



# MILITARY CULTURE AND GENDER

September 15 - 16, 2005

THE **BALDY**  
**CENTER**  
FOR LAW & SOCIAL POLICY

## Guarding Women: Abu Ghraib and Military Sexual Culture

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Since September 11, 2001, the United States has cast its war on terrorism as a new type of conflict, a war that can be won only by defying legal constraints and drafting new rules of engagement. The use of torture as a means of extracting information is the most controversial of those new rules. American soldiers' brutal treatment of Iraqi prisoners and other detainees took place after the Department of Justice and Department of Defense, hoping to land an intelligence coup, reinterpreted existing law to permit more aggressive interrogation methods. For many, the image of American soldiers grinning over hooded, naked prisoners was impossible to fathom except as a consequence of this new type of war on terrorism. The battle against an apparently stateless, irrational enemy seemed to necessitate tactics of questionable legality, tactics that were implemented by soldiers too undisciplined or sadistic to prevent a human rights disaster.

Observers have also struggled to make sense of women's participation in the abuse of prisoners of war. Among the most jarring images to come out of Abu Ghraib were those of a female soldier, Private First Class Lynndie R. England, photographed while smiling and pointing at the exposed genitals of captives and holding a leash attached to the neck of an Iraqi prisoner. After the exhaustive investigations, public fallout, and internal recriminations subsided, only a few low-ranking enlistees had been court-martialed.<sup>1</sup> A few junior- and mid-level officers were reprimanded and only one high-ranking female officer, Brigadier General Janis Karpinski, was subjected to formal censure.<sup>2</sup> Some critics have blamed the inclusion of women among combat troops for the soldiers' degrading behavior. They suggest that servicewomen be excluded from front-line military duty in order to improve military discipline and minimize servicemembers' opportunities for heterosexual encounters.<sup>3</sup> When PFC England returned from Iraq pregnant with the

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<sup>1</sup> As of July 2005, six enlisted persons were court-martialed, convicted, and sentenced for their conduct at Abu Ghraib and England was facing a second court-martial after a military judge declared a mistrial after her first trial. The catalog of abuses that took place at the hands of American soldiers has grown significantly since the initial Abu Ghraib photographs were made public in April 2004. For the most recent data, *see, e.g.*, [http://guantanamo.org/blog/archives/cat\\_guantanamo\\_and\\_abu\\_ghraib.html](http://guantanamo.org/blog/archives/cat_guantanamo_and_abu_ghraib.html) (last visited Jul. 28, 2005); <http://jurist.law.pitt.edu/hottopics/abughraib.php> (last visited Jul. 28, 2005).

<sup>2</sup> Indeed, two of the most senior officers who oversaw interrogation of detainees in Iraq were in line for promotion by the summer of 2005, *see* Eric Schmitt, *Army Moves to Advance 2 Linked to Iraq*, N.Y. TIMES, Jun. 29, 2005, and Lt. General Ricardo Sanchez, the highest-ranking commander implicated in the scandal, was reported to be close to securing his fourth star at urging of Secretary of Defense Donald Rumsfeld and Joint Chiefs of Staff Chairman Richard Myers, *see* L.A. TIMES, Oct. 2004. *See also* Eric Schmitt, *4 Top Officers Cleared by Army in Prison Abuses*, N.Y. TIMES, Apr. 23, 2005, at A1. On Karpinski and other officers' administrative punishments, *see, e.g.*, records posted online at the National Security Archive, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB140/> (last visited Jul. 28, 2005). For another example of how officers have escaped criminal censure while their subordinates have been court-martialed, consider the case of two enlisted Army dog handlers accused of abusing Iraqi detainees. No commissioned officers face criminal charges for these incidents, despite the fact that the warden of the prison, an Army major, testified at the soldiers' preliminary hearing (the court-martial correlate of a civilian grand jury) that he had attended a meeting at which "the commander of the Guantanamo prison recommended using military dogs for interrogation." *See* Neil A. Lewis, *Military's Opposition to Harsh Interrogation is Outlined*, N.Y. TIMES, Jul. 28, 2005.

<sup>3</sup> *See especially* the commentary of Elaine Donnelly and Linda Chavez; *see, e.g.*, Mary Leonard, *Abuse Raises Gender Issues, Women Soldiers' Role Debated*, BOSTON GLOBE, (May 16, 2004), A17; Richard R. Ostling (for the AP), *Southern Baptist*

child of Corporal Charles A. Graner Jr., one of the ringleaders of the Abu Ghraib abuse, she became a lightning rod for criticism of servicewomen's performance and vulnerability.<sup>4</sup> Others blamed the military for exploiting unwitting servicewomen to shame Iraqi prisoners into compliance with interrogators. The Abu Ghraib debacle gave new life to doubts not only about whether women ought to be performing dangerous military duties, but about whether they should be part of the armed forces at all.

