good of the service" in lieu of proceeding to court-martial. *See* U.S. DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 36-3207, PERSONNEL: SEPARATING COMMISSIONED OFFICERS, para. 2.23 (1 July 1995). Generally, if the request is approved, the service secretary has the discretion to characterize the military members' administrative discharge from the service as either (a) an honorable discharge, (b) a general discharge (also known as a discharge under honorable conditions), or (c) a discharge under other than honorable conditions. *See id.* at para. 1.7, 2.23. Lieutenant Kelly Flinn first submitted a request to resign but conditioned on receiving an honorable discharge; the Secretary of the Air Force quickly denied Flinn's request. *See* Gibbs, *supra* note 11, at 33. However, the secretary did accept Flinn's subsequent request to resign conditioned on a general discharge. *See id.*

30. *See* Gibbs, *supra* note 11, at 33.

31. *See* Rowan Scarborough, *Challenge to Adultery Ban Unlikely*, WASH. TIMES, June 2, 1997, at A4.

32. *See* Vistica & Thomas, *supra* note 4, at 29.

33. *See id.* at 29. Importantly, however, military authorities rarely prosecute adultery offenses independent of other, more serious, military crimes, such as the

ishment was minor compared to that of other adulterous service members. For example, in 1995 Air Force Captain Jerry Coles faced charges nearly identical to those against Kelly Flinn.[34] However, Coles's adultery prosecution did not receive similar public scrutiny.[35] As a result, his case did proceed to court-martial and his conviction resulted in a five-month prison term and a punitive dismissal from the service.[36]

The Kelly Flinn case propelled the issue of adultery into the public eye, where it still remains under fire. For many, Kelly Flinn's case shockingly revealed the military's ability to act as "pajama police," probing behind closed bedroom doors in an effort to regulate the private sexual relationships of its service members.[37] Additionally, many people do not comprehend how private extramarital affairs can impact the military's ability to accomplish its mission of defending our country.[38] Consequently, some feel that such intrusive military laws need to be repealed or updated to accommodate the sexual relations of a "modern gender-integrated military."[39] For instance, Representative Barney Frank proposed a bill in Congress that would "decriminalize consensual sex in the military," including adultery.[40] He argues that such a change recognizes "the right of consenting adults to have a private sexual relationship," free from government intrusion.[41]

This statement reveals that regulating the sexual relations of military members involves more than a mere policy decision; such laws implicate constitutional guarantees of liberty and privacy. Must

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false official statements and disobedience of orders in Flinn's case. *See* Rives, *supra* note 15, at 4. For instance, since 1985 the Air Force has only prosecuted nine individuals for adultery alone. *See id.*

34. *See* David Van Biema, *The Rules of Engagement*, TIME, June 2, 1997, at 36.

35. *See id.*

36. *See id.*

37. *See All Things Considered* (NPR radio broadcast, June 16, 1997).

38. *See, e.g.*, *Dateline NBC* (NBC television broadcast, June 13, 1997). The statements of unidentified callers to this television news program demonstrate the general public's view towards the military's adultery law: "I think it's ridiculous that the military would punish people for something . . . to do with their personal life." *Id.* In addition, an informal poll taken by the news program revealed that 62% of the American public felt that adultery should not be punished by the military. *See id.*

39. Jean Heller, *Does U.S. Military 'Get It' on Issues of Sex and Gender?*, ST. PETERSBURG TIMES, June 8, 1997, at 1A.

40. Rowan Scarborough, *Gays Use Adultery Issue as Military Springboard*, WASH. TIMES, June 18, 1997, at A1.

41. *Id.*

soldiers sleep in bedrooms with no curtains or covers in order to serve their country, or do soldiers' private sexual activities fall underneath a cover of constitutional protection that even the military cannot pull back?

III. THE RIGHT TO PRIVACY AND ADULTERY

The United States Supreme Court has never held there is a fundamental constitutional right to engage in adultery.[42] Nevertheless, this does not preclude such a right from existing today. The Supreme Court has conferred constitutional protection on certain forms of sexual and reproductive behavior in the name of "privacy."[43] Although the right to privacy is not expressly listed within the text of the Constitution, the Supreme Court has held such a right exists in the Constitution under the "penumbra" of the rights guaranteed in the Bill of Rights[44] and as an implicit aspect of the substantive "liberty" guaranteed in the Due Process Clause.[45] Under this doctrine of substantive due process, the Supreme Court has protected certain familial relationships and certain intimate decisions from unwarranted government intrusion.[46] In addition, when the Court deems certain conduct or decisions fundamental under the Constitution, the government can infringe upon these rights only pursuant to a "compelling state interest" and using laws or regulations that are "narrowly drawn" so as to fulfill only that compelling interest at stake.[47]

Although the Supreme Court has not provided a unified basis for its privacy decisions, it has developed the right of privacy through two distinct lines of cases.[48] The first line of cases bases fundamental privacy protection on the integrity and sanctity of marriage and family, while the second line extends outside the family and bases the

42. *Cf.* Bowers v. Hardwick, 478 U.S. 186, 191 (1986) (stating "any claim that these cases . . . stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable").

43. *See* United States v. Henderson, 34 M.J. 174, 176 (C.M.A. 1992); *see, e.g.,* Planned Parenthood v. Casey, 505 U.S. 833 (1992); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

44. *See Griswold*, 381 U.S. at 484-85.

45. *See Carey*, 431 U.S. at 684.

46. *See id.* at 684-85.

47. *Roe*, 410 U.S. at 155.

48. *See* Fugate v. Phoenix Civil Serv. Bd., 791 F.2d 736, 740 (9th Cir. 1986).

protection on broader principles of personal autonomy.[49] An examination of the development of the Supreme Court's substantive due process doctrine will inform the determination as to whether the modern right of privacy extends to protect decisions and actions regarding adulterous sex.

A. *Family-Based Privacy*

Many of the Supreme Court's early substantive due process decisions focused on preventing the government from intruding upon the sanctity of certain family relationships.[50] For example, in *Meyer v. Nebraska*[51] and *Pierce v. Society of Sisters*,[52] the Supreme Court held the liberty guaranteed in the Due Process Clause includes the right of parents to guide the "upbringing and education" of their children free from unwarranted government intervention.[53] In *Pierce*, the Court struck down a state statute that required children to attend public schools in lieu of available private and parochial schools.[54] The Court reasoned that the state cannot "standardize its children by forcing them to accept instruction from public teachers only" because such compulsion infringes upon "the liberty of parents and guardians to direct the upbringing and education of children under their control."[55] Therefore, these early decisions protected the integrity of the parent-child relationship.

Similarly, the first modern substantive due process privacy case, *Griswold v. Connecticut*,[56] held that married couples have a constitutional right to use contraceptives free from government interference.[57] In *Griswold*, Justice Douglas based the right of privacy on several textual guarantees in the Bill of Rights.[58] He reasoned that these rights have "penumbras"—related interests that must be protected to give the textual rights "life and substance."[59] Specifically, Douglas concluded that these "emanations" necessarily include a married couple's intimate associations, derived from the First

49. *See id.*
50. *See id.* at 738.
51. 262 U.S. 390 (1923).
52. 268 U.S. 510 (1925).
53. *See id.* at 534-35; *Meyer*, 262 U.S. at 399.
54. *See Pierce*, 268 U.S. at 530-31.
55. *Id.* at 534-35.
56. 381 U.S. 479 (1965).
57. *See id.* at 485-86.
58. *See id.* at 483-86.
59. *Id.* at 484.

Amendment's guarantee of free speech, and the physical sanctity of the family home, derived from the Fourth Amendment's protection from unreasonable searches and seizures.[60] Hence, the idea of allowing "the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives . . . is repulsive to the notions of privacy surrounding the marriage relationship."[61]

After *Griswold*, the Supreme Court continued to protect the integrity of family under the right of privacy, but the Court abandoned Douglas's penumbra basis in favor of more explicit substantive due process approach. For instance, in *Moore v. City of East Cleveland*,[62] the Court extended constitutional privacy protection to include the right of extended families to choose to live together. In this case, the Court struck down an East Cleveland housing ordinance that limited the occupancy of dwelling units to single "nuclear" families.[63] The Court stated "that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause."[64] Furthermore, the Court reasoned that this protection was not limited to nuclear families because the tradition of larger extended families "sharing a household . . . has roots equally venerable and equally deserving of constitutional recognition."[65]

Turning to the right at issue, this line of privacy cases does not seemingly support a fundamental right to commit adultery. In these cases, the Supreme Court based the constitutional protection on concerns for the sanctity, values, and traditions underlying family relationships. Although the military's adultery law is similar to the contraceptive law in *Griswold* in that they both involve a government invasion into the sanctity of one's bedroom, adultery involves no familial aspect, which was a critical component in both *Griswold* and *Moore*. Moreover, adulterous affairs are likely to destroy marriages and erode family ties, the very interests these cases sought to protect.

B. Autonomy-Based Privacy

Notably, the Supreme Court did not base all of its early privacy decisions on the sanctity of marital and familial relationships.[66] In a

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60. *See id.* at 483-85.
61. *Id.* at 485-86.
62. 431 U.S. 494 (1977).
63. *See id.* at 504-06.
64. *Id.* at 499 (quoting Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974)).
65. *Id.* at 504.
66. *See* Fugate v. Phoenix Civil Serv. Bd., 791 F.2d 736, 739 (9th Cir. 1986).

separate line of cases, the Court founded the privacy right on broader principles of personal autonomy.[67] Namely, the Court recognized that substantive due process liberty encompassed the right to make certain intimate decisions about one's life free from government interference.[68] This included choices regarding certain forms of sexual or reproductive behavior.

