

Why is adultery the military's business?

BY NOAH FELDMAN
BLOOMBERG VIEW

Is the military's law making adultery a crime unconstitutional? So says a colonel who has been charged with violating it. His motives aren't great — he's trying to deflect attention from more serious charges, including rape. But he may be right. The law arguably discriminates by criminalizing only heterosexual adultery. And even if that vestigial aspect of the law could be fixed, there's another problem: The anti-adultery law violates the fundamental right of privacy, which should extend even to armed-forces personnel, whose constitutional rights are limited by military necessity.

The issue has arisen in the context of a court-martial against U.S. Air Force Col. Marcus Caughey. He has been charged with rape, assault, taking a sexual selfie — and six counts of adultery. Under the Uniform Code of Military Justice, adultery is a crime. Military prosecutors typically add the charge when a defendant is accused of other crimes. It gives them extra leverage, but also provides room for the factfinder, whether judge or jury, to reach a compromise verdict and find the defendant guilty of adultery even if it doesn't find him guilty of rape or assault.

Caughey's lawyers want to get rid of the adultery charge — and, presumably, to change the narrative of the trial by refocusing attention on something other

than the accusations against their client. It's a creative argument.

The way the military adultery law works is a bit tricky. Article 134 of the Uniform Code of Military Justice makes it a crime for a member of the armed forces to "prejudice good order and discipline" or "bring discredit upon the armed forces."

That general language is then interpreted by the military to include various crimes including adultery. The military defines adultery as "sexual intercourse" when the parties are not married to each other and at least one of them is married to someone else.

But because it's a relic of an earlier era, military law treats only heterosexual intercourse as qualifying.

That's because in the bad old days, homosexual conduct was defined separately as "sodomy," which was a crime distinct from adultery. That definition is still on the books, even though it would be unenforceable today.

Caughey's lawyers say limiting the crime of adultery to heterosexuals makes the law unconstitutional because it discriminates against straight people relative to gay people.

You might find this argument laughable — after all, the law is set up the way it is precisely because of the military's history of anti-gay discrimination. It's just an accident of changed constitutional circumstances that today, you can be charged with adultery only by having intercourse with someone of the opposite sex.



REUTERS FILE

U.S. Army soldiers of Task Force Lancer salute during a memorial service for late Spc. Brittany Gordon of 572nd Military Intelligence Company, 8th Squadron, 1st Cavalry Regiment at Camp Nathan Smith in Kandahar province, southern Afghanistan, in October 2012. Gordon was killed with another U.S. civilian and two others after an Afghan NDS police officer exploded a suicide vest he was wearing in Kandahar province, a military officer said.

But Caughey's argument isn't ridiculous. There's a long history of the courts striking down laws that discriminate on the basis of sex because they reinforce stereotypes. Arguably, this law is just as bad. It's possible to imagine a court rejecting it.

There's a simple remedy, however. The military could solve the problem by criminalizing all adulterous sex, whether straight or gay. And it wouldn't require amending the Uniform Code of Military Justice, just reinterpreting it officially.

Indeed, I can easily imagine a military court holding that, in the light of Supreme

Court decisions legalizing gay sex and gay marriage, Article 134 of the Uniform Code of Military Justice necessarily must be interpreted to extend to straight and gay people equally.

If that's right, Caughey's argument should lose, since the discrimination of which he complains doesn't exist, legally speaking.

But there's another constitutional problem, in my view more serious than the one Caughey's lawyers raised.

The adultery prohibition violates the fundamental right to privacy, regardless of whom it covers.

In the landmark 2003 deci-

sion of *Lawrence v. Texas*, the court struck down laws prohibiting gay sex. Justice Anthony Kennedy's opinion didn't rest on equality. Instead he wrote that the right to have sex with a consenting person of one's choice was "central to personal dignity and autonomy."

Logically, the fundamental right to enter into a sexual relationship should apply even if one or both of the parties is married to someone else. It's true that the criminalization of adultery has a long history. But so did the criminalization of sodomy, which the *Lawrence* decision struck down. It could be argued that

adultery is different since it isn't victimless and therefore doesn't implicate the right to autonomy in the same way. But that's too facile. Consider a couple who is married but separated, or a situation where one party is making divorce difficult for the other. Can it really be the case that people in such a marriage lack the fundamental right to form sexual relationships with other people?