Yet blaming the mistreatment of prisoners at Abu Ghraib and other American-run detention facilities on the exigencies of the war on terrorism, or on the presence of women in the United States military, ignores a key culprit: the military's sexual culture. Whatever new legal terrain the war against terrorism has carved out, the sexualized torture that took place at Abu Ghraib was not new to the armed forces. Sexual humiliation, taunting, and abuse were a part of American military culture long before 2001.<sup>5</sup> Beginning with reports of egregious sexual harassment at the Tailhook convention of naval aviators in 1991, extensive media coverage has documented the military's inability to control sexual exploitation in its ranks.<sup>6</sup>

The servicemembers who stripped, beat, raped, and perhaps even killed Iraqi prisoners were practicing a particularly ugly form of the sexual degradation and domination that have appeared in many military sex scandals. Servicemen in positions of authority have sexually assaulted less powerful targets in many recent incidents. Drill sergeants raped Army trainees at Aberdeen Proving Grounds in the mid-1990s;<sup>7</sup> three servicemen gang-raped a 12 year-old Japanese girl in Okinawa in 1995;<sup>8</sup> "mock rapes" were part of a 1990's Air Force Academy training program intended to help cadets survive a POW encampment. Sexual harassment is routine in military workplaces, and sexualized degradation is an integral part of military rituals like the Navy's celebrated "crossing the line" initiation of those crossing the equator for the first time.<sup>9</sup>

The homosexual content of the Abu Ghraib guards' sexual abuse is also consistent with modern American military culture. Taunting accusations of homosexuality are the most common forms of derision encountered in military training. The recent parade of military sex scandals includes several involving violence against suspected homosexuals, including the 1999 murder of Barry Winchell by fellow Army enlistees who thought he was gay.<sup>10</sup> Sexual orientation discrimination is as powerful a force in military culture as gender discrimination. 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.

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*Blames Women in Military for Iraq Prison Scandal*, Grand Rapids Press (Jun 19, 2004); Kathleen Parker, *Why Are Women There Anyway?*, DAILY PRESS (Va.) (Jun. 1, 2004), A9. See generally Diane Richard, *POW Catch-22: Is the risk of rape worth keeping women from the frontline?*, 37 CONTEMP. SEXUALITY 7 (Jul. 2003) (describing the risk of sexual assault to female prisoners of war and military women's knowledge of that risk).

<sup>4</sup> See, e.g., Gail Gibson, *Added Combat Issue: Pregnancy Relations*, BALTIMORE SUN (May 16, 2004), 4A ("England has emerged as Exhibit A for conservatives who have long opposed women serving in combat roles, partly on the grounds that pregnancies could hurt military readiness and that sexual relationships among the troops could harm discipline.").

<sup>5</sup> See, e.g., 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 recent military sex scandals); Elizabeth Lutes Hillman, *The "Good Soldier" Defense: Character Evidence and Military Rank at Courts-Martial*, 108 YALE L.J. 879 (1999) (analyzing a high-profile 1998 court-martial for sexual harassment).

<sup>6</sup> See WILLIAM H. MCMICHAEL, *THE MOTHER OF ALL HOOKS: THE STORY OF THE U.S. NAVY'S TAILHOOK SCANDAL* (1997); JEAN ZIMMERMAN, *TAILSPIN* (1994); Lt. Cdr. J. Richard Chema, *Arresting 'Tailhook': The Prosecution of Sexual Harassment in the Military*, 140 MIL.L.REV. 1 (1993).

<sup>7</sup> See, e.g., Chamallas, *supra* note 4.

<sup>8</sup> See Julie Yuki Ralston, *Geishas, Gays and Grunts: What the Exploitation of Asian Pacific Women Reveals about Military Culture and the Legal Ban on Lesbian, Gay, and Bisexual Service Members*, 16 L. & INEQUALITY 661, 661-62 (1998) (noting the unwelcome attention the much-publicized rape brought to the American military presence in Japan, South Korea, and Thailand); see also Chalmers Johnson, *The Okinawan Rape Incident And The End Of The Cold War In East Asia*, 27 CAL. W. INT'L L.J. 389 (1997); Derek van Hoften, *Declaring War on the Japanese Constitution: Japan's Right to Military Sovereignty and the United States' Right to Military Presence in Japan*, 26 HASTINGS INT'L & COMP. L. REV. 289, 302 (2003).