In *Eisenstadt v. Baird*[69] and *Carey v. Population Services International*,[70] the Court extended the right of privacy to the sexual lives of single people and established their right to use contraceptives. In *Eisenstadt*, the Court stated that "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[71] In *Carey*, the Court added that "the constitutional protection of individual autonomy in matters of childbearing is not dependent" on one's marital status or familial relationship.[72] Additionally, the landmark abortion decision of *Roe v. Wade*[73] also relied on the principle of personal autonomy. In *Roe*, the Court held the right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[74] The Court reasoned that denying a woman the freedom to make this intimate decision, without compelling justification, would arbitrarily invade her personal liberty and natural right to control her own body.[75]

The principle of personal autonomy underlying this second line of cases appears to support extending the right of privacy to include consensual sexual activities, such as adultery. Although these early cases only expressly extended this autonomy-based notion of privacy to cover two situations, the use of contraceptives and the right to an abortion, the regulation of adultery and other private sexual conduct arguably implicates similar liberty interests. Namely, whom one decides to have sexual relations with is an intimate decision about one's life that, according to the reasoning underlying these cases, should be

67. *See, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972).
68. *See Eisenstadt*, 405 U.S. at 453-54.
69. 405 U.S. 438 (1972).
70. 431 U.S. 678 (1977).
71. *Eisenstadt*, 405 U.S. at 453.
72. *Carey*, 431 U.S. at 687.
73. 410 U.S. 113 (1973).
74. *Id.* at 153.
75. *See id.*

protected from unwarranted government intrusion.

Importantly, some lower courts have extended the right of privacy to cover adultery, based upon the Supreme Court's personal autonomy line of reasoning.[76] For instance, in *Thorne v. City of El Segundo*,[77] the Ninth Circuit held that individual interests in the privacy of adulterous sexual activities "are within the zone protected by the [C]onstitution."[78] In *Thorne*, the El Segundo Police Department forced a female applicant to disclose information about her sexual relationships, including a prior affair with a married police officer; as a result of her admitted adultery, the department denied her employment.[79] The court reasoned that the Supreme Court's precedent established two types of privacy interests: "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions."[80] Accordingly, the court concluded that the applicant had a fundamental privacy right protecting her personal sexual associations, and, without compelling justification, the state could not require the applicant "to forego his or her constitutionally protected rights simply to gain the benefits of state employment."[81] The court further stated that "[t]his conclusion follows from the [Supreme Court] cases holding that such basic matters as contraception, abortion, marriage, and family life are protected by the [C]onstitution from unwarranted government intrusion."[82] Notably, the Supreme Court denied certiorari on *Thorne* and let the Ninth Circuit's decision stand.[83]

Consistent with *Thorne*, in *Briggs v. North Muskegon Police Department*,[84] a Michigan district court held the Supreme Court's autonomy-based privacy decisions established a general "constitutional right of sexual privacy."[85] In *Briggs*, a local police department fired a married police officer due to his adulterous relationship with a married woman not his wife.[86] In assessing the officer's substantive due

76. *See Fugate*, 791 F.2d at 740-41.
77. 726 F.2d 459 (9th Cir. 1983).
78. *Id.* at 468.
79. *See id.* at 468-69.
80. *Id.* at 468 (quoting Whalen v. Roe, 429 U.S. 589, 599-600 (1977)).
81. *Id.* at 469.
82. *Id.* at 468.
83. *See* 469 U.S. 979 (1984).
84. 563 F. Supp. 585 (W.D. Mich. 1983), *aff'd mem.*, 746 F.2d 1475 (6th Cir. 1984).
85. *Id.* at 590.
86. *See id.* at 586.

process claim, the district court concluded that the Supreme Court's protection of the intimate decisions and relationships underlying marriage, procreation, contraception, and child rearing logically formed a "constitutional right to privacy [that] extends to sexual conduct in intimate relationships between unmarried individuals," even those relationships involving adultery.[87]

Specifically, the *Briggs* court reasoned that the Constitution's privacy protection did not rest upon the marital status of the particular relationship because "[m]arriage exists to facilitate the expression of emotional and sexual intimacy. That intimacy is so fundamental to individual liberty that it demands constitutional protection. Nothing is different about the psychological and emotional needs of unmarried couples which would justify denying them the same protection."[88] Accordingly, the court subjected the police department's action to heightened scrutiny and concluded that "general community disapproval" cannot justify the "infringement of an important constitutionally protected right."[89] The Sixth Circuit affirmed the district court's decision.[90] Importantly, both *Thorne* and *Briggs* recognized that the principled reasoning underlying the Supreme Court's personal autonomy line of privacy cases logically extends to protect certain forms of private consensual sexual behavior, including adultery.

C. Privacy Cases Converge

Despite these lower court holdings, the Supreme Court eventually stepped away from its autonomy-based substantive due process decisions. In the 1986 case *Bowers v. Hardwick*,[91] the Supreme Court attempted to converge its two lines of privacy cases into a unified theory and clarify the limits of privacy protection in the field of consensual sexual activity. In a five to four decision, the Court held there was no fundamental privacy right to engage in homosexual sodomy.[92] Writing for the majority, Justice White undercut the Court's prior autonomy-based privacy decisions by limiting those notions of liberty to the specific contexts and relationships in which they arose, namely "family, marriage, [and] procreation."[93] Accordingly,

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87. *Id.* at 588.
88. *Id.* (quoting Note, *Fornication, Cohabitation and the Constitution*, 77 MICH. L. REV. 252, 291 (1978)).
89. *Id.* at 590.
90. *See* 746 F.2d 1475 (6th Cir. 1984).
91. 478 U.S. 186 (1986).
92. *See id.* at 192-94.
93. *Id.* at 191.

the right to engage in homosexual sodomy bore no resemblance to those announced rights.[94] Furthermore, Justice White boldly stated that any notion that these previously declared rights "stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable."[95]

Justice White explained: "[t]he Court is most vulnerable and comes nearest to illegitimacy" when it announces new fundamental rights implicitly "imbedded in the Due Process Clause" and having no explicit textual support in the Constitution.[96] Accordingly, the Court must employ exacting standards to "identify the nature of the rights qualifying for heightened judicial protection" in order to "assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values."[97] This entails recognizing as fundamental only those rights which are "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed'"[98] or those rights which are "deeply rooted in this Nation's history and tradition."[99] Under these "tests," Justice White found no "fundamental right [for] homosexuals to engage in acts of consensual sodomy."[100] Because the case did not implicate a fundamental right, the Court held a state's moral disapproval for this conduct is a sufficient rational justification to proscribe homosexual sodomy.[101]

The Supreme Court adhered to a restricted view of substantive due process liberty in a subsequent plurality opinion, *Michael H. v. Gerald D.*[102] In this case, a California law precluded the appellant from gaining parental rights to his natural child, who was conceived during an adulterous affair with the child's married mother.[103] The California statute granted a presumption of paternity to the husband

94. *See id.*
95. *Id.*
96. *Id.* at 194.
97. *Id.* at 191.
98. *Id.* at 191-92 (quoting Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937) (alteration in original)).
99. *Id.* at 192 (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977)).
100. *Id.*
101. *See id.* at 195-96.
102. 491 U.S. 110 (1989).
103. *See id.* at 113.

who was living with the mother at the time of conception.[104] The natural father challenged the constitutionality of the statute on a number of grounds, including that the law violated his fundamental substantive due process liberty interest in establishing a parental relationship with his child.[105] The Court upheld the statute and reiterated its view that "the Due Process Clause affords only those protections 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[106]

Justice Scalia, writing for the *Michael H.* plurality, distinguished the Court's prior privacy cases protecting parent-child relationships, stating that the protection was based on the institution of the "unitary family" being "deeply rooted in this Nation's history and tradition."[107] Justice Scalia concluded that the appellant failed to establish that his claimed special relationship, mere biological fatherhood, "has been treated as a protected family unit under the historic practices of our society."[108] Therefore, the natural father's asserted privacy interest did not receive heightened constitutional protection.[109]

D. The Modern Right to Privacy

In *Bowers* and *Michael H.*, the Supreme Court seemingly quashed a potentially broad autonomy-based definition of privacy and, instead, forwarded stringent standards for newly asserted privacy rights to receive constitutional protection under the Due Process Clause. However, the bare majority deciding these cases indicates that these decisions stand on uncertain ground. Both cases deeply divided the Court, most likely due to the implicit retraction of the Court's prior autonomy-based privacy decisions. For example, in his dissent in *Bowers*, Justice Blackmun berated the majority for ignoring the underlying principle of personal autonomy recognized in prior privacy cases.[110] In his view, the right asserted in this case did resemble, and even closely paralleled, the rights deemed fundamental in previous decisions.[111] Specifically, these cases all centered on one's "right to be

104. *See id.*
105. *See id.* at 121.
106. *Id.* at 122 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).
107. *Id.* at 123-24.
108. *Id.* at 124.
109. *See id.*
110. *See* Bowers v. Hardwick, 478 U.S. 186, 204 (1986) (Blackmun, J., dissenting).
111. *See id.* at 205-06 (Blackmun, J., dissenting).

let alone" and the right of individuals to make "choices about the most intimate aspects of their lives."[112]

Blackmun criticized the majority's "obsessive focus on homosexual activity"[113] and its comparison with the family relationships protected in prior cases, while "'clos[ing] [their] eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the . . . Due Process Clause.'"[114] Blackmun contends "[w]e protect those rights . . . because they form so central a part of an individual's life"[115] and the "moral fact that a person belongs to himself and not others nor to society as a whole."[116] Blackmun further argued that this right, to independently define one's identity, is "'central to any concept of liberty'" and heavily depends on the "'emotional enrichment from close ties with others,'"[117] which includes "intimate sexual relationships."[118] Hence, the principle of personal autonomy embodied in the Constitution and recognized in many of the Court's past decisions supports a general fundamental right of intimate association that would protect a person's choice to engage in homosexual sodomy.[119] Using the majority's standard, Blackmun concludes that such a right is fundamental because the underlying value of individual liberty, not approval of the act of homosexual sodomy itself, is "deeply rooted in our Nation's history."[120]

Not only are the *Bowers* and *Michael H.* decisions weakened due to their own contradictions with prior precedent, but also the Supreme Court has further undermined these cases in recent decisions. For example, in the 1992 case *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[121] the Supreme Court rejected Justice Scalia's strict substantive due process formalism in *Michael H.*[122] Specifically, the Court expressly discarded the notion that an asserted privacy

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112. *Id.* at 199-200 (Blackmun, J., dissenting).

