Commanders in the Bedroom: A Constitutional Analysis of the Military and Substantive Due Process

Maj John S. Reid[1]

Introduction

Imagine that you needed your boss's permission to get married. Envision a world wherein your employer could make decisions about your intimate interactions. Consider a life in which your supervisor issues a written directive concerning your permissible modes of sexual intimacy. Such notions are anathema to the average American. However, in the specialized community that is the U.S. Armed Forces, such instances are commonplace.[2] Due to valid concerns about good order and discipline, the military often regulates the personal conduct of its service members. Regulations forbid certain forms of sexual intimacy. Commanders frequently use military orders to end consensual relationships that are deemed contrary to good order and discipline. When consensual sexual relationships violate a commander's order or the rank structure, prosecution is not uncommon. There currently exists no cohesive legal framework to analyze the legality of such orders when considering the growing right to privacy under substantive due process found by the Supreme Court. This article is an attempt to formulate such a legal framework for military orders as they impact a service member's right to privacy. When commanders venture into the bedroom they deserve a reliable legal standard.

The unique nature of the military requires more deference to command authority in numerous areas of the law. Yet even in the military environment, courts acknowledge such deference cannot be absolute when it comes to constitutional rights. In the context of the

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[1] Maj John S. Reid is a Judge Advocate General officer in the United States Air Force. The views or opinions expressed in this article are his own and do not reflect the policy or opinion of the Air Force or Department of Defense.

[2] *See* Orloff v. Willoughby, 345 U.S. 83, 94 (1953) (Justice Jackson first employing the term "specialized community" in describing a military society "governed by a separate discipline from than that of the civilian").

Fourth Amendment, military members may have a lower expectation of privacy and be subject to warrantless inspections, but they are not entirely deprived of their Fourth Amendment rights.[3] Reams of case law exist developing what the expectation of privacy means in the military context. Similar to this case law, the Supreme Court carved out a unique jurisprudence for the military in its explanation of how the First Amendment's freedom of speech right applies to military members.[4] In the contexts of both the Fourth and First Amendment, military courts have provided considerable jurisprudence from which military practitioners may glean the state of the law. In contrast, there is a dearth of meaningful discussion in both case law and academia on the intersection of substantive due process and the military. This vacuum exists even as the reach of substantive due process grows.

This Article will first provide a brief history of substantive due process related to consensual private relationships. It will then examine various contexts in which military members' private lives are potentially regulated. In many of these contexts, it will be apparent that military jurisprudence has not caught up to recent Supreme Court precedent. This Article will then examine how two analogous privately held rights, the Fourth Amendment expectation of privacy and the First Amendment right to free speech, are treated by military law. Utilizing these two examples as possible vehicles for a new standard of review in the context of service members' privacy, this Article proposes a new rule for military courts to adopt. Articulating such a standard is imperative for military justice practitioners and commanders to successfully navigate the substantive due process landscape.

It should be noted that the author takes no position in this Article on the sometimes controversial legal principles of substantive due process. Rather, accepting substantive due process as part of Supreme Court jurisprudence, this Article seeks to remedy the principle with military practice and supply a workable framework moving forward.

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[3] *See* United States v. McCarthy, 38 M.J. 398, 402 (C.M.A. 1993).

[4] *See* United States v. Priest, 21 C.M.A. 564, 570 (1972).

BACKGROUND

I. OVERVIEW OF SUBSTANTIVE DUE PROCESS

The term "substantive due process" does not appear in the Constitution. The Supreme Court discovered its foundation in the Fourteenth Amendment and the guarantee that "no state shall . . . deprive any person of life, liberty, or property, without due process of law."[5] Many scholars argue that the clause authorizes the deprivation of life, liberty, or property assuming there has been proper procedural due process of law,[6] but the doctrine of substantive due process argues otherwise.[7] Instead, substantive due process jurisprudence holds that certain takings of liberty are unconstitutional unless the restriction survives the strict scrutiny standard of review.[8]

The doctrine of substantive due process first appeared in the case *Meyer v. Nebraska.*[9] *Meyer* involved a fourth-grade teacher that taught students German in violation of a ban on instructing foreign languages in schools.[10] In an opinion that struck down the law, Justice McReynolds wrote that the Due Process Clause:

> [w]ithout doubt . . . denotes . . . the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[11]

With this opinion, the Supreme Court first opened the door to the possibility of enforcing extra-textual rights through substantive due process.

The principle of substantive due process grew when the Court considered the issue of a right to privacy, first discussed in the *Gris-*

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[5] U.S. CONST. amend. XIV, § 1; *see also* COREY BRETTSCHNEIDER, CONSTITUTIONAL LAW AND AMERICAN DEMOCRACY 952 (2011).

[6] *See* Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501, 1501 (1999).

[7] *See id.*

[8] *See id.* at 1510-12.

[9] Meyer v. Nebraska, 262 U.S. 390 (1923).

[10] *Id.* at 396-97.

[11] *Id.* at 399.

wold v. Connecticut decision.[12] *Griswold* held that the state of Connecticut's ban on contraceptives violated a right to marital privacy.[13] In *Griswold*, the Court drew on the First, Third, Fourth, Fifth, and Ninth Amendments to declare "zones of privacy" emanating from those rights.[14] Initially, it was unclear whether this right to privacy was an individual right or a right granted to the sanctity of the marital unit.[15] Regardless, the Court took the opportunity to emphasize that marriage is a fundamental right in its discussion,.[16]

In 1967, the Supreme Court decided *Loving v. Virginia* and struck down bans on interracial marriage under the Equal Protection Clause.[17] Despite the Court resting its decision on the Equal Protection Clause, the Court framed the right to marry as grounded in substantive due process.[18] The Court commented that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."[19]

While *Meyer* and *Griswold* began by growing substantive due process in the garden-bed of marriage, later cases, beginning with *Eisenstadt v. Baird*, found that the right to privacy is held by the individual beyond the scope of the marital relationship.[20] Like *Griswold*, *Eisenstadt* dealt with the issue of contraception.[21] Unlike in the prior cases, the law at issue applied only to unmarried individuals.[22] Ultimately, the case was decided under the Equal Protection Clause, but the Court stated that the law at issue impaired the exercise of personal rights.[23] The Court wrote:

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. . . . If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwar-

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12 Griswold v. Connecticut, 381 U.S. 479 (1965).

13 *Id.* at 485-86.

14 *Id.* at 484.

15 *See id.* at 485.

16 *Id.* at 486; *id.* at 491 (Goldberg, J., concurring).

17 Loving v. Virginia, 388 U.S. 1, 2 (1967).

18 *Id.* at 12.

19 *Id.* (citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

20 Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

21 *Id.* at 440.

22 *Id.* at 442.

23 *Id.* at 454.

> ranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[24]

In the decades following these decisions, the Court continued to reiterate that the right to marry is fundamental under the Due Process Clause.[25] Additionally, the right to privacy housed in the Court's substantive due process jurisprudence spread into other areas of American life, including abortion and gay and lesbian conduct and relationships.[26] For the purposes of this Article, the Court's opinions regarding gay and lesbian sexual conduct and marriage are most impactful.

In the 1986 case *Bowers v. Hardwick*, the Supreme Court held that the right to privacy housed in substantive due process does not extend to private sexual conduct such as sodomy.[27] However, in 2003, the Court held in *Lawrence v. Texas* that the right to privacy includes the right to engage in consensual sodomy.[28] Prior to *Lawrence*, "the Court had gone so far as to suggest legislation would not be invalidated unless it ran afoul of longstanding traditions . . . ."[29] However, the Court stated, "we think that our laws and traditions in the past half century are of most relevance here . . . [the Court should rely on an] emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[30]

The Court was not done expanding the outer bounds of substantive due process. In the 2015 decision *Obergefell v. Hodges*, the majority held that the fundamental due process right to marry included same-sex marriage.[31] The majority decision delineated the true extent of due process rights as subject to an "understanding of how constitutional imperatives define a liberty . . . in our own era."[32] While previous decisions framed substantive due process as confined

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[24] *Id.* at 453 (emphasis added).

[25] *See, e.g.,* M. L. B. v. S. L. J., 519 U.S. 102, 116 (1996); Turner v. Safley, 482 U.S. 78, 95 (1987); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974).

[26] BRETTSCHNEIDER, *supra* note 5, at 1000.

[27] Bowers v. Hardwick, 478 U.S. 186, 191 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

[28] *Lawrence*, 539 U.S. at 578.

[29] Cass R. Sunstein, *Liberty After Lawrence*, 65 OHIO ST. L.J. 1059, 1061 (2004).

[30] *Lawrence*, 539 U.S. at 571-72.

[31] Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

[32] *Id.* at 671-72.

to those liberties "deeply rooted in this Nation's history and tradition,"[33] the *Obergefell* Court added to the progeny of *Lawrence* that fundamental liberties may be discovered outside of any historical tradition.[34]

In the present day, substantive due process is effectively a constitutional principle that seeks to "safeguard rights that are not otherwise enumerated in the constitution."[35] The doctrine of substantive due process holds that there exists a general zone of privacy wherein individuals must be permitted to freely make their own decisions without interference.[36] The Supreme Court itself has stated that the "outer limits [of the right to privacy] . . . have not been marked."[37] As demonstrated in recent years, the scope of substantive due process continues to grow in the context of intimate personal relationships and marriage.

II. MILITARY RESTRICTIONS ON AREAS OF SUBSTANTIVE DUE PROCESS

While substantive due process rights grew quickly over the past decades in the civilian court system, military courts exhibited reluctance to embrace a right to privacy. With concerns regarding good order and discipline ideals that are at the center of military life, military courts gave great leeway to military orders and regulations that infringed on the privacy of service members. What followed is a litany of potentially problematic areas of military intrusion into zones of privacy that military courts have attempted to remedy with the rise of substantive due process in the civilian legal system. The reader will note that military courts lack a single cohesive standard to adjudicate a service member's substantive due process claims.

A. *"Safe Sex" Orders*

Becoming a member of the Armed Forces requires giving up many creature-comforts that society offers in exchange for a life of discipline. Surrendering a level of personal liberty is implicit to ser-

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33 *E.g.,* Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997).

34 *Obergefell*, 576 U.S. at 670-71; *Lawrence*, 539 U.S. at 578-79.

35 Chemerinsky, *supra* note 6, at 1510.

36 *Id.* at 1507 n.24 (citing Griswold v. Connecticut, 381 U.S. 479, 484 (1965)).

37 Carey v. Population Servs. Int'l, 431 U.S. 678, 684 (1977).

vice. The most obvious manifestation of this loss of liberty is the requirement to follow orders. The proverbial drill sergeant ordering push-ups at a whim may be the most common military order that comes to mind for ordinary citizens, but military orders extend far beyond battle plans and physical fitness. In the name of good order and discipline, orders may invade the most intimate corners of a service member's life. One such example are orders termed "safe sex" orders.[38]

Historically, commanders are granted incredible latitude in issuing military orders, even where those orders may impinge on personal rights. Generally speaking, military orders are presumed to be lawful and the legal burden falls on the service member to establish any illegality.[39] A lawful order must satisfy three requirements to be lawful: (1) reasonably in furtherance of military needs; (2) sufficiently specific as to time and place; and (3) not contrary to the law or a regulation.[40] Consistent with the first and third requirements, while military orders may limit the exercise of an individual right, the order may not do so arbitrarily or unreasonably.[41] Painting with broad brushstrokes, it is apparent that a military order given with specificity and connected in some manner to military duty are often legally unassailable.

It is within this context that military commanders often issue what are termed "safe sex" orders after discovering that a service member has a sexually transmittable disease.[42] Such orders restrict the manner in which the service member may have sexual contact with others, typically requiring the use of protection and informing any potential partner of their condition.[43] Such orders concern the most intimate portions of a service member's life.

