

Gentlemen Under Fire: The U.S. Military and “Conduct Unbecoming”

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Introduction

When it comes to military crime, the officer corps of the United States military occupies a space both protected and vulnerable. Military justice itself is “officers’ country,”¹ a venue in which officers not only control criminal investigation and

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1. “Officers’ country” technically refers to places on a ship where enlisted personnel are not allowed. See Kristin K. Heimark, *Sexual Harassment in the United States Navy: A New Pair of Glasses*, 44 NAVAL L. REV. 223, 235 n.39 (1997).

prosecution but also serve as judge and jury.² Yet officers themselves are rarely court-martialed.³ Many soldiers believe that officers are insulated against prosecution for wrongdoing by the political expediency of pushing blame to the lowest possible level, where it does not reflect as poorly on the judgment of military and civilian leaders.⁴ Others attribute the low number of officer courts-martial to the generally good behavior of officers⁵ or to the legal and political barriers to punishing individuals for acts that they did not themselves commit, notwithstanding the doctrine of command responsibility, which makes officers liable for crimes that they knew, or should have known, were being committed under their command.⁶ The privilege of rank, of course, does not protect all officers equally or absolutely, for lesser officers risk

2. See Uniform Code of Military Justice (UCMJ), art. 15, 10 U.S.C. § 825(a) (2000). Enlisted persons can, however, serve on a court-martial panel (the correlate of a civilian jury) if the accused is an enlistee and personally requests enlisted members. See § 825(c).

3. See, e.g., ELIZABETH LUTES HILLMAN, *DEFENDING AMERICA: MILITARY CULTURE AND THE COLD WAR COURT-MARTIAL* 109–14 (2005) (discussing reasons why officers have rarely been court-martialed); John Sifton, *United States Military and Central Intelligence Agency Personnel Abroad: Plugging the Prosecutorial Gaps*, 43 HARV. J. ON LEGIS. 487, 490 (2006) (noting that very few officers have been court-martialed and that the cases in which officers have been court-martialed have involved officers' direct participation in crimes). For what may be the exception that proves the rule, see Chelsea J. Carter, *2 Marines to Face Courts-Martial in Haditha Killings*, WASH. POST, Oct. 20, 2007, at A2 (reporting the pending court-martial of Lt. Col. Jeffrey R. Chessani for dereliction and disobedience).

4. See, e.g., Jonathan Peterson, *Higher Officials Unlikely to Be Tried*, L.A. TIMES, Jan. 16, 2005, at A24 (describing the difficulty of prosecuting high-ranking officials in the Abu Ghraib scandal); Sam Provance, *The American Ghosts of Abu Ghraib*, CONSORTIUMNEWS (Mar. 27, 2007), <http://www.consortiumnews.com/2007/032607b.html> (last visited Nov. 1, 2007) (reporting that the Pentagon punished an officer who testified about crimes at Abu Ghraib and arguing that the Pentagon blamed only low-level personnel). See generally GORDON A. GINSBURG, *THE LAVELLE CASE: CRISIS IN INTEGRITY* (1974) (on file with author) (describing the impact of politics on the investigation of an Army general for his role in the unauthorized bombing of North Vietnam); Keith E. Nelson, *Conduct Expected of an Officer and a Gentleman: Ambiguity*, 12 A.F. JAG L. REV. 124, 124 (1970) ("The disposition of cases involving officer misconduct has been a continuing problem in the Armed Forces of the United States.").

5. See, e.g., ROBERT BUZZANO, *MASTERS OF WAR: MILITARY DISSENT AND POLITICS IN THE VIETNAM ERA* (1996) (asserting that the armed forces are full of politically savvy officers); HILLMAN, *supra* note 3, at 114 (discussing the ability of high-ranking officers to work within the system to avoid court-martial).

6. See *In re Yamashita*, 327 U.S. 1, 15 (1946) (holding that officers bear some responsibility for acts of their subordinates); U.S. ARMY, FIELD MANUAL 27-10: THE LAW OF LAND WARFARE 501 (1956); Maj. Michael E. Smidt, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155 (2000) (discussing the doctrine of command responsibility).

being sacrificed for those higher up the chain of command.⁷ Officers who escape court-martial can be punished through sub-criminal measures, such as administrative sanction, demotion, or career-derailing reassignments.⁸ But the perception that high-ranking officers are rarely disciplined and almost never criminally prosecuted is so common partly because it is true.⁹ Although some of the best-known courts-martial in United States history involve officers,¹⁰ very few officers have faced court-martial, even when soldiers under their command have been tried and convicted for offenses related to their military duties.¹¹

The aftermath of a recent high-profile military scandal, the abuse of prisoners at Abu Ghraib in 2003, provides an example of the disparity of punishment between officers and enlistees. After exhaustive investigations, public fallout, and internal recriminations, eleven enlistees were court-martialed, convicted, and sentenced for their conduct at Abu Ghraib.¹² Their sentences

7. See, e.g., Dexter Filkins, *What the War Did to Colonel Sassaman*, N.Y. TIMES, Oct. 23, 2005, (Magazine), at 52 (describing the fate of Nathan Sassaman, another much-celebrated Army lieutenant colonel, who was reprimanded by the Army—but not court-martialed—after his men forced two Iraqis who had allegedly violated curfew to jump into a river as punishment); Scott Gold, *5 California Guardsmen Face Charges of Abusing Iraqis*, L.A. TIMES, Aug. 23, 2005, at A1 (explaining that five soldiers, three of whom were sergeants, faced courts-martial for abusing Iraqi detainees while their commander Lt. Col. Patrick Frey was simply suspended from duty).

8. See, e.g., HILLMAN, *supra* note 3, at 114 (noting the availability of administrative discharges and nonjudicial punishment for officers). In the past, officers could face a special punishment that delayed their promotions. See Eugene R. Fidell & Jay M. Fidell, *Loss of Numbers*, 48 NAVAL L. REV. 194 (2001) (assessing the impact of the abolition of “loss of numbers,” an officers-only punishment in the sea services that was eliminated in 1999, on the use of the general court-martial in cases involving naval officers).

9. HILLMAN *supra* note 3, at 109–14.

10. These include the 1865 trial of Capt. Henry Wirz for his conduct as commander of the notorious Civil War prison in Andersonville, Georgia, the 1925 trial of Gen. Billy Mitchell for insubordination for his stubborn advocacy of air power, and the 1970 trial of Army Lt. William L. Calley, Jr. for his role in the My Lai massacre in Vietnam. See, e.g., ALAN M. DERSHOWITZ, *AMERICA ON TRIAL: INSIDE THE LEGAL BATTLES THAT TRANSFORMED THE NATION* (2004) (discussing the courts-martial of Wirz, Mitchell, and Calley in a survey of great American trials).

11. See, e.g., HILLMAN, *supra* note 3, at 109–27 (analyzing the courts-martial of officers); Sifton, *supra* note 3, at 490 (describing the failure to hold military officers accountable in cases of misconduct overseas).

12. See Michael Sung, *US Army Officer to be Court-Martialed for Role in Abu Ghraib Abuses*, JURIST, Jan. 27, 2007, <http://jurist.law.pitt.edu/paperchase/2007/01/us-army-officer-to-be-court-martialed.php> (last visited Oct. 28, 2007); see also ONE OF THE GUYS: WOMEN AS AGGRESSORS AND TORTURERS (Tara McKelvey ed., 2007) (collecting essays analyzing the role of England and others in the abuses); Diane Marie Amann, *Abu Ghraib*, 153 U. PA. L. REV. 2085 (2005) (arguing that the legal context in which the Executive Branch had unprecedented discretion led to the events at Abu Ghraib); James W. Smith III, *A Few Good*

ranged from a reduction in rank and the loss of one-half of one month's pay to ten years in prison.¹³ As for the officers who ran the Abu Ghraib prison, only one, the lieutenant colonel who directed the interrogation center, was charged with crimes relating to the abuse and subsequent cover-up; he was cleared of all charges but for one count of willfully disobeying an order not to discuss the investigation.¹⁴ A few officers were reprimanded and administratively punished for their failures of leadership, including then-Brig. Gen. Janis Karpinski, who lost her star, and Col. Thomas Pappas, who was relieved of command, reprimanded, and fined.¹⁵ Not a single officer, however, was court-martialed for failing to stop the abuse of prisoners.¹⁶ In fact, Maj. Gen. Antonio M. Taguba, the Army investigating officer whose report revealed

Scapegoats: The Abu Ghraib Courts-Martial and the Failure of the Military Justice System, 27 WHITTIER L. REV. 671 (2006) (decrying the disproportionate punishment of low-ranking service members for the events at Abu Ghraib).

13. See, e.g., Associated Press, *Abu Ghraib Colonel Relieved of Command*, FOXNEWS.com, May 12, 2005, available at <http://www.foxnews.com/story/0,2933,156400,00.html>; Associated Press, *Fast Facts: Abu Ghraib Convictions*, FOXNEWS.com, Sept. 27, 2005, available at <http://www.foxnews.com/story/0,2933,170603,00.html>.

14. See, e.g., Associated Press, *Judge Won't Toss Abu Ghraib Charges*, ARMY TIMES, Feb. 9, 2007 (reporting the pending court-martial of Army Lt. Col. Steven L. Jordan, director of the interrogation center at Abu Ghraib during the abuses, for eight counts of cruelty and maltreatment of detainees, disobeying a superior officer, dereliction of duty, and making false statements); Josh White, *Abu Ghraib Officer Cleared of Detainee Abuses*, WASH. POST, Aug. 29, 2007, at A5 (reporting the court-martial verdict); Josh White, *Reprimand Is Sentence for Officer at Abu Ghraib*, WASH. POST, Aug. 30, 2007, at A3 (reporting the reprimand of Lieutenant Colonel Jordan).

15. See Associated Press, *Abu Ghraib Colonel Relieved of Command*, FOXNEWS.com, May 12, 2005, available at <http://www.foxnews.com/story/0,2933,156400,00.html>. Technically, Karpinski's promotion to brigadier general was rescinded by presidential action. In May 2005, some questioned the reasons for Karpinski's demotion to colonel, pointing out that the official reason for the action involved dereliction of duty, material misrepresentation, failure to obey an order, and an unproven allegation of shoplifting in 2002, rather than any explicit wrongdoing during her oversight of the Abu Ghraib prison. See Leon Worden, *Karpinski: Busted Back for Abu Ghraib Right? Wrong*, THE SIGNAL (Santa Clarita, Cal.), May 5, 2005, available at <http://www.scvhistory.com/scvhistory/signal/iraq/sg050705-iraq.htm>; see also JANIS KARPINSKI, ONE WOMAN'S ARMY: THE COMMANDING GENERAL OF ABU GHRAIB TELLS HER STORY (2005) (describing Karpinski's experience at Abu Ghraib and the ensuing investigation into her behavior). Note that two of the most senior officers who oversaw interrogation of detainees in Iraq were in line for promotion after the scandal. See Eric Schmitt, *4 Top Officers Cleared by Army in Prison Abuses*, N.Y. TIMES, Apr. 23, 2005, at A1 (noting that of the five top officers overseeing prison policies in Iraq, only Karpinski was punished); Eric Schmitt, *Army Moves to Advance 2 Linked to Iraq*, N.Y. TIMES, June 29, 2005, at A19.

16. See Sifton, *supra* note 3, at 490; see also Maj. Martin N. White, *Charging War Crimes: A Primer for the Practitioner*, ARMY LAW., Feb. 2006, at 6-7 (noting that "conduct unbecoming" is available to prosecute war crimes).

the extent of military crimes at Abu Ghraib, damaged his own military career by completing such a candid, hard-hitting report.¹⁷

The officers responsible for Abu Ghraib, however, could have been called to account before military courts under a statute that imposes criminal liability only upon officers. That statute, the “conduct unbecoming an officer and a gentleman” clause of the Uniform Code of Military Justice (“UCMJ”), articulates a crime that only officers can commit.¹⁸ In common parlance, “conduct unbecoming” refers to almost any misconduct by an official.¹⁹ But in this Article, “conduct unbecoming an officer and a gentleman” means something far more specific. It describes a crime long prosecuted under military law and preserved by twentieth century legal reform.²⁰ The military is not the only institution to use the phrase “conduct unbecoming” in a code of behavior; lawyers, police officers, and others rely on similar language to set standards for professional conduct.²¹ The armed forces are unique, however:

17. See Seymour Hersh, *The General's Report*, NEW YORKER, June 25, 2007, at 58, 58–69 (noting that Taguba was transferred to a less desirable assignment after testifying about abuses at Abu Ghraib).

18. See Uniform Code of Military Justice (UCMJ), art. 133, 10 U.S.C. § 933 (2000) (“Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.”). Enlisted servicemembers are subject to criminal censure under a comparably broad “general article” of military law, but they cannot commit “conduct unbecoming” offenses. See Uniform Code of Military Justice (UCMJ), art. 134, 10 U.S.C. § 934 (2000) (specifying that “all disorders and neglects to the prejudice of good order and discipline” and “all conduct of a nature to bring discredit upon the armed forces” shall be punishable at court-martial); HOMER E. MOYER, JUSTICE AND THE MILITARY, §§ 5-240 to 5-245 (1972) (describing the broad range of offenses prosecuted under the general article).

19. See, e.g., Alex Kozinski, *Conduct Unbecoming*, 108 YALE L.J. 835 (1999) (discussing the implications of a judicial clerk breaking with the traditional obligation to protect information disclosed within judges’ chambers by writing a book); Robert Williams, *Conduct Unbecoming: The Regulation of Legislative Ethics in Britain and the United States*, 55 PARLIAMENTARY AFFAIRS 611 (2002) (exploring how legislators police professional ethics); Al Baker, *Judge Censured for Conduct Unbecoming His Authority*, N.Y. TIMES, Dec. 11, 2004, at B5 (reporting the discipline of a judge accused of abusing his power in the court room); Richard L. Berke, *Conduct Unbecoming*, N.Y. TIMES, Sept. 20, 1998, (Book Review), at 11 (reviewing a book critical of President Clinton’s conduct); Susan Ferrechio, *Conduct Unbecoming in the House?*, 63 CONG. Q. WKLY. REP. 660, 660 (2005) (describing a dispute over the procedural rules for the U.S. House Committee on Standards of Official Conduct); Roger Franklin, *Office Romances: Conduct Unbecoming?*, BUS. WK. ONLINE, Feb. 13, 2002, http://www.businessweek.com/smallbiz/content/feb2002/sb20020213_7906.htm (last visited Nov. 1, 2007) (reporting on a survey conducted to measure perceptions of office romances); David Halperin, Op-Ed., *Conduct Unbecoming*, N.Y. TIMES, Oct. 12, 1996, at A23 (criticizing the inappropriate campaign tactics of a government official).

20. See Nelson, *supra* note 4, at 126–30.

21. See, e.g., Samuel J. Levine, *Taking Ethics Codes Seriously: Broad Ethics Provisions and Unenumerated Ethical Obligations in a Comparative Hermeneutic*

violating the rule in this context can trigger criminal prosecution.²² Because the history and current use of this crime reveal how officers can be held accountable for a wide range of misconduct,²³ this Article focuses on the meaning and prosecution of “conduct unbecoming an officer and a gentleman.” It uses this special subset of military crime to expose the protected yet vulnerable status of officers under military justice.

The first American “conduct unbecoming” statute appeared in the Massachusetts Articles of War of 1775,²⁴ and the crime remains a part of the UCMJ today.²⁵ Despite its archaic ring, “conduct unbecoming an officer and a gentleman” is an active part of military law. The clause can punish almost any misbehaving officer—from an outspoken critic of war (as in the case of Army Lt. Ehren Watada, court-martialed for conduct unbecoming in 2007)²⁶ to a brutal abuser of military prisoners (as in the case of a Navy SEAL accused of maltreatment of prisoners of war in 2004).²⁷ Its current version reads: “Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may

Framework, 77 TUL. L. REV. 527, 551 (2003) (analyzing the ethics codes of the legal profession, including “conduct unbecoming a member of the bar of the court”); Stephen D. Sugarman, “Lifestyle” Discrimination in Employment, 24 BERKELEY J. EMP. & LAB. L. 377 (2003) (detailing the role of behavioral codes in the employment context); Michael A. Woronoff, *Public Employees or Private Citizens: The Off-Duty Sexual Activities of Police Officers and the Constitutional Right of Privacy*, 18 U. MICH. J.L. REFORM, 195, 195 n.1 (1984) (detailing the existence of “conduct unbecoming” standards in the codes of conduct for police officers); J. Jordan-Lake, *Conduct Unbecoming a Preacher*, CHRISTIANITY TODAY, Feb. 10, 1992, at 26 (reporting on the frequency of sexual misconduct among the clergy).

22. See § 933.

23. See, e.g., MOYER, *supra* note 18, at §§ 5-240 to 5-245.

24. See MASS. ARTICLES OF WAR, art. 46 (Apr. 5, 1775), reprinted in WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 951 (2d ed. 1920).

25. See § 933.

26. See Bob Egelko, *Officer to Fight Against Retrial: Watada’s Attorney Cites Double Jeopardy; Legal Expert Disagrees*, S.F. CHRON., Feb. 9, 2007, at A4 (detailing the status of Watada’s first court-martial, which ended in a mistrial); *Iraq Objector Obtains Delay of Court-Martial*, WASH. POST, Oct. 7, 2007, at A20 (reporting another delay in the Army’s effort to re-try Watada, this time by a federal judge, on grounds of potential double jeopardy).

27. See *Doe v. Commander*, No. 220401530, 2004 WL 2896928 (N-M. Ct. Crim. App. Dec. 15, 2004) (considering charges of conduct unbecoming in a case of alleged maltreatment of prisoners of war); see also KELLY FLINN, *PROUD TO BE* (1997) (describing the events that led to charges of conduct unbecoming being filed against her); HOWARD MARGOLIAN, *CONDUCT UNBECOMING: THE STORY OF THE MURDER OF CANADIAN PRISONERS OF WAR IN NORMANDY* (1998) (relating the war crimes and subsequent prosecutions of soldiers for the casual killing of prisoners in Normandy during World War II); David Cowles, *Notebook*, NEW REPUBLIC, Apr. 18, 2005, at 8 (criticizing Lt. Gen. Ricardo Sanchez for approving brutal interrogation techniques for use in Iraqi prisons).

direct.”²⁸

The strategic vagueness of “conduct unbecoming,” a vagueness that has intensified rather than diminished over time, makes this peculiar statute a telling register of social conflict, cultural change, and military evolution. The history of “conduct unbecoming an officer and a gentleman” helps to illuminate the military imperatives and institutional cultures that have led to criminal prosecution of a few officers, but have allowed many more to avoid criminal sanction for errors or misdeeds.²⁹ Because of its pliable terms and frank embrace of class privilege,³⁰ the U.S. military’s conduct unbecoming clause has helped to enforce a status regime that separates officers from civilians, as well as from enlistees, even as the line of demarcation between those categories has blurred.³¹ Just as the history of manners and morals regulation reveals efforts to protect status and preserve social and cultural exclusivity,³² the history of this military crime reveals how criminal law patrols boundaries of class and privilege. Courts-martial for other crimes have not always centered on cultural assumptions about class or on other subjective categories,

28. § 933.

29. See *infra* Parts I.B, II.B, III.B, and IV.B.

30. See MOYER, *supra* note 18, at §§ 5-240 to 5-245.

31. Note that separating officers from the rest of the military does not capture the complexity of the military’s finely graduated hierarchy, which includes officers of varying levels as well as warrant and non-commissioned officers. For a primer, see Judith Hicks Stiehm, *Just the Facts, Ma’am, in IT’S OUR MILITARY TOO! WOMEN AND THE U.S. MILITARY* 60, 60–70 (Judith Hicks Stiehm ed., 1996) (explaining military hierarchies). Junior officers (those who occupy one of the three lowest grades of officers) have been the most frequent persons charged with conduct unbecoming, but those of higher rank have also occasionally been charged, as have warrant officers. See, e.g., *United States v. Tynes*, 58 M.J. 704 (A. Ct. Crim. App. 2003) (involving an Army warrant officer charged with conduct unbecoming for child sexual abuse and use of internet pornography), *aff’d in part, rev’d in part*, 60 M.J. 329 (C.A.A.F. 2004) (reversing guilty verdict as to conviction of knowing receipt and knowing possession of child pornography, but upholding the conviction of conduct unbecoming); *United States v. Carter*, 20 C.M.R. 501 (N.B.R. 1955) (involving a Navy warrant officer charged with conduct unbecoming for being drunk and disrespectful). See generally Jack M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2316 (1997) (stressing the importance of “the existence and the perpetuation of unjust status hierarchies” in law and culture); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997) (describing the persistence of status regimes, such as slavery and segregation, despite the success of reform efforts).

