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Article: The New Gender Panic: Reflections on Sex Scandals and the Military

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**BIO:**

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**LEXISNEXIS SUMMARY:**

... The legal regulation of sexual conduct is a precarious enterprise. ... In this article I look at the interrelationship among some of the prominent problem areas connected to gender in the military: namely, restrictions on women in combat; segregation of the sexes during basic training; exclusion of gay men and lesbians; enforcement of policies against rape and sexual harassment; and enforcement of policies regulating consensual sex, particularly rules against adultery and fraternization. ... Currently, the military's prohibitions on sexual conduct are a strange amalgam of traditional and feminist viewpoints. ... A per se ban thus might be seen as supportive of prohibitions against sexual harassment by making it easier for those in charge to enforce a bright-line rule without speculating as to the nature of the sexual relationship. ... The sexual harassment in Oncale took place in an exclusively male workplace. ...

**TEXT:**

[\*305]

The legal regulation of sexual conduct is a precarious enterprise. At times, it appears that laws governing sexual conduct are grossly underenforced. We are used to statistics that tell us that only a small fraction of rapes are reported to police n1 and that relatively few victims of sexual harassment have the temerity to complain about their mistreatment to their employers. n2 From these accounts, it looks like we need more legal intervention and far greater support for the victims of sexual abuse. At other times, it seems that there is a public hysteria centered on sex. We learn about the pain and suffering caused to those falsely accused of child molestation n3 and are told that [\*306] public officials find it

hard to do their jobs because they are constantly beset by allegations of sexual misconduct in their private lives. n4 The solution then seems to be deregulation of sexual conduct, with perennial calls for more privacy and less law.

In the 1980s, legal feminists argued over the meaning of equality. n5 Some emphasized the importance of being treated the same as men. Others stressed that women's different social status in society meant that we often needed to be treated differently to secure justice. Wendy Williams worried that "we can't have it both ways" n6 and urged feminists to choose a consistent strategy. At the close of this century, however, most legal feminists have learned to live with inconsistencies and complexity. The dominant feminist approaches are now pragmatic, starting from the realization that because sexism is such a complicated, multi-faceted and ever-changing phenomenon, no one theory or strategy could ever be a sufficient response. n7

In matters of sex, this means that we can experience the worst of both worlds: legal protections against sexual abuse can be woefully inadequate and yet, at times, there can be a dramatic overregulation of private sexual conduct. More so than in other areas of law, the legal regulation of sexual conduct has been characterized by inattention and panic, minimization and overreaction. Despite its messiness, it sometimes makes sense to argue simultaneously for more regulation and for more privacy. The choice of strategy is contingent; it depends on a close examination of particular contexts.

[\*307] This article examines the legal regulation of sexual conduct in the military context. I chose this topic because the military has recently been the site of numerous sex scandals and it is a rather dramatic illustration of the inattention/panic contradiction mentioned above. In some respects the military context is atypical of the larger society. The military is regarded as one of the last bastions of male culture and it has a special status under the law, complete with its own justice system. n8 Military prohibitions on sexual conduct differ from those in the civilian world, particularly because members of the armed service may not sue their "employer" in civil court for violations of their civil rights, n9 thus excluding private suits for race and sex discrimination that have proved so important in non-military life. n10

Despite these important differences, my examination of sex regulations within the military leads me to believe that the military is a microcosm of the civilian world. n11 The tensions and contradictions experienced more generally are clearly present in the military context, often in exaggerated form. This article explores three such parallels relating to sexual conduct.

The first example concerns the meaning of sexuality. We know that in the "real" world, gay men and lesbians are often forced to hide their sexual identity because they fear discrimination and ostracism. n12 As a result, there is a tendency to underestimate their presence, distorting cultural views about how such persons behave and about the nature of sexuality generally. In the military context, the tendency to equate sexuality with heterosexuality is even more pronounced. Gay and lesbian service members are rendered nearly invisible because of [\*308] their formal legal exclusion. n13 This means that more so than in the civilian world, the problem of managing sexualized conduct in the military, particularly the problem of sexual harassment, is apt to be treated as if it were a problem about heterosexuality and women, rather than about the abuse of power.

A second example of how the military world both mirrors and exaggerates trends in the larger society involves the treatment of adultery. In the civilian context, adultery is rarely the subject of criminal prosecutions. However, the commission of adultery still carries enough disapproval to tempt people to lie about their private sexual lives, sometimes leading indirectly to trouble with the law. In comparison, in the military, the commission of adultery is a crime. It can lead directly to court-martial and imprisonment.

The third example focuses on the military's struggle with sexual harassment, specifically the distance between the military's announced policy of zero tolerance for sexual harassment and the reports of widespread sexual abuse at military academies and training facilities. The military's struggle strikes me as an especially clear-cut illustration of the dilemma faced regularly by civilian employers. Inside and outside the military, those in charge of workplaces and

institutions insist that sexual harassment is intolerable and against official policy, yet they are plagued by an increasing number of claims by harassment victims. n14

This article first recounts some of the highlights of the recent sex scandals that have beset the military and explains [\*309] why what has occurred can aptly be described as a "gender panic." n15 I look closely at one response to the scandals which would attempt to curtail sexual harassment and sexual misconduct by segregating the sexes during basic training. n16 In this initial discussion, I also provide a glimpse of the military's recent attempts to control consensual sex through prosecutions of military personnel for adultery and fraternization. n17

The core of the article is devoted to a feminist interpretation and analysis of these various gender-related controversies. I first look for an understanding of the gender panic in the structural position of women in the armed services, employing what is known as "tokenism theory" to explain the current state of high anxiety about the status of women in the military. n18 The next section looks more in depth at the various rules governing sexual misconduct in the military context, focusing on the punishment of adultery n19 and fraternization n20 and on the special military doctrine of constructive force used in rape cases. n21 I show how the current rules are a curious mixture of traditional and feminist approaches to regulation of sexual conduct and argue for a reconceptualization of the basic offenses. The final section examines the interrelationship between the policy of excluding gay men and lesbians from the military and the military's approach to sexual harassment. n22 I advance the theory that the legal exclusion of homosexuals constructs a presumptively heterosexual world and, in the process, makes it easier to link sex and sexual misconduct to the presence of women. In this section, I hypothesize that recent calls to cure the problem of sexual harassment by the resegregation of women in basic training stem from a faulty logic that confuses sexual harassment with heterosexuality, and mistakes power for sexual desire.

[\*310]

## I. THE KASSEBAUM BAKER REPORT ON GENDER-INTEGRATED TRAINING

In late 1997, a federal advisory committee chaired by former Senator Nancy Kassebaum Baker issued a report recommending the resegregation of men and women during basic training. n23 The advisory report was the last in a series of rapid developments that year relating to what had become the explosive issue of gender and the military. If adopted, it would have reversed a long-standing policy of gender-integrated basic training in the Air Force (since 1976) and the more recent integration initiatives by the Navy (1993) and the Army (1994). Currently only the Marines segregate men and women during basic training. n24

The principal impetus for the advisory report was the scandal over widespread charges of sexual misconduct at Aberdeen Proving Grounds, an advanced training center for the Army in Maryland. The most visible of the perpetrators was Staff Sergeant Delmar Simpson, who was convicted in April 1997 of raping six female recruits under his command. The charges of rape were based on Simpson's use of "constructive force" to compel the women to submit to have sex with him. As a drill sergeant, Simpson had the authority to control the daily lives of the trainees and the case against him rested on abuse of that authority. According to the testimony of the recruits, Simpson engaged in such coercive conduct as ordering a recruit to disrobe in front of him, requiring a woman to report to his office wearing no underwear, and forcing a woman to trade sex as payback for Simpson's helping her avoid punishment for a disciplinary infraction. n25 The military jury found Simpson [\*311] guilty of eighteen rape charges. He was sentenced to twenty-five years imprisonment. n26

Simpson was the first of several drill sergeants at Aberdeen accused of sex crimes, which encompassed not only rape, but also consensual sexual relationships in violation of the military's ban on sex between a subordinate and a superior. The investigation at Aberdeen led to similar investigations at other training sites across the country and in Germany. n27 A hot line set up to receive complaints yielded thousands of calls. It was painfully clear that the military's policy of "zero tolerance" for sexual harassment, which had gained visibility after the Tailhook scandal in 1991, was not working well. n28

Even the Army's attempt to respond to the charges by appointing a blue ribbon commission to investigate the problem of sexual harassment in the military backfired. One of the men appointed to the Commission - Sergeant Major Gene McKinney - was himself accused by a former aide of forcibly kissing her and trying to pressure her into having sex. Once this allegation was made public, five other women came forward with similar complaints against McKinney. n29 This new case was especially embarrassing for the Army because McKinney was its highest ranking enlisted man and had even appeared in a videotape for recruits in which he declared "there is absolutely no place for sexual harassment in America's Army." n30

McKinney's court-martial for sexual misconduct, maltreatment of subordinates and obstruction of justice was high-profile and regarded as a "he said, she said" contest in which the six female accusers were pitted against McKinney and his long record of distinguished military service. n31 Unlike Sergeant Simpson, however, McKinney was not charged with rape by constructive force. Except for one alleged incident, n32 the misconduct charged against McKinney took the form of aggressive sexual harassment, including pressure for dates, forced kissing and verbal boasting of his sexual prowess to female subordinates. Ultimately, McKinney was acquitted of all the sexual misconduct charges n33 and found guilty only of obstruction of justice for attempting to coach the testimony of one of his accusers. He was demoted to master sergeant and reprimanded. n34

At first blush, it is not immediately obvious just what these charges of sexual misconduct have to do with the re-evaluation of gender integration in basic training. There seems to be a disconnect between the crisis and the response. As a practical matter, it is noteworthy that Aberdeen is an advanced - not a basic - training facility and the report made no recommendation to re-segregate the sexes at this level of training. More to the point, the report did not explain how segregating the sexes into separate barracks during basic training would prevent male instructors from exploiting female recruits, [\*313] particularly when there was no proposal that only women instructors train women recruits.

A clue to a possible connection between the crisis and the response can be found in the press coverage of Aberdeen and the other cases where charges of sexual harassment and sexual misconduct were lodged. Not infrequently the problem of sexual harassment was discussed in the press as a "woman problem," with the focus on the victim, rather than on the accused. The press accounts often highlighted the difficulties of the "experiment" of women in the military. n35 Soon, conservative Senators like Rick Santorum of Pennsylvania were calling for re-segregation of the sexes, declaring that the experiment with women had failed. n36

Accounts describing women in the military as an "experiment" convey an implicit warning. The message seems to be that complaints of sexual harassment might end up harming the accusers not only in the individual sense of labeling the complainant a troublemaker or someone who brought the misconduct on herself, but in the more systemic sense of prompting a reexamination of the "place" of women in the institution. In this scenario, the response to what is essentially a complaint about discriminatory working conditions takes a punitive turn, with the effect of questioning the rights of the person who complains, rather than addressing the source of the discriminatory behavior.

In the past, concerns about the sexual exploitation of women in the workplace quite often gave rise to the "solution" of exclusion. In the mid-nineteenth century, for example, when women first integrated the federal civil service, there were sex [\*314] scandals in which supervisors were charged with trying to extract sexual favors from female subordinates, what we would today call quid pro quo harassment. n37 In 1864, there were Congressional hearings addressing the scandal and much heated discussion by journalists and writers. Rather than simply denouncing the actions of the harassers, however, the debate centered on the propriety of hiring married women to work side by side with men (who regularly engaged in "manly" conduct at the office, such as smoking and spitting into spittoons). n38

The exclusionary response can also be seen in the 1948 case of *Goesaert v. Cleary*. n39 The case challenged a Michigan statute that barred women from the job of bartender (unless their husband or father owned the bar). n40 The Michigan legislation was part of a larger campaign by the male bartenders' union to push women out of these jobs. n41 The Court upheld the exclusion as legitimate "protective" legislation, n42 ruling that Michigan could exclude women from this line of work in part to protect them from the danger of sexual harassment. n43 Since the conduct at issue was

not called sexual harassment at the time, the Court delicately alluded to the "moral and social problems" n44 associated with women tending bar where they would be exposed to drunk and unruly male customers.

As late as 1977, in the case of *Dothard v. Rawlinson*, n45 the Supreme Court upheld the exclusion of women from the position of prison guard in an Alabama maximum security prison. The majority asserted that because of the "jungle atmosphere" n46 in the particular prison, there was a danger that [\*315] women guards would be sexually assaulted by inmates. The solution was to exclude the women, rather than redouble efforts to punish the offenders or prevent the offense.

By the 1980s, however, the cause of action for sexual harassment in employment became firmly established. n47 This development seemed to go a long way towards delegitimizing the exclusionary response. In fact, the recognition of sexual harassment as an actionable harm may have been possible only because the debate over women's right to equal access to jobs and occupations had largely abated. The legal equality campaign of the 1970s had been enormously successful in opening up virtually every field to women. n48 When women complained of sexual harassment or other abusive working conditions, the standard response was no longer that it was time to reexamine whether women should be working in those jobs after all. Stated another way, for perhaps the first time in history women workers were given the opportunity to complain about hostile working environments once the threat of denial of access altogether became a far less likely response to conflict. In this account, the relationship between equal access to jobs and transforming working conditions is quite straightforward. The guarantee of equal access for traditionally excluded groups functions as a precondition for agitation for substantial changes in the working culture.

My interest in the current controversy over gender in the military fits into this larger picture of the relationship between access to jobs and transformation of working cultures. In this article I look at the interrelationship among some of the prominent problem areas connected to gender in the military: n49 [\*316] namely, restrictions on women in combat; segregation of the sexes during basic training; exclusion of gay men and lesbians; enforcement of policies against rape and sexual harassment; and enforcement of policies regulating consensual sex, particularly rules against adultery and fraternization. In a 1993 essay, Kathryn Abrams argued for such a connected approach in addressing issues of gender and the military. n50 This article builds upon her work and other important recent scholarship in the area - particularly Kenneth Karst's article, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, n51 and Madeline Morris's study on the incidence of rape and military culture n52 - all of which go beyond analysis of specific problems to address root causes and long-term strategies for cultural change.

## II. THE GENDER PANIC

It is fair to describe the military's response to recent charges of sexual misconduct and the ensuing sex scandals as a "gender panic," or at least a gross overreaction to perceived problems. The Kassebaum Baker report described an atmosphere of fear in the wake of Aberdeen. Perhaps the most dramatic illustration of the gender panic was that military trainers responded by instituting a "no talk, no touch" policy with respect to female recruits. n53 Male recruits in basic training were told to avoid the women in their units altogether. The Kassebaum Baker report describes how male recruits had been "briefed at several installations that looking at a female for more than 3 seconds constitutes sexual harassment." n54 They [\*317] were told that they should stay away from the opposite sex because they could ruin their career. n55 What was described as a "buddy system" was enforced when males and female recruits interacted. n56 I understand this to mean that no man was permitted to interact with a woman without another woman being present. In the rush to respond to Aberdeen, there did not seem to be widespread appreciation that such a cure for sexual harassment might prove worse than the disease.

Although the advisory report did not approve of the "no talk, no touch" policy and in fact specifically recommended that it be eliminated, it is curious to note how the panic and its aftermath seemed to play into the committee's bottom line view on the desirability of segregation in basic training. For example, the advisory report concluded that little of value would be lost by resegregating the units. The committee conceded that "there will be some loss of training time together between males and females, including time spent marching together and eating together."

n57 It reasoned, however, that "because many trainers now insist their recruits refrain from talking to the opposite sex at all times, these periods of marching and eating together provide little in the way of meaningful integration." n58 Compared to treating women as untouchables (in the bad sense of the word), presumably segregation seemed preferable.

The other evidence of the existence of a gender panic comes from the handling of and the media frenzy surrounding the case of Lieutenant Kelly Flinn, the first woman to pilot a B-52 bomber. Flinn was scheduled to be court-martialed for violating the Air Force's rule against adultery, lying to her commander about the relationship and violating a direct order against continuing the relationship. n59

Flinn's gender was always at the forefront of the case. The Air Force appeared determined to deal harshly with Flinn, to [\*318] underscore that the rules of sexual misconduct applied equally to men and women. The Secretary of the Air Force at that time, Sheila Widnall (the first woman to occupy the post), was placed in the unenviable position of determining the proper punishment under intense media scrutiny. To avoid a court-martial, Flinn ultimately agreed to a general discharge. The compromise kept Flinn out of jail, but the less-than-honorable discharge meant that she lost her commission and part of her veteran benefits.

In a recent (admittedly self-serving) memoir of the events, Flinn speculates that it was gender panic that probably prevented her case from being treated administratively, like so many other adultery cases, in which the offending party submits to counseling, is reprimanded and pays a fine. She reflects:

Maybe the military brass wanted to even the score, to show that women were every bit as capable of sexual peccadilloes as men are - a kind of perverse equal opportunity project. Or maybe, as many women's advocates have suggested, this was a way of saying, without having to say it, that women have no place in the military: let them in and all hell breaks loose. n60

Around the time of the Flinn case, the media began to report on many cases of military personnel - men and women - facing criminal charges of adultery and/or fraternization. n61 One particular sympathetic offender was Lieutenant William Kite, threatened with a court-martial for having a sexual relationship with an enlisted woman, whom he later married and who subsequently left the Air Force. The media depicted the young couple as the victims of a heartless (and mindless) bureaucracy whose only crime was to fall in love. n62 The panic may have crested when President Clinton's choice for Chairman of the Joint Chiefs of Staff, General Joseph W. Ralston, was pressured to withdraw his candidacy after it was revealed that he had had an affair with a civilian woman more than ten [\*319] years before, violating the rule against adultery because he was married at the time. n63

As the panic abated somewhat, military authorities took a more moderate position with respect to gender integration of women in basic training. Defense Secretary Cohen decided to reject the most controversial recommendation of the Kassebaum Baker advisory report and to continue gender integration in training units and in barracks in the three services which currently integrate the sexes. n64 At the same time, however, he ordered that there should be more privacy and physical space between the sexes in actual living accommodations, even though men and women might be housed in the same barracks. n65 Although considered a temporary victory for women's rights, Cohen left open the possibility that he might decide to re-segregate the sexes in the future. Conservative members of Congress responded to Cohen's decision by vowing to return to segregation through the passage of legislation. n66 In the meantime, the Marine Corps continued its policy of training men and women separately. n67

By August 1998, Defense Secretary Cohen had also taken steps to refine the military's position with respect to adultery and fraternization, without fundamentally changing the direction of military policy. n68 Under the new proposal, adultery re [\*320] mains an offense subject to criminal penalties, although the number of adultery cases that qualify as a violation of military policy is very likely to decrease. With respect to fraternization, the latest proposals

would increase the scope of the ban on consensual relationships within the military, prohibiting virtually all sexual encounters between officers and enlisted personnel.

Through the ebb and flow of events, what is most striking about these recent developments is how charges of rape and sexual harassment are so easily lumped together with the cases involving adultery and fraternization. At the turn of this century, we again seem to be in the midst of an old-fashioned "sex scandal." Both consensual and coercive sexual conduct are discussed as if they derived from the same undifferentiated source, namely, biological urges. This conflation obscures consideration of the relative power of the parties and the vastly differing social contexts of the incidents. Alleged rapists are treated as if they were on the same moral plane and caused the same type of injuries as persons who have committed adultery. At times it seems as if the cultural changes produced by the feminist movement of the 1970s and 1980s and the liberalization of sexual mores occurring since the late 1960s have been erased, leaving for analysis only the categories available in 1950s America. n69 Although the public debate over the military sex scandals is not the only controversy about which this observation could be made, it surely has influenced the military's approach to the regulation of the private and professional life of its personnel and its framing of ethical questions relating to sexual conduct.