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[38] CTR. FOR HIV L. & POL'Y, *Federal Law including U.S. Military*, *in* HIV CRIMINALIZATION IN THE UNITED STATES: A SOURCEBOOK ON STATE AND FEDERAL HIV CRIMINAL LAW PRACTICE 3, https://www.hivlawandpolicy.org/sites/default/files/Federal%20Law%20including%20U.S.%20Military%20-%20Excerpt%20from%20CHLP%27s%20Sourcebook%20on%20HIV%20Criminalization%20in%20the%20U.S. .pdf.

[39] *See* United States v. Wine, 28 M.J. 688, 690 (A.F.C.M.R. 1989) (citing United States v. Ashley, 48 C.M.R. 102 (A.F.C.M.R. 1973); United States v. Bayhand, 6 C.M.A. 762 (1956)).

[40] *Id.* at 690-91.

[41] *See id.* at 690 (citing United States v. Dykes, 6 M.J. 744, 747-48 (N.C.M.R. 1978)).

[42] Joseph Jaafari, *What it's Like to Be HIV Positive in the Military*, ROLLING STONE (May 20, 2017, 2:00 PM), https://www.rollingstone.com/culture/culture-features/what-its-like-to-be-hiv-positive-in-the-military-120407/.

[43] *See id.*

The issue of an extensive and invasive "safe sex" order came to the military's highest court in 1989 in *United States v. Womack*.[44] *Womack* involved a gay Air Force Staff Sergeant who was diagnosed with HIV and given a very broad order by his commander that included a portion stating "[y]ou will refrain from any acts of sodomy or homosexuality as proscribed by the Uniform Code of Military Justice, regardless of whether or not your partner consents to such acts."[45] The appellant challenged the constitutionality of the order.[46] The military court relied on the then-valid *Bowers v. Hardwick* Supreme Court precedent to find that sodomy was not constitutionally protected conduct.[47] The court appeared to contrast the right to privacy with a First Amendment analysis, stating that "concerns of privacy apply differently to the military community because of the unique mission and need for internal discipline."[48]

Later that same year, in *United States v. Negron*, the military's highest court heard a direct challenge to "safe-sex" orders under the constitutional principle of a right to privacy.[49] The case involved an order to an HIV-positive appellant that he "forewarn prospective sex partners that he had been diagnosed as being infected with human immunodeficiency virus (HIV) and required him to wear a condom when having intimate sexual relations."[50] The appellant was not a sympathetic figure; he did not inform his partner of his HIV-positive status and was married to another individual at the time of the sexual relationship.[51]

The court performed a constitutional analysis of "safe sex" orders and the ability of a commander to order their troops to wear a condom.[52] The analysis began with a recognition that a military order "may not, without . . . a valid military purpose, interfere with private

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44 United States v. Womack, 29 M.J. 88 (C.M.A. 1989).

45 *Id.* at 89.

46 *Id.*

47 *Id.* at 91 (citing Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003)).

48 *Id.* (citing Parker v. Levy, 417 U.S. 733 (1974); United States v. Hoard, 12 M.J. 563 (A.C.M.R. 1981), *pet. denied*, 13 M.J. 31 (C.M.A. 1982)).

49 United States v. Negron, 28 M.J. 775, 776-77 (A.C.M.R. 1989).

50 *Id.* at 776.

51 *Id.*

52 *Id.* at 776-77.

rights or personal affairs."[53] The court found a valid military purpose in the order—keeping a unit healthy and free from disrepute.[54] Recognizing that a valid military purpose cannot necessarily override a constitutional right, the court moved on to examine the limits of a right to privacy.[55] The court stated its understanding of Supreme Court precedent at that time, finding that the *Griswold* case only protected sexual intimacy in the context of the marital relationship.[56] The court also cited the then-valid Supreme Court precedent that homosexual sodomy is not a protected activity.[57] As a result, it was determined that the appellant's claim to a "constitutionally protected privacy 'right to freely, and without limitation, engage in consensual, private, intimate . . . relations' [was] without merit."[58] The court went on to comment that:

> [t]o the extent that Sergeant Womack or Specialist Negron may have had some expectation of privacy in their sexual activities, that expectation must be subordinated to the constitutionally recognized and compelling principle that "in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual . . . may . . . be subjected to such restraint . . . as the safety of the public may demand."[59]

Of note, this justification cited precedent allowing a state to forcibly vaccinate a citizen, not the unique nature of military society.[60]

Both the *Negron* and *Womack* cases served as foundations for military commanders to issue "safe sex" orders. The cases commendably laid out the case for a military interest in commanders issuing "safe sex" orders. However, both *Womack* and *Negron* came after the *Eisenstadt* decision, yet avoided addressing its precedent. *Eisenstadt* established that the privacy right found by the Supreme Court in

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[53] *Id.* at 776 (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 14c(2)(a)(iii)-(iv) (1984)).

[54] *Id.* at 777 (citing United States v. Womack, 27 M.J. 630, 633 (A.F.C.M.R. 1988), *aff'd*, 29 M.J. 88 (C.M.A. 1989)).

[55] *See Negron*, 28 M.J. at 777.

[56] *Id.* at 777 (citing Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965)).

[57] *Id.* (citing *Womack*, 27 M.J. at 632-34).

[58] *Id.*

[59] *Id.* at 778 (quoting Jacobson v. Massachusetts, 197 U.S. 11, 29 (1905)).

[60] *Jacobson*, 197 U.S. at 39.

substantive due process is an individually held right.[61] The *Womack* case did not address the decision and the *Negron* case stated a misunderstanding of *Griswold's* holding that ignored more recent precedent.[62] Both cases established a broad right of military commanders to issue "safe sex" orders that intrude deeply into service members' personal lives. The outer limits of these orders were not clear, but the military courts attempted to supply more guidance in the coming years.

In 1990, the military's highest court faced the issue of whether a "safe sex" order could validly extend to sexual contact with civilians.[63] In a very brief opinion, the court concluded that "when a service member is capable of exposing another person to an infectious disease, the military has a legitimate interest in limiting his contact with others, including civilians, and otherwise preventing the spread of that condition."[64] In 1996, the military's highest court faced the issue of whether a commander could order a military defendant to wear condoms during sexual intercourse with his wife.[65] Unfortunately, any analysis of an emerging right to privacy in the context of military service was not directly addressed due to the events at trial.[66] The appellant in this case engaged in unprotected sexual intercourse with his wife after his commander issued an order that, because of his HIV-positive status, he could not engage in unprotected consensual sexual intercourse with any person.[67] The trial court judge expressed concern whether "a commander can give an order to an accused to wear condoms with his wife . . ." as it may infringe on a constitutionally protected area.[68] At trial, the defense unwisely stipulated that the order

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61 *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

62 *Negron*, 28 M.J. at 777 (stating "[a]mong these is a penumbral privacy right protecting some aspects of sexual intimacy in the context of the marital relationship." (citing Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965)). *But see Eisenstadt*, 405 U.S. at 453 ("It is true that in Griswold the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion . . . .").

63 United States v. Dumford, 30 M.J. 137, 137-38 (C.M.A. 1990).

64 *Id.* at 138 (citing United States v. Johnson, 30 M.J. 53 (C.M.A. 1990), *abrogated by* United States v. Gutierrez, 74 M.J. 61 (C.A.A.F. 2015)).

65 United States v. Pritchard, 45 M.J. 126, 127-28 (C.A.A.F. 1996).

66 *See id.* at 131.

67 *Id.* at 128.

68 *Id.* at 131 (internal quotations omitted).

was lawful because of the potential adverse medical harm to the appellant's wife.[69] Because the parties entered into such an agreement, the court concluded the constitutional implications of the order "need not be addressed . . . ."[70]

Recent case law on "safe sex" orders has tapered off. This may be attributed to the end of the HIV crisis in the United States. It may also be a result of case law repeatedly settling in favor of the government. Regardless, the law overwhelmingly supports the ability of a commander to issue orders regarding the most intimate parts of service members' lives where some nexus can be shown to military necessity or good order and discipline.[71]

B. *Commander's Permission to Marry*

The military has a long tradition of restricting the ability of service members to marry.[72] Judge Advocate Generals historically have struggled with the legal legitimacy of such orders.[73] As American views and laws on marriage have evolved, they had to be rectified with military realities. In the modern-day, as the Supreme Court continues to grow the right to marry, the military struggles with the legal limitations of commanders' ability to restrain marriage. For service members stationed at overseas locations, it is common that commanders issue an order that certain requirements be met prior to marrying a foreign national.

Around the world today, commanders have many orders in place restricting their subordinates' ability to marry foreign nationals. Ser-

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69 *See id.*

70 *Id.*

71 Major Derek J. Brostek, *Prosecuting an HIV-Related Crime in a Military Court-Martial: A Primer*, 2009-SEP ARMY L. 29, 29-36 (2009).

72 *See* Captain Ross W. Branstetter, *Military Constraints Upon Marriages of Service Members Overseas, or, if the Army Had Wanted You to Have a Wife . . .*, 102 MIL. L. REV. 5, 6 ("As early as the post-Civil War era, the Judge Advocate General of the Army was asked if it was permissible for commanders to prevent their soldiers from marrying. This question came at a time when . . . in the United States, only unmarried men could enlist.").

73 *See id.* at 6 n.4 ("[A] military commander could have no authority to prohibit soldiers, while in his command, from marrying . . . ." (quoting Command VA2s, Op. JAG, Army, (1912))). *See id.* at 8 n.11 (quoting the Judge Advocate General of the Army "[I]f in the opinion of the Secretary of War the military efficiency of foreign commands requires the prohibition of marriages by members of those commands . . . [it] would be subject to no legal objection. To the extent that prior opinions of this office express a contrary view, they are hereby overruled." (citing Richard B. Johns, *The Right to Marry: Infringement by the Armed Forces*, 10 FAM. L.Q. 357, 361 (1977))).

vice members stationed in Japan must attend a two-day class covering finances, inter-cultural communication, and Japanese marriage law, complete a medical check, legal brief, and talk to their commander about the implications of marrying a foreign national.[74] Ultimately, service members must submit a marriage package to route through their chain of command for approval.[75] Service members stationed in South Korea are subject to a similar order.[76] The requirements are similar to that in Japan, except the order also requires that the service member "receives pre-marriage advice and counsel from a military chaplain. Military chaplains are specially trained in marital counseling and cross cultural sensitivity. This advice and counsel shall not be religious in nature, unless requested by the service member."[77]

These processes for marriage are admittedly "lengthy and intrusive."[78] The stated rationale for such policies is that the military wishes to avoid marriages not accomplished legally under host nation law and to aid potential foreign national spouses with gaining a U.S. Visa.[79] The orders also admit a more paternalistic intent, seeking to ensure that "chain of command leadership is supportive and oversees the international marriage process . . . ."[80] The military recognizes that service members enjoy the same right to marry as their civilian counterparts.[81] However, the military articulates a commander's intent that:

> [C]ompelling military interests require that Service members, and the chain of command, follow the procedures set forth in this [marriage] regulation prior to a marriage involving a non-U.S. citizen (a non-U.S. citizen is referred to as an "alien" by the Immigration and Naturalization Service). There must be a positive engagement of the chain of command, counseling professionals, and medical authorities to ensure

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74 Cindy Fisher, *Navy, Marines Require Counseling–and Command's Permission to Marry*, STARS & STRIPES (Jan. 14, 2017), https://www.stripes.com/news/navy-marines-require-counseling-and-command-s-permission-to-marry-1.59076.

75 *Id.*

76 U.S. FORCES KOR., REG. 600-240, INTERNATIONAL MARRIAGES OF USFK PERSONNEL (28 Feb. 2013) [hereinafter USFK REG. 600-240].

77 *Id*. at para. 1-5(d)(4); *see also* U.S. DEP'T OF NAVY, INSTR. 1752.1S, MARRIAGES WITHIN THE U.S. NAVAL FORCES JAPAN AREA, para. 6 (6 Apr. 2016) [hereinafter INSTR. 1752.1S].

78 Branstetter, *supra* note 72, at 6.

79 USFK REG. 600-240, *supra* note 76, at para. 1-1.

80 *Id.* at para. 1.1(e).