113. *Id.* at 200 (Blackmun, J., dissenting).

114. *Id.* at 204 (Blackmun, J., dissenting) (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 501 (1977)).

115. *Id.* (Blackmun, J., dissenting).

116. *Id.* (Blackmun, J., dissenting) (quoting Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 777 n.5 (1986) (Stevens, J., concurring)).

117. *Id.* at 205 (Blackmun, J., dissenting) (quoting Roberts v. United States Jaycees, 468 U.S. 609, 619 (1984)).

118. *Id.* (Blackmun, J., dissenting).

119. *See id.* (Blackmun, J., dissenting).

120. *Id.* at 214 (Blackmun, J., dissenting).

121. 505 U.S. 833 (1992).

122. *See id.* at 847-51.

right must be "deeply rooted" in the nation's history in order to constitute a fundamental liberty.[123] The Court stated that "[n]either the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects."[124] The Court further emphasized that it must exercise "reasoned judgment" and not employ rigid standards to determine protected privacy interests because due process is an evolving "rational continuum" and "not a series of isolated points."[125] Therefore, "its content cannot be determined by reference to any code."[126]

Recalling its prior autonomy-based privacy decisions, the *Casey* Court stated that "[a]t 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."[127] Hence, the Court in *Casey* moved away from the limited substantive due process doctrine pronounced in both *Bowers* and *Michael H.* and reaffirmed a broader, personal autonomy-based definition of substantive due process liberty.[128]

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123. *See id.* at 847-48.
124. *Id.* at 848.
125. *Id.* at 848-49 (quoting Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).
126. *Id.* at 849-50 (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).
127. *Id.* at 851.
128. *But see* Washington v. Glucksberg, 117 S. Ct. 2258 (1997) (The Supreme Court's most recent substantive due process decision, holding the personal liberty specially protected by the Due Process Clause does not include the right to physician-assisted suicide for terminally-ill patients.). In making its decision, the Court analyzed whether the asserted right was either "deeply rooted" in the nation's history or "implicit in the concept of ordered liberty" in concluding such a right did not deserve constitutional protection. *See id.* at 2268-70. Hence, the Court's structured approach seemingly contradicts *Casey*'s free-wheeling substantive due process analysis founded upon broader principles of personal autonomy. *See Casey*, 505 U.S. at 848-51. However, in *Glucksberg*, the Court referred to the teachings of history and tradition as merely "'guideposts for responsible decisionmaking,'" as opposed to strict requirements, in discerning fundamental rights. *See Glucksberg*, 117 S. Ct. at 2268 (quoting Collins v. Harker Heights, 503 U.S. 115, 125 (1992)). This approach is consistent with the "reasoned judgment" used by the Court in *Casey*. *See Casey*, 505 U.S. at 849. Furthermore, *Glucksberg* deals with a novel and unique issue under substantive due process, not just one's personal autonomy in controlling decisions about one's life but also one's right to solicit the help of others in ending that life. *See Glucksberg*, 117 S. Ct. at 2269. Therefore, *Glucksberg* does not hinder the general direction of the Supreme Court concerning matters of pure personal privacy.

Additionally, in the 1996 case *Romer v. Evans*,[129] the Supreme Court directly contradicted and, arguably, implicitly overruled its restrictive holding in *Bowers*.[130] In *Romer*, the Court struck down, on equal protection grounds, a Colorado constitutional amendment that denied homosexuals special preferences and protections under state or local law.[131] The *Romer* majority concluded that moral animus for a particular class was an irrational and, hence, unconstitutional basis for prohibiting local governments from providing anti-discrimination protection for homosexuals.[132]

In his dissent, Justice Scalia objected to *Romer*'s direct contradiction of *Bowers*: "[i]f it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct."[133] For example, *Bowers* held that a state could criminalize homosexual sodomy based upon the rational justification that the community considered this conduct immoral,[134] and, notably, "there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal."[135] Nevertheless, *Romer* held moral disapproval was an irrational justification and could not sustain even a seemingly less invidious form of discrimination, the mere prevention of special local protections for homosexuals.[136] Interestingly, the *Romer* majority opinion was completely devoid of any reference to *Bowers*.[137]

Hence, *Romer*'s seemingly purposeful ignorance of *Bowers* suggests its diminished, if not obsolete, doctrinal value in the eyes of the current Supreme Court. Moreover, although *Romer* did not expressly overrule *Bowers*, many legal theorists claim that this was *Romer*'s precise implicit result and predict that the Court will make such a ruling express when confronted with a future case factually similar to *Bowers*.[138]

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129. 116 S. Ct. 1620 (1996).
130. *See* Thomas C. Grey, *Gay Rights and the Courts: The Amendment 2 Controversy*, 68 U. COLO. L. REV. 373, 374 (1997).
131. *See Romer*, 116 S. Ct. at 1623.
132. *See id.* at 1629.
133. *Id.* at 1631 (Scalia, J., dissenting).
134. *See Bowers*, 478 U.S. at 196.
135. *Romer*, 116 S. Ct. at 1631 (Scalia, J., dissenting) (quoting Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987)).
136. *See id.* at 1629.
137. *See id.* at 1623-29.
138. *See* Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 FORDHAM L. REV. 1249, 1267-68 (1997); *see also* Grey, *su-*

In *Casey*, the Supreme Court, in evaluating the continued validity of its abortion decision in *Roe*, outlined a number of prudential tests that the Court must consider before formally overturning past precedent.[139] There are four major factors: (1) whether the doctrine has proven unworkable; (2) the social reliance on the decision and resultant inequity from overturning it; (3) whether the law has developed as to abandon the doctrine; and (4) "whether the facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."[140] Using these factors, *Casey* reaffirmed *Roe* because its doctrine remained workable and respected, and, more importantly, "people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion."[141]

Unlike *Roe*, *Bowers* appears to be doomed under the *Casey* standards. For instance, the Supreme Court itself demonstrated that modern law has largely "abandoned" *Bowers* through its refusal to even mention this pertinent case in *Romer*.[142] Furthermore, *Bowers* has not gathered any significant social reliance. The anti-sodomy laws validated by *Bowers* that still exist today go largely unenforced.[143] Additionally, even the proponents of the Colorado amendment in *Romer* ignored *Bowers* in their arguments and briefs before the Court, further signaling the obsolete and unconvincing nature of the decision.[144] Hence, based on the doctrinal contradiction in *Romer* and prudential standards of *Casey*, the Supreme Court appears willing and is justified in formally overturning *Bowers* and its restrictive view of substantive due process in a future case.[145]

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pra note 130, at 385 (stating that "the Court's silence seems implicitly to deny the premise—that *Hardwick* was still good law").

139. *See Casey*, 505 U.S. at 854-55.

140. *Id.* at 855.

141. *Id.* at 856.

142. *See Romer*, 116 S. Ct. 1620.

143. For instance, even Michael Hardwick himself never faced formal prosecution under Georgia's sodomy statute because Georgia law enforcement officials decided not to enforce the violated law. *See Bowers*, 478 U.S. at 197-98 (Powell, J., concurring).

144. *See* Grey, *supra* note 130, at 375.