The excessive media coverage of the numerous military sex cases has the tendency to exhaust viewers and readers. The overall effect is to create the impression that things have gone too far and that it is time to stop the accusations. From what I can discern from the newspaper accounts of the adultery/fraternization cases and from the memoir of Kelly Flinn, many of the recent threats of courts-martial for consensual sex seem unwarranted. It is probably a good thing that the tide of public opinion now seems to be against strict enforcement of the military's rules against adultery and fraternization.

[\*321] However, I fear that the media saturation and the conflation of coercive and consensual sex has also generated a high level of skepticism about the legitimacy of complaints of sexual harassment, rape and other forms of gender bias in the military. The advisory report on gender-integrated training, for example, expressed concerns about the demoralization of trainers who purportedly lived in fear of being falsely accused of sexual misconduct. It recited the view that "bill of rights cards, dial-a-problem phone lines, and recruit training critiques have given recruits a stronger sense of their rights than of their responsibilities." n70 This version of the fallout from the sex scandal at Aberdeen regards women's presence as posing a threat to military discipline and ultimately the readiness of troops.

From an outsider's vantage point, it is difficult to judge whether this fear of a breakdown in discipline and a purported shift of power from drill sergeant to female recruits is warranted or is simply a backlash against the assertion of rights to gender equality. It should be kept in mind that not every woman who alleges sexual harassment has a good case and that men from less privileged groups (particularly African American men) are disproportionately targeted by accusations of harassment and sexual misconduct. n71 My point here, how [\*322] ever, is that in the year since the Aberdeen scandals first came to light, there appears to have been a reconfiguration of the problem - the initial focus on eliminating sexual abuse of women recruits has shifted to a concern for re-establishing discipline and improving morale among the troops, the large majority of whom, of course, are men. Particularly when the controversies about consensual sex are linked to the handling of charges of sexual harassment and exploitation, the problem of "sex in the military" appears intractable. It is not hard to see how the cumulation of incidents can create a longing for a simpler time, a time when there were far fewer women in the armed forces. This sets the stage for a reexamination of the "experiment" of women in the military, with the real prospect that women could again be subject to segregation and marginalization. Before this occurs, it seems appropriate to take a closer look at the gender panic, disentangle its various strands, and try to construct a different logic to connect the various gender-related controversies within the military.

### III. THREE THEORETICAL FRAMES: A FEMINIST TAKE ON THE GENDER PANIC

At its most basic, the gender panic in the military involves the interplay of three critical elements: (military) employment, sexual behavior, and gender. Structuring the topic this way suggests that it is ripe for feminist analysis and that we could learn something useful from the body of social science research on women and organizations. To begin

with, there is a rich literature investigating gender dynamics in the workplace, including how the gender composition of a working group and the distribution of power within an organization can affect the incidence of gender bias and sexual harassment. n72 Sociologists and legal academics have explored the special predicament of the "token" woman, an apt characterization of the female soldier who is still likely to find herself far outnumbered by men [\*323] within an historically male-dominated environment. n73 Additionally, perhaps no topic has generated more interest among feminist scholars than the meaning of "consent" in sexual relationships and the complexity of defining sexual harassment n74 given the differing perspectives and social positions of the parties involved. Allegations that drill sergeants raped female recruits without resorting to actual physical force, for example, closely resemble feminist descriptions of sexual exploitation and abuse of power outside the military context.

In the last decade there has also been a tremendous growth in the volume and sophistication of writings about the social meaning of gender. The new gaylegal scholarship n75 has generated deeper understandings of masculinity that can help us to dissect those aspects of military culture that operate as formidable barriers to gender integration.

The following is a distillation of themes and insights from social science research and feminist and gaylegal theory that strike me as having the most obvious relevance to an analysis of the gender panic. Although my recitation contains nothing particularly novel or unfamiliar, these insights about the relationship among employment, sexual conduct, and gender rarely find their way into popular accounts of the scandals. To a large extent, the categories and vocabulary of feminism are still quite foreign to the more mainstream discourses that dominate discussion in the media, on Capitol Hill and within military circles.

[\*324]

#### A. The Dynamics of Tokenism

Perhaps because of the volume of media attention devoted to women in the military, we may lose sight of the fact that there are still, relatively speaking, not that many women in the armed forces. Currently only about thirteen and a half percent of service personnel are women. n76 Although this represents a dramatic increase from the two percent figure for women who served in 1972, it is still fair to characterize women's presence as "token" in the social science meaning of the term. In the sociological literature "tokenism" is used to describe the situation of a group that is dramatically under-represented in a given organizational setting. n77 Relative numbers are important in this theory because of severe limitations on the extent to which small minority groups can influence the culture of the places where they work. n78 As long as they are still considered oddities and outsiders, members of the token group are likely to be hampered by lack of acceptance for their individual talents. They are often looked upon as symbols of their group and socially constructed in highly predictable ways. Tokens are rarely perceived as leaders or exemplary teammates. n79

The point at which a group gets beyond token representation to achieve a "critical mass" will differ from context to context. However, the figure of twenty-five percent is most often cited as an indication that a given group has the ability to form alliances and coalitions and to engage in effective strategies to [\*325] influence the culture of an organization. n80 Before this point is reached, tokens are more vulnerable to gender bias, including various forms of stereotyping and typecasting. n81

Tokenism theory has slowly been gaining acceptance outside the academy. Most significantly, the case law under Title VII has begun to recognize the connection between tokenism and gender discrimination. In *Price Waterhouse v. Hopkins*, n82 the United States Supreme Court acknowledged the link between tokenism and the prevalence of stereotyping which prevented a talented woman from being made partner in a large accounting firm. In the influential case of *Robinson v. Jacksonville Shipyards, Inc.*, n83 a trial court credited the testimony of a social psychologist who took the position that tokenism fostered a virulent form of sexual harassment of blue collar women. At the shipyards, the very presence of the token women posed a challenge to the hyper-masculine working environment.

As an employer of women, the military is poised to go beyond tokenism, at least in some of the services. What

happens in the next decade could thus have a crucial long-term impact on women's status in the military. In 1993, for example, women represented sixteen percent of new recruits in the Army. n84 The comparable figure for the Navy was thirteen percent, twenty-two percent for the Air Force, and five percent for the Marines. n85 Although these numbers represent an increase over the recent past, we should not assume that the percentage of women in the military will automatically increase simply with the passage of time. Even more so than most employers, [\*326] the military makes deliberate decisions about how many women it intends to recruit. n86 The representation of women thus depends not only on market forces and women's preferences, but on defined military policy. Most importantly, each service has a policy on "accessions" for female and male recruits, setting numerical goals for the sexes in the upcoming year. Madeline Morris reports, for example, that the Army's goal for women recruits in 1994 was eighteen percent, compared to sixteen percent for the Marines, n87 and between eighteen and twenty percent for the Navy. n88

Although there is no longer a fixed, static ceiling set on the number of women in the military, n89 women's representation is carefully monitored and managed. This means that a changing political climate can have a significant (even if not highly visible) impact on women's presence in the military. Contemporary writers are now beginning to discuss the effects of the policy known as "womanpause" instituted shortly after President Ronald Reagan took office. The objective of the 1981-82 policy was to diminish the visible presence of women, including an announced reduction in "accessions" for female Army recruits. n90 The current gender panic comes at a time when the Clinton administration has been quietly working to reverse some of the components of womanpause, notably by raising numerical goals for the recruitment of women.

The low representation of women in the armed forces makes a considerable difference in the everyday life of soldiers. It manifests itself first in basic training. The advisory report was quick to put the issue of gender-integrated training "in perspective" by noting that at the present time, despite public perception, only a minority of male recruits routinely train [\*327] with women in basic training. n91 The advisory report stated that "approximately 50 percent of the Army's male recruits, 25 percent of the Navy's male recruits, and 40 percent of the Air Force's male recruits regularly train with women." n92 Except for the Marines, this is not a result of a restrictive formal policy, but stems solely from the fact that there are not enough women to integrate every unit, particularly if the service decides to cluster women recruits rather than widely disperse them on a random basis. n93

Social scientists studying civilian workplaces have stressed that the existence and effects of tokenism must also be assessed at the level of the working group, i.e., the group of individuals who have face-to-face daily interaction. n94 Even when the overall representation of women in a large organization increases, it may have little effect on the personal interactions of the workers if the women are so dispersed that their presence has little chance to affect the culture of the working group. The relative number of women in the military is important under tokenism theory, not primarily because it represents the number of "opportunities" available to women, but because it is a proxy for determining the "male" or "gender-integrated" character of the working environment.

Advocates for gender-integrated training have asserted that there is an inverse relationship between the level of gender-integration and the level of sexual harassment. Citing a 1996 Report by the Department of Defense, the Co-President of the National Women's Law Center noted that the Marine Corps - the service with the lowest representation of women and the only service which segregates the sexes during basic training - had the highest level of reported sexual harassment. n95 Conversely, the service which had integrated basic training to the largest extent, the Navy, had also been the most successful in reducing the reported incidence of sexual misconduct. n96

Tokenism theory thus directly contradicts the traditional view that separating the sexes is a cure for sexual harassment. Because tokenism theory starts from the premise that the [\*328] character of the working culture affects the way people behave and interact, it posits that changing the demographics of a group may be the surest way to change the culture, and ultimately the behavior of the majority in the group. It also rejects the more biologically-premised view that men will inevitably be tempted to abuse women, unless their access to women is restricted. n97 For feminists, tokenism theory offers the promise of integration and equal access, without having to endure harassment and sexual abuse as the price of admission.

Another aspect of tokenism theory that seems particularly relevant to the current gender panic is its focus on the gender composition of the group that makes decisions. In examining the informal structures of an organization, sociologists have looked to see who exercises power, in particular whether any (and how many) of the token group are also located in supervisory or leadership positions. n98 We have long gotten past the point of thinking that the appointment of a Madeleine Albright or a Janet Reno or some other woman "first" will miraculously change the status of women within the organizations they head. Nevertheless, there does seem to be a positive correlation [\*329] between the representation of women in leadership positions and prospects for integrating greater numbers of women into the organization. Some women leaders do bring new perspectives into their decisionmaking and may be more likely to detect subtle, but harmful, forms of gender bias. Female leaders can also serve as role models for both males and females under their supervision. n99 Theorists have also noted that as more women are promoted to leadership roles, their authority seems more "natural." n100

In the civilian workplace, informal barriers pose the greatest obstacle to the advancement of women within organizational hierarchies. In the military, it is a formal barrier - the exclusion of women from combat positions - that is recognized as the single, major impediment to women's ascent into command positions. n101 A number of commentators have detailed the ways in which the combat exclusion curtails opportunities for military women: not only are they barred from engaging in actual ground combat, but they are often excluded from occupational specialties, simply because some personnel in this line of work might be expected to serve in combat conditions. n102 Perhaps most importantly, the combat exclusion plays a symbolic or expressive role. As long as it is in place, the prototype of the soldier remains the male hand-to-hand combatant, reinforcing the view that "to be a 'real soldier,' a fighter, one must be a man." n103

It is instructive to note that even in the Israeli armed forces, where women comprise nearly half of all military personnel, n104 their exclusion from combat roles has served to diminish their power within the military. One irony is that women's greater participation in combat during the struggle for statehood in Israel n105 neither ensured that women would continue to be allowed to engage in combat, n106 nor did it transform military culture. n107 Instead, like their American counterparts, women in the Israeli military are often assigned to clerical positions n108 and expensive training is primarily invested in men rather than women. n109 The problem of sexual harassment has also surfaced in the Israeli military and has recently been linked to women's lack of advancement and status. n110

Without repeating the arguments for and against permitting women to occupy combat positions, n111 I wish to underscore, as a way of shedding light on the causes of the gender panic, that the military is at a critical juncture with respect to the combat exclusion. Since 1991, there has been a significant [\*331] narrowing of the combat exclusions. Women have recently been allowed to serve on combat aircraft and combatant Navy vessels. During the Clinton administration, the Army and the Marine Corps also reinterpreted their definitions of combat positions to open up significantly more jobs to women. Madeline Morris reports the stunning figure that over ninety-nine percent of Air Force positions are now open to women. The comparable figure for the Navy is ninety-four percent. The Army, at sixty-seven percent, and the Marine Corps, at sixty-two percent, now remain as the two services which continue to bar women from a sizable number of jobs, although even here the formal exclusion has narrowed considerably in the last few years. n112 The last remaining barrier to women's full participation in the military is the exclusion of women from positions designated as "direct ground combat."

Similar to the policies on recruitment of women, the combat restrictions are very much influenced by the political climate. Even though a larger number of jobs are now formally open to women, women do not yet occupy these former-combat posts in great numbers. n113 Instead, the degree of women's access to military positions is still very much up for grabs and subject to debate. Recent experience demonstrates that the definition of combat is malleable and there is no guarantee that the combat exclusion will continue to erode. During "womanpause," for example, the Reagan administration limited women's access by increasing the list of combat positions. n114 The next few years may well prove critical, as military authorities and Congress decide whether to step up the process of integrating former combat positions. What does remain constant is that the combat exclusion continues to function quite effectively, albeit complexly, to depress women's chances for promotion n115 and makes it less likely that women can use their "power

from within" to change military culture.

[\*332] Overall, the most significant insight to import from tokenism theory into the military context is its questioning of the impulse to segregate or exclude women as a long-term strategy to cut down on the incidence of sexual harassment. The research on women and organizations suggests that coercive behavior such as sexual harassment has a structural as well as a moral dimension. Tokenism theory points to the gender demographics and distribution of power within an organization for keys to understanding how an organization is likely to respond to sexual harassment and how a change in relative numbers of men and women can bring about a change in the working environment. Under this analysis, more thorough integration of women into all aspects of military life, including positions designated as combat positions, would appear to be the best response to Aberdeen.

## B. Redefinitions of Consent

The conceptual frame that unites the recent scandals in the military is that they all are tied to sex. In one sense, of course, this is unremarkable. Because the conduct that gave rise to the high profile cases most often involved prohibited sexual intercourse, it is not surprising that the furor over the incidents is referred to as a "sex scandal." However, even labeling the controversy in this way is quite telling and presupposes that the problem is really about sex, rather than, for example, about the abuse of power, the military's policies on women, or the social construction of gender. The label of "sex" masks a significant, ongoing debate between traditionalist and feminist cultural forces over where to draw the line between permissible, private sexual conduct on the one hand, and impermissible sexual exploitation on the other.

Currently, the military's prohibitions on sexual conduct are a strange amalgam of traditional and feminist viewpoints. The military's rules against adultery, for example, seem to emanate from an earlier era when marriage was regarded as the sole demarcation line separating legitimate from illicit sex. These traditionalist prohibitions contrast with the military's definition of "constructive force" used in rape prosecutions, that finds philosophical support in contemporary feminist conceptions of "consent" and "coercion." Finally, the various anti-fraternization rules prohibiting consensual sex under a variety of circumstances have differed so greatly among the services that it is impossible yet to link them to any specific viewpoint [\*333] or to trace a logic - traditionalist, feminist, or otherwise - behind their enforcement.

### 1. Adultery

Rules against adultery are invariably supported by traditional notions of sexual morality. Under the traditional view of sex, it is the marital status of the participants, rather than their actual consent, that determines whether the conduct is subject to legal sanctions. n116 Until the late 1960s, non-marital sex was quite uniformly discouraged - adultery was criminalized in most states n117 and there was an elaborate array of indirect civil sanctions that bolstered the moral ban on non-marital sex. These included a denial of contraceptives to unmarried persons, n118 stigmatization and discrimination against "illegitimate" children n119 and a fault-based divorce system which penalized the unfaithful spouse. n120 Most importantly, persons who committed adultery were liable to be branded as immoral and untrustworthy, particularly if their conduct was indiscreet. In this traditionalist view, employers operating under an "at will" system of employment often chose to terminate employees whose moral character had been called into question.

In the civilian world, the consensus as to the proper response to adultery began to break down with the emergence of a more liberal attitude toward sex that marked legal reforms in the 1970s. Consent gradually replaced marriage as the touchstone for determining lawful versus unlawful sex, prompting the lifting of legal discriminations against "non-marital" children, n121 the trend towards decriminalization of consensual het [\*334] erosexual sex n122 and the shift to no-fault divorce. n123 In the world of work, employers were far more likely to respect a zone of privacy for their employees. Although policies continued to vary widely among employers, n124 a norm emerged in which employers were generally expected to demonstrate a nexus between private sexual conduct and job performance before justifying dismissal on grounds of immorality. At the present time, an employee who carries on an adulterous relationship with someone other than a co-worker is unlikely to be fired for that reason alone, absent some concrete

showing of deterioration in job performance. n125

[\*335] The military rules with respect to adultery are more punitive than in the civilian world. In contrast to the decriminalization of adultery under most state laws, commission of the offense of adultery in violation of the Uniform Code of Military Justice ("UCMJ") can subject a soldier to court-martial and imprisonment. Even though relatively few persons in the military are actually prosecuted for adultery, n126 the threat of a court-martial is nevertheless present, n127 putting pressure on soldiers to accept less-than-honorable discharges from the service and heightening the dangers associated with selective enforcement.

The current standards for determining when an act of adultery is prohibited are unclear and do not consistently require a showing either that the sexual conduct has interfered with the service member's ability to perform his or her job or has produced a tangible negative impact on the military unit. Technically, the commission of adultery is insufficient to constitute an offense under Article 134 of the UCMJ, unless it is also shown that the conduct of the accused "was either prejudicial to good order and discipline in the armed forces or was of a [\*336] nature to bring discredit upon the armed forces." n128 However, the "prejudice" and "discrediting" standards are inherently vague and invite speculation about the possible impact of the conduct on such intangibles as reputation and morale. Whether adultery will be judged unlawful may depend on whether the general public, or other soldiers, know about the extramarital relationship and whether the fact finder is willing to presume harmful effects from this kind of "immoral" conduct. In one 1994 case, n129 for example, a military court upheld the imposition of criminal penalties against a married officer (currently separated from his wife) who had sex in the barracks with a civilian woman. n130 The court found the requisite harm in the tendency for such conduct "to reduce the other soldiers' confidence in his integrity, leadership, and respect for law and authority... [and] to cause the other soldiers to be less likely to conform their conduct to the rigors of military discipline." n131

Most recently, the Department of Defense has issued a proposal to refine what is meant by the "prejudice" and "discrediting" requirements and to offer guidance to commanders when they are called upon to judge whether a service member's commission of adultery constitutes an offense under military law. The proposed "explanation" section to the Manual for Courts-Martial states that in general only "open and notorious" conduct will be regarded as discrediting to the service. n132 If a service member commits adultery in a "private and discreet" fashion, however, he or she may still be subject to sanctions if the conduct is found to be "prejudicial." n133 In deciding whether [\*337] the commission of adultery is "prejudicial" in violation of Article 134, commanders are directed to consider the status of the parties, including the military status of the "co-actor" and the accused's spouse. n134 The commander should also take into account the timing of the adulterous conduct ("ongoing or recent" versus "remote in time") and whether the accused or co-actor was legally separated. Most importantly, commanders are told to consider the "impact" of the adulterous conduct, specifically whether the conduct has affected the ability of any person to perform military duties or has had a "detrimental effect on unit or organization morale, teamwork, and efficiency."

Particularly because the proposal would not limit a commander's discretion to consider all relevant circumstances, including those factors not specifically listed, it does not represent a dramatic change from the current policy. Adultery is still regarded as "clearly unacceptable conduct... that reflects adversely on the service record of the military member." n135 It also appears to be the case that general concerns about "reputation" may still be enough to justify penalizing adulter [\*338] ous conduct if the parties do not take care to hide their relationship. However, the new advice given to commanders suggests that they should be hesitant to presume a negative impact on morale or discipline simply from the fact of adultery. The policy guidance encourages decision makers to assess concrete effects and to make contextual judgments that turn on the facts of the individual case. Overall, the new policy guidance directs commanders to consider the environmental effects of an accused's actions but retains the basic framework that condemns adultery as an inherently immoral act.