Some 16 states still criminalize adultery. But those laws are, I think, unconstitutional under the *Lawrence* precedent. But because they are rarely or never enforced, they are unlikely to come to court.

That leaves the military's adultery ban, which is enforced, as the logical subject of a constitutional challenge.

The military would no doubt argue that its special interests in discipline should be treated deferentially by the courts, and that adultery by uniformed personnel is especially harmful.

But those are weak and unconvincing arguments, which would be rightfully rejected in the context of gay sex. Private, consensual sexual behavior should be treated as a fundamental right that applies even to military personnel. The military doesn't need to regulate people's consensual sex lives to enforce discipline.

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Friends

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that you won't have to cook for months.

After the hospice nurse says hours to days, they stand at your side until family arrives; they hold his hand and say goodbye; they put Patty Griffin on in the background, every album repeating; they shake their heads right alongside you in disbelief that this is actually happening.

They meet you at the funeral home to fill out the cremation paperwork and tentatively look at urns. When you find a little slate one with a golden tree and say you're not going to buy it just yet, but look at this, they completely agree.

When he dies, they shower

the world with tributes of his good spirit, love for teaching everyone about the woods, and how much confidence, humor and knowledge he brought to their lives.

They help plan his celebration of life and spill into your neighbors' house to fill it with love and laughter and stories.

When you turn 30 just more than two months after his death, they take you out to a coastal town for dinner and drinks and the comforting smells of diesel fuel and the sea.

They hike 12 emotionally and physically grueling miles with you up your mountain to spread his ashes where they need to be; at the summit they all dip their hands and join you in setting him free.

When you return to nursing school that fall, they are there to support you through and

through; when you find that you are miserable and leave the program six months later, all they want is for you to be happy.

As the horror of that first Christmas approaches, they entertain and distract.

They house/pet/chicken-sit so that you can travel for the first time in half a decade.

As the one-year mark nears, they gather with you at his favorite pub to reminisce and love.

When you start to date again, they want to know EVERY. LAST. DETAIL.

Your life is what it is in great part because of these friends, these friends who kept you afloat through the best and worst years of your life, through thick and thin, through marriage, birth, death and life again.

Oftentimes, especially early in the morning with your first cup of coffee, you wonder where you would be without your friends. You breathe deeply, slowly, gratefully for all they have done, all they have sacrificed and loved. They are so much of why you are back on your feet, of how you are able to continue moving through life. You hope they never experience anything even remotely similar, but because of them you're there: ready, strong as hell, and by their sides to rally, protect, love and provide anything they might ever need.

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Cianchette

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population as unreasoning, hate-filled beasts, it is wrong. The fact is, like 1776, governing institutions are losing the support of the governed. British citizens, while divided, thought they were powerless when it came to Brussels; the rules and regulations of a behemoth bureaucracy were believed to threaten the core identity of "Britishness." In some cases, they were right. Rumors of EU bans on certain tea kettles and toasters are true.

The same challenges exist in the United States. Americans believe the federal government is distant and unresponsive, while the governing class seems unable to accomplish anything. Unpopular laws, such as the Affordable Care Act and the bank bailouts, are forced upon an unresponsive populace. And nearly 25,000 pages of new federal rules are added annually, governing everything from drug abuse programs in schools to how often dogs need to be fed.

Like the Brits, normal Americans feel powerless against this massive federal bureaucracy. The federal civilian workforce is double the population of Maine. Yet, when we left King George all those years ago, our founders designed a system that can help obviate the need for a "Textit" or "NoReMaine."

That system is federalism. In the original formulation, each state in the union was, to an extent, a master of its own domain. Unfortunately, Washington's tentacles have climbed into state-level decisions. The Bangor Daily News' report on the LePage administration's funding allocations highlights this fact. Maine is the oldest state in the union, and we will run out of money long before we run out of need. But byzantine federal regulations require elected officials to jump through countless hoops and file piles of paperwork — burning cash on staff and administration — to direct funds to needy elderly populations.