145. *See* Larry Cata Backer, *Reading Entrails: Romer, VMI and the Art of Divining Equal Protection*, 32 TULSA L.J. 361, 386-88 (1997). Only three of the justices who took part in the *Bowers* five to four decision remain on the Supreme Court: Chief Justice Rehnquist, Justice Stevens and Justice O'Connor. Rehnquist and O'Connor voted with the majority in *Bowers* and Stevens joined the dissent. *See Bowers*, 478 U.S. at 187. In *Romer*, however, Justice O'Connor, along with Justices Stevens, Souter, Ginsburg, and Breyer, joined Justice Ken-

Further marking the retreat from *Bowers, Michael H.*, and a limited view of substantive due process, lower courts are again extending the right of privacy to certain private consensual sexual activities.[146] For instance, in the 1997 case *United States v. Bygrave*,[147] the United States Court of Appeals for the Armed Forces conferred fundamental status to the right of individuals to engage in consensual heterosexual sex.[148] In *Bygrave*, a HIV positive serviceman claimed his conviction of aggravated assault for engaging in consensual sex with a female military member, who knew of his infection and whom he later married, violated his constitutional right to privacy.[149] Notably, the court discussed the uncertainty surrounding modern privacy precedent, stating "the constitutional terrain, at least insofar as it has been laid out by the Supreme Court, grows more difficult to negotiate."[150] The court applied strict scrutiny to the military's intrusion into the service member's sex life and, accordingly, implicitly conceded that a fundamental right may be implicated.[151] Nonetheless, the court concluded the intrusion was justified by the military's compelling interest in preventing the spread of AIDS.[152]

E. A Constitutional Right to Engage in Adultery

The development of substantive due process and related equal protection decisions indicates that the modern right of privacy includes a fundamental right of consenting adults to engage in adultery. Specifically, choosing the person with whom to have sexual relations is an intimate decision about one's life and is, therefore, a protected aspect of substantive due process liberty. The Supreme Court's autonomy-based privacy decisions, including *Eisenstadt*, *Carey*, *Roe*, and *Casey* strongly support this asserted fundamental right. These cases recognize that the liberty protected under the Due Process Clause includes the freedom to make important personal decisions and associations regarding one's sexual activities without government

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nedy's majority opinion, which ignored and contradicted *Bowers*. *See Romer*, 116 S. Ct. 1623. Chief Justice Rehnquist and Justice Thomas joined Justice Scalia's dissent. *See id.* Hence, *Romer* indicates that six justices are potentially willing to formally overturn *Bowers* in a future case, providing explicit heightened constitutional protection for private consensual sexual conduct.

146. *See, e.g.*, United States v. Bygrave, 46 M.J. 491 (C.A.A.F. 1997).
147. *Id.*
148. *See id.* at 495-96.
149. *See id.* at 494-95.
150. *Id.* at 495.
151. *See id.* at 495-96.
152. *See id.* at 496-97.

interference. Furthermore, in *Thorne* and *Briggs*, lower courts held this principled reasoning extends to establish fundamental privacy protection for adulterous behavior.

Although *Bowers* and *Michael H.* purportedly limited the Court's expanding view of substantive due process, the Supreme Court has ignored, and even renounced, this restricted doctrine in modern cases. Furthermore, recent lower court cases are again indicating that the right of privacy protects additional aspects of private consensual sex. Ultimately, the Supreme Court's precedent and its current direction regarding substantive due process establishes a fundamental privacy right encompassing one's choice to commit adultery. Hence, any law that "impinges upon [this] fundamental right explicitly or implicitly secured by the Constitution is presumptively unconstitutional."[153]

IV. THE RIGHT TO COMMIT ADULTERY IN THE MILITARY

A. The Unique Military Environment

Because of the unique nature of the military environment, constitutional rights found in the civilian life may require a different analysis when applied within the military.[154] The military exists for one important purpose: "to fight and win America's wars when called upon to do so."[155] Accordingly, the American people entrust the military with the security of their nation and the lives of their sons and daughters.[156] Thus, the military's critical role establishes it as a society apart from the civilian world in two fundamental respects. First, members of the armed forces have responsibility of the

153. City of Mobile v. Bolden, 446 U.S. 55, 76 (1980).

154. *See* Philips v. Perry, 106 F.3d 1420, 1429 (9th Cir. 1997).

155. General Ronald R. Fogleman, *The Bedrock of Integrity* (visited Jan. 19, 1998) <http://www.af.mil/news/speech /current/The_Bedrock_of_Integrit.html> (reprinting remarks that General Fogleman delivered at the United States Air Force Academy Commandant's Leadership Series on Nov. 8, 1995); *see also* Parker v. Levy, 417 U.S. 733, 743 (1974) (stating that "[t]he differences between the military and civilian communities result from the fact that 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise'") (citing United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955)).

156. *See* General Michael E. Ryan, *The Air Force One Team, One Force, One Family* (visited Jan. 20, 1998) <http://www.af. mil/news/speech/current/The_ Air_Force_One_ Team_One.htm> (reprinting General Ryan's remarks delivered during his swearing-in ceremony as the new Air Force Chief of Staff on Oct. 10, 1997).

highest magnitude:[157] field commanders must order soldiers, airmen, and sailors into harm's way to accomplish mission objectives;[158] missile-launch officers hold the keys that could initiate a nuclear war; and pilots carry lethal weapons that, with one slip of the finger, could annihilate scores of innocent civilians. No institution in the civilian world is charged with such far-reaching and deadly power.

A second distinction involves military members' required level of commitment to their employer. Notably, all members, whether they currently sit behind a desk or command a tank division, have the ultimate duty, when called upon, to sacrifice their lives to protect their nation's security interests.[159] If a military conflict arises, members are subject to worldwide deployment without notice, can be separated from their families for long periods of time, and may never return.[160] Most civilians will never be called upon to put service to their employer ahead of their own personal lives and safety.

The unique military environment demands that soldiers be held to higher and more rigorous standards of conduct.[161] Importantly, the Supreme Court recognizes that the military is "by necessity, a specialized society,"[162] and military regulations "must insist upon a respect for duty and a discipline without counterpart in civilian life."[163] Moreover, the military cannot apply its standards solely during times of war because they are

> as vital during peacetime as during war because [military] personnel must be ready to provide an effective defense on a moment's notice; the necessary habits of discipline and unity must be developed in advance of trouble . . . . '[T]he inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection.'[164]

Thus, the military environment demands exacting standards of order and discipline to ensure that the deadly power of the military is util-

157. *See* Grant Wade, *No Punishment, No Responsibility*, COM. APPEAL, June 1, 1997, at B7.
158. *See id.*
159. *See* Fogleman, *supra* note 155.
160. *See* Wade, *supra* note 157, at B7.
161. *See Parker*, 417 U.S. at 743.
162. *Id.*
163. Schlesinger v. Councilman, 420 U.S. 738, 757 (1975).
164. Goldman v. Weinberger, 475 U.S. 503, 508 (1986) (quoting in part Chappell v. Wallace, 462 U.S. 296, 300 (1983)).

ized responsibly and to safeguard the lives of the many men and women who subordinate themselves to protect their nation.

B. Constitutional Rights in the Military

Despite the rigorous demands of military life, courts have repeatedly held "one does not surrender his or her constitutional rights upon entering the military."[165] However, such rights "must be viewed in light of the special circumstances and needs of the armed forces."[166] The Supreme Court recognizes that restrictions exist in the military "'for reasons that have no counterpart in the civilian community'" and such "'considerations must be weighed'" when considering the constitutionality of military regulations.[167] Therefore, constitutional rights apply within the armed services, but the important demands of military life can narrow their application.[168]

1. Impact on textual constitutional rights

To date courts have only narrowed the application of substantive textual constitutional rights in a few areas within the military. For instance, in *Parker v. Levy*,[169] the Supreme Court limited the application of the First Amendment in the military. In *Parker*, a military officer brought a free speech challenge to his court-martial conviction under the UCMJ for making several public statements urging enlisted personnel to refuse to participate in the Vietnam conflict.[170] The Court reasoned that, although the First Amendment may protect "disrespectful and contemptuous speech" in the civilian community, it cannot be similarly enforced within the armed forces because such speech undermines "'a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself.'"[171]

Similarly, the "special needs" of the armed forces have also limited the application of the Fourth Amendment in the military context.[172] In *United States v. McCarthy*,[173] the United States Court of

165. Beller v. Middendorf, 632 F.2d 788, 810 (9th Cir. 1980).
166. *Id.*; *see also* Philips v. Perry, 106 F.3d 1420, 1426 (9th Cir. 1997) (referring to *Beller* as standing for this proposition).
167. Parker v. Levy, 417 U.S. 733, 758-59 (1974) (quoting United States v. Priest, 21 C.M.A. 564, 570, 45 C.M.R. 338, 344 (C.M.A. 1972)).
168. *See id.* at 743.
169. 417 U.S. 733.
170. *See id.* at 736.
171. *Id.* at 759 (quoting *Priest*, 21 C.M.A. at 570, 45 C.M.R. at 344).
172. United States v. Taylor, 41 M.J. 168, 171 (C.M.A. 1994).

Appeals for the Armed Forces held that a warrantless search and apprehension of an airman in his barracks room did not violate the Fourth Amendment. The accused claimed his barracks room was a "'home' within the meaning of the Fourth Amendment," and, therefore, was protected from unreasonable government intrusions.[174] The court rejected this argument, recognizing that "the Fourth Amendment analysis of the appellant's apprehension must be [made] in the context of a military setting."[175] The court reasoned that one's "reasonable expectations of privacy within the military society will differ from those in the civilian society" because in the military the reasonableness of intrusions "may be affected by the need for good order and discipline."[176] The court concluded that one's barracks "does not provide the same sanctuary as . . . a private home" and the accused "could not reasonably expect to avoid apprehension . . . by retreating to his room."[177]

Different from military barracks and dorms, courts have not narrowed the application of the Fourth Amendment to searches of the on-base private individual quarters or off-base homes of service members.[178] In *United States v. Kaliski*,[179] the court overturned a conviction of an officer because the search of his on-base quarters violated the Fourth Amendment. In *Kaliski*, Air Force security policemen stood on the officer's porch and peered through his curtains to witness his sexual activities with another service member's wife.[180] The Air Force used this evidence to court-martial the officer for adultery, sodomy, and conduct unbecoming an officer.[181] The court acknowledged that "[m]ilitary law recognizes a privacy right in government quarters" that does not deviate from the privacy afforded to civilian homes.[182] The court applied precedent from civilian Fourth Amendment cases in finding that the officer had a "reasonable expectation of privacy" not only inside the walls of his quarters but also in the property "immediately adjacent" to the home.[183] Thus, the

