University of Baltimore Law Review

Volume 35
Issue 2 *Winter 2005*

Article 6

2005

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Captain Erik C. Coyne
University of Baltimore School of Law

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Recommended Citation
Coyne, Captain Erik C. (2005) "Comments: Check Your Privacy Rights at the Front Gate: Consensual Sodomy Regulation in Today's Military Following United States v. Marcum," *University of Baltimore Law Review*: Vol. 35: Iss. 2, Article 6.
Available at: http://scholarworks.law.ubalt.edu/ublr/vol35/iss2/6

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CHECK YOUR PRIVACY RIGHTS AT THE FRONT GATE: CONSENSUAL SODOMY REGULATION IN TODAY'S MILITARY FOLLOWING *UNITED STATES v. MARCUM*

I. INTRODUCTION

In *United States v. Marcum*,[1] the latest judicial interpretation of the military's sodomy statute,[2] the Court of Appeals for the Armed Forces[3] created a delicate balance between servicemembers' privacy rights and Congress's right to regulate the military.[4] While limiting the Supreme Court's privacy protections articulated in *Lawrence v. Texas*[5] in the military context, the Court of Appeals for the Armed Forces crafted a new rule in which military members are now required to apply a multi-part test to determine if their conduct is protected.[6] The resulting environment is one in which servicemembers may not be precisely sure whether their private, consensual, sexual conduct is proscribed.[7] Upon closer examination, however, one need only look to the legitimacy of the underlying relationship—in the eyes of the military—to determine whether the sexual conduct will be criminal and prosecutable.[8]

The Uniform Code of Military Justice codifies the military's sodomy statute in Article 125, which states:

> (a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same

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1. 60 M.J. 198 (C.A.A.F. 2004).
2. *See* 10 U.S.C. § 925, art. 125 (2000).
3. The United States Court of Appeals for the Armed Forces is the military's highest appellate court, one level below the United States Supreme Court, and it has jurisdiction over servicemembers throughout the world. CLERK OF THE COURT, THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES 1, *available at* http://www.armfor.uscourts.gov/CAAFBooklet.pdf (last visited Oct. 1, 2005). The court was established as an Article I court by Congress. *Id.* Its judges serve fifteen year terms and are civilians. *Id.* at 8. To emphasize the civilian makeup of the court, Congress expressly stated that retired military members were to be excluded from appointment to the court. *Id.* Additionally, prior to 1994, the Court of Appeals for the Armed Forces was known as the Court of Military Appeals. *Id.* at 3. For clarity, this comment uses the name Court of Appeals for the Armed Forces for all cases decided by the court.
4. *See infra* Part V.C.
5. 539 U.S. 558 (2003) (overturning Texas's sodomy statute which prohibited same-sex sodomy on the grounds the law violated the Due Process clause).
6. *See infra* Part IV.D.; *Marcum*, 60 M.J. at 205.
7. *See infra* Part V.A.
8. *See infra* Part V.C.

> or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.
>
> (b) Any person found guilty of sodomy shall be punished as a court-martial may direct.[9]

The Court of Appeals for the Armed Forces' recent holding in *United States v. Marcum* has changed the scope, meaning, and understanding of Article 125 by creating a multi-part test to analyze sodomy cases.[10] In creating the test, the court has followed the less than clear guidance of the Supreme Court's *Lawrence* decision and created a constitutional, albeit cumbersome, standard for those in the military.[11]

This comment will analyze the scope of the constitutional right to privacy as it is applied in the military context and explore the limits of the military's sodomy statute in light of the new test (hereinafter called the "*Marcum* Test").[12] This comment will first address the history of sodomy statutes. Then, it will parse the Supreme Court's holding in *Lawrence v. Texas*, the liberty right it created, and how the Court of Appeals for the Armed Forces' recent holding in *United States v. Marcum* interprets that right in a military setting. Next, this comment will evaluate the constitutionality of the *Marcum* Test in the military and how the *Marcum* decision applies to military personnel today. Finally, this comment will suggest alternatives to criminally charging servicemembers for engaging in consensual sodomy.

II. HISTORICAL REVIEW OF SODOMY STATUTES

A. *Origins of Statutes Proscribing Sodomy*

The origin of sodomy laws in society stems from biblical interpretations of Genesis 19:4-11 from the Old Testament.[13] Based on the story

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9. 10 U.S.C. § 925, art. 125 (2000).
10. *Marcum*, 60 M.J. at 205.
11. *See infra* Part V.C.
12. *See infra* Part IV.D.
13. JOHN J. MCNEILL, THE CHURCH AND THE HOMOSEXUAL 42-43 (Beacon Press 1993); *see also* ROLAND A. BRINKLEY, JR. ET AL., CRIMINAL JUSTICE MONOGRAPH VOL. II, NO. 4: THE LAWS AGAINST HOMOSEXUALITY 11 (Inst. of Contemp. Corr. & the Behav. Sci., Sam Houston State Univ., Tex.) (n.d.); MARK D. JORDAN, THE SILENCE OF SODOM 121 (Univ. of Chicago Press 2000). The biblical verse is:

> But before they lay down, the men of the city, the men of Sodom, both young and old, all the people to the last man, surrounded the house; 5. and they called to Lot, "Where are the men who came to you tonight? Bring them out to us, that we may know them." 6. Lot went out of the door to the men, shut the door after him, 7. and said, "I beg you, my brothers, do not act so wickedly. 8. Behold, I have two daughters who have not known man; let me bring them out to you, and do to them as you please; only do nothing to these men, for they have come under the shelter of my roof." 9. But they said, "Stand back!" And they said, "This fellow came to sojourn, and he would play the judge! Now we will deal worse with

of Sodom and Gomorrah, early Church teachings focused on God's vengeance upon the two cities for wide-spread homosexual activities.[14] It was also taught that these "'offenses against nature'" were the cause of a number of natural disasters and other catastrophes.[15] Additionally, church leaders argued that God had given humans the ability to engage in sexual relations for the sole purpose of procreation.[16]

To protect themselves from these curses and to promote procreativity, societies, through both civil and Church law, outlawed sodomy.[17] The crime was often described as, "that detestable and abominable crime (among Christians not to be named). . . ."[18] This view of sodomy carried into England[19] and eventually flowed to America.[20]

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you than with them." Then they pressed hard against the man Lot, and drew near to break the door. 10. But the men put forth their hands and brought Lot into the house to them, and shut the door. 11. And they struck with blindness the men who were at the door of the house, both small and great, so that they wearied themselves groping for the door.

Genesis 19:4-11 (King James).

14. MCNEILL, *supra* note 13, at 42; *see also* L.J. Boon, *Those Damned Sodomites: Public Images of Sodomy in the Eighteenth Century Netherlands*, in THE PURSUIT OF SODOMY: MALE HOMOSEXUALITY IN RENAISSANCE AND ENLIGHTENMENT EUROPE 237, 242, 246 (Kent Gerard & Gert Hekma eds., Harrington Park Press 1989) (discussing the historical view of sodomites pre-1730 in the Netherlands).
15. MCNEILL, *supra* note 13, at 42; *see also* Boon, *supra* note 14, at 242.
16. Richard Green, *Sodomy Laws*, *in* THE HANDBOOK OF FORENSIC SEXOLOGY 35, 35 (James J. Krivacska & John Money eds., 1994); *see also* JAMES W. BUTTON ET AL., PRIVATE LIVES, PUBLIC CONFLICTS 179 (CQ Press 1997) (describing religious values as "procreatively-focused sexuality"); *cf.* PAUL R. ABRAMSON ET AL., SEXUAL RIGHTS IN AMERICA: THE NINTH AMENDMENT AND THE PURSUIT OF HAPPINESS 75 (N.Y. Univ. Press 2003) (pointing out that an argument could be made that the purpose of sex is to procreate, but concluding that the argument is "silliness, plain and simple").
17. MCNEILL, *supra* note 13, at 42. Of interest, McNeill discusses the possible mistranslation of the story of Sodom and Gomorrah. *Id.* at 42-43. He lays out an argument, made by some biblical scholars, that the ultimate sin of "inhospitality" is what delivered God's wrath and not sexual deviancy. *Id.* at 50. If true, McNeill opines that this would be one of history's greatest ironies. *Id.*
18. JOSEPH CHITTY, 2 A PRACTICAL TREATISE ON THE CRIMINAL LAW 51 (G. & C. Merriam, 3d Am. ed. 1836); *see also* RICHARD A. POSNER & KATHERINE B. SILBAUGH, A GUIDE TO AMERICA'S SEX LAWS 65 (Univ. of Chicago Press 1996) (stating that early laws containing the language "'crime against nature,' were limited to anal intercourse"). Today, however, this definition has been commonly expanded to include fellatio, cunnilingus and bestiality. *Id.*; *see also* B. ANTHONY MOROSCO, THE PROSECUTION AND DEFENSE OF SEX CRIMES § 1.02, at 1-5 (Matthew Bender 1976).
19. Green, *supra* note 16, at 37; *see also* POSNER & SILBAUGH, *supra* note 18, at 65.
20. Jonathan Ned Katz, *The Age of Sodomitical Sin*, 1607-1740, *in* RECLAIMING SODOM 43, 43-44 (Jonathan Goldberg ed., 1994); *see also* POSNER & SILBAUGH, *supra* note 18, at 65.