32. See, e.g., C. DALLETT HEMPHILL, *BOWING TO NECESSITIES: A HISTORY OF MANNERS IN AMERICA, 1620–1860*, at 130 (1999) (“Manners can serve to erect or maintain as well as to destroy class barriers.”); JOHN F. KASSON, *RUDENESS AND CIVILITY: MANNER IN NINETEENTH-CENTURY URBAN AMERICA* 3 (1990) (“[E]stablished codes of behavior have often served in unacknowledged ways as checks against a fully democratic order and in support of special interests, institutions of privilege, and structures of domination.”).

such as race, gender, and sexual orientation. But in the ill-defined arena of conduct unbecoming an officer and a gentleman prosecutions, such presumptions have played a leading role.

The key term of the crime is the word "unbecoming," which refers to unattractive or indecorous behavior, acts, or expressions inappropriate to one's appearance or status. "Unbecoming," then, indicates a preoccupation with the visible, perhaps even the superficial, dimensions of behavior rather than with some core of ill-will or evil intent. Despite its apparent superficiality, the crime of conduct unbecoming strikes at the heart of the military enterprise. To be unbecoming is, literally, to "un-become"—to unmake, to reverse the process of coming into existence. The term is meaningful only when applied to a specific person or role—in this case, to "an officer and a gentleman." Conduct unbecoming, then, sweeps into the realm of the potentially criminal any act by an officer that threatens to un-make the military. Because the military must weather political shifts and personnel turnover, casualties of war and other military operations, the institution must constantly re-create itself.³³ The possibility of unraveling from within is an especially serious threat to the status quo. Military life and culture often have been centered on the process of becoming: of helping boys become men, men become citizens, civilians become soldiers.³⁴

Officers who look or act unworthy of public confidence undermine the legitimacy of those transformations, casting doubt on the worth of the military and the personal honor of its officers.³⁵ As one scholar of the contemporary U.S. military has explained, the "officer subculture" dominates civilian perceptions of military society because of officers' public leadership roles, longevity in the service, and strong connections to American

33. See *infra* Part II (noting demographic change in the composition of the military).

34. On military service as confirmation of citizenship, see LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP 236-60 (1998). See also CAROLINE COX, A PROPER SENSE OF HONOR: SERVICE AND SACRIFICE IN GEORGE WASHINGTON'S ARMY (2004) (discussing education and punishment tactics used to create honorable officers); MARTIN VAN CREVELD, THE TRAINING OF OFFICERS: FROM MILITARY PROFESSIONALISM TO IRRELEVANCE (1990) (discussing the process of training soldiers to be officers); Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499 (1991) (discussing the connections between military service, citizenship, and manhood).

35. See, e.g., ROBINSON O. EVERETT, MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES 3 (1956) (noting the effect one soldier's actions can have on perceptions of the whole military).

society.³⁶ As a result, the errors of officers are effectively the errors of the military itself. Prosecuting officers for conduct unbecoming an officer and a gentleman allows the military to protect its image while preserving a culture of loyalty and deference to authority within the ranks.

In addition to linking disciplinary practices with institutional norms and culture, conduct unbecoming prosecutions reveal how military law and culture have been shaped by broad currents in American life.³⁷ This Article highlights the importance of class status and professional honor in the military, while revealing how the punishment of officers functions as a bulwark against challenges to the prestige, effectiveness, and legitimacy of the U.S. military. Despite the common uses of the phrase “an officer and a gentleman” in popular culture,³⁸ the very association of the two words is historically specific, advanced by a particular eighteenth-century vision of nationhood, citizenship, and military service.³⁹ Each Part below traces the broad outlines of the historical evolution of the U.S. military officer corps, exploring how professionalism replaced gentility as a code of conduct and how a small cadre of men with aristocratic aspirations grew into the large, diverse force that makes up the U.S. officer corps today. Understanding a crime defined by gentlemanliness requires attention to evolving notions of manhood and gentility as well as to changes in the function and internal structure of the military.

36. See Don M. Snider, *The Future of American Military Culture: An Uninformed Debate on Military Culture*, 43 ORBIS 11, 23–25 (1999). Because of their institutional status, their public role as military leaders, and their vulnerability to prosecution under the terms of the UCMJ’s “conduct unbecoming” article, commissioned officers are the focus of this Article, and limited attention is given to officers in training.

37. Compare *infra* Part I.C (discussing the types of behavior prosecuted as conduct unbecoming during the time of the Continental Army), with *infra* Part III.C (discussing the types of behavior prosecuted as “conduct unbecoming” during the Cold War).

38. See, e.g., EVELYN WAUGH, *OFFICERS AND GENTLEMEN* (1955) (the second of Waugh’s *Sword of Honor* trilogy about World War II); *AN OFFICER AND A GENTLEMAN* (Paramount Pictures 1981) (portraying a romance set in naval aviation school starring Richard Gere and Debra Winger).

39. See, e.g., LIONEL CAPLAN, *WARRIOR GENTLEMEN: “GURKHAS” IN THE WESTERN IMAGINATION* (1995) (analyzing, through ethnographical and historical sources, the gentlemanly nature of legendary Indian soldiers for the British); K.W. MITCHINSON, *GENTLEMEN AND OFFICERS: THE IMPACT AND EXPERIENCE OF WAR ON A TERRITORIAL REGIMENT, 1914–1918* (1995) (recounting the social history and character of the London Rifle Brigade during World War I); RICHARD A. PRESTON, *PERSPECTIVES IN THE HISTORY OF MILITARY EDUCATION AND PROFESSIONALISM* 4 (1980) (noting the historical origins of the concept and that “the idea that an officer must have the qualities of a gentleman . . . is still an essential concept in character development for military professionalism”).

The shifting definition and prosecution of this offense over the course of American military history delineate eras of military history and law. For the leaders of the Continental Army during the Revolutionary War, the conduct unbecoming standard was a public advertisement for the gentility of officers; for the military professionals of the late-nineteenth century, it was a means of educating officers about standards of comportment; for the post-World War II officer corps, it was a tool to redress the disorder that characterized a more democratic, and more permanent, armed force.

For the post-Cold War military, challenged not by large-scale wars but by smaller, more disparate threats that have led to peacekeeping, humanitarian intervention, and anti-terrorism operations, conduct unbecoming prosecutions reveal a desire for sexual and political conformity rather than class privilege or racial homogeneity. The post-Cold War period has been characterized by the successful integration of women into the armed forces, a process that challenged the notion of officers as *gentlemen*, and thus altered the definition and prosecution of a crime that is itself defined by gender norms.⁴⁰ The loyalty to fellow officers and public trust that the conduct unbecoming standard has worked to protect are now measured by sexual fidelity and restraint, not social distance or professional expertise. Officers' sexual improprieties, financial mismanagement, and social faux pas have long been subject to prosecution as conduct unbecoming. But by the late-twentieth century, controlling the sexuality of officers had become a primary means of asserting the moral authority of the officer corps—and of the military itself.

I. Creating an Officer Class

This Part analyzes the origins of “conduct unbecoming an officer and a gentleman” in British law and practice. It then sets out the social and political context in which military officers worked and describes the types of conduct that triggered prosecution as unbecoming, stressing the distinctions of socioeconomic class that characterized the relationship between officers and their troops.⁴¹

40. See, e.g., Elizabeth L. Hillman, *The Female Shape of the All-Volunteer Force*, in *IRAQ AND THE LESSONS OF VIETNAM, OR, HOW NOT TO LEARN FROM THE PAST 150* (Lloyd C. Garner & Marilyn B. Young eds., 2007).

41. This Article addresses only the crimes of officers—a critical sub-category of military crimes—but not nearly all of the military crimes charged against leaders

A. "A Scandalous and Infamous" Manner

The crime of conduct unbecoming originated, like much of American military law, with the law and custom of the British armed forces.⁴² The first American conduct unbecoming statute, enforced during the Revolutionary War,⁴³ paralleled the British Army's rules and regulations for military officers. The Article stated that an officer convicted at "court-martial[] of behaving in a scandalous, infamous manner, such as is unbecoming the character of an officer and a gentleman, [would] be discharged from the service."⁴⁴ Beyond the descriptive terms "scandalous" and "infamous," the Articles of War declined to specify what might constitute "unbecoming" conduct. The common-law definition of these terms, however, limited the reach of the statute to offenses involving cowardice and fraud.⁴⁵ Scandal and infamy were both associated with crimes of a particularly shameful nature; "infamous" crimes were described either as crimes of "moral turpitude" or crimes serious enough to be called felonies.⁴⁶

That restriction on what sorts of misconduct might qualify as criminal did not last long, however. In 1806, the clause was revised in response to confusion over the precise meaning of the term "infamous."⁴⁷ The adjectives "scandalous" and "infamous" were eliminated from the Article, effectively broadening the range

of military troops. The history of criminal prosecution of other military groups deserves further study. See generally ERNEST F. FISHER, JR., *GUARDIANS OF THE REPUBLIC: A HISTORY OF THE NONCOMMISSIONED OFFICER CORPS OF THE U.S. ARMY* (1994) (pointing out the contributions of non-commissioned officers and the negative consequences of the sharp distinction between officers and non-commissioned officers); *THE SERGEANTS MAJOR OF THE ARMY* (Daniel K. Elder et al. eds., 2003) (presenting an overview of the Army's highest-ranking non-commissioned officers as well as biographies of each); *THE STORY OF THE NONCOMMISSIONED OFFICER CORPS: THE BACKBONE OF THE ARMY* (David W. Hogan, Jr. et al. eds., 2003) (detailing the history of the Army's non-commissioned officers).

42. See, e.g., Nelson, *supra* note 4, at 126–28 (tracing the origins of "conduct unbecoming" back to the medieval codes of chivalry and the first versions of military law drafted by Gustavus Adolphus in the seventeenth century); cf. C. Quince Hopkins, *Rank Matters but Should Marriage?: Adultery, Fraternization, and Honor in the Military*, 9 UCLA WOMEN'S L.J. 177, 213–28 (1999) (analyzing conduct unbecoming as violating a concept of honor traceable to Greek tradition).

43. See MASS. ARTICLES OF WAR OF 1775, art. 47 (1775), reprinted in WINTHROP, *supra* note 24, at 957; see also D.B. Nichols, *The Devil's Article*, 22 MIL. L. REV. 111, 116–17 (1963) (describing the history of unspecified military crimes).

44. WINTHROP, *supra* note 24, at 957.

45. See Nelson, *supra* note 4, at 128.

46. See, e.g., Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 158–59 (2003).

47. See Nelson, *supra* note 4, at 129.

of potentially criminal conduct.⁴⁸ Only the word “unbecoming” was left to define the conduct proscribed by this Article of War, a statute that remained virtually untouched through the next 144 years of American military history.

B. *The “Military Art” and American Gentility*

In 1775, when Gen. George Washington wrote about “knowledge in the Military Art” to a comrade-in-arms, he was describing the insight into war and leadership that he had cultivated on his own by reading military literature and by observing the habits and practices of senior officers.⁴⁹ Leadership in the eighteenth century military was deemed an “art,” a pastime engaged in by men whose success in civic affairs and business encouraged, or perhaps obliged, them to serve in uniform.⁵⁰ Many military officers in the late-eighteenth and early-nineteenth centuries were not recruited, indoctrinated, or educated formally.⁵¹ Instead they were predominately drawn from the upper classes of civic life, often held both military and political offices, and taught themselves about military strategy and tactics.⁵²

Early American officers, then, were closely integrated into civil society. Popular understandings of gentility thus influenced both the social worlds from which military officers were drawn and individual officers’ perceptions of proper appearances and behavior.⁵³ The evolution of the concept of gentility and the

48. *See id.*; *see also* WINTHROP, *supra* note 24, at 710–11.

It is the effect of this omission [of the words scandalous and infamous] to extend materially the scope of the Article, and thus indeed to establish a higher standard of character and conduct for officers of the [A]rmy. . . . It is only required that it should be “unbecoming”—a comprehensive term including not only all that is conveyed by the words “scandalous” and “infamous” but more.

Id.

49. Don Higginbotham, *Military Education Before West Point*, in THOMAS JEFFERSON’S MILITARY ACADEMY: FOUNDING WEST POINT 23, 30–33 (Robert M.S. McDonald ed., 2004).

50. COX, *supra* note 34, at 38–40.

51. *Id.* at 29.

52. *See, e.g.*, ALLAN R. MILLETT & PETER MASLOWSKI, FOR THE COMMON DEFENSE: A MILITARY HISTORY OF THE UNITED STATES OF AMERICA 4–5 (rev. ed. 1994); Higginbotham, *supra* note 49, at 29–33.

53. *See* JORGE ARDITI, A GENEALOGY OF MANNERS: TRANSFORMATIONS OF SOCIAL RELATIONS IN FRANCE AND ENGLAND FROM THE FOURTEENTH TO THE EIGHTEENTH CENTURY (1998); NORBERT ELIAS, THE CIVILIZING PROCESS: THE HISTORY OF MANNERS, AND THE STATE FORMATION AND CIVILIZATION (Edmund Jephcott, trans., Blackwell Publishers 1994) (1939) (establishing the study of manners); HEMPHILL, *supra* note 32; KASSON, *supra* note 32 (studying American

regulation of manners and morals in the young United States are important backdrops to understanding officership and the ways in which conduct unbecoming was policed.

Prior to the American Revolution, "gentleman" usually referred to a man of noble birth, and the deference a gentleman expected from his inferiors was promoted by the regulation of morals and manners.⁵⁴ For example, C. Dallet Hemphill's study of American manners points out that the stratified society of Puritan New England relied on external coercion, including legal and judicial action, to enforce manners and maintain a vertical social order.⁵⁵ But when pressure from republican ideology and democratic culture forced the category of "gentleman" to embrace those with gentlemanly ambitions and financial resources if not aristocratic blood lines, the goals of manners regulations shifted.⁵⁶ Rather than exacting deference from those who occupied lower social strata, the enforcement of manners became a way to regulate the behavior of youth, men of lesser classes, women, and anyone else with middle and upper-class aspirations.⁵⁷

While socioeconomic status was the primary factor that defined the gentlemanly class from which officers were drawn, gender and race also created expectations for behavior and appearance.⁵⁸ Popular understandings of desirable male character and behavior were central to the historical meaning of "gentlemanliness."⁵⁹ Being a man in upper echelons of American

manners); ANDREW ST. GEORGE, *THE DESCENT OF MANNERS: ETIQUETTE, RULES, & THE VICTORIANS* (1993) (studying the complex role of manners in perpetuating and challenging social and political authority).

54. HEMPHILL, *supra* note 32, at 15–16.

55. See *id.* at 15–30. For another interpretation of early American manhood, see E. ANTHONY ROTUNDO, *AMERICAN MANHOOD: TRANSFORMATIONS IN MASCULINITY FROM THE REVOLUTION TO THE MODERN ERA* (1993) (describing colonial and early national American manhood as primarily concerned with social utility).

56. See *infra* text accompanying notes 93–140.

57. See, e.g., RICHARD L. BUSHMAN, *THE REFINEMENT OF AMERICA: PERSONS, HOUSES, CITIES* (1992) (analyzing the tension between republican equality and aristocratic gentility in material culture in the eighteenth and nineteenth centuries); HEMPHILL, *supra* note 32, at 9.

58. See MICHAEL S. KIMMEL, *THE HISTORY OF MEN: ESSAYS IN THE HISTORY OF AMERICAN AND BRITISH MASCULINITIES* 38 (2005).

59. Given the extensive scholarly literature on the history of gender in the United States, this Section is but a sampling of relevant work, not a comprehensive effort to detail the many historical dimensions of American masculinity. For greater insight into the history of male gender in the United States, see MARK C. CARNES, *SECRET RITUAL AND MANHOOD IN VICTORIAN AMERICA* (1989); KIMMEL, *supra* note 58; CARROLL SMITH-ROSENBERG, *DISORDERLY CONDUCT: VISIONS OF GENDER IN VICTORIAN AMERICA* (1985); PETER N. STEARNS, *BE A MAN! MALES IN MODERN SOCIETY* (2d ed. 1990); and *MEANINGS FOR MANHOOD: CONSTRUCTIONS OF*

society involved mastery of self, a mastery reflected in habits of dress, speech, and deportment.⁶⁰ Middle-class men who aspired toward a learned gentility found prescriptions for acting manly as well as mannerly.⁶¹ In advice manuals, sexual restraint was a much-discussed means of reasserting manhood and gaining control over oneself.⁶² Early American officers were expected to be manly as well as gentlemanly and were idealized as "refined but virile patricians" in the description of one scholar of military life.⁶³

Military law itself defined officers as gentlemen, but that alone could not resolve the tension between democracy and military hierarchy that often created dissent within the ranks.⁶⁴ The privileges attached to military office and the deference owed to officers by their troops lessened as American society democratized and as civilian control of the military evolved into a high-priority government policy.⁶⁵ Officers' joint civil-military positions required them to reconcile the conflicting roles of self-constrained men of society and potentially violent, aggressive warriors. The status of military officers was also complicated by Americans' ambivalence toward an armed force that might threaten individual liberty, even though that force was created as a means to achieve greater economic and political autonomy.⁶⁶ Suspicious of the potential civil authority of a standing army, many Americans considered the military a more necessary evil than a welcome protection.⁶⁷

MASCULINITY IN VICTORIAN AMERICA (Mark C. Carnes & Clyde Griffen, eds. 1990).

60. See, e.g., KASSON, *supra* note 32.

61. This middle-class model of male gender was not a totalizing vision of American manhood; class, racial, ethnic, and regional distinctions complicated popular understandings of manhood and male gender roles. For insight into regional variation in particular, see EDWARD L. AYERS, *VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH-CENTURY AMERICAN SOUTH* (1984) (assessing regional patterns of crime, linked in part to cultural constructions of status); BERTRAM WYATT-BROWN, *SOUTHERN HONOR: ETHICS AND BEHAVIOR IN THE OLD SOUTH* (1982) (analyzing a distinctively Southern ethic of honor and manhood).

62. KIMMEL, *supra* note 58, at 39-42.

63. See, e.g., C. ROBERT KEMBLE, *THE IMAGE OF THE ARMY OFFICER IN AMERICA: BACKGROUND FOR CURRENT VIEWS* 67 (1973).

64. COX, *supra* note 34, at xv, 21; see, e.g., BUSHMAN, *supra* note 57.

65. See CHARLES ROYSTER, *A REVOLUTIONARY PEOPLE AT WAR: THE CONTINENTAL ARMY AND AMERICAN CHARACTER, 1775-1783*, at 52, 200 (1979). See generally *THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES, 1789-1989* (Richard H. Kohn ed., 1991) (discussing how the Constitution has played a role in shaping the military); RUSSELL F. WEIGLEY, *HISTORY OF THE UNITED STATES ARMY* (Indiana Univ. Press, enl. ed. 1984) (1967); RUSSELL F. WEIGLEY, *THE AMERICAN WAY OF WAR: A HISTORY OF UNITED STATES MILITARY STRATEGY AND POLICY* (Indiana Univ. Press 1977) (1973).