Even with the new proposed refinements, the military prohibitions on adultery depend on traditional notions of morality that no longer govern employment policies in the rest of society. Underlying the military policy of criminalization of adultery seems to be a presumption that adultery is a sign of bad character and that soldiers must be

of good character to serve their country well. I think it is fair to say that a more agnostic view of adultery now permeates non-military life, although certainly many people retain traditionalist beliefs. There is no longer a consensus that people who have extramarital relationships are invariably of bad character or that only people who make good choices in matters of sexual morality will perform their jobs well. n136 At a time when the President is embroiled in a sex scandal involving adultery, I find it surprising that there is relatively little substantive discussion of whether adultery is always immoral and unethical or whether adulterous conduct truly has a bearing on a person's "fitness" to hold office.

The unwillingness to regard commission of adultery as a proxy for bad moral character, however, does not mean that there is a consensus that adultery is harmless or that it has no victims. Instead, the evolution of the law outside the military probably supports the viewpoint that the harms of adultery should not be redressed by law, particularly by criminal-like sanctions aimed at punishing the adulterer. While adultery is harmful conduct, I contend that it has outlived its usefulness as a legal category.

At the outset, I recognize that many persons regard adultery as a betrayal of a spouse's trust. Couples often agree, ei [\*339] ther explicitly or implicitly, that they will not have intimate sexual relations with anyone else. In the eyes of many persons, the breach of such an important promise is a deception that clearly qualifies as a "wrong." However, we also know that some couples make no promises of sexual fidelity n137 to each other and that some may not regard sexual fidelity as critically important, even if there is such a promise. The diversity of commitments among couples makes condemnation of adultery under all circumstances seem inappropriate. We would not, for example, want to imprison or fine a person who entered into an extramarital sexual relationship with the knowledge and consent of his or her spouse. Because the harm of deceit is not present in every case, it provides no contemporary justification for criminal penalties. The traditional moral and legal code that gave the husband exclusive sexual access to his wife, n138 regardless of her wishes or the couple's private understanding, has been altered by the more liberal currents of the last three decades.

Similarly, it cannot be denied that adultery may give rise to serious relational harms, whether or not accompanied by deceit. The knowledge that a spouse had an intimate relationship with another may alter or destroy the quality of the marriage relationship, perhaps permanently. In addition to the emotional suffering of the "betrayed" spouse, n139 the couple may find that their everyday life has changed, that the adultery has resulted in a "loss of spousal consortium." n140 At common law, [\*340] these relational harms could be vindicated in a tort action for criminal conversation or alienation of affections brought by the betrayed spouse against the lover of the adulterous spouse. n141 The vast majority of states, however, no longer permit such tort claims, n142 even though we continue to acknowledge the relational harm produced by adultery. This evolution has taken place, I believe, because the law no longer presumes that the "other woman" should be held legally responsible for breaking up the marriage or that the "other man" stole the plaintiff's wife away. Instead, we tend to locate the damage internally, to place responsibility on the couple to repair their own relationship, recognizing that, in the end, each individual has some choice over how he or she will respond to the other person in the marriage. This more privatized way of looking at the marriage relationship, even in the context of civil suits, underscores the rationale for decriminalization of adultery, particularly the decision not to impose criminal penalties on third parties who interfere with an existing marriage by having a sexual relationship with a married person.

In addition to the harms of deceit and loss of consortium mentioned above, adultery is sometimes said to cause a dignitary or psychological injury to the "betrayed" spouse, of a specifically gendered sort. Some men describe their response to their wife's adultery - particularly their realization that another man has "captured" their wife - as a wound to their manly pride and a disgrace that reflects on the man's "weakness and inadequacy." n143 In this scenario, men experi [\*341] ence adultery as a kind of emasculation. Thus even if their spouse remains loving and affectionate toward them, the adultery might incite feelings of rage and humiliation, directed primarily toward the "other man," for winning the competition for sexual access to the woman.

As for women who have been betrayed by their husbands, the gendered script - if indeed there is one - reads quite differently. There is no precise female counterpart to the emasculation said to be experienced by men, perhaps because women do not possess a privileged gender status. Depriving a woman of her femininity has a different meaning than

depriving a man of his masculinity and is not invariably associated with loss of status. Instead, I suspect that the dignitary harm many traditionally-minded women experience when they discover their husband's adultery is related to a sense of inadequacy - that they question why their husband was "forced" to look to someone else to fulfill his needs. n144 This lowering of self-worth is a status harm, to be sure, but unlike emasculation, the cause is likely not to be located in the predatory behavior of a third party, but in the victim's own perception of her loss of value as a sexual object.

As I have described these gendered dignitary harms, they are not the sort of injury that the law ought to redress. The sense of honor that is damaged in each of these scenarios is derived from an outmoded hierarchical image of husband and wife, in which the wife is treated as the property of the husband and the marriage is organized primarily to serve the husband's sexual and emotional needs. n145 I fear that legal recogni [\*342] tion of such harms would run a great risk of reproducing the sexist ideology behind these gendered scripts and perpetuating the objectification of women, even if, in some cases, the suffering of an individual woman was acknowledged through punishment of her husband for adultery.

Finally, in a comparatively small subset of cases, adultery might produce an environmental harm, n146 in the event that the adulterer is the betrayed spouse's commanding officer or a peer in the same military unit. One can imagine a situation, for example, where the rage of the "betrayed" husband is intensified because he has to take orders from the man who broke up his marriage and cannot fight back without jeopardizing his career. n147 Or, to take another example, a conflict might arise where two men in the same unit find that they can no longer work together because of the resentment created by their involvement with the same woman. Such conflicts could conceivably spill over to affect other relationships in the unit: n148 [\*343] the officer could lose the respect of the "betrayed" soldier's friends or factions could develop within the unit as the soldiers are forced to choose sides in the personal conflict.

It must be stressed, however, that these environmental harms would generally occur only in the rare case where more than one of the affected parties (i.e., among the accused, spouse and co-actor) are in the military and located in close physical proximity. n149 Such an environmental harm is not strictly speaking a by-product of adultery, in the sense that it flows specifically from the commission of adultery. Rather, it is a special instance of the difficult problems associated with managing conflicts of interests within a working group, conflicts that can be presented by sexual relationships when there is no adultery, by close personal friendships and generally by mixing professional and personal affairs in ways that give rise to serious ethical questions. As I will develop further in the discussion of the military's prohibition of fraternization, n150 I believe that these environmental harms are best addressed directly as breaches of professional ethics. There is no need to criminalize the broad category of adultery to reach such a narrow band of behavior.

In sum, none of the harms listed above justify the criminalization of adultery, either inside or outside the military. Regardless of the standards we might ultimately endorse for persons holding high public office, I am confident that there is little public sentiment for encouraging employers to penalize or dismiss employees because of extramarital relationships that have little direct impact on job performance or on the working environment. The tolerance for non-marital sex that has developed over the last three decades and the construction of a [\*344] realm of private morality separate from the public sphere of work is not likely to dissipate quickly. In this regard, the rules against adultery in the military seem archaic, difficult to understand and even more difficult to defend.

## 2. Constructive Force

In striking contrast to the military rules on adultery, other prohibitions on sexual misconduct - particularly the concepts of "constructive force" and "sexual harassment" - fit more comfortably within feminist conceptions of sexual morality than within the traditionalist framework. The last thirty years have witnessed a transformation in the meaning of "consent" in sexual relationships, the all-important line that is now routinely used to separate permissible from impermissible conduct. Prior to modern feminist legal reforms, the most prominent understanding of "consent" came from the criminal law and was roughly synonymous with lack of physical resistance on the part of the victim. Women

who did not subjectively desire to have sex were nevertheless deemed to have consented often because there was insufficient evidence of overpowering physical force. Many legal feminists, such as Susan Estrich n151 and Catharine MacKinnon, n152 argued that "consent" should not be presumed from a lack of physical resistance. Instead, they challenged the law to redefine "consent" by taking the victim's as well as the perpetrator's perspective into account. Once the victim's viewpoint was acknowledged, there was a greater understanding of the types of pressures, short of overpowering physical force, that might compel a woman to submit to sexual advances against her will. n153

The feminist-inspired redefinition of consent paved the way for the development of the new body of sexual harassment law. The first Supreme Court sexual harassment case - *Meritor Savings Bank v. Vinson* n154 - declared that "consent" as formerly understood was not a defense to a claim of sexual [\*345] harassment. n155 Instead, the touchstone for determining whether sexual conduct amounted to harassment was whether the advances were "unwelcome" or unwanted. This new formulation, of course, was not unambiguous - the Court left open significant questions such as the type of proof that would be accepted to prove unwelcomeness n156 and whether unwelcomeness ought to be judged from the perspective of the target or the perpetrator. n157 What was critically important, however, was the Court's acknowledgment that economically-coerced sex was unlawful, even if the woman submitted to her supervisor's advances and offered no physical resistance.

It should be noted that the redefinition of consent that occurred in sexual harassment law has had only limited impact in the criminal law. Although most states have abandoned the requirement that rape victims offer actual physical resistance to prove their lack of consent (or to meet the "force" requirement in rape statutes), n158 it is doubtful that economically-coerced sex (even of the quid pro quo variety) will suffice to establish rape under the criminal laws of most jurisdictions. [\*346] Unless there is at least a threat of physical force, rape convictions are hard to secure. In the civilian world, the remaking of consent has often taken place in the context of civil litigation. n159

The recent court-martial of Staff Sergeant Delmar Simpson has highlighted the contested nature of the concept of consent. Simpson was charged under Article 120 of the Uniform Code of Military Justice, the rape provision, which requires proof that the accused committed sexual intercourse "by force and without consent" of the victim. n160 As mentioned earlier, n161 the rape charges against Simpson were based on his use of "constructive force." Simpson's lawyer argued that because he did not use a weapon, exert physical force or specifically threaten to use physical force, the charges should be dismissed. n162 The defense also stressed that some of the trainees who submitted to Simpson's advances offered no physical or verbal resistance to his orders. n163 The trial judge rejected Simpson's restrictive definition of constructive force, however, and sent the case to the jury to decide whether Simpson's conduct constituted coercion. n164

[\*347] As the trial judge explained it, the doctrine of "constructive force" was broad enough to cover cases in which a drill sergeant abuses his authority to compel unwilling recruits to give in to sexual demands, even in the absence of specific threats or a showing of force. The judge stressed that "drill sergeants commanded so much authority over trainees - ordering them where to eat and sleep and how to act - that they were like parents" and that recruits were "conditioned to follow drill sergeants' orders." n165 Because of the extraordinary power that drill sergeants had over recruits, the court ruled that they did not need to use a weapon or threaten the trainees with harm to fit the definition of "constructive force." Instead, the jury was to find Simpson guilty if it found that Simpson's actions created "a reasonable belief in the victim's mind that death or physical injury would be inflicted on her and resistance is futile." n166

The trial judge's definition of "constructive force" followed a line of military cases in which rape convictions have been obtained even though the victims offered no physical resistance and the accused made no specific threats of physical harm. n167 The requisite "force" and "lack of consent" have been found in the victim's passive acquiescence and unwelcoming behavior when ordered to submit to sexual intercourse by a superior officer. In one important case, n168 for example, a sergeant who supervised a female trainee during basic training was convicted of rape when he ordered the trainee to follow him to an isolated shed, grabbed and kissed her and ordered her to take off her clothes. n169 The court found the requisite force in the act of penetration itself, even though the trainee had not expressly said "no," but manifested her lack of consent principally by not [\*348] returning the kiss and stiffening her body. n170 In

deciding that the evidence was sufficient to sustain a conviction, the court underscored "the unique situation of dominance and control presented by appellant's superior rank and position." n171 In such cases, the label of "constructive force" allows the fact finder to take a "totality of the circumstances" approach, permitting consideration of all individual and social factors relevant to a finding of coercion. n172 This approach lessens the danger that the victim's failure to offer physical or verbal resistance will be seized upon as the determinative factor, with the result that sexual aggression may not be labeled rape simply because the victim's passivity gave the accused no reason to use overpowering force to accomplish his objectives. n173

[\*349] The interpretation of "constructive force" used in Simpson's court-martial resembles feminist definitions of consent and the standard of unwelcomeness used in sexual harassment cases. n174 The emphasis is on abuse of power, stressing the inequality in the relationship between drill sergeant and recruit. It is also noteworthy that, similar to the plight of workers who are forced to have sex with their boss to keep their job, the recruits in the Simpson case likely feared that their military careers would be jeopardized if they resisted. In this respect, the drill sergeant represents a particularly powerful kind of supervisor, one who has the ability to affect a recruit's personal freedom as well as her job security. The Simpson court-martial also was marked by close consideration of the context in which the sexual conduct took place, permitting the jury to take into account all the circumstances in making its determination of coercion. They presumably were free to take into account the recruit's fear relating to her status in the military as well as her fear of imminent physical harm. Feminists have long advocated such a contextual approach in making determinations of consent, particularly by insisting that the absence of physical or even verbal resistance on the part of the victim should not be used as a litmus test in all cases. n175

I do not know whether Simpson would have been convicted on each count of rape had he been a civilian supervisor who had extracted sex from young trainees under his supervision. As mentioned earlier, n176 few rape convictions are secured when there is no clear threat of physical force, particularly if the victim does not explicitly say "no." Thus, with respect to at least some of the charges of rape, a prosecutor in a civilian court [\*350] may not have been able to prove the requisite "force" or "nonconsent," and perhaps Simpson would not have been sentenced to twenty-five years in jail had he been a civilian. n177 However, even to ask this question may be to obscure a crucial issue relating to the gross disparity in power between the target and the accused. If there is no civilian analogue to the drill sergeant, no employment supervisor who commands the kind of intimidating authority that was wielded by Simpson, n178 it may be pointless to compare the military's application of "constructive force" doctrine to standards used in civilian rape trials. However, I do think it is important to reflect on the fact that Simpson received a long prison term for conduct that might not have produced as readily a conviction in a civilian prosecution. I have little doubt, however, that his conduct constituted sexual harassment and would have subjected him to civil liability if his actions were covered under Title VII. That he faced criminal charges in the military demonstrates the degree to which new definitions of consent have influenced military justice and marks a departure from traditional criminal law.

### 3. Fraternalization

The final set of prohibitions relating to sexual misconduct - the military's rules against fraternization - are the most difficult to analyze and cannot be easily labeled as either traditional or feminist in character. The dictionary definition of "fraternize" is to "associate with others in a brotherly or congenial way." n179 Originally "fraternization" referred to officers associating or fraternizing with enlisted personnel on terms of [\*351] military equality, most often in the context of financial transactions such as loan agreements. n180 More recently, however, with growing numbers of women in the military, "fraternization" has often been used as a code word for impermissible, consensual sexual relationships n181 and each service has had to grapple with determining precisely just which consensual relationships it wishes to outlaw and which it will permit.

The UCMJ is singularly unhelpful in drawing a clear demarcation line. Article 134 sets forth only general elements of the offense, requiring a showing that the relationship violated the custom of the accused's service and that the conduct was "to the prejudice of good order and discipline... or was of a nature to bring discredit upon the armed services," n182 the same vague standard that applies in adultery cases. By its terms, [\*352] Article 134 covers only relationships

between officers and enlisted personnel and targets only the officer for criminal penalties. However, the Code also authorizes each service to promulgate its own regulations on fraternization. n183 These regulations may reach not only relationships involving officers and enlisted personnel, but also enlisted personnel of different ranks and officers of different ranks. In cases covered by the regulations, the lower-ranked individual may also be subject to criminal penalties. n184

The situation is very fluid. Until most recently, all branches of the military prohibited sexual relationships between people of different ranks in the same chain of command. Beyond this point, however, the policies of the services diverged. The Army was the most liberal, allowing dating between personnel of different ranks, provided that they are not in the same chain of command. The Navy had clarified its rules to prohibit both officers and enlisted sailors on the same ship from dating, even where they are not in the same direct chain of command. n185 Similarly, the Air Force had tightened its rules against fraternization to prohibit an officer from dating an enlisted person, even when that person is outside the chain of command. n186

The latest initiative by Secretary of Defense Cohen takes steps to establish more uniform policies among the Services. n187 He has ordered each service to produce "similarly worded" policies and training material that would prohibit dating and sexual relationships between officers and enlisted personnel, reaching relationships outside the chain of command and extending even to members from different services. n188 If implemented, the new policy would have the greatest impact on the Army, requiring that service to end its more liberal tradition of permitting dating and relationships outside the chain of command.

The policy rationales behind the prohibitions on fraternization are not self-evident, whether we examine the latest initiative n189 or the older policies. The major objective seems to be to prevent a breakdown in discipline and probably has less to do with feminist concerns with preventing sexual exploitation and harassment. For example, one commentator reasons that the anti-fraternization rules are justified to prevent favoritism, or at least the appearance of favoritism, when the relationship is between members of the same command. He notes that "undue familiarity... tends to create disharmony and distrust" when subordinates begin to expect or actually receive favored treatment or when the rest of the command perceives favoritism at the expense of others similarly situated. n190 There is not much theorizing, however, about prohibitions that reach beyond the chain of command, particularly the recent initiative that potentially criminalizes consensual sexual relationships between all officers and enlisted personnel. I can only speculate that some may view these broad bans as necessary to insure that officers retain "respect" and are not somehow demeaned by their association with those of a lesser rank.

As was true in the case of adultery, the military rules on fraternization tend to be stricter than those found in the civilian workplace. Commentators claim that there is now an increased acceptance of "dating" n191 among co-workers and most employers are reluctant to have explicit rules on the subject. n192 At the same time, however, there is a heightened awareness that consensual relationships can lead to charges of sexual harassment, particularly if the relationship turns sour. n193 This has led many employers to discourage - and sometimes to prohibit - dating between employees when they are in a supervisor-subordinate relationship. These "conflict of interest" rules, it should be noted, are most often grounded in concerns about the workplace environment, n194 either that the sexual relationship will negatively affect the parties' performance or generate resentment and perceptions of favoritism among others in the working group. n195 The rules seem to have little to do with fears about the general reputation of the employer or the "moral authority" of the supervisor engaged in the relationship. n196

Unlike the rules against adultery, however, at least some of the military prohibitions on fraternization might well withstand feminist scrutiny. With respect to relationships within the chain of command, a per se ban on consensual relationships reduces the likelihood that officers will abuse their power to pressure enlisted women to have sex, knowing that they will not be able to defend against a charge of sexual misconduct by alleging that the victim consented to or welcomed the conduct. It could also be argued that the officer/enlisted soldier relationship is so fundamentally asymmetric that it is simply too difficult to ensure that these sexual liaisons are not coerced or exploitive. Outside the military, for example, many universities have chosen to ban even "consensual" professor/student relationships, at least

in those instances where the professor has some instructional responsibility for the student. n197 A per se ban thus might be seen as supportive of prohibitions against sexual harassment by making it easier for those in charge to enforce a bright-line rule without speculating as to the nature of the sexual relationship. n198

[\*356] Finally, with respect to recruits in basic training, it is worth noting that this is a time of great vulnerability. Basic training cuts off young men and women from their family and friends and subjects them to what is often the most rigorous and stressful experience in their lives. In such circumstances, the person in charge has a disproportionate psychological edge, not unlike the divorce lawyer who handles an emotionally-laden case for his client n199 or other professionals who treat or perform services for especially vulnerable populations. n200 Banning sex between drill sergeants and recruits thus seems in line with the trend toward ethical bans on professional/client (or patient) sex in various civilian contexts, even absent direct proof of a conflict of interest or evidence of exploitation.