Before Henry VIII's Reformation Acts criminalized sodomy in 1533, sodomy had only been considered a sin against the church.[21] After 1533, however, sodomy, or "buggery" as it was often called, could, for the first time, be punished in civil courts.[22]

This new crime was a felony and its offenders faced death and, interestingly, loss of property.[23] There was no exception for clergy who were usually only subjected to punishment by the church.[24] This is important because it demonstrates, for the first time, a shift in power from the church to the state and exposes possible ulterior motives of the Reformation Parliament and Henry VIII.[25]

B. Sodomy Statutes Cross the Atlantic

As early as 1641, throughout colonial America, sodomy was a crime that was punishable by death.[26] The Massachusetts Bay code of 1641 made "man lying with man as with a woman" punishable by death.[27] Even heterosexual sodomy was condemned.[28] The New Haven Law of 1656 "provided death for male-female anal intercourse, incitement to masturbation, and undefined acts of women 'against nature.'"[29] In the agrarian colonies, procreation was not just God's will, it was viewed as a form of survival.[30] Therefore, the consequences of non-reproductive sexual acts were seen as an economic threat to society.[31]

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21. Katz, *supra* note 20, at 46-47; *see also* Lawrence v. Texas, 539 U.S. 558, 568 (2003); POSNER & SILBAUGH, *supra* note 18, at 65.
22. Katz, *supra* note 20, at 47; *see also* POSNER & SILBAUGH, *supra* note 18, at 65; LESLIE J. MORAN, THE HOMOSEXUAL(ITY) OF LAW 22 (Routledge 1996).
23. Katz, *supra* note 20, at 47; *see also* PETER ROOK & ROBERT WARD, ROOK & WARD ON SEXUAL OFFENCES 125 (Sweet & Maxwell 2d ed. 1997).
24. Katz, *supra* note 20, at 47; *see also* ROOK & WARD, *supra* note 23, at 125.
25. Katz, *supra* note 20, at 47. While not further explored in this comment, Katz implies Henry VIII's motives were more about separating England from Roman Catholic rule by the Pope than his concern about sodomy. *Id.* at 46-47. In 1536, relying on this new law, Henry VIII charged a number of Catholic monks with this crime and was able to confiscate their monasteries' land and redistribute it. *Id.*
26. Katz, *supra* note 20, at 47.
27. *Id.* It seems ironic that one of the first regions to have an anti-homosexual statute would also be home to one of the first states to permit same-sex marriage. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).
28. Katz, *supra* note 20, at 48.
29. *Id.* This phrasing is generally understood to mean women performing oral sex on men. *See* DONAL E.J. MACNAMARA & EDWARD SAGARIN, SEX, CRIME, AND THE LAW 196-97 (Free Press 1977) (stating that condemnation and punishment apparently did not deter men and women from engaging in these acts).
30. Katz, *supra* note 20, at 44-45. A community required procreation to ensure it would have adequate labor. *Id.*
31. *Id.* at 45; *see also* ABRAMSON ET AL., *supra* note 16, at 75.

At the time the Bill of Rights was ratified in 1791, sodomy was illegal in all thirteen original states.[32] By 1868, thirty-two of thirty-seven states had criminalized sodomy.[33] In 1961 every state criminalized sodomy; in that year Illinois became the first state to repeal its consensual sodomy statute by virtue of adopting the Model Penal Code, which advocated for repealing consensual sodomy statutes.[34] By 1986, when the Supreme Court heard arguments in *Bowers v. Hardwick*,[35] almost half of all states and Washington, D.C. still criminalized consensual sodomy.[36] Although the laws were largely ignored and not enforced in most jurisdictions, prosecutions for consensual sodomy still occurred, albeit rarely.[37]

In *Bowers v. Hardwick*, the Supreme Court held there was no fundamental right to engage in consensual homosexual sodomy.[38] It found that "[p]roscriptions against [sodomy] have ancient roots,"[39] and it cited a history of sodomy laws in this country dating back to 1791.[40] The Georgia statute at issue, which outlawed sodomy, regardless of whether heterosexual or homosexual, was validated.[41]

By the time the Court heard arguments in *Lawrence v. Texas*,[42] in 2003, the number of states outlawing consensual sodomy had decreased by nearly half since *Bowers*.[43] By virtue of the Court's holding

32. Green, *supra* note 16, at 38; *see also* Bowers v. Hardwick, 478 U.S. 186, 192-93 n.5 (1986) (listing states criminalizing sodomy). At least one of the founding fathers was aware of the criminalization of sodomy. Green, *supra* note 16, at 38. Thomas Jefferson apparently did not object to it being a crime, but did advocate repealing the death penalty for sodomy, preferring instead castration for sodomy offenders. *Id.* In 1800, Jefferson's Virginia replaced its death penalty for sodomy with a sentence of one to ten years in prison. *Id.*
33. *Bowers*, 478 U.S. at 192-93.
34. Green, *supra* note 16, at 39.
35. *See Bowers*, 478 U.S. at 186 (oral arguments heard March 31, 1986); *see also infra* text accompanying notes 38-41 (describing *Bowers*).
36. *Bowers*, 478 U.S. at 193-94; *see also* JEAN L. COHEN, REGULATING INTIMACY 94 (Princeton Univ. Press 2002).
37. *Bowers*, 478 U.S. at 198 n.2 (Powell, J., concurring); *see also* POSNER & SILBAUGH, *supra* note 18, at 66 (citing the *Bowers* case); Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of* Bowers v. Hardwick, *in* SEX, MORALITY, AND THE LAW 32, 32 (Lori Gruen & George E. Panichas eds., 1997) (stating that it took ten hours for a prosecutor to ultimately decide not to prosecute Hardwick, during which time Hardwick and his partner were in jail).
38. *Bowers*, 478 U.S. at 191-92.
39. *Id.* at 192.
40. *Id.* at 192-93 n.5.
41. *Id.* at 188-89. GA. CODE ANN. § 16-6-2(a) (1984) stated that "[a] person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another."
42. 539 U.S. 558, 558 (2003) (oral arguments heard March 26, 2003).
43. *Id.* at 573 (decreasing from twenty-five states in 1986 to thirteen by 2003).

in *Lawrence*,[44] consensual, noncommercial sodomy between adults is no longer a crime in any state.[45] Surprisingly, however, there remains one last jurisdiction in America that still has a consensual sodomy statute: the United States military.[46]

C. *Sodomy Statutes in the United States Military*

The Uniform Code of Military Justice ("UCMJ") was signed into law on May 5, 1950,[47] and the original sodomy statute articulated therein has remained virtually unchanged for nearly fifty-five years.[48] The UCMJ is rooted in military history and has its base in the Articles of War of 1775,[49] which traces its lineage to the British Articles of War of 1749.[50] Although the British Articles of War of 1749 did expressly proscribe sodomy, calling it an "unnatural and detestable sin,"[51] with a sentence of death,[52] the United States military, prior to 1920, had no express sodomy statute.[53] Pre-1920, the crime was charged under Article 96,[54] the general article or "catch-all."[55] After 1920, however, a prohibition on sodomy was added as a specific statute in the Articles

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44. *Id.* at 578.
45. *Id.*
46. 10 U.S.C. § 925, art. 125 (2000); *see also* United States v. Marcum, 60 M.J. 198, 206 (C.A.A.F. 2004).
47. Pub. L. 81-506, 64 Stat. 107 (1950); *see also* Lieutenant Colonel James B. Roan & Captain Cynthia Buxton, *The American Military Justice System in the New Millennium*, 52 A.F. L. REV. 185, 187-89 (2002) (discussing the various factors which lead to the development of the UCMJ).
48. *Compare id.* at art. 125 (1950) ("Any person subject to this *code* . . . ."), *with* 10 U.S.C. § 925(a) (2000) ("Any person subject to this *chapter* . . . .") (emphasis added).
49. JONATHAN LURIE, ARMING MILITARY JUSTICE 3 (Princeton Univ. Press 1992); *see also* Roan & Buxton, *supra* note 47, at 187.
50. Edmund M. Morgan, *The Background of the Uniform Code of Military Justice*, 28 MIL. L. REV. 17, 18 (1965).
51. Articles for War of the Royal Navy § 29 (1749), *reprinted in* N.A.M. RODGER, ARTICLES OF WAR, at 27 (Kenneth Mason 1982). The sodomy provision stated, in full, that "[i]f any person in the fleet shall commit the unnatural and detestable sin of buggery and sodomy with man or beast, he shall be punished with death by the sentence of a court-martial." *Id.*
52. *Id.*
53. *See* United States v. Harris, 8 M.J. 52, 53 (C.M.A. 1979); *see also* Major Eugene E. Baime, *Private Consensual Sodomy Should be Constitutionally Protected in the Military by the Right to Privacy*, 171 MIL. L. REV. 91, 94 (2002) (discussing the development of sodomy laws in the military).
54. *Harris*, 8 M.J. at 53; *see* Baime, *supra* note 53, at 94.
55. Article 96, the General Article of the Articles of War of 1916, provides:

> Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial according to the nature and degree of the offense, and punished at the discretion of such court.

of War and was later codified in the UCMJ.[56] In 1978, the Court of Appeals for the Armed Forces clearly articulated the scope of Article 125: "[b]y its terms, Article 125 prohibits every kind of unnatural carnal intercourse, whether accomplished by force or fraud, or with consent. Similarly, the article does not distinguish between an act committed in the privacy of one's home, with no person present other than the sexual partner. . . ."[57] This prohibition against private, consensual sodomy would eventually set the military apart from the rest of American jurisdictions.[58]

III. CONSENSUAL SODOMY STATUTES IN AMERICA AFTER *LAWRENCE v. TEXAS*

The Supreme Court's decision in *Lawrence v. Texas* expressly overturned its earlier decision in *Bowers v. Hardwick*, which had upheld states' consensual sodomy statutes.[59] In *Lawrence*, two men, John Lawrence and Tyron Garner, were convicted of violating the Texas sodomy statute after the police entered their apartment on a supposed weapons disturbance complaint and discovered the pair "engaging in a sexual act."[60] The case made its way through the Texas appellate process with courts relying on the Supreme Court's, then authoritative, holding from *Bowers*.[61]

In *Lawrence*, the Supreme Court determined that Texas's interest in proscribing the type of consensual, private conduct prohibited by the statute was neither "legitimate [n]or urgent."[62] Relying on history, the Court noted that provisions outlawing sodomy were rarely enforced "against consenting adults acting in private."[63] Additionally, the Court pointed out that even after *Bowers*, some states had chosen

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Federal Possession and Control Act, ch. 418, § 3, 39 Stat. 619, 666 (1916); *see also* DEPARTMENT OF THE ARMY, U.S. WAR OFFICE, A MANUAL FOR COURTS-MARTIAL, 283, 285-86 (Gov't Printing Office 1917).

Sodomy is specifically referred to under the "Crimes or Offenses not Capital" section and to be charged under the general article, Article 96. *Id.* The proof required was the same as that for "Assault to Commit any Felony" from Article 93. *Id.* at 252, 286.

