

CHIMERA OR JACKALOPE? DEPARTMENT OF DEFENSE EFFORTS TO APPLY CIVILIAN SEXUAL HARASSMENT CRITERIA TO THE MILITARY

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“If one guy looks at you but you like him, it’s flirting. If he gives you the ‘creeps,’ it’s sexual harassment.”¹

“A pass is different from harassment.”²

I. INTRODUCTION

Criteria developed to proscribe sexually harassing behavior, as defined by Title VII of the Civil Rights Act of 1964,³ are being used in the armed forces to which the Act does not apply.⁴ This application of the Act is pernicious and helps neither the cause of military women nor the legitimate goals of the armed forces. This usage of Title VII, like any challenge to the present regulatory regime, could be viewed as a threat to military women’s status. Consider, how-

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This essay is dedicated to the late Lizann M. Longstreet, Captain, USN Res., staff attorney with the U.S. Court of Appeals for the Armed Forces. She may not have agreed, but would have enjoyed the discussion. Thanks to Clare Dowling of Rep. Carolyn Maloney’s office and Andrea Stone of USA Today who first raised the topic with me. Thanks also to Women in International Security at the School of Public Affairs, University of Maryland for their December 1997 program on Sexual Harassment and Gender Discrimination in the Military, to the Independent Women’s Forum for their 1998 panel discussions on Sexual Harassment, and to Lisa Daniel, Army Times Corp., Colonel Barbara Mahoney Lee, USA, Office of the Assistant Secretary of the Army (Manpower and Reserve Affairs), the National Women’s Law Center, Yvette Brown, research librarian, Catholic University Law School, and Bernadette Lamson, former Assistant County Attorney of Montgomery County, Maryland for information supplied. None of those thanked have read this paper or were aware of its theme.

1. 1 SECRETARY OF THE ARMY, SENIOR REVIEW PANEL REPORT ON SEXUAL HARASSMENT, 81-82 (July 1997) (citing the response of a female trainee) [hereinafter 1 SENIOR REVIEW REPORT].

2. Sandra McElwaine, *A Different Kind of War*, USA WEEKEND, Oct. 3-5, 1997, at 5 (quoting Lt. Gen. Claudia Kennedy, USA).

3. 42 U.S.C. § 2000e; see also *Doe v. Garrett*, 903 F.2d 1455, 1458 (11th Cir. 1990); *Kawitt v. United States*, 842 F.2d 951, 953 (7th Cir. 1988).

4. Section 717(a) of Title VII extends the Act’s protection to federal employees including those in the military departments. 42 U.S.C. § 2000e-16(a) (1994); see also *Roper v. Department of the Army*, 832 F.2d 247 (2d Cir. 1987); *Stinson v. Hornsby*, 821 F.2d 1537 (11th Cir. 1987); *Salazar v. Heckler*, 787 F.2d 527 (10th Cir. 1986); *Gonzalez v. Department of the Army*, 718 F.2d 926 (9th Cir. 1983); *Johnson v. Alexander*, 572 F.2d 1219, 1224 (8th Cir. 1978) (excluding uniformed military personnel from the Act’s coverage by a military exception). Cf. *Carlson v. United States Dep’t of Health and Human Servs.*, 879 F. Supp. 545, 547 (D. Md. 1995) (discussing whether uniformed members of the Public Health Service are subject to the “military exception”).

ever, a widely accepted social fact about late Twentieth Century United States society that was articulated by philosopher Richard Rorty in "A Cultural Left":

[T]he casual infliction of humiliation is much less socially acceptable than it was during the first two-thirds of the century. The tone in which educated men talk about women, and educated whites about blacks, is very different from what it was before the Sixties. Life for homosexual Americans, beleaguered and dangerous as it still is, is better than it was before Stonewall. The adoption of attitudes which the Right sneers at as "politically correct" has made America a far more civilized society than it was thirty years ago.⁵

If civility - politeness or courtesy based on mutual respect - is a legitimate social goal, then Rorty's broad statement should be a matter for celebration. Yet, what Rorty does not say is equally important. First, Rorty speaks to behavior which is no longer socially acceptable, but he does not advocate criminalizing that behavior. Second, he speaks about "the educated," - dare I say the elite? - not the *hoi polloi*. Finally, Rorty discusses American society as a whole, and not the smaller peculiar community, the armed forces, which is the focus of this article. The Supreme Court, for more than a century, has acknowledged that while the soldier is also a citizen,⁶ the military, as a "specialized community governed by a separate discipline"⁷ may regulate or permit service members' conduct in ways which would be constitutionally impermissible in civilian society.⁸ This premise underlies any judicial interpretation of service member's rights and du-

5. RICHARD RORTY, *ACHIEVING OUR COUNTRY* 81 (1998) (Stonewall is widely considered the first unifying event for the homosexual community in the pursuit of equal rights).

6. See JOHN M. LINDLEY, *A SOLDIER IS ALSO A CITIZEN, THE CONTROVERSY OVER MILITARY JUSTICE, 1917-1920* (1990); Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181 (1962).

7. *Parker v. Levy*, 417 U.S. 733, 743 (1974) (quoting *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953)).

8. See, e.g., *Goldman v. Weinberger*, 475 U.S. 503 (1986) (upholding military refusal to permit a Jewish officer from wearing his yarmulke while in uniform). For a measured criticism of civilian judicial deference to military decision making, see Jonathan Lurie, *The Role of the Federal Judiciary in the Governance of the American Military: The United States Supreme Court and 'Civil Rights and Supervision' Over the Armed Forces*, in *THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES* 405, 405-30 (Richard H. Kohn ed., 1991). Lurie mistakenly describes the wearer of the yarmulke as a chaplain. See *id.* at 425. Critics who complain of the present military mindset against women - what one author has described as "androcentrism," see Kathryn Abrams, *Gender in The Military*, 56 LAW & CONTEMP. PROBS. 217, 222 (Autumn 1993), acknowledge that the doctrine of judicial deference effectively bars judicial review of what would otherwise be challenged as discriminatory practices. See LINDA BIRD FRANCKE, *GROUND ZERO: THE GENDER WARS IN THE MILITARY* 279 n.70 (1997); see also JUDITH HICKS STIEHEM, *ARMS AND THE ENLISTED WOMAN* 109 (1989). Because the concept of a separate community has social science implications, it also has consequences for legal analysis. Thus, when a Duke University law professor recently compared statistics concerning the sexual behavior of members of the armed forces, see Madeline Morris, *By Force of Arms: Rape, War and Military Culture*, 45 DUKE L.J. 651 (1996), to civilian statistics, she did not refer to a study of national sexual practices which, two years earlier, concluded that "[t]he largest group of individuals who are likely to be sexually active are in college, the military, or prison. Because each of these institutions has a substantial influence on the attitudes and experiences of their members, it would be wise to design and execute specialized research projects to study these groups separately." EDWARD O. LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* 553 (1994).

ties.