81 *Id.* at para. 1.4(a); INSTR. 1752.1S, *supra* note 77, at para. 5(a).

> a deliberate, informal, and legally sufficient international marriage decision . . . .[82]

In *United States v. Nation*, the military's highest court struggled with the permissible extent of a commander's restriction on the right to marry.[83] In that case, the accused was stationed in the Philippines and prosecuted for violating the commander's order that service members go through a six-month waiting period and then receive written permission from their commander to get married.[84] The rationale behind the regulation was the desire for a "cooling period" before a service member wed.[85] The court noted general regulations that do not offend the Constitution and have a valid military purpose are presumed lawful.[86] Yet the court struck down this order, finding that the length requirement was arbitrary and unreasonable.[87] Although the court did not articulate a scrutiny level for application, it did discuss how the order could be better tailored to the government interest.[88] This language suggests that something greater than minimum scrutiny was applied by the court.

United States v. Wheeler involved the same order from the *Nation* case that was updated following the court's prior finding of its unlawfulness.[89] The order now required the prospective spouses to meet with a chaplain to "advise and counsel both parties on the sanctity of marriage, the seriousness of the marriage contract, and, if applicable, the potential difficulties in inter-racial marriages," to present a medical certificate showing both to be "free from mental illness, infectious venereal disease, active tuberculosis or major communicable disease," and provide written consent from guardians if a party is under twenty-one years old.[90] The court found this order to be acceptable, stating:

> What may be relatively unimportant in an American environment can be tremendously significant in a foreign background. For example, marriage in the United States to a person having active tuberculosis

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82 USFK REG. 600-240, *supra* note 76, at para. 1-4(a).
83 *See* United States v. Nation, 9 C.M.A. 724, 726 (1958).
84 *Id.*
85 *Id.* at 727.
86 *Id.* at 726.
87 *Id.* at 727.
88 *Id.*
89 United States v. Wheeler, 12 C.M.A. 387, 388 (1961).
90 *Id.*

> may not be cause for too great concern because of the availability of medical facilities for treatment, cure, and control of the spread of the disease; but in a foreign community where the medical services may be few, and demands upon the service very heavy, it may be necessary to prohibit military personnel from marrying a civilian suffering from such condition in order to safeguard the health and morale of other military personnel. Other examples of real dangers that might flow from the unrestricted marriage of personnel in foreign countries are readily at hand. We need only say that, in our opinion, a military commander may, at least in foreign areas, impose reasonable restrictions on the right of military personnel of his command to marry.[91]

In a strongly written dissent, Judge Ferguson argued that the order had no reasonable relationship to military duty.[92] The *Wheeler* decision predated *Loving v. Virginia*, meaning both the majority and the dissent did not have the opportunity to address that jurisprudence.[93]

In a separate case following the *Loving v. Virginia* decision, the Navy Court of Military Review was urged by an appellant to "re-examine the law in this area, arguing that the passage of several years, and the consequent shift of social and military necessity, as well as changes in the regulation, justify a new inquiry."[94] In a brief written decision, the Navy court declined to reconsider the *Wheeler* decision in light of the recent Supreme Court case law, finding that the order was "a lawful and reasonable exercise of command authority to safeguard and protect the morale, discipline, and usefulness of service personnel in the Philippines."[95] This state of the law remains today. It is commonplace for service members overseas to face significant roadblocks to marriage.

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91 *Id.* at 388-89 (quoting U.S. DEP'T OF NAVY, INSTR. 5800.1E, para. 5 (5 Nov. 1958)).

92 *Id.* at 391 (Ferguson, J., dissenting) (stating a compelling historical analysis "Colonel Winthrop notes in his work that an order forbidding a soldier to contract marriage is unlawful" (citing WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 575 (2d ed. 1920))).

93 The *Wheeler* case was decided in 1961, the Supreme Court decision of *Loving v. Virginia* did not come until 1967. *See* Loving v. Virginia, 388 U.S. 1 (1967).

94 United States v. Parker, 5 M.J. 922, 922 (N.C.M.R. 1983), *pet. denied*, 6 M.J. 144 (C.M.A. 1978).

95 *Id.*

C. *Sodomy Prohibitions*

Sodomy was prohibited by militaries around the world "since time immemorial."[96] The landmark early American military treatise does not mention sodomy as a punishable offense under the 1874 Articles of War.[97] However, this is likely because the "apparent practice [was] to discharge summarily soldiers 'guilty of bestial offenses' without trial and without honor."[98] In 1912, sodomy, without being named, was made illegal under "offenses against nature."[99] The 1916 Articles of War effectively outlawed sodomy and allowed for the discharge and court-martial of any offender.[100] In the 1920 Articles of War, followed by the Uniform Code of Military Justice (UCMJ) in Article 125, the military formally codified consensual sodomy as illegal.[101]

Even in modern times, prior to the *Lawrence* decision, the military continued to prosecute many acts of consensual sodomy and generally did not recognize a right to privacy for sexual intimacy.[102] The landmark *Lawrence* decision posed a threat to the survival of Article 125. Not only did *Lawrence* articulate a right to privacy surrounding intimate sexual contact such as sodomy, but it also gave an outright rejection for moral disapproval as a sufficient basis for disallowing sexual conduct.[103] The adoption of Article 125 by Congress was only justified as codifying the historical common law offense of sodomy.[104] The common law purpose for anti-sodomy laws is understood as being primarily moralistic as sodomy was considered unnatural or deviant

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96 United States v. Henderson, 34 M.J. 174, 176 (C.M.A. 1992).

97 United States v. Hall, 34 M.J. 695, 698 (A.C.M.R. 1991), *decision set aside by*, 36 M.J. 80 (C.M.A. 1992) (citing WINTHROP, *supra* note 92, at 710-33).

98 *Id.* Sodomy allegations may also have been addressed in fraternization cases. *Id.* at 698 n.5 (citing Major Kevin W. Carter, *Fraternization*, 113 MIL. L. REV. 61, 76 n.92 (1986)).

99 *Id.* at 698.

100 *See* Jerald A. Sharum, Comment, *Controlling Conduct: The Emerging Protection of Sodomy in the Military*, 69 ALB. L. REV. 1195, 1204 (2006).

101 *Id.* at 1204-05.

102 *Hall*, 34 M.J. at 695 (A.C.M.R. 1991); United States v. Johnson, 30 M.J. 53, 58 (C.M.A. 1990), *abrogated by* United States v. Gutierrez, 74 M.J. 61 (C.A.A.F. 2015); United States v. Jones, 14 M.J. 1008, 1011 (A.C.M.R. 1982).

103 Lawrence v. Texas, 539 U.S. 558, 582 (2003).

104 Sharum, *supra* note 100, at 1203 (citing Eugene E. Baime, *Private Consensual Sodomy Should be Constitutionally Protected in the Military by the Right to Privacy*, 171 MIL. L. REV. 91, 96 (2002)).

behavior.[105] As the jurisprudential dust settled from the *Lawrence* decision, it was unclear how the military would be impacted.

In 2004, the military's highest court addressed the issue in the *United States v. Marcum* decision.[106] The *Marcum* case involved an active duty Air Force Technical Sergeant (TSgt) who often socialized with airmen under his command at his off-base apartment.[107] The victim in the case, Senior Airman (SrA) Harrison, alleged that he fell asleep on the couch of TSgt Marcum following a party and awoke to TSgt Marcum performing forcible sodomy on him.[108] At trial, the panel of officers found TSgt Marcum "'not guilty of forcible sodomy' but guilty of non-forcible sodomy."[109] Following his conviction, TSgt Marcum appealed the case through the military appellate system until reaching the military's highest appellate court.[110]

The *Marcum* court recognized that the *Lawrence* decision was within the Supreme Court's "liberty line of cases resting on the Griswold foundation . . . [and] requires [a] searching constitutional inquiry" even in the military context.[111] However, the court also recognized that "constitutional rights may apply differently to members of the armed forces than they do to civilians."[112] The *Marcum* court stated that the appropriate standard of review was unclear, noting courts applied both rational basis review and strict scrutiny in the wake of the decision.[113] The court ultimately rejected both standards, as it held both were inappropriate for the military setting.[114] Instead, the court viewed *Lawrence* as "applying a balancing of state and individual interests that cannot be characterized as strict scrutiny or rational basis."[115] Thus rejecting the application of any form of scrutiny, the court was free to create its own legal test.

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105 *Id.* at 1205 (citing *Jones*, 14 M.J. at 1010; Baime, *supra* note 104, at 96).

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

107 *Id.* at 200.

108 *Id.*

109 *Id.* at 201.

110 *Id.*

111 *Id.* at 204-05.

112 *Marcum*, 60 M.J. at 205 (citing Parker v. Levy, 417 U.S. 733, 743 (1974)).

113 *Id.* at 204 (citing Standhardt v. Superior Ct. of Ariz., 77 P.3d 451, 457 (Ariz. Ct. App. 2003); Fields v. Palmdale Sch. Dist., 271 F. Supp. 2d 1217, 1221 n.7 (C.D. Cal. 2003)).

114 *Id.* at 206.

115 Cook v. Gates, 528 F.3d 42, 51 (1st Cir. 2008) (citing *Marcum* generally).

After summarily rejecting a facial challenge to the validity of the entire article,[116] the court went on to formulate a three-pronged test that balanced "national security and constitutional rights . . . ."[117] The first prong of the test asks "whether Appellant's conduct was of a nature to bring it within the *Lawrence* liberty interest."[118] This filters out any misconduct that the *Lawrence* court did not contemplate as a constitutional right; such as non-consensual sodomy.[119] Second, the court asked whether the conduct involved any "behavior or factors that were identified by the Supreme Court as not involved in *Lawrence*."[120] In *Lawrence*, the court explicitly stated there were instances where the public interest outweighed any private liberty interest such as sexual conduct with a minor, public sexual conduct, prostitution, or situations where consent may not easily be refused.[121] Third, the court should analyze whether additional factors exist that are relevant to the military environment that affect "the nature and reach" of *Lawrence*.[122]

Applying the three prongs to the case at hand, the court found that TSgt Marcum's conduct was not protected by the *Lawrence* decision.[123] The court was satisfied that the private and consensual conduct of the appellant met the first prong of its newly-minted test.[124] On the second prong, the court noted that the Appellant was "the supervising noncommissioned officer . . . in a position of responsibility and command . . . [who] supervised and rated [his sexual partner]."[125] This led the court to conclude that the Appellant's sexual activity "fell outside the liberty interest" *Lawrence* articulated, as the conduct involved an individual who could easily be coerced.[126] The court did not examine the third prong.[127]

The *Marcum* decision marked a move by the military's highest court to insulate the service from the potential full impact of *Law-*

116 *Marcum*, 60 M.J. at 206.
117 *Id.*
118 *Id.* at 207.
119 *Id.*
120 *Id.*
121 *Id.*
122 *Marcum*, 60 M.J. at 207.
123 *Id.* at 208.
124 *Id.* at 207.
125 *Id.* at 208.
126 *Id.*
127 *Id.*

rence. The test postulated by the court recognized the precedence of *Lawrence*, yet effectively created a military opt-out in the form of the third prong: whether military factors limit the reach of *Lawrence*. It remained to be seen whether the conduct at issue in *Marcum* would be protected under *Lawrence* outside of a coercive relationship, or if unique military factors may shield the military from *Lawrence* challenges.[128]

Following *Marcum*, lower military courts attempted to apply the *Marcum* test to *Lawrence* challenges in the military. Utilizing the three-prong test, military courts "recognize[d] a right to engage in consensual adult sodomy" between heterosexuals where no aggravating factors existed.[129] While heterosexual sodomy was constitutionally protected, same-sex sodomy was not.[130] The military maintained a then-existing ban on gays and lesbians openly serving in the military under the theory that it impacted "good order and discipline."[131] This ban provided an argument that Article 125 could be utilized to prosecute same-sex private consensual sodomy.[132] Under such a theory, if gay or lesbian conduct was a threat to good order and discipline, Article 125 could escape *Lawrence* challenges under the third prong of the *Marcum* test: "additional factors relevant solely in the military environment."[133] Thus, prior to the repeal of "Don't Ask Don't Tell," it appeared that Article 125 could remain in effect for use against service members who engaged in same-sex sodomy, as such a policy is a government interest supported by congressional findings.[134]

In 2010, following the repeal of "Don't Ask Don't Tell," any justification for prosecution of non-aggravated same-sex sodomy under Article 125 appeared to be gone. As a result, non-aggravated sodomy existed in a strange legal twilight zone, legally on the books in Article 125 but unenforceable, as the government no longer claimed a govern-

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128 *Marcum*, 60 M.J. at 208.

