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FLYING BUTTRESSES*

Nancy K. Ota†

I. INTRODUCTION

The theme of the panel, *Criminalizing Disadvantage, Moralizing Privilege*, asks us to examine the contradictions and inconsistencies of moral arguments that contribute to continuing subordination of outsider groups and to think about ways that the moral arguments can be employed to effect social justice for outsider groups. For me, the question raises form, substance, and process issues with regard to the moral arguments and their potential. On one hand, the question suggests that some moral arguments are correct (essentially moral), and if we pry them loose from irrational social categories, the arguments can be employed, as is, to develop a more just system. By demonstrating the irrational application of the moral arguments, we expose areas amenable to improvement without giving up the moral principles. On the other hand, the question also asks us to think about the legitimacy of moral arguments given disparate impacts on outsider groups. To the extent that the inconsistencies reveal inequity in the underlying tenet, we need to change the standard (antidomination ethic). This reconfiguration of the moral arguments raises the third issue: what is the procedural ethic, that is, how do we go about redefining ideals and making the change?

This third issue is possibly the most contentious because it has the potential for completely transforming the way we view law and society. The narrow axes around which we examine law sometimes invites a limited vision of the potential for change. For example, some measure equality under the law by the extent to which previously subordinated groups are treated equally when compared to privileged

* A flying buttress is a Gothic architectural innovation that allowed the construction of cathedrals with taller and thinner walls by redirecting the force of the walls through the buttress. The buttresses facilitated the use of stained glass windows and larger inside spaces.

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groups. Social change amounts to removing the perceived impediments to equal treatment.¹ This view is consistent with the essential morality described above; that is, we are starting from a baseline standard or ideal.² So-called “outsider” perspectives such as feminist, critical race, and queer theory have helped us shift our perspectives and bring the voices of outsiders into our work.³ These approaches are extremely important because of the valuable insight they bring concerning the shortcomings of law built around privilege. At the same time, these perspectives have been limiting because of their one-dimensional focus on a particular characteristic.⁴ Nevertheless, critical perspectives do have a more expansive potential: they can facilitate imagining a structure and process for a different equality (the above-mentioned antisubordination ethic). Critical perspectives have advanced the transformation by complicating the way we view social change by pointing out that people of color, poor people, women, and sexual minorities do not naturally unite or work in coalition with each other.⁵ Rather, bridging divides within and among these groups is thorny because identity politics makes us unwitting reinforcers of a particular hegemonic structure. In other words, the incremental

1. Title IX of the education amendments to the Civil Rights Act is an example of this approach to gender discrimination in education. See 20 U.S.C. § 1681 *et seq.* The perception of legislation like Title IX is that girls will be treated like boys. The treatment of the privileged group (boys) becomes the standard for measuring whether or not girls have attained equality. Since social change does not happen in the vacuum of a courtroom or legislative chambers, one might view these legal remedies as only a part of a bigger picture.

2. See, e.g., Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175 (1982).

3. Professor Mari J. Matsuda urged legal scholars to take this approach. See, e.g., Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987) (exploring the problems faced by critical legal scholars).

4. See, e.g., Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (discussing structural, political, and representational intersectionality with respect to women of color); Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561 (1997) (critiquing gay and lesbian legal theory as inadequate in confronting the issues of race and class).

5. See Hutchinson, *supra* note 4, at 607. Another way of expressing the concept of “unwitting reinforcement” is “moral slavery.” See, e.g., David A.J. Richards, *Abolitionist Feminism, Moral Slavery, and the Constitution: “On the Same Platform of Human Rights,”* 18 CARDOZO L. REV. 767, 839-40 (1996); E. Nathaniel Gates, *Estranged Fruit: The Reconstruction Amendments, Moral Slavery, and the Rearticulation of Lesbian and Gay Identity*, 18 CARDOZO L. REV. 845, 851-52 (1996). Professor Gates notes that “moral slavery” is the “substantive denial of personal and social agency and autonomy imposes stultifying and rigid identities upon those in its thrall. It fashions a deformed consciousness in the oppressed which in its turn serves to reinforce the very mechanism that produced such deformity.” Gates, *supra* at 865 n.22. But, identity politics can be transformative by creating conditions that stimulate political identities that reveal contradictions, reform cultural and political practices, and create new ways of examining the state. See LISA LOWE, IMMIGRANT ACTS 1-36 (1996).

change brought about through formal equality along a particular axis such as gender or race does not go so far as eliminating subordination. This idea is not new, but it is certainly worth repeating because progressive people with good intentions seem so frequently to forget the idea when they focus on a particular manifestation of oppression.

For example, race and gender (among other characteristics) work as fault lines for social change movements, particularly the gay rights movement.⁶ The blundering during the 1998 election season by the Human Rights Campaign (“HRC”) when the organization endorsed Senator Alphonse D’Amato is illustrative. By unapologetically placing importance on recognizing D’Amato’s intermittent support for “gay” issues (to balance its apparently “liberal” and Democratic agenda), HRC managed to anger a significant segment of its membership, especially women who support reproductive choice and abortion. While this short-sighted focus may be emblematic of a mainstreaming interest group, the tacit significance of this episode is the continuing endorsement of values that maintain hierarchical privilege. As other scholars have noted, gay rights are raced, gendered, and class based, that is, the prototypical gay right belongs to gay white men.⁷

Moreover, legal training seems to prepare us to make endless analogies—the never-ending exercise to compare and distinguish. Rather than state the oft-repeated “our oppression is similar, but different” mantra when we analogize “parallel” oppression, we should strive towards looking at and naming the structure we all uphold. This analogizing too often limits our focus to subordination and the subordinated. The exercise only leads to noting the differences that are usually manifested in some hierarchy or other relative measures. In order to take the next step and identify and name the oppressive hierarchy, we should more explicitly and conscientiously expose how, together, the various ways we are oppressed operate to reinforce hegemony. Activists and other folks who advocate social change should constantly think about changing oppressive structures as a whole and not just along the axis where their particular oppression is exper-

6. The planning of a Millennium March on Washington for gay rights (also sponsored by the Human Rights Campaign) has been highly contentious as folks struggle over the politics of inclusion. See Christopher Smith, *Sparks fly over national gay rally plans: Queers of color and radicals demand a voice in the “Millennium March,”* FREEDOM SOCIALIST, July-Sept. 1999, available at <<http://www.socialism.com/fsarticles/vol20no2/gay.htm>>; Nick Napolitano, *Mostly white, blond, rich? Millennium March dissenters gather, event organizers listen in,* WASH. BLADE, Feb. 4, 2000, available at <<http://www.washblade.com/national/000204c.htm>>. Many gay rights activists cannot agree on inclusion of non-homosexual sexual minorities. Moreover, many organizations of color have refused to endorse or participate in the march.

7. See Hutchinson, *supra* note 4, at 567-83.

enced. There are both substantive and procedural aspects to this approach which entail a vigilant effort to understand the complexity of hegemony and an ethical commitment to an anti-subordination agenda.⁸

In this essay I want to reflect on the complexity of oppression by examining the regulation of sexualized relationships in the United States military. The specific focus of this essay will be interracial, heterosexual, and transnational relationships from the Spanish-American War through the first half of the twentieth century, a period of significant economic and social change that included overseas military operations during the Spanish-American War, three major United States Marine Corps interventions in the Caribbean and Central America, World War I ("WWI"), and World War II ("WWII"). The relationships arising out of the circumstances surrounding United States military encounters illustrate the complex ways that dominant ideology operates because they represent a fulcrum for moralism, immigration, imperialism, sexuality, race, and nationalism.⁹ Furthermore, these relationships engendered debates about morality that are similar to those raised by contemporary issues, like the debate over allowing gay men and lesbians to enlist openly in the military. These similarities plus their historical connection to existing conditions give these otherwise historical situations and cases currency. Moreover, the slight temporal and social distancing (or objectifying) provides an easier case for critical inquiry, especially in view of the difficulty of thinking critically about events or movements as they are taking place.

How do these relationships at the confluence of race, gender, and nationality relate to hegemony? If you accept that race, gender, nationality, and class are neutral characteristics insofar as the regulation of private intimate relationships is concerned, then some other dynamic must be producing disparate material conditions in the relationships distinguishable on the basis of race or nationality or gender or class. One starting point would be to examine the moral justification or moral foundation upon which the regulations rest. What is moral

8. Professor Robert S. Chang more fully describes this latter point as political commitments such as: (1) anti-subordination; (2) political, economic, and cultural empowerment; (3) uncompromising opposition to hetero-patriarchy; (4) reconstruction of the meaning and language of race; (5) self-criticism and self-reflection; (6) learning and openness to our histories; (7) egalitarian deliberative participatory democracy; (8) willingness to sacrifice and struggle; and (9) contextualized judgment and responsibility. See ROBERT S. CHANG, *DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION-STATE* 130 (1999).

9. I am not suggesting that these categories are fixed. Part of the difficulty of resolving subordination that manifests itself around particular categories is that the legal system inevitably fixes particular meanings to the categories.

foundation? One dictionary defines *morality* as “1. conformity to the rules of right conduct; moral or virtuous conduct. . . . 3. virtue in sexual matters; chastity. 4. a doctrine or system of morals.”¹⁰ It defines *moral* as “1. . . . concerned with the principles of right conduct or the distinction between right and wrong; . . . 2. conforming to accepted or established principles of right conduct . . . 6. virtuous in sexual matters; chaste. . . .”¹¹ *Moral or morality* presupposes “right conduct.” Furthermore, at least as far as this dictionary is concerned, morality also concerns sexual conduct. In a community or society committed to equality, the regulation of the relationships should reflect a moral principle that operates neutrally. Some moral principles do reflect neutrality, but in the situations examined here, morality enables a systematic buttressing of what I very tentatively label as “Euro-white heteropatriarchal privilege.”

My aim in this essay is to uncover the privilege built upon the social ordering produced by a system that is based on seemingly neutral moral arguments. Moral arguments may work fine if the moral principles apply to a homogeneous community. But, the relationships examined here involve a mix of elements that include the military, race, sex, gender, class, and nationality. These elements come together when troops stationed overseas interact with local populations. In spite of the fact that the relationships appear to involve basic human interaction, both legal and cultural systems of regulation worked in these situations to maintain a certain order to these elements. The underpinning ideals of the regulatory systems were occasionally incompatible. For example, nuclear family values work fine to define social connections until they are muddied by interracial relationships that affront “natural divisions among men”¹² or they tamper with notions of national purity. The resolution of these sorts of contradictions necessitated the imposition of some hierarchy.

This essay begins by outlining the military regulatory framework governing private sexual conduct. The essay continues in the third section with a description of the social context and specific details about heterosexual encounters during overseas military operations prior to the Korean War. This section primarily focuses on interracial relationships and encounters involving commercial sex, rape, and marriage. The circumstances where these encounters take place involve the sometimes volatile mix of young men emerging from long periods

10. RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 880 (1991).

11. *Id.*

12. *The West Chester & Philadelphia R.R. Co. v. Miles*, 55 Pa. 209, 214 (1867) (noting that the natural separation of races and the amalgamation of races is repugnant to the law of nature).

of hypermasculine social isolation and young women ready to extend some form of hospitality. These circumstances created situations where policies about race, gender, class, nationality, and sex could potentially clash and force a shift in the underlying values. The incidents show how instead of clashing, a neat alignment of values reinforced and upheld a particular view of American citizenship.