56. *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on the Armed Services*, 81st Cong. 1233 (1949) (referring to previous Article of War 93 as reference for breaking-out sodomy as its own statute, Article 125, in the first Uniform Code of Military Justice); *see also* Baime, *supra* note 53, at 94-96.
57. United States v. Scoby, 5 M.J. 160, 163 (C.M.A. 1978).
58. *See infra* Part III.
59. 539 U.S. 558, 578 (2003).
60. *Id.* at 562-63; *see also* Diana Hassel, *National Interest:* Lawrence v. Texas*: Evolution of Constitutional Doctrine*, 9 ROGER WILLIAMS U. L. REV. 565, 566 (2004) (reciting the facts from *Lawrence*).
61. *See* Lawrence v. State, 41 S.W.3d 349, 359-62 (Tex. App. 2001); *see also Lawrence*, 539 U.S. at 563.
62. *Lawrence*, 539 U.S. at 577.
63. *Id.* at 569; s*ee also supra* note 37 and accompanying text.

to abolish sodomy statutes.[64] The Court therefore overruled *Bowers*, calling the holding "not correct when it was decided, and . . . not correct today,"[65] and extended a liberty interest to private, consensual sexual conduct.[66]

Although the Supreme Court expressly overruled its *Bowers* decision in *Lawrence*, the implications of the *Lawrence* decision have been the subject of much debate.[67] For example, as Justice O'Connor would point out in her concurrence, the Texas statute, unlike the Georgia statute in *Bowers*, only outlawed same sex sodomy.[68] This may leave open a question in the future as to whether a statute forbidding sodomy could be applied equally to all, as the military's sodomy statute is, and not just between those of the same sex.[69]

Adding to the *Lawrence* debate is the fact the Court, in coming to its conclusion, did not expressly articulate which constitutional standard of review it applied.[70] Justice Scalia, in his dissent to *Lawrence*, characterized it as an "unheard-of form of rational-basis review."[71] Professor Laurence Tribe, however, argues that the standard of review used was not "mysterious."[72] He states that based on the analytical path the court followed, covering *Griswold v. Connecticut*[73] and *Roe v. Wade*,[74]

64. *Lawrence*, 539 U.S. at 570; *see also supra* note 43 and accompanying text.
65. *Lawrence*, 539 U.S. at 578.
66. *Id.*; *see also* Laurence H. Tribe, Lawrence v. Texas: *The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1894, 1935-37 (2004).
67. *See, e.g.*, Susan Austin Blazier, *The Irrational Use of Rational Basis Review in* Lawrence v. Texas: *Implications For Our Society*, 26 CAMPBELL L. REV. 21, 25 (noting the court's implication that any victimless conduct which occurs in private in one's own home may now be legal); Nan D. Hunter, *Sexual Orientation and the Paradox of Heightened Scrutiny*, 102 MICH. L. REV. 1528, 1532-33 (2004) (discussing three types of "antigay" legislation that appellate courts upheld even after *Lawrence* to demonstrate the possible limits of *Lawrence*); Hassel, *supra* note 60, at 577 (stating the results of *Lawrence* are not yet fully understood).
68. *Lawrence*, 539 U.S. at 582; TEX. PENAL CODE ANN. § 21.06(a) (2003) ("A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex."). The section title of the sodomy law is even named "Homosexual Conduct." *Id.*
69. *Lawrence*, 539 U.S. at 579-85 (O'Connor, J., concurring). *But see* Blazier, *supra* note 67, at 30 (arguing equal protection is not a valid basis on which to strike down a gender-neutral sodomy statute).
70. *See Lawrence*, 539 U.S. at 578 (holding that petitioners' Due Process rights were violated without stating which standard of review was applied); *see generally* Colin Callahan & Amelia Kaufman, *Constitutional Law Chapter: Equal Protection*, 5 GEO. J. GENDER & L. 17, 19-28 (2004) (providing an overview of the standards of review in equal protection analysis). The three levels of review generally used by the Court are rational basis, heightened scrutiny, and strict scrutiny. *Id.* at 22. The higher the level of scrutiny, the more difficult it becomes for legislation to survive judicial review. *Id.* at 21. For example, classifying something as a fundamental right will require strict scrutiny of any statute that infringes upon the fundamental right. *Id.* at 19.
71. *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting).
72. Tribe, *supra* note 66, at 1916-17.
73. 381 U.S. 479 (1965).

the standard used was "obvious."[75] Professor Tribe, by implication, claims the standard was some sort of heightened scrutiny because the Court methodically cited the history of personal rights cases and stated that, "'protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person.'"[76] Regardless, the majority based its decision on the Due Process Clause of the Fourteenth Amendment to the Constitution and provided some privacy protections for adults engaging in consensual sodomy.[77]

The Court's constitutional protection of consensual sodomy, however, was not limitless as certain parameters applied: "[t]he present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution."[78]

These limits would later become the cornerstone of the Court of Appeals of the Armed Forces' development of the *Marcum* Test.[79]

IV. HOW THE COURT OF APPEALS FOR THE ARMED FORCES INTERPRETS ARTICLE 125 TODAY: *UNITED STATES v. MARCUM*

While *Lawrence* seemed to provide a far-reaching umbrella of privacy protections, the question of how those rights would be interpreted in a military setting remained unresolved until the appeal of Air Force Technical Sergeant (E-6) Eric Marcum in 2003.[80] Marcum was the supervising noncommissioned officer of a flight of intelligence linguists.[81] He developed a variety of close relationships with his male subordinates and, allegedly, had "sexual encounters" with six of them.[82] He was charged with violating UCMJ Articles 92, 125, and 134, and was ultimately found guilty at court-martial of violating all three articles and also Article 128.[83]

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74. 410 U.S. 113 (1973).
75. Tribe, *supra* note 66, at 1917.
76. *Id.* (quoting *Lawrence*, 539 U.S. at 565) (emphases omitted) (alteration omitted).
77. *Lawrence*, 539 U.S. at 578-79.
78. *Id.* at 578.
79. *See infra* Part IV.D.
80. United States v. Marcum, 60 M.J. 198, 198 (C.A.A.F. 2004); *see generally* Baime, *supra* note 53 (arguing in a pre-*Lawrence* article that the right to privacy in the military was protected, and private, consensual sodomy should be allowed based on *Bowers*).
81. *Id.* at 200.
82. *Id.*
83. Supplemental Brief on Behalf of Appellant at 2-3, United States v. Eric P. Marcum, 60 M.J. 198 (C.A.A.F. 2004) (No. 02-0944/AF) (stating Marcum was charged with one count of Article 92, failure to obey an order or regulation by providing alcohol to persons under twenty-one, three counts of

Of importance to this comment, the court-martial found that one of Marcum's violations of Article 125 was for consensual sodomy and not the non-consensual sodomy that had been charged.[84] It was this conviction for consensual sodomy which formed one of the bases for Marcum's appeal to the Court of Appeals for the Armed Forces.[85]

A. The Relationship and Act at Issue

This particular conviction stemmed from Marcum's relationship with Senior Airman (E-4) Robert Harrison, one of Marcum's subordinates.[86] Following a night of drinking, Harrison returned with Marcum to Marcum's apartment,[87] where, before going to bed, Harrison took off all of his clothing with the exception of his boxer shorts and T-shirt.[88] He then went to sleep on Marcum's couch and at some point during the night he awoke to the following: "I looked down and I was trying to keep my eyes closed because I felt something strange and I didn't know exactly what was going on but I opened my eyes just enough to see Sergeant's head over my crotch and I felt his mouth on my penis."[89]

Of importance to the appellate court, Harrison testified that although he said nothing at the time and simply rolled over, the encounter made him "scared, angry, and uncomfortable" and he confronted Marcum about the incident to ensure, "this sort of thing d[id]n't ever happen again."[90]

Highlighting the apparent consensual nature of their relationship, on cross-examination Harrison admitted that he continued to go out drinking with Marcum, would spend the night at Marcum's apartment, sent Marcum gifts from his travels, and even told Marcum that

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Article 125, sodomy without consent, and five counts of Article 134, general article to include indecent acts and also convicted of Article 128 for assault).

84. *Id.* at 2.

85. *Marcum*, 60 M.J. at 199-200. Marcum was originally sentenced on May 24, 2000 and none of his subsequent appeals included the consensual sodomy charge, however, his appeal was pending when *Lawrence* was decided and he was ultimately granted a review of this issue as well. *See* United States v. Marcum, 59 M.J. 131 (C.A.A.F. 2003) (granting review of supplemental issue, the consensual sodomy charge, in light of *Lawrence*); United States v. Marcum, 58 M.J. 205 (C.A.A.F. 2003) (granting review of two issues, not including sodomy); United States v. Marcum, 2002 CCA LEXIS 173 (A.F. Ct. Crim. App. 2002) (affirming sentence while reviewing issues not including consensual sodomy charge).

86. *Marcum*, 60 M.J. at 200; Supplemental Brief on Behalf of Appellant at 4, *Marcum*, 60 M.J. 198 (No. 02-0944/AF).

87. *Marcum*, 60 M.J. at 200.

88. Supplemental Brief on Behalf of Appellant at 4, *Marcum*, 60 M.J. 198 (No. 02-0944/AF) (testimony of Harrison).

89. *Id.* at 5.

90. *Marcum*, 60 M.J. at 201.

"he [Harrison] loved him [Marcum]."[91] For his part, Marcum admitted only to "kissing [Harrison's] penis twice."[92] Additionally, both men testified that they had had a previous encounter in which Harrison had apparently lain down on top of Marcum and was "moving his pelvis area against [Marcum's] butt . . . [Harrison] had an erection . . ."[93]

The court-martial jury, a panel of officer and enlisted members, found Marcum innocent on the forcible sodomy charge, "but guilty of non-forcible sodomy in violation of Article 125."[94] Thus, in light of the *Lawrence* ruling, the door was opened for an appellate challenge of Marcum's conviction.[95]

B. Standard of Review

From the onset of its consideration of Marcum's appeal, the Court relied on its previous holding from *United States v. Scoby*[96] in asserting that "Article 125 forbids sodomy whether it is consensual or forcible, heterosexual or homosexual, public or private."[97] The court then considered whether Article 125 remained constitutional after *Lawrence*.[98] Because the case presented a constitutional question, the court reviewed this case *de novo*.[99] Following an in-depth review of *Lawrence*, the *Marcum* court was persuaded that the Supreme Court did not rely on any particular method of traditional constitutional analysis.[100] The court was particularly focused on the limits articulated by the *Lawrence* Court stating, "[t]he Supreme Court did not expressly state whether or not this text represented an exhaustive or illustrative list of exceptions to the liberty interest identified. . . ."[101]

In deciding which standard of review to use, the court acknowledged the use of "either the rational basis test or strict scrutiny might well prove dispositive of a facial challenge to *Article 125*."[102] However, the court was compelled by neither and opted for a case by case analysis instead of reviewing the statute on its face.[103] This contextual anal-