66. See, e.g., ROYSTER, *supra* note 65, at 35-53.

67. See *id.* at 35-37.

Resolving the tension between aristocratic aspirations and democratic culture was a major preoccupation for military officers and the rest of America.⁶⁸ As Caroline Cox explains in her study of the Revolutionary War-era Army, “[t]he creation of an officer class with distinct rights and privileges and a subordinate body of soldiers was the foundation on which the Continental Army was built.”⁶⁹ After the war for independence, “hierarchy and deference remained the bedrock principles of the naval world” even as the rhetoric of democracy and egalitarianism changed the American political landscape.⁷⁰ In an 1815 letter to another officer, naval officer William Bainbridge explicitly linked political independence to gentlemanliness: “I am a sailor—honest and capable enough to do my duty—and I have *independence* at all times to act like a gentleman.”⁷¹ Officers were expected to maintain social distinctions as well as exercise self-restraint, promote military discipline, and enhance the political health of the new republic.⁷²

C. Continental Army Prosecutions

Maintaining the image of the noble gentleman-officer during the Revolutionary War was made more difficult by the presence of officers in the ranks who did not hail from privileged social and economic backgrounds.⁷³ Too few authentic, wealthy, and obviously recognizable gentlemen were available to meet the military’s need for officers; ambitious young men stepped into the breach, welcoming the opportunity for social mobility but at the same time interfering with the upper-class identity of the officer corps.⁷⁴ Naval education during this period explicitly taught “the behavior of a gentleman,” which included “ethical conduct, internalized discipline, avoidance of indulgence or self-destructive

68. See Samuel J. Watson, *Developing “Republican Machines”: West Point and the Struggle to Render the Officer Corps Safe for America, 1802–33*, in THOMAS JEFFERSON’S MILITARY ACADEMY: FOUNDING WEST POINT, *supra* note 49, at 154, 167 (noting that officers’ “ultimately aristocratic value system was a common source of dissension in the early national army (as it had been in the Continental one)”; see also HEMPHILL, *supra* note 32; KASSON, *supra* note 32).

69. COX, *supra* note 34, at xvii; see also CHRISTOPHER MCKEE, A GENTLEMANLY AND HONORABLE PROFESSION: THE CREATION OF THE U.S. NAVAL OFFICER CORPS, 1794–1815, at 28–39 (1991) (pointing out the “tiny elite of officers” in the Navy).

70. PRESTON, *supra* note 39, at 22 (“Until the Civil War, the military purpose of the [Military] Academy was definitely secondary to its civil function [T]he corps of cadets came nearer to being an aristocracy than any other part of American government and society.”).

71. MCKEE, *supra* note 69, at 108.

72. See *id.* at 165–77.

73. See COX, *supra* note 34, at 22–23.

74. See *id.*

excess" as well as "the habit of associating with, and emulating, those who were one's social equals or—better yet—those of superior social standing."⁷⁵ Prosecutions for conduct unbecoming policed the behavior of these newly minted officers in order to protect the authority and privilege accorded to their brethren.⁷⁶

In the Continental Army of the Revolutionary War, criminal prosecution of officers was rare.⁷⁷ But when an officer was prosecuted for conduct unbecoming, his crime often involved acting below his rank.⁷⁸ For example, charges such as "[m]essing with common soldiers" and performing duties "derogatory to their rank" were prosecuted as conduct unbecoming, as were incidents of insubordination involving a failure to defer to superiors in civil fashion.⁷⁹ Officers were not punished in the same ways that soldiers were; under military law, they could be discharged ("cashiered") or reprimanded but not subjected to corporal punishment.⁸⁰ Perhaps the best indication of the gulf between service as an officer and as an enlistee was the practice of punishing soldiers by extending their tours of duty—and officers by cutting them short.⁸¹ The acts that were prosecuted as conduct unbecoming did sometimes involve indiscretions, such as sexual misconduct, incompetence, or dishonesty, less clearly related to socioeconomic status than fraternizing with enlistees or performing manual labor derogatory to their rank.⁸² But the core definition of the crime was tied to preserving the upper-class appearances and behavior of the officer corps.

After the Revolutionary War ended and the American military took on the role of defending a new republic, the same pattern of prosecuting conduct unbecoming offenses held.⁸³ In the late-eighteenth century, the military code of conduct for American officers echoed the British Army's effort to enforce "a gentlemanly

75. MCKEE, *supra* note 69, at 169.

76. See COX, *supra* note 34, at 59–60.

77. *Id.* at 60.

78. *Id.*

79. *Id.*

80. *Id.* at 86. On "cashiering," the officers' equivalent of a dishonorable discharge, see GEORGE B. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 166–67 (1898).

81. COX, *supra* note 34, at 86.

82. See MCKEE, *supra* note 69, at 437–43; Bradley J. Nicholson, *Courts-Martial in the Legion Army: American Military Law in the Early Republic, 1792–1796*, 144 MIL. L. REV. 77, 101–02 (1994).

83. See Nicholson, *supra* note 82, at 82–83 (describing conduct unbecoming and other military crimes for which officers were charged, noting that the public notoriety that came with court-martial was an incentive to comply).

self-discipline based on honor and trust.”⁸⁴ Conduct unbecoming was most often charged when young officers failed to defer to superiors or associated with lesser-ranking troops.⁸⁵ This crime was also a part of officers’ efforts to settle personal disputes through military justice; for example, Ensign Meriwether Lewis (before he journeyed west with Clark) was court-martialed for conduct unbecoming after insulting another officer.⁸⁶ As Gen. Anthony Wayne explained, “mixing with and [p]utting yourself on a footing” with subordinates “tends to destroy your own reputation and consequence as an officer” and “is subversive of good order [and] highly injurious to the public service.”⁸⁷

The social gap between officers and the men serving beneath them was wide, and commanding officers saw only trouble if it were to be breached.⁸⁸ The leaders of the Navy were vexed by “backsliders and underachievers” who failed to meet this gentlemanly code of conduct.⁸⁹ Midshipman Ebenezer Clough, Jr., for example, was dismissed in 1814 for “alcohol abuse and because he ‘will never make an officer or a gentleman; his manners and habits are coarse and vulgar and his associates of the lowest class.’”⁹⁰ Sexual misconduct also could trigger dismissals, but most sexual behavior was not punished.⁹¹ In short, officers who crossed “the gulf that separated officers from enlisted men” did so at their peril.⁹² As a result, the crime of conduct unbecoming an officer and a gentleman put military law to work preserving the deference and obedience on which officers’ authority rested.

II. Building a Profession

As the U.S. military changed in response to the growth of the nation and the role of its armed forces, the demographics and culture of the officer corps changed as well. This Part sketches an outline of the social and cultural shifts most relevant to understanding the criminalization of officers’ misbehavior. It

84. *Id.* at 100.

85. *Id.* at 100–02.

86. *See id.* at 104 n.112. Lewis was acquitted. *Id.*

87. Nicholson, *supra* note 82, at 101.

88. *See, e.g.,* MCKEE, *supra* note 69, at 434.

89. *Id.* at 169. *See generally id.* at 447–57 (describing generally the crimes of naval officers, including the prevalence of alcohol abuse as the most common reason for officers’ dismissals).

90. *Id.* at 464 (emphasis omitted) (footnote omitted) (quoting a letter to the Secretary of the Navy discussing Clough’s dismissal).

91. *Id.* at 437–43.

92. *Id.* at 434.

traces the gradual professionalization of military service in the nineteenth and early-twentieth centuries, focusing on how evolving notions of gender, class, race, and sexual propriety influenced the self-perception and social status of military officers, key elements in the self-regulation of the profession and in the definition of "conduct unbecoming."

A. Colonel Winthrop's Definition

Commanders who sought guidance in defining "conduct unbecoming" and other matters of military law often turned to Col. William Winthrop's *Military Law and Precedents*.⁹³ First published in 1886, this detailed treatise by the "Blackstone of military law" became the most frequently cited authority on U.S. military justice and provided the most thorough explanation available of the terms and function of the statute.⁹⁴

Colonel Winthrop endorsed the crime of conduct unbecoming as a means of promoting proper conduct but recognized limits on the types of behavior it might punish. He defined "unbecoming" as "not merely inappropriate or unsuitable . . . but morally unbecoming and unworthy."⁹⁵ He also relied on the mandatory punishment of dismissal to narrow its definition; because conduct unbecoming indicated a man's unworthiness to be an officer in the armed forces, the punishment literally defined the crime.⁹⁶ To be found guilty of conduct unbecoming was, by definition, to forfeit one's status as an officer. Winthrop emphasized that acts punishable under the statute must have a "double significance and effect," involving both personal disgrace and institutional

93. WINTHROP, *supra* note 24; see Col. Patrick Finnegan, *The Study of Law as a Foundation of Leadership and Command: The History of Law Instruction at the United States Military Academy at West Point*, 181 MIL. L. REV. 112, 117 (2004).

94. Winthrop was an 1853 graduate of Yale Law School who reached the rank of captain in the Union infantry during the Civil War. He later became a judge advocate, professor of law at West Point, and widely published scholar. After more than thirty years of service, he retired and completed the treatise that became the famed *Military Law and Precedents*. It was republished twice, in 1920 and 1942, by the War Department. See Finnegan, *supra* note 93, at 117.

95. WINTHROP, *supra* note 24, at 710.

96. See *id.* at 712.

The quality, indeed, of the conduct intended to be stigmatized by this provision of the code is, in general terms, indicated by the fact that a conviction of the same must necessarily entail the penalty of *dismissal*. The Article in the fewest words declares that a member of the army who misconducts himself as described is unworthy to abide in the military service of the United States.

Id.

dishonor.⁹⁷

Winthrop focused, then, on officers' integrity and honor, not on superficialities such as good manners or a refined appearance. He stressed the moral fiber of a "gentleman" rather than noble birth or even education, adopting a descriptive model of behavior appropriate for officers. In defining a "gentleman," Winthrop wrote that the term designates "not simply . . . a person of education, refinement, and good breeding and manners . . . but a man of honor; that is to say, a man of high sense of justice, of an elevated standard of morals and manners, and of a corresponding general deportment."⁹⁸ Note his switch of pronouns, from the universally refined "person" to the honorable "man." Women could be educated, well-mannered, and even moral, but only men could be honorable. Colonel Winthrop, a precise writer and careful scholar, understood military law and military life.⁹⁹ His choice of words reflects a gendered understanding of officership and military service that his contemporaries, and many who followed him, shared.

B. "A Stable Fraternity"

The "military art" to which Gen. George Washington had dedicated himself gradually gave way to the notion of "military science" and a professional army during the nineteenth century.¹⁰⁰ Exactly when the U.S. military became a profession remains subject to scholarly debate, partly because the process of professionalization itself was uneven and contested.¹⁰¹ Less open

97. *Id.* at 711–12.

98. *Id.* at 711.

99. See, e.g., Finnegan, *supra* note 93, at 117.

100. See, e.g., James Burk, *Expertise, Jurisdiction, and Legitimacy of the Military Profession*, in *THE FUTURE OF THE ARMY PROFESSION* 19, 19–35 (Lloyd J. Matthews ed., 2002) (tracing the shift from art to science, asserting that after Reconstruction "the Army began seriously to cultivate the study of war as an applied science").

101. See, e.g., EDWARD M. COFFMAN, *THE OLD ARMY: A PORTRAIT OF THE AMERICAN ARMY IN PEACETIME, 1784–1898*, at 96–102, 269–86 (1986) (describing the transition to military professionalism); EDWARD M. COFFMAN, *THE REGULARS: THE AMERICAN ARMY, 1898–1941*, at v (2004) (defining the period from 1898 to 1941 as the era during which "the American Regular Army made the great transformation from a frontier constabulary to a modern army"); ALLAN R. MILLETT, *THE GENERAL: ROBERT L. BULLARD AND OFFICERSHIP IN THE UNITED STATES ARMY, 1881–1925*, at 3–12 (1975) (describing professionalization); WILLIAM B. SKELTON, *AN AMERICAN PROFESSION OF ARMS: THE ARMY OFFICER CORPS, 1784–1861* (1992) (discussing the roots and emergence of the military profession); VAN CREVELD, *supra* note 34, at 57 (noting that the United States did not employ advanced training for its military officers until the late-nineteenth century); see also MATTHEW MOTEN, *THE DELAFIELD COMMISSION AND THE AMERICAN MILITARY*

to dispute is the profound effect that changing notions of masculinity and the softening of class-based distinctions in the United States had on the professional training of officers. These trends in the military and in broader American society changed the demographics of the officer corps, altered officers' education and training, and influenced the standard set by the "conduct unbecoming an officer a gentleman" clause. Military officers who served during this period of professionalization—broadly defined as starting between 1802, when President Thomas Jefferson signed legislation creating the United States Military Academy at West Point, and 1917, when the U.S. military entered World War I—found both their social status and professional prestige undermined by a less exclusive officer corps.¹⁰² By the end of this transition, the image of the U.S. officer corps reflected a more democratic, prescriptive ideal of military service rather than the ascriptive model of the gentleman-officer that had held sway before.¹⁰³

Among the many changes in American society that influenced military life during the nineteenth century, the turn away from a rank-ordered society probably had the most profound impact. The new economic and social order being forged by industrialization complicated the nature of social status and class privilege in American society.¹⁰⁴ "Gentleman" became an earned designation, not a self-evident classification, and gentility became an acquired, not an inherent, trait.¹⁰⁵ In the military, it was

PROFESSION 3-17 (2000) (providing a thoughtful overview of the historiography of military professionalism).

102. See Jennings L. Wagoner Jr. & Christine Coalwell McDonald, *Mr. Jefferson's Academy: An Educational Interpretation*, in THOMAS JEFFERSON'S MILITARY ACADEMY: FOUNDING WEST POINT, *supra* note 49, at 118, 135.

103. See MORRIS JANOWITZ, *THE PROFESSIONAL SOLDIER: A SOCIAL AND POLITICAL PORTRAIT* 60-61 (1960).

By the turn of the twentieth century, the skill structure of the military profession had undermined the effectiveness of ascribed authority. Yet, in the United States armed forces promotion by strict seniority, on the basis of age and service, was a keystone in the persistence of an ascriptive hierarchy. As the profession became more achievement-oriented, personnel records began to supplant social pedigree.

Id.; see also THE POLITICAL EDUCATION OF SOLDIERS 251-323 (Morris Janowitz & Stephen D. Wesbrook eds., 1983) (describing political education in the United States military after World War II). See generally ROGERS SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* (1997) (analyzing multiple traditions of American citizenship).

104. See David R. Segal, *From Political to Industrial Citizenship*, in THE POLITICAL EDUCATION OF SOLDIERS, *supra* note 103, at 285, 304.

105. See, e.g., MICHAEL KIMMEL, *MANHOOD IN AMERICA: A CULTURAL HISTORY* ix (1996) (asserting that, in the nineteenth century, "American manhood became less and less about an inner sense of self, and more and more about a possession that

increasingly clear that success as a gentleman in civil life did not guarantee military genius or battlefield heroics. This tension was apparent during the Civil War, when a dispute over whether electing or appointing officers was preferable divided the Confederate Army, manifesting the tension between a Southern culture of ascriptive status and a newer focus on achievement and ambition in the ranks.¹⁰⁶

As part of this sea change in social status, the act of serving as a military officer became a less certain marker of social privilege. The professionalization of the officer corps, with its emphasis on education and a shared ethic, did not operate as a simple status-enhancer.¹⁰⁷ When war was an art in which gentlemen aristocrats dabbled, high-ranking military officers were likely to possess considerable status in civilian as well as military communities.¹⁰⁸ Now, officers relied on military science, their own schools, and their own developing expertise.¹⁰⁹ The Naval Academy at Annapolis was established in 1845 to train midshipmen; the Naval War College was founded in 1882 to educate established officers; and the U.S. Naval Institute was formed in 1873 to serve as a professional organization.¹¹⁰ In 1821, West Point formalized instruction in the law as part of officers' education; in 1874, a separate Department of Law was created.¹¹¹ Sylvanus Thayer, who took over as superintendent at West Point

needed to be acquired"). This change is also reflected in the rise of interest in etiquette manuals and advice books. See JUDY HILKEY, *CHARACTER IS CAPITAL: SUCCESS MANUALS AND MANHOOD IN GILDED AGE AMERICA* (1997) (analyzing the cultural history of the success manual from 1870–1910); KASSON, *supra* note 32, at 240 (assessing post-Civil War efforts to broaden access to good manners).

106. See JUDITH N. MCARTHUR & ORVILLE VERNON BURTON, "A GENTLEMAN AND AN OFFICER": A MILITARY AND SOCIAL HISTORY OF JAMES B. GRIFFIN'S CIVIL WAR 58–63 (1996); see also PRESTON, *supra* note 39, at 26.

107. See, e.g., SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS* 256–58 (1957); John Hattendorf, *The Conundrum of Military Education in Historical Perspective*, in *MILITARY EDUCATION: PAST, PRESENT, AND FUTURE* 1, 1–12 (Gregory C. Kennedy & Keith Neilson eds., 2002). See generally JUDITH HICKS STIEHM, *THE U.S. ARMY WAR COLLEGE: MILITARY EDUCATION IN A DEMOCRACY* (2002) (detailing the Army's educational system and its impact).

108. See HUNNINGTON, *supra* note 107, at 222–26.

109. See *id.* at 256–57.

110. See DONALD CHISHOLM, *WAITING FOR DEAD MEN'S SHOES: ORIGINS AND DEVELOPMENT OF THE U.S. NAVY'S OFFICER PERSONNEL SYSTEM, 1793–1941*, at 779 (2001) (tracing the professionalization of the naval officer corps); see also TIMOTHY K. NENNINGER, *THE LEAVENWORTH SCHOOLS AND THE OLD ARMY: EDUCATION, PROFESSIONALISM, AND THE OFFICER CORPS OF THE UNITED STATES ARMY, 1881–1918*, at 10 (1978) ("The development of the military as a profession closely paralleled the development of military schools.").

111. See Finnegan, *supra* note 93, at 112–15.

in 1817 and stayed until 1833 (earning the honorific "Father of the Military Academy"), promoted a concept of honor "rooted in disinterested personal accountability and obligation rather than the self-centered personal 'independence' of citizens and gentlemen."¹¹² The division between civil and military careers grew as the military identified education and integrity as more important to the success of its leaders than noble birth.¹¹³ While many subcultures continued to exist within military service, "[o]fficers not only saw themselves becoming more and more alike, they saw themselves becoming increasingly different from civilians."¹¹⁴ By 1900, one military historian described Army officers as "a stable fraternity," suggesting the corporateness and separate identity that now distinguished the officer corps.¹¹⁵

In the late-nineteenth and early-twentieth centuries, other powerful cultural currents, particularly a demand for bodily strength and an embrace of racial hierarchy, also reshaped the desired image of the officer.¹¹⁶ The former was voiced most loudly by Theodore Roosevelt but was echoed by many others as well; it was based on a perception that men had become over-civilized and that luxury and wealth had undermined their moral authority and physical prowess.¹¹⁷ After the Civil War, elite men—gentlemen—were instructed on the necessity of "patriotic American manhood," a concept that embraced a new set of manly characteristics.¹¹⁸ Physical strength and virility had always been desired attributes

112. Samuel J. Watson, *Developing "Republican Machines,"* in THOMAS JEFFERSON'S MILITARY ACADEMY, *supra* note 49, at 168; PRESTON, *supra* note 39, at 24 ("Rejection of the myth that class was the key to character and leadership [sic] had made it possible for the [Military] Academy to foster the personal qualities required by an officer.").

113. See Russell F. Weigley, *The American Civil-Military Cultural Gap: A Historical Perspective, Colonial Times to the Present*, in SOLDIERS AND CIVILIANS: THE CIVIL-MILITARY GAP AND AMERICAN NATIONAL SECURITY 215 (Peter D. Feaver & Richard H. Kohn eds., 2001) ("When a professional military officer corps emerged during the middle years of the nineteenth century, the military culture became, and its members felt themselves to be, more separate from civilian society and values, yet more representative of a distinctive kind of discipline, virtue, and responsibility."); see also Moten, *supra* note 101, at 5.

114. MOTEN, *supra* note 101, at 45.

115. MILLETT, *supra* note 101, at 205–06.

116. Clyde Griffen, *Reconstructing Masculinity from the Evangelical Revival to the Waning of Progressivism: A Speculative Synthesis*, in MEANINGS FOR MANHOOD, *supra* note 59, 183–204.

117. See GAIL BEDERMAN, MANLINESS AND CIVILIZATION: A CULTURAL HISTORY OF GENDER AND RACE IN THE UNITED STATES, 1880–1917, at 170–215 (1995); KIM TOWNSEND, MANHOOD AT HARVARD: WILLIAM JAMES AND OTHERS 215 (1996); see also Griffen, *supra* note 116, 183–204 (presenting the scholarly debate on the late-nineteenth century "crisis" in masculinity).