<sup>9</sup> Carie Little Hersh, *Crossing the Line: Sex, Power, Justice, and the U.S. Navy at the Equator*, 9 DUKE J. GENDER, L. & POL'Y 277 (2002) (describing in detail the simulated sex, degradation, and humiliation that constitutes the Navy's initiation of those who have not crossed the equator before); see generally CAROL BURKE, *CAMP ALL-AMERICAN, HANOI JANE, AND THE HIGH-AND-TIGHT: GENDER, FOLKLORE, AND CHANGING MILITARY CULTURE* (Boston, Beacon Press: 2004).

<sup>10</sup> See, e.g., [http://www.sldn.org/binary-data/SLDN\\_ARTICLES/pdf\\_file/1449.pdf](http://www.sldn.org/binary-data/SLDN_ARTICLES/pdf_file/1449.pdf) (detailing the gay-bashing that has occurred under the "don't ask/don't tell" policy) (visited Jun. 10, 2004).

Recent scholarship has documented many of the troubling consequences of military sexual culture, including its toleration of heterosexual rape,<sup>11</sup> exploitation of sex workers (especially overseas),<sup>12</sup> and violence against gay men. This culture places not only prisoners, but also servicewomen and men suspected of homosexuality at particular risk. The restrictions on women's military service, particularly the ban that prevents women from filling certain "combat" positions and the policy of male-only draft registration, have diminished the status and limited the promotion opportunities of women in uniform.<sup>13</sup> Reports of sexual assaults and harassment of military women by servicemen have prompted congressional investigations and negative media coverage of the armed forces.<sup>14</sup> High rates of domestic violence in military families have also captured public attention, particularly after a series of wife murders committed by soldiers recently returned from wartime duty.<sup>15</sup> Many servicemembers, and many military families and civilians, have experienced sexual humiliation and physical violence at the hands of American soldiers and sailors. In order to show how the incidents at Abu Ghraib were, in part, a manifestation of a distinctive sexual culture rather than a consequence of women's service or a result of the war on terror, this essay analyzes three courts-martial from 20<sup>th</sup>-century military history. These cases are drawn not from the highly publicized sex scandals of the recent past, but from the 1950s and early 1960s, when the roots of the armed forces' attitudes toward gender and sexuality were formed as a newly modernized military justice system integrated legal process into military culture.<sup>16</sup> During this period, before the recruiting demands of the all-volunteer force opened the door for more women in uniform, women did not constitute a sizable percentage of the force. Yet sexual harassment and abuse were features of military life, present not only in military prisons, but in other military workplaces as well. Because courts-martial, then as now, reinscribe the boundaries of acceptable conduct for servicemembers, the records of military criminal prosecutions are a rich source of insight into the norms of military culture. The military crimes described below include a case of prison sexual assault, a case of sexual play that went too far, and a case of fraternization, a military crime that protects the class and rank hierarchy of the armed forces. Preserving the military's hierarchical, hostile culture and separate society also preserves the likelihood that incidents of brutal, sexualized violence will continue—in military detention facilities, in the dorm rooms of Air Force Academy cadets, in Army training barracks. Courts-martial do not simply document aberrant behavior. Quite the contrary. They reveal the cultural norms and institutional structures that have created and perpetuated gender-based, sexualized abuse in military workplaces.

## I. Military Prison Abuse

The May 2004 court-martial of Jeremy Sivits, the first soldier so far to face trial for his role at Abu Ghraib, was not the first time that courts-martial have dealt with the sexual exploitation, or sexual exploits, of American servicemembers in prisons. Like civilian prisons, military prisons have long been associated with both forcible and consensual homosexual encounters. In many ways, the sexual hierarchies of military stockades echo those of civilian detention facilities. But the armed forces' official condemnation of homosexuality and emphasis on male aggressiveness created a special irony

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<sup>11</sup> See Madeline Morris, *By Force of Arms: Rape, War, and Military Culture*, 45 DUKE L. J. 651 (1996).

<sup>12</sup> See KATHARINE H.S. MOON, *SEX AMONG ALLIES: MILITARY PROSTITUTION IN U.S.-KOREA RELATIONS* (1997); SAUNDRA POLLOCK STURDEVANT & BRENDA STOLTZFUS, EDs., *LET THE GOOD TIMES ROLL: PROSTITUTION AND THE U.S. MILITARY IN ASIA* (1992); Elizabeth Rho-Ng, *The Conscripted 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); 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); Gwyn Kirk & Carolyn Bowen France, *Redefining Security: Women Challenge U.S. Military Policy And Practice In East Asia*, 15 BERK. 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").

<sup>13</sup> See LINDA K. KERBER, *NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP* (1998) (analyzing the citizenship implications of limits on women's military service).

<sup>14</sup> R. Jeffrey Smith, *Sexual Assaults In Army On Rise*, WASH. POST (Jun. 3, 2004), at A1 (detailing the rising number of sexual assaults reported to the Army over recent years).