91. Supplemental Brief on Behalf of Appellant at 6, *Marcum*, 60 M.J. 198 (No. 02-0944/AF); *Marcum*, 60 M.J. at 201.
92. *Marcum*, 60 M.J. at 200.
93. *Id.* at 201.
94. *Id.*
95. *Id.* at 199-200; *see also supra* note 85 (detailing the issues granted for review in Marcum's various appeals).
96. 5 M.J. 160 (C.M.A. 1978).
97. *Marcum*, 60 M.J. at 202.
98. *Id.* at 202-07.
99. *Id.* at 202-03 (citing Jacobellis v. Ohio, 378 U.S. 184, 190 (1964)).
100. *Id.* at 204.
101. *Id.* at 203.
102. *Id.* at 204; *see also supra* note 70 (discussing the different standards of review).
103. *Marcum*, 60 M.J. at 205. Relying on the Supreme Court's distaste for broad, facial challenges the court cited *Sabri v. United States*, 541 U.S. 600, 609

ysis, the *Marcum* court argued, required a constitutional review based on the Due Process Clause.[104]

Further, the court noted that the *Lawrence* court failed to articulate the privacy interest at issue in the case as a fundamental right.[105] Thus, the court would not take it upon itself to impute a fundamental right to members of the military where the Supreme Court had not even extended it in a civilian context.[106]

C. Lawrence *in the Military Environment*

The *Marcum* court concluded that *Lawrence* applied in the military context, but it refused to adopt the decision's implications for the military.[107] The court determined that the application of *Lawrence* required a different standard for servicemembers than it would for civilians.[108] Focusing on various cases where the court has upheld servicemembers' rights,[109] the court stated it had routinely extended the protections of the Bill of Rights to the military, "except in cases where the express terms of the Constitution make such application inapposite."[110] The court explained that "'[t]he military is, by necessity, a specialized society,'"[111] and therefore, "it is clear that servicemembers, as a general matter, do not share the same autonomy as civilians."[112]

In this context, the court cites First and Fourth Amendment cases where the protected liberty interest in a civilian context does not withstand similar inquiry in a military context because of unique military requirements inherent in providing the United States' national defense.[113] Thus, based on its previous preference for a case-by-case test and by extending the *Lawrence* analysis to the military environment,

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(2004), in which the Supreme Court noted that facial challenges are "especially to be discouraged." *Id.* at 206.

104. *Id.* at 205; *see also supra* note 77 and accompanying text (noting the Supreme Court also based its decision on the Due Process Clause of the Fourteenth Amendment).
105. *Marcum*, 60 M.J. at 205.
106. *Id.*
107. *Id.* at 206.
108. *Id.* at 205-06.
109. *Id.* at 205 (citing Goldman v. Weinberger, 475 U.S. 503, 507, 509 (1986) (military regulation prohibiting wear of religious headgear does not violate the First Amendment), *superseded by statute,* National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100-180, 101 Stat. 1086 (allowing wear of religious headgear in certain circumstances) and United States v. Mitchell, 39 M.J. 131, 135 (C.M.A. 1994) (upholding annual evaluation requirement of military judges as within the Fifth Amendment)).
110. *Id.*
111. *Id.* (quoting Parker v. Levy, 417 U.S. 733, 743 (1974) (finding neither Article 133, conduct unbecoming an officer, nor Article 134, general article, void for vagueness or constitutionally overbroad)).
112. *Id.* at 206.
113. *Id.* at 205-06 (citing United States v. Priest, 21 C.M.A. 564, 570 (C.M.A. 1972) (First Amendment) and United States v. McCarthy, 38 M.J. 398, 403-04 (C.M.A. 1993) (Fourth Amendment)).

the court determined the appropriate challenge for Article 125 sodomy cases is to be limited to the facts of each case that served as the basis for conviction.[114] The *Marcum* court then laid out a two-step test to determine whether a constitutionally protected zone of privacy exists in each case.[115]

D. The Court's New Rule: The Multi-part Marcum *Test*

To analyze Article 125 consensual sodomy cases, the court stated one must take a two-step approach.[116] First, a court must analyze whether an accused's sexual conduct was within *Lawrence*'s protections and second, if not within *Lawrence*'s protections, the court must determine if the accused's sexual conduct was of the type proscribed by Article 125.[117] To analyze this first part, the court developed a novel three prong test to apply in military cases:

> First, was the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court? Second, did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in *Lawrence*? Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest?[118]

Although the *Marcum* court did not break each prong of the test into individual elements, clearly each prong is comprised of its own requirements.[119] An evaluation of the components of the test will aid one in applying a discrete set of facts to the *Marcum* Test.[120] This new three-prong *Marcum* Test will determine if *Lawrence*'s liberty interest applies in a military setting to the conduct in question, and, thus, whether the conduct will be protected.[121] The first prong enunciates which conduct comes within the scope of *Lawrence*'s protection while the last two prongs describe exceptions which may give otherwise protected conduct, unprotected status.[122]

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114. *Id.* at 206.
115. *Id.* at 206-07.
116. *Id.* at 208.
117. *Id.* This comment focuses on analyzing the first step of the analysis. The second step, whether the behavior actually violated Article 125, i.e. was the sexual act sodomy, will necessarily be determined during an analysis of the first part. *See infra* note 126 and accompanying text. Thus, this comment refers to the entire test as the *Marcum* Test, although technically the *Marcum* Test presented here analyzes only the dispositive first step.
118. *Id.* at 206-07 (citation omitted).
119. *Id.*
120. This analysis of the *Marcum* Test is applied to various factual scenarios later in the comment. *See* discussion *infra* Parts IV.E., F. and V.C.
121. *Marcum*, 60 M.J. at 206-07.
122. *Id.*

1. The First Prong—Sexual Conduct Within *Lawrence*'s Protections

In the first prong, whether the conduct is within the scope of *Lawrence*, there are four requirements, which, if all are satisfied, allows the analysis to proceed to the next prong of the *Marcum* Test.[123] Here, the court states that the ultimate question to ask is, "did [the accused's] conduct involve private, consensual sexual activity between adults?"[124] Thus, the four requirements that must be satisfied in this first prong of the *Marcum* Test are:[125]

a. Was the conduct sexual activity?[126]
b. Was the conduct in private, as opposed to in public?
c. Was the conduct consensual?
d. Was the conduct between adults?[127]

Again, if all four of these questions are answered in the affirmative, the conduct is presumably protected pending the outcome of the next two prongs of the *Marcum* Test.[128] If at least one question is answered in the negative, then the analysis is complete as the conduct falls outside the protective shield of *Lawrence*, and therefore is prosecutable.[129]

2. The Second Prong—General Exceptions to *Lawrence*'s Protections

The second prong of the test enunciates the first set of exceptions to *Lawrence*'s protection.[130] It asks whether, satisfying the first prong notwithstanding, the conduct nonetheless falls outside the scope of *Lawrence* by virtue of any of the exceptions stated in *Lawrence*.[131] If any of these exceptions are found, i.e., any of the below questions are answered in the affirmative, the conduct would not be protected.

Here there appear to be four exceptions:[132]

a. Did the conduct involve prostitution?[133]

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123. *Id.*
124. *Id.* at 207.
125. *Id.*
126. Although the court articulates this question as "sexual activity," in context, the court was referring to sodomy. *See id.*
127. The court gave some guidance on its interpretation of consent and children in a post-*Marcum* case. While discussing other issues, the court stated in *United States v. Banker* that while, "a child under the age of 16 may factually consent to certain sexual activity, this Court has never recognized the ability of a child to legally consent to sexual intercourse or sodomy." 60 M.J. 216, 220 (C.A.A.F. 2004).
128. *Marcum*, 60 M.J. at 207.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*

b. Did the conduct involve persons who might be injured or coerced?[134]
c. Did the conduct involve persons who were situated in relationships where consent might not be easily refused?[135]
d. Did the conduct involve other circumstances that would tend to place the conduct outside the scope of *Lawrence*?[136]

In its holding the court explained this prong of the *Marcum* Test with some unnecessary steps. For example, the court asked whether the conduct involved minors or was in public.[137] This is duplicative; if either of these were true, the analysis presumably would not proceed beyond the first part of the *Marcum* Test which requires the conduct to be private and between adults.[138]

Additionally, the injury or coercion to which the *Lawrence* court refers is unclear,[139] although one could, presumably, get to this step of the analysis if the accused had taken advantage of an incompetent adult. In a situation like that, while the sexual contact may have been technically "consented to" and was in private, an incompetent adult could be unknowingly, and even willingly, injured. The state, it seems, would have a legitimate interest in a case like that.

As for the second half of the second exception, coercion, the Court of Appeals for the Armed Forces has previously stated that a "coercive atmosphere . . . includes, for example, threats to injure others or statements that resistance would be futile"[140] and that "[c]onsent [. . .] induced by . . . coercion is equivalent to physical force."[141] By applying these definitions, the logical inference is that behavior compelled by force would not be consensual. Thus, this exception is also unnecessary as the *Marcum* Test's first prong, specifically the requirement that the conduct be consensual, would again be dispositive.[142]

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134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *See supra* Part IV.D., notes 126-29 and accompanying text.
139. Lawrence v. Texas, 539 U.S. 558, 578 (2003). While it is unclear what type of injury either the *Lawrence* Court or the *Marcum* court was referring to, as is demonstrated below, physical and emotional injuries could be conceptualized. While physical injuries would potentially result from a rape, that scenario would be dealt with in the first prong of the *Marcum* Test and therefore not survive to be analyzed in the second prong. Additionally, any type of scenario involving emotional injury would likely involve some sort of doctor-patient, senior-subordinate, or adult-child relationship which would be analyzed using other prongs or exceptions rather than under this exception. *See infra* Part V.C.
140. United States v. Simpson, 58 M.J. 368, 377 (C.A.A.F. 2003) (citing MANUAL FOR COURTS-MARTIAL, Pt. IV, para. 45.c.(1)(b) (2002)).
141. *Id.* (omissions in original) (quoting United States v. Palmer, 33 M.J. 7, 9 (C.M.A. 1991)).
142. *See supra* Part IV.D.