129 DAVID F. BURRELLI & CHARLES DALE, CONG. RESEARCH SERV. REPORT FOR CONG., HOMOSEXUALS AND U.S. MILITARY POLICY: CURRENT ISSUES 20 (2005). "Aggravating factors" is a term utilized in this article to denote sexual acts that are non-consensual or run afoul of some criminal sanction. *See id.* at 7 (citing U.S. DEP'T OF DEF., REVIEW OF THE EFFECTIVENESS OF THE APPLICATION AND ENFORCEMENT OF THE DEPARTMENT'S POLICY ON HOMOSEXUAL CONDUCT IN THE MILITARY 3 (Apr. 1998)).

130 *Marcum*, 60 M.J. at 206.

131 *Id.* (citing 10 U.S.C. § 654(a)(15) (repealed 2010)).

132 *Id.*

133 *Id.* at 205-07. *But see* Sharum, *supra* note 100, at 1215-16.

134 *See* 10 U.S.C. § 654(a) (repealed 2010).

ment interest in prosecution.[135] In 2014, the National Defense Authorization Act formally repealed the offense of consensual sodomy from Article 125.[136]

Marcum is now largely irrelevant law. However, it provides valuable insight into the military court's reluctance to recognize military substantive due process rights over concerns with good order and discipline. Military courts possess the ultimate trump card: where the military environment clashes with substantive due process rights, military courts will side with the need for good order and discipline.

D. *Adulterous Sexual Intimacy*

Adultery is a criminal offense under the UCMJ.[137] While a limited number of states have statutes on the books criminalizing adultery, such laws are rarely, if ever, enforced.[138] Contrast this to the military criminal justice system wherein adultery is a frequently charged criminal offense, albeit almost always accompanied by other misconduct.[139] The military crime of adultery requires what is styled a "terminal element," meaning that in addition to the crime itself, the prosecution must prove the misconduct impacted good order and discipline or was of a nature to bring discredit upon the Armed Forces.[140] This additional element recognizes that the unique nature of military life requires specialized criminal rules.

Unlike other sexual crimes addressed by the UCMJ, military adultery prosecutions were not commonplace throughout the rich history of military justice.[141] To the contrary, in modern times, as civilian

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135 Adam Serwer, *Why the Military Still Bans Sodomy*, MSNBC (Sept. 13, 2013), http://www.msnbc.com/msnbc/why-the-military-still-bans-sodomy.

136 David Vergun, *Legislation Changing UCMJ, Especially for Sex Crimes*, U.S. ARMY (Jan. 8, 2014), https://www.army.mil/article/117919/legislation_changing_ucmj_especially_for_sex_crimes.

137 UCMJ art. 134 (2019).

138 LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 345-46 (1993).

139 Katherine Annuschat, *An Affair to Remember: The State of the Crime of Adultery in the Military*, 47 SAN DIEGO L. REV. 1161, 1164-65 (2010).

140 *See* UCMJ art. 134 (2019); *see also* United States v. Fosler, 70 M.J. 225, 226 (C.A.A.F. 2011) (discussing the "terminal element").

141 United States v. Hickson, 44 M.J. 146, 148 (C.M.A. 1986) ("In military law, the history of adultery and fornication is comparatively recent. Colonel Winthrop does not discuss these offenses in his treatise, *Military Laws and Precedents.* The Manuals for Courts-Martial contain no reference to these offenses prior to 1949."), *overruled in part on other grounds by* United States v. Hill, 48 M.J. 352 (C.A.A.F. 1997).

prosecution of adultery waned, military prosecution appeared to increase.[142] This sometimes led to negative press coverage of the military as prosecuting "Scarlet Letter" offenses,[143] attempting to force its way into the bedroom,[144] and acting as the "pajama police."[145] Despite such public misgivings, prior to the *Lawrence* decision, it was generally accepted that the military could police adultery as it was not constitutionally protected.

Following the *Lawrence* decision, "there exists a strong argument that adultery is protected under the constitutional right of privacy."[146] Indeed, Justice Scalia's dissent in the *Lawrence* decision decried the majority decision as calling into question statutes criminalizing adultery.[147] The Ninth Circuit has held that adulterous sexual conduct is protected by substantive due process and the right to privacy.[148] The Supreme Court declined to grant certiorari on the issue, allowing the decision to stand.[149] The Ninth Circuit is not alone in this reading of *Lawrence*.[150] Scholars have also suggested that laws against fornication could not withstand the precedent of *Griswold*.[151] *Lawrence* poses a problem to the military's adultery prohibition in that it explicitly does not allow for moral disapproval to be the underpinnings of a law. Where a service member commits adultery and it has no impact on good order and discipline, it is difficult to conceive of a justification for prosecution in a post-*Lawrence* legal landscape.

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142 Annuschat, *supra* note 139, at 1173-74; James M. Winner, *Beds with Sheets but No Covers: The Right to Privacy and the Military's Regulation of Adultery*, 31 LOY. L.A. L. REV. 1073, 1077-78 (1998).

143 *See* Krista Bordatto, *The Crime Behind the Bedroom Door: Unequal Governmental Regulation of Civilian and Military Spouses*, 26 HASTINGS WOMEN'S L.J. 95, 105 n.81 (2015) (citing *60 Minutes: The Court-Martial of Lt. Flinn; First Woman Bomber Pilot on Trial for Adultery* (CBS television broadcast May 11, 1997)).

144 *See id.* at 105 n.82 (citing *Internight* (NBC television broadcast July 7, 1997) (discussing the Lt. Kelly Flinn case)).

145 *All Things Considered: Sex & The Military* (NPR radio broadcast June 16, 1997) (discussing adultery in U.S. military and Lt Kelly Flynn case).

146 Annuschat, *supra* note 139, at 1168 (citing Lawrence v. Texas, 539 U.S. 558, 572 (2003)); *see also* Winner, *supra* note 142, at 1082-83 ("[W]hom one decides to have sexual relations with is an intimate decision . . . that, according to the reasoning underlying these cases, should be protected . . . .").

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

148 Thorne v. City of El Segundo, 726 F.2d 459, 468 (9th Cir. 1983).

149 City of El Segundo v. Thorne, 469 U.S. 979 (1984).

150 *See* Briggs v. North Muskegon Police Dep't, 563 F. Supp. 585, 589-90 (W.D. Mich. 1983), *aff'd*, 746 F.2d 1475 (6th Cir. 1984), *cert. denied*, 473 U.S. 909 (1985).

151 Sunstein, *supra* note 29, at 1068.

Adultery cases have not been significantly litigated in military appellate courts. In 2005 an appellant challenged his conviction for adultery, claiming it violated his substantive due process right of privacy.[152] The lower military appellate court employed the three-prong *Marcum* test that the military's highest court applied to Article 125 to determine the constitutionality of the military's criminalization of adultery.[153] The court found that because Article 134 required the proof of a terminal element, and in this case both the conduct was prejudicial to good order and of a nature to bring discredit on the armed forces, the adulterous conduct did not have constitutional protection.[154] The court additionally found the military's "substantial interest" in preserving marriages, particularly where it provides benefits based on dependent status, brought the appellant's conduct outside of any potential constitutional protection.[155]

That year, the same court dealt with a similar claim in *United States v. Orellana*.[156] The court quickly disposed of the appellant's claim that adultery was constitutionally protected by noting that "neither *Lawrence* nor *Marcum* expressly considered the constitutional validity of . . . adultery."[157] The court noted that Article 134 requires showing that the adulterous conduct impacted good order and discipline or discredited the service and found such a showing cured any constitutional concerns.[158]

Military courts' line of adultery cases track closely to its sodomy case law, even adopting the *Marcum* test. The Article 134 terminal element provides valuable constitutional justification for the criminal sanction as the prosecution must prove the adulterous action negatively impacted the Armed Forces. This terminal element neatly fits into the *Marcum* test's third prong. As a result, if the prosecution meets its burden of proof at trial, the *Marcum* test will surely be found satisfied on appeal. Just as with the prior sodomy sanction, the military could legitimately claim that its unique interests allow the criminalization of conduct otherwise sanctioned by society. However,

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152 United States v. Brown, NMCCA 200201647, 2005 CCA LEXIS 291, at *2 (N-M. Ct. Crim. App. Sept. 14, 2005).

153 *Id.* at *8-9.

154 *Id.* at *9.

155 *Id.*

156 United States v. Orellana, 62 M.J. 595 (N-M. Ct. Crim. App. 2005).

157 *Id.* at 598.

158 *Id.*

no case law exists squaring the military's ban on consensual adulterous conduct with growing due process jurisprudence.

E. *Rank-based Fornication*

It is a crime in the U.S. military for an officer to "fraternize on terms of military equality with . . . enlisted member(s)."[159] There exists a long history of fraternization as a punishable offense within militaries around the world. The military prohibition against fraternization finds its roots as far back as "when the legions of Rome marched through Europe and the Middle East."[160] Western military history is rife with prohibitions against fraternization.[161] Historically, fraternization was not concerned with romantic or sexual relationships, but with officers and enlisted gambling or becoming intoxicated together.[162] However, the 1980s saw a substantial increase in the number of females joining the armed forces, giving rise to fraternization as a sexual offense.[163]

While there remains debate regarding what conduct meets the threshold of fraternizing "on terms of military equality,"[164] there is no doubt that intimate sexual contact is criminally sanctioned.[165] The legal justification for prohibiting sexual conduct between officers and enlisted rests on the legal principle that fornication may be criminalized where it is illicit, that it is illicit where it impacts good order and discipline, and that sexual contact between enlisted and officers *per se* impacts good order and discipline.[166]

In *United States v. Stirewalt*, the military's highest court considered whether the liberty interest articulated in *Lawrence* protected sodomy between an enlisted officer and service member.[167] Performing a *Marcum* analysis, the court held that "Stirewalt's conduct with

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159 UCMJ art. 134 (2019).

160 Walter T. Cox, III, *Consensual Sex Crimes in the Armed Forces: A Primer for the Uninformed*, 14 DUKE J. GENDER L. & POL'Y 791, 792 (2007).

161 Major David S. Jonas, *Fraternization: Time for a Rational Department of Defense Standard*, 135 MIL. L REV. 37, 43 (1992).

162 *See* Cox, *supra* note 160, at 792-93 (citing Carter, *supra* note 98, at 98-101; Jonas, *supra* note 161, at 69 n.174).

163 *Id.* at 793 (citing Jonas, *supra* note 161, at 37).

164 *See* United States v. Appel, 31 M.J. 314, 315-16 (C.M.A. 1990); United States v. Wales, 31 M.J. 301, 302 (C.M.A. 1990).