II. POINTED ARCHES¹³

The military is “a specialized society separate from civilian society” and military law is a jurisprudence which “exists separate and apart from the law which governs in our federal judicial establishment.”¹⁴ The separate law governing the military, until 1950, included regulations codified in the Army’s Articles of War and the Articles for the Government of the Navy, plus orders of military commanders, and the President as Commander-in-Chief.¹⁵ The Articles govern the administration of military justice, define the offenses for which personnel may be tried by court-martial, prescribe the court-martial procedures, and establish the limits of punishment that may be imposed by these courts. They specify certain infractions including purely military offenses that consist of offenses for which ordinary civilians would not be punished, such as desertion or disobeying a superior. The Articles also cover offenses that had an impact on discipline and readiness, including criminal acts such as murder, rape, and assault.

The military regulated offenses, such as private sexual conduct, through a three-tiered court-martial system in accordance with the rules set forth by the Articles and various orders. One officer adjudicated proceedings at the lowest level, the summary court-martial,

13. “A curved structural device . . . used to support a structure as well as enlarge an opening.” *Lexicon of Architectural Terms* <<http://titan.iwu.edu/~callahan/glossaire-e.html#buttress>> [hereinafter *Lexicon*].

14. *Parker v. Levy*, 417 U.S. 733, 743 (1974). The Constitution bestows Congress with plenary power over the military. U.S. CONST. art. I, § 8, cl. 14.

15. In 1947, Congress consolidated the service branches under the Department of Defense, National Security Act of 1947, 61 Stat. 495, and in 1950, Congress enacted the Uniform Code of Military Justice, Act of May 5, 1950, 64 Stat. 107. CAPT. JAY M. SIEGEL, *ORIGINS OF THE NAVY JUDGE ADVOCATE GENERAL’S CORPS: A HISTORY OF LEGAL ADMINISTRATION IN THE UNITED STATES NAVY, 1775 TO 1967*, 2-5 (1997). Until then, the Army operated under the Articles of War, which experienced a number of revisions since their adoption in 1775. *See id.* at 22. The most significant revision of the Articles occurred in 1820, which implemented reforms arising out of concern for fair process in courts-martial. The Navy and Marine Corp were governed by the Navy Articles initially adopted in 1799, significantly revised in 1800, and updated again in 1862. *See id.* at 33-35, 105. The laws governing the Army and the Navy developed separately, in part, as a result of history and tradition. *See id.* at 2-4. Traditionally, naval commanders have had greater autonomy to impose disciplinary measures on their crews because of the nature of the service—aboard self-contained and isolated ships. *See id.* at 15.

which limited punishment to confinement or solitary confinement for up to one month and forfeiture of two-thirds pay for one month.¹⁶ The special court-martial involved at least three officers and allowed imposition of more severe punishment including up to six months confinement and forfeiture of six months pay.¹⁷ General courts-martial were convened to handle violations that are more serious or involved charges against officers. A general court-martial required five officers. Depending on the violation, a court-martial could end with the imposition of the maximum penalty: capital punishment.¹⁸

At the heart of these regulations is military morale aimed at maintaining obedience and discipline, that is, a commander's ability or power to control his troops. At war, military leaders do not want troops to question orders, they just want them carried out. It is through discipline and obedience that this end is met. Military leaders achieve this discipline in a variety of ways. Most obviously, good conduct is rewarded with promotion and other rewards, and bad conduct is punished.¹⁹ In addition, and in contrast to the studio images of drill sergeants barking out orders, most military leaders maintain morale through "professional paternalism,"²⁰ uniformity, and routine, which generate the esprit de corps. Members of the armed forces must set aside their individualism for the military team, which stands ready to protect that individualism.²¹

16. See, e.g., Edwin C. McNeil, *United States Army Courts-Martial in Britain: Judge Advocate Section, European Theatre of Operations, U.S. Army*, 60 L. Q. REV. 356 (1944) (citing the Articles of War, ch. 227, 41 Stat. 789 (1920)). See also GARY D. SOLIS, *MARINES AND MILITARY LAW IN VIETNAM: TRIAL BY FIRE 3* (1989).

17. See McNeil, *supra* note 16, at 356.

18. See *id.* In the Army, a Commanding General could order capital punishment. In the Navy, the President had to order executions. This difference in review of capital sentences may account for the difference in its imposition in the services. Between 1849 and 1950, the Navy did not execute anyone, but the Army executed 451 soldiers. See SOLIS, *supra* note 16, at 8. The Articles vested general court-martial jurisdiction in the commanders of armies, corps, divisions, and separate brigades. During World War I ("WWI"), the Army had 75 general courts-martial jurisdictions in the AEF. See *Final Report of the Judge Advocate, General Headquarters American Expeditionary Forces* (Aug. 19, 1919), in *UNITED STATES ARMY IN THE WORLD WAR 1917-1919: REPORTS OF THE COMMANDER-IN-CHIEF, STAFF SECTIONS AND SERVICES* 356, 356-57 (rev. ed. 1988).

19. The *New Soldier's Handbook* stated that enlisted men who had received medals for bravery or good conduct were entitled to \$2.00 per month additional pay for each medal. *NEW SOLDIER'S HANDBOOK* 254 (1942). Conviction for desertion during a time of war could result in death. See *United States v. Slovik*, 15 BR (ETO) 151 (1945).

20. LAWRENCE B. RADINE, *THE TAMING OF THE TROOPS: SOCIAL CONTROL IN THE UNITED STATES ARMY* 75 (1977).

21. With regard to military discipline, the *New Soldier's Handbook* states:

[Military discipline] means that you are learning to place the task of your unit-your team-above your personal welfare; that you are learning to obey promptly and cheerfully the orders of your officers and noncommissioned officers so that even when they

The armed forces regulate private conduct including many aspects of military personnel's intimate relationships, over which civilians have near autonomy or are normally left unregulated.²² Regulating sexual relationships in the military is justified in order to maintain morale and discipline and, reflecting one of the oldest moral principles,²³ because sex is allowed (only) in marriage (at least for women) to preserve the basic societal unit, the heterosexual/nuclear family.²⁴ Engaging in sexual relationships with local women while posted in a foreign country often meant that military personnel had to maneuver around regulations governing marriage, prostitution, and criminal activity such as rape. The military regulations did not officially condone prostitution, rape, or marriage. Prostitution and rape were outside the boundaries of legality, while regulations and commanders seriously impeded or discouraged the marriage of sailors and soldiers.²⁵ The rationale for these measures was that service personnel would not be distracted by personal problems arising from marriage or prolonged separation from family. In addition, the restrictions worked to prevent rash decisions during periods of conflict.²⁶

Regulation of marriage and commercial sex among soldiers, sailors, and marines was also effected through legal and social controls arising outside of the military. The military regulations governing overseas relationships worked in tandem with immigration laws and state marriage laws.²⁷ Immigration laws impeded many relationships because of the restrictions on migration from certain parts of the world.²⁸

are not present you will carry out their orders to the very best of your ability. When you have learned these things and prompt and cheerful obedience has become second nature to you, then you have acquired *military discipline*—the kind of discipline which will save lives and win battles.

NEW SOLDIER'S HANDBOOK, *supra* note 19, at 11.

22. See *Parker v. Levy*, 417 U.S. 733, 749 (1974).

23. See JAMES A. BRUNDAGE, *LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE* (1987). Brundage notes that the Code of Hammurabi punished women for adultery. See *id.* at 10. The same Code also inflicted severe penalties for rape. See SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 19 (1975).

24. See *United States v. Collier*, 36 M.J. 501, 511 (1990) (finding that adultery shows the officer lacks sound moral fiber).

25. See Roger W. Little, *The Military Family*, in *HANDBOOK OF MILITARY INSTITUTIONS* 248 (Roger W. Little ed., 1971).

26. See AMERICAN HISTORICAL ASSOCIATION, *GI ROUNDTABLE: CAN WAR MARRIAGES BE MADE TO WORK?* (Nov. 14, 1944).

27. I explore the regulation of overseas marriage in the military in Nancy K. Ota, *Loving Off Base* (unpublished manuscript).

28. Immigration exclusion laws focused on migration from Asia. For example, the Immigration Act of February 5, 1917 prohibited immigration from the Asiatic barred zone that included India, Siam, Indo-China, Afghanistan, Asian Russia, Asian Arabia, New Guinea, Borneo, Sumatra, Java, and other islands. Immigration Act of February 5, 1917, § 3, 39 Stat. 874.

Even if the relationship could overcome the immigration law hurdle, couples also had to deal with state marriage laws that prohibited interracial marriage and sexual relationships in over half of the states.²⁹ In harmony with social taboos against interracial marriage, the three systems operated to curtail the ability of American soldiers, marines, and sailors to establish permanent legal relationships with women overseas.

In addition to focusing on marriage, military regulations and other social controls impacted less formal short-term relationships.³⁰ The Articles specifically prohibited certain conduct involving sex by punishing carnal knowledge, sodomy, and rape.³¹ More general provisions were enforced under the Articles to protect the public image of the services. The military also court-martialed personnel for other offenses such as wrongful cohabitation, adultery, and fornication.³² In some wartime situations, commanders issued orders to prevent any friendly contact with “enemies” or restrict contact with allied civilians.³³ Federal, state, and local laws proscribing certain sexual and social conduct impacted military personnel directly while stationed within a particular United States location, but in many ways, also mirrored views held by those in command with control over GI’s lives.³⁴ In addition, local governments in foreign countries implemented tighter controls over commercial sex and considered policies to minimize consensual sexual encounters.³⁵ Finally, military, political, and

29. Thirty states had anti-miscegenation laws on the books during WWI and WWII. Fourteen of these states prohibited marriage between whites and Asians. See Ota, *supra* note 27, at 23.

30. Ultimately, interracial sex and miscegenation are at the heart of these controls over less intimate conduct on a kind of domino theory of sex.

31. Article 92 covered murder and rape. Article 93 covered “various crimes” including sodomy. See A MANUAL FOR COURTS-MARTIAL, U.S. ARMY 223 (1927).

32. The general article, Article 96, punished service members for conduct that prejudices “the 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.” *Id.* at 224. A soldier could also get into trouble under the articles for disobeying an order under Article 64. See *id.* at 218. And, under Article 95, officers could be punished where conduct is deemed to be “unbecoming of an officer and a gentleman.” *Id.* at 224.

33. See, e.g., Note, *Nonfraternization, Occupied Germany, 1944-45* USAMHI Ger-Occup 1944-49 (visited May 13, 1997)

<<http://carlisle-www.army.mil/usamhi/bibliographies/refbibs/germany/occup45/nonfrat.doc.url>>. General Eisenhower, the supreme commander of the allied forces in Europe during WWII, ordered social activity with Germans off-limits. See *id.* During the post-WWI occupation of France, African American soldiers could not talk or be in company with any white women. See ADDIE HUNTON & KATHRYN JOHNSON, *TWO COLORED WOMEN WITH THE AMERICAN EXPEDITIONARY FORCES* 184-85 (1920).