173. 38 M.J. 398 (C.M.A. 1993).
174. *Id.* at 402.
175. *Id.* at 401.
176. *Id.* at 402.
177. *Id.* at 403.
178. *See* United States v. Kaliski, 37 M.J. 105, 109-10 (C.M.R. 1993).
179. *Id.*
180. *See id.* at 107.
181. *See id.* at 106.
182. *Id.* at 108.
183. *Id.* (quoting United States v. Anderson, 552 F.2d 1296, 1300 (8th Cir. 1977)).

court held the peeping cops' warrantless visual search was illegal.[184]

2. Impact on non-textual substantive due process rights

Although courts have narrowed the breadth of the First and Fourth Amendments within the military, no similar narrowing has occurred with non-textual substantive due process rights.[185] In fact, in numerous cases, both civilian and military courts have consistently applied the Supreme Court's privacy decisions to military cases without limitation.[186] For instance, in *Bygrave*, the Court of Appeals for the Armed Forces analyzed the precedent of *Griswold* through *Bowers* in attempting to determine whether military members have a fundamental privacy right to engage in consensual heterosexual sex.[187] The court's reasoning indicated that substantive due process rights pronounced by the Supreme Court are not narrowed due to military considerations, but instead, when such a right exists, the military, like any other state or federal institution, must advance a "compelling interest" and take action that is "narrowly tailored" pursuant to that interest in order to infringe upon that privacy right.[188]

Similarly, in *Beller v. Middendorf*, the Ninth Circuit Court of Appeals faced the issue of military members' right to engage in homosexual sodomy before the Supreme Court's historic *Bowers* decision.[189] As in *Bygrave*, the *Beller* court looked to the Supreme Court's privacy precedent in its analysis and reasoned that some decisions, such as *Roe*, arguably protected consensual homosexual conduct.[190] Notably, the court did not treat this right as any less fundamental due to the military environment and, as a result, applied strict constitutional scrutiny to the military's challenged sodomy regulation.[191]

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184. *See id.*

185. *See, e.g., Philips*, 106 F.3d 1420; High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990); Hatheway v. Secretary of the Army, 641 F.2d 1376 (9th Cir. 1981); *Beller*, 632 F.2d 788; United States v. Bygrave, 46 M.J. 491 (C.A.A.F. 1997); United States v. Gates, 40 M.J. 354 (C.M.A. 1994); United States v. Henderson, 34 M.J. 174 (C.M.A. 1992); United States v. Fagg, 34 M.J. 179 (C.M.A. 1992).

186. *See, e.g., Philips*, 106 F.3d 1420; *High Tech Gays*, 895 F.2d 563; *Hatheway*, 641 F.2d 1376; *Beller*, 632 F.2d 788; *Bygrave*, 46 M.J. 491; *Gates*, 40 M.J. 354; *Henderson*, 34 M.J. 174; *Fagg*, 34 M.J. 179.

187. *See Bygrave*, 46 M.J. at 495-96.

188. *Id.* at 496.

189. *See Beller*, 632 F.2d at 807-12.

190. *See id.* at 810.

191. *See id.* at 810-12.

Hence, in the area of substantive due process, a fundamental privacy right to engage in adultery in the civilian context would be no less fundamental in the military environment. Therefore, the military's adultery regulation is presumptively unconstitutional and, as a result, must meet strict scrutiny to survive a substantive due process challenge.

C. Surviving Strict Scrutiny in the Military

Fundamental rights are not absolute and, therefore, untouchable by the government.[192] The government can intrude even on protected privacy rights if it can identify a compelling interest and employ narrowly tailored means to advance this relevant interest.[193] Hence, the military can intrude upon a soldier's constitutionally protected consensual sexual activities to the extent necessary to accomplish compelling needs of the armed services.

1. "Military" strict scrutiny

Before analyzing the military's justifications for infringing upon military members' right to engage in adultery, one must realize that courts apply a more deferential strict scrutiny analysis in cases involving military matters.[194] The Supreme Court first utilized this concept of "military" strict scrutiny in *Korematsu v. United States*,[195] the infamous World War II Japanese exclusion case. In *Korematsu*, the Supreme Court considered the constitutionality of a military order excluding all persons of Japanese ancestry, including American citizens, from certain areas on the West Coast and subjecting those who refused to leave to detention in relocation centers.[196] For the first time in its history, the Court pronounced that any law that curtails individual rights solely on the basis of race or ethnicity is "immediately suspect," and such a restriction must meet "the most rigid scrutiny" in order to sustain its constitutionality.[197] Nonetheless, the Court upheld the military's discriminatory order.[198]

The Court unquestionably adhered to the judgment of military

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192. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 686 (1977).
193. *See id.*
194. *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503 (1986); Rostker v. Goldberg, 453 U.S. 57 (1981); Parker v. Levy, 417 U.S. 733 (1974); Korematsu v. United States, 323 U.S. 214 (1944).
195. 323 U.S. 214 (1944).
196. *See id.* at 215-17.
197. *Id.* at 216.
198. *See id.* at 223-24.

authorities that people of Japanese ancestry posed a special threat of espionage and sabotage not similarly posed by other ethnic groups, and, as a result, the Court found that the government had the requisite compelling need to justify the exclusion.[199] Furthermore, the Court concluded that the means employed by the military, a total class exclusion, was necessary and not unconstitutionally overbroad, even though the military had actual evidence of only a few disloyal Japanese-Americans and ignored the option of conducting individualized disloyalty hearings to exclude dangerous people on a case-by-case basis.[200] Thus, although the Court purported to apply strict scrutiny to the challenged military order, it employed special deference and respect for the judgment and reasoning of military leaders due to the national security implications of the case.

Moreover, the Supreme Court applies this less demanding scrutiny even in military cases outside the context of war.[201] For example, in *Goldman v. Weinberger*, a serviceman challenged the constitutionality of the Air Force's dress and appearance regulations, claiming they infringed upon his fundamental First Amendment right to wear a yarmulke in respect of his religion.[202] In reviewing the Air Force's justification for preventing this religious exercise, the Court reasoned that the critical and unique demands of military life require that judicial scrutiny of military regulations be "far more deferential than constitutional review of similar laws or regulations designed for civilian society."[203] Moreover, the Court admitted that the judiciary is "ill-equipped" to evaluate the impact that particular activities have on military effectiveness, and, thus, "when evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest."[204] Accordingly, the Court held the in-

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199. *See id.*
200. *See id.* at 218-19, 223-34.
201. *See, e.g.*, *Goldman*, 475 U.S. 503 (upholding the constitutionality of an Air Force regulation that prevented service members from wearing religious headgear); *Rostker*, 453 U.S. 57 (upholding the constitutionality of legislation that required the selective service registration of males but not females); *Parker*, 417 U.S. 733 (holding Articles 133 and 134 of the Uniform Code of Military Justice are not unconstitutionally vague, stating that "Congress is permitted to legislate both with greater breadth and with greater flexibility when proscribing the rules by which [the military] will be governed." *Id.* at 756).
202. *See id.* at 504-05.
203. *Id.* at 507.
204. *Id.*

fringement in this case was constitutionally justified because

> [t]he considered professional judgment of the Air Force is that the traditional outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission. Uniforms encourage a sense of hierarchical unity by tending to eliminate outward individual distinctions except for those of rank.[205]

Hence, these cases reveal that, in military cases, courts are more inclined to respect the government's legislative rationale as legitimate and even compelling as compared to those cases unrelated to military issues because "judicial deference ... is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged."[206]

2. A compelling military interest

Even under a deferential strict scrutiny analysis, the military still must establish that there is a compelling need to criminalize adultery. Ultimately, the purpose of all military law, including those laws regulating adultery, is to maintain "good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."[207] Furthermore, the Supreme Court has held that "no governmental interest is more compelling than the security of the Nation."[208] Courts also recognize that "maintaining effective armed forces is indisputably a compelling governmental purpose."[209] However, under strict scrutiny, the military must affirmatively establish that this is, in fact, the interest being pursued by its adultery law.

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205. *Id.* at 508. Interestingly, after winning this case, the Department of Defense voluntarily authorized the military services to make reasonable accommodations for the religious practices of military members. *See* U.S. DEP'T OF DEFENSE, DIR. 1300.17, ACCOMMODATION OF RELIGIOUS PRACTICES WITHIN THE MILITARY SERVICES (3 Feb. 1988). Subsequently, the Air Force authorized the wearing of visible yarmulkes with the military uniform. *See* U.S. DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 36-2903, PERSONNEL: DRESS AND PERSONAL APPEARANCE OF AIR FORCE PERSONNEL, table 2.8 (1 Apr. 1996).

206. *Rostker*, 453 U.S. at 70.

207. MCM, *supra* note 1, pt. I, ¶ 3.

208. Haig v. Agee, 453 U.S. 280, 307 (1981).

209. Philips v. Perry, 106 F.3d 1420, 1425 (9th Cir. 1997); *see also* Hatheway v. Secretary of the Army, 641 F.2d 1376, 1382 (9th Cir. 1981) (stating "[t]he government has a compelling interest in maintaining a strong military force").