Title VII of the Civil Rights Act of 1964 is the fundamental law that lays the foundation for civil, not criminal, liability for sexually harassing discriminatory behavior in commercial, rather than social, situations.⁹ This article addresses aspects of Title VII case law that focuses on sexual harassment in the workplace and not on other forms of gender based discrimination. In the workplace context, the statute has been interpreted to apply to two different situations: the quid pro quo proposal where sexual favors are sought in return for favorable treatment, and the “hostile work environment” where the recipient of sexually charged behavior claims that it has unreasonably altered her working conditions.¹⁰ The most important characteristics of quid pro quo claims are that 1) they may be asserted even though the plaintiff originally consented to the proposal,¹¹ and 2) they impose strict liability on the employer of the harasser.¹² Alternatively, hostile work environment claims require some degree of employer knowledge, actual or constructive, before liability can be imposed.¹³ These claims may be categorized as involving either 1) touching¹⁴ or 2) “climatic” situations in which, over time, the recipient is confronted with unwelcome sexually oriented behavior.¹⁵ Also, in contrast to quid pro quo claims, the hostile work environment plaintiff may be a bystander.¹⁶ For example, a female employee at an office work station who is exposed to sexual, scatological conversations by persons on

9. Section 703(a) of Title VII provides: “It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment, because of an individual’s race, color, religion, sex or national origin.” 42 U.S.C. § 2000e (1994); see also SEX DISCRIMINATION AND SEXUAL HARASSMENT IN THE WORK PLACE (Lawrence Solotoff & Henry S. Kramer eds., 1998) [hereinafter Solotoff & Kramer].

10. The distinction, first made in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), was recently reaffirmed in *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998). Same sex discriminatory behavior, the subject of *Oncale v. Sundowner Offshore Services, Inc.*, 118 S. Ct. 998 (1998), could fall within Department of Defense prohibitions. In the interest of space and prose style, I will assume that the target of behavior is female and that the actor is a male.

11. 29 C.F.R. § 1604.11(a); see generally SUSAN M. OMILIAN & JEAN P. KAMP, SEX-BASED EMPLOYMENT DISCRIMINATION § 22:13 (1998) [hereinafter OMILIAN & KAMP].

12. See Solotoff & Kramer, *supra* note 9, § 3.02[2].

13. See OMILIAN & KAMP, *supra* note 11, § 23:02. As to the Supreme Court’s recent creation of an employer’s affirmative defense of reasonable care, see *Faragher*, 118 S. Ct. at 2292-93, and *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 2270 (1998).

14. An example of touching is assault and battery, in which one unconsented act may be sufficient to trigger employer liability. See *Tommka v. Seiler Corp.*, 66 F.3d 1295 (2d Cir. 1995).

15. “[In hostile environment cases], a showing of pervasiveness lessens the required showing of severity; conversely, a showing of severity lessens the required showing of pervasiveness.” Solotoff & Kramer, *supra* note 9, § 3.04[2] (citing *Trotta v. Mobil Oil Corp.*, 788 F. Supp. 1336 (S.D.N.Y. 1992)).

16. The term “bystander” is used in tort actions for negligent infliction of emotional distress to describe the witness whose actionable claim results from watching harm inflicted on another. For example, consider a mother’s claim against a driver who runs over her child. See John L. Diamond, *Dillon v. Legg Revisited: Toward a Unified Theory of Compensating Bystanders and Relatives for Intangible Injuries*, 35 HASTINGS L.J. 477 (1984); cf. Marcie Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L.L. REV. 1, 46-49 (1990) (discussing the tendency for female employees to become quasi-captive audience members of sexualized speech).

the other side of a partition who are unaware of her presence could bring a hostile work environment claim. Yet, this employee's claim is limited by Title VII which recognizes that not all speech is actionable. Demeaning and discriminatory words or actions, unrelated to the work place, may be, and are, condemned as boorish or discourteous, but may fall outside the statute's reach.¹⁷ For example, if getting "hit on" by another customer while shopping was defined as sexual harassment, then the term has no legal meaning.

II. THE SPECIALIZED COMMUNITY

Under the judge made military exception,¹⁸ if a military woman¹⁹ is the subject of workplace²⁰ harassment she is not able to assert the rights granted by Title VII. Instead, this situation is covered by a Department of Defense (DoD) Directive.²¹ Before considering the DoD Directive governing sexual harassment, however, one should consider the civil remedies available to non-military women. If the harasser's behavior constituted a tort, the civilian plaintiff typically would seek to hold the harasser's employer vicariously liable for harassing acts committed within the scope of employment.²² Alternatively, a military woman seeking to hold her employer, the United States, vicariously liable would assert her claim under the provisions of the Federal Tort Claims Act.²³ Her claim would fail, however, simply because she is a member of military. As a member of the military, her claim would be barred by the so-called *Feres* doctrine which precludes tort claims by military personnel injured "incident to service" by a federal tortfeasor.²⁴ The possibility that such suits could "call into question military discipline and decision making, [which] would itself require judicial inquiry into, and hence intrusion upon, military matters"²⁵ serves as justification for the doctrine. The distinction is vividly illustrated by the case of Kelly Theriot, a civilian lawyer at Madigan Army Medical Center at Fort Lewis Washing-

17. As indicated in the EEOC guidelines, not all discriminatory speech or conduct in the workplace violates Title VII; rather only behavior that unreasonably interferes with work performance or creates a hostile or offensive working environment is sexually harassing. See EEOC: Policy Guidance on Sexual Harassment, 405 Fair Empl. Prac. Man. (BNA) 6681 (Mar. 19, 1990).