Even if they do not share the traditionalists' zeal for promotion of military discipline, feminists may well conclude that bans on sex within the chain of command make sense. However, these feminist justifications for anti-fraternization rules would suggest that only the higher-ranked officer or service member should be subject to sanctions. There is little justice in punishing an enlisted service member as a way of "protecting" that individual from being exploited.

[\*357] It is more difficult to come up with feminist justifications to support a ban on consensual sex outside the chain of command. The lack of direct supervision tends to lessen the opportunity for sexual coercion and retaliation and may not present the target with the stark dilemma of having to choose between disappointing her supervisor or denying her own wishes. However, one thoughtful proposal has been made endorsing a prohibition beyond the chain of command. Professor Madeline Morris has recently recommended a broadened fraternization policy that would prohibit sexual relationships, regardless of rank, within military units. n201 Interestingly, her proposal does not focus on preventing abuses of power by persons of higher rank. Instead, her concern is with the danger of permitting peers in the special, close-knit context of the military unit to engage in sexual relations. Her call for a military "incest taboo" n202 is an attempt to assure cohesion and a family-like structure for gender-integrated units. The objective is to reduce the risk that sexual tensions and jealousies will prevent the formation of bonds among male and female soldiers. Her proposal is animated by a desire to improve the status of women in the military and echoes concerns of feminists that, in general, sexualized workplaces pose a greater risk of sexual harassment because even consensual relationships may tend to erode the professional atmosphere of a particular work setting.

In another respect, however, Morris's proposal seems quite traditional: she implies that heterosexual relationships inevitably produce a competition among men for the available women and that there is no sexual tension in all-male groups. As I will discuss more fully in the next section, n203 it may be a mistake to assume that all-male groups are asexual, even when gay men are expressly excluded. The other troublesome aspect of the incest taboo is its potential to reinforce images of women as sexual commodities, as objects of desire that distract [\*358] men from more important business. The incest taboo assures that only the desexualized woman is allowed access to formerly male enclaves, precisely to preserve the male character of these groups. Traditionalists argue that male bonding in the absence of women is essential for soldiers who might some day be called into combat. n204 Though it does not call for the exclusion of women, Morris's incest taboo might play into these exclusionary impulses, insofar as it signals that female sexuality is dangerous, even when a woman consents to a relationship and in other respects is equal in status to her sexual partner. My problem with the incest taboo is that it seems to accept the prototype of the male fighting unit as intimate but asexual and implicitly conditions women's access on their willingness to give up the sexual aspect of their femaleness. In a subtle way, I believe that the incest taboo reinforces a male norm that was developed in an all-male culture - the message is that whether or not women are allowed, female sexuality is still off limits. n205

In the final analysis, it is not clear that feminist-inspired arguments such as Morris's provide adequate justification for the military rules against fraternization outside the chain of command. Obviously her proposal for an incest taboo provides no support for the recent anti-fraternization initiative that would ban relationships between officers and enlisted personnel from different units. Moreover, like the rules against adultery, there is a danger of selective enforcement of broad policies that ban dating and relationships beyond the working unit. While I have not seen

empirical evidence to support this claim, particularly after the Kelly Flinn case, critics of the military's anti-fraternization rules have claimed that there is a double standard of enforcement and that women are targeted more frequently and receive harsher punishments than men. n206 [\*359] Most importantly, I worry that even the more limited incest taboos may backfire and acquire a social meaning that makes women "taboo." I concede that it is possible that a ban against sex within military units might promote closer relationships and bonding between male and female soldiers. But there is also a risk that a ban of sex among peers would simply reinforce the traditional view that women and female sexuality are a danger and a distraction to the enterprises of men, thereby diminishing the chances that gender integration will bring about a transformation of military culture. The lesson of the recent gender panic may be that we should proceed with caution in regulating sexual relationships that present little concrete danger of abuse of power.

#### 4. The Need for Reconceptualization

This analysis of rules governing sexual misconduct in the military suggests the need for a reconceptualization of some of the basic offenses. To be sure, the military may present an acute case for reform, particularly because of the recent gender panic and because the penalties for sexual misconduct in the military are so severe. However, the tension between traditional and feminist visions of sexual ethics present in the enforcement of sex-related rules in the military is also present in the larger society. Many of the suggestions I offer here may well have merit for the civilian work force as well.

Perhaps the one noncontroversial point to be made is that there is currently no widespread agreement on what constitutes ethical sexual conduct and therefore no consensus as to the proper reach of the law. Particularly in such a volatile area as the legal regulation of sexual conduct, I am mindful of the fact that those closer to the situation are in a better position to judge whether the reconceptualization of basic offenses I offer here would indeed further my ultimate goal of gender equity in the military.

I start from the basic premise that, as in the civilian world, the touchstone for dividing permissible from impermissible sexual conduct should generally be the consent of the parties. Nonconsensual sexual conduct should be subject to legal sanctions, for the very simple yet important reason that it causes great harm to the health, welfare and dignity of individuals. Consensual sexual conduct, on the other hand, should be [\*360] treated as presumptively lawful and should be restricted only when there is good reason for doing so. Particularly for women, there is a great danger that even laws designed to protect women's interests may end up reinforcing old views of women as the sexual property of men and as a separate class of persons who cannot be trusted to make important decisions affecting their own lives.

To some extent, of course, the military rules governing sexual conduct reflect this basic value judgment. As a matter of formal law at least, rape and sexual harassment are recognized as serious offenses under the code of military justice and punished more severely than adultery or fraternization. However, the military rules governing consensual sexual conduct reflect values other than preserving the sexual integrity of service members, at least as I interpret the ban on adultery and the anti-fraternization regulations restricting consensual relationships outside the chain of command.

The rule against adultery is premised on the view that extramarital sex is immoral and at its core protects the marriage relationship, rather than the relationships among service personnel. Even though it is possible to enforce the ban against adultery sparingly and selectively only in those relatively rare cases in which the adultery causes the kind of environmental harm I described above (where, for example, a commanding officer has an affair with the spouse of an enlisted man or woman under his charge), n207 this selective deployment only underscores the need to rethink the nature of the harm that is being vindicated through criminal prosecution. If, as I suggest, it is not the commission of adultery per se that is the problem, but the conflict of interest and environmental harm that arises in some cases of adultery, then it might be better to rename the offense and define it differently. Thus, a married officer who has a sexual relationship with a soldier under his direct command might still be subject to court-martial or other punitive administrative action. Under my reconceptualization of sex-related crimes, however, the punishment would not stem from the fact that the officer was married, but from his breach of ethics in entering into a conflict-laden sexual

relationship which carried too great a risk of sexual exploitation of the lower-ranked party and too much potential for environmental damage.

[\*361] In short, I contend that adultery as a separate offense apart from more specific breaches of workplace sexual ethics should be abolished. I fear that as long as Article 134 outlaws "adultery" - even with the new guidance interpreting the "prejudice" and "discrediting" requirements n208 - it will be too difficult to sever the offense from its traditionalist moorings. Sexual ethics in the military - like sexual ethics in the civilian workplace - should not depend on the marital status of the parties. The harms of adultery are best addressed as private harms, to be dealt with by the spouses themselves pursuant to their own understanding of their particular relationship.

I would also rename and reorient the offense of fraternization. Like adultery, the offense seems to be grounded in notions of status. It is designed primarily to preserve hierarchy, not to protect the sexual integrity of less powerful persons or even to ameliorate the conflicts of interests that arise when the person in charge has an intimate relationship with a person under his direct command. As a status crime, fraternization could conceivably reach a wide range of social interactions between an officer and an enlisted member which threatens to undermine the officer's status. In their current sexualized meaning, however, the anti-fraternization rules are incoherent and place too much emphasis on the dangers of sexual conduct, as opposed to other overly-familiar behavior. The Air Force, for example, now prohibits an officer from dating an enlisted person, even when that person is outside the chain of command. n209 Thus a male officer whose "drinking buddy" is an enlisted man in another unit probably is in no danger of court-martial or administrative discipline. But if the same officer dates an enlisted woman in another unit, he might be charged with fraternization. This pattern of enforcement signals that sex with an inferior (who most often will be a woman) is the one type of boundary-crossing conduct that most threatens discipline and good order.

The rules against consensual sex in each service suggest that sex is the problem in and of itself, without focusing closely enough on the precise harms that consensual sexual relationships actually present in the particular environment. The gender panic makes me fear that - as in the phrase "fraternizing with the enemy" - anti-fraternization rules will [\*362] serve to further marginalize and isolate female service members who are still a relatively small minority in the military.

Although the term "fraternization" could again be retooled to encompass nonsexual and sexual conduct that poses a danger of conflict of interest or exploitation of lower-ranked service members, I would prefer to jettison the term, with its brotherly and sexual connotations. In its place, I think it is preferable to refer to the conduct simply as a breach of ethics, underscoring that sexual ethics is but a subset of larger ethical responsibilities. On this front, the terminology used in the new initiative to establish a uniform policy on "unprofessional" relationships seems a step in the right direction.

This shift in terminology, of course, would not solve the critically important issue of when to ban consensual sexual relationships, particularly outside the chain of command. As discussed above, n210 I remain unconvinced that there is a strong reason for banning such relationships, either among persons of the same rank in the same unit (the "incest taboo") or between officers and enlisted personnel when the officer is outside the chain of command.

It may well be that the demands of discipline within the unit, the young age of many service members and the fact that, unlike civilian workers, many military members cannot go "home" and escape the pressures of their job, means that greater attention should be paid to the twin dangers of possible sexual exploitation of subordinates and conflicts of interest arising from actual or perceived favoritism of sexual partners. These considerations provide solid grounding for a per se ban on consensual sexual relationships between superiors and subordinates within the chain of command. n211 To my mind, however, these considerations do not warrant broad bans on consensual conduct outside the chain of command that are grounded in more diffuse harms. Although the boundary lines may sometimes be blurry, n212 there does seem to be a salient dif [\*363] ference between an environmental harm within a working group and less concrete concerns for deterioration of morale, reputation, or level of respect. Particularly when the sanctions are criminal in nature, I would err on the side of more privacy.

Finally, with respect to the all-important issue of the definition of "consent" in cases of rape and sexual harassment, I endorse the willingness of military judges to recognize that officers are in a position to exercise "constructive force" to pressure those under their command to submit to sex against their will. n213 Victims should not be required to offer resistance in every case. Nor should the offender escape punishment simply because he does not resort to physical force or explicit threats of physical force. The recent gender panic, however, does make me wonder whether the prison term of twenty-five years meted out to Staff Sergeant Delmar Simpson may be too harsh, particularly when we compare his treatment to similarly situated offenders outside the military or to more highly-ranked offenders within the military. Most significantly, because military defendants may not bring civil rights claims for racial discrimination, n214 there is insufficient assurance that the courts-martial of Simpson and McKinney were not tainted by racial bias. The lack of availability of civil rights suits in the military context means that we lose the valuable opportunity of having a jury decide claims of gender and race discrimination under a preponderance of the evidence standard. Such civil rights suits have the advantage of allowing vindication of plaintiffs' rights without sending offenders to jail. Particularly in the highly contested area of the legal regulation of sexual conduct, such a compromise is of great utility.

Although it might seem odd for a feminist to argue for moderation in the punishment of rape and sexual harassment, such a position has been taken by feminist activists outside the military context since the rape reform movement of the 1970s. Two of the main objectives of the rape reform movement were to increase the number of victims who were willing to report they had been raped and to increase the number of convictions of those charged with rape. n215 These objectives could only be secured, however, if the system of enforcing rape laws was perceived to be effective and fair. There was a recognition that imposition of draconian penalties in a few rape cases could only undermine reform efforts aimed at consistent and commensurate punishment. Thus women's rights groups have successfully opposed the death penalty for rape n216 and have lobbied for grading the offense of rape according to the severity of the injury inflicted and the type of force used. n217 In the long run, disproportionately severe penalties, even for those convicted of the heinous crime of rape, tend to discourage prosecutions and invite selective enforcement of the law against racial minorities and other less privileged groups of men. I suspect that military justice is not immune from these dangers.

### C. The Social Meaning of Gender

There is a widespread belief that the military is quintessentially a "male" institution n218 and that it is unrealistic to expect that changes relating to gender in the larger society will necessarily penetrate this last bastion of male supremacy. Given that women have now secured a presence in the military, at least comparable to their representation in corporate board rooms and other male-dominated sectors, it is time to look more closely at what we mean by the "maleness" n219 of the military and how that might affect the specific policy issues we have been addressing. The recent scholarship n220 on gender and the military has focused on military culture as the term that best conveys the complex of attitudes, daily interactions and institutional structures that can give us a clue as to why the military might be so resistant to women and so fearful of feminization.

[\*365] An eloquent voice in the literature is that of Kenneth Karst, who regards the military as an important site for the construction of masculinity. n221 In his view, the military is "male" not only because it contains eighty-five percent men and has been even more intensely male-dominated for its entire history. The "maleness" of the military also derives importantly from its capacity to function as a symbol of what it means to be a man, that is, to produce and reproduce meanings of masculinity. In his words: "Masculinity is traditionally defined around the idea of power; the armed forces are the nation's preeminent symbol of power; and not incidentally, 'the Marines are looking for a few good men.' The symbolism is not a side effect; it is the main point." n222

The bad news for women is that many contemporary theorists tell us that masculinity is often defined through opposition - that we can best tell what is masculine by what is not feminine. n223 Since Simone de Beauvoir developed the concept of the "other" in *The Second Sex*, n224 many feminist theorists have approached gender as a socially constructed concept that tells us more about dominant views of masculinity than about the nature of women. Political theorist Sally Kenney explains that "men are defined and define themselves in opposition to a set of categories assigned

to women, usually whatever qualities or characteristics are less valued for the fully human, rational, creative or competent." n225 This point should be distinguished from the more traditional view that regards men and women as different and complementary. The observation made by Karst and others is that masculinity as an identity is often built around the exclusion (and subordination) of women and [\*366] that "gender, unlike sex, is not found in nature, but created and understood through representation." n226

This view of the construction of masculinity as an identity constructed in opposition to femininity is very much related to a central theme in recent gaylegal and feminist theory, namely, the theme of gender polarity. n227 Scholars such as Sandra Bem have argued that an important feature of the oppression of women and sexual minorities is the cultural tendency to superimpose a male/female dichotomy onto virtually every aspect of social life, from the clothes we wear, to the products we buy, to the way we express emotions and sexual desire. n228 Masculinity and femininity have been so thoroughly constructed as opposites (as in the "opposite sex") that we often fail to see how individuals fall on a continuum of personal styles, sexual orientations, and behavioral traits and instead expect people to follow "mutually exclusive scripts for being male and female." n229 Perhaps most importantly, people who are seen as deviating from the gender script - notably, gay men and lesbians - are regarded as problematic and disruptive of good order.

This cultural tendency toward gender polarity poses a particular problem for the woman warrior. Unless the job of the soldier is degendered, in the sense that the image of a "good soldier" is no longer seen as exclusively male, we can expect continued resistance to women in the military, particularly in leadership roles. There has been powerful commentary detailing how informal customs and traditions in the service academies and during basic training construct a hypermasculine environment in which women are regarded as alien and inferior. n230 To my mind, however, the most critical reinforce [\*367] ment of gender polarity in the military is the policy of exclusion of gays and lesbians. n231 This is because the exclusion has the effect of distorting and exaggerating problems associated with gender integration of the services.

As I understand the discourse surrounding the recent sex scandals and gender panic, a cognitive association has been forged between the problem of sex and the problem of women - thus, in the media, the problem of sexual harassment in the military is discussed as if it were really a problem of men harassing women and the problem of adultery and fraternization is thought to be really a problem of regulating heterosexual relations. In this account, what is totally eclipsed is that sexual harassment is not exclusively (or naturally) a male/female phenomenon and that consensual sexual relationships may also occur between people of the same sex.

There is a strange irony to this point. Because gays and lesbians are not free to be open in the military, discussion about military policies and practices takes place as if gay and lesbian soldiers did not exist. Thus, I find it telling that in the debate about fraternization within military units, n232 for example, there seems to be an assumption that the element of sexuality is introduced only when women are integrated into the unit. By denying the possibility that the men in the unit may have sexual contact, all problematic aspects of managing sexuality get mapped onto women. It is not surprising, therefore, that the solution to a sex scandal is to get rid of (or at least to segregate) the women. In this respect, the military exclusion of homosexuals represents the most extreme imposition of gender [\*368] polarity - the "don't ask, don't tell" policy assures that we will not be able to break the link between women and sex and increases the tendency to regard the military as a place where both women and sex have no place.

The influence of gender polarity can also be discerned in the discussion of sexual harassment in the military. From the Tailhook scandal onward, sexual harassment has been depicted exclusively as a problem for female soldiers, with the perpetrators invariably portrayed as heterosexual men. The implicit reasoning is that because gay men are excluded from the military, all harassers must be heterosexual. It is then a short step to assume that it is men's heterosexuality that is causing them to harass women, that is, that the harassment really is about sex. Again, what is missing from this picture are the stories of male-on-male sexual harassment that might lead us to a different theory about the causes and remedies for sexual harassment.

In the world outside the military, however, we are beginning to glimpse the complexity of the phenomenon of

sexual harassment and to have a better understanding of what is meant when it is said that harassment is about power, not sex. This term the Supreme Court decided *Oncale v. Sundowner Offshore Services, Inc.*, n233 one of many same-sex sexual harassment cases to reach the courts in recent years. n234 Although the facts of *Oncale* are quite brutal, sadly it is not an atypical same-sex harassment case.

The plaintiff in *Oncale* worked as a roustabout on an oil rig off the Gulf Coast. He was the most junior man on his rig and was subjected to repeated physical harassment by his supervisor and other men on the rig. n235 At one point, for example, *Oncale* was pushed down by a co-worker and held in a squatting position on his knees while his supervisor unzipped his pants and stuck his penis onto the back of *Oncale's* head. n236 Further, [\*369] the supervisor and a co-worker physically assaulted *Oncale* in a sexual manner while he was in the shower and, on other occasions, his co-workers threatened to rape him. n237 In addition to the physical abuse, *Oncale's* co-workers constantly picked on him, sometimes increasing the physical danger of the job. n238 Despite the clear pattern of harassment, *Oncale* initially lost his sexual harassment suit because the Fifth Circuit took the position that Title VII covered only "opposite sex" harassment. n239

The sexual harassment in *Oncale* took place in an exclusively male workplace. The case proceeded on the assumption that all of the men involved were heterosexual; significantly, there were no allegations that any of the parties were homosexual. The case thus presented the Court with what some commentators regard as the most difficult scenario of harassment - one that forced the Court to decide whether Title VII's ban on sexual harassment covers male-on-male harassment in a context that has nothing to do with sex, at least in the traditional sense of "sex" as "sexual desire." Some lower courts have dismissed similar cases as not actionable, dismissively characterizing male-on-male aggression as "horseplay" n240 and "locker room antics." n241

In a brief unanimous opinion for the Court, Justice Scalia held that Title VII was broad enough to encompass same-sex sexual harassment. The opinion clearly stated that "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex." n242 This move paved the way for recognition of same-sex harassment cases in the great majority of such cases where there is no allegation or finding that the harasser was homosexual and thus presumably [\*370] motivated by sexual desire. The Court, however, did not give much guidance as to how a plaintiff might prove sex-based discrimination in an all-male workplace where the plaintiff could not point to comparatively better treatment of the other sex. n243 The narrow opinion simply emphasized that a plaintiff must prove more than that the targeted conduct was "merely tinged with offensive sexual connotations," n244 and stressed that "ordinary socializing in the workplace such as male-on-male horseplay" n245 was not actionable under Title VII. At the end of the opinion, Justice Scalia expressed faith that "common sense, and an appropriate sensitivity to social context" n246 would allow fact finders to distinguish between "simple teasing or roughhousing between members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive." n247

*Oncale* is a threshold opinion that challenges the conventional wisdom about sexual harassment, without endorsing a coherent theory about its nature or origin. It is significant that the Court seemed to embrace the feminist position that sexual harassment is not necessarily about sexual desire and may stem from hostility rather than attraction. But not surprisingly given the procedural posture of the case, n248 the Court did not dwell on the power dynamics that might have been at play in the very case before it. There was no discussion of why the men on the oil rig might have singled out *Oncale* for hostile treatment or what function the harassment performed in that particular all-male culture. Most importantly, the Court did [\*371] not explain how male-on-male harassment might be regarded as sex-based discrimination when it seemed highly unlikely that a female roustabout would have been welcomed in such an environment. The Court enlarged the image of sexual harassment beyond opposite-sex harassment, but did not speculate on how this expanded concept might change our understanding of what is sexual conduct. In other words, *Oncale* provides no theory of sexuality or sexual aggression to supplant traditional notions of sexuality such as sexual desire and attraction. n249

A cogent statement of such a theory can be found in an amicus brief in *Oncale* authored by Catharine MacKinnon

on behalf of groups of male victims of rape and sexual abuse and profeminist men's organizations. n250 In the brief, MacKinnon elaborates on her dominance theory of sexual harassment and gives us new insight into the power dynamics behind sexualized aggression. MacKinnon starts out by observing that men are most often raped by other men when there are no women around, "in prisons, in confined and isolated work sites, in men's schools and colleges, in the military, in athletics, in fraternities." n251 It is important to recognize that MacKinnon [\*372] would classify these rapes as "sexual" even though the rapists regard themselves as heterosexual and are not motivated by sexual desire. In other words, that the rapes are "power rapes" n252 does not mean that they are not also sexual.