165 United States v. Boyett, 42 M.J. 150, 154 (C.A.A.F. 1995).

166 Cox, *supra* note 160, at 795-96.

167 United States v. Stirewalt, 60 M.J. 297, 297 (C.A.A.F. 2004).

[LTJG B] was more than a personal consensual relationship in the privacy of an off-base apartment. At the time of this relationship, [LTJG B] was one of seven officers on the USCGC SWEETGUM, a cutter with a crew of only 42."[168] Considering the military interest in "discipline and order" the court found "Stirewalt's conduct fell outside any protected liberty interest" from Supreme Court precedent.[169]

Military courts again utilized the *Marcum* test to uphold the criminality of conduct that may be constitutionally protected in civilian society. This again insulates the military's ban on sexual contact between officers and enlisted from constitutional challenge. Scholars admit that the *Lawrence* principle may be problematic in the civilian world for outlawing fornication, for instance, a public university's ban on consensual relationships between students and professors, but the *Marcum* test again allows military considerations to reign supreme in the military environment.[170]

F. *Other Good Order and Discipline (GOAD) Based Prosecutions*

Article 134, which criminalizes conduct that prejudices good order and discipline, and a commander's broad authority to issue orders, both allow incredible leeway for the military to police the intimate private lives of its members. The overwhelming majority of such cases rarely see an appellate courtroom. When such cases do meet the appellate system, military courts demonstrate deference to command.

It is commonplace in the military for commanders to give "no-contact orders." These function as the military equivalent of a restraining order, requiring a party to cease any form of contact or communication with a named individual.[171] Such orders are often utilized where a consensual sexual relationship undermines good order and discipline.[172] The majority of such orders concern potential adulterous contact and more directly implicate the section of this Article

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168 *Id.*

169 *Id.*

170 *See* Sunstein, *supra* note 29, at 1064.

171 U.S. DEP'T OF ARMY, REG. 608-18, MILITARY NO-CONTACT ORDER (30 May 2006).

172 *See* United States v. Frasier, 48 M.J. 271, 271-72 (C.A.A.F. 1998); United States v. Argo, 46 M.J. 454, 456 (C.A.A.F. 1997); United States v. Wine, 28 M.J. 688, 689-90 (A.F.C.M.R. 1989).

focused on adulterous misconduct.[173] However, in certain circumstances, these orders may extend to consensual sexual relationships that are non-adulterous yet impact good order and discipline, for instance, a pilot who begins seeing the recently divorced ex-wife of a fellow pilot resulting in fights within the unit.[174] As with most matters in the military, command reserves broad authority to take any action protecting good order and discipline.[175] Military law dictates that such orders must simply have a "rational connection between the order and proper service objectives and responsibilities."[176] These orders may extend into the private lives of military members so long as they do not "arbitrarily or unreasonably interfere with the private rights or personal affairs of military members."[177] No military case law exists seeking to remedy these deferential legal standards with substantive due process rights.

Generalized Article 134 prosecutions may also impede the intimate private lives of service members. Military courts recognize that misconduct amounting to a crime against good order and discipline need not be "illegal under the common law or under most statutory criminal codes."[178] Military prosecution, while rare, can proceed under the theory that the conduct at issue "however eccentric or unusual–would not be viewed as criminal outside the military context . . .

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173 *See* Coker v. Whittington, 858 F.3d 304, 305-07 (5th Cir. 2017); Seegmiller v. LaVerkin City, 528 F.3d 762, 764-66 (10th Cir. 2008). *But see* Perez v. City of Roseville, 926 F.3d 511, 515-16 (9th Cir. 2019).

174 A situation witnessed by the author in 2012.

175 *See* U.S. DEP'T OF AIR FORCE, INSTR. 36-2909, AIR FORCE PROFESSIONAL RELATIONSHIPS AND CONDUCT para. 2.2, 2.3.4 (14 Nov. 2019). The instruction states:

> All relationships, whether pursued on or off duty, are prohibited if the relationship . . . Creates an actual or reasonably foreseeable adverse impact on good order, discipline, authority, morale, or command's ability to accomplish its mission . . . Sexual relationships between Air Force members are subject to the same policy considerations as are other relationships. However, unprofessional relationships that include sexual activity have increased potential to significantly degrade unit cohesion, respect for authority in a unit and mission accomplishment. When an unprofessional relationship includes evidence of sexual acts, the entirety of the unprofessional relationship and its adverse impact on the unit should be considered when determining an appropriate disposition unless discharge is required.

But see, e.g., United States v. Wilson, 32 C.M.R. 517, 518 (A.B.R. 1962) ("Fornication in the absence of aggravating circumstances is recognized as not an offense under military law.").

176 *Wine*, 28 M.J. at 689 (citing United States v. Dykes, 6 M.J. 744 (N.C.M.R. 1978)).

177 *Dykes*, 6 M.J. at 747-48.

178 United States v. Davis, 26 M.J. 445, 448 (C.M.A. 1988).

[yet is] illegal solely because, *in the military context*, its effect is to prejudice good order" and discipline.[179]

Under this theory, military members were previously prosecuted for cross-dressing.[180] The military's highest court went so far as to develop a cross-dressing legal test requiring a consideration of: (1) the time of the cross-dressing; (2) the place of the cross-dressing; (3) the circumstances of the cross-dressing; and (4) whether the purpose of the cross-dressing was prejudicial to good order and discipline or of a nature to bring discredit on the armed forces.[181] Scholars argue, and some Supreme Court case law suggests, that any cross-dressing regulations in the civilian world could not survive substantive due process analysis.[182] A military prosecution today for cross-dressing is virtually unimaginable.[183] Yet it remains part of military legal precedent that although "cross-dressing can certainly be non-prejudicial and even enhance morale . . . such as Dustin Hoffman's 'Tootsie' or Flip Wilson's 'Geraldine' . . . [where the factfinder is] certain that the prejudice of the discrediting nature of the conduct is legitimately focused toward good order and discipline or discrediting to the armed forces" it may be criminalized.[184]

Such instances serve to illustrate the potential reach of "good order and discipline" crimes in the Armed Forces. There exist innumerable manners in which military regulation or a commander's order may impact service members under the theory of maintenance of good order and discipline. With no workable standard of review, military courts are left crafting legal tests for every conceivable situation, including developing a cross-dressing legal test.

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179 *Id.* (emphasis in the original).

180 *See id.* 447-48; United States v. Guerrero, 33 M.J. 295, 297 (C.M.A. 1991).

181 *Guerrero*, 33 M.J. at 298.

182 *See* Jillian T. Weiss, *Gender Autonomy, Transgender Identity and Substantive Due Process: Finding a Rational Basis for* Lawrence v. Texas*,* 5 J. OF RACE, GENDER, & ETHNICITY 2, 7 (2010) (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 887 (1978) (arguing "autonomy" concept put forth in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) and *Lawrence v. Texas*, 539 U.S. 558 (2003) necessarily includes cross-dressing); *see also* Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

183 *See* J.D. Simkins, *Sailor by Day, Performer by Night–Meet the Navy's Drag Queen, 'Harpy Daniels,'* NAVY TIMES (Aug. 30, 2018), https://www.navytimes.com/off-duty/military-culture/2018/08/30/sailor-by-day-performer-by-night-meet-the-navys-drag-queen-harpy-daniels/.

184 *Guerrero*, 33 M.J. at 298.

ANALYSIS

I. PROPOSING A STANDARD OF REVIEW

The purpose of this Article is not to assess the constitutionality of the military's jurisprudence regarding each area of substantive due process discussed above. Due to a lack of recent precedent, the military must rely on cases that are clearly problematic when juxtaposed with current Supreme Court jurisprudence.[185] As an example, in light of the *Lawrence* decision, the permissible extent of "safe-sex" orders must be reexamined. It is clear that certain portions of these broad "safe-sex" orders can no longer pass constitutional muster, as the military jurisprudence relies on overturned Supreme Court precedent.[186]

For instance, a blanket order not to engage in homosexual sodomy could no longer survive. The *Womack* court relied on the *Hardwick* decision to reach its conclusion that a safe-sex order could ban homosexual conduct.[187] Similarly, the military's ability to set stringent marriage requirements overseas may be constitutionally problematic.[188] Other military cases that remain part of our appellate jurisprudence hinge on weakened underpinnings.[189] While some of the military's standing case law is likely unconstitutional in light of recent Supreme Court precedent, nit-picking issues with sometimes decades-old military appellate law serves no beneficial purpose.

A. *The Current Uncertainty*

The larger problem is that no court, military or civilian, has provided an overarching scheme detailing how the privacy rights articulated by substantive due process interface with the U.S. military. This is problematic for a military society that must frequently regulate the

185 *See* Brostek, *supra* note 71, at 33-34.

186 United States v. Womack, 29 M.J. 88, 91 (C.M.A. 1989) (citing Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003)).

187 *Id.*

188 *See* Branstetter, *supra* note 72, at 21 ("[T]he present Army policy of permitting commanders the option of denying authorization to marry . . . [is] constitutionally suspect . . . ."); Captain Dana Michael Hollywood, *An End To "Til DEROS Do Us Part": The Army's Regulation of International Marriages in Korea*, 200 MIL. L. REV. 154, 192-94 (2009) ("Regulation 600-240's allowance that verification authorities can deny a Soldier's marriage on nothing more than a subjective analysis is an arbitrary grant of discretion.").

189 Cox, *supra* note 160, at 801-02.

private conduct of its members. This issue is exacerbated by the Supreme Court's definition of substantive due process – that the liberty interest is in part determined by an "emerging awareness" within society.[190] Such a definition may arguably be workable in the context of the civilian appellate system, wherein multiple federal circuits can flesh out society's evolving attitudes. However, in the rigidly regulated society that is the U.S. Armed Forces, it is unclear how such emerging attitudes impact the rights of military members. As substantive due process jurisprudence moves forward, military practice must be re-examined and ultimately appellate courts must supply a workable standard.

One of the challenges for the military's application of substantive due process to its ranks is that even civilian courts remain unsure what standards federal courts should use when evaluating substantive due process claims.[191] Courts generally employ strict scrutiny when reviewing government action that impinges on fundamental liberties.[192] However, in substantive due process cases, federal courts are not always ready to embrace such a standard of review. Following the *Lawrence* decision, the First Circuit observed the myriad of approaches: "[s]ome have read *Lawrence* to apply a rational basis approach. Others see the case as applying strict scrutiny. And a third group view the case as applying a balancing of state and individual interests that cannot be characterized as strict scrutiny or rational basis."[193] In the right to marry case *Zablocki v. Redhail*, the Supreme Court declared that strict scrutiny must be met by the government.[194] In another right to marry case, *Turner v. Safley*, the Supreme Court declined to apply strict scrutiny and instead opted for a hybrid "rigorous scrutiny" test and applied rational basis review in the context of prison inmates.[195] The *Glucksberg* decision offered a two-step process

190 Lawrence v. Texas, 539 U.S. 558, 571-72 (2003).

191 Justice Saclia, in his dissent, argued the Court was employing rational basis review. *Lawrence*, 539 U.S. at 593-94. "The Supreme Court, however, has not yet shown an interest in addressing what standard of review is appropriate under Lawrence." Sharum, *supra* note 100, at 1202.

192 Griswold v. Connecticut, 381 U.S. 479, 503-04 (citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

193 *E.g.,* Cook v. Gates, 528 F.3d 42, 51 (1st Cir. 2008).

194 Zablocki v. Redhail, 434 U.S. 374, 386 (1978).

195 Turner v. Safley, 482 U.S. 78, 89 (1987).

that has been applied spottily over the years.[196] The *Obergefell* decision offered no further clarity on appropriate standards of review.

In the face of this uncertainty, military courts have also employed numerous approaches. In the 1958 *Nation* decision, a right to marry case, the court did not articulate a scrutiny level for application.[197] However, it did discuss how the order could be better tailored to the government interest, suggesting a heightened level of scrutiny.[198] In *Negron,* the court discussed the government's interest being "compelling," summoning a term associated with strict scrutiny.[199] In contrast, the *Nation* and *Wheeler* decisions regarding overseas marriages to foreign nationals stated that the regulations could not be "arbitrary" and must be "reasonable," suggesting rational basis review.[200]

In 1989, the military's highest court appeared to contrast the right to privacy with a First Amendment analysis, stating that "concerns of privacy apply differently to the military community because of the unique mission and need for internal discipline," citing a landmark decision limiting the first amendment in the military context.[201] Similarly, in the *Womack* decision involving "safe sex" orders, the military's highest court cited First Amendment jurisprudence to find the "safe sex" order constitutional.[202] Under such an approach, this conduct would not be constitutionally protected and not subject to any level of judicial scrutiny. The *Dumford* court discussed how the military met a "legitimate" government interest in a safe-sex order case, utilizing a term identified with minimum scrutiny.[203]

In 1997, the military's highest court indicated that when substantive due process privacy rights are at issue, "compelling interests may be identified . . . [and a government interest should] be narrowly tailored to advance the relevant interests" seemingly invoking strict scrutiny.[204] The Ninth Circuit similarly suggested that substantive due

196 *See* Peter Nicolas, *Fundamental Rights in a Post-Obergefell World*, 27 YALE J.L. & FEMINISM 331, 342 (2016); *Lawrence*, 539 U.S. at 571-72.