<sup>15</sup> See, e.g., PETER J. MERCIER & JUDITH D. MERCIER, *BATTLE CRIES ON THE HOME FRONT: VIOLENCE IN THE MILITARY FAMILY* (2000); Stephen J. Brannen & Elwood R. Hamlin II, *Understanding Spouse Abuse in Military Families*, in JAMES A. MARTIN, LEORA N. ROSEN, & LINETTE R. SPARACINO, EDs., *THE MILITARY FAMILY: A PRACTICE GUIDE FOR HUMAN SERVICE PROVIDERS* 169-83 (2000). See also the Miles Foundation website at <http://hometown.aol.com/milesfdn/myhomepage/> (last visited May 26, 2004).

<sup>16</sup> See ELIZABETH LUTES HILLMAN, *DEFENDING AMERICA: MILITARY CULTURE AND THE COLD WAR COURT-MARTIAL* (Princeton University Press, 2005).

when imprisoned soldiers sought to prove their manhood through sexual aggression toward other men.<sup>17</sup> Forbidden or not, homosexual acts were part of the way that male soldier-prisoners communicated with each other and tried to protect themselves from the violence that often took place behind bars, sometimes out of sight of the soldier-guards and sometimes with their tacit consent. During the 1950s, when the armed forces grew into a large, permanent force, servicemembers convicted of crimes were often sent to military prisons before being returned to active duty or discharged from the service. The emphasis on sexual performance and masculinity that shaped soldiers' expectations and behavior was exaggerated in the isolated, all-male environment of stockades and brigades. These were not prisoner-of-war camps, but facilities run by military police and corrections officers and populated by American servicemembers sentenced to confinement at courts-martial.

Yet the sexualized abuse that was sometimes permitted to take place among military prisoners reflected a culture similar to the one that led to Abu Ghraib. In May 1956, at one of a series of courts-martial involving what the Court of Military Appeals described as "a bizarre and sordid incident," Private William G. Miasel was convicted for assault with intent to commit sodomy for his part in a gang rape in the Fort Polk, Louisiana stockade.<sup>18</sup> Seven men, including Miasel, tied down a prisoner on a bed in what the eighteen year-old Miasel termed "a joke." Miasel testified that he was afraid of one of the prisoners in the group, a man who had been "bullying" and physically intimidating him. In order to avoid a fight, Miasel pretended to commit sodomy on the victim, thinking his act would make him appear a "big shot" and would protect him from sharing the fate of the prisoner being assaulted.<sup>19</sup>

Miasel's effort to portray the incident as a joke, part of the usual teasing that occurs among young men in all-male environments, was contradicted by his own statements. Aware of the hierarchy of the stockade and cognizant of the threat of rape, he responded to the situation as a person who took the threat of forcible sodomy seriously, not as a man being teased. Miasel knew that becoming a sexual aggressor was a practical way to adapt and survive in the culture of the stockade. That the assault targeted another man, rather than a woman, signaled strength, not weakness. Despite the military's assumption that homosexuality implied weakness, homosexual acts established informal hierarchies among men in both prisons and isolated military units.

Private Miasel was 18 years old in 1956, when he decided to play along with the prison gang rape crew and pretend to sodomize a fellow prisoner. He was young and afraid, and he opted to protect himself at the expense of another young man. The situation of both male and female prison guards at Abu Ghraib was not entirely different from that of Private Miasel. The Army soldiers guarding prisoners in Iraq faced a physically challenging and frightening situation in an overcrowded, dangerous prison. They used the act of abusing prisoners to bond among themselves, choosing to fit in (and perhaps to follow the orders of superiors) rather than risk being ostracized from the only peer group available in a remote, alien place.<sup>20</sup> They pretended that the sexual abuse was a joke even when they knew their conduct was causing pain and suffering. In short, they accepted a military realm in which sexual abuse was valued currency.

## II. Crossing the Line: Sexual Play

Homosexual innuendo and sexualized play have been a much more routine aspect of military life than prison gang rape. But like the prison sexual assault recounted above, the sexual play of soldiers and sailors reflected the tension between the military's official stance against homosexuality and the reality that military society created extensive opportunities for same-sex intimacy and bonding. Like Private Miasel, who characterized the forcible sodomy of his cellmate as a "joke," many soldiers kidded each other about homosexual acts and about sodomy in particular. But sodomy was a uniquely reviled crime in the Cold War armed forces. Military courts described sodomy as loathsome, revolting,

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<sup>17</sup> Gang rapes in Cold War military prisons targeted male, not female, victims. See, e.g., *United States v. Cockram*, 15 C.M.R. 199 (A.B.R. 1952); *United States v. Barker*, 13 C.M.R. 472 (A.B.R. 1953); *United States v. Young*, 18 C.M.R. 729 (A.F.B.R. 1955); *United States v. Martin*, 24 C.M.R. 156 (1957) and 22 C.M.R. 601 (A.B.R. 1956). On homosexuality in military prisons in general, see *United States v. Parrish*, 24 C.M.R. 345 (A.B.R. 1957); *United States v. Smith* 28 C.M.R. 782 (A.F.B.R. 1959); *United States v. Matthews*, 38 C.M.R. 430 (1968).