MacKinnon next theorizes that men sexually abuse those persons over whom they have power: first women and children, and then other men who are perceived as less powerful or different, based on, for example, their age, sexual orientation, ethnicity or disability. n253 What is perhaps most pernicious about the sexual victimization of men, however, is its invisibility and the consequent cultural denial that such victimization even exists:

The denial that interactions among men can have a sexual component, and that sexual abuse of men is gendered, are twin features of the social ideology of male dominance... This image protects men from much male sexual violence and naturalizes the sexual abuse of women, making it seem that women, biologically, are sexual victims. Denying that men can be sexually abused as men thus supports the gender hierarchy of men over women in society. The illusion is preserved that men are sexually inviolable, hence naturally superior, as the sexual abuse of men by men is kept invisible. n254

MacKinnon's insights about the invisibility and denial of the sexual abuse of men have potential for sharpening our understanding of how the dynamic of gender polarity might be at work in the military. The exclusion of gay men would seem to reinforce the belief that military men are sexually inviolable and to heighten the belief that military women are naturally sexual victims. In a culture that purports to be composed only of "real" men, the sexual abuse of men, whether gay or heterosexual, is likely to be driven further underground. MacKinnon's theory explains, for example, why stories of male-on-male sexual harassment in the military are less likely to surface in the media and provide material for a sex scandal, unless, of course, the perpetrator is discovered to be gay. Her theory made me consider the possibility that military men might experience sexual harassment far more frequently than we might [\*373] suppose. n255 It challenges us to consider what it might mean for our understanding of sexual harassment if we truly learned that women were not its cause.

In a curious way, the "discovery" of the sexual abuse of men could be liberating for women. When rape and sexual harassment are degendered, in the sense that we acknowledge that men may also be victims and that same-sex sexual abuse is not naturally linked to sexual orientation, some of the major objections to women's presence in the military may lose their force. For example, one recurring rationale for barring women from combat is the fear that women will be taken as prisoners of war and raped by enemy forces. n256 While this fear is certainly justified, perhaps there should be comparable concern over the prospect of sexual abuse of male prisoners of war as well. n257 The invisibility of the danger to men makes the potential harm to women seem not only intolerable but unique.

My main point is that once we understand that sexual abuse is a problem in male-only, as well as integrated environments, we might stop trying to solve the problem of sexual abuse by excluding women. Most importantly, in the military context, lifting the restrictions and discrimination against gay men and lesbians would not only extend human rights to this group of men and women, it might well facilitate gender integration generally.

[\*374]

## CONCLUSION

The dizzying pace of events related to gender and the military makes it tempting to reach for one explanation for the

chaos. Particularly in the popular commentary, there is a tendency to fall back on simplistic views about sex to address difficult issues concerning training, ethics, and opportunities. The backdrop of much of the public discussion of the "sex scandals" in the military is the assumption that innate biological differences between men and women produce intractable problems and that only separation of the sexes can ease the conflict.

This article proceeds from a much different premise. The three theoretical frameworks I have used to deconstruct the recent gender panic (tokenism, consent, and the social construction of gender) point to organizational structure and culture, rather than to biology, for clues to understanding the heated controversies relating to gender and the military that have absorbed the nation in the past year. If, as I suggest, the military is a microcosm of larger society, it is not surprising that there is a struggle over where to draw the line between permissible and impermissible sexual conduct under military law, given the contest between traditional and feminist viewpoints in the civilian world.

One starting point for analysis is institutional demographics. To some degree, the current gender panic is a function of the still relatively low numbers of women in the military. For the first time in history, the military is poised to go beyond tokenism. Particularly because of the recent contraction of the combat exclusion, it is possible that women could secure more than a marginal place in the armed forces in the near future. From this vantage point, the gender panic - particularly the move to re-segregate the sexes during basic training - represents a gender backlash. The unfortunate irony is that, rather than being a cure for sexual harassment, sex segregation is likely to foster and perpetuate sexual harassment.

Additionally, the recent courts-martial for sexual misconduct and prosecutions for consensual sex demonstrate a need to develop a new conception of sexual ethics in the military. In my view, the guideposts for such a reconceptualization should be principles of consent and gender equality, rather than traditional notions of sexual morality. The refinement of the "constructive force" doctrine to prevent recruits from being pressured to have sex with drill instructors against their will is [\*375] important because it acknowledges the importance of power differentials, of context, and of the perspective of rape victims. However, particularly with respect to enforcement of its policy against sexual harassment, the military's response is currently limited by the ban against filing anti-discrimination civil suits. The use of criminal sanctions, particularly long prison terms, is too blunt a tool to control all forms of sexual misconduct. It can backfire and deter even-handed enforcement of the law.

With respect to consensual sexual activity, the military's rules on adultery and fraternization should be thoroughly reexamined and redirected toward the concrete objectives of eliminating sexual exploitation and conflicts of interest. Sexual ethics within the military, like sexual ethics in the civilian workplace, should be aimed at avoiding environmental harms, rather than promoting more diffuse and contested notions of morality. I recommend that the military follow the trend in the larger society and eliminate all penalties for adultery as a separate offense. Although more debatable, my analysis also suggests that the ban against fraternization should be tailored to reach only sexual relationships within the chain of command.

Finally, it is important to realize that managing sexuality will be a problem for the military, with or without women. Recent developments in Title VII same-sex sexual harassment cases indicate that sexual harassment occurs in all-male, as well as mixed-sex, environments and that sexual harassment is best conceptualized as an abuse of power that can and does harm both men and women. Because of their historic marginalization within the military, however, women have a special stake in transforming and de-gendering military culture, particularly in severing the connection between women and sex. Such an important change, however, is not likely to occur unless and until the exclusion of gay men and lesbians is finally lifted. Until then, exclusion and segregation of women will look like a cure for male sexual misconduct and prevent us from concluding, at long last, that the "experiment" with women in the military has ended in success.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Labor & Employment Law  
 Discrimination  
 Harassment  
 Sexual Harassment  
 Correction & Prevention  
 Labor & Employment  
 Law  
 Discrimination  
 Harassment  
 Sexual Harassment  
 Coverage & Definitions  
 Same-Sex Harassment  
 Labor & Employment  
 Law  
 Discrimination  
 Harassment  
 Sexual Harassment  
 Coverage & Definitions  
 Sexual Harassment

#### FOOTNOTES:

n1. See Deborah L. Rhode, *Justice and Gender* 246-48 (1989) ("Recent studies suggest that rape is the most underreported of all violent crimes."); National Victim Center & Crime Victims Research and Treatment Center, *Rape in America: A Report to the Nation* 4-6 (1992) (only 12% of victims report the rape to the police within 24 hours; another 4% report after 24 hours, and 84% never report at all).

n2. See National Council for Research on Women, *Sexual Harassment: Research and Resources* 10 (1991) (reporting a study finding that only 1-7% of women who report harassment in surveys actually file a formal complaint; only 5% of federal employees who stated in a 1987 survey that they had been harassed filed a formal complaint or requested an investigation).

n3. See, e.g., Terese L. Fitzpatrick, *Innocent Until Proven Guilty: Shallow Words for the Falsely Accused in a Criminal Prosecution for Child Sexual Abuse*, 12 *U. Bridgeport L. Rev.* 175, 196-99 (1991); Deborah Patterson, Note, *The Other Victim: The Falsely Accused Parent in a Sexual Abuse Custody Case*, 30 *J. Fam. L.* 919, 924-26 (1991).

n4. See Jackie Calmes, *White House Tries to Stick to Business Amid Scandal*, *Wall St. J.*, Mar. 30, 1998, at A20 (discussing time spent on damage control).

n5. Many of the major feminist contributions in the equality debate appear in anthologies of feminist legal thought. See *Feminist Legal Theory: Readings in Law and Gender* 15-156 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991); *Feminist Jurisprudence* 17-135 (Patricia Smith ed., 1993); *Feminist Legal Theory: Foundations* 121-334 (D. Kelly Weisberg ed., 1993).

n6. Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 *Women's Rts. L. Rptr.* 175, 196 (1983). To be precise, Williams urged feminists to consider that "if we can't have it both ways, we need to think carefully about which way we want to have it." *Id.*

n7. See, for example, Marina Angel's statement: "The debate on the nature of equality has focused on whether we should have an equality of sameness or an equality of differences. We can and should have both." Marina Angel, *Susan Glaspell's Trifles and a Jury of Her Peers: Woman Abuse in a Literary and Legal Context*, 45 *Buff. L. Rev.* 779, 796 (1997).

n8. For a brief overview of some of the salient differences between the civilian and military systems of justice, see Jane Gross, *Justice in the Military Has Its Reasons*, *N.Y. Times*, Mar. 1, 1998, at A16.

n9. See *Chappell v. Wallace*, 462 *U.S.* 296 (1983) (military personnel may not sue superior officer in

Bivens-type action for race discrimination).

n10. The courts have held that Title VII does not extend to suits by uniformed members of the armed services or applicants for enlistment. See, e.g., *Johnson v. Alexander*, 572 F.2d 1219 (8th Cir. 1978).

n11. I am indebted to Alan Michaels for this characterization of the military as a microcosm of the larger society.

n12. For a discussion of the ways in which gays and lesbians conceal their sexual orientation and the costs of such concealment, see Marc A. Fajer, Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men, 46 U. Miami L. Rev. 511, 592-602 (1992).

n13. Since 1993, the exclusion of gay men and lesbians in the military has been embodied in what is known as the "don't ask, don't tell" policy. See National Defense Authorization Act for FY '94, 10 U.S.C. 654 (1994). The military no longer questions applicants about their sexual orientation, but continues to discharge any member who has "engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts." See Kenneth Williams, Gays in the Military: The Legal Issues, 28 U.S.F. L. Rev. 919, 925 (1994). Service members can prevent separation only if they can prove that their conduct was not customary behavior and that they do not have a "propensity or intent to engage in homosexual acts." *Id.* at 925 n.58. The "don't tell" provision of the policy requires discharge of service members who have stated that they are homosexual, unless they can prove that they do not engage in homosexual conduct. See *id.* at 926.

n14. Since the 1991 Hill/Thomas Senate hearings, the number of sexual harassment complaints received by the EEOC has increased sharply. For example, in its fiscal year 1992, there was a 50% increase. See EEOC Collected \$ 183 Million in Fiscal '92; Charges Jumped Sharply From A Year Earlier, 1992 Daily Lab. Rep. (BNA) No. 232, at A-7 (Dec. 2, 1992).

n15. See infra notes 53-63 and accompanying text.

n16. See infra notes 23-24, 53-58, 64-66 and accompanying text.

n17. See infra notes 59-63 and accompanying text.

n18. See infra notes 76-115 and accompanying text.

n19. See infra notes 126-50 and accompanying text.

n20. See infra notes 179-206 and accompanying text.

n21. See infra notes 151-78 and accompanying text.

n22. See infra notes 218-57 and accompanying text.

n23. See Federal Advisory Committee on Gender-Integrated Training and Related Issues, Report of the Federal Advisory Committee on Gender-Integrated Training and Related Issues (visited Jan. 11, 1998) <<http://www.defenselink.mil/pubs/git/report.html>> [hereinafter Advisory Report].

n24. See National Defense Authorization Act for Fiscal Years 1998 and 1999: Hearing on H.R. 1119 Before the Subcomm. on Military Installations and Facilities of the House Committee on National Security, 105th Cong. 2 (1997) (statement of Nancy Duff Campbell, Co-President, National Women's Law Center on Gender-Integrated Training) [hereinafter Statement of Nancy Duff Campbell].

n25. See Neil A. Lewis, Sergeant's Lawyers Start Case by Accusing 2 of His Accusers, N.Y. Times, Apr.22, 1997, at A12; Dana Priest & Jackie Spinner, For Aberdeen Jury, A Murky Question of Human Relations, Wash. Post, Apr. 27, 1997, at A1.

n26. See Paul Richter, Army Sergeant Gets 25-Year Term, L.A. Times, May 7, 1997, at A1.

n27. Specifically, Fort Leonard Wood and the U.S. installation in Darmstadt, Germany were the site of numerous allegations by female trainees. See James Bone, Unreasonable Force, Times (London), Oct. 25, 1997, at 20.

n28. The "zero tolerance" policy of the Navy had been made explicit in 1989 when Navy Secretary Lawrence Garrett III issued the following pronouncement:

Sexual harassment is unacceptable conduct; it undermines the integrity of the employment relationship, debilitates morale, and interferes with the work productivity of an organization. Sexual harassment will not be tolerated at any level. Substantiated acts of or conduct which results in sexual harassment shall result in corrective action.

Department of the Navy, Office of the Secretary, SECNAV INSTRUCTION 5300.26A (1989).

n29. See Philip Shenon, Hearings Against Sergeant Major Conclude, N.Y. Times, Aug.26, 1997, at A10.

n30. Stephen Komarow, Army Sex Scandal Reaches Higher, Service's Top Enlisted Man Faces Charges, USA Today, May 8, 1997, at 3A.

n31. See Jane Gross, Former Top Sergeant of Army Is Acquitted of All Sex Charges, N.Y. Times, Mar. 14, 1998, at A1; Jane Gross, When Character Counts, N.Y. Times, Mar.15, 1998, at A1.

n32. One woman sergeant testified that she reluctantly had sex with McKinney when she was eight months pregnant. See Bone, *supra* note 27, at 20.

n33. The jurors in the McKinney court-martial declined to comment on their reasons for acquitting McKinney of the sexual misconduct charges. As possible explanations for the acquittal, commentators have

cited the heavy burden of proof (beyond a reasonable doubt) in courts-martial and the existence of the "good soldier" defense which permits the fact finder in military prosecutions to rely on the accused's good record to create reasonable doubt as to the commission of each offense charged. See Editorial, *N.Y. Times*, Mar.17, 1998, at A24 (emphasizing heavy burden of proof); Stephen A. Saltzburg et al., *Military Rules of Evidence Manual* 458-59 (3d ed. 1991) (explaining that "good military character" is admissible in prosecutions for "uniquely military offenses" such as prosecutions under Article 134).

n34. The demotion may have the effect of reducing McKinney's lifetime pension benefits by as much as \$ 700,000. However, this issue will first be decided through the military administrative process. See Jane Gross, *Sergeant Major Gets One-Step Demotion But No Time in Jail*, *N.Y. Times*, Mar. 17, 1998, at A1.

n35. It was not always clear whether the "experiment" with women encompassed only gender integration during basic training or referred to women's enhanced role in the military more generally. See John Barry & Evan Thomas, *At War Over Women*, *Newsweek*, May 12, 1997, at 48 ("The headlines have made some wonder whether the integration of women into the armed forces is a failed experiment."); Steven Lee Meyers, *Defense Chief Rejects Advice to Separate Sexes in Training*, *N.Y. Times*, Mar.17, 1998, at A1 (citing statement by Congress member that "the recent experiment with social engineering has been proven a failure"); Elaine Sciolino, *Sergeant Convicted of 18 Counts of Raping Female Subordinates*, *N.Y. Times*, Apr.30, 1997, at A1 ("Today's verdict is certain to rekindle the debate on Capitol Hill and within the military about whether the American military's experiment with integrating men and women has failed.").

n36. See Dana Priest, *Army May Restudy Mixed-Sex Training: Chief Suggests It's Time to Weigh Benefits, Drawbacks*, *Wash. Post*, Feb. 5, 1997, at A1; Editorial, *The Military and Women*, *Wall St. J.*, Feb. 21, 1997, at A14.

n37. *Quid pro quo* harassment takes place when a supervisor or other person in authority threatens harm or promises a benefit in exchange for sexual compliance. See EEOC Guidelines on Sexual Harassment, 29 *C.F.R.* 1604.11(a)(1)-(2) (1997).

n38. See Cindy Sondik Aron, *Ladies and Gentlemen of the Civil Service: Middle-Class Workers in Victorian America 162-74* (1987).

n39. 335 *U.S.* 464 (1948).

n40. See *id.* at 465.

n41. See Barbara Babcock et al., *Sex Discrimination and the Law* 144-47 (2d ed. 1996). The International Bartenders Association adopted the following as a slogan: "Liquor alone causes enough trouble, why add women?" *Id.* at 144.

n42. See *id.* at 146.

n43. See *Goesaert*, 335 *U.S.* at 466.

n44. *Id.*

n45. 433 U.S. 321 (1977).

n46. *Id. at 334.*

n47. See Martha Chamallas, Writing About Sexual Harassment: A Guide to the Literature, 4 *U.C.L.A. Women's L.J.* 37, 83 (1993).

n48. In particular, the courts have interpreted Title VII to give qualified women access to jobs except in very rare cases in which employers can prove that sex is a bona fide occupational qualification. See *International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991) ("The BFOQ defense is written narrowly, and this court has read it narrowly."). The strategy of employers to exclude all "fertile" women from allegedly hazardous jobs was successfully challenged by feminists, culminating in the Johnson Controls case. See generally Sally J. Kenney, For Whose Protection?: Reproductive Hazards and Exclusionary Policies in the United States and Great Britain (1992).

n49. These are not the only issues related to gender in the military. In the recent past, the most contentious issue was whether women should be subject to a military draft. See *Rostker v. Goldberg*, 453 U.S. 57 (1981) (upholding the constitutionality of male-only draft registration); Jane J. Mansbridge, Why We Lost the ERA 46, 86 (1986) (discussing how opposition to drafting women helped to defeat the ERA). As in the civilian workplace, there is currently controversy surrounding the treatment of pregnancy in the military and the possibility of women becoming pregnant continues to surface as a justification for denying women full participation. See Michael J. Frevola, Damn the Torpedoes, Full Speed Ahead: The Argument for Total Sex Integration in the Armed Services, 28 *Conn. L. Rev.* 621, 646-50 (1996). In this Article, however, I focus on those gender-related controversies that are most closely associated with the recent gender panic.

n50. Kathryn Abrams, Gender in the Military: Androcentrism and Institutional Reform, *Law & Contemp. Probs.*, Autumn 1993, at 217.