18. See *supra* text accompanying note 4.

19. As the Department of Defense is composed of both military and civilian personnel, harassment may occur across these lines. Civilian men and women employed in, or by, the Department of Defense may be subject to sexual harassment. The claims of civilians would be adjudicated under procedures generally applicable to federal (executive branch) employees. See Solotoff & Kramer, *supra* note 9, §§ 1.12, 12. Civilian claims, even those resulting from the acts of military personnel, are not the subject of this paper.

20. See *infra* text accompanying notes 42-50 (defining "workplace").

21. See *infra* text accompanying notes 29-32.

22. See OMILIAN & KAMP, *supra* note 11, § 11.06. (explaining the doctrine of *respondeat superior*).

23. See generally 28 U.S.C. §§ 1346(b), 2401(b), 2402, 2671-80 (1994).

24. See *Feres v. United States*, 340 U.S. 135 (1950); see also JOHN M. STEADMAN ET AL., LITIGATION WITH THE FEDERAL GOVERNMENT § 13.105.1 (1994).

25. *United States v. Stanley*, 483 U.S. 669, 682 (1987). The same doctrine has been held by the Supreme Court to bar both common law and constitutional claims against the tortfeasor. See *Chappell v. Wallace*, 462 U.S. 296 (1983).

ton.²⁶ She accused a colonel (since promoted to general) of sexual harassment.²⁷ The Army settled her claim for \$500,000.²⁸ Had she been a military lawyer, the *Feres* doctrine would have precluded her compensable claim. In place of legal remedies, what does the Department of Defense offer?

The Department of Defense Directive²⁹ that addresses sexual harassment is “Department of Defense Military Equal Opportunity (MEO) Program.” The MEO program is intended to carry out a policy that “[u]nlawful discrimination against persons or groups based on race, color, religion, sex or national origin is contrary to good order and discipline and is counterproductive to combat readiness and mission accomplishment.”³⁰ It defines sexual harassment as:

A form of sex discrimination that involves unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

- a. Submission to such conduct is made explicitly or implicitly a term or condition of a person’s job, pay, or career, or
- b. Submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person, or
- c. Such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creates an intimidating, hostile, or offensive working environment.³¹

The DoD language is identical to the 1980 Guidelines issued³² by the Equal Employment Opportunity Commission (EEOC) when it declared sexual harassment a violation of Section 703 of Title VII. Several aspects of the Department of Defense replication of the regulation are noteworthy since the original EEOC regulation was intended to define the circumstances under which employer civil liability could be imposed.³³

The portion of the EEOC regulation relating to submission or rejection as a basis for employment decisions has very limited application to the military services. An example of a violation of the EEOC regulation in the civilian context would be if an employer told a job applicant that consenting to sexual relations (or other form of unwanted sexual behavior) was a prerequisite to obtaining and holding a position. The military analogue to this example would be a

26. See *General, Woman Settle Sex-Harassment Case*, THE WASH. TIMES, June 20, 1998, at A3.

27. See *id.*

28. See *id.*

29. DEPARTMENT OF DEFENSE, DIRECTIVE 1350.2, THE DEFENSE MILITARY EQUAL OPPORTUNITY PROGRAM (last modified May 7, 1997) <<http://web7.whs.osd.mil/pdf/d13502p.pdf>> [hereinafter DoD Directive].

30. *Id.* ¶ 4.2 In the interest of brevity, I will not summarize the organizational structures created by the Directive, its predecessors, and its implementation by each of the military services.

31. *Id.* ¶ E2.1.15.

32. See 29 C.F.R. § 1604.11 (1980).

33. See Solotoff & Kramer *supra* note 9, § 3.01[1].

similar offer extended by a recruiter. The civilian definition assumes that the harasser, unlike a military recruiter, has the authority to hire and retain an employee. As military recruiters do not have this authority, it is not surprising that research revealed no cases where a prospective enlistee complained that sexual cooperation was demanded as a condition for enrollment.³⁴ Thus, it is inappropriate to apply civilian provisions relating to hiring decisions by analogy to military recruitment.

The EEOC provision regarding submission as a term or condition of job, pay, or career has slight application to the military where formal job descriptions and career paths are defined by military bureaucracy and pay rates are set by Congress. In this context, harassing behavior in the military occurs when submission to, or rejection of, such conduct is used as a basis for career decisions. The Aberdeen, Maryland³⁵ and Great Lakes, Illinois³⁶ cases best exemplify this problem. In these cases, recruits reported that they were induced to have sex with their trainers in order to get good assignments or to ensure successful completion of a course.³⁷ It is noteworthy that, even in this context, there is a major distinction between the civilian employee who can rely on the concept of "constructive discharge," and claim compensation as the recipient of quid pro quo harassment,³⁸ and a uniformed member of the armed forces who cannot legally withdraw unilaterally from her military occupation. If she did so, she would be charged with the military crimes of Desertion or Absence Without Leave.³⁹ As a result, the doctrine of constructive discharge cannot be applied in the military context.

Finally, in the military context, the most problematic portion of the EEOC definition relates to sexually harassing conduct which has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive working environment. This paper will explore whether the EEOC formulae, which were intended to set the parameters defining a hostile workplace environment, will be useful in the military.

34. The closest incident, which could loosely be considered an analogue, occurred when an Air Force captain was convicted, dismissed and jailed for having sex with one of his ROTC cadets at the University of Texas and for having twice kissed another cadet on the mouth and threatening to prevent her graduation from training. See Julie Bird, *Ex-ROTC Instructor is Convicted*, AIR FORCE TIMES, May 5, 1997, at 2.