<sup>18</sup> *United States v. Miasel*, 24 C.M.R. 184 (1957). The other cases were not reported, but were referred to in the court's opinion. See also *United States v. Miasel*, 22 C.M.R. 562 (A.B.R. 1956).

<sup>19</sup> The victim's testimony corroborated Miasel's claim, but also described being sodomized by three of the prisoners who had been part of Miasel's "joke" during a later assault that took place out of Miasel's presence. A board of review reversed Miasel's conviction (and that reversal was confirmed by the Court of Military Appeals) because evidence of this later assault was admitted into evidence at trial, thus prejudicing Miasel's court-martial panel with information irrelevant to his guilt.

<sup>20</sup> The cost of taking a stand against the abuse that took place at Abu Ghraib is evident from the Army's reassignment, to prevent reprisals, of those soldiers responsible for reporting the incidents to higher authorities. See, e.g., Barbara Ehrenreich, *Honor the Resisters*, MILWAUKEE JOURNAL-SENTINEL (Jul. 16, 2004), 23A.

obscene, abominable, and detestable.<sup>21</sup> Consensual homosexual acts were termed “repelling,”<sup>22</sup> “disgusting and repulsive misconduct,”<sup>23</sup> and behavior of a “despicable nature”<sup>24</sup> by military courts. At trial and on appeal, military lawyers and judges described it as “a morbid sexual passion”<sup>25</sup> and perversion, and repeatedly termed homosexuals “perverts.”<sup>26</sup>

As horrifying as sodomy was in the language of the military appellate courts, it was far from unspoken within military culture. Court-martial records suggest broad acceptance of sexual language that included explicit references to sodomy and sexual contact among servicemembers of the same sex. Like service in a combat zone, remote tours of duty and extended deployments at sea created conditions of isolation and deprivation that men sought to relieve through sexualized teasing and physical interaction.<sup>27</sup> In January 1963, Engineman Third Class Edgar F. Moore was serving onboard a Coast Guard cutter that spent about seven and a half months of each year away from Boston, its home port.<sup>28</sup> After chow one day during a stint in the ice at McMurdo Sound, Antarctica, some of the sailors decided to have some fun at the expense of a young man named Ellis in the aviation repair shop, “a small compartment on the main deck.” “Purely as horseplay,” they grabbed Ellis and took off his dungarees, initiating about fifteen minutes of sexual teasing and roughhousing.<sup>29</sup> The sailors then sent for Engineman Moore. When he arrived in the repair shop, four men were holding Ellis, clad only in his thermal underwear, down on the deck. Moore proceeded to expose himself, make “some indelicate remarks and gestures” and pretend to write something on Ellis’s backside. “All but the victim were laughing” when Ellis was released. Because a Navy lieutenant entered the compartment just as Ellis was pulling up his trousers, this “skylarking,” as the Coast Guard board of review termed it, resulted in Moore’s court-martial. Charged with indecent exposure and committing “an indecent and lewd act,” Moore was initially sentenced to a bad-conduct discharge. On appeal, however, his sentence was reduced to a loss of grade. The board of review considered Moore’s offense “quite different” from the sort of conduct contemplated by the Manual for Court-Martial’s description of “lewd acts,” which could be punished by a dishonorable discharge and five years confinement.<sup>30</sup> Moore’s act was “a touching in jest,” “a mere joke” on Ellis, not a “homosexual touching.” To the board of review, “horseplay” was distinct from consensual “homosexual play” and “acts of lust or lechery;” the latter were military crimes, while horseplay was simply part of military life.<sup>31</sup>

The board’s decision attempted to draw a line that could be easily erased in the sexual and physical culture of military life. Trying to separate sexualized play from homoerotic conduct was virtually impossible, especially among socially and sexually deprived men. However much military leaders sought to distinguish horseplay from sex, case after case revealed how fragile such distinctions were. Sexualized teasing could evolve into intercourse, sometimes consensual,

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<sup>21</sup> *United States v. Parker*, 33 C.M.R. 111, 112-13 (1963).

<sup>22</sup> *United States v. Warren*, 20 C.M.R. 135 (1955).

<sup>23</sup> *United States v. Bennington*, 31 C.M.R. 151 (1961).

<sup>24</sup> *United States v. Parker*, 33 C.M.R. 111, 13 (1963).