34. See *infra* note 117 and accompanying text.

35. For example, the British government facilitated chaperoned relationships by establishing “Welcome Clubs.” See *infra* note 72 and accompanying text.

other community leaders engaged in local indoctrination campaigns to educate the residents who might interact with United States military personnel about the proprieties of relationships.³⁶

III. FRIEZES AND STAINED-GLASS SCENES³⁷

Between the end of the nineteenth century through the Korean War, roughly 27 million men served in the various branches of the United States military machine, a large proportion of them served overseas.³⁸ Among these men, approximately 1.5 million were men of color.³⁹ Additionally, overseas duty included locations in countries populated primarily by people of color. The various military missions created occasions for sexualized relationships of which the United States military was well aware and regulated. The circumstances created opportunities for cross-national, interracial relationships involving American soldiers and women in Europe, Asia, Latin America, the Caribbean, and Africa. The relationships often took place within the context of a colonizer in the colony or of the liberator or protector of freedom in the freed or protected country. Also, the relationships took place in countries that did not have the *de jure* legacy of slavery found in the United States, that is Jim Crow and anti-miscegenation statutes.⁴⁰ This section examines three types of relationships that

36. See, e.g., GRAHAM SMITH, *WHEN JIM CROW MET JOHN BULL: BLACK AMERICAN SOLDIERS IN WORLD WAR II BRITAIN* 37-96 (1987).

37. Gothic cathedrals, such as Chartres Cathedral, feature sculptured friezes decorating the tympana and immense stained-glass windows (made possible by the buttressing of the cathedral walls) that enabled illiterate pilgrims to learn and understand the biblical themes and stories they depicted. See MALCOLM MILLER, *CHARTRES CATHEDRAL MEDIEVAL MASTERPIECES IN STAINED GLASS AND SCULPTURE* 2 (1997).

38. See Ellen C. Collier, *Instance of Use of United States Forces Abroad, 1798-1993* (visited Jan. 29, 2000) <<http://www.history.navy.mil/wars/foabroad.htm>>. Sailors and marines participated in land action on foreign soil as early as 1798. See *id.* The United States government dispatched sailors and marines as part of a multinational western force to stop the Boxer Rebellion in 1900. See *id.*

39. Roughly 10,000 African American soldiers served during the Spanish-American War. During WWI, approximately 12,000 Indians, at least 5,800 Mexicans and Mexican-Americans, and 367,000 African Americans served. And nearly one million African Americans served in the armed forces through the Korean War. See THE NEW YORK PUBLIC LIBRARY AMERICAN HISTORY DESK REFERENCE 138, 149-51 (1997).

40. Anti-miscegenation statutes in many states not only covered interracial marriage, but also prohibited interracial cohabitation and fornication. For example, the Florida statute in question in *McLaughlin v. Florida* concerned interracial cohabitation. 379 U.S. 184, 186 (1964). This case marked the beginning of the Supreme Court's dismantling of anti-miscegenation laws. The Court declined to extend its holding to cohabitation. Instead, it found that Florida's parallel law banning interracial marriage was unconstitutional and limited its decision to the law's effect on non-marital sex. See *id.* at 195.

arose during military occupation of foreign territory: prostitution, rape, and marriage.

A. Prostitution

In the social purity/anti-prostitution atmosphere of the early 1900s, one might expect that in order to maintain discipline and readiness the military would discourage personnel from taking part in commercial sex. Progressive reformers successfully created a repressive anti-prostitution atmosphere that culminated in the early 1900s with the passage of federal laws such as immigration provisions barring the entry of prostitutes, the Mann Act, otherwise known as the White Slave Traffic Act, and with the establishment of vice commissions.⁴¹ The outward formal signs indicate that the military took a discouraging stance on prostitution. Commanders attempted to restrain prostitution internally through its nonfraternization policies and by simply declaring known establishments of ill repute off limits.⁴² In the states, prostitution or the operation of a house of ill repute within a five mile radius of a military establishment was prohibited.⁴³ All of these regulations were aimed at controlling disease, defining sexual virility, and managing morale. A closer look reveals the contradictions at work in the underlying purposes.

Prior to WWI, investigations of army camps along the Mexican-U.S. border exposed rampant immorality exhibited by drunkenness and unrestrained sex.⁴⁴ Concerned about the impact of venereal disease ("VD") on public health, family relations, and military readiness, the military, with the help and encouragement of progressive civil reformers, embarked on a major morality campaign to discourage commercial sex.⁴⁵ Part of the campaign involved military and public training and education about hygiene and the immorality of sex for women outside of marriage. Some of this education was carried out in a clinical manner, some exhorted the evil of those who participated in

41. See ALLEN M. BRANDT, *NO MAGIC BULLET: A SOCIAL HISTORY OF VENEREAL DISEASE IN THE UNITED STATES SINCE 1880*, 36 (1987).

42. See *McKinley v. United States*, 249 U.S. 397, 399 (1919) (upholding Act of Congress of May 18, 1917, § 13, authorizing the Secretary of War to regulate brothels around military camps).

43. Officials used the law to prosecute individual women for prostitution. See, e.g., *Goublin v. United States*, 261 F. 5, 7 (9th Cir. 1919) (affirming a conviction and sentencing in violation of the law prohibiting prostitution within a five mile radius of a military post).

44. See BRANDT, *supra* note 41, at 53-57. United States Army and Marine Corp troops were involved in the policing of the border following the Mexican revolution and Pancho Villa's excursions into the United States. See *id.*

45. See *id.* at 54-61. The campaign involved special social hygiene commissions, Women's Temperance Christian Union, the YMCA, and the like. See *id.*

the commercial sex industry.⁴⁶ This campaign emphasized the correlation of the man who could control his sexual urges with masculinity. Reformers also incorporated American democratic idealism by distinguishing “old world degeneracy” from American upright behavior. Thus, sexual purity became an identifying characteristic of American manhood.⁴⁷ Nativists’ association of prostitution with poor, uneducated immigrant women enhanced the impact of the message by setting apart those immoral women from the good, chaste white girls and women. The campaign preached an American brand of masculinity as sexually restrained and of femininity as sexually pure. American identity was placed on a higher moral ground than non-American identity.

By itself, preaching upright behavior would have been ineffective. The obvious problem with this approach to commercial sex was military officials’ and soldiers’ deeply embedded belief that soldiers were sexual and were expected to seek sexual gratification.⁴⁸ In addition, the common belief about women who engaged in commercial sex was that of a VD carrier. As a practical matter, VD was a debilitating health problem for the military.⁴⁹ In light of both of these beliefs, reform pressure convinced the military to adopt a multipronged attack by approaching the problem through prophylactic as well as punitive measures. During WWI, many local governments, under pressure from progressive forces, cooperated with the military with increased policing of red-light districts.⁵⁰ For the sex workers, the policing was largely punitive; on the other hand, for soldiers, the policing was largely prophylactic.

Furthermore, community leaders were not blind to the fact that young women were sexual and would seek sexual gratification. At the same time that police and public health officials cracked down on prostitution, an undercurrent of benign passivity towards enforcing the restrictions on prostitution was at work in order to protect the “good girls” who might succumb to their own urges. Officials were concerned that the respectable girls would be tempted into immoral liaisons, not prostitution, because they could not count on these girls to remain chaste. They believed that the brothels would act as a

46. See *id.* at 60.

47. See NANCY K. BRISTOW, *MAKING MEN MORAL: SOCIAL ENGINEERING DURING THE GREAT WAR 19-23* (1996).

48. See BROWNMILLER, *supra* note 23, at 96-97 (noting that the fear of death or the expectation of death created an incentive to seek sexual gratification).

49. See BRANDT, *supra* note 41 (noting that venereal disease (“VD”) in the Army in 1909 accounted for over one-third of all days lost from duty).

50. See *id.* at 53-57 (discussing the beliefs behind these reforms including: training camps were breeding grounds for immoral behavior; immigrants were responsible for the declining morality).

buffer between the virile soldiers and the innocent, naive, but curious young women. A parallel practice occurred in countries where servicemen were stationed in large numbers. For example, in Japan, officials preparing for the post-armistice United States occupation in the 1940s encouraged the development of “clean” commercial sex establishments in convenient locations in order to protect wives, mothers, and sisters from the “sex-mad U.S. soldiers.”⁵¹

The implementation of the selective service draft and the corresponding increase in the number of young men entering training camps contributed to the push for broader reform. In conjunction with the educational and enforcement campaigns, the military and civilian reformers embarked on an extensive recreation project.⁵² The thought was that the government needed to provide or encourage the provision of moral and hygienic distractions to keep the soldiers and sailors from acting on their natural sexual urges. The result was to develop on-base activities such as theaters, libraries, and athletics and, at the same time, to develop recreational programs for civilians. Unfortunately, but as one could have expected, the reaction in the Jim Crow south was opposition to integrated facilities. In spite of the willingness to participate and assist with the effort, the needs of both black soldiers and the black communities were neglected. Rather than recognizing that African Americans would be left with fewer resources, the lack of “wholesome” activity in the communities reinforced the belief that Black people were immoral and simultaneously deemed to be morally irredeemable.⁵³

While the social purity campaign was prominent back home, the situation overseas was a little different. Brothels were established and maintained in the Philippine Islands during the Philippine Revolution against the United States and subsequent United States occupation (1899–1902) and in Mexico during the Mexican Border War (1916).⁵⁴

51. WALTER A. LUSZKI, *A RAPE OF JUSTICE: MACARTHUR AND THE NEW GUINEA HANGINGS* 96 (1991). The abuse of these “comfort women” and other commercial sex workers living around United States military bases is related to the abuse of comfort women servicing the Japanese troops. See Cynthia Enloe, *It Takes Two*, in *LET THE GOOD TIMES ROLL: PROSTITUTION AND THE U.S. MILITARY IN ASIA* 24, 24-27 (Saundra Pollock Sturdevant & Brenda Stoltzfus eds., 1992).

52. See BRANDT, *supra* note 41, at 54-61.

53. At the same time that members of the African American communities were asserting the right to participate fully in the war effort, they were also facing horrific violence throughout the south and northeast.

54. See “Regulation” in *the Philippines*, *WOMAN’S JOURNAL* 31 (Nov. 10, 1900), available at *ANTI-IMPERIALISM IN THE UNITED STATES, 1898-1935* (Jim Zwick ed., 2000) <http://www.boondocksnet.com/wj/wj_19001110.html> (noting that houses of prostitution are being established, maintained, and inspected in the Philippine Islands for the use of soldiers); see

In WWI, American Expeditionary Forces (“AEF”) arrived in France where prostitution was legal. Under the command of General Pershing, who had previously instituted the regulated bordellos on the Mexican border, soldiers initially were not prohibited from acquiring services at the brothel houses. Instead, a soldier could be court-martialed or have his pay withheld for contracting a VD. Facing high rates of infection, Pershing later would order houses of prostitution off-limits, thus setting up a cultural confrontation between French and American officials over the best method for dealing with VD. The fundamental difference between the French and the American approaches was that the Americans believed that sexual purity was possible, whether self-imposed or compelled by confinement and threat of punishment. On the other hand, the French believed that, in the absence of both regulated prostitution plus absolute control over soldiers’ chastity, the American goals were unrealizable. Instead, since American authorities could not control all military personnel all the time, soldiers would be at risk of contracting VD from the underground sex trade and innocent women would be at risk of rape.⁵⁵

Unlike the conditions in France, United States naval personnel and Marines during the various occupations of Nicaragua, Haiti, and the Dominican Republic over the three decades appeared to have relative freedom from formal control over their sexual conduct.⁵⁶ For example, in Haiti, United States Marines organized and officered the Gendarmerie, the Haitian constabulary, primarily with enlisted men. This force held total control over the local population.⁵⁷ Let loose in a

also KRISTIN L. HOGANSON, *FIGHTING FOR AMERICAN MANHOOD: HOW GENDER POLITICS PROVOKED THE SPANISH-AMERICAN AND PHILIPPINE-AMERICAN WARS 187-88* (1998) (quoting William Lloyd Garrison who claimed that brothels flourished after Americans arrived and United States soldiers guarded the houses); BRANDT, *supra* note 41, at 54 (discussing Mexican brothels).