35. See Tom Bowman and Lisa Respers, *Many Aberdeen Issues Unresolved a Year Later*, BALTIMORE SUN, Nov. 8, 1997, at 1A.

36. See Amanda Vogt, *Navy Instructor's Court Martial Begins: Sex Misconduct Case 3d For Great Lakes*, CHI. TRIB., Sept. 15, 1998, at 1; David Southwell, *Didn't Want Sex With Supervisor*, CHICAGO SUN TIMES, June 4, 1998, at 18.

37. See *supra* notes 35-36; see also 10 U.S.C. § 885, 886 (1994).

38. Solotoff & Kramer, *supra* note 9, § 3.04[1].

39. See MANUAL FOR COURTS-MARTIAL UNITED STATES IV, ¶ 9, 10 (1998) [hereinafter MCM].

III. SETTING STANDARDS FOR CIVILITY⁴⁰ IN THE SPECIALIZED COMMUNITY

The DoD Directive explains that:

This definition [of sexual harassment] emphasizes that workplace conduct, to be actionable as “abusive work environment” harassment, need not result in concrete psychological harm to the victim, but rather need only be so severe and pervasive that a reasonable person would perceive, and the victim does perceive, the work environment as hostile or offensive.⁴¹

The Directive’s language is drawn directly from the 1993 Supreme Court decision in *Harris v. Forklift Systems, Inc.*,⁴² and, as such, is an accurate statement of the law. Whether it is helpful to an analysis of sexual harassment in the military is another matter. *Harris* was intended to guide courts in their charge to a jury called on to assess civil liability, but the Directive has a different purpose.⁴³ Its purposes, besides reissuing a prior Directive on the same topic, are to regulate the Department of Defense Military Equal Opportunity Program, provide for education and training in Equal Opportunity, provide standard terms for the program and to establish Department-wide standards for discrimination complaint processing and resolution.⁴⁴ The Directive’s explanation of harassment is directed not at a randomly selected jury, in conjunction with a “preponderance of the evidence” burden of proof and persuasion instructions, but, *inter alia*, to the Service Secretaries, to the chairman of the Joint Chief of Staff and to the commanders of the combatant commands⁴⁵ and other individuals neither randomly selected nor disinterested in the consequences, as a jury would be.⁴⁶

40. The term “civility” might suggest that I consider hostile environment claims to be trivial. That is not the case. Civility, as defined in the text accompanying note 5 *supra*, is a fundamental component of unit cohesion which social scientists consider to be the *sine qua non* of combat effectiveness. See Stanford Gregory, *Toward a Situated Description of Cohesion and Disintegration in the American Army*, 3 ARMED FORCES & SOC’Y 463 (1977); COMBAT EFFECTIVENESS: COHESION, STRESS, AND THE VOLUNTEER MILITARY, (Sam C. Sarkesian ed., 1980). One of the recurring themes in the Army’s 1997 Senior Panel Report was the effect of sexual harassment on unit cohesion. See *supra* note 1; 2 SECRETARY OF THE ARMY, SENIOR REVIEW PANEL REPORT ON SEXUAL HARASSMENT 80 (July 1997) [hereinafter 2 SENIOR REVIEW REPORT]; see also Leora N. Rosen and Lee Martin, *Sexual Harassment, Cohesion, and Combat Readiness in U.S. Army Support Units*, 24 ARMED FORCES & SOC’Y 221 (1997) [hereinafter Rosen & Martin].

41. DoD Directive, *supra* note 29, ¶ E2.1.15.3.

42. 510 U.S. 17, 23 (1993) (stating that “the alleged conduct need not cause injury or seriously affect” a plaintiff’s “psychological well-being” to qualify as an actionable “abusive work environment”).

43. See *id.* at 21-23 (discussing the standard to be applied in a Title VII case); Solotoff & Kramer, *supra* note 6, § 3.05[2]; see also Mark McLaughlin Hager, *Harassment as a Tort, Why Title VII Environment Liability Should be Curtailed*, 30 CONN. L. REV. 375-439 (1998) (criticizing the standard).

44. DoD Directive, *supra* note 29, ¶ 1.1-1.6.

45. *Id.* ¶ 2.

46. The definitions are used in any military EO investigation. For admittedly subjective assessments of the Army’s investigation of the sexual harassment claims against Sgt. Maj. Eugene McKinney, see Charles Gittins, *Show Trial*, NAT’L REV., May 4, 1998, at 28; Glen Skoler, *The Half-Told Story of Sgt. Maj. McKinney*, WASH. POST, Mar. 22, 1998, at C7. For an opposing view, see Andrea Stone, *Military’s Gender Battle Still far from Resolved*, USA TODAY, Mar. 16, 1998, at 4A (quoting Rep. Carolyn Maloney, (D)N.Y., commenting on women’s roles in the military).

Thus, “harassment,” a term intended to define the characteristics of behavior which would be “actionable,” (i.e. impose liability on employers), is used by the Department of Defense to define behavior which, if directed against a member of the armed forces, could not result in a finding of liability.

An additional peculiarity in the Directive is that “[w]orkplace’ [is defined] as an expansive term for Military members to include conduct on or off duty, 24 hours a day.”⁴⁷ This definition, while “expansive,” must be subject to some limitations, otherwise any offensive behavior could constitute harassment. The “incident to service” or “service connection” criteria, which have been used in other areas of military justice, could be useful for establishing “workplace” and limiting the breadth of the definition. In the context of tort injuries, federal courts have, for nearly half a century, held that injuries sustained “incident to service” are barred by the *Feres* doctrine.⁴⁸ Correspondingly, under military justice, only those offenses committed with a “service connection” may be subject to trial by court martial.⁴⁹ Thus, when the military investigates a claim of sexual harassment, these criteria - tort (“incident to service”) or military justice (“service connected”) - may prove useful for defining “workplace.”⁵⁰

Another problem with the Directive is that it does not include an analysis for two well-developed standards under civilian law: 1) the totality of the circumstances⁵¹ and 2) whether the employer knew or should have known of the behavior.⁵² These terms and concepts, which are central to Title VII claims, are absent from the Directive. In many cases, however, the Department’s efforts to apply, Title VII reasoning to instances of abusive behavior in the military would be appropriate if these standards were adopted.