118. See TOWNSEND, *supra* note 117, at 11.

of individual soldiers, but the new emphasis on a manly "strenuous life" elevated masculinity to an important theme of political culture and social interaction.¹¹⁹ The armed forces began to use organized sports and athletics as training tools and morale-builders.¹²⁰ Men were instructed to be fit, but also to master their drives and impulses, in order to fulfill their authoritarian roles in society.¹²¹

At the same time, race became an increasingly salient aspect of American manhood.¹²² Gentlemen were required to possess not only strong and secure bodies and bank accounts but also a particular trait that could not be acquired through sporting events or capitalist enterprise: whiteness.¹²³ By the early-twentieth century, class distinctions among Americans were reinforced and sometimes even redrawn along color lines.¹²⁴ Many native-born Americans sought to protect their social and political entitlements against a perceived assault by immigrants, African Americans, and even women.¹²⁵ As a result, the category of "gentlemen" more actively excluded men who were not White.

Concerns about the quality of officers and the effectiveness of the military in general also tended to undermine officers' status, especially in the period between Reconstruction and World War I. Criticism of officers' aristocratic pretensions and "retiring" manner led many Americans to view military officers as "ballroom popinjays and petty tyrants," yet another sign of the uncertain status of officership.¹²⁶ The military bureaucracy grew quickly

119. See BEDERMAN, *supra* note 117, at 5–10; see also ELLIOT J. GORN, *THE MANLY ART: BARE-KNUCKLE PRIZE-FIGHTING IN AMERICA* 98–100 (1986); KIMMEL, *supra* note 58, at 47–59.

120. See WANDA ELLEN WAKEFIELD, *PLAYING TO WIN: SPORTS AND THE AMERICAN MILITARY, 1898–1945*, at 3 (1997).

121. See, e.g., BEDERMAN, *supra* note 117, 5–20 (1995) (summarizing the changing nineteenth century conceptions of manhood).

122. See *id.* at 170–215; TOWNSEND, *supra* note 117, at 245.

123. Cf. NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE passim* (1995) (analyzing ethnicity and whiteness); DAVID R. ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS passim* (1991) (tracing the history of whiteness in labor); Richard Delgado, *The Current Landscape of Race: Old Targets, New Opportunities*, 104 MICH. L. REV. 1269, 1279–83 (2006) (describing the incorporation of "white privilege" into racial analyses).

124. See AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* 60–97 (1998) (tracing the complex interplay between gender, labor, and race during and after Reconstruction); BARBARA YOUNG WELKE, *RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW AND THE RAILROAD REVOLUTION, 1865–1920* (2001) (uncovering the transformative power of technological and administrative change in American life).

125. STANLEY, *supra* note 124, at 60–97.

126. BRIAN MCALLISTER LINN, *GUARDIANS OF EMPIRE: THE U.S. ARMY AND THE*

with the creation of policy-making staffs and the need for administrative coordination in the early-twentieth century. Ambitious "new" officers complained that the "backward, old and incompetent" officers from an old era of the Army held back progress.¹²⁷ The quality of recruits was a persistent concern for military leaders,¹²⁸ and the number of officer recruits from the upper classes declined after the Civil War.¹²⁹ Frustrated with a system that promoted officers solely on the basis of seniority, ambitious young men were likely to leave the military after brief tours of duty, even after demands for personnel reform in the 1890s revised the promotion system to recognize merit as well as longevity.¹³⁰ Low pay and difficult assignment patterns made military service a less attractive career option,¹³¹ and the inability of the armed forces to retain qualified officers left the ranks of officers depleted after the Civil War, a situation that persisted through World War I.¹³²

In addition to an officer corps less rooted in the upper classes of American society, the racial and ethnic make-up of military officers became marginally less exclusive over the course of the nineteenth century, a shift that likewise threatened to undermine the popular esteem of U.S. officers.¹³³ While remaining mostly native-born and of Anglo-American origins, the officer corps did not stay completely closed to immigrants and African Americans.¹³⁴ The potency of military service as a catalyst for assertions of equality, and for violent explosions of racism, was evident during Reconstruction as well as during and after World Wars I and II.¹³⁵ From the end of the Civil War through the early twentieth century, only a handful of African-American men received commissions in the armed forces.¹³⁶ Most served as

PACIFIC, 1902-1940, at 57 (1997).

127. MILLETT, *supra* note 101, at 222 (quoting the 1909 diary of Gen. Robert L. Bullard, complaining that Gen. Leonard Wood might try to "force out . . . the backward, old and incompetent" but that he would not necessarily be successful); see CHARLES WALTON ACKLEY, *THE MODERN MILITARY IN AMERICAN SOCIETY: A STUDY IN THE NATURE OF MILITARY POWER* 53-77 (1972) (detailing the growth of the staff and administration in the twentieth century military).

128. See JANOWITZ, *supra* note 103, at 10.

129. *Id.*

130. See MILLETT & MASLOWSKI, *supra* note 52, at 278.

131. See LINN, *supra* note 126, at 56.

132. See MILLETT & MASLOWSKI, *supra* note 52, at 365.

133. See JANOWITZ, *supra* note 103, at 10.

134. See BERNARD C. NALTY, *STRENGTH FOR THE FIGHT: A HISTORY OF BLACK AMERICANS IN THE MILITARY* 43 (1986); see also COFFMAN, *supra* note 101, at 226.

135. See generally NALTY, *supra* note 134, at 47-234.

136. See COFFMAN, *supra* note 101, at 226-29.

chaplains, quartermasters, or cavalry lieutenants, and none in the "Great White Fleet," the Navy was even more hostile to African Americans than the Army.¹³⁷ The few African Americans who endured West Point suffered extreme isolation. Benjamin O. Davis, Jr., later commander of the World War II Tuskegee Airmen, reported that at West Point "no one spoke to him except in the line of duty."¹³⁸

After the Civil War, the officer-gentleman "lived on as an exemplar of established values," "modernized and professionalized," but still "guardian of threatened ethical and social ideals."¹³⁹ Literary and social critic William Dean Howells argued that officers were models of devotion to duty for the nation and that military service was an elevated calling because of its moral values, not because of the breeding of its leaders.¹⁴⁰ By the time the United States entered World War I, its military officers had adapted to a new world of society and politics by creating a professional identity that both harkened back to romantic notions of chivalry and embraced modern ideas.

C. Old Army Prosecutions

As the military professionalized in the nineteenth century, its concern with preserving a gentlemanly ethic intensified. Conduct unbecoming allowed commanders to enforce gentlemanly behavior in an officer corps that was no longer composed of the gentlemanly class. The law reflected this altered demographic and sought to clarify the new terms of military service. For example, an 1870 federal statute dictated that "[n]o officer shall use an enlisted man as a servant in any case whatsoever," correcting any misimpression that might persist about the proper relationship between officers and their men.¹⁴¹ The common understanding of "conduct unbecoming" embraced a model of officership that required adherence to a shared vision of honor and morality but was accessible to those not born with the advantages of wealth and status.

But conduct unbecoming prosecutions, which functioned as a means of enforcing compliance with these high aspirations, reveal the uncertainty of the moral high ground that Colonel Winthrop

137. See NALTY, *supra* note 134, at 83.

138. See *id.* at 146.

139. KEMBLE, *supra* note 63, at 143.

140. See *id.* at 145.

141. Act of July 15, 1870, ch. 294, § 14, 16 Stat. 319 (1870) (current version at 10 U.S.C. §§ 3639, 8639 (2000)).

and others wanted officers to hold. Officers still invoked gentlemanly rhetoric when defending their honor against challenges from peers, and charges were still brought in defense of officer privilege and to enforce deference among junior officers.¹⁴²

Using criminal prosecution to preserve social status during this period, however, resulted in some spectacularly ill-conceived courts-martial. Two late-nineteenth century examples illustrate this point. The first involves sexual conduct and the second, racial insubordination; both reflect officers' commitment to elitism over honor. In 1879, on a small frontier post in West Texas, a sexual relationship between an Army captain and his eighteen-year-old daughter led to a court-martial for conduct unbecoming.¹⁴³ But the father was not the officer accused at trial. Instead, a fellow Army captain who dared to bring such shocking behavior to light, whose acts of "eavesdropping" on the private affairs of his fellow officer were "ungentlemanly," was court-martialed for conduct unbecoming an officer and a gentleman.¹⁴⁴ In this case, preserving discretion, and perhaps even sexual entitlement, among officers trumped the incest taboo and led to a criminal conviction.

In the second example, Henry O. Flipper, who became the first African American to graduate from West Point in 1879, was court-martialed in 1884 for allegedly embezzling funds.¹⁴⁵ Although he was found innocent of the main charge, Flipper was convicted of conduct unbecoming an officer and a gentleman and sentenced to dismissal for misleading investigators during the investigation of his bookkeeping habits.¹⁴⁶ White officers were

142. See, e.g., *United States v. Fletcher*, 148 U.S. 84, 85 (1893) (considering a conviction for conduct unbecoming for "the incurring and nonpayment of certain indebtedness"); *Smith v. Whitney*, 116 U.S. 167, 184 (1886) (involving an officer charged with conduct unbecoming for failing to "vindicate his honor and reputation" from attack); Richard Selcer, *Conduct Unbecoming*, 34 CIVIL WAR TIMES ILLUSTRATED 60 (1995) (describing the conflict between Robert H. Chilton and John B. Magruder, two high-ranking Confederate officers, culminating in charges against Chilton); see also LOUISE BARNETT, *UNGENTLEMANLY ACTS: THE ARMY'S NOTORIOUS INCEST TRIAL passim* (2000); THOMAS P. LOWRY, *TARNISHED EAGLES: THE COURTS-MARTIAL OF FIFTY UNION COLONELS AND LIEUTENANT COLONELS 77-126* (1997) (recounting the circumstances of prosecution for high-ranking Civil War era officers); Watson, *supra* note 68, at 167-68 (describing courts-martial for officers' insubordination).

143. BARNETT, *supra* note 142. But see Lisa Lindquist Dorr, Book Review, 20 LAW & HIST. REV. 423, 424-25 (2002) (reviewing BARNETT, *supra* note 142, and cautioning about the risks of generalizing from a single Army trial).

144. BARNETT, *supra* note 142, at 3-4, 83, 149 (footnote omitted).

145. See NALTY, *supra* note 134, at 60.

146. See CHARLES M. ROBINSON III, *THE COURT-MARTIAL OF HENRY FLIPPER* 98-99 (1994).

sometimes dismissed for similar offenses, but Flipper's court-martial, which he later maintained was inspired by resentment over his friendship with the sister-in-law of a White officer, signals how much more likely African-American officers were to trip the wires that triggered criminal prosecution under military law.¹⁴⁷

Flipper's one-time roommate at West Point Johnson Whittaker was also court-martialed for conduct unbecoming. Early one April morning in 1880, Whittaker—the only African-American cadet at West Point—was found tied to his bed, unconscious and covered with blood.¹⁴⁸ After an investigation, Army officials decided to charge Whittaker at court-martial for allegedly staging his own beating—an absurd conclusion given the available evidence.¹⁴⁹ The racism that continued to infect military policies led to racial violence in the World War I Army, often triggered by outrage at suspected sexual connection between African-American men and White women.¹⁵⁰ The entrenchment of Jim Crow was furthered by the long reach of vague criminal statutes like conduct unbecoming.

III. Defending a Standing Army

Despite post-World War II military justice reforms, the scope of “conduct unbecoming” actually broadened after the war. This Part shows how the statute survived as part of the military's criminal code despite the imprecision of its terms and the decreasing relevance of genteel norms in military life. It also traces the new applications of conduct unbecoming to address the disorder of a less coherent officer corps facing new cultural and military challenges to its authority and effectiveness.

A. “As a Court-Martial May Direct”

The statute that Colonel Winthrop described was preserved by the UCMJ, a major post-World War II reform.¹⁵¹ The UCMJ transplanted conduct unbecoming from the Army's 95th Article of

147. See NALTY, *supra* note 134, at 60. Flipper was posthumously pardoned. See Darryl W. Jackson et al., *Bending Toward Justice: The Posthumous Pardon of Lieutenant Henry Ossian Flipper*, 74 IND. L.J. 1251 (1999).

148. See JOHN F. MARSZALEK, *ASSAULT AT WEST POINT: THE COURT-MARTIAL OF JOHNSON WHITTAKER* 44–45 (1972).

149. See *id.* at 239.

150. See MILLETT, *supra* note 101, at 429.

151. See Uniform Code of Military Justice (UCMJ), Pub. L. No. 81–506, 64 Stat. 142 (1950) (codified at 10 U.S.C. § 933 (2000)); see also HILLMAN, *supra* note 3, at 3–4, 13–16.

War into the new Code.¹⁵² Other articles of the new Code mentioned officers, but no other crime used "officer" in its very definition.¹⁵³

There was, however, one crucial change in the UCMJ's conduct unbecoming statute. The closing phrase of the new statute set out the punishment for a conviction as whatever "a court-martial may direct" instead of mandatory dismissal.¹⁵⁴ This meant that a court-martial panel, the military correlate of a civilian jury, no longer faced any constraints in deciding on an appropriate punishment, short of death, for a violation of the Article.¹⁵⁵ Thus an officer could be imprisoned, fined, or dismissed from the service for conduct unbecoming.

The modern military justice system thus retained the language of the offense but removed the part of the statute, the mandatory punishment of dismissal, that Winthrop and others had relied on to define the offense itself.¹⁵⁶ This change was extremely unpopular with military officers who felt that it "effectively pulled the teeth from the article."¹⁵⁷ Apparently, the legal scholars who drafted the Code sought to allow greater discretion in sentencing for relatively minor offenses charged

152. See Article of War 95, 41 Stat. 787, 806 (1920); see also § 933; Nelson, *supra* note 4, at 129.

153. See, e.g., 10 U.S.C. § 892 (2000) (specifying disobedience to an officer's order as a crime); 10 U.S.C. § 885 (2000) (specifying a type of desertion that could only be committed by officers).

154. Nelson, *supra* note 4, at 129.

155. Compare MANUAL FOR COURTS-MARTIAL, U.S. ARMY § 151 (1928) [hereinafter MCM 1928] ("Any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service."), with MANUAL FOR COURTS-MARTIAL, U.S. ARMY §§ 125-27 (1951) [hereinafter MCM 1951] (detailing limits on the range of available punishments). There was also one minor change to the statute. The drafters added the word "midshipman," since the UCMJ now covered Navy and Marine Corps officers and officer candidates, whereas the Articles of War had applied only to the Army and Army Air Force. Naval law prior to the UCMJ had not included a clause criminalizing ungentelemanly conduct. See ARTICLES FOR THE GOVERNMENT OF THE NAVY (AGN), 34 U.S.C. § 1200 (repealed 1956); NAVAL COURTS AND BOARDS (1937).

156. The elimination of mandatory dismissal has been described as "without doubt the most significant change throughout the article's evolution." Nelson, *supra* note 4, at 132; see also *United States v. Tuck*, 7 C.M.R. 829, 835 (A.F.B.R. 1953).

The result [of the change in possible punishments] is that an officer may now properly be found guilty of conduct unbecoming an officer and a gentleman by a showing of commission of an offense which does not establish his moral unfitness to remain an officer, nor require his expulsion from the service.

Id.

157. Nelson, *supra* note 4, at 130.

under the Article,¹⁵⁸ but the drafting committee's official commentary to the Secretary of Defense included no explanation of the intended meaning or application of the revised conduct unbecoming offense.¹⁵⁹ A 1959 internal military report concerning the operation of the UCMJ recommended that mandatory dismissal be reinstated, but Congress did not adopt the change.¹⁶⁰ Since the requirement that an officer convicted of conduct unbecoming be dismissed from service had proved the main delimiter of the Article's scope, this change, like the 1806 revision, increased the vagueness and breadth of the criminal statute.

Very little explanation guided military commanders and judge advocates on the proper scope and implementation of this unspecified crime. The official *Manual for Courts-Martial* ("MCM") included only a brief description of "unbecoming" offenses.¹⁶¹ Drafted to replace the separate manuals of each service, the 1951 MCM contained far more detail than the UCMJ.¹⁶² Yet it devoted only five short paragraphs to discussion of conduct unbecoming, totaling less than one page of text.¹⁶³ It listed eight sample specifications of the crime, ranging from making false statements to insulting other officers,¹⁶⁴ but did little to cabin the potential reach of the crime.

After the implementation of the UCMJ in 1951, practitioners of military law still turned to Colonel Winthrop and to other treatises on military law for guidance, but few authors ventured

158. *Id.*

159. See H.R. REP. NO. 81-491 (1949); see also UNIFORM CODE OF MILITARY JUSTICE; TEXT, REFERENCES AND COMMENTARY BASED ON THE REPORT OF THE COMMITTEE ON A UNIFORM CODE OF MILITARY JUSTICE TO THE SECRETARY OF DEFENSE (the Morgan Draft) 157 (1949) (citing only Article of War 95 as a reference for the new Article 133, without further explanation of its meaning or intended application).

160. See Nelson, *supra* note 4, at 130.

161. See MCM 1951 § 212.

162. See WILLIAM T. GENEROUS, JR., SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE 56-57 (1973).

163. *C.f.* MCM 1951 § 213 (describing Article 134 offenses in four subsections and six detailed pages of text).

164. See MCM 1951 § 212.

Knowingly making a false statement; dishonorable failure to pay debts; opening and reading the letters of another without authority; using insulting or defamatory language to another officer in his presence or about him to another military person; being grossly drunk and disorderly in a public place; public association with notorious prostitutes; committing or attempting to commit a crime involving moral turpitude; failing without good cause to support his family.

Id.

beyond lists of sample offenses and perhaps a few cases.¹⁶⁵ For example, a 1954 casebook on military law included but a single conduct unbecoming case among hundreds of reprinted opinions.¹⁶⁶ Another textbook author noted some of the case law relevant to the clause, but offered no explanation or insight into the Article's intended scope.¹⁶⁷ The silence of the legislative record and the drafters' comments about Article 133 was echoed in the services' legal periodicals, training manuals, and official pamphlets about the military justice system.¹⁶⁸ The services published official handbooks to assist officers unfamiliar with the dictates of the new Code, but none addressed the nuances of conduct unbecoming.¹⁶⁹ Apparently, the crime was presumed transparent enough to warrant virtually no attention from scholars and practitioners of military law.

In a departure from this general lack of commentary, Keith E. Nelson, an accomplished military lawyer who later reached the rank of major general and served as Judge Advocate General of the Air Force, made a valiant effort to assess conduct unbecoming an officer and a gentleman in a 1970 article.¹⁷⁰ Nelson categorized Article 133 offenses as crimes involving honor, the status of officers, finances, trustworthiness, overindulgence, and morality

165. See, e.g., EVERETT, *supra* note 35, at 63; A. ARTHUR SCHILLER, *MILITARY LAW AND DEFENSE LEGISLATION* 521 (1941); JAMES SNEDEKER, *MILITARY JUSTICE UNDER THE UNIFORM CODE* §§ 3601–03 (1953); WINTHROP, *supra* note 24, at 710–20.

166. See DANIEL WALKER, *MILITARY LAW* 395–99 (1954). The only conduct unbecoming case cited involved cheating on an examination. See *United States v. Welch*, 3 C.M.R. 136, 136 (C.M.A. 1952).

167. See WILLIAM B. AYCOCK & SEYMOUR W. WURFEL, *MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE* 305–06 (1955).

168. See, e.g., AIR UNIV., *THE MILITARY JUSTICE SYSTEM* 14 (1962 rev. ed.) (neglecting entirely to define “conduct unbecoming an officer and a gentleman” in a description of the military justice system intended for the soon-to-be-officers of the Air Force Reserve Officers’ Training Corps).

169. See, e.g., DEP’T OF THE ARMY, *MILITARY JUSTICE HANDBOOK: THE LAW OFFICER* 45 (1954) (describing the Article 133 jury instructions for the benefit of “law officers,” who functioned as pseudo-judges at courts-martial: “[t]hat, under the circumstances, the accused’s conduct was unbecoming an officer and a gentleman”). The Army published many editions of this handbook (for example, in 1952 and 1958 under the same title), but each included the same tautological instruction. See JOE H. MUNSTER & MURL A. LARKIN, *MILITARY EVIDENCE* (1959); F. GRANVILLE MUNSON & WALTER H.E. JAEGER, *U.S. ARMY OFFICERS’ HANDBOOK OF MILITARY LAW AND COURT-MARTIAL PROCEDURE* (1941); A. ARTHUR SCHILLER, *MILITARY LAW: STATUTES, REGULATIONS AND ORDERS, JUDICIAL DECISIONS, AND OPINIONS OF THE JUDGE ADVOCATES GENERAL* 568–74 (1952); DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* (6th ed. 2004).