Instead of our own take on "Brexit-ing" and regardless of who the next president is, we should demand more authority be relinquished to the more responsive levels of government. You can love or hate Paul LePage or the Maine Legislature, but the simple fact is they act more quickly than Washington, as London is more responsive than Brussels. And while Mainers may have strong debates over tax and welfare reform, defining the "most needy" in society or school curriculum, the answers we arrive at can be put into practice. If voters later decide those choices were wrong, new officials can change them.

So I'm with Bernie, the Brits and the Beatles. It is time for a new American revolution, where power is returned to the states and thus to the people. After all, to secure our rights, "Governments are instituted among Men, deriving their just powers from the consent of the governed." And "whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it."

Wise words of our nation's birth certificate. Happy 240th Birthday, America, and have a great, safe Fourth of July.

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How many times have you heard these phrases thrown around without even thinking about them? As a taxpayer, don't you want your money to go to people who need it most? Of course you do. Aren't people who are disabled in more need than people who are able-bodied?

And that's why this is such effective political rhetoric, used to justify even an unlawful redirection of federal funds.

The first issue with the positioning of "able-bodied" or "disabled" is that it's entirely misleading and dismissive of issues that can be extraordinarily debilitating to those facing them without technically qualifying as a disability. A survivor of rape or sexual abuse, for example, is able-bodied, as is someone who struggles with mental illness. A child who lives in the turbulence of poverty may be able-bodied, as their parents may be, but the trauma inflicted by a life of poverty can be incredibly debilitating. It can have profound, lasting effects on the child's ability to perform in an educational setting



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Even as the economy has begun to recover, statewide poverty rates haven't improved.

and, in the long run, a professional environment. Poverty can be a multipronged psychological assault, and it can have crippling lifelong effects.

None of this even mentions that the choice to withdraw funding from children facing poverty is a terrible approach to long-term economic development, as it does nothing to prepare our future workforce for the information economy.

So by this point you're probably thinking, "Sure, but what

about the disabled and elderly? Why aren't they a priority, too?"

They absolutely should be, and this leads to the second issue with this sort of rhetorical positioning. The language of "reprioritizing Maine's welfare system to best serve our neediest elderly and disabled neighbors" creates a false "either/or" dichotomy.

In the case of the millions in re-directed funds, taking funds earmarked for "able-bodied" children and giving them to the elderly appears to have been illegal. Even if

Painkillers

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grams to catch possible cases of prescription drug abuse and help patients get treatment for addiction if needed.

But while Maine has had a PMP since 2004, our team found that, in 2014, many pharmacists were not using it. Of 275 pharmacists surveyed, only 56 percent said they were using the program.

Doctors and other health care providers use the system, but it's still important for pharmacists to be linked in, too.

"Often, the pharmacist is the

'last line of defense,'" Nichols said.

Based on the state's PMP, opioids were prescribed to 22 percent of Maine residents in 2014 — enough to give every person in the state a 16-day supply.

That figure is down slightly from 2010, but it's still a very large number.

In an encouraging sign, though, prescriptions for oxycodone and hydrocodone were lower in 2014, while prescriptions for buprenorphine were up sharply. Buprenorphine is an opioid, but it's typically used to treat opioid addiction.

"I think that's a positive trend, because we interpret that as an increase in treatment for

addiction," Nichols said.

Still, more can be done. That includes getting health care providers and pharmacists on board with existing programs.

Maine has not only a PMP but a diversion alert program — which allows providers to see whether a patient has a history of drug-related arrests.

"We have resources to help tackle the opioid epidemic," Nichols said, "but we're under-using them."

A second study in the same issue of *JSAD* looked at another type of program aimed at curbing prescription drug abuse: drug "take-backs." Those are local events where people can bring their unneeded or expired

prescriptions for safe disposal.

The study, which surveyed over 900 New Jersey adults, found that efforts to raise public awareness of local take-back programs seem to work. People who had seen media stories on drug take-backs — or even just signs at their local drug store — were twice as likely to have used the programs in the past 30 days as other state residents were.

It all suggests that if people are aware of local take-back programs, many will actually use them.

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