Two recent cases, involving similar abusive behavior, illustrate the current differences between civilian and military legal regimes. In the civilian context, Capt. Tammy S. Blakey, a pilot for Continental Airlines sued her employer under Title VII and the New Jersey Law Against Discrimination.⁵³ She claimed that

47. DoD Directive, *supra* note 29, ¶ E2.1.15.3.

48. *Feres v. United States*, 340 U.S. 135 (1950). See *supra* text accompanying notes 23-24. Over the past half-century, courts have tried unsuccessfully to articulate the precise criteria necessary to establish when an injury is sustained incident to service.

49. Military courts have tried without success to define the conditions when an offense is “service connected” and therefore subject to trial by court martial. See *Solorio v. United States*, 483 U.S. 435, 435 (1987) (finding that the jurisdiction of a court martial dependent solely on accused’s status as a member of the Armed Services is not a “service connection”); *O’Callahan v. Parker*, 395 U.S. 258, 272-73 (1969) (holding that a military tribunal may not try a service man charged with a crime that has no “service connection”).

50. There is no clear answer as to which criteria would be used. As such, Army Staff Judge Advocates [SJAs] reported that “some commanders seem to lack understanding of what constitutes a hostile work environment,” 2 SENIOR REVIEW REPORT, *supra* note 40, at 97, while “[s]ome SJA suggest a separate article [in the UCMJ] for charging sexual harassment and or sexual misconduct. They also suggest clarification of the concepts of fraternization and hostile work environment.” *Id.* at 98.

51. See 29 C.F.R. § 1604.11(b) (1998).

52. See 29 C.F.R. § 1604.11(d), (e).

53. See Jerry DeMarco, *Pilot Wins \$1M in Cockpit Smut Suit*, THE RECORD, Oct. 17, 1997, at A1. The trial judge subsequently reduced the emotional distress award to \$250,000. See Lydia Barbara Bashwiner, *Emotional-Distress Damages Subject to Remittitur if Verdict is Unsupported by the Evidence*,

Continental failed to stop the practice of flight crews leaving behind pornographic pictures for incoming crews.⁵⁴ These pictures were glued to the bottom of cockpit drawers, in flight manuals, and behind panels marked with an X.⁵⁵ A jury awarded her \$500,000 for emotional distress and \$350,000 for lost salary.⁵⁶ This case illustrates that employers are not shielded from liability when a female employee is exposed to sex-related behavior which was traditionally part of the male working environment.⁵⁷

Meanwhile, First Lieutenant Julie Clemm, newly assigned to the 90th Fighter Squadron, deployed to Aviano Air Base Italy to patrol the no-fly zone in Bosnia, described similar harassing behavior.⁵⁸ Lt. Clemm complained to the Air Force Inspector General about male Squadron members who were permitted to display a naked female blowup doll at the Squadron Thanksgiving party, to leave sexually explicit magazines in the Alert Facility and the Alert vehicle, and to show sexually explicit films in the Operations Building.⁵⁹ Clemm's claim of sexual harassment merely resulted in her supervisor being charged with making an inappropriate joke.⁶⁰

As the harassing behaviors in both cases are similar, there should not be a distinction between the treatment of the harassers merely because the settings differed: a benign domestic airline versus a hostile fire zone. One explanation for the differing outcomes in these cases is that the DoD Directive lacks "the totality of the circumstances" test. DoD's wholesale adoption of EEOC criteria without its nuances offers no guidance and creates particular problems in the area of criminal law.

IV. CRIMINALIZING INCIVILITY IN THE SPECIALIZED COMMUNITY

Notably, Title VII does not impose criminal penalties. The employer who, passively or actively, harasses an employee is subject to civil liability and, since 1991, to punitive damages.⁶¹ However, the same DoD Directive which relies so heavily on civilian criteria defining sexual harassment provides that "unlawful

N.J. LAW., Feb. 16, 1998, at 32. The trial judge also awarded \$764,000 in attorney's fees and \$211,000 in costs. See *Circuit: \$3M to Quadriplegic Not 'Shockingly Inadequate'*, N.J. L.J., Apr. 20, 1998, at 7. Had Captain Blakey been a pilot in the Air Force her claim would have been dismissed. See *supra* text accompanying notes 24-25.

54. See Jerry DeMarco, *Pilot Wins \$1M in Cockpit Smut Suit*, THE RECORD, Oct. 17, 1997, at A1.

55. See *id.*

56. See *id.*

57. See *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287 (8th Cir. 1997) (discussing the tradition of sexual hazing in the workplace); *Saum v. Widnall*, 959 F. Supp. 1310 (D. Colo. 1997) (applying the standard to the experience of an Air Force Academy cadet undergoing Survival Training).

58. See Julie Bird, *A Brief Look at the Complaints*, AIR FORCE TIMES, Aug. 11, 1997, at 8.

59. See *id.*

60. See *Parents See an Air Force Cover-Up*, AIR FORCE TIMES, Oct. 6, 1997, at 13.

61. See 42 U.S.C. § 1981a(a)(1), (b)(1) (1994). Punitive damages are capped according to the number of employees. See *id.* § 1981a(b)(3). Presumably Congress, the EEOC, and the courts expected that employers will, having paid the penalty, cure the environment. That is not always the case. See Julia Duin, *Pueschel Seeks \$2 Million Settlement*, WASH. TIMES, June 16, 1998, at A2 (reporting that a Federal Aviation Administration female employee found to have been harassed then returned to the same worksite and same harassing employees).

discrimination . . . is contrary to good order and discipline. . . .”⁶² Conduct contrary to good order and discipline is an offense under the Uniform Code of Military Justice (UCMJ), and thus, criminal.