170. Nelson, *supra* note 4. Major General Nelson retired in 1991; for biographical information, see <http://www.af.mil/bios/bio.asp?bioID=6590> (last visited Nov. 1, 2007).

(including homosexuality, adultery, and other sex-related crimes).¹⁷¹ Neither Nelson, however, nor the other scholars and judges who considered Article 133, were willing to articulate the conceptual framework that linked these categories of disparate crimes. Clearly, however, each subgroup threatened to undermine the status of officers. Officers who are financially irresponsible undermine the upper-class privileges of officership; those who transgress against codes of acceptable sexual behavior weaken heterosexual entitlement; those who gamble, drink to excess, or are untruthful undermine the public trust that is fundamental to military authority. Preservation of status is the unifying theme that clarifies an otherwise incomprehensible jumble of conduct unbecoming offenses.

Like its predecessors, the current version of the MCM does not specify sample offenses for conduct unbecoming. This omission is all the more notable because the MCM does specify offenses to be charged under Article 134, the general article that applies to all servicemembers.¹⁷² No fewer than fifty-two sample Article 134 offenses, from “[a]busing public animal” to “[w]earing unauthorized insignia, decoration, badge, ribbon, device, or lapel button” appear in the MCM to guide lawyers and commanders.¹⁷³ The guidance for conduct unbecoming, on the other hand, includes only a short list of possible violations that is almost identical to the list that appeared in the 1951 MCM. All eight of the 1951 offenses appear, along with one new specification: “cheating on an exam.”¹⁷⁴ The trend to specify, fundamental in the modernization of U.S. criminal law, has not yet led to a precise elaboration of the extent of criminally unbecoming behavior.

As one might expect given the breadth of the crime, there was no shortage of judicial opinions concerning conduct unbecoming from the military appellate courts created by the UCMJ. The many precedents that govern its prosecution illustrate just how thoroughly the UCMJ legalized even the areas

171. See Nelson, *supra* note 4, at 132–37.

172. MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶¶ 61–113 (2005) [hereinafter MCM 2005].

173. *Id.*

174. *Id.* at pt. IV, ¶ 59.c.(3). Cheating on exams at the national service academies has been a recurring source of embarrassment for the military. For the latest example, see Alan Cooperman, *Air Force Academy Probes Allegations of Student Cheating*, WASH. POST, Feb. 10, 2007, at A3 (describing the investigation of widespread cheating on a weekly military knowledge quiz by the fourth class cadets). See also H. MICHAEL GELFAND, SEA CHANGE AT ANNAPOLIS: THE UNITED STATES NAVAL ACADEMY, 1949–2000, at 106–07 (2006) (describing the reaction to a 1990 cheating scandal).

of military law most remote from civilian criminal justice. For example, the issue of multiplicity—that is, whether conduct unbecoming charges constitute a distinct offense or instead are duplicative of misconduct that is also charged as a separate, specified crime—has been frequently litigated and is the focus of numerous judicial opinions.¹⁷⁵ In response, military courts have permitted conduct unbecoming charges to be added to other offenses and have adopted a standard of what “a reasonable military officer” would know to be wrongful to define the scope of conduct unbecoming offenses.¹⁷⁶

Like the authors of treatises and training manuals, however, most military judges have elected to recite lists rather than venture a definition of “conduct unbecoming.”¹⁷⁷ Because the civil courts have largely deferred to the military on issues of criminal law since the end of the Vietnam War, unspecified military crimes, including conduct unbecoming, have remained outside the reach of constitutional doctrines that have constrained civilian criminal law.¹⁷⁸ The key Supreme Court precedent on vagueness in military criminal law is *Parker v. Levy*, a 1974 opinion in the case

175. See, e.g., *United States v. Maderia*, 38 M.J. 494, 495 (C.M.A. 1994); *United States v. Ramirez*, 21 M.J. 353, 355 (C.M.A. 1986); see also Capt. David O. Anglin, *Service Discrediting: Misuse, Abuse, and Fraud in the Government Purchase Card Program*, ARMY LAW., Aug. 2004, at 1, 12 (discussing multiplicity and conduct unbecoming charges in *United States v. Palagar*, 56 M.J. 294 (C.A.A.C. 2002)); David D. Velloney, *Recent Developments in Substantive Criminal Law: A Continuing Education*, ARMY LAW., May 2003, at 64, 65 (assessing the jurisprudence of multiplicitous charges and conduct unbecoming). In general, military courts have limited overcharging by rejecting convictions for both conduct unbecoming and a specified crime for the same conduct. Article 133 charges also appear in other important precedents in modern military law as well. See, e.g., Maj. Christopher T. Fredrikson, *The Unsheathing of a Jurisdictional Sword: The Application of Article 2(C) to Reservists*, ARMY LAW., July 2004, at 1, 3 (reviewing the impact of *United States v. Phillips*, 58 M.J. 217 (C.A.A.F. 2003), a case involving charges of drug abuse and conduct unbecoming, on military criminal jurisdiction).

176. See, e.g., *United States v. Hartwig*, 39 M.J. 125, 130 (C.M.A. 1994); *United States v. Moore*, 38 M.J. 490, 493 (C.M.A. 1994); *United States v. Miller*, 37 M.J. 133, 138 (C.M.A. 1993); *United States v. Frazier*, 34 M.J. 194, 198–99 (C.M.A. 1992).

177. For one such list, see *United States v. Sollmann*, 59 M.J. 831, 834–35 (A.F. Ct. Crim. App. 2004) (including examples of conduct unbecoming such as publicly expressing dissent or disloyalty, making false statements, advising others how to defeat drug tests—as well as cross-dressing, asking intimate sexual questions, making sexually suggestive remarks to children, speaking indecently to adults, and having sex across officer/enlisted lines).

178. See Diane H. Mazur, *Rehnquist's Vietnam: Constitutional Separatism and the Stealth Advance of Martial Law*, 77 IND. L.J. 701, 701–41 (2002) (tracing the Rehnquist Court's development of a doctrine of judicial deference that shielded legislative and executive decisions from judicial review); see also Jonathan Turley, *The Military Pocket Republic*, 97 NW. U. L. REV. 1, 95–133 (2002).

of a medical doctor whose outspoken opposition to the war in Vietnam earned him a conduct unbecoming conviction.¹⁷⁹ In upholding Captain/Dr. Levy's conviction, then-Justice Rehnquist wrote, "While the members of the military are not excluded from the protection granted by the First Amendment, . . . [t]he 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."¹⁸⁰ This much-quoted phrase has become a maxim of military justice, used to exempt the conduct unbecoming clause and the general article from legal doctrines that constrain civilian criminal law.¹⁸¹

B. Democratization and Its Discontents

While American society in the 1950s did not completely dispense with the social and economic hierarchies of previous eras, the upper-crust implications of the term "gentleman" were out of sorts with the Cold War culture. American men in the 1950s played many roles, from hipster to organization-man, but the appellation "gentleman" fit very few of them.¹⁸² The term, however, remained a defining element of the military crime even as its relevance faded. During the 1950s, both the wealth and the taste of the gentleman were available to an increasing number of American men.¹⁸³

The 1950s brought a new set of anxieties, along with suburban homes, to many American men. A culture that emphasized domesticity, stability, and the nuclear family relied

179. See *Parker v. Levy*, 417 U.S. 733, 733 (1974); see also *United States v. Howe*, 37 C.M.R. 429, 433 (C.M.A. 1967); LEWIS MAYERS, *THE AMERICAN LEGAL SYSTEM: THE ADMINISTRATION OF JUSTICE IN THE UNITED STATES BY JUDICIAL, ADMINISTRATIVE, MILITARY, AND ARBITRAL TRIBUNALS* 507 ("The Code . . . thus rejects the basic principle of the civilian criminal law, that no act is punishable unless specifically defined as such in advance of its commission."); CHARLES A. SHANOR & L. LYNN HOGUE, *MILITARY LAW IN A NUTSHELL* 204 (2d ed. 1996) ("[T]he UCMJ expressly endorses the concept of unspecified crimes . . ."); Robert N. Strassfeld, *The Vietnam War on Trial: The Court-Martial of Dr. Howard B. Levy*, 1994 WISC. L. REV. 839, 839-963 (1994) (providing historical and legal context for the Levy case).

180. *Parker*, 417 U.S. at 758.

181. Mazur, *supra* note 178, at 740-48.

182. See SUSAN BORDO, *THE MALE BODY: A NEW LOOK AT MEN IN PUBLIC AND IN PRIVATE* 119, 107-52 (1999).

183. See JOHN DIGGINS, *THE PROUD DECADES: AMERICA IN WAR AND PEACE, 1941-1960* (1988); DAVID HALBERSTAM, *THE FIFTIES* (1993); MICHAEL KAMMEN, *AMERICAN CULTURE, AMERICAN TASTES: SOCIAL CHANGE AND THE 20TH CENTURY* 95-132 (1999).

more heavily than ever on men's and women's willingness to conform to prescribed gender roles.¹⁸⁴ Yet American men protested against the constraints of these new roles.¹⁸⁵ Anxious to meet social and cultural expectations, middle-class men felt pressured to provide for their families at home and to fit into the new organizational cultures of the workplace.¹⁸⁶ Mixed cultural messages about desirable male behavior proved difficult to reconcile for many men.¹⁸⁷ Feminist scholar Susan Bordo points out that the "double bind," a term first articulated by a psychologist in 1956, describes the dual messages sent to late-twentieth century American men: be aggressive yet restrained—or, as Bordo writes, be "gentleman" and "beast."¹⁸⁸

This double bind had always confounded military officers, men who were asked to be polite yet violent, neat yet savage.¹⁸⁹ The conflict inherent in the "gentleman warrior" extended to men outside the ranks of officers as well.¹⁹⁰ As male gender roles were challenged and reconstructed in the 1950s, many elite and middle-class, American men felt their status was under siege from efforts by newly assertive segments of society, including the Civil Rights Movement, feminism, and gay liberation.¹⁹¹ Elite, White men might cling to the title "gentlemen," but the privileges they hoped it would preserve were fast dwindling.

184. STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* 23–41 (1992).

185. BORDO, *supra* note 182, at 107–52.

186. See DAVID RIESMAN, *THE LONELY CROWD: A STUDY OF THE CHANGING AMERICAN CHARACTER* 113–29, 307–25 (1950); see also K.A. Cuordileone, "Politics in an Age of Anxiety": *Cold War Political Culture and the Crisis in American Masculinity, 1949–1960*, 87 J. AM. HIST. 515, 525 (2000).

187. DAVID SAVRAN, *TAKING IT LIKE A MAN: WHITE MASCULINITY, MASOCHISM, AND CONTEMPORARY AMERICAN CULTURE* 4, 45 (1998); see also BARBARA EHRENREICH, *THE HEARTS OF MEN: AMERICAN DREAMS AND THE FLIGHT FROM COMMITMENT* (1983); GORN, *supra* note 119, at 101.

188. BORDO, *supra* note 182, at 242–43, 229. For another contemporary assessment of American manhood, see SUSAN FALUDI, *STIFFED: THE BETRAYAL OF THE AMERICAN MAN* 10 (1999) ("The man controlling his environment is today the prevailing American image of masculinity.").

189. Gayle L. Watkins & Randi C. Cohen, *In Their Own Words: Army Officers Discuss Their Profession*, in *THE FUTURE OF THE ARMY PROFESSION*, *supra* note 100, at 77, 77–110.

190. *Id.*

191. See TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954–1963*, at 87–93 (1988); SAVRAN, *supra* note 187, at 70–75. See generally JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES 1940–1970*, at 9–74 (2d ed. 1998) (assessing the origins of the gay rights movement); Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 61–120 (1988) (linking foreign policy to domestic racial policy).

As "gentleman" receded further from American cultural consciousness, "officer" slid into the background as well. Military officer seemed almost as unlikely a 1950s role as gentleman, even though the United States fought a major war overseas—and got involved in another—during the decade.¹⁹² The mobilization of industry and personnel for the Korean War, and the establishment of the military-industrial complex that would remain for the duration of the Cold War, was "a radical departure" for "a nation deeply suspicious of the military establishment."¹⁹³ Americans were weary of the costs and dislocations of war and apprehensive about the future of warfare in an age of nuclear weapons.¹⁹⁴ Even "war" itself seemed to be losing traction in American culture, replaced by "defense" and "security" in the 1950s military lexicon.¹⁹⁵

After World War II, "the male enlisted force dropped dangerously in age, education, and socioeconomic background."¹⁹⁶ Concerns about the lower quality of recruits contributed to two 1948 "manpower" reforms: the Women's Armed Services Integration Act,¹⁹⁷ which allowed for the possibility of military careers for at least a few servicewomen, and President Truman's much-celebrated order to desegregate the armed forces.¹⁹⁸ Despite having little immediate impact on the make-up of the armed forces, the reforms were powerful symbols of the opening-up of military service to a wider range of Americans. Reaction against the policy changes from within the armed forces was considerable. In the words of two eminent military historians, "the integration of women and blacks further distracted the undermanned, marginally effective armed forces."¹⁹⁹ The military struggled to recruit and retain personnel, even after instituting policies more conducive to family life and raising the pay scales of officers to

192. See MARGOT A. HENRIKSEN, DR. STRANGELOVE'S AMERICA: SOCIETY AND CULTURE IN THE ATOMIC AGE 27–37 (1997).

193. PAUL G. PIERPAOLI, JR., TRUMAN AND KOREA: THE POLITICAL CULTURE OF THE EARLY COLD WAR 11 (1999).

194. HENRIKSEN, *supra* note 192, at 36–37.

195. See VAN CREVELD, *supra* note 34, at 71 (1990) (describing changes in popular war terminology); see also Burk, *supra* note 100, at 29 (describing a new and broader science of national security and strategic studies).

196. MILLETT & MASLOWSKI, *supra* note 52, at 506.

197. Women's Armed Services Integration Act, Pub. L. No. 80-625, 62 Stat. 356 (1948) (codified as amended in scattered sections of 10 U.S.C.).

198. MILLETT & MASLOWSKI, *supra* note 52, at 506 (citing Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948)).

199. *Id.*

attempt to keep pace with civilian salaries.²⁰⁰ The advent of the draft further diminished enthusiasm for the military, especially among American youth.²⁰¹

The prospect of a growing number of African Americans, with officers' rank as well as military uniforms, who would warrant salutes and would be addressed as "sir" by enlisted servicemembers, was unsettling to an officer corps already unsure of itself.²⁰² Campaigns to identify and eliminate suspected gay and lesbian servicemembers also gathered strength in the 1950s,²⁰³ even when the military stood to lose face as a result.²⁰⁴ The distinctive quality of military discipline as compared to civilian corporate culture seemed to be eroding as a new psychology of management took hold in the armed forces.²⁰⁵ All of this turmoil made it clear to officers that they were at the top of an institutional structure under great strain during the 1950s.²⁰⁶

C. Cold War Prosecutions

Although conduct unbecoming an officer and a gentleman remained a crime after World War II, gentlemanliness seemed an

200. See JANOWITZ, *supra* note 103, at 182–84 (discussing the military's efforts to make pay more competitive with the civilian market).

201. See generally BERNARD ROSTKER, *I WANT YOU! THE EVOLUTION OF THE ALL-VOLUNTEER FORCE* 27–105 (2006).

202. See ALAN L. GROPMAN, *THE AIR FORCE INTEGRATES, 1945–1964* (2d ed. 1998); MORRIS J. MACGREGOR, JR., *INTEGRATION OF THE ARMED FORCES, 1940–1965* (1981); NALTY, *supra* note 134, at 235–69.

203. See ALLAN BÉRUBÉ, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO* 228–54 (1990); Clifford A. Dougherty & Norman B. Lynch, *The Administrative Discharge: Military Justice?*, 33 GEO. WASH. L. REV. 498, 518 (1964); William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet, 1946–1961*, 24 FLA. ST. U. L. REV. 703, 744 (1997); Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 837–55 (1979); see also EVERETT, *supra* note 35, at 4 (1956) (explaining the similar security threats that drug addicts and homosexuals posed to youth).

204. The military's pursuit of Navy doctor and Catholic icon Tom Dooley indicates its aggressive attitude toward ousting gay men during this period. See JAMES T. FISHER, *DR. AMERICA: THE LIVES OF THOMAS A. DOOLEY, 1927–1961*, at 82–88 (1997). Touted as the next Surgeon General of the Navy after gaining notoriety through celebrated humanitarian missions to Vietnam and Laos, Dooley was forced to resign in 1956 for "homosexual tendencies." *Id.* Naval intelligence officers followed Dooley around the world, tapped his phones, and repeatedly set him up for sexual encounters with informants. *Id.*

205. See JANOWITZ, *supra* note 103, at 38–40.

206. See generally *EVOLUTION OF THE AMERICAN MILITARY ESTABLISHMENT SINCE WORLD WAR II* (Paul R. Schratz ed., 1978) (discussing postwar changes in military structure); VAN CREVELD, *supra* note 34, at 101 ("The effect of the expansion of civilian higher education [after World War II] was to threaten the status of the officer in society.").

unlikely answer to the problems of the nuclear age. The high anxieties of the early years of the Cold War magnified the desire for stable identities and clear expectations for behavior.²⁰⁷ Military leaders, concerned with self-preservation and anxious to keep detractors at bay, defined and prosecuted conduct unbecoming crimes in a manner designed to re-stabilize a military order being shaken to its foundations.

For military officers, the Cold War crises in professional authority and social status increased a desire to be perceived as gentlemen despite that category's loss of meaning during the postwar era. Officers in the 1950s could consult a growing number of etiquette guides, each intended to enhance knowledge of and respect for military customs and courtesies.²⁰⁸ The 1946 report of the Doolittle Board, a committee headed by Air Force Lt. Gen. James H. "Jimmy" Doolittle and tasked with assessing the relationship between officers and enlisted men, referred to the morale problems caused by the Army's "lack of democracy" and its officers' "abuse of privileges."²⁰⁹ In 1953, the Department of Defense appointed a special committee to investigate the professional status of officers, itself an indication of uncertainty within the ranks.²¹⁰ The committee's report emphasized the importance of tradition and formalism in maintaining high morale and effectiveness among troops in spite of the challenges of new missions and personnel policies.²¹¹ In disciplinary proceedings like those held to consider whether American prisoners of war had collaborated with their North Korean and Chinese captors during the Korean War, commanding officers stressed the importance of officers maintaining their bearing, independence, and honor in the face of even the most dire challenges. For example, in a 1956 letter of reprimand issued to an Army lieutenant colonel convicted for his failures while imprisoned, a commanding general

207. See generally TIMOTHY MELLEY, *EMPIRE OF CONSPIRACY: THE CULTURE OF PARANOIA IN POSTWAR AMERICA* (2000) (elaborating on the anxiety that characterized postwar American culture).

208. JANOWITZ, *supra* note 103, at 175–203; see, e.g., *THE AIR OFFICER'S GUIDE* (5th ed. 1951); *THE OFFICERS' GUIDE* (12th ed. 1956); NANCY SHEA, *THE AIR FORCE WIFE* (2d ed. 1966); NANCY SHEA, *THE ARMY WIFE* (3d ed. 1954).

209. See *REPORT OF THE SECRETARY OF WAR'S BOARD ON OFFICER-ENLISTED MAN RELATIONSHIPS* 1 (1946); see also FISHER, *supra* note 41, 263–70 (describing the Doolittle board and the Army's decision to ignore its recommendations); G. Dearborn Spindler, *The Doolittle Board and Coöptation in the Army*, 29 *SOCIAL FORCES* 305–10 (1951) (analyzing the organizational impact of the tension between "the democratic context" and wartime mission of the military).

210. JANOWITZ, *supra* note 103, at 50.

211. See *id.*

castigated the officer for not only complying with his captors but for acting in a “*servile, craven, and unsoldierly manner*” during captivity.²¹² Officers remained committed to “a gentlemanly style of life”²¹³ and invested in the advantages it might offer in terms of both social privilege and professional duty despite the challenges that a more democratic military posed to that lifestyle.