n51. Kenneth L. Karst, The Pursuit of Manhood and the Desegregation of the Armed Forces, 38 *U.C.L.A. L. Rev.* 499 (1991).

n52. Madeline Morris, By Force of Arms: Rape, War, and Military Culture, 45 *Duke L.J.* 651 (1996).

n53. See Advisory Report, *supra* note 23, at 12.

n54. *Id. at 16.*

n55. See *id.*

n56. See *id. at 12*; see also Diane H. Mazur, The Beginning of the End for Women in the Military, 48 *Fla. L. Rev.* 461, 465-66 (1996) (describing the buddy system).

n57. Advisory Report, *supra* note 23, at 13.

n58. *Id.*

n59. These were the main charges, stemming from Flinn's relationship with Marc Zigo, a civilian who was married to an enlisted woman. See Kelly Flinn, *Proud to Be 206* (1997). There was also a charge of fraternization lodged against Flinn, based on a "one night" encounter with an enlisted man who was not in Flinn's chain of command. See *id.* at 157.

n60. *Id.* at 213.

n61. Some of these charges reached the upper ranks. For example, John E. Longhouser, a two-star general who had been a commanding officer at Aberdeen, retired early, at one rank beneath his standing, after it was revealed that he had engaged in adultery five years earlier, at a time when he was separated from his wife. See Editorial, *Sex and the Military*, *Wash. Post*, June 6, 1997, at A26.

n62. See Elaine Sciolino, *Courtship Leads to Marriage and Maybe Officer's Ouster*, *N.Y. Times*, July 3, 1997, at A1.

n63. See Flinn, *supra* note 59, at 245-46.

n64. See Steven Lee Myers, *Defense Chief Rejects Advice to Separate Sexes in Training*, *N.Y. Times*, Mar. 17, 1998, at A4.

n65. See *id.*

n66. The House passed a bill requiring separate training and housing throughout the military at the basic training level. The Senate rejected the bill, deferring the decision on resegregation until after a Congressionally appointed committee issues its report. See *House, Senate Differ Basic Training of Sexes*, *Seattle Times*, June 25, 1998, at A3.

n67. See *id.*

n68. The Department of Defense has issued a notice of proposed amendments to the Manual for Courts-Martial recommending the addition of a new "explanation" section that lists nine factors to guide commanders in making determinations of when adulterous conduct is "prejudicial to the good order and discipline or is of a nature to bring discredit upon the armed forces." R.14.2 Notice of Proposed Amendments, *63 Fed. Reg. 43, 687* (1998). Secretary Cohen also directed each of the four military services to produce similarly worded policies and training material to prohibit sexual relations between officers and enlisted personnel and between recruiters and recruits, emphasizing the objective of standardizing anti-fraternization policies among the services. See Office of the Assistant Secretary of Defense (Public Affairs), *News Briefing* (last updated July 29, 1998) <<http://www.defenselink.mil/news/Jul1998/t07291998-t0729ascd.html>>. For a more detailed discussion of the military's anti-fraternization policies, see *infra* Part III.B.3.

n69. For a discussion of the components of the sexual revolution of the 1960s through the 1980s, see Stephanie Coontz, *The Way We Never Were: American Families and the Nostalgia Trap* 193-96 (1992).

n70. Advisory Report, *supra* note 23, at 10.

n71. Sergeant Major McKinney, Sergeant Simpson and several other African American service members accused of sexual harassment at Aberdeen complained of racist selective prosecution. At his court-martial, Sergeant Major McKinney alleged that he was singled out because of his race and his lawyer submitted a list to the court containing the names of generals who had supposedly been allowed to retire quietly after being accused of similar sex-related violations. See Philip Shenon, *Judge is Given Names of Accused Generals*, N.Y. Times, Nov. 6, 1997, at A23. McKinney also complained that Army investigators had asked witnesses whether McKinney was "only interested in white women." *Army Charges Top Enlisted Man with Sex-Misconduct Offenses*, Chi. Trib., May 8, 1997, at A11. The six women who accused McKinney of harassment were white.

The NAACP questioned the fairness of the Simpson court-martial, alleging that the conviction was "an attack on the leadership of the African-American male." Sciolino, *supra* note 35, at A1. All of the 12 Aberdeen soldiers accused of sexual misconduct were black, while most of the accusers were white. Some female soldiers stated that investigators pressured them into accusing the black drill sergeants of rape. See *First of Aberdeen Trials Begins*, Dayton Daily News, Apr. 15, 1997, at 3A.

In addition to intentional racially selective enforcement, there may also be race bias in the labeling of conduct as harassment. See Patti A. Giuffre & Christine L. Williams, *Boundary Lines: Labeling Sexual Harassment in Restaurants*, 8 *Gender & Soc'y* 378, 387-97 (1994) (finding that target is more likely to label sexualized conduct "harassment" when the perpetrator is of a different race, ethnicity or sexual orientation).

n72. For a description of the sociological literature focusing on organizational demography and power, see Robin J. Ely, *The Power in Demography: Women's Social Constructions of Gender Identity at Work*, 38 *Acad. Mgmt. J.* 589, 589-92 (1995); see also Elizabeth Chambliss, *Organizational Determinants of Law Firm Integration*, 46 *Am. U. L. Rev.* 669, 679-91 (1997) (explaining structuralist and organizational theories in the sociology of work).

n73. In her memoir, Kelly Flinn reflects on her experience of being a token woman at the Air Force Academy and in her subsequent training as a bomber pilot. Amazingly, she was given the "call sign" of "Token," which she describes as "somebody's idea of an icebreaker." She later had it changed to "Scoper." Flinn, *supra* note 59, at 153.

n74. Some important new contributions focusing on the harms of sexual harassment are Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 *Cornell L. Rev.* 1169 (1998); Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 *Harv. L. Rev.* 445 (1997); Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 *Stan. L. Rev.* 691 (1997); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 *Yale L.J.* 1683 (1998). For a review of some of the earlier literature, see Martha Chamallas, *Introduction to Feminist Legal Theory* 236-50 (forthcoming 1999).

n75. See Chamallas, *supra* note 74, at 157-70.

n76. See Advisory Report, *supra* note 23, at 2.

n77. See Chamallas, *supra* note 74, at 177 (discussing Rosabeth Moss Kanter's ground-breaking work in tokenism theory). For a discussion of many of the more recent tokenism studies, see generally Brief of NOW Legal Defense and Education Fund et al. in support of petitioner, *Piscataway Bd. of Educ. v. Taxman* (No. 96-679), cert. granted, 117 S. Ct. 2506 (1997), cert. dismissed, 118 S. Ct. 595 (1997), available in 1997 WL 523789.

n78. Two basic insights of tokenism theory are that relative numbers affect power in institutions and that relative numbers affect the culture of an institution. See Sally J. Kenney, *New Research on Gendered Political Institutions*, 49 *Pol. Research Q.* 445, 456-57 (1996).

n79. For a discussion of the dynamics of tokenism, see Martha Chamallas, *Structuralist and Cultural Domination Theories Meet Title VII: Some Contemporary Influences*, 92 *Mich. L. Rev.* 2370, 2378-85 (1994); see also Jennifer Crocker & Kathleen McGraw, *What's Good for the Goose is Not Good for the Gander: Solo Status an Obstacle to Occupational Achievement for Males and Females*, 27 *Am. Behav. Sci.* 357, 365-66 (1984) (indicating that a laboratory experiment found that token women were less likely to be identified as leaders of the group or to perceive themselves as leaders).

n80. See Diane N. Ruble & E. Tory Higgins, *Effects of Group Sex Composition on Self-Presentation and Sex-Typing*, 32 *J. Soc. Issues* 125, 131 (1976); James H. Thomas & Dirk C. Prather, *Integration of Females into a Previously All-Male Institution*, in *Proceedings of the Fifth Symposium on Psychology in the Air Force* 100-01 (1976); cf. Eve Spangler et al., *Token Women: An Empirical Test of Kanter's Hypothesis*, 84 *Am. J. Soc.* 160 (1978) (observing that the performance of women law students was better in law schools with 33% female enrollment as compared to law schools with only 20% female enrollment).

n81. See *Brief of NOW Legal Defense and Education Fund et al.*, *supra* note 77, at 19 (arguing that "tokenism thus contributes to the vicious circle of stereotyping: stereotyping supports the glass ceiling, and the glass ceiling reinforces gender stereotypes").

n82. 490 U.S. 228 (1989).

n83. 760 F. Supp. 1486 (M.D. Fla. 1991).

n84. See *Morris*, *supra* note 52, at 742 n.346.

n85. See *id.*

n86. See *id.* at 739-40.

n87. See *id.* at 740.

n88. *Morris* was not able to cite a figure for the Air Force. In contrast to the Army and the Marines, the accessions policies of the Navy and the Air Force are now expressed only in "gender neutral" figures. These two services, however, still make projections or predictions of the number and percentage of women expected to be

recruited. See *id.*

n89. Until 1967, there were statutory ceilings restricting women to only 2% of the total enlisted population. See *id.* at 734.

n90. See Karst, *supra* note 51, at 524 n.96. In 1982, the Army also reseggregated basic training which had been integrated in 1978 and added to the list of occupational specialties that were designated as "combat" jobs from which women were excluded. See *id.*

n91. Advisory Report, *supra* note 23, at 3.

n92. *Id.*

n93. See *Morris*, *supra* note 52, at 742-43.

n94. See generally Ruble & Higgins, *supra* note 80.

n95. See Statement of Nancy Duff Campbell, *supra* note 24, at 6.

n96. See *id.*

n97. The biological approach is prevalent in the popular press. Many commentators, for example, expressed the view that the sex scandals at Aberdeen were the inevitable, natural result of placing male soldiers in close proximity to female soldiers. See, e.g., Thomas J. Bray, *Aberdeen: A Result of Utopianism*, *Det. News*, May 4, 1997, at C6 (stating that "no amount of sensitivity training is going to overcome the hormonal inclinations of military-age males and females"); Richard Cohen, *Duty, Gender, Country*, *Wash. Post*, Apr. 24, 1997, at A25 (noting that "it's also possible that the scandal is a warning to both the brass and the civilian leadership that they are attempting the impossible - a fight not against a few bad men but against a more formidable foe: human nature").

n98. To reduce stereotyping, the social science research indicates that there must be substantial gender integration in supervisory positions. It is not enough that women are proportionately represented among the rank and file. See Ely, *supra* note 72, at 625-27; cf. Cecilia L. Ridgeway, *Gender Differences in Task Groups: A Status and Legitimacy Account*, in *Status Generalization: New Theory and Research* 188, 195-98 (1988) (theorizing that the gender of the "organizational authority structure" affects participation of women in both mixed-sex and single-sex groups); Madeline E. Heilman & Richard F. Martell, *Exposure to Successful Women: Antidote to Sex Discrimination in Applicant Screening Decisions?*, 37 *Org. Behav. & Hum. Decision Processes* 376, 378 (1986) (suggesting that exposure to successful women can sometimes mitigate against broader gender stereotyping); Madeline E. Heilman, *Sex Stereotypes and Their Effects in the Workplace: What We Know and What We Don't Know*, 10 *J. Soc. Behav. & Personality* 1, 10-11 (1995) (emphasizing that the referent for women managers is limited to the proportion of women in similar roles).

n99. For women in the lower ranks, the presence of female officers may have the effect of increasing their

level of ambition and self confidence. Studies show that women are reluctant to seek jobs that few other women have held. See Laurie L. Cohen & Janet K. Swim, *The Differential Impact of Gender Ratios on Women and Men: Tokenism, Self Confidence, and Expectations*, 21 *Personality & Soc. Psychol. Bull.* 876, 883 (1995); cf. Christine L. Williams, *Gender Differences at Work: Men and Women in Nontraditional Jobs* (1989) (arguing that women were initially attracted to the Marine Corps because of active efforts to recruit them). For both men and women, the research indicates that stereotyping decreases in more gender diverse environments. See Anne Locksley et al., *Sex Stereotypes and Social Judgment*, 39 *J. Personality & Soc. Psych.* 821, 830 (1980).

n100. See Karst, *supra* note 51, at 527n.108.

n101. See *id.* at 524 n.95.

n102. See *id.* at n.96.

n103. *Morris, supra* note 52, at 738.

n104. Since the founding of Israel in 1948, there has been a compulsory military draft for both sexes. An estimated one-half of the 176,000 regular forces are women. See Andy Goldberg, *Sex Video Exposes Torment of Israel's Women Soldiers*, *Sunday Times*, Apr.23, 1995. However, women have shorter enlistment periods than men (21 months versus 36 months). See Sasha Sadan, *Women Battle IDF Job Discrimination*, *Jerusalem Post*, Feb.11, 1994, at 4B, available in *1994 WL 9848666*.

n105. For a discussion of women's heroic participation in combat during the pre-state period, see Anne R. Bloom, *Israel: The Longest War*, in *Female Soldiers - Combatants or Noncombatants?* 137, 137-62 (Nancy Loring Goldman ed., 1982).

n106. Women were soon excluded from combat after the 1948 Arab-Israeli war. In particular, fears were raised that women combatants would be taken prisoner, raped and brutalized by Arab soldiers, who would be humiliated because they were forced to fight against women. See Joel Greenberg, *Ruling Expands Women's Roles in the Israeli Military*, *N.Y. Times*, Jan.3, 1996, at A5.

n107. Many commentators attribute women's inferior status in the Israeli army to the widespread acceptance of traditional attitudes about the role of women in the larger society. See, e.g., *id.* (observing that "a far deeper influence on subsequent policy has been the more general paternalism toward women in Israeli society").

n108. See Ann LoLordo, *Israeli Army's "Girl Stigma"*, *Baltimore Sun*, Dec.1, 1996, at 1A; see also *Greenberg, supra* note 106, at A5 ("Women are present, but only in roles where they are witness to the glory of men. They are help-mates. Women serve the men, and the men serve the army.").

n109. See Sadan, *supra* note 104, at 4B.

n110. One infamous harassment case involved an allegation by a female soldier (a 20-year old Russian immigrant) that her commander persuaded another soldier to seduce her, to videotape the encounter, and to

circulate the tape among the men. See Louise Lief, *Second Class in the Israeli Military; Women Are Fighting for Equality in the Ranks*, U.S. News & World Rep., May 22, 1995, at 47.

n111. For an argument in favor of lifting nearly all restrictions on women in combat, see Frevola, *supra* note 49, at 621.

n112. See *Morris*, *supra* note 52, at 736-37.

n113. For example, of the 20,000 former-combat positions recently "opened" to women in the Army, only 1,367 are currently held by women. The Catch-22 is that, in some "high-profile operations" jobs, commanders exercise their discretion to exclude women who do not have the requisite company- or battalion-level experience, which the women were barred from attaining because of the former combat exclusions. See Dana Priest, *Still Far From the Front Lines*, Wash. Post Nat'l Wkly. Ed., Jan. 26, 1998, at 6.

n114. See Karst, *supra* note 51, at 524 n.96.

n115. Mid-grade female officers and senior enlisted women in the Army still lag behind male peers in promotions. See Priest, *supra* note 113, at 7.

n116. See Martha Chamallas, *Consent, Equality and the Legal Control of Sexual Conduct*, 61 *S. Cal. L. Rev.* 777, 781, 784-90 (1988).

n117. See Model Penal Code 213.6 note on adultery and fornication (Proposed Official Draft 1962).

n118. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 454-55 (1972) (striking down a Massachusetts law forbidding distribution of contraception to unmarried persons).

n119. See generally Harry D. Krause, *Equal Protection for the Illegitimate*, 65 *Mich. L. Rev.* 477 (1967).

n120. See Homer Clark, *The Law of Domestic Relations in the United States* 14.5, at 445-46 (1968) (description of traditional divorce law); Lenore J. Weitzman, *The Divorce Revolution* 6-14 (1985) (same).

n121. The trend began with *Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (unconstitutional to deny a nonmarital child the right to recover for parent's wrongful death), followed by *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 176 (1972) (unconstitutional to deny nonmarital child the right to recover worker's compensation for father's death).

n122. However, the trend is not complete. Criminal laws against adultery are still on the books in almost half the states and are occasionally enforced. See Note, *Constitutional Barriers to Civil and Criminal Restrictions on Pre- and Extramarital Sex*, 104 *Harv. L. Rev.* 1660, 1672-74 (1991). Selective enforcement is a danger and prosecutors may resort to adultery charges when they lack evidence to prove other misconduct. For example, persons suspected of prostitution or rape are sometimes charged with adultery. See *id.* at 1672 n.89. With respect to same-sex sexual relationships, moreover, consent of the parties provides no assurance of

legality. See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (authorizing states to continue to criminalize same-sex relationships through enforcement of anti-sodomy laws).

n123. Some states, however, continue to deny alimony to a spouse who has committed adultery. See Note, *supra* note 122, at 1672.

n124. For example, until quite recently, Wal-Mart Stores had a policy of prohibiting dating relationships between a married employee and another employee, other than his or her spouse. See *State v. Wal-Mart Stores, Inc.*, 621 N.Y.S.2d 158, 159 (1995); see also *City of Sherman v. Henry*, 928 S.W.2d 464, 474 (Tex. 1996), cert. denied, 117 S.Ct. 1098 (1997) (upholding unwritten police policy of not promoting anyone who had an affair with the spouse of a fellow officer).

n125. It should be emphasized, however, that both public and private employers probably have a legal right to terminate employees because they committed adultery. Public employees have generally been unsuccessful in challenging such dismissals on "right to privacy" grounds. See *Henry*, 928 S.W.2d at 474; *Krzyzewski v. Metropolitan Gov't*, 584 F.2d 802, 806-07 (6th Cir. 1978); *Hollenbaugh v. Carnegie Free Library*, 436 F. Supp. 1328, 1334 (W.D. Pa. 1977), aff'd, 578 F.2d 1374 (3d Cir. 1978); *Johnson v. San Jacinto Jr. College*, 498 F. Supp. 555, 576 (S.D. Tex. 1980). But see *Briggs v. North Muskegon Police Dep't*, 563 F. Supp. 585, 592 (W.D. Mich. 1983), aff'd, 746 F.2d 1475 (6th Cir. 1984) (holding that firing married employee for engaging in adultery violated right to privacy).

In the private sector, there is generally no redress for employees fired for adultery, unless perhaps there is sex discrimination in the enforcement of the ban or the employer's action amounts to an invasion of privacy which violates public policy. See *Staats v. Ohio Nat'l Life Ins. Co.*, 620 F. Supp. 118, 120 (W.D. Pa. 1985) (holding that employer did not violate public policy by discharging employee who appeared at a convention with a woman who was not his wife); *Watkins v. United Parcel Serv.*, 797 F. Supp. 1349, 1362 (S.D. Miss.), aff'd, 979 F.2d 1535 (5th Cir. 1992). But see *Morriss v. Coleman Co.*, 738 P.2d 841, 851 (Kan. 1987) (holding that discharge of male and female employee for taking trip together violated implied contract to treat employees fairly). An unusual case is *Slohoda v. United Parcel Serv.*, 475 A.2d 618, 620 (N.J. Super. Ct. App. Div. 1984), holding that a married employee terminated for having an affair can show violation of state law forbidding discrimination on the basis of marital status if employer would not have fired an unmarried employee in a similar situation. But see *Federal Rural Elec. Ins. Co. v. Kessler*, 388 N.W.2d 553, 565 (Wis. 1986) (rejecting similar claim of discrimination based on marital status).

n126. See Letter from National Women's Law Center to Judith Miller, General Counsel, Department of Defense, at 3 n.1 (Aug. 1, 1997) (on file with author) (stating that relatively few persons are prosecuted for adultery and citing July 16, 1997 memorandum to Air Force commanders urging that court-martial be sought only in "the most aggravated cases"). In particular, visits by married military men to prostitutes seem to be tolerated and apparently are quite common when troops are stationed outside the United States or near the Mexican border. See Ian Fisher, *Army's Adultery Rule Is Don't Get Caught*, N.Y. Times, May 17, 1997, at A1 (explaining that no adultery cases stemmed from visits to brothels in Juarez, Mexico, despite common practice of Fort Bliss soldiers visiting prostitutes); Cynthia Enloe, *Does Khaki Become You? The Militarization of Women's Lives 18-45* (1983) (discussing the military's direct and indirect control of prostitution near military bases).

n127. For example, Air Force prosecutions for adultery rose to 67 in 1996, compared to only 16 in 1987. See Elaine Sciolono, *From a Love Affair to a Court-Martial*, N.Y. Times, May 11, 1997, at A1.

n128. *United States v. Perez*, 33 M.J. 1050, 1054 (1991) (no per se rule that every act of adultery violates Article 134).

n129. See *United States v. Green*, 39 M.J. 606 (1994).

n130. See *id.* at 607-10.

n131. *Id.* at 610.

n132. The explanation states that:

Adultery may also be service discrediting, even though the conduct is only indirectly or remotely prejudicial to good order and discipline. Discredit means to injure the reputation of the armed forces and includes adulterous conduct that has a tendency, because of its open and notorious nature, to bring the service into disrepute, make it subject to public ridicule, or which lowers it in the public esteem.