Department of Defense Directives are not self-executing; they are directed to the Secretaries of the Military Departments to ensure compliance.⁶³ Each Secretary is then expected to issue Departmental regulations to enforce the Directive.⁶⁴ As an example, consider the Department of the Army⁶⁵ policy regarding Equal Opportunity which is found in Chapter 6, Army Regulation 600-20, Army Command Policy.⁶⁶ A recent Army publication discusses the regulation’s legal consequences:

Although Chapter 6 of AR 600-20 is not punitive, the commander’s inherent authority to impose administrative sanctions and the nonjudicial punishment and punitive articles of the Uniform Code of Military Justice (UCMJ) provide commanders with sufficient authority to enforce Army policy in matters of discrimination and harassment.⁶⁷

Administrative sanctions range from counseling to censure and administrative withholding of privileges and need not be based on behavior which constitutes a crime under the UCMJ.⁶⁸ Punitive actions for harassment can range from non-judicial punishment to court-martial.⁶⁹

Moreover, there are five peculiarities of military jurisprudence which increase the likelihood of sanction or punishment when a commander learns of an incident of sexual harassment. These peculiarities extend the range of a commander’s options beyond those available to either a district attorney or an employer. First, commanders may impose administrative sanctions for acts which do not constitute a crime under the UCMJ or for acts which could not be proven beyond a reasonable doubt.⁷⁰ This contrasts to a federal prosecutor who must be satisfied that a crime has been committed and can be proven.⁷¹ Second, the UCMJ lists offenses which have no civilian counterpart and which, when ap-

62. See DoD Directive, *supra* note 29, ¶ 4.2.

63. See *id.* ¶ 6.2 (requiring the Secretaries of the Military Departments to ensure compliance). Each Secretary is expected to then issue Departmental regulations to enforce the Directive.

64. See DoD Directive, *supra* note 29, ¶ 6.2.5 (establishing and publishing complaint procedures). See SENIOR REVIEW REPORT, *supra* notes 1 and 40. (My citations are all drawn from the Army simply because this report conveniently summarized that Service’s sexual harassment policies implementing the DoD Directive.)

65. See 1 SENIOR REVIEW REPORT, *supra* note 1.

66. See *id.* at E5-E6.

67. *Id.* at E7.

68. See MCM V, ¶ 1.g; see, e.g., *James v. Caldera*, 159 F.3d 573 (Fed. Cir. 1998) (discussing the Army’s refusal to extend a soldier’s enlistment for five months, thus disqualifying him for retirement pay when he failed a drug test and received non-judicial punishment).

69. See MCM V, ¶ 1.g (describing the range of corrective measures available in non-judicial punishment proceedings).

70. See *id.*

71. Cf. Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC’Y 18-19 (1940) (stating that a prosecutor is required to select those cases for prosecution “in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain”).

plied to incidents of sexual harassment, offer the military the option to punish acts which would not constitute a crime in civilian life.⁷² Third, Article 15 of the UCMJ permits punishment without trial.⁷³ There is no civilian equivalent of such non-judicial punishment. Fourth, the defense of consent, which is widely available in the civilian context, has been eliminated when the accused is superior in rank to the sexual partner.⁷⁴ Fifth, unlike civilian employers, a military commander's authority to respond to harassment complaints is neither limited by labor/management agreements⁷⁵ nor constrained by First Amendment implications.⁷⁶

As discussed previously,⁷⁷ none of the remedies available to the civilian recipient of unwanted sexual attention are available to military females. The punitive tools available to commanders suggests a similar legal asymmetry in the case of military harassers: they are more easily punished than their civilian counterparts. But how common are these offenses? The next section discusses how military surveys of the incidence of sexual harassment, ostensibly relying on civilian measurement techniques, do not provide data which would satisfy Title VII and EEOC criteria.

V. MILITARY RESEARCH ON SEXUAL HARASSMENT

Three surveys illustrate the difficulties of using civilian standards to measure military behavior. Although similar, they merit separate analysis, even though, none of them were designed to determine compliance with the DoD Directive on discrimination. The first, "1988 DoD Survey of Sex Roles in the Active-Duty Military,"⁷⁸ instructed respondents that "[c]ertain kinds of

72. For example, quid pro quo harassment might be charged under MCM IV, ¶ 8 (Article 84 - Unlawful enlistment), while quid pro quo or hostile environment harassment might be charged under MCM IV, ¶ 12 (Articles 88 - Contempt toward officials), MCM IV, ¶ 13.c.(2) (Article 89 - Disrespect toward a superior officer), MCM IV, ¶ 15.b(3) (Article 91 - Insubordinate conduct), MCM IV, ¶ 16 (Article 92 - Failure to obey), MCM IV, ¶ 17 (Article 93 - Cruelty and maltreatment), MCM IV, ¶ 59.c.(2) (Article 133 - Conduct unbecoming an officer and gentleman) or MCM IV, ¶ 60.a (Article 134 - General article). Criminal responsibility for creating an intimidating, hostile or offensive working environment might be charged under MCM IV, ¶ 16 (Article 92 - Failure to obey) or MCM IV, ¶ 60.b.(2) (Article 134 - Disorders and neglects to the prejudice of good order and discipline).

73. 10 U.S.C. § 815 (1998). Under most circumstances, an accused may demand trial but will risk a conviction.

74. The military doctrine of constructive force, articulated in *United States v. Webster*, 40 M.J. 384 (C.M.A. 1994), has been described as an "approach [which] is progressive, yet at the same time successfully avoids the suspect legal reasoning, impracticable statutory redefinitions, and radical sociological assumptions which affect the law of rape in the civilian sector. It accomplishes what other jurisdictions have, for the most part, failed to accomplish: a principled approach to criminalizing all sexual intercourse which is coercive and unwanted." See Maj. Timothy W. Murphy U.S.A.F., *A Matter of Force: The Redefinition of Rape*, 39 A.F. L. REV. 19, 34 (1996).

75. See Solotoff & Kramer, *supra* note 9, § 1.16 (describing the effects of collective bargaining agreements for sexual discrimination claims in the civilian workplace).

76. See *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984) (stating the Supreme Court has repeatedly held that in cases raising First Amendment issues "an appellate Court has an obligation to make an independent examination of the whole record.").