<sup>25</sup> *United States v. Doherty*, 17 C.M.R. 287 (1954).

<sup>26</sup> *United States v. Bennington*, 31 C.M.R. 151 (1961).

<sup>27</sup> This phenomenon is not unique to the armed forces. Same-sex harassment was recognized as actionable under Title VII in a case involving sexual teasing and abuse on an oil rig. See *Oncala v. Sundowner Offshore Services, Inc.*, 118 S.Ct. 998 (1998).

<sup>28</sup> *United States v. Moore*, 33 C.M.R. 667 (C.G.B.R. 1963).

<sup>29</sup> 33 C.M.R. 668.

<sup>30</sup> The dissent takes issue with this definition of “indecent,” arguing that if mere exposure of Ellis’s buttocks could constitute the crime of indecent exposure, then forcibly restraining Ellis and pretending to mark his exposed body must also be a crime of indecency.

<sup>31</sup> On the persistence of such rituals in the modern-day military, see BURKE, CAMP ALL-AMERICAN, and Hersh, *Crossing the Line*, *supra* note 8.

sometimes not.<sup>32</sup> In 1958, two privates described their joint sexual assault on a sleeping serviceman as “just the usual rough, vulgar horseplay” involving nudity and physical abuse that was typical of servicemen’s behavior.<sup>33</sup> Sometimes horseplay was simply too rough to dismiss as typical behavior. Although under-reporting of male-male sexual assaults hinders any effort to gauge the full extent of sexual exploitation among servicemen, military leaders recognized that servicemen were sometimes assaulted by other soldiers and sailors, most of whom considered themselves heterosexual. Like servicemembers’ heterosexual encounters, same-sex intimacy was the trigger for a significant number of violent crimes. Servicemen were sometimes convicted at court-martial for forcible sodomy against other servicemen.<sup>34</sup> A steady stream of cases that reached the appellate courts involved assaults on sleeping servicemen.<sup>35</sup> The preponderance of cases involving men who were assaulted in their sleep may have been because they were more likely to report the incidents than men assaulted under other circumstances. A soldier who was unconscious when a sexual act commenced was better protected against the impression that he consented to the sex act, in addition to the fact that the group sleeping arrangements in military barracks provided potential witnesses to corroborate the victim’s account of the crime.<sup>36</sup> Like servicemembers’ heterosexual encounters, homosexual connection was often a trigger for intra-military violence, whether in the communities around military bases or on post. The continuum of hazing, sexual intimidation, and brutal violence was well established in military culture. Long before American military police went too far in Iraq or women in uniform were a common sight, sexual teasing and domination were used to reinforce and sometimes disrupt military hierarchies, especially during the hardships of stressful military duty.

### III. Protecting the Fraternity: Crimes of Intimacy

Because of the intensity of same-sex intimacy that military life encouraged, the Cold War armed forces followed a military tradition of enforcing social and professional distance between officers and enlistees with the threat of criminal prosecution. Officers were expected to avoid becoming so intimate with persons of inferior rank that the senior person’s judgment or impartiality might be questioned. Excessive familiarity between officers and enlistees, sexual or not, was of such concern that it was given a special name—fraternization—and prosecuted as a military crime. But rare were the cases so egregious they triggered criminal prosecution in this era of administrative, rather than criminal,

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<sup>32</sup> In 1957, two Army privates were court-martialed for their role in giving a “GI bath” to another private in the latrine (by spraying urine over a man stripped of his clothes) and later, for forcibly sodomizing him. The two men tried to prevent the other participants from testifying against them, to the extent of smuggling threatening messages from the stockade to potential witnesses, revealing the depth of peer pressure among military units to hide this sort of behavior from superior officers. *United States v. Hayes*, 24 C.M.R. 440 (A.B.R. 1957).

<sup>33</sup> *United States v. Marcey* 25 C.M.R. 444 (1958). The members of the court-martial did not agree with this assessment, and sentenced both men to five years confinement and dishonorable discharges. This was not a unique argument; see *United States v. Polak*, 27 C.M.R. 87 (1958), in which two privates defended a charge of consensual sodomy as “horseplay;” both were sentenced to dishonorable discharges and one year confinement.