Nineteen-fifties prosecutions for conduct unbecoming reflected this concern with preserving military authority, tradition, and privilege. Military leaders’ sense that the officer corps was coming apart, losing its exclusiveness and cultural distinctiveness, led to a renewed emphasis on cultural and ideological conformity. In many instances, an Article 133 violation was added to the list of charges when an officer faced trial for a specified crime, most often larceny²¹⁴ or lying to officials, commonly prosecuted as the crime of making “false official statements.”²¹⁵ However, when conduct unbecoming was the centerpiece of the prosecution’s case against an officer, the charges clustered around acts that were embarrassing to the armed forces: officers who could not pay their debts or repeatedly bounced checks,²¹⁶ who were outspoken in criticizing military leaders or policy,²¹⁷ who appeared to be gay,²¹⁸ or who associated publicly with women who were not their wives.²¹⁹ Conformity to the ideal

212. RAYMOND B. LECH, *BROKEN SOLDIERS* 317 (2000) (emphasis added).

213. See JANOWITZ, *supra* note 103, at 186.

214. See, e.g., *United States v. Howe*, 38 C.M.R. 522 (A.B.R. 1967) (larceny); *United States v. Pond*, 38 C.M.R. 17 (C.M.A. 1967) (larceny) *overruled in part by United States v. Reed*, 54 M.J. 37 (2000) (overruling to the extent it conflicts with legal sufficiency standard for evidence); *United States v. Giordano*, 35 C.M.R. 135 (C.M.A. 1964) (usury); *United States v. Kalmaer*, 20 C.M.R. 748 (A.F.B.R. 1955) (soliciting a bribe); *United States v. Allbrook*, 20 C.M.R. 580 (A.F.B.R. 1955) (bribery); *United States v. Griffiths*, 18 C.M.R. 354 (A.B.R. 1955) (larceny); *United States v. Krull*, 11 C.M.R. 129 (C.M.A. 1953) (larceny).

215. See, e.g., *United States v. Daggett*, 29 C.M.R. 497 (C.M.A. 1960); *United States v. Dowling*, 18 C.M.R. 670 (A.F.B.R. 1954); *United States v. Gomes*, 11 C.M.R. 232 (C.M.A. 1953). Spying for Communists was also deemed conduct unbecoming. See *United States v. Kauffman*, 33 C.M.R. 748 (A.F.B.R. 1963), *aff’d in part, rev’d in part* 34 C.M.R. 63 (C.M.A. 1963).

216. See, e.g., *United States v. Underwood*, 27 C.M.R. 487 (C.M.A. 1959); *United States v. Kirksey*, 20 C.M.R. 272 (C.M.A. 1955) (dismissing charge of dishonorably failing to pay a debt); *United States v. Journell*, 18 C.M.R. 752 (A.F.B.R. 1955); *United States v. Knight*, 13 C.M.R. 444 (A.B.R. 1953); *United States v. Danilson*, 11 C.M.R. 692 (A.F.B.R. 1953).

217. See, e.g., *United States v. Howe*, 37 C.M.R. 555 (A.B.R. 1966); *United States v. Wolfson*, 36 C.M.R. 722 (A.B.R. 1966); see also Lt. Col. Michael J. Davidson, *Contemptuous Speech Against The President*, ARMY LAW., July 1999, at 1.

218. See, e.g., *United States v. Yeast*, 36 C.M.R. 890 (A.F.B.R. 1966); *United States v. Jackson*, 12 C.M.R. 403 (A.B.R. 1953).

219. See, e.g., *United States v. McGlone*, 18 C.M.R. 525 (A.F.B.R. 1954); *United*

of the gentleman officer required military officers to have particular class, gender, racial, and sexual identities—or at least to act them out in public.

A telling case from the 1950s Army illustrates the military's efforts to police many of these identities. In 1953, First Lt. John Calvin Sloan made the mistake of bringing the wife of an enlisted soldier into the mess at the Smoke Bomb Hill Officers' Club at Fort Bragg, North Carolina. By escorting another man's wife (along with an Army sergeant and the sergeant's wife, all of which violated the rules of the officers' club) and then proceeding to drink to incapacity, Sloan had already attracted the attention of other officers in the club.²²⁰ But when he left the club with the assistance of the woman and another officer, passed out in the back seat of their car, and then lay senseless while the woman was raped by the other officer, Sloan was deemed guilty of a serious crime.²²¹ For "wrongfully and dishonorably plac[ing] himself in such a condition that he did not protect her from being raped by another," he was convicted of conduct unbecoming an officer and a gentleman.²²²

Sloan had brought the wife of an enlisted man into the officers' club, presumably as his date. By itself, this act was already a military crime, given that both "fraternizing," a term of art loosely defined as undue familiarity with servicemembers of significantly lower rank, and adultery were criminal offenses under the UCMJ.²²³ By choosing to socialize with a woman who was married to an enlisted man—by bringing her to an *officers'* club—Sloan had already demonstrated bad judgment. Officers and gentlemen were supposed to associate with persons of similar social status.²²⁴

But Sloan's bad judgment slid into criminal misconduct because of the racial and gendered implications of what happened after he brought his inappropriate date to the club. He became

States v. Knight, 13 C.M.R. 444 (A.B.R. 1953).

220. United States v. Griffin, 14 C.M.R. 405 (A.B.R. 1954).

221. See United States v. Sloan, 14 C.M.R. 375, 376 (A.B.R. 1954) (affirming conviction on the charges related to drunkenness, fraternizing, and "wrongfully and discredibly" escorting the woman, but dismissing the rape-related charge for lack of reasonable foreseeability).

222. *Id.*

223. See United States v. Hickson, 22 M.J. 146 (C.M.A. 1986) (adultery) *overruled by* United States v. Guthrie, No. 9501697, 1998 WL 918627 (N-M. Ct. Crim. App. Dec. 21, 1998); Hopkins, *supra* note 42, at 238 (analyzing fraternization and adultery as military crimes).

224. Major Nelson's article placed Sloan's case in the category of violations against military "honor." See Nelson, *supra* note 4, at 133.

extremely drunk (which on its own was certainly not enough for a conduct unbecoming offense)²²⁵ while his "date" danced and talked to another officer—an officer who happened to be African American, unlike the woman.²²⁶ When the threesome left the club, Sloan fell unconscious and "allowed" the woman to be raped by the other officer, who was convicted at court-martial for the assault.²²⁷

The precise role that race played in the decision to court-martial these officers is not easily discerned from the available records. But there is little doubt that popular perceptions of the inappropriateness of sex across lines of race and class influenced many prosecutions for rape and for conduct unbecoming.²²⁸ From Thurgood Marshall's 1951 trip to Korea to investigate African-American servicemen's charges of racism in courts-martial, to racially charged riots at the Presidio Army stockade in 1968, the early years of the UCMJ were fraught with racial tension.²²⁹ African-American servicemen encountered resistance from White officers and enlisted servicemembers, held few positions of authority, and were subject to unusual scrutiny and censure through the military justice system, which was closely monitored for racially disparate outcomes.²³⁰

225. Drunkenness charges will not be sustained when there is a lack of a "gross" degree of drunkenness. See, e.g., *United States v. Mallory*, 17 C.M.R. 409, 409 (A.B.R. 1954) (reversing a conduct unbecoming conviction for public drunkenness); *United States v. Loney*, 8 C.M.R. 533, 538 (A.C.M.R. 1952) (indicating gross level of public drunkenness required); *United States v. Clarke*, 3 C.M.R. 227 (A.C.M.R. 1952) (discussing degree of intoxication required).

226. *United States v. Griffin*, 14 C.M.R. 405, 406 (A.B.R. 1954).

227. The officer charged with rape in this incident, First Lt. John R. Griffin, was sentenced to dismissal and twenty years confinement. *Id.* at 407.

228. See HILLMAN, *supra* note 3, at 84–86 (assessing military prosecutions for adultery and wrongful cohabitation); *id.* at 92–108 (considering the impact of racism on Cold War military justice).

229. On Marshall's investigative trip to Korea, during which he interviewed dozens of African-American servicemen concerned about being singled out for prosecution and sentenced to disproportionately harsh sentences at courts-martial, see MICHAEL D. DAVIS & HUNTER R. CLARK, *THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH* 125–35 (1992); ROGER GOLDMAN & DAVID GALLAN, *THURGOOD MARSHALL: JUSTICE FOR ALL* 112–19 (1992); CARL T. ROWAN, *DREAM MAKERS, DREAM BREAKERS: THE WORLD OF JUSTICE THURGOOD MARSHALL* 159–69 (1993). The Presidio "mutiny," a short-lived protest among twenty-seven men serving court-martial sentences in the San Francisco stockade, was triggered when a prisoner with a history of drug and related mental health problems was shot to death by a guard as the prisoner ran away from a work detail. The protesting prisoners demanded relief from overcrowding and inhumane prison conditions; twenty-two were convicted of mutiny for their roles in the disturbance. See ROBERT SHERRILL, *MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC* 4–61 (1970).

230. See, e.g., DAN LANDIS & RICK TALLRIGO, *DEF. EQUAL OPPORTUNITY MGMT.*

The military's progress toward racial equality in courts-martial was retarded by the availability of the conduct unbecoming charge, an action malleable enough to enforce race-based prejudices that persisted among some military leaders.²³¹ During World War II, the tradition of using conduct unbecoming against African-American officers had persisted; for example, two Tuskegee airmen, members of an elite group of pilots in the Army Air Corps, were court-martialed for conduct unbecoming for their protests against racial discrimination.²³² The racial assumptions of "gentleman" and "officer" were aspects of the cultural hierarchy of the American military throughout the 1950s and 1960s.²³³ Because the social environment of officers' clubs remained segregated and the interaction of White women with African-American men was still a particular concern of White military authorities, African-American officers who did frequent such clubs were especially likely to cross the boundaries established by codes of gentlemanliness.²³⁴

The procedural reforms of the UCMJ, however, did impose limits on the use of conduct unbecoming to enforce racial separatism and stereotypes. The case of Lieutenant Sloan, the Army officer who was prosecuted for permitting a forcible sexual encounter across race lines to take place in his presence, confirms that military justice in the mid-1950s had changed since the late-nineteenth century.²³⁵ Although Sloan was convicted of conduct

INST. DIRECTORATE OF RESEARCH, RACE AND THE ADMINISTRATION OF NON-JUDICIAL PUNISHMENTS IN THE U.S. ARMY (1996).

231. The discretion that led to racialized outcomes was a feature of civilian, as well as military, criminal justice systems of the era. See generally RANDALL KENNEDY, *RACE, CRIME AND THE LAW* (1997); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004) (tracing the legal struggle for racial equality from the late-nineteenth century through the mid-1960s); GAIL WILLIAMS O'BRIEN, *THE COLOR OF THE LAW: RACE, VIOLENCE, AND JUSTICE IN THE POST-WORLD WAR II SOUTH* (1999).

232. See F. Michael Higginbotham, *Soldiers for Justice: The Role of the Tuskegee Airmen in the Desegregation of the American Armed Forces*, 8 WM. & MARY BILL OF RTS. J. 273, 310–11 (2000). Both were later acquitted of conduct unbecoming. *Id.*

233. See DAVIS & CLARK, *supra* note 229, at 129; Karst, *supra* note 34 (discussing racism in the armed forces generally).

234. See JANOWITZ, *supra* note 103, at 203.

235. In 1983, in another important example of the evolution of military law, the Court of Military Appeals reversed the conviction of a captain stationed at Minot Air Force Base in North Dakota for conduct unbecoming. The charge stemmed from the captain's sexual relationships with at least three enlisted women, one of whom was married, relying on changed customs and relaxed proscriptions against fraternization. *United States v. Johanns*, 20 M.J. 155 (C.M.A. 1985). But see *United States v. Boyett*, 42 M.J. 150 (C.A.A.F. 1995) (upholding the conviction of a male Air Force second lieutenant for having a consensual sexual relationship with

unbecoming, the conviction was dismissed as invalid by the first military appeals court to review the case.²³⁶ Holding that the charge was deficient as a matter of law for its "vague and indefinite" nature, the Army Board of Review explained that the rape was not reasonably foreseeable, and therefore Sloan could not be held criminally responsible for it.²³⁷ Sloan's dismissal from the Army stood because the court-martial had convicted him on other charges, but he ultimately was not guilty of conduct unbecoming an officer and a gentleman.²³⁸ Even as the military used conduct unbecoming prosecutions to smooth over difference within a diversifying officer corps, legal reform made conduct unbecoming a less reliable tool for preserving officers' social status.²³⁹

IV. Meeting the Proliferating Threats

The late-twentieth century brought new strategic and personnel challenges to military organizations. This Part analyzes the resilience and relevance of conduct unbecoming in the military's reaction to the arrival of large numbers of women in the ranks of military officers and the decline of legal exclusions from military service.

A. *The Gentlewoman Question*

The absence of a modern conceptual framework for conduct unbecoming is especially striking in the wake of women's

a female airman not under his command); James J. Kilpatrick, *Just What Is "Conduct Unbecoming an Officer and a Gentleman"?*, 51 HUMAN EVENTS 8 (Nov. 17, 1995) (discussing the *Boyet* case); see also *"Don't Ask" Officer Leaves the Air Force*, N.Y. TIMES, Oct. 13, 1996, at 24 (reporting that Maj. Debra L. Meeks retired after being acquitted of sodomy involving a civilian woman and of conduct unbecoming an officer); *Jury Acquits Air Force Major Accused of Lesbian Affair*, N.Y. TIMES, Aug. 17, 1996, at 7 (reporting on Meeks's trial and case).

236. See *United States v. Sloan*, 14 C.M.R. 375, 376 (A.B.R. 1954).

237. *Id.*

238. *Id.*

239. See generally Mark J. Osiel, *Obedying Orders: Atrocity, Military Discipline, and the Law of War*, 86 CAL. L. REV. 939, 1079 (1998) (commenting on the uncertain definitions of "conduct unbecoming" and other such military terms concerning honor).

But using such concepts is no longer so easy where the profession lacks the social homogeneity of a traditional martial stratum. Its members then would not have the dense web of connecting conventions enabling them to respond immediately in unison to superior orders calling for particular acts, with cries of "No. That's unchivalrous!" Without bright-line rules, there is serious danger of wildly disparate judgments on whether particular instances of soldierly conduct should count as cowardly or "unbecoming."

Id.

admission into the officer corps. Even when analyzing charges against female officers, observers and scholars of military justice have sidestepped the question of how gender defines “conduct unbecoming.”²⁴⁰ This neglect is not surprising. Most students of military law are familiar with the military’s practice of using male titles to refer to servicewomen as well as men.²⁴¹ Although some 350,000 women served in the military during World War II,²⁴² the “gentleman” of the old Article of War 95 was not altered when the UCMJ was drafted after the war.²⁴³ The 1951 MCM likewise noted only that “[w]hen applied to a female officer the term ‘gentleman’ is the equivalent of ‘gentlewoman.’”²⁴⁴ The current MCM, published in 2005, includes a similar comment in its conduct unbecoming description: “As used in this article, ‘gentleman’ includes both male and female commissioned officers, cadets, and midshipmen.”²⁴⁵

Similarly, military courts have routinely used the word “gentleman” when reviewing the many conduct unbecoming an officer and a gentleman cases that have been prosecuted against women officers.²⁴⁶ Indeed, judicial opinions sometimes leave out “gentleman” altogether in describing the crime, notwithstanding the importance of the term in its historical definitions.²⁴⁷ For

240. See, e.g., Major Warner, *Judicial Notice of a Violated Custom or Tradition*, ARMY LAW., Mar. 1991, at 39 (discussing *United States v. Arthen*, 32 M.J. 541 (A.F.C.M.R. 1990)).

241. To wit: airmen, seamen, midshipmen, and other such terms apply to both women and men in uniform.

242. See generally LEISA D. MEYER, *CREATING G.I. JANE: SEXUALITY AND POWER IN THE WOMEN'S ARMY CORPS DURING WORLD WAR II* (1996) (tracing the experiences of women in the Army during World War II).

243. Uniform Code of Military Justice (UCMJ), Pub. L. No. 81–506, 64 Stat. 142 (1950) (codified at 10 U.S.C. § 933).

244. See MCM 1951 § 212.

245. MCM 2005, pt. IV, ¶ 59.c.(2). The MCM describes the crime as follows:

Conduct violative of this article is action or behavior in an official capacity which, in dishonoring or disgracing the person as an officer, seriously compromises the officer's character as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer. There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty, unfair dealing, indecency, indecorum, lawlessness, injustice, or cruelty.

Id.

246. Only four military appellate opinions since the implementation of the UCMJ in 1951 mention “gentlewoman” in the context of conduct unbecoming an officer and a gentleman: *United States v. Frelix-Vann*, 55 M.J. 329 (C.A.A.F. 2001), *United States v. Arthen*, 32 M.J. 541 (A.F.C.M.R. 1990), *United States v. Rodriguez*, 18 M.J. 363 (C.M.A. 1984), and *United States v. Halliwell*, 4 C.M.R. 283 (A.B.R. 1952).

247. See, e.g., *United States v. Killingsworth*, No. 200201785, 2005 WL 1080797,

many military officers and for military law, subsuming women into a nominally male category like “gentleman” is neither confusing nor particularly worrisome.

But it should be. While the precise contours of gentlemanly conduct are hard to specify, “gentlewomanly” conduct is virtually meaningless as a guide for servicewomen. Even outside the military context, “gentleman” is defined in a way that allows for the possibility of military service. In the *Oxford English Dictionary*, “gentleman” and related words receive more than two full pages of coverage; the first definition of the term includes “one who is entitled to bear arms.”²⁴⁸ “Gentlewoman,” on the other hand, warrants but a few lines and is defined as “a woman of good birth or breeding” or “a female attendant upon a lady of rank.”²⁴⁹ Gentlewomen, then, are ladies or else servants; gentlemen, however, possess weapons as well as prestige. Unlike “gentleman,” the connotations of “gentlewoman” conflict with those of “officer.”²⁵⁰ While the civility required of a gentleman might seem incongruous alongside the sometimes grim duties of a military officer, the idea that a deferential, retiring gentlewoman could be an effective military leader, willing to resort to violence and able to command men, is preposterous.

In addition to the dissonance created by the word “gentlewoman” itself, the existing understanding of the military crime of conduct unbecoming could not be easily adapted to apply to female misbehavior. In the 1951 MCM, the first manual issued after women were a recognized part of the regular officer corps, associating with prostitutes and failing to support one’s family were both included on the short list of sample conduct unbecoming offenses.²⁵¹ Neither offense made sense when applied to servicewomen at that time. In fact, servicewomen had to worry instead about being assumed to be prostitutes simply because they

at *1 (N-M. Ct. Crim. App. May 6, 2005) (“A military judge . . . convicted the appellant, pursuant to her pleas, of conduct unbecoming an officer . . .”).

248. OXFORD ENGLISH DICTIONARY (18th ed. 1979).

249. *Id.* Other definitions reflect similar understandings of “gentlewoman.” See, e.g., Cambridge Dictionaries Online, <http://dictionary.cambridge.org/define.asp?key=32547&dict=CALD> (last visited Nov. 10, 2007) (classifying the term as “old-fashioned” and defining it as “a woman who belongs to a high social class, or one who is kind, polite and honest”); Merriam-Webster Online, <http://mw1.merriam-webster.com/dictionary/gentlewoman> (last visited Nov. 9, 2007) (“a woman of refined manners or good breeding”).

250. See BETTYANN HOLTZMANN KEVLES, *ALMOST HEAVEN: THE STORY OF WOMEN IN SPACE* 171–89 (2003) (describing the challenges that military culture posed to the first group of female astronauts in a chapter entitled “Officers and Gentlewomen”).