As brought to light by the Kelly Flinn case, many people fail to see the causal connection between private adulterous behavior and the effectiveness of a military unit;[210] however, a critical link exists. As already discussed, the military is a specialized and interdependent society where the mission is critical and lives are always at risk. Due to this unique environment, the military's strength and effectiveness depends on trust: service members trusting one another and the American public trusting the military as a whole.[211] Therefore, the military holds its members to high standards of moral integrity so they, and the military as a whole, can be trusted.[212]

a. maintaining trust and confidence among soldiers

Most importantly, service members must be able to trust one another. For instance, a pilot must trust her 19-year-old crew chief who decides whether her aircraft is fit to fly; a paratrooper must trust the 17-year-old private who packs his parachute; and an infantryman must trust his 30-year-old platoon leader who may ultimately decide whether he lives or dies.[213] Moral integrity—knowing that a fellow soldier always seeks and does what is right—provides the crucial foundation for this trust.[214] The former Air Force Chief of Staff, General Robert R. Fogleman, once said, "[w]hen you ask young men and women to go and die for their country, when you are put in a situation where you make decisions that employ those people, it's essential that they believe you are a person of honor and integrity who has their best interests at heart."[215] Moreover, the General stressed that trust is not built on words; behavior is the key:

> [Y]ou must demonstrate the utmost integrity and honesty in everything *you* do—on duty and off duty. You must be straightforward in your dealings with superiors and subordi-

210. *See* Scarborough, *supra* note 31, at A4.

211. *See* Sheila E. Widnall, *The Importance of Values* (visited Jan. 20, 1998) <http://www.af.mil/news/speech/current/ The_Importance_of_Value.html> (reprinting remarks of the then Secretary of the Air Force, Sheila Widnall, at the 1997 commencement ceremony at Texas A&M University at College Station, Texas on May 10, 1997); *see also Parker*, 417 U.S. at 758-59 (discussing the command responsibilities of sending soldiers into combat); Orloff v. Willoughby, 345 U.S. 83, 91 (1953) (discussing the "special trust and confidence" of the President and the American people placed in the hands of every military officer).

212. *See* Fogleman, *supra* note 155.

213. *See* Widnall, *supra* note 211.

214. *See* Fogleman, *supra* note 155.

215. General Ronald R. Fogleman, *Leadership Initiatives* (last modified Oct. 10, 1997) <http://www.af.mil/lib/afissues/1997/issuepl.html>.

> nates alike. You must set the example of principled behavior for all to observe, and you must do the right thing, even when no one is looking. It is this example that inspires troops to demonstrate similar integrity and self-sacrifice. When they know your word is your bond, then confidence and trust will permeate the outfit. On the other hand, nothing destroys an outfit's effectiveness quicker than a lack of integrity on the part of its leadership.[216]

Even outside the walls of the military, our courts recognize the causal link between promoting behavior that fosters mutual trust and achieving military effectiveness. More specifically, courts acknowledge the deteriorating impact that certain private sexual conduct can have on the military's compelling need to maintain a strong fighting force.[217] In *Beller v. Middendorf*, three Navy sailors challenged their discharges for homosexual conduct on the grounds that such action violated their privacy or liberty interests protected under the Due Process Clause of the Fifth Amendment.[218] Because this case preceded *Bowers*, the Ninth Circuit Court of Appeals conceded that the Supreme Court's then-existing privacy decisions could extend to protect "private consensual homosexual behavior."[219] Nonetheless, the court held the Navy's interest in the "effective and efficient performance of [its] mission" is sufficiently compelling to justify the regulation of this protected sexual behavior.[220] In making this decision, the court accepted the Navy's rationale connecting this behavior to mission accomplishment, including "that a substantial number of naval personnel have feelings regarding homosexuality, based upon moral precepts recognized by many in our society as legitimate, which would create tensions and hostilities, and that these feelings might undermine the ability of a homosexual to command the respect necessary to perform supervisory duties."[221] The court found "[these] concerns have a basis in fact and are not conjectural,"[222] and, in upholding the regulation, concluded that "the importance of the government interests furthered ... outweigh[s] whatever heightened solicitude is appropriate for consensual private homosexual conduct."[223]

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216. Fogleman, *supra* note 155.
217. *See* Beller v. Middendorf, 632 F.2d 788, 810-12 (9th Cir. 1980).
218. *See id.* at 807.
219. *Id.* at 810.
220. *Id.* at 811 n.22.
221. *Id.* at 811-12.
222. *Id.* at 811.
223. *Id.* at 810. *But see* Meinhold v. United States Dep't of Defense, 34 F.3d

Shortly after *Beller*, the Ninth Circuit decided *Hatheway v. Secretary of the Army*,[224] an equal protection challenge to the Army's prohibition of homosexual sodomy. Due to "the similarity of the interests at stake . . . [with those] in *Beller*," the court again subjected the government action to heightened scrutiny.[225] The court upheld the regulation and reaffirmed *Beller's* reasoning that, due to widespread moral disapproval, this form of sexual behavior undermines a service member's "'ability to command the respect and trust of the personnel he or she commands.'"[226] As a result, such acts "severely compromise the government's ability to maintain . . . [a strong] force."[227]

The Ninth Circuit's decisions in *Beller* and *Hatheway* became guideposts for every other circuit that subsequently faced constitutional issues in regulating homosexual conduct in the military.[228] For example, in *Rich v. Secretary of the Army*,[229] the United States Court of Appeals for the Tenth Circuit heard a substantive due process challenge to a soldier's homosexual discharge from the Army.[230] The Court relied on the "nexus between homosexuality and unsuitability"[231] for military service set forth in *Beller* and *Hatheway* in holding "even if privacy interests [are] implicated in this case, they are outweighed by the Government's interest in preventing armed services members from engaging in homosexual conduct."[232] Moreover, even

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1469 (9th Cir. 1994) (holding service members cannot be discharged based upon homosexual status alone). The Ninth Circuit concluded that the military's policy for discharging homosexuals was rationally based upon the damaging effects of homosexual conduct on the military; "the presence of persons who engage in homosexual conduct, or who demonstrate a propensity to engage in homosexual conduct by their statements, impairs the accomplishment of the military mission." *Id.* at 1472. However, in this case, the Navy's presumption that a member's statement that "I am in fact gay" presents similar dangers by indicating an intent or propensity to engage in homosexual conduct is irrational and "arbitrarily goes beyond what the DOD's policy seeks to prevent." *Id.* at 1479-80. The Court avoided this equal protection issue by construing the military's regulation to mandate a discharge for a statement of homosexuality "only when that statement itself indicates more than the inchoate 'desire' or 'propensity' that inheres in status." *Id.* at 1479. The statement must demonstrate a "concrete, expressed desire to commit homosexual acts." *Id.*

224. 641 F.2d 1376 (1981).
225. *Id.* at 1382.
226. *Id.* (quoting Beller v. Middendorf, 632 F.2d 188, 811 (9th Cir. 1980)).
227. *Id.*
228. *See Philips*, 106 F.3d at 1427 n.12; *see, e.g.*, Rich v. Secretary of the Army, 735 F.2d 1220 (10th Cir. 1984).
229. 735 F.2d 1220 (10th Cir. 1984).
230. *See id.* at 1227.
231. *Id.*
232. *Id.* at 1228.

after the Supreme Court's decision in *Bowers* reduced the review of such cases to mere rational basis, courts continued to refer to *Beller* and *Hatheway's* heightened scrutiny rationale to justify the military's infringement on homosexuals' asserted privacy interests.[233]

Adultery presents a comparable threat to military effectiveness. Similar to homosexual conduct, there is widespread moral disdain for adulterous behavior. Consequently, adultery undermines a soldier's "moral beacon" image that is vital to commanding the respect of peers and subordinates in critical situations.[234] Indeed, military leaders acknowledge that "it's tough to follow a moral maggot, especially in combat."[235]

Although modern Supreme Court decisions indicate that mere moral repugnance towards a particular class or activity is an illegitimate basis for government restrictions,[236] such considerations remain legitimate within the military context due to the unique nature of the military mission.[237] For instance, in *City of Cleburne v. Cleburne Living Center, Inc.*,[238] the Supreme Court struck down a city ordinance that required special use permits for homes for the mentally retarded but no other multiple resident housing because the city enacted the ordinance largely due to the negative attitudes and fears of the surrounding property owners towards the mentally retarded.[239] The Court reasoned that "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from" other multiple resident dwellings.[240]

Nevertheless, *Cleburne* and similar Supreme Court decisions did not involve military matters.[241] As already discussed, courts evaluate military regulations with "great deference to the professional judgment of military authorities,"[242] recognizing that "[i]n the armed

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233. *See Philips*, 106 F.3d at 1425-26.

234. *See* Mark Thompson, *Adulterated Standards: What's the Pentagon to Do When Scandal Snags the Top Candidate for Chairman of the Joint Chiefs?*, TIME, June 16, 1997, at 40.

235. Bill Menke, *Hard to Tell Difference Between Parties*, CIN. BUS. COURIER, June 20, 1997, at 51.

236. *See Romer*, 116 S. Ct. at 1629, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448 (1985).

237. *See Philips*, 106 F.3d at 1427-29.

238. 473 U.S. 432 (1985).

239. *See id.* at 448.

240. *Id.*

241. *See Philips*, 106 F.3d at 1429.