77. See *supra* text accompanying notes 19-25.

78. See Juanita Firestone & Richard J. Harris, *Sexual Harassment in the U.S. Military: Individual-*

UNINVITED and UNWANTED sexual talk and behavior at work can be considered sexual harassment.⁷⁹ The survey, however, did not define the term “at work.”⁸⁰ The survey asked about UNINVITED and UNWANTED sexual attention DURING THE LAST TWELVE MONTHS where you work in the active duty military.⁸¹ Unlike the civilian model, where the typical job is separated from home,⁸² military installations are the last “company towns,” where everyone in the community has the same employer. It is not clear whether military respondents were expected to list any incident which took place on post. In fact the survey report uses the terms “work,” “work site,” and “workplace” interchangeably, leaving open the hypothetical question of whether sexual talk or attention of a non-coworker, at the post bowling alley on a Saturday night would qualify.⁸³ Also, the typical military respondent, unlike a civilian, may be reporting on experiences during the prior twelve months at a number of geographic locations (e.g. first at technical school, then at a permanent assignment, then an overseas base, then a U.S. posting, etc.). Thus, the “workplace environment” surveyed for the Department of Defense was anywhere members of the armed forces were assigned, unlike the typical compliance survey undertaken for EEOC purposes, where the worksite and workforce are stable.⁸⁴ These differences between military and civilian milieus make it difficult to compare workplace harassing behaviors using Title VII criteria.

In fact, the surveys compounded the problem by using Title VII and DoD sexual harassment terms, but defining them differently. The EEOC criteria for determining a “hostile environment,” utilize a two pronged model involving severity and pervasiveness⁸⁵ while the survey simply asked respondents “whether they had experienced any ‘sexual talk or behavior at work during the past year that, overall, created an offensive, hostile or intimidating environment’ for them.”⁸⁶ One can imagine a single offensive statement which, from the respondent’s point of view, poisoned the working environment, but was not severe or pervasive enough to constitute sexual harassment.⁸⁷ Similarly, by focusing solely

ized and Environmental Concerns, 21 ARMED FORCES & SOC’Y 25 (1994) [hereinafter Firestone & Harris].

79. *Id.* at 31 (emphasis in original).

80. *Supra* note 47 (noting the expansive definition given to the term workplace under the DoD Directive).

81. See Firestone & Harris, *supra* note 78, at 34 (emphasis in original).

82. *But see* Michelle Adams, *Knowing Your Place: Theorizing Sexual Harassment at Home*, 40 ARIZ. L. REV. 17 (1998) (addressing the different contextual issues which sexual harassment at home raises and how the current application of established legal principles in this area is fatally flawed).

83. Firestone & Harris, *supra* note 78.

84. In the most recent survey used in this article, Army respondents were asked to differentiate between occurrences in barracks, on post, on the job, or off post. See 2 SENIOR REVIEW REPORT, *supra* note 40, at 34. The most frequently reported location was “elsewhere on post.” *Id.* at 47. Respondents were also asked to distinguish between occurrences at their present job, their previous job, or during training. See *id.*

85. DoD Directive, *supra* note 29, ¶ E2.1.15.3; see also Solotoff & Kramer, *supra* note 9, § 3.04[2].

86. Firestone & Harris, *supra* note 78, at 32 (emphasis added).

87. See, e.g., *Zweiter v. Brazilian Nat’l Superintendency of Merchant Marine*, 833 F. Supp. 1089 (S.D.N.Y. 1993) (asserting that sexually offensive behavior is not actionable *per se*).

on the respondents' perception of "UNINVITED and UNWANTED sexual attention," the survey ignores both 1) the traditional two pronged legal test which requires that conduct be both subjectively *and* objectively offensive and 2) the "totality of the circumstances" test.⁸⁸ Finally, the survey blurs the distinction between bystanders and objects of unwanted sexual attention.⁸⁹ While the survey may accurately represent the incidence of perceptions of inappropriate sexual behavior, it is not useful for discovering the extent of the military's compliance with Title VII and EEOC guidelines.⁹⁰

The second military sponsored study examined soldiers'⁹¹ perceptions of sexual harassment in their unit and the consequences for unit cohesion.⁹² Cohesion in a military context is both vertical (relationship between subordinate and superior) and horizontal (relationship between peers).⁹³ The researchers reported that

Using aggregate data from thirty-four army companies, we found that two measures of sexual harassment correlated negatively with vertical cohesion, combat readiness, and acceptance of women. The strongest group level correlation was that between gender harassment and vertical cohesion (. . .) thus providing empirical support for the contention that poor leadership is implicated in a hostile work environment and may be partly responsible for creating and maintaining such an environment. The study has also shown, through group level correlations, that a hostile work environment is associated with lower combat readiness. Where sexual harassment was high, preparedness for

88. 2 SENIOR REVIEW REPORT, *supra* note 40, at 38 (discussing survey results regarding unwanted sexual attention).

89. See Firestone & Harris, *supra* note 78, at 35.

We have also subdivided the behaviors into those that represent 'individualized' harassment, focusing on personal sexual issues (rape/assault, sexual favors, touching, . . . letters/phone calls, [invitations to engage in] dates, sexual activities), and those that might be considered 'environmental' harassment (looks/gestures, teasing/jokes, whistles/calls). The latter tend to be less focused on a particular individual, but reflect and define a sexual context for the workplace.

90. The authors found that the survey was a useful tool with which to measure the military's compliance with Title VII and the EEOC guidelines stated that:

"these results suggest that in spite of criticisms which imply that the redefinition of sexual harassment to include 'creating a hostile work environment' is too broad and idiosyncratic, a large proportion of men and women apparently both understand the definition and recognize such behaviors."

Firestone & Harris, *supra* note 78, at 32. However, the definition the respondents were given did not match, in several ways, the definition the law relies on.

91. For convenience, I have used three surveys: two undertaken by the Walter Reed Army Institute of Research, *supra* note 1, and the DoD survey, *supra* note 1, previously discussed, see *supra* text accompanying notes 64-69. All seem to rely on similar methodologies as do those listed in Sorenson et al., *Solving the Chronic Problem of Sexual Harassment in the Workplace: An Empirical Study of Factors Affecting Employee Perceptions and Consequences of Sexual Harassment*, 34 CAL. W. L. REV. 457 (1998). For a comparison of several of the surveys' findings see 2 SENIOR REVIEW REPORT, *supra* note 40, at 20.