251. See MCM 1951 § 212.

decided to join the Army²⁵²—and about being fired from their jobs if they decided to have a family.²⁵³

Despite the difficulty of applying conduct unbecoming to female officers, women were prosecuted alongside men for violating this Article of the UCMJ.²⁵⁴ The first case of a woman's conduct unbecoming conviction reached the military's highest court in 1952.²⁵⁵ In upholding the conviction of a nurse who stole morphine from a hospital to support her addiction, the Court of Military Appeals noted that, "[w]hen applied to a female officer[,] the term 'gentleman' is the equivalent of 'gentlewoman,'"²⁵⁶ and it approvingly quoted the instructions given at trial: "The court is reminded that the word 'gentleman' in the case now in hearing is to be interpreted as 'gentlewoman.'"²⁵⁷

The military appellate record makes clear that women have been charged with conduct unbecoming for many of the same acts as men, including larceny,²⁵⁸ drug abuse,²⁵⁹ failure to pay debts,²⁶⁰ and sexual misconduct such as adultery and fraternization.²⁶¹ As might be expected, given the different norms that have governed male as compared to female sexual behavior, gentlewomen officers were sometimes treated differently in this final category of sexual

252. See JUDITH HICKS STIEHM, *ARMS AND THE ENLISTED WOMAN* 25 (1989) (referring to the stereotype that "military women are whores or lesbians").

253. See LINDA BIRD FRANCKE, *GROUND ZERO: THE GENDER WARS IN THE MILITARY* 137 (1997) ("The services were authorized to discharge any woman who had a natural or adopted child under eighteen . . .").

254. See *infra* notes 256–61.

255. *United States v. Halliwill*, 4 C.M.R. 283, 287 (A.B.R. 1952) (citing MCM 1951 § 212). For a similar case much later, see *United States v. Phares*, No. 34483, 2002 WL 1163912 (A.F. Ct. Crim. App. 2002) (involving an Air Force nurse who stole Demerol and lied about it).

256. *Halliwill*, 4 C.M.R. at 287.

257. *Id.* at 289.

258. See, e.g., *United States v. Baldwin*, 54 M.J. 308 (C.A.A.F. 2001) (involving an Army captain convicted for mail tampering, larceny, and obstruction of justice); *United States v. Frelix-Vann*, 55 M.J. 329 (C.A.A.F. 2001) (involving a larceny conviction).

259. See, e.g., *United States v. Phillips*, 58 M.J. 217, 219 (C.A.A.F. 2003) (involving an Air Force lieutenant colonel who used marijuana and tried to get a urine sample from a junior officer); *United States v. Southwick*, 53 M.J. 412 (C.A.A.F. 2000) (involving an Air Force captain convicted for drug abuse).

260. See, e.g., *United States v. Guyton-Bhatt*, 56 M.J. 484 (C.A.A.F. 2002) (involving an Army captain who failed to pay a debt and then lied about it).

261. See, e.g., *United States v. Dunbar*, 48 M.J. 288 (C.A.A.F. 1998) (involving an Air Force lieutenant colonel who was drunk and disorderly and who fraternized with an enlisted member); *United States v. Jouett*, No. 32618, 1998 WL 378255, at *6 (A.F. Ct. Crim. App. May 28, 1998) (involving two lieutenant colonels engaged in adultery); *United States v. Arthen*, 32 M.J. 541 (A.F.C.M.R. 1990) (upholding the conviction of a nurse for her adulterous relationship with an airman).

misconduct. In particular, female officers were sometimes punished for being sexually aggressive in consensual relationships, a type of sexual behavior that was less likely to lead to punishment for male officers. In 1984, for example, the Court of Military Appeals heard a female officer's appeal from a conduct unbecoming conviction based on her sexual promiscuity in a case complicated by drug use and suggested homosexual acts.²⁶² In 1997, the furor over the censure of Air Force Lt. Kelly Flinn for her extramarital exploits was based largely on the disputed perception that women were more likely to be singled out for prosecution than men.²⁶³ The scant appellate record for cases of female officers' sexual misconduct makes broad generalizations unwise. But even if female officers are not disproportionately targeted, the ungainly term "gentlewoman" reveals the rhetorical and practical difficulty of integrating women into both the officer corps and its notions of sexual and gender propriety.

B. Post-Cold War Diversity and Operations

The postmodern military officer corps exists alongside civil society, maintaining its status as a legitimate profession while facing the multiplying threats of the post-Cold War era with a large, all-volunteer force.²⁶⁴ Although discipline is easier to

262. See *United States v. Rodriguez*, 18 M.J. 363, 366 (C.A.A.F. 1984) (including a lengthy instruction at court-martial about officers and gentlewomen); see also *United States v. Walts*, No. 32118, 1997 WL 392592, at *1 (A.F. Ct. Crim. App. July 7, 1997) (involving a female officer who explained that her insubordination and improper language were simply attempts to mimic male fighter pilots).

263. See Gregory L. Vistica & Evan Thomas, *Sex and Lies*, NEWSWEEK, June 2, 1997, at 26 (presenting figures on adultery prosecutions in the wake of the Flinn publicity); see also Linda Strite Murnane, *Legal Impediments to Service: Women in the Military and the Rule of Law*, 14 DUKE J. GENDER L. & POL'Y 1061, 1079-90 (describing the "tortured history" of military prosecution of servicewomen, men, and officers).

264. For a discussion of the changes in the armed forces in the late-twentieth century, see Weigley, *supra* note 113, at 217.

Since 1990, however, the end of the Cold War notwithstanding, external threats to the United States national interests have persisted, on a scale not large enough to demand a closing of the civil-military ranks, but troublesome enough to require maintaining military forces much larger than in any previous period when no full-scale military rivalry was afoot.

Id.; see Burk, *supra* note 100, at 247-74 (describing the military as a central institution in the United States during the Cold War and beyond); Williamson Murray, *Does Military Culture Matter?*, 43 ORBIS 27 (1999) (describing the historical and current framework of the U.S. military). For thought-provoking studies of the challenges facing contemporary professionals in general, see HOWARD GARDNER, ET AL., *GOOD WORK: WHEN EXCELLENCE AND ETHICS MEET* (2001) (analyzing the professional ethics of journalism and genetics, with implications for all professions) and The GoodWork Project, <http://www.goodworkproject.org> (last visited Nov. 1, 2007) (profiling individuals and institutions creating socially

maintain without the distractions of servicemen forced to serve by law, soldiers' codes of conduct remain important in controlling the behavior of servicemembers and asserting the high standards deemed essential to effective recruiting.²⁶⁵ U.S. military operations have long included occupations and other non-warfighting efforts, but the peacekeeping missions of the Cold War and the war against terrorism have moved the armed forces toward performing law enforcement functions rather than more traditional military missions.²⁶⁶ Humanitarian operations, long-term occupations, and nation-building missions require capabilities and attitudes that do not sit easily with the warrior mentality that has grounded military culture in the past.²⁶⁷ Budget constraints have pressured officers to do more with less, while legal imperatives to treat personnel fairly regardless of gender or race have created anxiety among officers who worry about complying with regulations while accomplishing their missions.²⁶⁸ In addition to these changes, a trend toward outsourcing for duties previously considered military functions has further diminished the attractiveness and uniqueness of military service as a professional calling.²⁶⁹ Thus, as the gap between civil society and the military has grown because of the end of

responsible, high quality work).

265. See John Hillen, *Must U.S. Military Culture Reform?*, 43 ORBIS 43 (1999) (assessing the functions of military culture).

266. See Burk, *supra* note 100, at 19–38 (tracing the shift in the Army's focus); see also Hillen, *supra* note 265, at 43.

267. See generally THE POSTWAR MOMENT: MILITARIES, MASCULINITIES, AND INTERNATIONAL PEACEKEEPING (Cynthia Cockburn & Dubravka Zarkov eds., 2002) (assessing the impact of military culture on occupying forces and peacekeeping missions in Bosnia-Herzegovina and the Netherlands). Within this collection, see especially Marc de Leeuw's piece, *A Gentlemen's Agreement: Srebrenica in the Context of Dutch War History*, discussing the challenges peacekeeping missions pose to the military's reliance on a particular model of masculinity, and examining the gentleman-warrior in a post-modern context. *Id.* at 162–82.

268. See, e.g., Kingsley R. Browne, *Military Sex Scandals from Tailhook to the Present: The Cure Can Be Worse Than the Disease*, 14 DUKE J. GENDER L. & POL'Y 749–89 (2007) (complaining of the negative impact of policing sexual harassment and assault within the military).

269. See, e.g., Deborah Avant, *Privatizing Military Training: A Challenge to U.S. Army Professionalism*, in THE FUTURE OF THE ARMY PROFESSION, *supra* note 100, at 179–96 (discussing the implications of privatization). See generally P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY (2003) (describing the privatization of military functions); Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989 (2005) (elaborating the dangers of outsourcing); P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521 (2004) (analyzing privatization and international law).

conscription, the distinctiveness of officership has waned.²⁷⁰

Within this high-stakes, high-pressure environment of postmodern military service, officers remain a relatively small fraction of the total force. In 2006, officers comprised sixteen percent of active-duty military personnel.²⁷¹ Perhaps to a greater degree than in the past, however, the subculture of officers dominates the public perception of the armed forces, especially for the joint-service, multi-national forces routinely deployed in recent armed conflicts.²⁷²

The two primary shifts in military demographics in the decades after the Vietnam War were closely linked: the gender integration of most military training and operations, and the end of involuntary service. Without conscripted men to fill the ranks, military leaders succumbed to rising political pressure and their own pragmatism and opened their doors to female recruits.²⁷³ As servicewomen grew in number and stature, they challenged the tenets of an institution that had viewed male strength and authority as fundamental to its success.²⁷⁴

The sexual culture of military life, which had long offered young men opportunities for sexual experimentation and, sometimes, incentives to sexual violence, changed when servicewomen arrived.²⁷⁵ While movements advancing women's rights, sexual liberation, and gay rights gathered steam in American society, young women began to enter the officer corps

270. See SOLDIERS AND CIVILIANS: THE CIVIL-MILITARY GAP AND AMERICAN NATIONAL SECURITY 1-11 (Peter D. Feaver & Richard H. Kohn eds., 2001) (analyzing the disconnect between military life and civilian life); see also Triangle Institute for Security Studies, <http://www.pubpol.duke.edu/centers/tiss/research/cmr/> (last visited Sept. 21, 2007) (examining the effects of the gap between civilian society and the military).

271. See Military Personnel Statistics, <http://siadapp.mdc.osd.mil/personnel/MILITARY/Miltop.htm> (last visited Sept. 21, 2007) (providing military personnel statistics).

272. See, e.g., Don M. Snider, *An Uninformed Debate on Military Culture*, 43 ORBIS 11 (1999) (assessing types of military operations).

273. The two percent ceiling on the percentage of women in the force was lifted in 1967 and women were admitted to the elite national service academies in 1976. See Hillman, *supra* note 40, at 150-54 (detailing the pressure to recruit women after the draft ended).

274. See *id.* at 151-55.

275. See Madeline Morris, *By Force of Arms: Rape, War, and Military Culture*, 45 DUKE L. J. 651 (1996) (describing the rape-prone culture of military life); see also HILLMAN, *supra* note 3, at 102-08 (describing the sex commerce and crime surrounding military bases). But see John B. Corr, *Rape, Sex, and the U.S. Military: Questioning the Conclusions and Methodology of Madeline Morris' By Force of Arms*, 10 TRANSNAT'L L. & CONTEMP. PROBS. 191 (2000) (challenging Morris' conclusions).

and enlisted forces of all of the service branches.²⁷⁶ As women became a sizable presence in the ranks, sexual abuse and harassment became a contentious issue of military law and policy.²⁷⁷ Sexual abuse in the military was not new, but in the past male-male sexual intimacy had been policed relatively quietly, through administrative discharges, informal censure, and an occasional court-martial.²⁷⁸ During the 1980s, each branch of service established a policy prohibiting sexual harassment. These policies collectively became known as "zero tolerance," indicating that the military would not accept any sexual harassment as part of a military workplace.²⁷⁹ However, zero tolerance could not prevent sex scandals from repeatedly embarrassing military leaders.²⁸⁰ Extensive media coverage documented the military's difficulties with sexual exploitation in its ranks; perhaps most notable was the egregious sexual misconduct at the Tailhook convention of naval aviators in 1991, just two years after the Navy

276. See Judith Hicks Stiehm, *ARMS AND THE ENLISTED WOMAN* 3-7 (1989) (discussing the arrival of women in the military).

277. See generally CAROL BURKE, *CAMP ALL-AMERICAN, HANOI JANE, AND THE HIGH-AND-TIGHT: GENDER, FOLKLORE, AND CHANGING MILITARY CULTURE* (2004) (describing a military culture of sexual harassment); MICHAEL J. DAVIDSON, *A GUIDE TO MILITARY CRIMINAL LAW* 130-32 (1999) (describing sexual harassment); Martha Chamallas, *The New Gender Panic: Reflections on Sex Scandals and the Military*, 83 MINN. L. REV. 305, 310-16 (1998) (recounting the details of military sex scandals); Carrie Little Hersh, *Crossing the Line: Sex, Power, Justice, and the U.S. Navy at the Equator*, 9 DUKE J. GENDER L. & POL'Y 277-303 (2002) (describing the simulated sex, degradation, and humiliation that constitutes the Navy's initiation of personnel who have not crossed the equator before).

278. See HILLMAN, *supra* note 3, at 119-26.

279. See, e.g., Kristin K. Heimark, *Sexual Harassment in the United States Navy: A New Pair of Glasses*, 44 NAVAL L. REV. 223, 225 (1997) (arguing zero tolerance is ineffective in protecting women from sexual harassment); see also Diane H. Mazur, *The Beginning of the End for Women in the Military*, 48 FLA. L. REV. 461, 464 (1996) (criticizing the zero tolerance policy as an ineffective avoidance of the substantive problems).

280. MARGARET C. HARRELL & LAURA L. MILLER, *NEW OPPORTUNITIES FOR MILITARY WOMEN: EFFECTS UPON READINESS, COHESION, AND MORALE* 73-77 (1997); Michael I. Spak & Alice M. McCart, *Effect of Military Culture on Responding to Sexual Harassment: The Warrior Mystique*, 83 NEB. L. REV. 79, 79-80 (2004) (arguing that the "warrior mystique" prevents the armed forces from managing sexual harassment on its own); Michael I. Spak & Jonathan P. Tomes, *Sexual Harassment in the Military: Time for a Change of Forum?*, 47 CLEV. ST. L. REV. 335 (1999) (arguing that current means of policing sexual harassment are inadequate). But see Browne, *supra* note 268, at 749-89 (commenting on excessive responses to military sexual assault and harassment incidents); Brian C. Hayes, *Strengthening Article 32 to Prevent Politically Motivated Prosecution: Moving Military Justice Back to the Cutting Edge*, 19 REGENT U. L. REV. 173, 183-89 (2006) (arguing that politically motivated prosecutions and overreactions hindered the pursuit of justice in the Tailhook and Aberdeen Proving Ground investigations and prosecutions); Hillen, *supra* note 265, at 51 (criticizing the emphasis on women's rights and gay rights by military leaders).

implemented its zero tolerance standard.²⁸¹

Servicemen's exploitation of women was not the only dimension of the military's sex scandals. Violence against suspected gay and lesbian servicemembers, for example the murder of Barry Winchell in 1999 by fellow Army enlistees who thought he was gay, has been a recurring event on military bases.²⁸² The message that homosexuality is a shameful weakness, and that gays and lesbians are appropriate targets of violence, is reinforced by the "Don't Ask, Don't Tell" policy and by the military's informal culture of lesbian-baiting and same-sex harassment.²⁸³ The debate over the military's policy toward homosexuality helped to keep sexual conduct at center stage in public discussions of military service.

As the all-volunteer military matured, the distinguishing aspect of military competence—the characteristic deemed critical to military readiness, morale, and prestige—became conformity to a particular model of sexual fidelity and discretion. Officers were expected to conform to a model of sexual behavior that would keep public criticism at bay while preserving the integrity of the military hierarchy. Unfortunately for military and government leaders, the aspect of military culture that celebrated sexual conquest worked against this imperative, especially at foreign outposts where a commercial sex industry thrived on the business of American servicemen.²⁸⁴

281. After conducting 1500 interviews, naval investigators reported that perhaps 175 junior officers had been involved in assaulting more than eighty women. See OFFICE INSPECTOR GENERAL, DEP'T OF DEFENSE, TAILHOOK '91 (PART I) (Sept. 1992) (reporting the results of the official investigations into the Tailhook incidents and subsequent follow-up); OFFICE INSPECTOR GENERAL, DEP'T OF DEFENSE, TAILHOOK '91 (PART II) (Feb. 1993) (reporting results from the continuing the official investigation into the Tailhook incidents); WILLIAM H. MCMICHAEL, *THE MOTHER OF ALL HOOKS: THE STORY OF THE U.S. NAVY'S TAILHOOK SCANDAL* (1997) (detailing the incident and follow-up coverage); JEAN ZIMMERMAN, *TAILSPIN* (1994) (placing the incident into the broader context of women in the Navy); Lt. Comdr. J. Richard Chema, *Arresting "Tailhook": The Prosecution of Sexual Harassment in the Military*, 140 MIL. L. REV. 1 (1993) (characterizing the legal response to the incidents).

282. See, e.g., Tobias Barrington Wolff, *Political Representation and Accountability Under Don't Ask, Don't Tell*, 89 IOWA L. REV. 1633, 1684–86 (2004) (detailing the gay-bashing that has occurred under "Don't Ask, Don't Tell").

283. See Policy Concerning Homosexuality in the Armed Forces, Pub. L. No. 103-160, § 571, 107 Stat. 1670 (1993); WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 729–45 (2d ed. 2004) (describing the policy and history surrounding the implementation of "Don't Ask, Don't Tell"); see also DON'T ASK, DON'T TELL: DEBATING THE GAY BAN IN THE MILITARY (Aaron Belkin & Geoffrey Bateman eds., 2003).

284. See KATHARINE H.S. MOON, *SEX AMONG ALLIES: MILITARY PROSTITUTION IN U.S.-KOREA RELATIONS* (1997) (documenting the extent of sex commerce in Korea

C. Recent Prosecutions

Since the Cold War ended, the visibility of the U.S. military in the world has subjected its officers to the scrutiny of local, national, and international media. Additionally, the need to recruit volunteers (alongside the related trend toward a more politically conservative officer corps) has heightened the military's desire to promote an appealing image. As a result, preserving the status of "officer" is increasingly important, but complicated by erosion of the legal barriers that once permitted the military to maintain an officer corps with a coherent class, racial, and sexual identity. Un-becoming, in short, is more of a risk than ever. This creates incentives for wielding military criminal law in defense of military distinctiveness, rather than for purposes similar to those pursued by civilian criminal justice. A recent study of patterns in military death penalty cases suggests that since 1990, military capital punishment, unlike civilian capital punishment, "has been used primarily as a disciplinary vehicle to protect military authority and effectiveness."²⁸⁵

The same trend is noticeable in conduct unbecoming prosecutions. The setting of boundaries for acceptable officer conduct, whether in the grave cases that might lead to a capital court-martial or in the relatively minor incidents that could result in an Article 133 violation, reveals the military's effort to set itself apart from, and even above, the civil society and Constitution it defends.

In recent years, "conduct unbecoming an officer and a

involving U.S. troops); LET THE GOOD TIMES ROLL: PROSTITUTION AND THE U.S. MILITARY IN ASIA (Saundra Pollock Sturdevant & Brenda Stoltzfus eds., 1992) (revealing the extent of military prostitution in Asia); Emily Nyen Chang, *Engagement Abroad: Enlisted Men, U.S. Military Policy and the Sex Industry*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 621 (2001) (describing military policy toward sex commerce); Gwyn Kirk & Carolyn Bowen France, *Redefining Security: Women Challenge U.S. Military Policy and Practice in East Asia*, 15 BERKELEY WOMEN'S L.J. 229, 229 (2000) (urging "significant changes in U.S. military policy and practice" to protect "host communities in East Asia from crime committed by U.S. military personnel . . ."); Elizabeth Rho-Ng, *The Conscription of Asian Sex Slaves: Causes and Effects of U.S. Military Sex Colonialism in Thailand and the Call to Expand U.S. Asylum Law*, 7 ASIAN L.J. 103 (2000) (describing sex commerce in Thailand).