55. See BRANDT, *supra* note 41, at 103-06.

56. I do not mean to imply that Marines had *carte blanche* to act however they pleased, nor that all Marines conducted themselves inappropriately. Rather, the three imperialist forays involved practical control of the countries against the will of the inhabitants, which suggests a fox guarding the hen house. The Marines occupied these regions for several years and provided basic policing and administration of government. See J. ROBERT MOSKIN, *THE U.S. MARINE CORPS STORY* 150 (1982). Additionally, once the United States entered WWI, many of the top officers left these posts for Europe leaving a less elite and perhaps less disciplined Corps.

57. See HANS SCHMIDT, *THE UNITED STATES OCCUPATION OF HAITI: 1915-1934*, 88-89 (1995). In the beginning of the occupation, the Gendarmerie included 120 Marines serving as officers and 1,500 presumably Haitian enlisted personnel. See MOSKIN, *supra* note 56, at 180. The Marines tried Haitian civilians in military courts-martial and also directed the public works project—road building—employing the *c rve *—a system of forced (unpaid) labor. See *id.* at 181-87. The occupation was generally unsuccessful and plagued by many instances of violence. The problems between the Marines and the local citizens stemmed in part from racism, drunkenness, Gendarmerie officers comprised of enlisted Marines rather than officers, and posting the officers

country where alcohol flowed freely, many of the dollar-rich Marines could visit 147 registered saloons and dance halls in Port-au-Prince alone.⁵⁸

Prostitution was made an enemy alongside the Germans, Italians, and Japanese during WWII.⁵⁹ But, similar to its approach during WWI, the military's main focus was prevention of VD through education and prophylactics again based on the belief that it would be unnatural to try to control men's sexual behavior.⁶⁰ Even though officials targeted red-light districts at home,⁶¹ the sheer number of troops mobilized for war in numerous locations made it impractical to exert effective control over commercial sex.⁶² Plus, the disruption of the war combined with changes in women's social status in the first quarter of the century led to the liberalization of sexual attitudes.⁶³ Women had greater freedom and autonomy because of the economic security they developed by moving into the workforce. Psychologically, the threat of dying or long separations also loosened sexual morality.⁶⁴ Thus, in the sexually charged atmosphere of the war, the educational strategy expanded to target the girls-next-door.⁶⁵

Related problems arose out of the changing social order in America. First, the military would mobilize a significant number of women for overseas duty in the auxiliary and nursing corps. Paternalistic attitudes towards members of the Women's Auxiliary Corps ("WACs") in New Guinea resulted in their being "locked within their barbed-wire" military compound for their protection from American

in isolated interior posts with inadequate supervision. See SCHMIDT, *supra* at 135-53; Mary Angela Renda, "This American Africa: Cultural dimensions of U.S. Imperialism in Haiti, 1915-1940, Chapter 2: Violence and Paternalism (1993) (Ph.D. Dissertation, Yale University); Addie Hunton & Emily G. Balch, *Racial Relations, in OCCUPIED HAITI* 113, 115-17 (Emily Greene Balch ed., 1926); James Weldon Johnson, *Self-Determining Haiti: II. What the United States Has Accomplished, in THE NATION* (Sept. 4, 1920), available at ANTI-IMPERIALISM IN THE UNITED STATES, 1898-1935 (Jim Zwick ed., 2000) (last modified Apr. 3, 2000) <<http://www.boondocksnet.com/ailtexts/johnson200904.html>>.

58. See Hunton & Balch, *supra* note 57, at 119.

59. See BRANDT, *supra* note 41, at 163.

60. Congress repealed the provision allowing punishment for contracting VD, court-martial, and withholding pay. See *id.* at 163-69.

61. On July 11, 1941, the Act to Prohibit Prostitution in and Around Military and Naval Establishments was enacted. 18 U.S.C. § 1384. The law enabled military and civilian enforcement officials to crack down on prostitution. See H.R. Rep. No. 79-512, at 1-3 (1945).

62. See JOHN COSTELLO, *VIRTUE UNDER FIRE: HOW WORLD WAR II CHANGED OUR SOCIAL & SEXUAL ATTITUDES* 210-28 (1985).

63. See *id.* (discussing the social and economic impact of WWII on women in the workforce).

64. See *id.* at 7-17. The discovery of penicillin's effectiveness in combating VD also had an impact on people's attitudes. See BRANDT, *supra* note 41, at 170-71.

65. See BRANDT, *supra* note 41, at 167-68.

soldiers who had not seen white women in months.⁶⁶ Since the local culture and the sparsely populated and remote location did not support commercial sex, officials believed that the male soldiers' sexual urges would be ready to explode. Second, the armed forces would enlist hundreds of thousands of people of color and the military understood it had to take care of their sexual needs as well. At the same time the military was trying to protect the white WACs' virtue, the military also considered a plan to "import" African American WACs to Britain to divert the attention of the African American soldiers stationed there away from British women.⁶⁷

Legal and illegal prostitution flourished in various areas for different reasons. Some areas served either as troop mobilization areas, while others served as rest and recuperation areas. In either case, commercial sex was available for the GIs' consumption.⁶⁸ Conversely, the war's tremendous devastation and corresponding economic disruption lead to widespread poverty, food shortages, and hunger among local Europeans, Filipinos, and Japanese. American GIs had cash, candy, cigarettes, and food. In some areas, women traded sex for these commodities to support themselves and their families.⁶⁹ In occupied Japan, the Japanese government established brothel houses. One chaplain noted that the establishments were advertised as "Special Recreation Centers" and were frequently guarded by Military Police.⁷⁰ As was true in France during World War I, the justification for the licensed brothels was the maintenance of public health via health examinations of the women.

During WWII, the British approach to prostitution and the attendant public health risks were not as oppressive as that employed by the Americans. Prostitution and the transmission of VD were not illegal, although a prostitute could be arrested for indecent behavior or public nuisance.⁷¹ Canadian and American military officials were pressuring the British to use a more proactive approach to stop the spread of VD among troops. The British resisted, but as the number of American

66. See MATTIE E. TREADWELL, *THE WOMEN'S ARMY CORP* 421 (1954).

67. See SMITH, *supra* note 36, at 191-93.

68. Costello notes that the bomber crews suffered higher rates of VD than infantryman in part because bomber crews operated out of bases around which more women were available than there were for those fighting on the war fronts. See COSTELLO, *supra* note 62, at 91-92. Brisbane, Australia was a rest and relaxation destination in the Pacific Southwest Theater, which had legal prostitution that catered to both white and Black soldiers. See LUSZKI, *supra* note 51, at 90.

69. See COSTELLO, *supra* note 62, at 95-96.

70. See Luther D. Miller, Memorandum For the Director of Personnel, Army Service Forces, Dec. 27, 1945 SPCHT 250.1 (Misc.) National Archives (on file with author).

71. See DAVID REYNOLDS, *RICH RELATIONS: THE AMERICAN OCCUPATION OF BRITAIN, 1942-1945*, 204 (1995).

troops stationed in Britain increased such that the sex trade grew outside of London and into other regions, American and local officials proposed tighter, more oppressive controls over prostitution. Instead of instituting tighter controls, the Ministry of the Interior (“MOI”) opted for a strategy that paralleled the American recreation program in WWI. The MOI made funds available for establishing “Welcome Clubs” to entertain GIs and British women workers. The goal was to promote friendly contact and to provide outlets for wholesome recreation for GIs and women with time on their hands.⁷² Given the official British attitude towards African American soldiers and the belief that VD was prevalent among them, the plan did not include facilities for black soldiers. The British Women’s Voluntary Service (“BWVS”) instead proposed alternate facilities for African Americans: “Silver Birch Clubs.” The BWVS established only three Silver Birch Clubs. Considering that over 100,000 African American troops spent time in Britain, this small number reflected the less than welcoming reception they received.⁷³

Social custom and policy based in racism played a significant role in the military’s attitude towards regulation of private conduct. African American soldiers served in significant numbers during the Spanish-American War, the Philippine occupation, the Mexican border war, WWI, and WWII. Their service prior to WWII was mainly confined to the segregated units in the Army. The Marine Corps had no Black Marines until 1942 and the Navy limited enlistment to service roles as either messmen (busboys and waiters), cooks, or firemen who passed coal in the ships’ firerooms.⁷⁴ The War Department opposed the failed attempts in Congress to disqualify Blacks altogether from the Army prior to WWI. Nevertheless, the Department managed to limit their opportunities by placing them in segregated units performing unskilled labor and by providing minimal training.⁷⁵ African Americans

72. See *id.* at 204-07.

73. See, e.g., SMITH, *supra* note 36, at 84 (discussing Lady Stella Reading and the Women’s Voluntary Service organization which she founded).

74. See JACK D. FONER, *BLACKS AND THE MILITARY IN AMERICAN HISTORY* 103-06, 124 (1974). The Navy had nearly eliminated African Americans from the service between the wars. See ULYSSES LEE, *THE EMPLOYMENT OF NEGRO TROOPS* 51 (1966). In response to President Roosevelt’s Executive Order 8802, the Marine Corps began enlisting African Americans on June 1, 1942. See MOSKIN, *supra* note 56, at 420. The Roosevelt administration had to respond to pressure from various sources within African American communities demanding the opportunity to participate in the services. See LEE, *supra* at 51-87.

75. See SHERIE MERESHON & STEVEN SCHLOSSMAN, *FOXHOLES & COLOR LINES: DESEGREGATING THE U.S. ARMED FORCES 6-7* (1998). Indians also served in segregated units, but in support of the government’s assimilation policy, they were later integrated into white units. In WWI, the Army established a few predominantly or all-Indian units. In both the integrated units and the segregated units, Indians saw duty overseas in the Philippines and China at the end

serving in the regular army saw duty in the Spanish-American War, including meritorious service in Cuba and the Philippines. In addition, they participated in the post-rebellion occupation in the Philippines at the turn of the century. The United States was entering WWI in the midst of "a nationwide surge of violence" against Blacks,⁷⁶ and in spite of proving their valor and ability in the earlier efforts, the regular regiments were excluded from the AEF during WWI.⁷⁷ By keeping these trained units out of combat, the Army administrators were trying to avoid racial trouble among troops.⁷⁸ Instead, two divisions comprised of African American draftees saw combat duty in France along with Service of Supply battalions that provided stevedore, graves registration, construction, and other service work.⁷⁹ Opportunities for African Americans improved slightly in WWII, but the services were still segregated by unit (Army and Marines) or by occupation (Navy).⁸⁰

The systemic effects of racism on African American military personnel were evident in many ways beyond the basic structure of the United States military organizations. United States civilians humiliated, harassed, and insulted African Americans in uniform before, during, and after WWI.⁸¹ White officers, many of them Southerners, attempted to discredit Black officers, and white officers and noncoms subjected African American troops to mistreatment.⁸² As if all of that scorn was not enough, officers and enlisted personnel offered local populations in foreign posts instruction on American-style racism

of the nineteenth century and with the AEF in France during WWI. See THOMAS A. BRITTEN, *AMERICAN INDIANS IN WORLD WAR I: AT WAR AND AT HOME* 28-50 (1997). Britten also states that 5,794 Mexican aliens were accepted for service during WWI. See *id.*

76. ARTHUR E. BARBEAU & FLORETTE HENRI, *THE UNKNOWN SOLDIERS: BLACK AMERICAN TROOPS IN WORLD WAR I* 21 (1974).

77. See *id.* at 27. The Army used the Regulars in the Philippines, along the Mexican border, and in Hawaii in order to release white regiments for service in France.