The third exception in this second prong of the *Marcum* Test, involving the ability to easily refuse consent, is important in the military context because of the military's hierarchical nature.[143] As the court points out, "the nuance of military life is significant."[144] The Air Force's regulation governing unprofessional relationships further articulates the importance of the policy maintaining professional relationships in the military context:

> [T]he nature of the military mission requires absolute confidence in command and an unhesitating adherence to orders that may result in inconvenience, hardships or, at times, injury or death. This distinction makes the maintenance of professional relationships in the military more critical than in civilian organizations.[145]

Indeed, this part of the test is where the *Marcum* court would eventually find that Marcum's conduct, involving a senior-subordinate relationship, was an exception to the reach of *Lawrence*'s protections.[146]

As to the final exception in this prong of the test, other circumstances placing the conduct outside *Lawrence*'s protections, the *Marcum* court left open the range of conduct which might be encompassed.[147] The court noted the Supreme Court had failed to express whether the *Lawrence* exceptions it articulated were inclusive, thus the court was likewise unwilling to limit itself.[148] Therefore, when analyzing conduct that does not seem to fit into any of the previous exceptions, one must ensure that the conduct might not somehow fit under this "other circumstances" exception, assuming that the conduct would not be considered a military-unique factor encompassed by the final prong of the test.[149]

In sum, in the second prong of the *Marcum* Test there are four exceptions to *Lawrence*'s protections which would bring one's conduct outside of constitutional protections: prostitution, likelihood of injury, inability to refuse consent and the catch-all, other circumstances. While seemingly limited to these four exceptions, their application to

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143. *See e.g.*, Air Force Instruction 38-101 §§ 2.2, 2.3, *Air Force Organization*, at 8-12 (April 21, 2004), *available at* http://www.e-publishing.af.mil/pubfiles/af/38/afi38-101/afi38-101.pdf (describing the various organizations and chain of command structure within the Air Force).

144. United States v. Marcum, 60 M.J. 198, 207 (C.A.A.F. 2004).

145. Air Force Instruction 36-2909 *Professional and Unprofessional Relationships*, §1 at 2 (May 1, 1999), *available at* http://www.e-publishing.af.mil/pubfiles/af/36/afi36-2909/afi36-2909.pdf.

146. *See infra* Part IV.E.

147. *Marcum*, 60 M.J. at 207 (using the open-ended language "for instance" to describe examples of conduct).

148. *Id.* at 205; *see also supra* note 78 and accompanying text (listing the exceptions to the protections of *Lawrence*).

149. *See Marcum*, 60 M.J. at 207.

a wide variety of fact patterns, especially in a hierarchical organization, seems limitless.

3. The Third Prong—Military Unique Exceptions to *Lawerence*'s Protections

The final prong of the *Marcum* Test is, in essence, a military specific catch-all; it asks whether any military-unique factors would create exceptions to the applicability of *Lawrence*?[150]

This prong will likely have broad application in light of the Supreme Court's, and the Court of Appeals for the Armed Forces', view that "[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."[151]

Although this prong was not analyzed by the *Marcum* court,[152] it will likely be used in future cases. Indeed, in the only other case in which the court has applied the *Marcum* Test, *United States v. Stirewalt*,[153] this part was used when none of the previous parts of the test applied.[154] In *Stirewalt*, Stirewalt performed sodomy on a superior officer, who presumably could have easily refused consent.[155] The court relied on this last prong to place Stirewalt's behavior outside of *Lawrence*'s protections, because none of the previous prongs were applicable.[156] This final prong, because of its open-endedness, may cause the most confusion about what conduct is protected within the military context. It is conceivable, albeit unlikely, that virtually all military sodomy convictions with even the slightest military nexus could stand based upon this prong alone.

To understand how the court will likely use the overall *Marcum* Test, this comment will now explore the only two cases the Court of Appeals for the Armed Forces has decided using the *Marcum* Test: *United States v. Marcum* and *United States v. Stirewalt*.[157]

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150. *Id.*

151. *Id.* (quoting Parker v. Levy, 417 U.S. 733, 758 (1974)). *See also* Major Steve Cullen, *Prosecuting Indecent Conduct in the Military: Honey, Should we get a Legal Review First?*, 179 MIL. L. REV. 128, 160-63 (2004) (arguing military should be treated the same as civilians for private sexual acts and that *Parker v. Levy* should be limited to the First Amendment); Baime, *supra* note 53, at 127-32 (arguing there are no compelling reasons to proscribe consensual sodomy in the military).

152. *See id.* at 208 (deciding *Marcum* on the second prong of the test and not discussing the third).

153. 60 M.J. 297 (C.A.A.F. 2004), *cert. denied*, 125 S. Ct. 1682 (2005).

154. *See infra* Part IV.F.

155. *Stirewalt*, 60 M.J. at 303-04.

156. *Id.* at 304.

157. *See infra* Parts IV.E-F.

E. The Marcum *Test as Applied to Technical Sergeant Marcum*

The court found that Marcum's conduct fell outside the protections of *Lawrence*, and thus, Marcum's conviction for consensual sodomy stood.[158] In arriving at this determination the court found that the first prong of the *Marcum* Test, whether the conduct was between consenting adults in private, was satisfied by virtue of the court-martial finding of consensual sodomy.[159] The court "assume[d] without deciding" that these two adults' conduct was consensual and in private.[160]

The court took a more in depth view of the second prong of the *Marcum* Test, whether the conduct fell outside the scope of *Lawrence* by virtue of any of the exceptions enunciated in *Lawrence*, and concluded Harrison "was a person 'who might be coerced.'"[161] In so doing, the court primarily focused on one exception in the second prong, namely whether the conduct involved persons who were in relationships where consent might not be easily refused.[162] Eventually, it was this element that would prove to be insurmountable for Marcum.[163]

The conclusion here seems inevitable. Marcum was two grades senior to Harrison; he was his direct supervisor and a noncommissioned officer as well.[164] The court stated that not only was this conduct a violation of Article 125, it also fell under Article 92, in that the unprofessional relationship was a failure to obey a regulation, specifically Air Force Instruction 36-2909,[165] which forbids relationships "when they detract from the authority of superiors or result in, or reasonably create the appearance of, favoritism, misuse of office or position, or the abandonment of organizational goals for personal interests."[166]

Having disposed of the case on the second prong of the *Marcum* Test, the court did not analyze the third prong of the test[167] and allowed Marcum's conviction for consensual sodomy to stand.[168] However, a little more than a month after deciding *Marcum*, the court did analyze the third prong of its test in *United States v. Stirewalt*.[169]

158. *Marcum*, 60 M.J. at 208, 211.
159. *Id.* at 207.
160. *Id.*
161. *Id.* at 207-08 (quoting Lawrence v. Texas, 539 U.S. 558, 578 (2003)).
162. *Id.*
163. *Marcum*, 60 M.J. at 207-08.
164. *Id.* at 200, 208.
165. *Id.* at 207-08.
166. Air Force Instruction 36-2909 *Professional and Unprofessional Relationships*, § 2.2, at 2 (May 1, 1999), *available at* http://www.e-publishing.af.mil/pubfiles/af/36/afi36-2909/afi36-2909.pdf.
167. *Marcum*, 60 M.J. at 208.
168. *Id.* at 208, 211.
169. 60 M.J. 297, 304 (C.A.A.F. 2004), *cert. denied*, 125 S. Ct. 1682 (2005).

F. The Marcum *Test Applied in* United States v. Stirewalt

Health Services Technician Second Class Darrell Stirewalt (E-5) was convicted, after two trials, of one count of consensual sodomy, under Article 125, UCMJ.[170] In his first trial, Stirewalt was convicted of forcible sodomy of a superior officer;[171] however, on appeal he won a retrial based upon an evidentiary issue.[172] At his retrial Stirewalt entered a guilty plea to one count of consensual sodomy under Article 125.[173]

The court, for the first time after *Marcum*, employed its own *Marcum* Test analysis to the facts in *Stirewalt*.[174] As to prong one, whether the sexual conduct was between consenting adults in private, and prong two, whether the conduct fell under any of the *Lawrence* exceptions, the court "assume[d] without deciding," that the conduct was within the scope of *Lawrence*.[175]

Based on its ruling here and in *Marcum* the court seems unlikely to analyze prong one of the test if a court-martial concludes a member is guilty of consensual sodomy.[176] Additionally, where, as in *Stirewalt*, the accused is subordinate to the alleged victim, it is unlikely the court will find a situation where consent could be coerced or not easily refused by an alleged victim who is senior in rank.[177] Therefore, the

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170. *Id.* at 298-99.
171. *Id.* at 298, 304; *see also* United States v. Stirewalt, 53 M.J. 582 (C.G. Ct. Crim. App. 2000), *aff'd*, United States v. Stirewalt, 60 M.J. 297 (C.A.A.F. 2004).
172. *Stirewalt*, 60 M.J. at 298-99; *see* United States v. Stirewalt, 53 M.J. 582, 587-90 (C.G. Ct. Crim. App. 2000) (finding that Military Rule of Evidence 412, the rape shield law, only shields victims of nonconsensual sexual misconduct). Stirewalt successfully argued that a former roommate of the alleged victim, who was allowed to testify regarding a previous consensual adulterous affair with Stirewalt, should have been able to be cross-examined regarding a different consensual sexual relationship she had had with another enlisted man and the punishment she (the former roommate) had received. *Id.* at 587-88. As a result, Stirewalt argued he was not able to establish a defense that the victim in his case knew the repercussions of her actions and was only accusing him to protect her career. *Id.* at 588. This finding by the Coast Guard Court of Criminal Appeals was further explained later by the Court of Appeals for the Armed Forces in *United States v. Banker*, 60 M.J. 216, 218-21 (C.A.A.F. 2004). It stated, "[Military Rule of Evidence] 412 hinges on whether the subject of the proffered evidence was a victim of the alleged sexual misconduct and not on whether the alleged sexual misconduct was consensual or nonconsensual." *Id.* at 220.
173. *Stirewalt*, 60 M.J. at 303.
174. *Id.* at 304. The court referred to its test as a "tripartite framework." *Id.*
175. *Id.*
176. *See Stirewalt*, 60 M.J. at 303-04; United States v. Marcum, 60 M.J. 198, 207 (C.A.A.F. 2004).
177. *Compare Marcum*, 60 M.J. at 208 (subordinate "victim"), *with Stirewalt*, 60 M.J. at 304 (superior officer "victim"). The court assumes prong two is satisfied in *Stirewalt* where the alleged victim is senior to the accused, *id.*, however, in *Marcum*, the accused was senior to the alleged victim, thereby warranting an analysis under prong two of the *Marcum* Test. *Marcum*, 60 M.J. at 208. *But see* United States v. Gamez, 2005 CCA LEXIS 109 (A.F. Ct.

court was left with only one option and decided this case based on the third prong of the *Marcum* Test, whether any military-unique factors affect the reach of *Lawrence*.[178]

Noting that the relationship in question was between an officer, who happened to be Stirewalt's department head, and a subordinate enlisted crew member,[179] the court quoted from the Coast Guard's Personnel Manual:

> Romantic relationships between members are unacceptable when:
>
> 1. Members have a supervisor and subordinate relationship . . ., or
> 2. Members are assigned to the same small shore unit . . ., or . . .
> 3. Members are assigned to the same cutter. . . .[180]
>
> This policy applies regardless of rank, grade, or position.[181]

In light of the Coast Guard's military-unique regulations and "the clear military interests of discipline and order that they reflect," the court placed Stirewalt's conduct outside of the protection of *Lawrence*.[182] Further, the court specifically stated that the fact only the subordinate Stirewalt was charged did not "alter the nature of the liberty interest at stake."[183] For the second time in as many opportunities the court affirmed a servicemember's court-martial conviction of consensual sodomy.[184]

V. THE COURT OF APPEALS FOR THE ARMED FORCES' NEW STANDARD, ITS CONSTITUTIONALITY AND APPLICABILITY TODAY

Even before the Supreme Court decided *Lawrence* in 2003,[185] servicemembers have been attacking the constitutionality of Article 125

Crim. App. Mar. 30, 2005) (finding that a senior-subordinate consensual heterosexual sexual relationship, with a subordinate "victim," warranted analysis under the third prong, other military unique factors, and not the second prong, inability to easily refuse consent, as was the case with a similar (albeit homosexual) fact pattern in *Marcum*).