242. *Goldman*, 475 U.S. at 507.

forces some restrictions exist for reasons that have no counterpart in the civilian community."[243] Accordingly, reasoning that has no rational place within a civilian context can, nevertheless, be legitimate within a military environment.[244] For example, the Supreme Court acknowledges that "to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps."[245] Flaws in a soldier's moral character subvert this instructive process and, therefore, put the mission and additional lives at risk.[246] Hence, extensive moral disapproval for certain forms of personal conduct remain legitimate and compelling concerns for the military.[247]

Apart from moral considerations, adultery entails an additional harmful element not apparent in homosexual cases. Namely, an adulterous affair "inevitably involves deceit,"[248] and, most likely, deceit of one's own spouse and children. States historically proscribed adultery not only in respect of age-old biblical and moral norms, but, more importantly, to protect "the marriage vow," the pledge of unyielding fidelity taken by each spouse.[249] Contrary to this promise, an extramarital affair destroys the bond of trust between a husband and wife and "often rips apart families."[250] Hence, an adulterous service member signals to the soldiers around him, "I am not to be trusted." As a result, this promiscuous conduct directly undermines the interrelationships essential to the effectiveness of a military unit.[251] If a member "cannot be trusted to control his or her emotions, libido or temper, how then can he or she be trusted to command ships, fly nuclear-armed aircraft and send troops off to war?"[252]

Kelly Flinn's case is a clear example of adultery's damaging impact on military effectiveness. Flinn was entrusted to fly a nuclear-armed bomber, and she had an affair with the husband of an airman

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243. *Parker*, 417 U.S. at 758-59.

244. *See id.*

245. *Goldman*, 475 U.S. at 507.

246. *See Philips*, 106 F.3d at 1427-29; *Rich*, 735 F.2d at 1228; *Hatheway*, 641 F.2d at 1382; *Beller*, 632 F.2d at 811-12.

247. *See id.*; *Rich*, 735 F.2d at 1228; *Hatheway*, 641 F.2d at 1382; *Beller*, 632 F.2d at 811-12.

248. 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).

249. *See* United States v. Hickson, 22 M.J. 146, 147 (C.M.A. 1986).

250. City of Sherman v. Henry, 928 S.W.2d 464, 470 (Tex. 1996).

251. *See* Menke, *supra* note 235, at 51.

252. Lou Ransom, *Don't Compromise Standards*, CIN. ENQUIRER, June 6, 1997, at A10.

whose unit maintains safe operating conditions for her aircraft.[253] In the end, her adultery not only cast doubt on her ability to use sound judgment when flying, but also, arguably, put hers and other pilots' lives at increased risk.[254] This case of an officer stealing the spouse of a subordinate enlisted member likely injected the entire enlisted ranks with a general mistrust of all officers on base, and, as a result, damaged a critical relationship between pilots and their support personnel.[255] Indeed, one haphazard or careless oversight during an aircraft safety-check can cost several lives and several million dollars. Granted, these notions of trust and confidence are intangibles that, for the most part, cannot be objectively measured.[256] Nonetheless, history and experience has taught our military that "circumstances that foster trust and confidence must prevail" because they "engender discipline, which saves lives" and wins wars.[257]

b. maintaining the trust and confidence of the American people

The military must not only foster trust and confidence among its troops to maintain its effectiveness, it must also sustain the trust and confidence of the American people. Ultimately, the American people are the foundation of the armed forces' strength; they provide the people and funds necessary to build a military infrastructure.[258] These critical resources would become scarce if the public lost faith in the military to which they entrust their security and the lives of their family members. Thus, the military's high standards of moral conduct are a vital source of comfort and confidence for the American public.[259]

Because the public entrusts the military with responsibilities of the highest magnitude, Americans closely scrutinize the military, the

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253. *See* Mark J. Chiarello, *Flinn's Affair Has Been Harmful for U.S. Security*, TIMES UNION, June 1, 1997, at B4.

254. *See id.*

255. *See id.*

256. *See* Togo D. West, Jr., *There's a Problem, and We Mean to Fix It* (visited Jan. 20, 1998) <http://www.defenselink.mil/pubs/di97/di1207.html> (reprinting the remarks of the Secretary of the Army, Togo West, before the Senate Armed Services Committee on Feb. 4, 1997).

257. *Id.*

258. *Id.*

259. *See generally* Debra Dickerson, *Drawing the Right Line: Defense Secretary William Cohen Knows It's the Mission That Matters*, U.S. NEWS & WORLD REP., June 16, 1997, at 35, 38 (stating that high moral standards are often "[w]ise restraints" because "[s]oldiers often regard their service as a place where people can use words like Duty, Honor, Country . . . without being ironic").

decisions of its leaders, and the conduct of all its members. This scrutiny reaches into military members' personal conduct and even their sexual activities. One need only open a newspaper or magazine to understand how sex can affect the public's perception of the military. Most notably, the 1991 Navy Tailhook "sex scandal" shocked the entire nation.[260] Numerous allegations of sexual misconduct, ranging from sexual harassment to rape, arising from a Las Vegas convention of naval aviators "branded the Navy . . . as sexual harassers out of control."[261] The official investigation of the incident implicated 117 Navy and Marine Corps officers for a wide range of sexual offenses, including twenty-three indecent assaults and twenty-three indecent exposures.[262] The most outrageous actions included "sexual relations in public, paid consensual sex, oral sex, 'butt-biting,' and 'leg shaving' in hotel rooms where women had their legs and crotches shaved by aviators."[263] This "atmosphere of debauchery" deeply scarred the professional reputation of the Navy and the entire military.[264] Specifically, Tailhook created a harmful public perception of a sexist military willing to let soldiers "behave like animals when they are off duty or 'blowing off steam.'"[265] Does America want their sons and daughters confined on ships with these people?

Importantly, the Navy's Tailhook debacle convinced the military that it must take a tough and active role in quashing "disorderly, improper, and promiscuous behavior."[266] Military leaders vowed to "restore public trust and confidence"[267] in the military by creating a professional environment that does not tolerate personal conduct that "erodes the U.S. military's integrity and reputation for excellence."[268]

Despite more concerted efforts to quash sexual misconduct, the military's problems with sex scandals continue. More recently, national attention turned to the Army's Aberdeen Proving Ground,

260. *See* Bill Gertz, *140 Implicated in Tailhook Report: Navy Leadership 'Breakdown' Cited*, WASH. TIMES, Apr. 24, 1993, at A1.

261. *Id.* (quoting Representative Patricia Schroeder, a member of the House Armed Services Committee).

262. *See id.*

263. *Id.*

264. *Id.*

265. *Kelso's Departure Gives Navy a Chance to Reinvent Itself*, AUSTIN AMERICAN-STATESMAN, Feb. 18, 1994, at A20 [hereinafter *Kelso's Departure*].

266. Gertz, *supra* note 260, at A1.

267. *Kelso's Departure*, *supra* note 265, at A20.

268. Charles Grassley, *Shape Up Military on Gender Issue*, DES MOINES REG., Jan. 23, 1997, at 11.

where a ring of Army drill sergeants allegedly extorted sex from female recruits during basic training.[269] The investigation also revealed the commander of the training base, Major General Longhouser, engaged in sexual impropriety, having an adulterous affair with a civilian co-worker.[270] Can America trust the Army to properly train and protect their sons and daughters?

Finally, the most recent military sex scandal involved the highest-ranking noncommissioned officer in the Army, Sergeant Major Gene McKinney. He is a married man and faced a court-martial for several counts of sexual assault.[271] He was accused of seeking sex from six women by using "varying degrees of pressure," sometimes grabbing and touching them.[272] Although the military court acquitted Sergeant McKinney of most of the charges due to a lack of concrete evidence, the highly-publicized prosecution of this decorated military leader, nonetheless, further undermined the professional reputation of the military.[273] Can America have confidence in the judgment of the top military officials who entrusted the Army's most prestigious enlisted post to this man?

These cases of sexual impropriety erode the people's trust and confidence in their military establishment. Although cases of adultery can arguably be less egregious than the above examples, adulterous behavior still involves the same issues of trust and fidelity. Adulterous service members serve their own interests above those of others; they willingly subordinate the needs and trust of either their own family or the family of their sexual partner. This creates the same questions and doubt in the eyes of the American public. Can we trust these people and the organization in which they act to always serve the best interest of our country and our children? The trust and confidence of the American people is an essential source of

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269. *See* Thomas, *supra* note 248, at 34.

270. *See id.*

271. *See* Paul Richter, *Army Will Face Delicate Decision in Sex Case*, L.A. TIMES, Aug. 25, 1997, at A4.

272. *Id.* The Army court-martialed Sergeant Major McKinney for eighteen counts of sexual misconduct and one count of obstruction of justice. *See* Robert L. Jackson & Dennis Freeman, *McKinney Demoted, Reprimanded by Army*, L.A. TIMES, March 17, 1998, at A1.

273. *See* Robert L. Jackson & Dennis Freeman, *McKinney Demoted, Reprimanded by Army*, LA TIMES, March 17, 1998, at A1. Ultimately, the military court found McKinney not guilty of the eighteen counts of sexual misconduct but did convict him of obstruction of justice. *See id.* The court sentenced Sergeant Major McKinney to a reprimand and reduction in two ranks to master sergeant. *See id.*

strength for the military and, therefore, justifies the military in regulating adulterous transgressions that undermine this special relationship.

Thus, proscribing adultery serves the compelling purpose of maintaining a strong and viable military capable of fighting for our national security. The critical link is trust. First, adultery erodes the trust among soldiers that is crucial in an environment where their lives are on the line. Second, adultery undermines the trust and confidence of the American public that is the ultimate source of military strength.