<sup>34</sup> Army soldiers predominate in this category of offenders whose cases reached the appellate records. One Air Force case appears at *United States v. O’Connell*, 18 C.M.R. 881 (A.F.B.R. 1955); other cases of forcible sodomy against men, apart from the prosecutions of officers discussed below, arose in the Army. See, e.g., *United States v. Williams*, 13 C.M.R. 438 (A.B.R. 1953); *United States v. Jones*, 13 C.M.R. 420 (A.B.R. 1953); *United States v. Morgan*, 24 C.M.R. 151 (1957); *United States v. Bonnell*, 32 C.M.R. 608 (A.B.R. 1962); *United States v. Greene*, 33 C.M.R. 480 (A.B.R., 1963); *United States v. Harrison*, 41 C.M.R. 595 (A.B.R. 1969); *United States v. Lindsey*, 41 C.M.R. 529 (A.B.R. 1969); *United States v. Rockenbach*, 43 C.M.R. 805 (A.C.M.R. 1971); *United States v. O’Neal*, 48 C.M.R. 89 (A.C.M.R. 1973). In addition, a few appellate records do not specify the sex of the victim of the forcible sodomy charge. See *United States v. Farrell*, 24 C.M.R. 118 (1957); *United States v. Davis*, 41 C.M.R. 217 (1970); *United States v. Falls*, 44 C.M.R. 48 (1971) and 44 C.M.R. 748 (N.C.M.R. 1971).

<sup>35</sup> In addition to the cases cited below, see the case of an airman who accidentally suffocated a bunkmate who had passed out from excessive drinking in the course of forcibly sodomizing him, *United States v. Breeden*, 13 C.M.R. 805 (A.F.B.R. 1953); an airman charged with a sodomitical assault on a sleeping soldier, *United States v. Butts*, 14 C.M.R. 596 (A.F.B.R. 1954); an Army soldier who defended against a charge of premeditated murder by explaining that he shot only after being assaulted in his sleep, *United States v. Turner*, 18 C.M.R. 69 (1955); a sleeping assault in the bunks onboard a ship, *United States v. Johnson*, 22 C.M.R. 289 (1957); a Navy petty officer who assaulted sailors in their sleep, *United States v. Goodman*, 33 C.M.R. 195 (1963); an airman who allegedly assaulted a sleeping fellow airman, *United States v. Kindler*, 34 C.M.R. 174 (1964); and a Navy commander who apparently assaulted a number of enlisted men in their sleep and was prosecuted in civilian criminal courts, see *Silvero v. Chief of Naval Air Basic Training*, 428 F.2d 1009 (C. A. Fla. 1970).

<sup>36</sup> See, e.g., *United States v. Holladay*, 36 C.M.R. 598 (A.B.R. 1966).

sanction. The *Manual for Courts-Martial* did not specify fraternization as a separate offense under the general article until 1984, and the services did not promulgate regulations to clarify its definition until the 1970s.<sup>37</sup> The first official Army policy on fraternization was not drafted until 1974, when the Army responded to a female officer's relationship with an enlisted man by issuing a regulation defining their relationship as improper.<sup>38</sup>

Part of the military's reluctance to specify fraternization as a crime was its inherent murkiness. Men were expected to be brothers-in-arms when they became part of the military family; the bonds of friendship between servicemembers were often powerful, forged in times of hardship and need. Drawing a line between such intense relationships and the improper associations that could be prosecuted as criminal could be very difficult. Clarity about the boundaries of fraternization eluded commanders and judge advocates despite the volumes of official guidance that were issued to try to standardize interpretations of the law from the 1970s through the 1990s.<sup>39</sup> Uncertainty about when fraternization charges were warranted led to few prosecutions for the crime and to tentative opinions from military courts in fraternization cases.<sup>40</sup> Rarely charged at court-martial, fraternization appears very infrequently in the appellate record.<sup>41</sup> But when it does appear, the prosecutions were prompted by same-sex, not opposite-sex, relationships.

During the 1950s, 60s, and early 70s, fraternization was a gay crime. Its prosecution was triggered by fear that homosexual officers would take advantage of their positions and seduce junior servicemembers, discrediting the armed forces and corrupting the chain of command. Edgar Dauphin Free, a captain in the Marine Corps Reserve, was the appellee in the first fraternization case to reach the Court of Military Appeals.<sup>42</sup> The court's 1953 opinion tries to establish a legal standard by which to gauge potentially improper relationships but declines to articulate any rule to divide appropriate from inappropriate conduct. The opinion is light on facts, and it does not mention homosexuality explicitly. But its description of the conduct that led to the charges reads like an account of an officer on a date. Free drove his companion around while they talked, bought dinner and drinks, and afterwards asked his friend to spend the night.<sup>43</sup> The evening apparently ended when Free climbed into bed with his "date"—who was an enlisted man.<sup>44</sup> The court tried to clarify the boundaries of social interaction in the Cold War military, carefully noting that Free's actions might have demonstrated innocent camaraderie rather than criminal familiarity under different circumstances. Though it accepted that "democratic concepts of social relations" had lessened the social divide between officers and enlistees, the court insisted that fraternization remained a cognizable military crime and that the military's "standards of honor and conduct" were at stake.<sup>45</sup> Refusing to specify a definition for the crime, the court listed examples of what sort of conduct might, or might not be, fraternization—and defended the ability of officers to discern acceptable from unacceptable behavior.<sup>46</sup>