178. *Stirewalt*, 60 M.J. at 304.
179. *Id.*
180. A cutter is a "small, lightly armed [motor]boat used by the Coast Guard." THE AMERICAN HERITAGE DICTIONARY 451 (4th ed. 2000).
181. *Stirewalt*, 60 M.J. at 304 (quoting COAST GUARD PERSONNEL MANUAL, *Interpersonal Relationships within the Coast Guard*, para. 8.H.2.f at 8.H 4-5 (change 38, 2002), *available at* http://www.uscg.mil/hq/g-w/g-wp/g-wpm/PersMan/PERSMAN%20Opening.pdf (Unacceptable Romantic Relationships)).
182. *Id.*
183. *Id.*
184. *Id.* at 305; *see also supra* Part IV.E.
185. Lawrence v. Texas, 539 U.S. 558 (2003).

on two fronts: it violates their right to privacy[186] and is void for vagueness.[187] As was previously discussed, the *Marcum* and *Stirewalt* rulings have quashed, for now, the latest attacks on the military's sodomy statute under right to privacy principles enunciated in *Lawrence*.[188] Yet, in deflecting the right to privacy attack, the court may have left itself susceptible to an attack based on the void for vagueness principle[189] when it created the three-prong *Marcum* Test.[190]

A. Void for Vagueness

The Supreme Court's standard for void for vagueness doctrine has been oft cited: "The doctrine incorporates notions of fair notice or warning. Moreover, it requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.'"[191]

In *United States v. Scoby* the Court of Appeals for the Armed Forces specifically analyzed the phrase "unnatural carnal copulation" for vagueness.[192] In *Scoby*, the court reviewed holdings from various state courts, which were mixed,[193] and determined the proper backdrop to analyze the vagueness claim was the Due Process Clause.[194] The court, quoting the Supreme Court, stated, "[a]ll the Due Process

186. *See supra* Part IV.C. *See also, e.g.*, United States v. Allen, 53 M.J. 402, 410 (C.A.A.F. 2000) (holding sodomy with a spouse, in private, is not a protected privacy right when "not in furtherance of the marriage"); United States v. Thompson, 47 M.J. 378, 379 (C.A.A.F. 1997) (holding husband had no right to privacy guarantee with his wife when sodomy occurred while he was assaulting her); United States v. Henderson, 34 M.J. 174, 176-78 (C.M.A. 1992) (holding that consensual heterosexual fellatio is not protected by a right to privacy under the Constitution); United States v. Scoby, 5 M.J. 160, 164-66 (C.M.A. 1978) (holding no right to privacy protection when sex acts occurred in semi-private living quarters); *see also* Baime, *supra* note 53, at 110-114 (discussing, pre-*Lawrence*, the right to privacy and sodomy within the military environment).

187. *See, e.g.*, United States v. Johnson, 30 M.J. 53, 56 (C.M.A. 1990) (finding that a charge of aggravated assault was not void for vagueness in light of the defendant being warned he could be criminally liable for any acts of sodomy); *Scoby*, 5 M.J. at 163 (holding the proscriptions of the military's sodomy statute are understood by a person of ordinary intelligence).

188. *See supra* Parts IV.E-F.

189. *See infra* Part V.A.

190. *See supra* Part IV.D.

191. Parker v. Levy, 417 U.S. 733, 752 (1974) (quoting Smith v. Goguen, 415 U.S. 566, 572-73 (1974)).

192. 5 M.J. 160, 161-63 (1978).

193. *Id.* at 161-62. Alaska, Ohio, and Florida had ruled that definitions similar to the one used here were unconstitutionally vague. *Id.* While the United States Supreme Court, in *Rose v. Locke*, 423 U.S. 48, 49-50 (1975), along with the state courts of New Jersey, Nevada, Michigan, Missouri, Indiana, Maine, Oklahoma, and New Mexico did not view "crimes against nature," or like definitions, as unconstitutionally vague. State v. Lair, 301 A.2d 748, 752 (N.J. 1973).

194. *Scoby*, 5 M.J. at 162.

Clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden."[195] With this standard, the court reviewed the history of the phrase "crimes against nature," which it felt was similar to "unnatural carnal copulation,"[196] and opined, as did the Supreme Court, that anyone who wanted to know what particular acts would fit under this language could have easily determined them.[197] With this finding, the Court of Appeals for the Armed Forces easily determined the phrase was defined well enough so that the average servicemember would understand what it means, and therefore, the phrase was not unconstitutionally vague.[198]

In another case, *United States v. Johnson*, the Court of Appeals for the Armed Forces found a charge for aggravated assault was not void for vagueness when the underlying act was consensual sodomy.[199] In *Johnson*, however, the service member was given specific warnings that, due to his HIV positive status and the harm that could befall others if he were to engage in sodomy, he could be held criminally liable.[200]

With the court's creation of the *Marcum* Test, one could surmise the court changed what was once, arguably, an understandable statute into one that the servicemember of "ordinary intelligence"[201] might not understand. Courts, however, attempt to avoid constitutional concerns when they create limiting tests;[202] therefore, it would seem, to remain constitutional the *Marcum* Test would have to be interpreted in lock-step with *Lawrence*. Thus, one could argue that for servicemembers, just like civilians, consensual, non-economic, private sodomy between adults should not be outlawed.[203] This argument fails, however, because constitutional rights in the military setting are not interpreted in lock-step with the civilian world.[204]

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195. *Id.* (quoting *Rose*, 423 U.S. at 50).
196. *Id.* "'The phrase has been in use among English-speaking people for many centuries.'" *Id.*
197. *Id.* Interestingly, the court did not define the specific acts which might define this phrase, stating that "some esoteric acts may not easily be identifiable as within or without the scope of Article 125," however, it did quote the United States Supreme Court citing the Missouri Supreme Court, which stated that the phrase "embraced sodomy, bestiality, buggery, fellatio, and cunnilingus within its terms." *Id.* at 162-63 (quoting *Rose*, 423 U.S. at 50).
198. *Id.* at 163.
199. 30 M.J. 53, 56 (C.M.A. 1990).
200. *Id.*
201. *Scoby*, 5 M.J. at 163.
202. *See* McConnell v. FEC, 540 U.S. 93, 211 (2003). "If a reasonable limiting construction 'has been or could be placed on the challenged statute' to avoid constitutional concerns, we should embrace it." *Id.* (quoting Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973) and Buckley v. Valeo, 424 U.S. 1, 44 (1976)).
203. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003).
204. *See infra* Part V.B.

B. Constitutional Rights as Applied to Military Members

While the Supreme Court has said, "men and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service,"[205] the Court has also noted that military life is not the same as civilian life[206] and therefore, due process rights might be less in the military sphere.[207]

The *Marcum* court itself proclaimed that, "an understanding of military culture and mission cautions against sweeping constitutional pronouncements that may not account for the nuance of military life."[208] The court also remarked, however, that the *Lawrence* Court had failed to limit the liberty interest it sought to protect to only civilians, thus implicitly granting the rights to military personnel.[209]

Yet, in the military context, "[j]udicial deference . . . 'is at its apogee' when reviewing congressional decision making in th[e] [Due Process] area."[210] Therefore, while the rights articulated in *Lawrence* would apply to military members, Congress enjoys latitude in regulating those rights.[211]

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205. Weiss v. United States, 510 U.S. 163, 194 (1994) (Ginsburg, J., concurring) (finding appointments of military judges within the scope of both the Article II Appointments Clause and the Fifth Amendment).

206. Parker v. Levy, 417 U.S. 733, 749, 758 (1974).

207. *See* Rostker v. Goldberg, 453 U.S. 57, 67 (1981) (determining that Congress's requiring men, and not women, to register for the draft did not violate the men's Due Process rights partly because of combat restrictions placed on women). *But see* Captain Dale A. Riedel, *By Way of the Dodo: The Unconstitutionality of the Selective Service Act Male-Only Registration Requirement Under Modern Gender-Based Equal Protection*, 29 U. DAYTON L. REV. 135 (2003) (arguing in today's world *Rostker* no longer applies). *See also* Cullen, *supra* note 151, at 160-63 (discussing *Parker v. Levy* and arguing that simply because First Amendment restrictions are placed against the military, the same urgency does not exist when dealing with the consensual sexual conduct described by *Lawrence*).

208. United States v. Marcum, 60 M.J. 198, 206 (C.A.A.F. 2004).

209. *Id.*

210. Weiss v. United States, 510 U.S. 163, 177 (1994) (quoting *Rostker*, 453 U.S. at 70) (holding that military judges were sufficiently insulated from command influence to satisfy due process requirements).