78. See *BLACKS IN THE MILITARY: ESSENTIAL DOCUMENTS* 78 (Bernard C. Nalty & Morris J. MacGregor eds., 1981) [hereinafter *BLACKS IN THE MILITARY*].

79. See BARBEAU & HENRI, *supra* note 76, at 70-110 (noting that the 92nd and 93rd Divisions were composed of National Guard units and draftees).

80. African Americans had difficulty getting into the Army's special schools, were frequently transferred, lived in inferior quarters, relied on separate blood banks, and were disproportionately placed in service and labor units. See *BLACKS IN THE MILITARY*, *supra* note 78, at 103-32.

81. See BARBEAU & HENRI, *supra* note 76, at 21-32, 175-89 (describing the mob violence directed at African Americans).

82. See *id.* at 138-39 (describing the commanding officer, General Bullard, as a "negro hater"); FONER, *supra* note 74, at 118-21; LEE, *supra* note 74, at 348-79. General Ballou commanded the 92nd Division and referred to the division as the "rapist division." *Id.* at 138. Ballou's Chief of Staff was a white Georgian. See W. E. Burghardt DuBois, *An Essay Toward a History of the Black Man in the Great War*, 18 *CRISIS* 63, 70 (1919).

often reinforced by violence.⁸³ In France, American white soldiers “spread tales and rumors among the peasants and villagers and sought to chastise Negroes” and the French (white) women who associated with them.⁸⁴ Mere conversation with a white woman and entering a French home were in violation of standing orders issued to African American troops.⁸⁵ British officials issued guidelines for maintaining Jim Crow style segregation to their troops and civilian officials in part to appease American officials but also because of British bigotry.⁸⁶ The combination of formal segregation and informal and often violent enforcement of white racial superiority led to segregated commercial sex establishments as well.⁸⁷

Gendered stereotypes of women associated with the military frequently emphasized their role as prostitutes, but race and gender combined to operate differently where women of color were living. Race and gender operated as “red-lining” markers.⁸⁸ Sex workers who offered services to soldiers of color were subject to considerably more scorn. White women who were friendly with African American men were presumed to be prostitutes.⁸⁹ Notions of race, gender, and sexuality formed a lens through which many military personnel in the Pacific Theater of Operations would view Asian women.⁹⁰ Legal

83. American white troops attacked black troops when the whites determined that blacks were getting too friendly with local women. See Robert J. Lilly & J. Michael Thomson, *Executing U.S. Soldiers in England, World War II: Command Influence And Sexual Racism*, 37 BRIT. J. CRIM. 262, 262 (1997) (indicating that white troops were responsible for 90% of the trouble).

84. See DuBois, *supra* note 82, at 87.

85. See BARBEAU & HENRI, *supra* note 76, at 108.

86. See REYNOLDS, *supra* note 71, at 224-25.

87. See, e.g., WILLARD B. GATEWOOD, JR., BLACK AMERICANS AND THE WHITE MAN'S BURDEN 1898-1903, 277 (1975) [hereinafter BLACK AMERICANS] (noting that houses of prostitution attempted to establish a color line); Scot Ngozi-Brown, *African-American Soldiers and Filipinos: Racial Imperialism, Jim Crow and Social Relations*, 82 J. NEGRO HIST. 42, 44-45 (1997) (discussing the export of Jim Crow to the Philippines).

88. Redlining is the practice among financial institutions of marking low-income neighborhoods of color outside of the eligible boundaries for financing, no matter what the financial strength of a particular business or individual property owner is. See Charles L. Nier, III, *Perpetuation of Segregation: Toward a New Historical and Legal Interpretation of Redlining Under the Fair Housing Act*, 32 J. MARSHALL L. REV. 617, 665 (1999).

89. British young women were characterized as “Girls Who Prey on Negroes” and “goldiggers.” Elbert L. Harris, *Social Activities of the Negro Soldier in England*, 11 NEGRO HIST. BULL. 152, 154-56 (1948). The Jack Johnson controversy in the early 1910's also set off a national public debate in the United States about interracial relationships that Kevin J. Mumford claims characterized white women involved with black men as prostitutes. See KEVIN J. MUMFORD, *INTERZONES: BLACK/WHITE SEX DISTRICTS IN CHICAGO AND NEW YORK IN THE EARLY TWENTIETH CENTURY* 93 (1997).

90. See Eddy Meng, *Mail-Order Brides: Gilded Prostitution And The Legal Response*, 28 U. MICH J.L. REF. 197, 226-28 (1994); Julie Yuki Ralston, *Geishas, Gays and Grunts: What the Exploitation of Asian Pacific Women Reveals About Military Culture and the Legal Ban on Lesbian, Gay and Bisexual Service Members*, 16 L. & INEQUALITY 661, 685-89 (1998). Concerning

restrictions hindered the immigration of Asian women and, besides limiting the population of Asian women in the United States, the legislative efforts in the early history of anti-Asian immigration forces painted Chinese and Japanese women as prostitutes.⁹¹ "Oriental" women's images were further refined by popular culture's stereotypical characterization of Asian Pacific Islander ("API") women such as *Madame Butterfly*. "Butterfly," the geisha waiting in port for her American naval officer, was willing to sacrifice everything for him, including her life.⁹² The reality of post-war Japan reinforced these images. In the aftermath of the war, many Japanese women lived in poverty having lost husbands, fathers, and brothers. Japan was in economic turmoil and many women turned to prostitution for food and shelter.⁹³ Although the Japanese government contributed to the sex trade by procuring "comfort women" for the occupation forces,⁹⁴ the arrival of nearly a half-million of mostly male Americans comprising the occupation force would facilitate increased commodification of women around the bases. Economic circumstances and expectations about American military men's sexuality aligned with their idea of a subservient, but exotic "geisha girl."⁹⁵

B. Rape

Rape has been an element of United States military campaigns overseas for which military personnel have suffered the highest penalty. While campaigning against advancing United States neo-colonialism, anti-imperialists cited incidents of gang rape by American

women of color in Haiti during the Marine occupation, Renda notes that one Marine observed, "[a]ll the native women are of easy virtue and all its accompanying evils." Renda, *supra* note 57, at 61 (quoting First Lieutenant Adolph Miller's personal log).

91. See Sucheng Chan, "The Exclusion of Chinese Women," 1870-1943, in ENTRY DENIED, EXCLUSION AND THE CHINESE COMMUNITY IN AMERICA, 1882-1943, 94, 95 (Sucheng Chan ed., 1991).

92. Gina Marchetti discusses the "Butterfly" image presented in film in ROMANCE AND THE "YELLOW PERIL": RACE, SEX, AND DISCURSIVE STRATEGIES IN HOLLYWOOD FICTION 78-108 (1993).

93. See PAUL R. SPICKARD, MIXED BLOOD INTERMARRIAGE AND ETHNIC IDENTITY IN TWENTIETH-CENTURY AMERICA 124-25 (1989) (discussing GIs and Japanese women).

94. See KATHLEEN BARRY, FEMALE SEXUAL SLAVERY 75-76 (1979). The Japanese were experienced in establishing these outlets. See, e.g., GEORGE HICKS, THE COMFORT WOMEN: JAPAN'S BRUTAL REGIME OF ENFORCED PROSTITUTION IN THE SECOND WORLD WAR (1995) (discussing an officially organized system of rape by the Japanese military).

95. One GI related the following from occupied Japan: "Once a fifteen year old child reared in America was taking us to visit a Buddhist shrine in her small town. Up slunk a Yank behind us, the only other one we ever saw there, 'Say, what is this place?' he yelled. 'A whore-house?'" Hargis Westerfield, *Failures in G.I. Orientation: The Japanese Story*, 12 FREE WORLD 62 (1946).

troops in the Philippines during the first American occupation.⁹⁶ Eleven AEF soldiers in France were executed; ten of the executions involved rape convictions.⁹⁷ In WWII, the Army recorded 971 convictions for rape by general courts-martial. Out of these convictions, the Army executed fifty-two soldiers. In addition, thirteen soldiers were executed for combined murder-rape convictions.⁹⁸ Numerous soldiers received life sentences following rape convictions.⁹⁹

Rape by American military personnel commonly occurred despite the severity of punishment that at least represents a measure of the act's immorality in war.¹⁰⁰ Rape has been specifically prohibited in the Articles and a conviction by general court-martial still carries a maximum penalty of death.¹⁰¹ Although the infliction of the ultimate penalty reflects the seriousness of the American military's official attitude towards rape, what these bare statistics leave open to question is the unofficial attitude. Did GIs get away with rape more frequently in hostile invasions than they did in friendly occupations? What impact do race and gender have on the enforcement of rape prohibitions?

GIs very likely committed more rapes than the statistics indicate. Professor Morris cites at least three reasons why rape during periods of combat would be undercounted: underreporting, informal handling, and slippage in the central collection of crime records.¹⁰² Apart from

96. See KRISTIN L. HOGANSON, *FIGHTING FOR AMERICAN MANHOOD: HOW GENDER POLITICS PROVOKED THE SPANISH-AMERICAN AND PHILIPPINE-AMERICAN WARS* 187 (1998) (citing letters from soldiers complaining about the degradation of troops and rape).

97. The other execution was for murder. See *Alleged Executions Without Trial in France: Hearings before a Special Committee on Charges of Alleged Executions without Trial in France*, 67th Cong., 4th Sess., at iv (1923).

98. See BROWNMILLER, *supra* note 23, at 76-78. These figures were recorded from January 1942 through June 1947 and would include post-war occupation forces. See *id.* In this study, Brownmiller states that no statistics are available for the number of reported rapes, arrests and trials for rape during WWII. See *id.* at 77. She suggests one could extrapolate a figure of approximately 1,600 charges based on the 60% conviction rate in the Vietnam war. See *id.* at 77, 98-99. Brownmiller also notes that the figures do not include convictions for lesser charges that the military often tried. See *id.* at 76-78. In the European Theater, the Judge Advocate General ("JAG") reported a 51% conviction rate. See 1 HISTORY BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL WITH THE UNITED STATES FORCES EUROPEAN THEATER: 1942-1945, 13 [hereinafter JAG ETO HISTORY].

99. In the European Theater of Operations, 378 life sentences were approved out of 461 convictions for rape. See JAG ETO HISTORY, *supra* note 98, at 13.

100. See BROWNMILLER, *supra* note 23, at 32; Madeline Morris, *By Force of Arms: Rape, War and Military Culture*, 45 DUKE L.J. 651, 653-56 (1996) (discussing the higher incidence of rape during war and noting that the pervasiveness of rape stems from the nature of war); see also Darren Anne Nebesar, *Gender-Based Violence as a Weapon of War*, 4 U.C. DAVIS J. INT'L L. POL'Y 147 (1988).

101. See A MANUAL FOR COURTS-MARTIAL, *supra* note 31 (citing art. 92 of the Articles of War); Uniform Code of Military Justice, 10 U.S.C. § 920 (art. 120).