Notice of Proposed Amendment to the Manual for Courts-Martial, 63 *Fed Reg.* 43,687 (1998).

n133. The explanation states that "while adulterous conduct that is private and discreet in nature may not be service discrediting by this standard, under the circumstances it may be determined to be conduct prejudicial to good order and discipline." *Id.* On a general level, the explanation provides that "adulterous conduct that is directly prejudicial includes conduct that has an immediate, obvious and measurably divisive effect on unit or organization discipline, morale or cohesion, or is clearly detrimental to the authority or stature of or respect toward a servicemember." *Id.*

n134. To determine whether the adultery is "prejudicial" or "discrediting" commanders are directed to consider the following nine factors:

(a) The accused's marital status, military rank, grade or position;

(b) The co-actor's marital status, military rank, grade or position, or relationship to the armed forces;

(c) The military status of the accused's spouse or the spouse of co-actor, or their relationship to the armed forces;

(d) The impact, if any, of the adulterous relationship on the ability of the accused, the co-actor, or the spouse of either to perform their duties in support of the armed forces;

(e) The misuse, if any, of government time and resources to facilitate the commission of the conduct;

(f) Whether the conduct persisted despite counseling or orders to desist; the flagrancy of the conduct, such as whether any notoriety ensued; and whether the adulterous act was accompanied by other violations of the UCMJ;

(g) The negative impact of the conduct on the units or organizations of the accused, the co-actor or the spouse of either of them, such as a detrimental effect on unit or organization morale, teamwork, and efficiency;

(h) Whether the married accused or co-actor was legally separated; and

(i) Whether the adulterous misconduct involves an ongoing or recent relationship or is remote in time.

Id.

n135. Id.

n136. See Deborah L. Rhode, *In Matters Sexual, Equality Still Hasn't Made It*, *Nat'l L.J.*, Feb. 23, 1998, at A19 ("Whatever else is true about marital fidelity, it is not necessarily connected to honesty in office. Consider, for example, Richard Nixon.").

n137. The term "sexual fidelity" may be somewhat anachronistic because it implies that the sole meaning of faithfulness in a marriage is to refrain from extramarital sex. This erroneously assumes that a spouse is always unfaithful if he or she has sex with someone else, regardless of the couple's understandings and disclosures.

n138. For example, the theory behind the marital rape exemption was that, simply by virtue of marrying, women gave up their right to withhold consent to sex. Many states have now abolished or narrowed the marital rape exemption. See Katharine A. Bartlett, *Gender and Law* 521-22 (1993). The recognition of marital rape as a crime restricts the husband's sexual access to his wife, requiring that he first secure her consent, similar to other sexual partners. See generally Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth*

Amendment, *42 Fla. L. Rev. 45 (1990)* (arguing that marital rape exemptions violate the Fourteenth Amendment).

n139. I use the term "betrayed" spouse here to denote the spouse who did not commit adultery, recognizing that there may be no betrayal if there was no deception or no prior commitment of sexual fidelity. Our language has no neutral term for such a spouse - certainly "cuckold" is not the word I am searching for.

n140. The claim for loss of spousal consortium typically centers on a loss of society and companionship, as well as deterioration in the quality of sexual relationship. In an earlier era, consortium claims also encompassed material services (typically household services) that the wife performed for the husband. See Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, *146 U. Pa. L. Rev. 463, 527 (1998)*; Katharine Silbaugh, *Turning Labor Into Love: Housework and the Law*, *91 Nw. U. L. Rev. 1, 41-44 (1996)*; Kevin Lindsay, Note, *A More Equitable Approach to Loss of Spousal Consortium*, *75 Iowa L. Rev. 713, 713-17 (1990)*.

n141. See Jeremy D. Weinstein, Note, *Adultery, Law and the State: A History*, *38 Hastings L.J. 195, 218 (1986)* (discussing the tort of criminal conversation).

n142. In the 1930s, there was a movement to abolish the so-called "Heart Balm" tort claims, i.e., intentional tort claims relating to sexual and intimate relationships, including seduction, breach of a promise to marry and criminal conversation. See Note, *Heartbalm Statutes and Deceit Actions*, *83 Mich. L. Rev. 1770, 1770-73 (1985)*.

n143. See David M. Buss, *The Evolution of Desire: Strategies of Human Mating* 126 (1994) (claiming that a wife's adultery reduces status and reputation of husband); Annette Lawson, *Adultery: An Analysis of Love and Betrayal* 45-49 (1988) (explaining intolerance of wife's adultery as stemming from men's insecurity regarding paternity of children and their desire for "absolute property" in their wives' person and body); Constantina Safilios-Rothschild, *Attitudes of Greek Spouses Toward Marital Infidelity*, in *Extra-Marital Relations* 78-79 (Gerhard Neubeck ed., 1969) (asserting that in the Greek culture, toleration of a wife's adultery is considered to be "unmanly").

n144. I am indebted to Lu-in Wang for this point.

n145. The older view of adultery focused on what was regarded as the "theft" of the wife by another man. Under Roman law, for example, the offense centered on the taking of a man's wife and subjected both the adulterous wife and her lover to death or exile. Married men, however, were generally permitted to take up with mistresses or concubines, provided only that they did not bring these women into the marital home. See Lawson, *supra* note 143, at 42. The Anglo-American tort of criminal conversation which permitted husbands to sue their wives' lovers for interfering with their exclusive sexual rights is also grounded in the notion that the wife is the property of the husband. Recovery in criminal conversation suits were regarded as adultery payments, compensating the husband for loss of his property-like interests. See *id.* at 43.

n146. In one case outside the military, however, a court rejected a claim of constructive discharge made by an employee who suffered humiliation and stress when he learned that his wife - also an employee - was having an affair with the boss. See *Kader v. Paper Software*, *111 F.3d 337, 341 (2d Cir. 1997)*. The court did not believe that the plaintiff had been subjected to an intolerable working condition, deliberately created by the

employer, because there was no showing that the purpose of the affair was to force the husband to quit. See *id. at 339*. Even though all the parties worked in close proximity to one another, the court treated the affair as a private matter that the employer had no duty to ameliorate. See *id. at 341 n.4*.

n147. The case of Major General David Hale seems to fit within this framework. Hale was alleged to have blackmailed the wife of his deputy into having sex with him. While the investigation was pending, Hale requested that he be allowed to leave the military and was honorably discharged. See Mark Thompson, *Sex, The Army and a Double Standard*, *Time*, May 4, 1998, at 30-32. A report by the inspector general later disclosed that Hale had engaged in sexual relationships with wives of four officers under his command during assignments in Hawaii and Turkey. In response to the case, the Army tightened its procedures for approving the retirement of senior officers. See Bradley Graham, *Hale Case Spurs Tighter Army Retirement Process*, *Wash. Post*, July 8, 1998, at A4.

n148. See, e.g., *City of Sherman v. Henry*, 928 S.W.2d 464 (Tex. 1996) (involving a police officer who was denied a promotion because he had an affair with another officer's wife who also served on the same police force). The court upheld the city's action against a constitutional challenge. See *id. at 474*. A concurrence noted that the affair had cast doubt on the plaintiff's ability to command the trust of his fellow officers which was deemed "necessary in a paramilitary organization." *Id. at 476* (Spector, J., concurring).

n149. It is also conceivable that mere knowledge of a soldier's adulterous relationship with a civilian could produce environmental effects in a special case. Suppose, for example, that a married officer's open affair with a civilian woman somehow undermined his "moral authority" to command his troops, such that they refused to obey orders or became demoralized. This scenario, however, is far more likely to occur where there is a widespread belief that adultery is invariably immoral and that adulterers do not deserve to be in leadership positions. Because I argue that there is no longer such a consensus on these points, it is no longer rational to presume that adultery alone will produce these harmful environmental effects. The current military standard which allows the fact finder to consider putative damage to reputation and morale as a harmful environmental effect of adultery, see *supra* text accompanying notes 128-31, too easily converts a moral belief about adultery and adulterers into an environmental harm.

n150. See *infra* text accompanying notes 191-206.

n151. See Susan Estrich, *Real Rape* 29-41 (1987) (critiquing the resistance requirement).

n152. See Catharine A. MacKinnon, *Toward A Feminist Theory of the State* 172-83 (1989) (critiquing legal interpretations of consent in rape cases).

n153. Those pressures include the threat of physical force, either explicit or implicit, economic coercion, and deception. See Chamallas, *supra* note 116, at 814-35 (discussing unacceptable inducements to sex).

n154. 477 U.S. 57 (1986).

n155. See *id. at 68-69*.

n156. The Court noted that a plaintiff's provocative dress or public expression of sexual fantasies could be admitted into evidence to discredit her allegations and defeat her claim. See *id.* at 69. Several commentators have criticized this aspect of Meritor Savings Bank. See, e.g., Susan Estrich, *Sex at Work*, 43 *Stan. L. Rev.* 813, 827 (1991); Wendy Pollack, *Sexual Harassment: Women's Experience vs. Legal Definitions*, 13 *Harv. Women's L.J.* 35, 57 (1990). Congress recently amended *Rule 412 of the Federal Rules of Evidence* to preclude admission in most cases of plaintiff's sexual history or plaintiff's sexual predisposition (including evidence regarding dress and appearance). See Jane Harris Aiken, *Sexual Character Evidence in Civil Actions: Refining the Propensity Rule*, 1997 *Wis. L. Rev.* 1221, 1222.

n157. The debate over perspective continues to rage, not only with respect to the "unwelcomeness" element of the harassment claim, but also as to proof that the harassment was "severe or pervasive," another element of the claim. See generally Martha Chamallas, *Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation*, 1 *Tex. J. Women & Law* 95 (1992). The most recent Supreme Court case indicates that the fact finder should judge the harasser's conduct from the perspective of a person in plaintiff's position, taking into account the social context of the incidents. See *Oncale v. Sundowner Offshore Servs., Inc.*, 118 *S. Ct.* 998, 1003 (1998).

n158. At present, a major point of debate is whether unauthorized penetration is sufficient evidence of "force" in those states that require proof of both "force" and "lack of consent" in rape prosecutions. Compare *State ex rel. M.T.S.*, 129 *N.J.* 422 (1992) (holding that penetration itself is sufficient force) with *Commonwealth v. Berkowitz*, 415 *Pa. Super.* 505 (1992), *aff'd in part and vacated in part*, 641 *A.2d* 1161 (*Pa.* 1994) (requiring additional showing of forcible compulsion beyond nonconsensual penetration).

n159. I do not mean to suggest that there has been no change in the criminal law, only that a more thoroughgoing revision of the concept of consent has occurred in the civil context, most notably with respect to sexual harassment law. In fact, following Wisconsin's lead, some states have revised their rape law to emphasize that resistance is not required and have redefined consent more affirmatively to include only words and actions by the victim which indicate freely given consent. See *Wis. Stat. Ann.* 940.225(4) (1996), discussed in Chamallas, *supra* note 116, at 800.

n160. By requiring that the act be both by force and without consent, Article 120 adopts the traditional definition of rape. Theoretically, at least, nonconsensual intercourse accomplished without the use of "force" is not rape under this definition. It is this aspect of traditional rape law that has generated much feminist criticism and many attempts to define and refine the concept of force to capture virtually all instances of nonconsensual intercourse. See *supra* notes 151-53. To my mind, rape should encompass all instances of nonconsensual intercourse, except for those unusual cases in which the accused could not have reasonably understood that the woman did not wish to have sex. Because some rapes are more heinous than others and cause more damage, however, it seems appropriate to consider the nature and degree of force used in determining punishment in the individual case.

n161. See *supra* notes 25-26 (citing newspaper reports of the Simpson case).

n162. See Army Judge, *In Disputed Ruling, Refuses to Drop Rape Charges*, *N.Y. Times*, Apr. 19, 1997, at A20 [hereinafter *Army Judge*].

n163. Some of the recruits, however, testified that they did attempt to push Simpson away and were

unsuccessful and that Simpson ignored their resistance and pinned them down. See Priest & Spinner, *supra* note 25 (recounting details of the Simpson case).

n164. See *Army Judge*, *supra* note 162, at 20.

n165. *Id.* The judge's view of the extraordinary power of drill sergeants was supported by the testimony of a private who explained why she did not resist Simpson: "I just didn't feel like I had a choice... He's a drill sergeant... He was supposed to know what's best for me." Jackie Spinner, *Three More Soldiers Testify Against Sergeant; Women Say They Had No Choice but to Submit*, *Wash. Post*, Apr. 18, 1997, at B3.

n166. See Sciolino, *supra* note 35, at A1 (reporting expert opinion on the relevant legal standards in the Simpson case).

n167. See Major Timothy W. Murphy, *A Matter of Force: The Redefinition of Rape*, *39 A.F. L. Rev.* 19, 26-34 (1996) (discussing requirements of "force" and "nonconsent" in military rape prosecutions).

n168. See *United States v. Clark*, *35 M.J.* 432 (C.M.A. 1992).

n169. See *id.* at 433-34.

n170. See *id.*

n171. *Id.* at 436.

n172. There is a mini-debate as to whether the totality of the circumstances approach - in which one of the relevant factors is the disparity in power between the accused and the victim - is properly considered an inquiry into "constructive force" or "actual force." One commentator would limit use of the term "constructive force" to situations in which the victim is incapable of consenting (such as when the victim is asleep, unconscious or lacks mental capacity). He would classify all other contextualized inquiries into the coercive nature of the encounter, including consideration of such evidentiary factors as "intimidation, threats of harm, superior-subordinate coercion, and creation of a coercive atmosphere (such as refusal to heed a victim's verbal protestations)" as inquiries into "actual consent." See Murphy, *supra* note 167, at 32-33. My reaction is that use of the term "constructive force" is an apt way of describing coercive encounters in which there is no application of physical force beyond that typically used in consensual encounters (including the force necessary to accomplish penetration). The term underscores that judgments about sexual encounters require an interpretation or construction of events and that, in some cases, the parties may have differing interpretations of the same event. See Kim Lane Scheppele, *The Re-Vision of Rape Law*, *54 U. Chi. L. Rev.* 1095, 1104-11 (1987) (discussing the "perceptual fault line" in sexual encounters which accounts for differing perceptions of the same event).

n173. The "totality of the circumstances" approach, however, often leaves open the question of the perspective from which the encounter should be judged - that is, from the perspective of the accused, from the victim's perspective or from the purportedly neutral perspective of a third party. Left uninstructed, a jury is free to identify either with the accused or the victim and to view events from their vantage point. It should be noted that in the Simpson case, the trial judge instructed the jury to take the victim's perspective, i.e., to determine

whether Simpson's conduct created "a reasonable belief in the victim's mind that death or physical injury would be inflicted on her and resistance is futile." Sciolino, *supra* note 35, at A1. See *supra* text accompanying note 166.

Generally, feminists have expressed concern that women's perspectives on sexual matters have been submerged and are less likely to influence legal judgments. See Scheppele, *supra* note 172. The issue of perspective has been theorized and debated more extensively in the context of sexual harassment law. See Chamallas, *supra* note 157, at 95 (discussing the "reasonable woman" standard).

n174. See Clarence Page, *An Unjust Military Code?*, *Sacramento Bee*, May 17, 1997, at B7 ("The Army has embraced the feminist definition of rape as a crime of power and exploitation, not sex, especially when the power is as wildly one-sided as it is between drill sergeants and trainees.").

n175. One major theme in feminist writing is that "lack-of-consent intercourse," even if not accompanied by violence in addition to forced penetration, is degrading, scary and "excruciatingly painful." Lynne Henderson, *Getting to Know: Honoring Women in Law and in Fact*, 2 *Tex. J. Women & Law* 41, 64-65 (1993); see also Robin L. West, *Legitimizing the Illegitimate: A Comment on Beyond Rape*, 93 *Colum. L. Rev.* 1442, 1448 (1993), discussed in Chamallas, *supra* note 74, at 229-30.

n176. See *supra* text accompanying notes 158-59 (discussing the evolving definition of consent).

n177. For some, Simpson's sentence appeared lenient. Theoretically, Simpson could have been sentenced to life imprisonment for each of the 18 counts of rape and up to 32 years in prison for the 11 counts of consensual sex to which he pleaded guilty. One former Air Force colonel and a vice president of the National Organization for Women complained that Simpson's 25 year sentence was too light because it amounted to a mere 15 months for each rape count. For others, the penalty was too harsh. A spokesman for the Congressional Black Caucus described the sentence as "cruel and unusual." See Richter, *supra* note 26, at A1 (describing reactions to the Simpson verdict). In civilian courts, sentences for rape range from several years in jail to life imprisonment, depending on the circumstances, including the amount of force used. See *id.*

n178. The closest analogy may well be that of prison guard and inmate, another context in which the supervisor exercises plenary power over the body and activities of the subordinate.

n179. *The American Heritage College Dictionary* 541 (3d ed. 1993).

n180. See David A. Schlueter, *Military Criminal Justice: Practice and Procedure* 2-8A, at 93 (4th ed. 1996).

n181. As a matter of formal law, proof of the existence of a sexual relationship is not necessary to establish the offense of fraternization against the customs of a particular service. The offense is technically complete if there is an "illicit association between officers and enlisted personnel on terms of equality." See *United States v. Nunes*, 39 *M.J.* 889, 890 (*A.F.C.M.R.* 1994). However, even in *Nunes*, where no sexual relationship was proven, the defendant officer's relationship with an enlisted man that formed the basis of the fraternization charge clearly had sexual overtones. *Nunes*, a doctor, was also charged and convicted of indecent acts stemming from his medical examination of two male patients in the military hospital. See *id.* at 892. Thus, even though the *Nunes* opinion recited a broad definition of fraternization as encompassing nonsexual as well as sexual conduct, the

case itself dealt with sexual conduct.

n182. Specifically, there are five elements that must be proven to sustain a charge of fraternization under Article 134:

- (1) That the accused was a commissioned or warrant officer;
- (2) That the accused fraternized on terms of military equality with one or more certain enlisted member(s) in a certain manner;
- (3) That the accused then knew the person(s) to be (an) enlisted member(s);
- (4) That such fraternization violated the custom of the accused's service that officers shall not fraternize with enlisted members on terms of military equality; and
- (5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

See also *United States v. Boyett*, 42 M.J. 150, 152 n.3 (1995). Service members guilty of fraternization may also be charged under Article 133 prohibiting "conduct unbecoming an officer and a gentleman." *Id.* at 152 n.2. However, to prove a violation under Article 133, the government must prove all the elements of fraternization under Article 134 plus the additional requirement of conduct unbecoming an officer. See *id.* at 152.

n183. Article 92 of the UCMJ authorizes prosecutions for fraternization in violation of regulations.

n184. One leading commentator doubts that enlisted personnel may be prosecuted under Article 134 for fraternization. However, he asserts that enlisted personnel are subject to prosecution under Article 92 prohibiting fraternization in violation of regulations. See Schlueter, *supra* note 180, at 94-97.

n185. See Paul Richter & Mike Clary, *The Business of Love; From Corporations to the Military, Policymakers Wonder How to React to Romance in the Ranks*, L.A. Times, May 19, 1997, at E1.

n186. See *Boyett*, 42 M.J. at 150 (upholding conviction of Air Force officer for having sexual intercourse with enlisted person not under his supervision); Flinn, *supra* note 59, at 157.

n187. See News Release, July 29, 1998 <<http://www.defenselink.mil/cgi-bin/dlprint>>.

n188. The new initiative addresses a wide range of unprofessional relationships, including sexual and nonsexual conduct. Specifically, the services were instructed to produce policies and training materials that:

(1) Address how the policies are applied and enforced, and the possible consequences of noncompliance in language that is clearly understandable to all; (2) Prohibit personal relationships such as dating, sharing living accommodations, engaging in intimate or sexual relations, business enterprises, commercial solicitations, gambling, and borrowing between officer and enlisted personnel, regardless of the member's Service. This change will not affect existing marriages; (3) Prohibit personal relationships between recruiter and recruit; and During Initial Entry Training, prohibit instructors and staff from having personal relationships with trainees.