211. *See Parker*, 417 U.S. at 756 (finding that differences between military and civilian life warrants applying different constitutional standards when reviewing constitutional questions arising in the military context). *But see* Baime, *supra* note 53, at 130-32 (stating it is "disingenuous to argue that private consensual sodomy is prejudicial to good order and discipline or service discrediting" to maintain that there exists a military need to intrude into servicemembers' bedrooms); Cullen, *supra* note 151, at 162-63 (arguing the military has no "particular need to regulate the adult, consensual, noncommercial, private sex-related decisions of its members"). *See also* James M. Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C. L. REV. 177 (1984). Although over 20 years old, this article provides a still useful, in-depth discussion of constitutional rights as they apply in the military context. *See id.*

Against this backdrop, the *Marcum* court faced the difficult task of balancing servicemembers' constitutional rights against Congress's Article I right to regulate the military.[212] The result was the compromise *Marcum* Test,[213] whereby the court has left Congress's law in place, while simultaneously expanding the rights of most, but not all, servicemembers to fit within the scope of *Lawrence*.[214]

C. *What Conduct is Now (Im)permissible in the Military Environment?*

There are few foreseeable circumstances which would warrant prosecuting private, consensual sodomy between adults.[215] For now, the Court of Appeals for the Armed Forces has found two situations that merit prosecution.[216] First, *Marcum* made clear that the existence of a senior-subordinate relationship between the parties fails the second prong of the *Marcum* Test if the person charged is the senior person, regardless of the consensual nature of the homosexual or heterosexual conduct.[217] Second, based on *Stirewalt*, a senior-subordinate relationship can fail the third prong of the *Marcum* Test if the person performing the act is the subordinate person, regardless of the consensual nature of the homosexual or heterosexual conduct.[218]

What these two holdings have in common is that the underlying relationship which formed the basis for the sexual contact was in itself impermissible in the military setting.[219] Thus, for servicemembers try-

212. *Marcum*, 60 M.J. at 206; U.S. CONST. art. I, § 8, cl. 14.
213. *See supra* Part IV.D.
214. *See supra* Parts III., IV.C.
215. *See* POSNER & SILBAUGH, *supra* note 18, at 66.
216. *See supra* Parts IV.E-F.
217. *See supra* Part IV.E. *But see supra* note 177 (discussing the Air Force Court of Criminal Appeals's use of the *Marcum* Test's third prong to uphold the conviction of the senior officer in a senior-subordinate relationship).
218. *See supra* Part IV.F.
219. *See supra* Parts IV.E-F.; *cf.* United States v. Bullock, ARMY 20030534 (A. Ct. Crim. App. Nov. 30, 2004) (mem.). This was the first case to be decided by a lower military appeals court since the *Marcum* ruling took effect. The United States Army Court of Criminal Appeals, applying the *Marcum* Test, overturned an unmarried, male soldier's heterosexual consensual sodomy conviction with a female civilian where there was no military nexus. *Id.* at 4-5. This case further supports the relationship-based analysis because the relationship here was not proscribed (male military member and adult female civilian) by military regulations or the UCMJ. *See id.* at 5; *see also* United States v. Myers, 2005 CCA LEXIS 44 (N-M. Ct. Crim. App. Feb. 10, 2005) (upholding consensual sodomy conviction of male military member and adult female, civilian spouse of another military member based on third part of *Marcum* Test, unique military factors); United States v. Avery, 2005 CCA LEXIS 59 (N-M. Ct. Crim. App. Feb. 28, 2005) (upholding consensual sodomy conviction of married male military member with adult female civilians based on third prong of *Marcum* Test, unique military factors); United States v. Bart, 61 M.J. 578 (N-M. Ct. Crim. App. 2005) (upholding consensual sodomy conviction of unmarried female military member with co-worker, married male military member based on third prong of *Marcum* Test, unique military factors); United States v. Christian, 61 M.J.

ing to determine if their conduct is proscribed or not, the ultimate question should be whether the underlying relationship is prohibited, either by regulation or the UCMJ. In fact, the government in *Marcum* focused on the unprofessional relationship cases that have been applied to heterosexual sodomy.[220]

Based on this permitted/not-permitted relationship analysis, the *Marcum* court's implication that it was not considering the impact of the holding on the military's homosexual policy becomes somewhat clearer.[221] In summing up the *Marcum* Test, the court stated that it need not determine what constitutional impact the military's homosexual policy would have on the sodomy statute.[222] Until the court completely works through the *Marcum* Test in a situation that would otherwise be protected, but for its homosexual nature, this issue will not be resolved. Nevertheless, the implication, which is consistent with a relationship-based analysis, is that even if an accused satisfies the first two prongs of the *Marcum* Test, he or she may still not overcome the conviction by virtue of the impermissibility of the homosexual relationship and the "unique conditions of military service," thus failing to satisfy the *Marcum* Test's third prong.[223]

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560 (N-M. Ct. Crim. App. 2005) (upholding consensual sodomy conviction of married, male military member with unmarried civilian female based on third prong of *Marcum* Test, unique military factors); United States v. Gamez, 2005 CCA LEXIS 109 (A.F. Ct. Crim. App. March 30, 2005) (upholding consensual sodomy conviction of married, male military officer with unmarried female enlisted military member based on third prong of *Marcum* Test, unique military factors). These cases further support the relationship analysis. In all, the relationships were proscribed by Article 134, the general article, as adultery. 10 U.S.C. § 934, art. 134 (2000); *see also* MANUAL FOR COURTS-MARTIAL Pt. IV, para. 62, at IV-97 (2002 Edition). In fact, all servicemembers were also convicted for adultery. *Myers*, 2005 CCA LEXIS 44, at *1, *7; *Avery*, 2005 CCA LEXIS 59, at *1, *6; *Bart*, 61 M.J. at 579, 584; *Christian*, 61 M.J. at 561, 567; *Gamez*, 2005 CCA LEXIS 109, at *1. In *Gamez*, however, Gamez's adultery charge was conditionally dismissed on appeal. *Gamez*, 2005 CCA LEXIS 109, at *13. This does not change the relationship-based analysis because Gamez's conviction for fraternization with an enlisted female member was allowed to stand. *Id.* at *14-16.

220. *See* Supplemental Final Brief on Behalf of Appellee at 10-11, United States v. Marcum, 60 M.J. 198 (C.A.A.F. 2004) (No. 02-0944/AF) (citing United States v. Ayers, 54 M.J. 85 (C.A.A.F. 2000) (consent in an inappropriate relationship does not preclude a conviction, here a military instructor and trainee); United States v. Boyett, 42 M.J. 150 (C.A.A.F. 1995) (conviction affirmed for sexual relationship between officer and enlisted person under Article 133, Conduct Unbecoming an Officer); United States v. Bygrave, 46 M.J. 491 (C.A.A.F. 1997) (HIV positive service member having unprotected sex convicted of assault)).

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

222. *Id.* (referring to 10 U.S.C. § 654 which is the "Policy concerning homosexuality in the armed forces" and is commonly referred to as the "don't ask, don't tell" policy); *see* 10 U.S.C. § 654(b)(2) (2000).

223. 10 U.S.C. § 654(a)(8)(A); *see also* discussion *supra* Part IV.F. For example, Stirewalt's consensual, heterosexual sodomy charge was also analyzed, and

Therefore, a consensual, non-commercial heterosexual relationship between adults, whether military-military or civilian-military, that does not violate any of the military's unprofessional relationship regulations[224] or other laws (not including the sodomy statute), would be permissible.[225] The same homosexual relationship, however, by virtue of 10 U.S.C. § 654, would likely not be protected.

VI. ALTERNATIVES AVAILABLE TO CHARGING CONSENSUAL SODOMY

If the military courts of appeals continue to follow the relationship-based analysis[226] then actually charging sodomy as a crime would not only be unnecessary because the underlying relationship will be prosecutable,[227] it may also be multiplicious.

A. Use of Alternate Punitive Articles of the UCMJ

Relying on the relationship-based analysis, a number of alternatives are available to military prosecutors to punish military members engaged in impermissible relationships, regardless whether any sexual contact has occurred.[228] In its supplemental brief, to support the legitimacy of the sodomy statute, the government cited a number of cases that were disposed of with other than Article 125 convictions.[229] Even the *Marcum* court pointed out that the conduct Marcum was convicted of, Article 125, consensual sodomy, could have been charged under Article 92, for violating a regulation,[230] because Marcum was in violation of the Air Force's unprofessional relationships regulation.[231]

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upheld, on the basis of military unique factors, namely an impermissible senior-subordinate relationship. *See supra* Part IV.F.

224. *See infra* Part VI.A.

225. *See* United States v. Bullock, ARMY 20030534 (A. Ct. Crim. App. Nov. 30, 2004) (mem.) (overturning consensual sodomy charge between military member and civilian where underlying relationship was permissible).

226. *See supra* Part V.C.

227. *See supra* note 219 and accompanying text (charging servicemembers with relationship-based crime as well as consensual sodomy).

228. *See infra* notes 236-43 and accompanying text.

229. *See* Supplemental Final Brief on Behalf of Appellee at 10-11, United States v. Marcum, 60 M.J. 198 (C.A.A.F. 2004) (No. 02-0944/AF) (citing United States v. Ayers, 54 M.J. 85 (C.A.A.F. 2000) (upholding Articles 92, Failure to Obey a Regulation and 134, General Article conviction for military instructor having adulterous relationship with trainee); United States v. Boyett, 42 M.J. 150 (C.A.A.F. 1995) (affirming Article 133, Conduct Unbecoming an Officer, conviction for sexual relationship between officer and enlisted person); United States v. Bygrave, 46 M.J. 491 (C.A.A.F. 1997) (upholding assault conviction of HIV positive service member having unprotected sex)).

230. United States v. Marcum, 60 M.J. 198, 208 (C.A.A.F. 2004).

231. *Id.* at 207-08; *see* Air Force Instruction 36-2909, *Professional and Unprofessional Relationships* paras. 2.1, 2.2, 4, 5, 5.1 (May 1, 1999), *available at* http://www.e-publishing.af.mil/pubfiles/af/36/afi36-2909/afi36-2909.pdf.

Thus, consensual sodomy cases that come under the umbrella of "unprofessional relationships" can be charged under Article 92, for failure to follow a regulation,[232] Article 133, for conduct unbecoming an officer,[233] or Article 134, the general article, which is also the article under which adultery is charged.[234]

Additionally, consensual homosexual sodomy cases can be handled administratively under 10 U.S.C. § 654, the military's homosexual policy, with, for example, an administrative discharge.[235] The policy covers, in detail, Congress's belief that "[t]here is no constitutional right to serve in the armed forces,"[236] the distinct differences between civilian and military life,[237] the steps to be taken to separate servicemembers if they meet certain homosexual "qualifiers,"[238] and some of the rights of those targeted by the statute.[239]

The sodomy statute is thus duplicative as applied to homosexuals, if the government's purpose is to separate those who have, or would, engage in consensual homosexual conduct.[240] 10 U.S.C. § 654 clearly

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232. *See* Uniform Code of Military Justice, 10 U.S.C. § 892 art. 92 (2000):
Failure to obey order or regulation
Any person subject to this chapter who—
(1) violates or fails to obey any lawful general order or regulation;
(2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or
(3) is derelict in the performance of his duties; shall be punished as a court-martial may direct.
Id.; *see also* MANUAL FOR COURTS-MARTIAL, Pt. IV, para. 16, at IV-23-25 (2002).