102. See Morris, *supra* note 100, at 667.

the general reluctance to report rape on the part of victims and their families who are often forced to witness the crimes, the power relationship of military forces and civilians, language differences, and cultural expectations compound the problem.¹⁰³ When victims fail to report the crimes, GIs who frequently witness military rapes fail to report them for fear of retaliation or ridicule and due to tacit authorization of the crimes by superiors.¹⁰⁴ In situations involving hostile aggression, rape works as a weapon that both humiliates and psychologically terrorizes the enemy. And viewed as a weapon, rape is merely an instrument of warfare that on occasion goes unchecked.¹⁰⁵

The statistics for WWII exhibit a marked increase in the incidence of rape after the end of the war and during American military occupations of Germany and Japan.¹⁰⁶ The Judge Advocate General's ("JAG") office explained that the increase from the beginning days of the war resulted from a combination of increased troop strength and increased free time during occupation.¹⁰⁷ The occupation phases also involved billeting troops in former enemy territory immediately following the end of hostilities. Throughout the war, Americans viewed beastly subhuman and racist images of the enemy in order to facilitate their annihilation.¹⁰⁸ Since these images continue to have meaning to-

103. In some instances, such as in the Philippines and Haiti, the governing authority was the United States military. Additionally, an oversexed image preceded GIs to the various countries they occupied. In Germany, one victim testified that her government had warned her about American soldiers and stated, "[i]t was best not to resist them; otherwise we would be killed. Everybody talked about that." JAG ETO HISTORY, *supra* note 98, at 246 (discussing whether or not such conduct on the part of the victim constitutes consent and citing CM ETO 10700, *Smalls*).

104. See, e.g., BROWNMILLER, *supra* note 23, at 102-13 (describing atrocities during the Vietnam War in which soldiers experienced resistance to complaints from superiors, fear of ridicule, and situations where superior officers failed to stop, and in some cases encouraged, rape).

105. See *id.* at 37-38.

106. See *id.* at 77-78. This conclusion by the clerk of court and detailed by Susan Brownmiller is contradicted somewhat by the JAG report that states: "A sharp drop in the commission of the offense of rape was noted as of V-E day on 8 May 1945." JAG ETO HISTORY, *supra* note 98, at 13.

107. See BROWNMILLER, *supra* note 23, at 78 (suggesting alternative explanations: reluctance and impracticality of convening courts-martial in the midst of warfare and increased opportunity for courts-martial on charges of rape on the part of the military judges). The JAG ETO History shows a comparable increase in rapes and explains the difference in terms of differing circumstances. JAG ETO HISTORY, *supra* note 98, at 13, 237. The "German Phase" involved the American military as "conquerors into the land of the enemy. The people were at our mercy. We were armed; they were the defeated." *Id.*

108. See JOHN W. DOWER, WAR WITHOUT MERCY: RACE & POWER IN THE PACIFIC WAR 89 (1986) ("[T]he attachment of stupid, bestial, even pestilential subhuman caricatures on the enemy, and the manner in which this blocked seeing the foe as rational or even human . . . facilitated mass killing."). Dower also reproduces many of the images depicting Japanese as

day, it would not be surprising to find that GIs continued to view those among whom they lived as disposable and therefore, inconsequential targets of sexual violence.¹⁰⁹

Racism also played a role in prosecuting rape cases. The JAG reported courts-martial statistics for rape in the European Theater of Operations (“ETO”) as follows:¹¹⁰

Offense: Rape	Charged (%)	Guilty (% of Charged)	Guilty of Lesser Offense (% of Charged)	Not Guilty (% of Charged)
White	513 (56.7)	205 (40)	48 (9.3)	260 (51.7)
African- American	391 (43.3)	256 (65.5)	19 (4.8)	116 (29.7)
Total	904	461 (51)	67 (7.4)	375 (41.6)

The military charged African American soldiers disproportionately since their troop strength in Europe represented approximately 10% of the total troops.¹¹¹ African Americans also received more capital sentences for rape with thirty-six of the forty-five death sentences approved. These sentences were carried out by hanging. Only 5.5% of the African American soldiers versus 11.7% of the white soldiers were sentenced to a term of years less than life.¹¹² In the Pacific Theater, General Douglas MacArthur authorized twenty-one

monkeys, gorillas, and a buck-toothed louse. *See id.* at 88, 182-88; *see also* Keith Aoki, “Foreignness” & Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes, 4 UCLA ASIAN PAC. AM. L.J. 1, 9-13 (1996) (describing the depiction of the Japanese through stereotypical images of an “other” non-white inscrutable, subhuman menace).

109. *See* Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. GENDER RACE & JUST. 177, 178 (1997). One study in Japan estimated that American soldiers sexually assaulted about 150,000 Japanese women in the first five months of the occupation. *See* LUSZKI, *supra* note 51, at 96.

110. *See* JAG ETO HISTORY, *supra* note 98, at 13. The JAG divided sex offenses in this report among rape, statutory rape, assault with intent to commit rape, and sodomy. Some unspecified number of the death sentences imposed for rape involve rape/murder convictions. The figures in the table only cover rape. *See id.*

111. At the start of the war, African American troop strength was limited by quota to 10.4%. At the beginning of the war, African Americans represented 6.32% of the total enlisted personnel in the Army and by December, 1945, they comprised 10.29%. *See* LEE, *supra* note 74, at 409, 415.

112. *See* JAG ETO HISTORY, *supra* note 98, at 13. Moreover, African American soldiers were disproportionately executed.

	Executed for Murder	Executed for Rape	Executed for Murder/Rape	Executed for Desertion	Total Death Sentences
White	6	4	4	1	245
African Amer.	22	25	8	0	198

executions. Eighteen of the soldiers executed were African American and eight of them were convicted of rape.¹¹³ Likewise, of the eleven executions in France during WWI, five African Americans were executed for rape, three African Americans were executed for murder/rape, and one Indian was executed for murder/rape. One white soldier was executed for rape and one for murder.¹¹⁴

One might conclude that African Americans were more likely to commit rape from these numbers;¹¹⁵ however, the general treatment of African Americans in the military, the racist social climate in the United States, and the actual treatment of soldiers of color in the military justice system support a different conclusion. As was discussed earlier, the military operated under Jim Crow: separate and unequal. The segregation, inferior training, and limited opportunities were exacerbated by racism among officers, many from strong Southern families,¹¹⁶ and among other GIs.¹¹⁷

The officers and GIs' attitudes mirrored those among civilians. The social climate in the United States during the first quarter of the twentieth century was marked by extreme violence against African Americans. The violence manifested itself in legal and extralegal ways and quite often, interracial sex was at the center of the storm. In 1906, the Army discharged 167 soldiers from the 25th Infantry on the basis of their refusal to cooperate in the investigation of an all-night melee in Brownsville, Texas. The evidence supported the story that the soldiers could not have been involved and that the white townspeople were retaliating against the black soldiers for resisting the violent enforcement of Jim Crow laws. The evidence also suggests

Id. at 10. Robert J. Lilly & Michael J. Thomson reported that two Mexican American soldiers were hanged for rape in England. See Lilly & Thomson, *supra* note 83, at 268. If that soldier was included in the "White" statistics above, then soldiers of color comprise 27 of 29 executed for rape.

113. See LUSZKI, *supra* note 51, at 107. The three white soldiers were executed for murder. One of these soldier's name was Aveline Fernandez, who the Department of the Army listed as white, but could have been Latino or Filipino. See *id.* at app. E. Based on a maximum Black troop strength of 9.5%, Luszki calculated that nine times as many blacks were executed as whites. See *id.* at 109.

114. See *supra* note 97; see also Colonel N.E. Felder, *A Long Way Since Houston: The Treatment of Blacks in the Military Justice System*, 8 ARMY LAW. 9 (1987) (reporting that 35 soldiers, all African-American, were executed).

115. Indeed, Sir James Grigg of the British War Office claimed that such statistics revealed that African Americans had a natural propensity for crimes of sex and violence. See REYNOLDS, *supra* note 71, at 232.

116. See WILLIAM MANCHESTER, *AMERICAN CEASAR* 41-42 (1978). For example, General Douglas MacArthur grew up in a family with a strong Southern tradition and his second wife, Jean Faircloth, was a member of the United Daughters of the Confederacy. See *id.* at 178; see also FONER, *supra* note 74, at 149; LUSZKI, *supra* note 51, at 101.

117. See *supra* notes 83-84 and accompanying text.

that the townspeople fabricated a story of an assault on a white woman by a black soldier and that they instigated a confrontation that led to the shooting death of a bartender.¹¹⁸ A few years later, Jack Johnson drew national contempt as much for his affairs and marriage to white women as for his status as an African American boxing champion. In connection with his relations with white women, he was targeted for prosecution under the Mann Act in 1912 and convicted the following year.¹¹⁹ Through 1922, mob lynchings of African Americans generally remained above fifty per year.¹²⁰ In the summer of 1917, several United States cities, including Chicago, East St. Louis, New York, Newark, Omaha, and Waco, among others, witnessed race riots.¹²¹ Also in 1917, interracial tension stemming from Jim Crow and the refusal to abide with the laws by the African American soldiers of the 24th Infantry resulted in their beating and harassment by the Houston police. One soldier suffered a pistol-whipping and that incident escalated into melee between soldiers and white citizens. Echoing the Brownsville Affray, the black soldiers were arrested and court-martialed *en masse*. Thirteen of the sixty-three soldiers tried were sentenced to death and hanged just eight days after sentencing and without opportunity for review of the trial.¹²²

The WWI experiences of African Americans would galvanize a stronger movement for equality,¹²³ but no significant change was imminent and African Americans would continue to suffer from discrimination in both civilian and military courts. Prior to the United States entry into WWII, Americans lived through the series of trials of nine young African American men accused and convicted of raping two white women in Scottsboro, Alabama—even after one of the women recanted her accusation.¹²⁴ In 1944, forty-four African American sailors would be court-martialed for mutiny when they said they were afraid to load ammunition following an explosion that

118. See BARBEAU & HENRI, *supra* note 76, at 16-17; BLACKS IN THE MILITARY, *supra* note 78, at 60-64.

119. See AL-TONY GILMORE, *BAD NIGGER! THE NATIONAL IMPACT OF JACK JOHNSON* 95, 118-19 (1975) (discussing the national impact of Johnson's conduct and the subsequent trial).

120. See SOUTHERN COMMISSION ON THE STUDY OF LYNCHING, *LYNCHINGS AND WHAT THEY MEAN* 73 (1931). Table I compiles the lynchings of whites and Blacks from 1889 to 1929. See *id.*

121. See BARBEAU & HENRI, *supra* note 76, at 23.

122. See *id.* at 29. Sixteen additional soldiers were sentenced to death and six of these soldiers were executed. See *id.*

123. For example, after the 1941 March on Washington African American activists would gain minor ground when President Roosevelt issued Executive Order No. 8802 to eliminate discrimination in the defense industry.