197 *See* United States v. Nation, 9 C.M.A. 724, 725, 727 (1958).

198 *See id.* at 727.

199 United States v. Negron, 28 M.J. 775, 778 (A.C.M.R. 1989) (citing Jacobson v. Massachusetts, 197 U.S. 11, 29 (1905)).

200 *See Nation*, 9 C.M.A. at 727; United States v. Wheeler, 12 C.M.A. 387, 387-88 (1961).

201 United States v. Womack, 29 M.J. 88, 91 (citing Parker v. Levy, 417 U.S. 733 (1974)).

202 *Id.*

203 *See* United States v. Dumford, 30 M.J. 137, 138 (C.M.A. 1990).

204 *See* United States v. Bygrave, 46 M.J. 491, 496 (C.A.A.F. 1997) (citing Roe v. Wade, 410 U.S. 113, 162-64 (1973)).

process rights in the military should not apply differently than in the civilian world and must survive strict scrutiny.[205] More recently, the military's highest court articulated the *Marcum* standard, requiring a military court to employ a three-pronged approach to *Lawrence* challenges.[206] In sum, a patchwork quilt of vague legal tests applies across a variety of potential privacy regulations.

B. *Rejecting* Marcum *as a Viable Standard*

As the law currently stands, although commanders are provided straight-forward case law on issues as opaque as orders not to indulge in alcohol, there exists no clear law on the regulation of a service member's private sexual life.[207] The *Marcum* court aptly summarized the jurisprudence surrounding substantive due process claims as a "fog of constitutional law."[208] When unique situations such as cross-dressing come to the attention of military courts, they are left to invent a military standard.[209]

It could be argued that the three-pronged *Marcum* test can be construed as a standard applicable to all substantive due process challenges in the military context.[210] However, the *Marcum* court's language was confined to an examination of Article 125.[211] Indeed, the *Marcum* court in no manner stated it wished to disturb the precedent of *Negron*, *Womack*, *Wheeler*, or any other area of substantive due

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[205] *See* Beller v. Middendorf, 632 F.2d 788, 810-12 (9th Cir. 1980), *overruling recognized by* Witt v. Dep't of Air Force, 527 F.3d 806 (9th Cir. 2008).

[206] United States v. Marcum, 60 M.J. 198, 206-07 (C.A.A.F. 2004).

[207] *See* United States v. Wilson, 12 C.M.A. 165, 166-67 (1961) (citing United States v. Wysong, 9 C.M.A. 249 (1958)), *overruled by* United States v. Blye, 37 M.J. 92 (C.M.A. 1993). *Compare*, *e.g.*, *id.*, (order "not to indulge in alcoholic beverages" held to be overbroad), *with Blye*, 37 M.J. at 94 (order "not to drink any alcoholic beverages" held valid under circumstances of the case). Other areas of the law where military courts provided guidance in obscure areas regarding the extent of a proper order include

> In *United States v Milldebrandt*, we unanimously held illegal an order requiring an accused to report his financial condition to his commanding officer while on leave. The basis for our decision in that case was the complete lack of connection between the order and any requirement of the military service. The language used by the Chief Judge in his concurring opinion is illuminating.

United States v. Wheeler, 12 C.M.A. 387, 391 (1961) (Ferguson, J., dissenting).

[208] *Marcum*, 60 M.J. at 206.

[209] *See* United States v. Guerrero, 33 M.J. 295, 298 (C.M.A. 1991).

[210] *See* United States v. Brown, NMCCA 200201647, 2005 CCA LEXIS 291, at *8-9 (N-M. Ct. Crim. App. Sept. 14, 2005) (applying the *Marcum* test to an adultery conviction challenge).

[211] *Marcum*, 60 M.J. at 204-07.

process as applied to the military.[212] The former chief judge of the United States Court of Appeals for the Armed Forces (CAAF) himself notes that *Marcum* addressed the issue "on the narrowest basis. . . ."[213] The *Marcum* standard also carries significant baggage with it, and it is not a precedent the military should seek to amplify. The *Marcum* standard found heterosexual sodomy constitutionally protected while allowing criminal cases to proceed for same-sex sodomy.[214] Regardless of one's view of substantive due process, such a result should befuddle any onlooker and does not portend favorably for the *Marcum* standard.

The *Marcum* decision is problematic for additional reasons. The second prong requires military courts to determine whether the conduct at issue was intended to be protected by the Supreme Court's due process line of cases.[215] Given the evolving nature of substantive due process and the unknown legal status of activities such as adultery, this prong is difficult to apply in practice and is subject to constant evolution. The third prong is also problematic in its breadth. Nebulously allowing military courts to carve out exceptions wherever additional factors from the military environment exist potentially removes such matters from the reach of Supreme Court precedents relevant to the facts of a military case.[216] This prong seemingly expands even further on the already broad concept of good order and discipline, making it difficult to imagine a privacy right not potentially impacted by military considerations. It is best to allow the *Marcum* test to remain a relic of history.

The bottom line is that a clear standard of review is necessary for military justice practitioners in light of the growth of substantive due process. This standard should be sufficiently flexible to apply to all potential claims raised within the military ranks over the course of years and decades. It must also establish a bright-line for commanders and Judge Advocate Generals (JAGs) to utilize in their daily considerations. This legal standard should come from military courts as an interpretation of constitutional standards, making it binding on the military.

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212 *See id.* at 204-08.

213 Cox, *supra* note 160, at 799-800.

214 *Marcum*, 60 M.J. at 206-07.

215 *Id.*

216 *Id.*

II. FORMULATING A MILITARY CONSTITUTIONAL STANDARD

The formulation of a military constitutional standard is ultimately an exercise in remedying the tension between the interests of individual rights and the need for good order and discipline. The Supreme Court and military courts have long recognized that service members "do not leave constitutional safeguards and judicial protection behind when they enter military service."[217] As a result, courts refuse to allow "our citizens in uniform [to be] stripped of basic rights simply because they have doffed their civilian clothes."[218] However, this freedom must be balanced against good order and discipline in the armed forces.[219] As Justice Jackson succinctly wrote: "judges are not given the task of running the Army."[220] Supreme Court jurisprudence broadly reflects the recognition that judicial deference to military necessities is of the utmost importance.[221]

The legal standard of review must fully appreciate the nature of the military's unique mission. Unlike other criminal jurisdictions, the primary purpose of the military justice system is not solely the service of justice and the community. Instead, the purposes of military justice are enumerated as: the promotion of justice, the maintenance of good order and discipline, the promotion of efficiency and effectiveness in the military, and ultimately to strengthen the national security of the United States.[222] Colonel Jeremy S. Weber comments in his work on military justice:

> It is one of the ironies of patriotism that a man who is called to the military service of his country may anticipate not only the possibility of giving up his life but also the certainty of giving up his liberties.
>
> Historically, the man in uniform has been viewed as the property of his commanding officer, to be fed, clothed, rewarded and punished as

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217 United States v. Mitchell, 39 M.J. 131, 135 (C.M.A. 1194) (quoting Weiss v. United States, 510 U.S. 163, 194 (1994) (Ginsburg, J., concurring). *See also e.g.,* United States v. Jacoby, 11 C.M.A. 428, 430-31 (1960) (stating courts will only refuse to grant service members those individual rights guaranteed by the Bill of Rights where they "are expressly or by necessary implication inapplicable . . .").

218 *E.g.,* Goldman v. Weinberger, 475 U.S. 503, 515 (1986).

219 *See* Parker v. Levy, 417 U.S. 733, 743 (1974) ("[T]he military is, by necessity, a specialized society. . . .").

220 Orloff v. Willoughby, 345 U.S. 83, 93 (1953).

221 *See* Hollywood, *supra* note 188, at 182.

222 MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. I, ¶ 3 (2016).

> the commander believed appropriate for the preparation for war and the waging of it. The serviceman has had to bend his personal life to what even such a libertarian as Chief Justice Warren tolerantly viewed as the "military necessity" for absolute discipline, order and conformity. If the serviceman does not bend, his commander—with the approval of the federal government—can break him at will.[223]

This truth must be counter-balanced against the reality that service members remain citizens with certain inalienable rights. Joining the military is not an act of abandoning all constitutional rights and protections. As Judge Quinn stated:

> [p]ersons in the military service are neither puppets nor robots. They are not subject to the willy-nilly push or pull of a capricious superior, at least as far as trial and punishment by court-martial is concerned. In that area they are human beings endowed with legal and personal rights which are not subject to military order.[224]

In the face of this tension, the military takes divergent approaches depending on the area of law at issue. One approach is to formulate a tailored standard, similar to the tailored standard that military courts utilize in the context of the Fourth Amendment expectation of privacy. As discussed in the next section, military courts carefully tailor military necessities around the individually held right to an expectation of privacy that is free from unreasonable searches and seizures. This standard may be helpful in formulating a standard of review because the Fourth Amendment right to privacy is arguably similar to the right to privacy under substantive due process.[225] Similar to substantive due process claims, the expectation of privacy is an individually held right concerning personal privacy and applicable to intimate activity outside the public view.[226]

In the alternative, courts sometimes recognize that the military must utilize a standard that amounts to a broad constitutional excep-

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223 Colonel Jeremy S. Weber, *Whatever Happened to Military Good Order and Discipline?,* 66 CLEV. ST. L. REV. 123, 129 (2017) (citing ROBERT SHERRILL, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC 1 (rev. ed. 1970)).

224 United States v. Wheeler, 12 C.M.A. 387, 391 (1961) (Ferguson, J., dissenting) (citing United States v. Milldebrant, 8 C.M.A. 635, 639 (1951) (Quinn, J., concurring)).

225 *E.g.,* Jacob Paul Goldstein, *From the Exclusionary Rule to a Constitutional Tort for Malicious Prosecutions*, 106 COLUM. L. REV. 643, 671 (2006).

226 United States v. Springer, 58 M.J. 164, 168 (C.A.A.F. 2003).

tion.[227] Under such a standard, the military is given broad latitude to criminalize conduct where it is a threat to good order and discipline.[228] The Supreme Court has endorsed such an approach for the military in the realm of free speech and the First Amendment.[229] Like the right to privacy, free speech is an individually held right that often impacts military discipline in a very public fashion.[230] The public perception of the military often hinges on the free speech or exercise of substantive due process rights by service members.[231] The following section will demonstrate how courts allow the military a broad constitutional exception in this area of law.

Both the military case law regarding the Fourth Amendment expectation of privacy and the First Amendment freedom of speech provide potential standards of review for substantive due process claims in the military.[232] Each is analogous in some manner to substantive due process rights.[233] But military law's approach towards the right to privacy and free speech offers two divergent approaches to a standard of review for the right to privacy in the military context.[234]

A. *Fourth Amendment Right–A Tailored Approach*

The Fourth Amendment applies to military members in much the same manner as civilians. Military members enjoy an expectation of privacy that can only be overcome by a duly authorized search warrant.[235] Questions of standing, probable cause, and whether a government actor accomplished the search "are generally resolved in the same manner" as civilian practice.[236] However, in some circumstances, military members may possess a lesser degree of privacy than

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227 *See* discussion *infra* Sections II.A, II.B.

228 *Id.*

229 *See* discussion *infra* Section II.B.