The 2004 case of PFC England, now carrying a fellow soldier's child, is, of course, not quite the same of that of Captain Free and his companion. Corporal Graner, married to another woman, is being charged with adultery for his relationship with PFC England as well as for other crimes related to his conduct at Abu Ghraib. But marriage and pregnancy aside, the military's concerns with the consequences of servicemembers' sexual involvement with other soldiers today are much the same as they were in 1953. Sexual intimacy threatens to undermine the chain of command and the success of military missions, cloud individual judgment, and tarnish the armed forces' public image. Commanding officers faced these problems long before the war against terrorism began in earnest in 2001.

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<sup>37</sup> See David S. Jonas, "Fraternization: Time for a Rational Defense of a Department of Defense Standard," *Military Law Review* 135 (1992): 37-129, 47.

<sup>38</sup> See Wilton B. Persons Papers in the Senior Officers Oral History Program series at the Military History Institute, Carlisle Barracks, PA (1985 interview), 460-64 of the transcript. According to Persons' account, Second Lieutenant Marylou Follett, a nurse stationed in Heidelberg, was living in a Mannheim apartment with Specialist James Johnson, a 20-year old medical technician whom she supervised. Her living arrangements generated "considerable outrage" in the hospital, prompting the legal officers to write a policy regarding fraternization. Soon after, Lt. Follett resigned.

<sup>39</sup> See Paul H. Turney, "Relations Among the Ranks: Observations of and Comparisons Among the Service Policies and Fraternization Case Law, 1999," *Army Lawyer* (April 2000): 97-107.

<sup>40</sup> For an astute judicial analysis of fraternization (and sodomy), see *United States v. Cain*, 59 M.J. 285 (2004).

<sup>41</sup> These cases share other similarities: each involved the prosecution of a junior officer in the Navy or Marine Corps. See *United States v. Free*, 14 C.M.R. 466 (N.B.R. 1953); *United States v. Lovejoy*, 42 C.M.R. 210 (1970); *United States v. Pitasi*, 44 C.M.R. 31 (1971).

<sup>42</sup> *United States v. Free*, 14 C.M.R. 466 (1953).

<sup>43</sup> 14 C.M.R. 468.

<sup>44</sup> *Id.*

<sup>45</sup> 14 C.M.R. 469-71.

<sup>46</sup> *Id.*

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When scholars review the Abu Ghraib court-martial records, they will find, as we did here, failures of discipline and individual judgment as well as insight into cultural norms and institutional structures. They will see reflections of the armed forces' complex bureaucracy of military grades, occupational specialties, and interactions with civilian intelligence agencies. They will note the mistakes of defense counsel, the limited impact of investigations into detention facilities, the careers of officers derailed but not ended by their roles in authorizing, or at least permitting, the abuse.

They will also be able to assess the results of the national reckoning over the size and shape of the military that has been prompted by the war in Iraq. Because of the increasingly desperate situation, virtually everything about the military is open to reconsideration. Questions abound about who ought to serve and for long, about how military and government agencies ought to be reconfigured to prevent future intelligence and operational failures, about the role of uniformed and civilian lawyers in the war on terrorism, about whether the United States is bound by the recognized principles of international law.

One proposed solution to the legal and political decisions that made the abuse at Abu Ghraib possible is to eliminate women from some, if not all, of the armed forces. Implementing such a plan would be difficult because of the essential roles that servicewomen play in the contemporary American military. Women now constitute about 15 percent of active-duty military personnel; their numbers are roughly equivalent to the 200,000 troops now stationed in and around Iraq. There are now 1.6 million female veterans, and about 350,000 servicewomen in the active and reserve forces.<sup>47</sup> But even if men could be recruited and trained to perform all of the tasks that servicewomen currently perform, the problem of sexual abuse in military culture, and the difficulty that military justice has faced in redressing it, will remain. The military's judge advocates enforce "don't ask/don't tell," its commanders accept the limitations on women's service, its judges embrace the military's hierarchy and culture. The military that is occupying Iraq today is very different than the military that Private Miasel and Engineman Moore and Captain Free served in fifty years ago. But it has not left behind its notions of women as inferior, homosexuality as infectious, or violence as amusing. Until it does, sexualized abuse, within and without military prisons, against enemies as well as comrades, will continue to compromise its effectiveness.

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<sup>47</sup> For statistics, see <http://www.womensmemorial.org/PDFs/StatsonWIM.pdf>; <http://web1.whs.osd.mil/mmid/military/rg0209f.pdf> (last visited Jul. 19, 2004).