124. See JAMES GOODMAN, *STORIES OF SCOTTSBORO: THE RAPE CASE THAT SHOCKED 1930'S AMERICA AND REVIVED THE STRUGGLE FOR EQUALITY* xi-xii (1994) (introducing the events and the three main viewpoints arising from the events).

killed 250 of their fellow seamen. The military tribunal interpreted their expression of fear as a refusal to obey an order to load the ammunition.¹²⁵ In his study of the trial of six African American soldiers for rape of two white members of the Army Nurse Corps in New Guinea, Walter Luszki commented on the shortcomings of the investigation and legal defense that had an impact on the fairness of the trial, which cost the soldiers' their lives.¹²⁶ Lilly and Thomson also cite the lack of competent defense and a tradition of sexual racism for the disproportionate number of African Americans executed in England during WWII.¹²⁷

The Army's statistics from WWII also showed that African American soldiers accounted for 76.8% of the rapes in France, while accounting for 35.8% in Germany and 33% in England.¹²⁸ In the Army's discussion of rape during the "French Phase," which began on D-Day, the JAG notes that American "soldiers found themselves suddenly placed in a quite different environment. The people spoke a strange tongue, their social customs and conditions were, in many respects, new and different. From four years of occupation, they arose joyously [sic] to welcome their liberators."¹²⁹ The French people had extended hospitality to the African American regiments in WWI and the French military had decorated a number of African American soldiers.¹³⁰ In the earlier war, French people welcomed African American soldiers without hesitation and resented the official American efforts to infect France with the mean-spirited racism they brought and imposed.¹³¹ Assuming the French people's attitude toward African American soldiers remained respectful in WWII, one could conclude that white Americans continued to respond negatively to relationships among black soldiers and French women. American GIs' attitudes appeared to have changed very little as evidenced by their behavior in England where white women's welcoming reception of African American GIs induced resentment among many white

125. See FONER, *supra* note 74, at 169.

126. These included a faulty investigation, coerced confessions, and inadequate defense. See LUSZKI, *supra* note 51, at 75-86.

127. See Lilly & Thomson, *supra* note 83, at 262-63 (discussing how racism exists in the process of United States executions of soldiers during WWII in England).

128. See JAG ETO HISTORY, *supra* note 98, at 13.

129. *Id.* at 237 (discussing the patterns of rape cases.)

130. See FLORETTE HENRI, BITTER VICTORY: A HISTORY OF BLACK SOLDIERS IN WORLD WAR I 99-101 (1970) (discussing the many men and regiments who received medals for heroic deeds in France, including more than 100 soldiers who received the Croix de Guerre).

131. See HUNTON & JOHNSON, *supra* note 33, at 182-97 (1920) (discussing the authors' experiences in France with the Y.M.C.A. and describing the welcoming atmosphere and attitudes of the French people they encountered).

American GIs, which led to harassment, brawls, shootings, and killings.¹³² Thus, charges of rape of white women by black soldiers were raised in circumstances that have similar uncertainties with regard to military justice as those existing in England and New Guinea. Such bias can account for the disparity in the number of rape charges brought against African American GIs in France.

C. Marriage

If relationships involving prostitution and rape were officially discouraged by military policy because they were viewed as immoral, then marriage would seem to be a relationship to be encouraged. Until WWII, the military neither forbid nor encouraged marriage. In 1896, Brigadier General William Dunn noted that an order *forbidding* a soldier to contract marriage would be an unlawful command.¹³³ In 1939, youthful officers were denied the privilege to marry.¹³⁴ The justification for the prohibition was that marriage was a financial burden and preoccupation with the problem of supporting a wife decreased his value to the government.¹³⁵ The Army's position on marriage changed under the War Department's Operating Circular No. 179 which stated, "No military personnel on duty in any foreign country or possession may marry without the approval of the commanding officer of the United States Army forces stationed in such foreign country or possession."¹³⁶ Under this order, a commanding officer could and did forbid certain marriages.

The main justification for denying marriage under this order was the military's interest in maintaining discipline and morale. The military does not want its members distracted by personal problems that arise in military marriages, such as a lengthy separation from family. In addition, policymakers believe the stress of military service during war leads to hasty and careless decisions. These decisions are more complicated when they involve cross-cultural or interracial relation-

132. See Lilly & Thomson, *supra* note 83; SMITH, *supra* note 36, at 133 (quoting a white sergeant, "Every time so far that we have seen a nigger with a white girl we have run him away. I would like to shoot the whole bunch of them").

133. See Lt. Martin Drobac, *Regulation of Marriage Overseas*, 15 JAG J. 183 (1961); see also Richard B. Johns, *The Right to Marry: Infringement by the Armed Forces*, 10 FAM. L.Q. 357, 359-60 (1977).

134. See Act of July 25, 1939, 53 Stat. 1074 (1939). The Secretary of War was authorized to revoke the commission of any officer who married within one year after the date of receiving his commission.

135. See Sen. Rep. 1190 to accompany S2380, 77th Cong. 2d Sess. (Mar. 23, 1942) (statement of Sec. of War Stimson commenting on a bill to suspend all prohibitions against marriage for the duration of the war.)

136. Op. Circ. No. 179, June 8, 1942, National Archives, RG 165 Entry 418 Box 470.

ships. Apart from the anticipated problems stemming from social and cultural differences, couples could also encounter legal impediments to their marriages. Through WWII, thirty states had anti-miscegenation laws on the books. Additionally, the military's marriage restriction served to protect the policy objectives of federal laws governing military benefits and immigration.¹³⁷ In the case of overseas marriage, restrictive immigration laws were formidable obstacles for many couples.¹³⁸

Before WWI, marriages arising out of military presence in foreign countries appear to be influenced most by social norms. Taboos against interracial marriage, reinforced by state laws and eugenicists' beliefs, created a strong case against interracial marriage. By the time of the Spanish-American War, the Supreme Court had weighed in against interracial relationships with its decision in *Pace v. State of Alabama*.¹³⁹ African American soldiers reportedly married Cuban women and Filipinas,¹⁴⁰ but the record is unclear about marriages among white soldiers. One might guess that very few marriages occurred between white soldiers and Filipinas since the "dark-skinned" Filipinos were viewed as savages, and according to one correspondent, "the white soldiers, unfortunately, got on badly with the natives."¹⁴¹ In Haiti, all of the Marines were white and other Americans treated the few who married Haitian women as outcasts.¹⁴²

137. Military courts have upheld legal challenges to the marriage restrictions under the broad Constitutional authority delegated to commanding officers. See *U.S. v. Parker*, 5 M.J. 922 (1978); *U.S. v. Wheeler*, 30 C.M.R. 387 (1961); *U.S. v. Levinsky*, 30 C.M.R. 541 (1960).

138. The primary provisions to have an impact on overseas marriage were the Asian exclusion and the quota restrictions. The impact of these provisions following WWII was diminished by the enactment of the War Brides Act.

139. 106 U.S. 583 (1882) (upholding Alabama's statute punishing interracial adultery and fornication against an equal protection challenge).

140. See WILLARD B. GATEWOOD, Jr., "SMOKED YANKEES" AND THE STRUGGLE FOR EMPIRE: LETTERS FROM NEGRO SOLDIERS, 1898-1902, 184 (1987) (at least two dozen Negro soldiers married "Cuban señoritas"). Capt. Crumbley of the 49th Infantry wrote about business opportunities for African Americans in the Philippines and stated: "[a]s a rule they are well liked by the peaceable natives and many of them will ask for their discharges with a view of staying over here, and will marry native women as soon as they are free of Uncle Sam." *Id.* at 296. Era Bell Thompson estimated that "more than 1,000 blacks remained, married indigenous women and made the Spanish-speaking islands their permanent address." Era Bell Thompson, *Veterans Who Never Came Home*, EBONY, OCT. 1972, at 104. A handful of African American soldiers defected to fight with the Filipino rebels, the most notorious was David Fagen. See Michael C. Robinson & Frank N. Schubert, *David Fagen: An Afro-American Rebel in the Philippines, 1899-1901*, 44 PAC. HIST. REV. 68 (1975).

141. BLACK AMERICANS, *supra* note 87, at 280 (quoting Stephen Bonsal). Gatewood also quotes several other reports of racial prejudice among white soldiers who viewed and treated Filipinos the same as "niggers." See *id.* at 281.

142. See SCHMIDT, *supra* note 57, at 140.

Approximately 140,000 African Americans would serve in France during WWI. Military officials did not actively prohibit marriage among GIs, but they did make it difficult for African Americans to socialize with the French. The Secretary of War and the Judge Advocate General expressed reluctance to prohibit marriages among French women and GIs, especially when the women became pregnant.¹⁴³ The Army did not keep statistics on the number of marriages although one officer estimates that between one and two thousand African American soldiers married French women.¹⁴⁴ I would speculate that some number of these soldiers returned to France. The combination of restrictions on social interaction and the improbability that a commanding officer would authorize marriage, the relentless humiliation inflicted by white Americans, the hostile social climate back home, and the relatively positive reception in France may have influenced a black soldier to return to France and join the African American expatriate community.¹⁴⁵

After the implementation of marriage restrictions in WWII, one might expect that the number of marriages would be relatively low. But, the military would experience an explosion in the number of war-bride relationships because of the huge number of Americans who served overseas during and immediately after the war.¹⁴⁶ Many of the war-bride marriages involved intra-racial relationships formed in Europe and Australia among white GIs and local women. Violence and harassment continued to plague soldiers of color and their ability to interact with European women. Commanders who wanted to discour-

143. See Letter from Sec. of War Newton D. Baker to Hon. James W. Wadsorth, Jr., in Sen. Rep. No. 295, *Marriage of Persons in Military or Naval Forces of the United States in Foreign Countries*, 66th Cong., 1st Sess., Nov. 3, 1919. Lt. Col. Albert B. Kellogg compiled several cases dealing with marriage during WWI. According to this report, the military denied permission to marry in one case involving pregnancy and an officer risked court-martial if he married a German woman in violation of the Army's nonfraternization policy. See Albert B. Kellogg, *Marriages of Soldiers* 1, Hist. Sec. USAWC, July 1942; see also *supra* note 33.

144. See Lieut. William N. Colson, *The Social Experience of the Negro Soldier Abroad*, MESSENGER, Oct. 1919, at 26, 27. Nina Mjagkij examined WWI war brides and estimated a total of 10,000 marriages between members of the AEF and European women. Nina Mjagkij, *Forgotten Women: War Brides of World War I*, 32 AMERKASTUDIEN/AM. STUD. 191, 191 (1987).

145. See TYLER STOVALL, *PARIS NOIR: AFRICAN AMERICANS IN THE CITY OF LIGHT* 1-24 (1996).

146. Twelve million Americans served in the military during WWII. See N.Y. TIMES 1999 ALMANAC 149 (John W. Wright ed., 1997). The relationships developed in at least sixty-one countries spanning five continents. Estimates of the actual number of marriages range from 100,000 to 750,000. Most marriages occurred between GIs and women in Britain, Australia, Continental Europe, China, The Philippines, and Japan. See Ota, *supra* note 27. The INS reports that nearly 150,000 Asian wives of United States citizens entered the United States between 1945 and 1970. Of these, over 55,000 came from Japan and nearly 14,000 from Korea. See INS Annual Reports 1945-1970.

age interracial relationships from further development could simply transfer the soldier.¹⁴⁷ The Court of Military Appeals struck rules with excessive requirements before permission to marry could be granted.¹⁴⁸ Nevertheless, commanders had many reasons for denying permission to marry and they could deny permission with impunity. A commanding officer's, or in some cases a chaplain's, subjective assessment of the probable success of a marriage was the primary consideration before granting permission. The commanding officer's discretionary decision determined the viability of an interracial marriage and the ability of a foreign woman to assimilate into American society. The officer could determine that based on anti-miscegenation laws, the marriage would not legally survive.¹⁴⁹ Several of the western states with anti-miscegenation laws barred marriages between whites and Asians, and all of the states with anti-miscegenation laws barred marriages between whites and Blacks.¹⁵⁰ Even if the GI was headed to a state without an anti-miscegenation law, the officer or chaplain could project his own misgivings about interracial marriage and refuse permission because he did not believe the couple could survive the difficulties they would face at home. If the immigration laws would not allow the bride to immigrate to the United States, the commander could likewise determine the marriage had little chance of success. The key ground for inadmissibility affecting war brides was the Asian exclusion provision, but other women were barred from admission to the United States on the ground that they were security risks.¹⁵¹

147. See *ELFRIEDA BERTHIAUME SHUKERT & BARBARA SMITH SCIBETTA, WAR BRIDES OF WORLD WAR II* 29 (1988) (discussing a Chinese American soldier who was transferred because of his race after being denied permission to marry an English woman he met in Manchester).