230 *Id.*

231 *Id. See also* Rachel E. Vanlandingham, Opinion, *When Military Justice is Injustice*, HILL (Dec. 20, 2018), https://thehill.com/blogs/congress-blog/judicial/422318-when-military-justice-is-injustice.

232 *See* discussion *infra* Sections II.A, II.B.

233 *Id.*

234 *Id.*

235 United States v. Astley-Teixera, ACM 35161, 2003 CCA LEXIS 246, at *16-17 (A.F. Ct. Crim. App. Oct. 21, 2003).

236 DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE 266 (6th ed. 2004) (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 311(a), 315; United States v. Parrillo, 34 M.J. 112 (C.M.A. 1992)).

their civilian counterparts.[237] Commanders also enjoy greater latitude to intrude into areas under their military control.[238]

United States v. McCarthy provides a helpful vignette on the application of the Fourth Amendment in the military context. In *McCarthy*, the appellant challenged his apprehension within the barracks as a violation of his Fourth Amendment rights.[239] The underlying issue was whether the appellant had an expectation of privacy in his barracks.[240] The Court of Military Appeals found that there is an expectation of privacy in a barracks room.[241] However, the court also reasoned that the Fourth Amendment still allows for reasonable intrusions and that "in some instances, an intrusion that might be unreasonable in a civilian context not only is reasonable but is necessary in a military context."[242] As a result, the court found the warrantless entry into military barracks to effectuate apprehension did not violate the Fourth Amendment.[243] Discussing the balance between liberty and military necessity, the court stated that "reasonable expectations of privacy within the military society will differ from those in the civilian society" due to the need for "good order and discipline."[244]

McCarthy should not be interpreted as establishing a hardline rule regarding an expectation of privacy in the military setting. Military courts balance all relevant factors in determining the expectation of privacy possessed by a service member in any given situation. For instance, while an airman has an expectation of privacy in his living quarters, that expectation of privacy is not complete, as the dormitory room is subject to cleanliness inspections by superiors.[245] Additionally, factors such as whether the living quarters are open bay, closed bay, or cohabitated by roommates may push the analysis in favor or against the service member's expectation of privacy.[246] In private housing, military courts find that an expectation of privacy exists com-

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237 United States v. McCarthy, 38 M.J. 398, 399 (C.M.A. 1993).

238 *E.g.,* United States v. Moore, 45 M.J. 652, 653 (A.F. Ct. Crim. App. 1997).

239 *McCarthy*, 38 M.J. at 400.

240 *Id.* at 401.

241 *Id.* at 402 (citing United States v. Middleton, 10 M.J. 123, 128 (C.M.A. 1981)).

242 *Id.* (quoting United States v. Thatcher, 28 M.J. 20, 22 (C.M.A. 1989)).

243 *Id*. at 403.

244 *E.g., id.* at 402.

245 United States v. Astley-Teixera, ACM 35161, 2003 CCA LEXIS 246, at *7 (A.F. Ct. Crim. App. Oct. 21, 2003).

246 *See* United States v. Thatcher, 28 M.J. 20, 24 n.3 (C.M.A. 1989); *McCarthy*, 38 M.J. at 403; *Astley-Teixera*, 2003 CCA LEXIS at *18-19.

pletely congruent with the expectation of privacy enjoyed by a civilian in their home.[247]

A substantial difference between civilian and military search and seizure is the authority of military commanders to perform inspections.[248] An inspection is an examination of persons or things under military control, "the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit . . . ."[249] Military courts adopted the term "health-and-welfare inspection" in describing lawful military inspections.[250] Where a commander's motivation in ordering an examination is for the purpose of good order and discipline, not law enforcement, no probable cause is required.[251] Because the military must be prepared to fight its nation's wars at a moment's notice, inspections to ensure readiness are a part of military life and "no serviceperson whose area is subject to the inspection may reasonably expect any privacy which will be protected from the inspection."[252] While a commander's right to inspect is inherent to their authority, when challenged in court the burden is on the government to demonstrate that an examination was accomplished for proper motives and is thus an inspection.[253]

In short, the analysis of whether an expectation of privacy exists in the military context is nuanced.[254] While military members have a lower expectation of privacy in many circumstances, the government must be cautious not to overreach. For instance, if the military attempted to simply post a sign on the entrance to the installation stating no expectation of privacy exists, military courts would intervene to protect the liberties of service members.[255] The protections of

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247 *See* United States v. Kaliski, 37 M.J. 105, 108-10 (C.M.A. 1993).

248 MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 313 (2012) [hereinafter MRE].

249 *Id.* at 313(b).

250 *E.g.,* United States v. Brown, 12 M.J. 420, 422-23 (C.M.A. 1982).

251 *See* United States v. Middleton, 10 M.J. 123, 127-28 (C.M.A. 1981).

252 *E.g., id.* at 128.

253 MRE, *supra* note 248, at 313(b); United States v. Jackson, 48 M.J. 292, 294 (C.A.A.F. 1998).

254 *See* United States v. Springer, 58 M.J. 164, 168 (2003) (holding accused expectation of privacy differs based on facts and circumstances of the case).

255 United States v. Astley-Teixera, ACM 35161, 2003 CCA LEXIS 246, at *20 (AFCCA A.F. Ct. Crim. App. Oct. 21, 2003) (reasoning government's "argument goes too far–everything on a military base is potentially subject to inspection . . . . Taken to its logical extreme, no one would have a reasonable expectation of privacy in anything on a military base") (citing MRE, *supra* note 248, at 313(b)).

the Fourth Amendment resemble a form of heightened scrutiny in the military, where the burden rests on the government to demonstrate that an inspection was not accomplished for improper motives.[256]

An analogous legal test to the Fourth Amendment standard would be well tailored so as not to infringe on the individually held constitutional right wherever possible. Military courts do recognize an individually held right to an expectation of privacy.[257] This right may only be annulled where a policy applies equally to all service members and the government can show that health and welfare are at issue.[258] In the substantive due process context, similar to an inspection under the Fourth Amendment, such a right could not be overcome by a general regulation or order unless the military could demonstrate that the policy is necessary for good order and discipline or the health and welfare of all service members.[259] An intrusion would only be permitted where the government can meet the burden in establishing that it has a significant interest in the conduct at issue.[260] Policies or orders that apply only to a select group of individuals (such as gays and lesbians, racial or ethnic groups) would be automatically suspect in the same manner as an inspection that targets contraband.[261]

B. *Free Speech Rights–A Broad Exception*

In contrast to Fourth Amendment protections, free speech rights apply to military members very differently than they do to civilians. In the civilian context, the courts zealously protect free speech, as even so-called "hate speech" is broadly protected by the First Amendment.[262] However, free speech of military members does not receive the same zealous protection.

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256 *See Jackson*, 48 M.J. at 297-99 (Gierke, J., dissenting); *see also* United States v. Mitchell, 39 M.J. 131, 135 (C.M.A. 1194) (quoting Weiss v. United States, 510 U.S. 163, 194 (1994) (Ginsburg, J., concurring); *see e.g.,* United States v. Jacoby, 11 C.M.A. 428, 430-31 (1960) (stating courts will only refuse to grant service members those individual rights guaranteed by the Bill of Rights where they "are expressly or by necessary implication inapplicable . . .").

257 *See Astley-Teixera*, 2003 CCA LEXIS 246, at *16-17.

258 *See e.g.,* United States v. Brown, 12 M.J. 420, 422-23 (C.M.A. 1982).

259 *See* United States v. Middleton, 10 M.J. 123, 127-28 (C.M.A. 1981); United States v. Jackson, 48 M.J. 292, 294 (C.A.A.F. 1998); MRE, *supra* note 248, at 313(b).

260 MRE, *supra* note 248, at 313(b); *Jackson*, 48 M.J. at 294.

261 *See* U.S. v. Daskam, 31 M.J. 77, 82 (C.M.A. 1990).

262 *See* Stephen R. McAllister, *Would Other Countries Protect the Phelpses' Funeral Picketing?*, 2010 CARDOZO L. REV. 408, 415 (2010).

Prior to the 1970s, military courts did not clearly delineate the extent of a service member's freedom of speech rights, offering that some protections existed but that they may be limited given the circumstances.[263] The Vietnam War era gave rise to a protest culture that spread into the military itself and tested the limit to which the military can sanction certain speech within its ranks.[264] In the face of free speech challenges during this time, military courts showed little patience for dissenting speech. *United States v. Priest* involved an active duty service member who was convicted of printing and distributing a publication intended to promote disloyalty and disaffection after he edited, published, and distributed an underground newsletter containing numerous provocative anti-American and anti-military statements.[265] The service member appealed his conviction, arguing that his actions were protected by the First Amendment.[266] The military's highest court found that "[t]he right of free speech . . . must be brought into balance with the paramount consideration of providing an effective fighting force . . . "[267] The military court ultimately rejected the appellant's plea, finding that speech which "undermine[s] the effectiveness of response to command . . . is constitutionally unprotected."[268] This decision was in line with previous military court decisions finding that speech contravening good order and discipline is not constitutionally protected.[269] Military courts' approaches to free speech challenges were as straight-forward as they were legally restrictive.[270]

Across both civilian and military society, unprotected speech is speech that is of so little value to society that the state may criminalize

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263 *See* United States v. Gray, 20 C.M.A. 63, 66 (1970); United States v. Vorhees, 4 C.M.A. 509, 521 (1954).

264 *See* United States v. Priest, 21 C.M.A. 564, 566-67 (1972).

265 *Id.* (newsletter included information on draft-dodging by fleeing to Canada and statements "BOMB AMERICA" and "We'll assa[ss]inate the President And take over the government").

266 *Id.* at 568-69.

267 *Id.* at 570.

268 *Id.*

269 *See* United States v. Gray, 20 C.M.A. 63, 66 (1970) ("[T]he public making of a statement disloyal to the United States, with the intent to promote disloyalty and disaffection among persons in the armed forces and under circumstances to the prejudice of good order and discipline, is not speech protected by the First Amendment . . . ."); United States v. Daniels, 19 C.M.A. 529, 536-39 (1970); United States v. Harvey, 19 C.M.A. 539, 543 (1970).

270 *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

it entirely and avoid any free speech challenge in court.[271] The Supreme Court has found that child pornography,[272] libel,[273] and obscenity[274] are unprotected categories of speech. However, military courts have effectively attempted to create a new form of unprotected speech: speech made by military members that threaten good order and discipline.

In 1974, the Supreme Court stepped in to settle the matter, issuing the authoritative decision on free speech limits in the military.[275] The case involved Captain Howard Levy, a physician assigned to Fort Jackson where he was charged with training Special Forces.[276] Captain Levy did not properly tend to his duties due to a claim that his medical ethics did not allow him to support the Vietnam War.[277] He also made numerous incendiary statements to enlisted personnel at his post, including:

> I would refuse to go to Viet Nam if ordered to do so. I don't see why any colored soldier would go to Viet Nam: they should refuse to go . . . Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children.[278]

As a result of his speech, Captain Levy was charged with disobeying an order and conduct unbecoming of an officer and a gentleman.[279] His defense rested on the First Amendment, arguing that the military's actions deprived him of his freedom of speech rights.[280] His appeal initially found success in the appellate system as the Third Circuit ultimately found for Captain Levy, concluding that the UCMJ articles under which he was charged were void for vagueness on First Amendment grounds.[281]

The Supreme Court heard the case and ultimately provided a *tour de force* of constitutional analysis as applied to military life. The court

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271 *Id.*
272 New York v. Ferber, 458 U.S. 747, 764 (1982).
273 New York Times, Co. v. Sullivan, 376 U.S. 254, 299-300 (1964).
274 Miller v. California, 413 U.S. 15, 21 (1973).
275 Parker v. Levy, 417 U.S. 733, 740-42 (1974).
276 *Id.* at 735-36.
277 *Id.* at 736.
278 *Id.* at 737.
279 *Id.* at 737-38.
280 *Id.* at 741-42.
281 *Parker*, 417 U.S. at 740.

began with an examination of its historical deference to the military, citing the *Grimley* decision that "[a]n army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the solider."[282] The court focused on the military's status as a "society apart from civilian society" that is governed by its own unique rules.[283] The court also examined the historical roots of the military's sanctions on speech that threatens good order and discipline, beginning with the British antecedents to an American military, examining the Continental Congress' adoption of British military law, and Supreme Court decisions upholding the military's authority to punish conduct under generalized articles.[284] The court then pivoted to a recognition of the differences between the military and civilian communities, noting that the military has long criminalized activity that is protected in civilian life.[285]

Ultimately the court determined that Captain Levy's right to freedom of speech was not unconstitutionally abridged by the military.[286] In coming down squarely on the side of the military's ability to regulate speech that threatened good order and discipline, the court appeared to endorse a standard of incredible deference to the needs of good order and discipline.[287] Writing for the majority, Justice Rehnquist wrote:

> While members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it . . . "Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected."[288]

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282 *Id.* at 744 (citing In re Grimley, 137 U.S. 147, 153 (1890)).