233. *See* Uniform Code of Military Justice, 10 U.S.C. § 933 art. 133 (2000). "Conduct unbecoming an officer and a gentleman:
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." *Id.*; *see also* MANUAL FOR COURTS-MARTIAL, Pt. IV, para. 59, at IV-93 (2002).

234. *See* Uniform Code of Military Justice, 10 U.S.C. § 934 art. 134 (2000).
Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.
Id.; *see also* MANUAL FOR COURTS-MARTIAL, Pt. IV., para. 60, at IV-94 (2002).

235. *See* 10 U.S.C. § 654(b) (2000); *see also* THE MILITARY COMMANDER AND THE LAW 230-32 (Thomas L. Strand & Michael W. Goldman eds., 7th ed. 2004) (instructing commanders on the process for administratively separating homosexual servicemembers).

236. 10 U.S.C. § 654(a)(2).

237. 10 U.S.C. § 654(a)(8)(A)-(B).

238. Author's term; *see* 10 U.S.C. § 654(b)(1)-(3).

239. 10 U.S.C. § 654(d).

240. *See* Supplemental Final Brief on Behalf of Appellee at 6-7, United States v. Marcum, 60 M.J. 198 (C.A.A.F. 2004) (No. 02-0944/AF); *see also* THE MILI-

covers the breadth of homosexual conduct, even covering non-acts, as the statute covers those who say they are homosexual without ever having committed a homosexual act.[241] Therefore, based solely on the government's interest to separate homosexuals from military service, the sodomy statute adds only a criminal conviction[242] which, when taken in conjunction with the administrative discharge that 10 U.S.C. § 654 requires, does nothing more than provide a newly separated homosexual servicemember with a federal conviction with which to restart his or her life.[243]

Charging Article 125, consensual sodomy, in almost every instance, becomes duplicative at the least, and multiplicious at most. Further, it leaves a case vulnerable to a constitutionally grounded appellate review if a conviction is awarded based on a consensual sodomy charge.[244]

B. Multiplicity

The protection from multiplicity is based upon the Fifth Amendment principle "against double jeopardy [which] provides that an accused cannot be convicted of both an offense and a lesser-included offense."[245] To raise a claim of multiplicity, an accused must raise the issue at trial or the issue will only be reviewed by an appellate court for plain error.[246] The idea that two charges are "factually the same" is a basic premise of a multiplicity claim.[247] The Court of Appeals for the Armed Forces has stated,

> [An] [a]ppellant may show plain error and overcome [waiver] by showing that the specifications are *facially duplica-*

TARY COMMANDER AND THE LAW, *supra* note 235, at 230-32 (requiring a commander to initiate administrative discharge proceedings and only allowing an Under Other than Honorable Condition discharge if certain circumstances exists, such as force, sex with a minor, in public, for money, in a prohibited senior-subordinate relationship, or on a military vessel); 10 U.S.C. § 654.

241. *See* 10 U.S.C. § 654(b)(2) (requiring only a finding that a servicemember "intends to engage in homosexual acts").
242. 10 U.S.C. § 925, art. 125(b) (2000) ("punished as a court-martial may direct").
243. 10 U.S.C. § 654(b). The statute requires that a service member "shall be separated from the armed forces under regulations prescribed by the Secretary of Defense." *Id.* Based on principles of statutory construction, this implies an administrative discharge, not a court-martial, because when a court-martial is preferred the statute will articulate that. *See, e.g., supra* notes 238-39; *see also* THE MILITARY COMMANDER AND THE LAW *supra* note 235, at 230-31 (emphasizing that a commander is required to begin separation processing when the commander has found the servicemember violated 10 U.S.C. § 654).
244. *See supra* Parts IV.D. and V.B.
245. United States v. Hudson, 59 M.J. 357, 358 (C.A.A.F. 2004).
246. *Id.*
247. *Id.* at 359 (quoting United States v. Lloyd, 46 M.J. 19, 23 (C.A.A.F. 1997)).

> *tive*, that is, factually the same. The test to determine whether an offense is factually the same as another offense, and therefore lesser-included to that offense, is the "elements" test. Under this test, the court considers whether each provision requires proof of a fact which the other does not. Rather than adopting a literal application of the elements test, this Court [has] stated that resolution of lesser-included claims can only be resolved by lining up elements realistically and determining whether each element of the supposed lesser offense is rationally derivative of one or more elements of the other offense—and vice versa. Whether an offense is a lesser-included offense is a matter of law that this Court will consider de novo.[248]

Post-*Marcum*, this test was employed by the Air Force Court of Criminal Appeals to determine whether adultery, consensual sodomy, and fraternization convictions were multiplicious.[249] Ultimately, in that case the court determined that the fraternization and consensual sodomy charges were not multiplicious, while the adultery and fraternization were.[250] Interestingly, the court was persuaded by the factual distinction of "sexual intercourse" versus "fellatio" when it determined that the fraternization and sodomy charges were "factually distinguishable."[251]

This ruling creates an interesting legal twist.[252] If, on the one hand, a servicemember is involved in an unauthorized relationship and engages in sexual intercourse and sodomy, the servicemember can be charged with both fraternization and sodomy, without the charges being multiplicious.[253] If, however, on the other hand, this same servicemember only goes so far as to engage in sodomy within the unauthorized relationship, the fraternization and sodomy charges would be multiplicious because they would both be based upon sodomy, and thus "factually the same."[254]

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248. United States v. Gamez, 2005 CCA LEXIS 109, at *7-8 (A.F. Ct. Crim. App. March 30, 2005) (quoting *Hudson*, 59 M.J. at 359 (citations omitted)) (emphasis added by lower court).
249. *Id.* at *2, *7-8.
250. *Id.* at *13 (finding the adultery and fraternization were both based on the same factual act of "sexual intercourse").
251. *Id.*
252. *Gamez*, 2005 CCA LEXIS 109, at *13.
253. *Id.*
254. *Id.* at *8, *13; *see also* text accompanying *supra* note 251. If the Air Force Court of Criminal Appeals found the fraternization and adultery convictions multiplicious because they were both based on the act of "sexual intercourse," it follows that fraternization and sodomy would have to be multiplicious as well when both are based on the same act, i.e., sodomy. *Gamez*, 2005 CCA LEXIS 109, at *13. It seems a military prosecutor could avoid the multiplicity question by simply basing the fraternization charge on anything but sodomy.

In cases like *Gamez*, however, where the fraternization and sodomy are based on different sex acts, one could argue that the subtle distinction between varying sex acts is meaningless because of *Marcum*'s new requirements.[255] The *Marcum* holding, in essence, states the crucial fact now required to uphold consensual sodomy charges is the unauthorized relationship *in conjunction* with the sodomy.[256] Thus, to be constitutional in the military environment, a consensual sodomy charge now requires an unauthorized relationship-based nexus, such as adultery or fraternization, making the relationship itself a key fact of the sodomy charge.[257] Therefore the consensual sodomy offense and the relationship-based offense, regardless of any differences in the underlying sex acts, would be necessarily "factually the same,"[258] and thus, charging both would be multiplicious.

VII. CONCLUSION

The newly created *Marcum* Test is constitutional and, for most servicemembers, expands their right to engage in private sexual conduct.[259] The Court of Appeals for the Armed Forces' rulings in *Marcum* and *Stirewalt* imply that the nature of the relationship between two people will form the basis for determining whether their conduct falls under the *Lawrence* protections.[260] Appellate courts will uphold consensual sodomy convictions when the underlying relationship is unauthorized, while the converse will be true as well.[261]

The implication this may have on homosexual conduct has yet to be seen.[262] If the Court of Appeals for the Armed Forces continues to follow this relationship-based path, then it would seem consensual homosexual sodomy would be proscribed and within the government's right to prosecute.[263]

Military prosecutors, however, have at their disposal a number of other punitive and administrative articles of the UCMJ with which to

255. *See supra* Part V.C.
256. *See supra* Part V.C.
257. *See supra* Part V.C.
258. United States v. Gamez, 2005 CCA LEXIS 109, at *8, *13 (A.F. Ct. Crim. App. March 30, 2005) (quoting United States v. Hudson, 59 M.J. 357, 359 (C.A.A.F. 2004)).
259. *See supra* Part V.C.
260. *See supra* Parts IV.E-F.
261. *See supra* Parts IV.E-F., notes 224-25, and accompanying text.
262. *See supra* Part V.C.
263. *See supra* Part V.C. The military's homosexual policy is being challenged in the U.S. District Court for the District of Massachusetts. *See* Complaint at 2-4, Cook v. Rumsfeld, Civil Action No. 04-12546 GAO (D. Mass. Dec. 6, 2004), *available at* http://www.sldn.org/binary-data/SLDN_ARTICLES/pdf_file/1864.pdf; *see also* Memorandum of Law in Support of Defendant's Motion to Dismiss at 1, 3, Cook v. Rumsfeld, Civil Action No. 04-12546 GAO (D. Mass. Feb. 7, 2005), *available at* http://www.sldn.org/binary-data/SLDN_ARTICLES/pdf_file/1869.pdf.

punish those who violate military relationship regulations.[264] To survive the *Marcum* Test, these relationship convictions would be a prerequisite to any consensual sodomy conviction.[265] Therefore, simply adding a consensual sodomy charge to the relationship charge may be multiplicious and, regardless, not necessary within the military environment to punish the servicemember(s) involved.[266]

Captain Erik C. Coyne†

264. *See supra* Part VI.A.
265. *See supra* Part V.C.
266. *See supra* Part VI.B. *See also* John Files, *Pentagon Considers Changing the Legal Definition of Sodomy*, N.Y. TIMES, Apr. 21, 2005, at A17. This article discusses a memorandum sent from the Department of Defense Office of the General Counsel to Congress calling for the end of the military's proscription of consensual sodomy. *Id.* The memorandum calls for a change in the law to only outlaw sodomy "with a person under age 16 or acts 'committed by force.'" *Id.*

† J.D. expected May 2006, University of Baltimore School of Law; M.A., Bowie State University, 2001; B.S., The United States Air Force Academy, 1996. The views expressed in this comment are those of the author and do not reflect the official policy or position of the U.S. Air Force, U.S. Department of Defense, or the U.S. Government.