3. A narrowly drawn regulation

The second prong of strict scrutiny requires that the military only employ means "precisely tailored" to effectuate its compelling interest of maintaining an effective military. Importantly, one need only look to the adultery law itself to determine whether it is narrowly drawn. For example, the military's criminal offense of adultery requires three elements of proof:

> (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.[274]

Noticeably, the law requires more than mere adulterous sexual intercourse. The third element of the offense ensures that the rule is implicated only when compelling military interests are threatened. The government must show that the affair, under the circumstances, either prejudiced the "good order and discipline" or brought "discredit upon the armed forces."[275] Hence, many private extramarital affairs escape untouched by the military. Only when this conduct threatens the compelling mission of the armed forces does the adultery law require its application.

a. conduct prejudicial to good order and discipline

First, the adultery law applies to adulterous sex that threatens

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274. MCM, *supra* note 1, pt. IV, ¶ 62.
275. *Id.*

the good order and discipline of the military. Arguably, nearly every instance of a military member acting improperly is prejudicial to the military in some way, directly or remotely.[276] Nevertheless, the adultery regulation, as applied by military courts, "does not include these distant effects."[277] The military crime of adultery is limited to conduct that causes prejudice that is "direct and palpable,"[278] and the government must present "specific proof of prejudice."[279]

The case of *United States v. Perez*[280] demonstrates that merely proving that a military member engaged in adultery will not, by itself, establish prejudice to good order and discipline.[281] In *Perez*, an Army staff sergeant appealed his court-martial conviction of adultery.[282] The soldier had carried on an affair with a civilian woman, who was not a co-worker, in the privacy of the civilian's off-base home.[283] The sergeant was still married at the time of the affair, but he had entered into a formal separation agreement with his wife.[284] The agreement stated that each spouse "'could conduct individual business and personal affairs without interfering with each other in any way, just as if [they] were not married.'"[285] The court emphasized that a critical element of an adultery offense is that "[t]he government must prove, either by direct evidence or by inference, that the accused's conduct was prejudicial to good order and discipline."[286] The court reasoned that because the appellant was legally separated and the affair was wholly private and did not involve a working relationship, the government failed to prove that the accused's conduct "adversely affected good order and discipline."[287] Accordingly, the court dismissed the adultery conviction.[288]

On the other hand, the case of *United States v. Green*[289] shows that the government can prove the prejudicial element by establish-

276. *See* Captain Mayer, *Satisfying All Elements of Adultery*, ARMY LAW., Apr. 1992, at 38, 39.
277. *Id.*
278. *Id.*
279. Major Hunter, *Aids and Adultery*, ARMY LAW., Apr. 1993, at 16, 18.
280. 33 M.J. 1050 (A.C.M.R. 1991).
281. *See* Mayer, *supra* note 275, at 39.
282. *See Perez*, 33 M.J. at 1054.
283. *See id.*
284. *See id.* at 1052.
285. *Id.*
286. *Id.* at 1054.
287. *Id.*
288. *See id.* at 1055.
289. 39 M.J. 606 (A.C.M.R. 1994).

ing an adulterous affair's impact on the inter-workings of a military unit. In *Green*, a married noncommissioned officer had sex with a civilian in the enlisted barracks.[290] The court concluded that this conduct did cause a "direct and obvious injury to good order and discipline" because the accused was in a position of leadership and engaged in these acts where other soldiers could see or find out about them.[291] As a result, this conduct would reduce other soldiers' trust and confidence in the sergeant's integrity, leadership, and respect for authority and regulations.[292] The court upheld the adultery conviction.[293]

b. conduct discrediting the armed forces

Even if the government cannot establish the adulterous conduct is prejudicial to good order and discipline, an adultery offense can still be predicated on a showing that the conduct "was of a nature to bring discredit upon the armed services."[294] Thus, an adulterous affair that undermines the special trust and confidence of the American people constitutes the military crime of adultery. Again, military law requires more than a potential remote impact on the military's public reputation.[295] Military law requires the government to make an affirmative showing through "direct or circumstantial evidence or by inference," that the affair "operated to bring the service into disrepute or lower it in public esteem."[296]

In *Perez*, the court also addressed the issue of whether the accused's adulterous conduct discredited the armed services.[297] The court indicated that the government must meet two elements in order to establish service-discrediting conduct: (1) "[c]ivilans must be aware of the behavior and the military status of the offender" and (2) "the conduct offended local law or community standards."[298] The government failed to offer any such evidence in *Perez* and, therefore, did not establish the crime of adultery under the service-discrediting prong.[299]

290. *See id.* at 608.
291. *Id.* at 610.
292. *See id.*
293. *See id.*
294. MCM, *supra* note 1, pt. IV, ¶ 62.
295. *See* Mayer, *supra* note 275, at 39.
296. Hunter, *supra* note 278, at 17, 18.
297. *See Perez*, 33 M.J. at 1054-55.
298. *Id.* at 1054.
299. *See id.* at 1054-55.

c. a narrowly drawn adultery law applied in the case of Kelly Flinn

In the case of Kelly Flinn, the Air Force's application of the military's adultery standard plainly demonstrates that this law is narrowly tailored to the compelling needs of military effectiveness. First, Kelly Flinn's adulterous conduct directly threatened good order and discipline within the military. The military trains its enlisted members to trust in the judgment of their superior officers and faithfully follow their orders—even when it means putting their own lives on the line. In return for this fidelity, the military expects its officers to lead and make decisions with the best interests of their country and subordinates in mind. At first, Kelly Flinn exercised the hospitality expected of all military officers by helping an enlisted member new to the Air Force and her civilian husband move into their new home.[300] However, within a week of arriving at her new base, the young airman found love letters from Kelly Flinn to her husband, revealing that this seemingly trustworthy superior officer was having sex with and trying to steal her husband.[301] Unlike *Perez*, Kelly Flinn's affair was not wholly private and unrelated to the inter-workings of a military unit; she violated the trust of an enlisted corps trained to follow her orders.[302] Thus, Kelly Flinn's adulterous conduct constituted a "direct and palpable"[303] injury to a military environment that relies upon "instinctive obedience, unity, [and] commitment."[304]

Second, although Kelly Flinn's direct affront to military discipline was sufficient to justify the application of the adultery regulation, her conduct also undeniably discredited the professional reputation of the armed forces. As the nation's first female bomber pilot, Kelly Flinn assumed a position of great public honor and trust.[305] She flew an aircraft tasked with a nuclear mission, and, in a time of war, her nation might call upon her to deliver nuclear weapons and other payloads of mass destruction.[306] As with other important military figures, Flinn's tremendous responsibility, coupled with her status as a

300. *See* Gibbs, *supra* note 11, at 32.

301. *See id.* Airman Zigo later wrote to the Secretary of the Air Force that she felt helpless to stop the relationship between her husband and Kelly Flinn. *See id.* at 30-31. Airman Zigo stated that "[Kelly Flinn] had power, both as an officer and academy graduate. She also had special status as the first female B-52 pilot." *Id.*

302. *See id.* at 30-33.

303. Mayer, *supra* note 275, at 39.

304. *Goldman*, 475 U.S. at 507.

305. *See* Gibbs, *supra* note 11, at 30.

306. *See id.*

female aviation pioneer, placed her life and even her private actions under the watchful eye of the American public. Hence, even independent of her intentional media campaign, Flinn's adultery would have met the first required element for service-discrediting conduct, that "[c]ivilans must be aware of the behavior and the military status of the offender."[307] Additionally, had Flinn's case proceeded to a court-martial, the government could have also established the final element for service-discrediting conduct, that "the conduct offended local law or community standards."[308] Kelly Flinn's adulterous affair took place at Minot Air Force Base in North Dakota, where the local law classifies adultery as a criminal offense.[309] Thus, the Air Force's prosecution of Kelly Flinn for adultery was a narrowly tailored means to serve a compelling government interest because her conduct was both prejudicial to "good order and discipline" and "of a nature to bring discredit upon the armed forces."[310]

The adultery regulation itself and the cases applying it dispel public perceptions that the military can barge into service members' bedrooms at any point and closely monitor their private sexual activities. Instead, the military's adultery regulation is precisely tailored to infringe upon this personal conduct only when its effects travel outside the bedroom and impact the military's compelling interest in maintaining a strong military establishment. Although the right to commit adultery is deemed fundamental under a modern substantive due process analysis, the military's adultery law survives the requisite strict scrutiny because it both pursues compelling ends and narrowly applies so as to substantially advance only those ends deemed compelling.

V. CONCLUSION

To many, the Kelly Flinn case revealed the military's active enforcement of its adultery law and its intrusion into soldiers' private sexual relationships. This is an intimate area of one's life that is, today, protected as a fundamental aspect of substantive due process liberty. Nevertheless, the military can continue to pull down the bed covers of this privacy protection in order to enforce its adultery standard. Indeed, the military enforces its adultery law to advance the compelling needs of maintaining a strong military force. In addition,

307. *Perez*, 33 M.J. at 1054.
308. *Id.*
309. *See* N.D. CENT. CODE § 12.1-20-09 (1991).
310. MCM, *supra* note 1, pt. IV, ¶ 62.

the adultery law is carefully tailored to avoid invading soldiers' privacy interests unless their conduct impacts these legitimate ends. Hence, the sheets remaining on the military bed protect members' private sexual activities from unjustified scrutiny so long as the effects of their private conduct never directly threaten military effectiveness. Ultimately, the critical nature of the military's mission sustains the constitutionality of its adultery law and demands that military members continue to sleep in beds with sheets but no covers.[311]

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311. The views expressed in this article are those of the author and do not reflect the official policy or position of the United States Air Force, Department of Defense, or the United States Government.

* This Comment is dedicated to the men and women of the United States Armed Forces who serve their country honorably and uphold the military's professional standards of conduct even in the face of personal adversity. In addition, I would like to thank Professor Karl Manheim and Lieutenant Colonel Robert Blevins for their helpful guidance and comments during the drafting of this paper.