283 *Id.*

284 *Id.* at 746-47.

285 *Id.* at 749.

286 *Id.* at 761.

287 *See id.* at 748-49, 761.

288 *Parker*, 417 U.S. at 758-59 (citing United States v. Priest, 21 C.M.A. 564, 570 (1972)).

The Supreme Court, in quoting a military court decision finding speech that threatens good order and discipline to be unprotected, appears to endorse the most lenient legal standard when reviewing such cases. Unprotected speech faces an even lower legal hurdle than minimum scrutiny.[289] If speech is unprotected, the government need not even offer a rationale for criminal regulation.[290] Where speech impacts good order and discipline, the Supreme Court seemed to give the military *carte blanche* to regulate.[291]

An analogous test to the court's First Amendment jurisprudence in the context of substantive due process would provide a broad exception for the military. Conduct that demonstrably negatively impacts good order and discipline would be considered constitutionally unprotected, meaning regulation would be permissible. Where courts determine that conduct protected by substantive due process undermines military efficiency, criminalization is allowable. This approach shows significant deference to military decision-making.

III. PROPOSED REVIEW STANDARD – ENDORSING A BROAD EXCEPTION

A test resembling the military jurisprudence of the Fourth Amendment would ultimately prove unworkable for military commanders and military justice practitioners. The Fourth Amendment is a well-developed area of the law allowing military courts to fashion common sense military standards that build on existing civilian case law. In contrast, substantive due process privacy jurisprudence is significantly under-developed in the civilian courts. This will leave the military grasping unsuccessfully for workable standards. The legal realm of substantive due process evolves at such a pace that a nuanced approach, resembling the expectation of privacy legal tests, would prove unworkable. Additionally, the complications injected into a more layered test may allow hidden prejudices room to grow. The *Marcum* test's three prong approach allowed considerable nuance in judicial decision-making, ultimately producing puzzling and discriminatory case law.

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289 *See id.* at 761.

290 *See id.*

291 *Id.*

The most fitting standard of review for the military is one that focuses on the nexus between the conduct at issue and good order and discipline. Such a standard first examines whether an order or regulation has a meaningful nexus to good order and discipline. If a nexus is sufficiently established by the government, the conduct at issue is considered constitutionally unprotected. The former Chief Judge of the CAAF endorsed a similar approach in a discussion regarding adultery and fornication in the armed forces, writing:

> "In my view, the only thing left to debate in a given case is whether the particular conduct is prejudicial to good order and discipline." While it is true that the military is a separate and distinct society, this is no justification for punishing military members for conduct modern society does not deem criminal unless that conduct is indeed disruptive of the needs to maintain good order and discipline in that society.[292]

A potential criticism of this approach is that it grants excessive latitude to military authorities wherever they can articulate a real or imagined impact on good order and discipline. While this concern is valid, the straight-forward nature of this proposed scheme should actually help to avoid concerns of discrimination. Under this test, ordering a pilot not to bring the recently divorced ex-wife of a fellow pilot to a unit function stands on more solid legal ground than an order or regulation banning consensual same-sex sodomy. The beauty of an easily applied constitutional test is that the proverbial "apples-to-apples" comparison can be made by the courts with ease. This test is consistent with the already existing approach of military courts that "[g]eneral regulations which do not offend against the Constitution, an act of Congress, or the lawful order of a superior are lawful, if 'reasonably necessary to safeguard and protect the morale, discipline and usefulness of the members of a command and . . . directly connected with the maintenance of good order in the services.' "[293]

Ultimately the courts must zealously guard the equal rights of service members under this test. The nexus between the conduct at issue and good order and discipline cannot be fanciful or imaginative

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[292] Cox, *supra* note 160, at 803 (quoting United States v. Boyett, 42 M.J. 150, 156 (C.A.A.F. 1995) (Cox, J., concurring)).

[293] *E.g.,* United States v. Nation, 9 C.M.A. 724, 726 (1958) (citing United States v Martin, 1 C.M.A. 674 (1952); United States v. Milldebrandt, 8 C.M.A. 635 (1958)).

but instead the subject actions established on the record must pose a true threat to good order and discipline. This standard does present a challenge for the courts in how to determine whether behavior is truly a threat to good order and discipline while working in a judicial vacuum. This has historically been an issue for military courts. A leading Air Force scholar notes that "the military's use of the phrase has primarily focused on opposition to proposed personnel and social issues and that senior leaders' definitions of the term are disparate and generalized."[294] Good order and discipline is an amorphous principle that either side of a debate can leverage in hypotheticals to support a given position. Colonel Jeremy Weber notes that:

> [C]riticisms assert that the military's good order and discipline language reflects not a core principle of military effectiveness but a rhetorical smokescreen to reflect its opposition to social and personnel policy changes and proposed military justice reforms. They observe that the military opposed the opening of military opportunities to racial minorities, women and homosexuals, along with military justice reforms. Each time, it based its opposition on good order and discipline-based concerns. Repeatedly, critics note, the objections were overruled, and ultimately the changes seemingly had little to no tangible impact on good order and discipline.[295]

The criticism of the term is legitimate. The military is a rigid society that too often shouts down proposed changes as a knee-jerk reaction. Any opposition to a new idea, whether legitimate or not, can easily be projected onto the principle of good order and discipline. Yet criticism of the military's use of the principle can also be overstated. While critics note that the military survived policy changes it predicted would negatively impact good order and discipline,[296] being able to "survive" is a far cry from good order and discipline not suffer-

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294 Colonel Jeremy S. Weber, Research Report, *The Disorderly, Undisciplined State of the "Good Order and Discipline" Term*, AIR WAR COLLEGE, at iv (2016).

295 *Id.* at 3.

296 Steve Chapman, *Military Brass Play Same Old Song*, CHI. TRIB. (July 25, 2013), https://www.chicagotribune.com/news/ct-xpm-2013-07-25-ct-oped-0725-chapman-20130725-story.html. Note that the author in no manner takes a position in this paper on the manner in which prior policy changes did or did not impact good order and discipline. Such a study is well beyond the purview of this piece.

ing.[297] The military prides itself on accomplishing the mission regardless of the circumstances. It is conceivable that policies may negatively impact good order and discipline yet the military will still find a way to function effectively. Put in a sports analogy, Michael Jordan may win the game even though he is playing with the flu; that does not mean the flu did not impact his performance negatively. What is clear is that military courts can no longer give the military unending leeway in applying the term good order and discipline.[298]

Ultimately, courts are often called on to quantify the unquantifiable, to draw lines on a slippery slope, and measure impacts without metrics. This standard would be no different than others already employed by courts, such as the reasonable person standard. The experience of service members and veterans on the record as provided by the government should support claims of a valid concern for good order and discipline. Needless to say, the nexus between good order and discipline and the claimed substantive due process right cannot be fanciful or imaginative, but instead must be established as a true threat to good order and discipline that an order or regulation seeks to halt. Serious judicial considerations supported on the record are a must for a judicial standard to survive the test of time.

Such a standard is also rooted in constitutional intent and history, a necessary part of any standard of review. A genuine challenge in formulating an appropriate standard of review for the military and substantive due process is the dearth of relevant historical records.

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297 The author does note that many of the military's prior practices on issues of equality are indefensible. However, that does not mean good order and discipline concerns must always be a smokescreen for discrimination.

298 *See* United States v. Groomes, ACM 38360, 2014 CCA LEXIS 752 (A.F. Ct. Crim. App. Oct. 2, 2014). Military's highest court heard a colorful case that illustrates the seemingly unending reach of the term of good order and discipline. The facts before the court involved an Air Force Staff Sergeant who conspired with his wife to shoot her in the leg so she could avoid a deployment and then tell the police that a home intruder inflicted the wound. *Id.* at *2. One of the charges the appellant faced at trial was obstruction of justice under Article 134, a charge requiring the government prove the misconduct resulted in injury to good order and discipline. *Id.* at *4. The court found that the appellant's lying to civilian police officers impacted military good order and discipline because he should have foreseen that the military would open an investigation and likely rely on the statements given to civilian law enforcement. *Id.* *13-14. *See also* United States v. Mead, 63 M.J. 724, 728 (A.F. Ct. Crim. App. 2006) ("Article 134 . . . does not require direct injury."); United States v. Greene, ACMR 9101456, 1992 CMR LEXIS 194, at *4 (A.C.M.R. Feb. 11, 1992) (holding the accused need not admit the conduct was prejudicial or service discrediting for a finding of guilt); United States v. Velazquez, NMCCA 200602421, 2007 WL 2340612, at *6 (N-M Ct. Crim. App. Aug. 16, 2007) (finding no requirement to actually prove civilians thought less of military due to the misconduct, only that they were aware).

Modern due process rights are seemingly built on admittedly difficult to quantify notions such as an "emerging awareness [of] liberty . . . pertaining to sex . . ."[299] and an "understanding of how constitutional imperatives define a liberty . . . in our own era."[300] Thus, there can be no historical inquiry of how the framers understood privacy right to apply to service members. This robs constitutional scholars of a valuable exercise oftentimes employed by courts in determining how rights enjoyed by civilians apply to the military, examining the interplay between such records as the Articles of War and the drafting of the U.S. Constitution.[301]

This standard is also consistent with the historical record. Although the historical record is mostly devoid of any commentary on the interplay between the right to sexual privacy and the military, it speaks loudly on the analogous issue of the right to free speech in the military. In *United States v. Howe*, the military's highest court highlighted the historical fact that certain rights enshrined in our Constitution were not protected by the military at the time of the Constitution's readoption and reenaction.[302] Case in point, Congress kept and readopted Article 88, criminalizing contemptuous speech, while the same Congress enshrined the First Amendment in the Constitution.[303] Congress was not creating a contradictory legal construct, they clearly understood that actions affecting good order and discipline could be criminalized in the military in a manner that could not survive judicial scrutiny in the civilian world.[304] The proposed constitutional standard is but an offshoot of this historical root.

CONCLUSION

Imagine that your boss needed to give you permission to get married. Envision a world wherein your employer's job sometimes involved telling you who you could sleep with. Consider a life in which a supervisor is charged with giving you a written directive con-

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299 Lawrence v. Texas, 539 U.S. 558, 571-72 (2003) (citing Cnty. of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy & O'Connor, JJ., concurring).

300 Obergefell v. Hodges, 576 U.S. 644, 671-72 (2015).

301 *See* United States v. Howe, 17 C.M.A. 165, 170 (1967), *abrogation recognized by* United States v. Frelix-Vann, 55 M.J. 329 (C.A.A.F. 2001).

302 *Id.* at 174.

303 *Id.*

304 *Id.*

cerning your permissible modes of sexual intimacy. Finally, picture a reality wherein your superior has no clear guidance on the legal limits of these orders. Military and federal courts should articulate a workable standard for substantive due process claims within the military. This standard should be a broad constitutional exception when an order or regulation has a sufficient nexus to good order and discipline. Such a standard provides clear and understandable guidance for military commanders rather than the muddled jurisprudence existing today.