Id.

n189. The news release announcing the new initiative stated that regulating unprofessional relationships was justified because "even the perception that members in positions of authority may have abused that authority or made decisions based upon favoritism adversely affects morale and can degrade readiness." Id.

n190. Schlueter, *supra* note 180, at 93.

n191. "Dating" is the euphemism most commonly used to describe engaging in social activities with someone with whom the employee is sexually or romantically involved. The term, however, is not free from ambiguity. One judge has argued that "dating" need not be "encumbered" with an "amorous interest component," citing the definition of "date" in Webster's Ninth New Collegiate Dictionary as "a social engagement between persons of opposite sex." *State v. Wal-Mart Stores, Inc.*, 621 N.Y.S. 158, 160-61 (*App. Div. 1995*) (Yesawich, J., dissenting). Because most employers who prohibit dating among co-workers, however, probably intend to reach same-sex as well as heterosexual relationships, use of the heterosexist dictionary definition of "date" seems inappropriate in this context. There is, however, considerable difficulty determining when going out with a friend turns into a "date."

n192. See Anna M. De Palo, *Antifraternalizing Policies and At-Will Employment: Counseling for a Better Relationship*, 1996 *Ann. Surv. Am. L.* 59, 62 (citing 1994 survey of human resource directors in which only 7.3% said that their organization has a policy on co-worker dating); see also Kathleen M. Hallinan, *Invasion of Privacy or Protection Against Sexual Harassment: Co-Employee Dating and Employer Liability*, 26 *Colum. J.L. & Soc. Probs.* 435 (1993) (urging more employers to adopt explicit policies). But see Philip Weiss, *Don't Even Think About It (The Cupid Cops are Watching)*, N.Y. Times Mag., May 3, 1998, at 45 (stating that one quarter of American companies have oral or written policies on consensual relationships).

n193. See *Boddy v. Dean*, 821 F.2d 346 (6th Cir. 1987); EEOC Guidance on Sexual Harassment, 8 Fair Empl. Prac. Man. (BNA) at 405:6687 (Mar. 19, 1990).

n194. See, e.g., *Crosier v. United Parcel Serv.*, 198 Cal. Rptr. 361, 366 (1983), overruled by *Foley v. Interactive Data Corp.*, 765 P.2d 373 (Cal. 1988) (involving an employer that justified its rule prohibiting management employees from dating nonmanagement employees by citing concerns about sexual harassment

and appearances of favoritism). The unwritten rule was applied to terminate a manager who had promoted a woman with whom he was living. See *Crosier*, 198 Cal. Rptr. at 366.

n195. Employers have complained about the "unstable nature of consent" in cases in which a complaint of sexual harassment surfaced only after an office romance had broken up. There are also a growing number of reports of complaints by co-workers who allege that the lover of their supervisor received a promotion or other special treatment. See Weiss, supra note 192, at 46.

n196. Similar to rules prohibiting adultery by employees, however, prohibitions on dating are not likely to be declared unlawful. They are rarely struck down as either unconstitutional in public employee suits or violative of public policy in private employee wrongful discharge claims. Protection for management prerogative seems to exist even when there is no proof of a harmful environmental effect or a conflict of interest. See *Watkins v. United Parcel Serv.*, 797 F. Supp. 1349 (S.D. Miss. 1992) (permissible to discharge manager who disobeyed anti-fraternization policy forbidding sexual relationships between managers and employees); *Patton v. J.C. Penney Co.*, 719 P.2d 854 (Or. 1986) (permissible to fire employee for dating co-employee, even in absence of explicit no-dating rule). However, fewer reported cases involve single as opposed to married employees, suggesting perhaps that employers are more likely to enforce no-dating rules in cases of adultery.

n197. See Chamallas, supra note 116, at 843-61; Patrick Dilger, Putting an End To Risky Romance, Yale Alumni Mag., Apr. 1998, at 30, 30 (discussing Yale's new policy banning sexual relationships, even if consensual, between teachers and students over whom they have direct supervisory responsibility); Carol Sanger, The Erotics of Torts, 96 Mich. L. Rev. 1852 (1998) (reviewing Jane Gallop, Feminist Accused of Sexual Harassment (1997)).

n198. From the perspective of those enforcing the law, per se bans on consensual relationships have other advantages. Because of the restrictions on consensual relationships, military authorities presently have the option of charging defendants with fraternization and/or adultery in cases in which the evidence of coercion is arguably too weak to sustain a charge of rape or sexual harassment. This considerably strengthens the hand of prosecutors. Additionally, during the Simpson court-martial, there was concern that some of the women who accused Simpson of rape did so in part because they feared that if they admitted that the sex was consensual, they could be prosecuted for violations of military regulations against consensual sex. See Page, supra note 174, at B7.

n199. See Caroline Forell, Hands-Off Rule is Unique, 54 Or. St. B. Bull. 34 (July 1994); Caroline Forell, Lawyers, Clients and Sex: Breaking the Silence on the Ethical and Liability Issues, 22 Golden Gate U. L. Rev. 611 (1992); John Freeman, Sex with Clients: A Recipe for Disaster, 8 S.C. Law. 10 (1996); David Pincus, Lawyers in Lust: Does New York's New Rule Addressing Attorney-Client Relations Do Enough?, 2 J.L. & Pol'y 249 (1994).

n200. The American Psychiatric Association and the American Psychological Association have ethical rules forbidding sex with current patients. See American Psychiatric Ass'n, The Principles of Medical Ethics: With Annotations Especially Applicable to Psychiatry 2(1) (1995); American Psychological Ass'n, Ethical Principles of Psychologists and Code of Conduct Standard 4.05 (1992). See generally Catherine S. Leffler, Note, Sexual Conduct Within the Physician-Patient Relationship: A Framework for Disciplining this Breach of Fiduciary Duty, 1 Widener L. Symp. J. 501 (1996). Several states also make it a crime for a prison guard to engage in sexual relations with an inmate. See, e.g., Conn. Gen. Stat. Ann. 53a-71(a)(5) (1994); Fla. Stat. Ann. 944.35

(West 1998); Ill. Comp. Stat. Ann. 5/11-9.2 (West 1997); *N.J. Stat. Ann. 2C:14-2(6)(c)(3)* (West 1979); *N.Y. Penal Law 130.05* (1997).

n201. *Morris*, *supra* note 52, at 757.

n202. *Id.* at 757-60. Anthropologist Margaret Mead first argued for an "incest taboo" with respect to relationships between male and female co-workers generally. See Margaret Mead, *A Proposal: We Need Taboos on Sex at Work*, Redbook, Apr., 1978, at 31. Mead believed that legal prohibitions alone would be insufficient to protect women from sexual harassment or other discriminatory conduct in the workplace without the existence of deeper taboos against sex between workers, roughly comparable to the "relationship of brothers and sisters who have grown up together safely within a household." *Id.* at 33.

n203. See *infra* text accompanying notes 218-57.

n204. See Anna Simons, *In War Let Men be Men*, *N.Y. Times*, Apr.23, 1997, at A23 (arguing that male bonding is critical to the effectiveness of Green Berets in part because the men feel free to talk about sex in the absence of women).

n205. Whether or not there is a formal ban on consensual relationships within military units, women will still face difficult decisions as to whether to date or get involved with men in their units. Describing her experiences at the Air Force Academy, Kelly Flinn noted that male cadets tended to label female cadets as either "worthy virgins or incompetent whores." Female cadets who had sex with their "peers" could suffer a loss of respect. On the other hand, female cadets who slept with no one were liable to be called lesbians, an intimidating allegation given the ban on homosexuals. See Flinn, *supra* note 59, at 75-76.

n206. See Margery Eagan, *Pilot's Ordeal Shows Military's Double Standard*, *Boston Herald*, May18, 1997, at A8.

n207. See *supra* text accompanying notes 146-47.

n208. See *supra* text accompanying notes 132-50.

n209. See *supra* text accompanying note 186.

n210. See *supra* text accompanying notes 201-06.

n211. Just as in the civilian workplace, it may not always be a simple matter to determine whether a particular relationship falls within or outside of the chain of command. Enforcement of these ethical rules should be sensitive to context. This is a matter that must be decided locally, by someone who knows the specific responsibilities of the persons involved and how decisions affecting service members are actually made.

n212. See *supra* note 149 (discussing the boundary between environmental harm and moral disapproval).

n213. See *supra* text accompanying notes 160-75.

n214. See *supra* notes 9-10.

n215. See Cassia Spohn & Julie Horney, *Rape Law Reform: A Grassroots Revolution and Its Impact* 21 (1992).

n216. See Herma Hill Kay & Martha S. West, *Sex-Based Discrimination* 1162 (4th ed. 1996) (discussing amicus briefs in *Coker v. Georgia*, 433 U.S. 584 (1977)).

n217. See Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 *Law & Phil.* 35, 38 (1992); Patricia Searles & Ronald J. Berger, *The Current Status of Rape Reform Legislation: An Examination of State Statutes*, 10 *Women's Rts. L. Rep.* 25, 25-27 (1987).

n218. See, e.g., Lucinda Peach, *Women at War: The Ethics of Women in Combat*, 15 *Hamline J. Pub. L. & Pol'y* 199, 207-09 (1994).

n219. An English professor at the Naval Academy has described the "maleness" of that institution by noting that "at the Naval Academy, we no longer exclude women, but (whether we admit it or not) we still exclude the female." See Bruce Fleming, *Gay Poets, Women, and Other Threats to Group Loyalty at the Naval Academy*, *Chron. Higher Educ.*, Jan.30, 1998, at B4.

n220. See Abrams, *supra* note 50; Karst, *supra* note 51; *Morris*, *supra* note 52.

n221. See Karst, *supra* note 51.

n222. *Id.* at 501.

n223. See Michelle M. Benecke & Kirstin S. Dodge, *Military Women in Nontraditional Job Fields: Casualties of the Armed Forces' War on Homosexuals*, 13 *Harv. Women's L.J.* 215, 234-35 (1990); Enloe, *supra* note 126, at 13 ("To be masculine is to be not feminine."); Karst, *supra* note 51, at 503 ("Masculinity begins in escape - the perceived need to separate from a feminine identity.").

n224. Simone de Beauvoir, *The Second Sex* 16 (H. M. Parshley ed. & trans., 1953) ("She is defined and differentiated with reference to man and not he with reference to her; she is the incidental, the inessential as opposed to the essential. He is the Subject, he is the Absolute - she is the Other.") (citation omitted).

n225. Kenney, *supra* note 78, at 458.

n226. Karst, *supra* note 51, at 503.

n227. For discussions of the cultural effects of gender polarity, see, for example, Fajer, *supra* note 12, at 630-31 ("As long as we map sexual orientation to gendered traits - we will have trouble conceptualizing sexual orientation on a continuum."); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 *N.Y.U. L. Rev.* 197, 202 (1994) (arguing that the "prohibition of homosexuality preserves the polarities of gender on which rests the subordination of women"); Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, in *Feminism Unmodified: Discourses on Life and Law* 32, 44 (1987).

n228. Sandra Lipsitz Bem, *The Lenses of Gender* 80-132 (1993).

n229. *Id.* at 81.

n230. See Benecke & Dodge, *supra* note 223, at 236-37 (describing how contempt for women is displayed by name calling, displays of pornography, catcalls and other methods); Fleming, *supra* note 219, at B5 (noting how "the very carriage required of people in the military is an exaggeration of the male, rather than female, body language" and that "even the military uniforms are made to flatter the male, rather than the female, figure"); *Morris*, *supra* note 52, at 716-20 (providing examples of the "unmistakable hostility" directed toward women in the military culture such as T-shirts proclaiming to hate women or the practice of calling male recruits "ladies" or "girls" when they perform poorly in basic training).

n231. Michele Benecke and Kirstin Dodge also regard the policy of excluding gays and lesbians as particularly harmful to women in the military. Their analysis, however, focuses on the phenomenon of lesbian baiting and the consequent investigations of large numbers of women suspected of being homosexual. They make the important observation that women who reject sexual advances by men are particularly vulnerable to being accused of being lesbians, thereby jeopardizing their military careers. They assert that this form of sexual harassment of military women, both lesbian and heterosexual, is directly linked to the exclusionary policy and has had devastating effects on military women in nontraditional jobs. See Benecke & Dodge, *supra* note 223, at 222-33.

n232. See *supra* notes 201-06 and accompanying text.

n233. 118 *S. Ct.* 998 (1998).

n234. See *id.* at 1002. The percentage of sexual harassment charges filed by males with the EEOC has also steadily increased, from 7.5% of all sexual harassment charges in 1991 to 11.6% of all such charges in 1997. See Equal Employment Opportunity Commission, *Sexual Harassment Charges, EEOC & FEPAs Combined: FY 1991-1997* (Apr. 17, 1998). Because the EEOC does not keep statistics on the gender of the alleged harasser, we do not know how many of these charges involve male-on-male harassment.

n235. The facts are most fully stated in the lower court opinion. See *Oncale v. Sundowner Offshore Servs., Inc.*, 83 *F.3d* 118 (5th Cir. 1996).

n236. See *id.*

n237. See *id.* at 118-19 (stating that Oncale's supervisor pushed a bar of soap into his anus while the

co-worker restrained him).

n238. See *Brief of National Organization on Male Sexual Victimization, Inc. et al., Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118 (5th Cir. 1996) (No. 96-568), reprinted in 8 *U.C.L.A. Women's L.J.* 9, 13 (1997) [hereinafter *Brief of National Organization on Male Sexual Victimization*].

n239. 83 F.3d 118 (5th Cir. 1996).

n240. See *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1197 (4th Cir. 1996), cert. denied, 117 S. Ct. 72 (1996).

n241. See *Tietgen v. Brown's Westminster Motors, Inc.*, 921 F. Supp. 1495, 1501 (E.D. Va. 1996) (contrasting the case at bar with *McWilliams and Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 740 (4th Cir. 1996)).

n242. *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998, 1002 (1998).

n243. The one example the Court offered was the highly unusual case of female-on-female harassment involving the use of "sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace." *Id.* Because such hostility to the general presence of men in the workplace rarely exists, the example tells us nothing useful about cases such as *Oncale* where the harassment is directed more specifically against those particular men who fail to conform to gender norms or otherwise have less power than the men doing the harassing.

n244. *Id.*

n245. *Id.* at 1003.

n246. *Id.*

n247. *Id.*

n248. The lower courts had dismissed the claim before trial on the ground that same-sex sexual harassment was never actionable under *Title VII*. *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118 (5th Cir. 1996). Thus, the Court had only to decide whether any same-sex cases were cognizable under Title VII. *Oncale's* case was remanded for trial.

n249. The amicus briefs filed on behalf of *Oncale*, however, presented rather extensive arguments addressing the question of why same-sex sexual harassment could be classified as sex-based, even if it did not stem from sexual attraction or class-wide animus against a gender group. In addition to the brief authored by MacKinnon, discussed *infra* at notes 250-55, a group of law professors (including myself) filed a brief arguing that same-sex sexual harassment often consisted of a kind of stereotyping in which the target males were singled out for abuse because they did not "live up to a stereotypic norm of proper masculinity" or because they

"objected to a hyper-masculine environment." See Brief of Law Professors as Amici Curiae in *Support of Petitioner at 24-25, Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118 (5th Cir. 1996) (No. 96-568). The brief was authored by Katherine M. Franke & Nan D. Hunter and based largely on Katherine M. Franke, *What's Wrong With Sexual Harassment?*, 49 *Stan. L. Rev.* 691 (1997).

n250. See Marc S. Spindelman & John Stoltenberg, *Oncale: Exposing Manhood*, 8 *U.C.L.A. Women's L.J.* 3, 5-6 (1997). MacKinnon's brief is published in 8 *U.C.L.A. Women's L.J.* 9,19 (1997).

n251. *Brief of National Organization on Male Sexual Victimization*, *supra* note 238, at 19 (citing Michael B. King, *Male Rape in Institutional Settings*, in *Male Victims of Sexual Assault* 67 (Gillian C. Mezey & Michael B. King eds., 1992)); see also Mary Ann Humphrey, *My Country, My Right to Serve* 68 (1988) (describing sexual assaults on military men by individuals who do not consider themselves gay); Judith Hicks Stiehm, *Managing the Military's Homosexual Exclusion Policy: Text and Subtext*, 46 *U. Miami L. Rev.* 685, 701 (1992) (noting that "in a hyper-macho environment, some non-homosexuals believe that sodomizing other men is a means of demonstrating their masculinity").

n252. For a discussion of the dynamics of "power rapes" in which men are the victims, see A. Nicholas Groth & Ann Wolbert Burgess, *Male Rape: Offenders and Victims*, 137 *Am. J. Psychiatry* 806, 808-09 (1980) (arguing that "satisfaction and pleasure in male rape appear to be experienced in the sense of power, the discharge of anger, and the erotization of aggression more than in sexual release").

n253. See *Brief of National Organization on Male Sexual Victimization*, *supra* note 238, at 19.

n254. *Id.* at 20-21 (citation omitted).

n255. In a recent survey conducted throughout the Army, 30% of male soldiers reported experiencing "unwanted sexual attention," and 8% reported "sexual coercion." The comparable figures for female soldiers were 47% and 15%. See Philip Shenon, *Army's Leadership Blamed in Report on Sexual Abuses*, *N.Y. Times*, Sept. 12, 1997, at A1. This survey, of course, is unlikely to include aggressive behavior that the targets themselves do not classify as "sexual."

n256. See Wayne E. Dillingham, *The Possibility of American Military Women Becoming Prisoners of War: Justification for Combat Exclusion Rules?*, 37 *Fed. B. News & J.* 223 (1990). This concern has been very prominent in Israel where the threat of war is always present and may account for much of the reluctance to allow women to engage in combat, despite their impressive record in combat prior to statehood. See Lief, *supra* note 110, at 48.

n257. One commentator points out, for example, that both women and men were sexually assaulted while being held captive by Iraqi forces during the Persian Gulf war. See Frevola, *supra* note 49, at 644 n.146. Frevola describes how, in response to the assaults, the Air Force instituted training on survival, evasion, resistance, and escape for both female and male cadets to prepare them for how to cope with sexual abuse if they are captured by enemy forces. See *id.*