148. See *United States v. Nation*, 26 C.M.R. 504, 508 (1958) (holding the requirements for marriage to be too broad and unreasonable to sustain the prosecution of a sailor for marrying a Filipina woman without permission). This case was decided outside of the time frame of this essay, but offers some guidance regarding the limits that a commanding officer could go to before infringing on military personnel's private right to marry. In this case, the sailor could not comply with the numerous requirements before permission to marry would be granted. The requirements included a six-month waiting period, detailed disclosure of financial affairs, an affidavit of parental consent, and an affidavit concerning membership in subversive organizations. See *id.* at 506-07.

149. See, e.g., 24 Op. LA Att'y Gen. 240 (1949) ("A marriage in another state between a person of the white race and a person of the colored race who is domiciled in Louisiana is not recognized in Louisiana as a valid marriage.").

150. See *DAVID H. FOWLER, NORTHERN ATTITUDES TOWARDS INTERRACIAL MARRIAGE*, 339-439, app. A (1987).

151. See, e.g., *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 552 (1950) (denying admission to the United States on security grounds).

IV. CLERESTORY¹⁵²

Unlike prior military operations in countries populated predominantly by people of color, the war and occupation in the Pacific yielded a significant number of interracial marriages involving white soldiers. At least part of the reason for the large number is the length of the occupation. However, comparing the seven-year occupation of Japan to the nearly twenty-year occupation of Haiti raises questions regarding white soldiers' willingness to intermarry with Japanese women and not with Black women. The cultural gaps between Americans and Japanese were arguably wider than the gaps between Americans and Haitians.¹⁵³ The deep level of hostility between the United States and Japan was not a factor preceding Marine Corps arrival in Haiti. Both of these factors would seem to facilitate a closer relationship among Haitians and Americans.

A few factors explain the disparity in intermarriage. Foremost would be the numbers. The occupation troops numbered around 2,000 in Haiti and around a half million in Japan.¹⁵⁴ In addition, after the Marines gained control of Haiti and with the diversion of Marines to Europe during WWI, their numbers dropped to approximately 600.¹⁵⁵ The Japanese had suffered defeat at the American's hands and were not in the position to resist.¹⁵⁶ On the other hand, the Marine occupation of Haiti was more of an imperialist intervention in a country that had a history of anti-colonial revolt and a portion of the population committed to resisting American intervention. Race differences also played a role. That is, the salience of race in marital relationships in the United States made it impossible for the Marines in Haiti to overcome the overwhelming repugnance of black/white intermarriage.¹⁵⁷ Rather than engaging in a moral sexual relationship, the Marine participated in immoral activity and reinforced his white, heterosexual male American superiority.

Of the three sexual relationships discussed in this essay, marriage is the only moral relationship.¹⁵⁸ But, anti-miscegenation laws disquali-

152. The highest level of the nave or chancel elevation. See *Lexicon, supra* note 13.

153. For example, written language in Haiti used an alphabet and Haiti had stronger historical ties to Europe.

154. See *MOSKIN, supra* note 56, at 177.

155. See *id.* at 178.

156. The Japanese were encouraged to cooperate. See *MANCHESTER, supra* note 116.

157. Also, white men may have felt they had free access to black women's sexual services, in the same way that slave masters had access. Marriage imposes costs—both economic and social—so why bother?

158. Of course, prostitution, rape and marriage are not the exclusive means of sexual relationships. Many GIs were involved in nonmarital long-term relationships that the parties considered

fied certain marriages by defining interracial marriage as immoral because it violates natural law and "leads to a corruption of races."¹⁵⁹ Anti-miscegenation laws attempted to maintain white racial purity in support of white racial superiority.¹⁶⁰ This connection between whiteness and natural law and the associated rhetoric of social Darwinism promoted and practically assured the ingrained belief in white superiority.

Both rape and prostitution are immoral, but their existence is indispensable to the notion of white heteropatriarchal privilege. The violence of war does not justify rape, but war creates conditions that foster its toleration. This toleration secures its use as a means of degrading and controlling women and plays on paternalistic patriarchal values to humiliate men who were frequently forced to watch the violence. In war, white soldiers could assert their power over enemy women and men. Moreover, the potential power of sexual violence was marshaled for use in the rape mythology of African American men. The myth supplemented regulations that discouraged legitimate relationships among African American soldiers and European women. The rape myth justified violent intervention and resulted in the disproportionate prosecution of African American soldiers (and civilians) and thereby served to reinforce white moral superiority.

Prostitution defines immoral women thereby creating at least two categories: moral women and immoral women. The definition of immoral women based on prostitution is intertwined with historical distinctions based on race, nationality, and class. The anti-prostitution campaign associated with the military also reinforced a definition of American masculinity that excluded African Americans because it left the impression that they were unable to control their sexual appetite through wholesome activity. By characterizing African Americans as

moral. *See, e.g., id.* (discussing how General MacArthur had a Eurasian girlfriend he supported while he was in Washington, D.C.). But given the military's ability to prosecute GIs for adultery and wrongful cohabitation, marriage is the only moral relationship sanctioned by law. The Supreme Court has also commented on the morality of marriage. *See* *Maynard v. Hill*, 125 U.S. 190, 205 (1888) (stating that marriage creates the most important relation in life and has more to do with the morals and civilization of people than any other institution).

159. *The West Chester & Philadelphia R.R. Co. v. Miles*, 55 Pa. 209, 213-14 (1867).

160. Numerous scholars have examined the purposes and affects of anti-miscegenation law. *See, e.g.,* A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 *Geo. L.J.* 1967 (1989); Charles F. Robinson, II, *The Antimiscegenation Conversation: Love's Legislated Limits (1868-1967)* (Ph.D. Dissertation, University of Houston); Byron Curti Martyn, *Racism in the United States: A History of the Anti-Miscegenation Legislation and Litigation* (Ph.D. Dissertation, University of Southern California) (1979); Peggy Pascoe, *Miscegenation Law, Court Cases, and Ideologies of "Race" in Twentieth-Century America*, 83 *J. Am. Hist.* 44 (1996).

immoral, the campaign thereby used and reinforced the rape myth and reaffirmed white moral superiority.

Nevertheless, the military sent service members mixed signals that undermined the morality message meant to curb prostitution by sometimes unrealistically insisting on abstinence from commercial sex while at other times encouraging and supporting it. Though many military leaders outwardly scorned prostitution, they believed prostitution acted like a buffer and justified it by claiming that the availability of prostitution protected women who might be vulnerable to engaging in premarital or extramarital sex during war. In addition, the military claimed that the availability of commercial sex provided an outlet for men's natural sexual urges that prevented rape. Without a firm stance against it, the military fueled American soldiers' consumption of commercial sex.

This ambivalent approach reflects the underlying hypocrisy. The service member's participation in prostitution is characterized as natural, while the woman's participation and the woman are characterized as immoral, not economically necessary, coerced or natural. As such, the military's attitude toward prostitution reinforced the heteropatriarchal imperative that denies women economic and sexual agency and dehumanizes them by leaving them vulnerable to sexually transmitted disease, exploitation, and rape at the hands of United States soldiers. Plus, prostitution's characterization as illicit and immoral provides a contrast for legitimate marital sexual relationships that further reinforces the marriage privilege and acts as a disqualification of foreign women, many of whom are women of color, for entry into the American community via marriage to a United States soldier.

In addition to discouragement caused by the immorality attached to interracial marriages, military regulation and immigration laws further obstructed access to the privilege of marriage, especially when the marriages involved Asian Pacific Islander ("API") women. In spite of these obstacles, thousands of GIs sought permission to marry API women.¹⁶¹ Once granted permission to marry or once married without permission, hundreds of GIs were forced to petition for private bills from Congress in order to bring their families to the states.¹⁶²

161. Some of the GIs who married API women were African American or Asian American. These couples did not pose a threat to the racial order in the same way that white/Asian or white/Black couples might.

162. The private bill enacted a law granting a personal exemption from immigration restrictions. See BERNADETTE MAGUIRE, *IMMIGRATION: PUBLIC LEGISLATION AND PRIVATE BILLS 1-3* (1997). Private bills enacted by Congress were at their highest level in the early 1950s. See *id.* at 70. Most of the enactments concerned quota limitations and racial exclusion. See *id.* at 71-79.

These romantic sexual relationships had a legitimizing force.¹⁶³ That is, the approved petitions described relationships that promoted patriarchal nuclear family values and assured the continuation of the dominance of an American identity as white, heterosexual, male, and Christian.¹⁶⁴

The racial composition of the war bride couples also illustrates the power of white privilege in the formation of race in the United States. The entry of Asians into the United States and their renewed entry into American consciousness in the late 1940s and early 1950s marked the beginning stages of the API journey to “model minority” status. By pledging allegiance to American values, APIs could be transplanted to the United States thereby shedding some of their foreignness. API overachievement puts them on the road towards whiteness. APIs never reach the all-American white status, but they serve the purpose of a foil to African American complaints of racism. More importantly, they help preserve the domain of full citizenship rights that comes with substantive equality to those who can identify as not foreign and not black.

V. CONCLUSION

In this essay, I have attempted to illustrate the complex operation of American heteropatriarchal hegemony by examining interracial relationships that were affected by a web of laws governing marriage, the military, and immigration. The relationships show that the laws rely on moral justifications inconsistently. The regulation of the sexual relationships also illustrates the underlying privileging at work by showing the ways that prostitution, rape, and marriage are linked through race, gender, class, and nationality. The privileging produces a particular standard for citizenship that relies on sexism, racism, heterosexism, classism, and nationality. Given this privileging, consis-

163. In George Lipsitz's discussion of racial formation, he asserts that the representation of interracial romantic relationships depicted in films such as *The Teahouse of the August Moon* and *Sayonara* “make unequal social relations seem natural and therefore necessary.” George Lipsitz, “*Frantic to Join . . . the Japanese Army*”: *The Asia Pacific War in the Lives of African American Soldiers and Civilians*, in *THE POLITICS OF CULTURE IN THE SHADOW OF CAPITAL* 323, 347 (Lisa Lowe & David Lloyd eds., 1997). Conversely, these real relationships seem to stand for the idea that unequal social relations make interracial romantic relationships seem normal.

164. See Ota, *supra* note 27 (discussing the private bill petitions). Granting permission to immigrate should not lead you to conclude that the couples were welcomed with open arm when they settled in the United States. See Jan Breslauer, *Hues and Cries for Playwright Velina Hasu Houston*, L.A. TIMES, July 7, 1991, at 3 (noting that “[t]he society at large did not welcome the Japanese women”). But see Gerald J. Schnepf & Agnes Masako Yui, *Cultural and Marital Adjustment of Japanese War Brides*, 61 AM. J. SOC. 48 (1955) (noting that severe cultural conflict were not found and that cooperation and adaptation were common).

tent application of moral justifications in a diverse community can fail to eliminate inequality. The buttressing of privilege illustrated here complicates the way we view equality based on the homogenization of difference and requires that we rethink the underlying moral justifications.