285. David Baldus et al., *Equal Justice in the Administration of the Death Penalty: The Experience of the United States Armed Forces (1984–2005)*, <http://ssrn.com/abstract=914195> (last visited Oct. 28, 2007). This study also concludes that "the military data show less evidence of arbitrariness than we see in most civilian systems" and that, "[w]ith respect to racial discrimination, the military system resembles the typical civilian system in that the documented race of victim disparities are confined to the prosecutorial function and are concentrated in the mid-range of cases in terms of accused criminal culpability." *Id.*

gentleman" has become more strongly identified with sexual behavior, consensual and coercive.²⁸⁶ At the same time, conformity in sexual orientation, sexual practices, and sexual partners has become a primary source of coherence in the officer corps.²⁸⁷ In an environment in which sex is pervasive—it is even a part of military interrogation techniques—perhaps the military's use of sexual culture as a source of coherence is as predictable, or inescapable, as the age-old association between sexual conquest and war.²⁸⁸

Conduct unbecoming has long been associated with gay sex.²⁸⁹ In 1957, for example, a Navy admiral was hauled out of retirement to be prosecuted for conduct unbecoming for his

286. Part of that rhetoric shift can be traced to activists in the movement for lesbian and gay rights who used "conduct unbecoming" to describe the prejudice that kept lesbians and gay men from serving openly in the armed forces. See generally RANDY SHILTS, *CONDUCT UNBECOMING: LESBIANS AND GAYS IN THE U.S. MILITARY* (1993) (describing the experiences of gay and lesbian military personnel). "Conduct Unbecoming" was also the title of the annual reports of the Servicemembers Legal Defense Network. Compare Servicemembers Legal Defense Network, <http://www.sldn.org> (last visited Nov. 11, 2007), with JEFFREY MCGOWAN, *MAJOR CONFLICT: ONE GAY MAN'S LIFE IN THE DON'T-ASK-DON'T-TELL MILITARY* (2005) (describing the experiences of a gay Army officer through his retirement from service in 1998).

287. Some military commentators contend that the link between promoting discipline and controlling sexuality is coincidental rather than instrumental. See, for example, Army Colonel, accomplished Judge-Advocate, and noted scholar of military law Fred L. Borch's study of sexual harassment, which asserts that "the American military's current prohibition on fraternization has nothing to do with social class distinction," but instead "it undermines a unit's ability to function as a team." Fred L. Borch III, *Military Law and the Treatment of Women Soldiers: Sexual Harassment and Fraternization in the U.S. Army*, in A SOLDIER AND A WOMAN: SEXUAL INTEGRATION IN THE MILITARY 342–43 (Gerard J. DeGroot & Corinna Peniston-Bird eds., 2000).

288. Sexualized torture is used in military interrogation techniques. See, e.g., TARA MCKELVEY, *MONSTERING: INSIDE AMERICA'S POLICY OF SECRET INTERROGATIONS AND TORTURE IN THE TERROR WAR passim* (2007) (detailing sexualized torture used in interrogations of prisoners at Abu Ghraib); ONE OF THE GUYS: WOMEN AS AGGRESSORS AND TORTURERS (Tara McKelvey ed., 2006) (discussing women's role in sexualized interrogation techniques); ERIK SAAR & VIVECA NOVAK, *INSIDE THE WIRE: A MILITARY INTELLIGENCE SOLDIER'S EYEWITNESS ACCOUNT OF LIFE AT GUANTÁNAMO passim* (2005) (describing sexualized interrogation techniques). Rape has been widespread in the history of United States warfare. See SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE* (1975) (analyzing the prevalence of rape in warfare).

289. The use of conduct unbecoming to prosecute suspected homosexual activity, especially if perceived to be predatory, predates the Cold War. See, e.g., COFFMAN, *THE REGULARS*, *supra* note 101, at 122–23 (discussing a conduct unbecoming prosecution from 1913 in which a West Point graduate was convicted for sexually harassing and assaulting several men); DAVID K. JOHNSON, *THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT* (2004) (describing the investigation and prosecution of homosexuality among government employees).

homosexuality.²⁹⁰ But now it is also used to prosecute a wide range of sexual activity considered wrongful in a military context. It encompasses sexual harassment,²⁹¹ adultery,²⁹² the use of internet pornography,²⁹³ child sexual abuse,²⁹⁴ gay sex,²⁹⁵ and sex without disclosing one's status as HIV positive.²⁹⁶ Even the highest-ranking officers risk conduct unbecoming charges if they deviate from military sexual norms and attract the attention of superiors. For example, in 1998, Maj. Gen. David Hale—*after* retiring from the Army—was court-martialed for conduct unbecoming an officer and a gentleman when the wife of a former subordinate officer accused him of sexual coercion.²⁹⁷ In August 2005, Gen. Kevin P. Byrnes, the third highest-ranking person in the entire Army, was relieved of duty because of allegations that he had an extramarital affair with a civilian.²⁹⁸ This administrative punishment drew fire from critics who objected to the criminalization of consensual sexual conduct and adultery.²⁹⁹

290. See HILLMAN, *supra* note 3, at 114–18 (discussing the court-martial of Admiral Hooper).

291. See Chema, *supra* note 281, at 36–37, 51–52 (describing the use of conduct unbecoming in sexual harassment cases).

292. See Maj. William T. Barto, *The Scarlet Letter and the Military Justice System*, ARMY LAW., Aug. 1997, at 3 (reviewing the offense of adultery under military criminal law); see also Hopkins, *supra* note 42, *passim*.

293. See Maj. Daniel A. Olson, *United States v. Mason and United States v. Irvin: Impacting Military Justice Practice in Child Pornography Cases*, 55 A.F. L. REV. 335 (2004) (analyzing the impact of a case involving internet pornography and conduct unbecoming charges).

294. See *United States v. Geiss*, 30 M.J. 678 (A.F.C.M.R. 1990).

295. See Lt. Col. Ernest Harper, *Defending the Citadel of Reasonableness: Search and Seizure in 2004*, ARMY LAW., Apr. 2005, at 57–58 (describing the search and seizure ramifications of *United States v. Simmons*, 59 M.J. 485 (C.A.A.F. 2004), a case of a lieutenant convicted of conduct unbecoming for his homosexual relationship with a private in his company).

296. See *United States v. Upham*, 64 M.J. 547 (C.G. Ct. Crim. App. 2006).

297. See J. Mackey Ives & Michael J. Davidson, *Court-Martial Jurisdiction over Retirees Under Articles 2(4) and 2(6): Time to Lighten Up and Tighten Up?*, 175 MIL. L. REV. 1, 17–25 (2003) (describing the use of conduct unbecoming charges against retired officers).

298. See Josh White, *Four-Star General Relieved of Duty*, WASH. POST, Aug. 10, 2005, at A01. Byrnes was one of only eleven four-star generals in the Army, making the action against him nearly unprecedented in the annals of military misconduct. Most officers of comparable rank who have been removed from duty were punished for making improper comments to the media. For example, Navy Adm. Richard C. Macke was relieved of command in 1995 after commenting that the Marines who raped a twelve-year-old girl in Okinawa should have hired a prostitute, and Air Force Gen. Michael J. Dugan's term as Chief of Staff ended abruptly in 1990 because he revealed the U.S. bombing strategy to reporters during the planning stages of the Gulf War. See Mark Mazzetti, *General Is Relieved of Command over 'Personal Conduct'*, L.A. TIMES, Aug. 10, 2005, at 10.

299. See, e.g., Hopkins, *supra* note 42, at 213–28; Michael C. Dorf, *Should the*

From 2003 through mid-2007, sexual offenses accounted for seventy percent of the conduct unbecoming charges—that is, twenty-eight of thirty-nine cases—appearing in military appellate opinions.³⁰⁰ While these numbers are only one measure of this

Law Punish Adultery?, CNN.COM INT'L, Aug. 18, 2005, <http://edition.cnn.com/2005/LAW/08/18/dorf.adultery/> (last visited Nov. 11, 2007) (criticizing the military's criminalization of consensual sexual conduct). "[L]arge-scale adultery prosecutions in the military context are recent in origin rather than deeply historically embedded. . . . [M]ilitary culture historically is rife with adulterous conduct." Hopkins, *supra* note 42, at 222–23.

300. See *United States v. Ashby*, No. 200000250, 2007 WL 1893626 (N-M. Ct. Crim. App. June 27, 2007) (involving dereliction of duty charges against the Marine aviator whose aircraft cut a gondola cable in Italy, killing twenty people); *United States v. Davis*, No. 36652, 2007 WL 1725784 (A.F. Ct. Crim. App. May 31, 2007) (involving adultery as well as other charges, including dereliction of duty); *United States v. Culbertson*, 65 M.J. 587 (N-M. Ct. Crim. App. 2007) (involving rape); *United States v. Schweitzer*, No. 200000755, 2007 WL 1704165 (N-M. Ct. Crim. App. May 10, 2007) (involving dereliction of duty charges in the gondola cable accident); *United States v. Cordle*, No. 200600570, 2007 WL 1704194 (N-M. Ct. Crim. App. Apr. 17, 2007) (involving sexually explicit e-mails to a minor); *United States v. Fujiwara*, 64 M.J. 695 (A.F. Ct. Crim. App. 2007) (involving rape, adultery, and fraternization); *United States v. Miller*, 64 M.J. 666 (A.F. Ct. Crim. App. 2007) (involving attempted rape and sodomy); *United States v. Knepper*, No. 200401159, 2007 WL 1701362 (N-M. Ct. Crim. App. Jan. 31, 2007) (involving child sexual assault); *United States v. Upham*, 64 M.J. 547 (C.G. Ct. Crim. App. 2006) (involving sex while HIV-positive); *United States v. Jaeger*, No. 36127, 2006 WL 3895069 (A.F. Ct. Crim. App. Dec. 14, 2006) (involving indecent sexual acts with a child); *United States v. Varga*, No. 36093, 2006 WL 3085741 (A.F. Ct. Crim. App. Oct. 12, 2006) (involving indecent assault); *United States v. Robinson*, No. 36409, 2006 WL 2547392 (A.F. Ct. Crim. App. Aug. 28, 2006) (involving dereliction of duty), *appeal denied*, 65 M.J. 12 (C.A.A.F. 2007); *United States v. McCoy*, No. 200101209, 2006 WL 1029163 (N-M. Ct. Crim. App. Apr. 20, 2006) (involving consensual sodomy), *appeal denied*, 64 M.J. 220 (C.A.A.F. 2006); *United States v. Phillips*, No. 200400865, 2006 WL 650022 (N-M. Ct. Crim. App. Mar. 16, 2006) (involving dereliction and larceny), *cert. denied*, 2007 WL 2260773 (U.S. Oct. 1, 2007); *United States v. Taylor*, No. 35685, 2006 WL 521595 (A.F. Ct. Crim. App. Feb. 22, 2006) (involving counterfeiting), *appeal denied*, 65 M.J. 277 (C.A.A.F. 2007); *United States v. McClelland*, No. 200101300, 2006 WL 228927 (N-M. Ct. Crim. App. Jan. 24, 2006) (involving sex with a patient); *United States v. Hill*, 62 M.J. 271 (C.A.A.F. 2006) (involving sexual misconduct); *United States v. Doolin*, No. 35825, 2006 WL 13152 (A.F. Ct. Crim. App. Dec. 15, 2005) (involving illegal drugs), *appeal denied*, 63 M.J. (C.A.A.F. 2006); *United States v. Fournier*, No. 200301557, 2005 WL 2850289 (N-M. Ct. Crim. App. Oct. 31, 2005) (involving fraternization); *United States v. Mazer*, 62 M.J. 571 (N-M. Ct. Crim. App. 2005) (involving child pornography); *United States v. Jemison*, No. 200100993, 2005 WL 2850293 (N. M. Ct. Crim. App. Oct. 27, 2005) (involving fraud); *United States v. Sills*, 61 M.J. 771 (A.F. Ct. Crim. App. 2005) (involving sexual relationship with civilian), *aff'd*, 63 M.J. 262 (C.A.A.F. 2006); *United States v. Smith*, 61 M.J. 696 (N-M. Ct. Crim. App. 2005) (involving various sex offenses); *United States v. Forney*, No. 200200462, 2005 WL 1800117 (N-M. Ct. Crim. App. July 19, 2005) (involving various sex offenses); *United States v. Szymczyk*, No. 200000718, 2005 WL 1473965 (N-M. Ct. Crim. App. June 20, 2005) (involving child pornography); *United States v. Killingsworth*, No. 200201785, 2005 WL 1080797 (N-M. Ct. Crim. App. May 6, 2005) (dismissing conduct unbecoming charges as multiplicitous with bad check charges); *United States v. Gamez*, No. 35576, 2005 WL 743052 (A.F. Ct.

crime's capacious reach, they suggest that the conduct unbecoming statute is most often used as a means of prosecuting officers' sexual conduct.³⁰¹

Military courts have responded to this preponderance of sexual offense cases by imposing stricter charging standards in cases of consensual sex.³⁰² In *United States v. Brown*, the U.S. Court of Appeals for the Armed Forces tried to clarify what might constitute inappropriate language among officers of similar rank.³⁰³ Writing for the court, Judge Effron suggested how elusive the legal standard remains in such cases, noting that "[g]iven the

Crim. App. Mar. 30, 2005) (involving a male officer's sexual relationships with enlisted women, including one who was married); *United States v. Dodge*, 60 M.J. 873 (A.F. Ct. Crim. App. 2005) (involving an officer charged with numerous sex, drug, and bad check offenses); *United States v. Williams*, No. 35350, 2004 WL 2710067 (A.F. Ct. Crim. App. Nov. 30, 2004) (involving indecent exposure); *United States v. Plush*, No. 35134, 2004 WL 2191813 (A.F. Ct. Crim. App. Sept. 21, 2004) (involving internet and digital pornography); *United States v. Wimmer*, No. 35138, 2004 WL 1539585 (A.F. Ct. Crim. App. June 30, 2004) (involving fraternization and false swearing); *United States v. Mason*, 60 M.J. 15 (C.A.A.F. 2004) (involving pornography); *United States v. Simmons*, 59 M.J. 485 (C.A.A.F. 2004) (involving a homosexual relationship with an enlistee); *United States v. Little*, No. 34726, 2003 WL 22271352 (A.F. Ct. Crim. App. Sept. 26, 2003) (involving a military doctor addicted to Percocet); *United States v. Isaac*, 59 M.J. 537 (C.G. Ct. Crim. App. 2003) (involving sexual harassment); *Lawrence v. Maksym*, 58 M.J. 808 (N-M. Ct. Crim. App. 2003) (involving a failure to appear as ordered); *United States v. Phillips*, 58 M.J. 217 (C.A.A.F. 2003) (involving drug use and attempt to conceal it); *United States v. Tynes*, 58 M.J. 704 (A. Ct. Crim. App. 2003) (involving internet pornography and child sexual abuse); *United States v. Pryor*, 57 M.J. 821 (N-M. Ct. Crim. App. 2003) (involving child sexual abuse).

301. Not every conduct unbecoming charge is connected to a sexual act. See, e.g., Capt. John A. Carr, *Free Speech in the Military Community: Striking a Balance Between Personal Rights and Military Necessity*, 45 A.F. L. REV. 303, 328-31 (1998) (describing the use of conduct unbecoming to prosecute officers' speech); Maj. Henry R. Richmond & Capt. Daryle A. Jordon, *Doctors and the Distribution of Drugs*, ARMY LAW., Sept. 1991, at 5, 11-12 (describing conduct unbecoming charges against medical doctors for illegal drug distribution). Conduct unbecoming was one of the charges levied against Chaplain Yee, the Army officer accused of aiding Muslim detainees at Guantánamo Bay. See Dave Moniz, *Muslim Chaplain from Guantánamo Likely to Be Charged With Misconduct*, USA TODAY, Oct. 10, 2003, at 03A (reporting that conduct unbecoming an officer was likely to be charged against Captain Yee). However, before charges against Yee were dropped, he was also accused of adultery. Laura Parker, *The Ordeal of Chaplain Yee*, USA TODAY, May 16, 2004, at 01A.

302. Maj. Steven Cullen, *Prosecuting Indecent Conduct in the Military: Honey, Should We Get a Legal Review First?*, 179 MIL. L. REV. 128, 130 (2004) (arguing that recent U.S. Court of Appeals for the Armed Forces opinions have restricted the prosecution of "indecency" under military criminal law); Velloney, *supra* note 175, at 64 (stating that the U.S. Court of Appeals for the Armed Forces "will closely scrutinize 'consensual' sex offenses to ensure the evidence supports all the required elements . . .").

303. *United States v. Brown*, 55 M.J. 375, 388 (C.A.A.F. 2001) (upholding Article 133 charges based on unwanted physical contact, but not charges based on sexualized "office banter").

wide variety of personalities and relationships that may exist among officers, there is likely to be an equally wide variety of reactions to comments of a personal or sexual nature.”³⁰⁴ Concurring in part and dissenting in part, Judge Baker agreed with the court’s desire to avoid “criminalizing the day-to-day fabric of life” but stressed the need for enforcement of “the prohibition on unprofessional relationships” and the military ban on sexual harassment.³⁰⁵ The President has also sought to clarify standards for sexual misconduct; for instance, in 2002 an executive order was issued to guide the prosecution of minor sex offenses.³⁰⁶ For its part, Congress overhauled the sexual misconduct provisions of the UCMJ, effective October 2007, prompting the executive to undertake a major revision of the relevant provisions of the MCM.³⁰⁷ The armed forces have encouraged these changes and initiated others, including the “restricted reporting” option for sexual assault cases, implemented in 2006 to promote higher rates of reporting among services members who have been sexually assaulted.³⁰⁸

These measures may alter the landscape of military prosecutions for sexual misconduct. They leave untouched, however, the conduct unbecoming statute, a vestige of eighteenth-century law and a prior era of military service that has breathed new life into military leaders’ efforts to enforce sexual morality.

Conclusion

The definition and prosecution of “conduct unbecoming an officer and a gentleman” is more than a cosmetic feature of military justice. “Conduct unbecoming” reifies the importance of bright lines in a legal and social arena, the training for and

304. *Id.* at 384.

305. *Id.* at 394 (Baker, J., concurring in part and dissenting in part).

306. See Nan D. Hunter, *Sexual Orientation and the Paradox of Heightened Scrutiny*, 102 MICH. L. REV. 1528, 1540, nn.74–76 (2004).

307. See National Defense Authorization Act, Pub. L. No. 109-163, § 552(a)(1), 119 Stat. 3257, 3263 (codified as amended in scattered sections of 10 U.S.C.); see also Walter T. Cox, III, *Consensual Sex Crimes in the Armed Forces: A Primer for the Uninformed*, 14 DUKE J. GENDER L. & POLY 791 (2007) (explaining military sexual misconduct prosecutions from the perspective of an experienced military appellate judge).

308. See DEP’T OF DEFENSE, MILITARY SERVICES SEXUAL ASSAULT ANNUAL REPORT FOR CY 2006 (2007) (reporting data on sexual assault allegations involving members of the armed forces in 2006); see also United States Department of Defense Sexual Assault Prevention and Response, <http://www.sapr.mil/HomePage.aspx?Topic=Sexual%20Assault&PageName=securingcare.htm> (last visited Nov. 11, 2007) (providing guidance for victims and responders of sexual assault).

prosecution of war, that confounds such easy demarcation. It attempts to draw sharp distinctions—between acceptable and unacceptable conduct, between soldier and civilian, between officer and enlistee—even as those distinctions are blurred by forces as powerful as democratization and privatization. Defying the constraints of modern criminal law, conduct unbecoming attempts to set high standards without articulating them, and to reinscribe boundaries that are being erased by changes in sexual norms and behaviors, especially in the youth culture from which the military draws its recruits. The history of its prosecution reflects the military's struggle to preserve a distinctive identity and an effective hierarchy during periods of demographic, technological, and legal change.

"Conduct unbecoming," then, is the canary in the coal mine of the military's officer corps. Its shifting definitions tell us which threats to cohesion and effectiveness strike military leaders as so egregious that they must be rooted out. The privileges of officers, so carefully protected by this statute, create social deference and legal authority. They also create an obligation to prevent crimes of war. But rather than enforce that solemn obligation or engage other aspects of soldierly behavior, conduct unbecoming has instead concerned itself primarily with class, race, and, most recently, sexual exclusivity. This crime has put military law to work assuaging fears that an increasingly heterogeneous military is in danger of un-becoming itself. Its history reveals the unstable hierarchies that make the military intelligible not just to outsiders, but to officers—and gentlemen?—themselves.