92. See Rosen & Martin, *supra* note 40, at 222.

93. See COMBAT EFFECTIVENESS: COHESION, STRESS, AND THE VOLUNTEER MILITARY, (Sam C. Sarkesian ed., 1980).

the mission was low.⁹⁴

There is no obvious reason to question these conclusions. Yet, after analyzing the prior DoD survey, an inquiry into how the researchers used the terms “sexual harassment” and “hostile work environment” is demanded. Were the terms used as defined in the DoD Directive⁹⁵ and, by extension, in Title VII/EEOC jurisprudence? The terms were used as follows:

For social scientists, it makes sense to approach environmental harassment as a work climate variable similar to cohesion or leadership climate, and to base it on measures that meet acceptable psychometric standards. The Sexual Experiences Questionnaire (SEQ) developed by Fitzgerald and colleagues may provide such a measure. The SEQ was derived from items identified through content analysis of a national survey of college women. The basis of the questions is their focus on the experience of certain behaviors as distinct from subjective perceptions of whether or not these constitute harassment. Items elicit information about experiences in the workplace ranging from offensive remarks to attempted rape.⁹⁶

This explanation offers us several insights. The Army respondents were not asked whether they had been sexually harassed. Rather, they were asked whether they had endured certain experiences which the researchers then matched against certain criteria and defined as harassing. The criteria for harassing experiences were derived from a national survey of predominantly white college women, although the female respondents in the Army survey were “more likely [than the men surveyed] to be lower ranking [and] black,” and not attending college as full time students.⁹⁷ Both the Army researchers and the developers of the SEQ made the questionable assumption that behavior can be determined to be sexually harassing without reference to the recipient’s cultural background or to the context in which it occurred.⁹⁸ If one were to envisage an array of sexually harassing behavior arranged by the degree of violence, with rape or murder at one end of the spectrum and sexually oriented scrutiny or language at the other, the recipient’s cultural background, or the context in

94. *Id.* at 235.

95. See DoD Directive, *supra* note 29, ¶ E2.1.15, E21.15.3.

96. Rosen & Martin, *supra* note 40, at 226 (footnotes omitted).

97. *Id.* at 228. Eighty-four percent of Army women are in the enlisted ranks. Of those women only 41 percent are white, 48 percent are black and 11 percent are of other races. See Laura L. Miller, *Feminism and the Exclusion of Army Women from Combat*, 16 GENDER ISSUES 33, 54-55 (1998). The social scientists administering the surveys assumed that an instrument designed to test responses of predominately white college students would adequately reflect the responses of high school graduates who were predominately non-white. See Cynthia R. Mabry, *African Americans 'Are Not Carbon Copies' of White Americans - The Role of African American Culture in Mediation of Family Disputes*, 13 OHIO ST. J. ON DISP. RESOL. 405 (1998) (discussing the possible consequences resulting from the cultural difference between whites and blacks).

98. The authors seem to acknowledge that their “objective” (consensus of female college students) criteria, derived from the SEQ, must be supplemented by the recipient’s subjective evaluation of the behavior, much as the DoD Directive utilizes *Harris v. Forklift Systems, Inc.*, *supra* note 43 and accompanying text. “The concept of perceived harassment is also important, since this provides an indication of how the work environment is subjectively evaluated.” Rosen & Martin, *supra* note 40, at 226. For a discussion of their approach to perceived harassment, see my Conclusion.

which the incident occurred, would have no legal relevance at the violent end of the spectrum. This same assumption, however, that cultural background and context have no relevance, does not apply at the non-violent end of the spectrum. Further, a later SEQ survey of a far larger sample of Army personnel⁹⁹ established that female respondents typically endure sexual harassment at the non-violent end of the spectrum.¹⁰⁰ Thus, it is not surprising that the researchers concluded that, of the three subscales used by the SEQ:

The scale that most closely approximates the concept of a hostile work environment is gender harassment, which includes the display of pornographic or suggestive materials, crude, sexist or offensive remarks and sexist or discriminatory behavior.¹⁰¹

99. *Compare 2 SENIOR REVIEW REPORT, supra note 40, at 16 (noting that Army wide survey yielded 14,498 useable subjects) with Rosen & Martin, supra note 40, at 225 (finding that a prior survey yielded 1,316 subjects).*

100. *2 SENIOR REVIEW REPORT, supra note 40, at 35-40:*

During the past twelve months in this company, have you ever been in a situation where fellow soldiers or supervisors:

...

115. Made unwanted attempts to stroke or fondle you (e.g. stroking your leg or neck)?

NEVER: 84.5%; ONCE OR TWICE: 8.8%; SOMETIMES: 4%; OFTEN: 2.1%; ALWAYS: .7%

....

116. Made unwanted attempts to have sex with you that resulted in you pleading, crying, or physically struggling?

NEVER: 93.4%; ONCE OR TWICE: 2.9%; SOMETIMES: 2.2%; OFTEN: 1.0%; ALWAYS: .5%

...

124. Had sex with you without your consent or against your will?

NEVER: 96.0%; ONCE OR TWICE: 1.6%; SOMETIMES: 1.3%; OFTEN: .7%; ALWAYS: .5%.

These responses have implications for Professor Morris' conclusions in *By Force of Arms: Rape, War and Military Culture, supra note 13.*

101. Rosen & Martin, *supra note 40, at 226.* The rejected subscales involved unwanted sexual attention and coercion or imposition. We have seen a low incidence in the larger survey of affirmative responses to questions involving assault and battery. *See supra note 92.* The same levels were reported for coercion:

“During the past twelve months in this company, have you ever been in a situation where fellow soldiers or supervisors:

...

117. Made you feel you were subtly bribed with some sort of reward or special treatment to engage in sexual behavior?

NEVER: 89.6%; ONCE OR TWICE: 5.1%; SOMETIMES: 2.9%; OFTEN: 2.0%;

ALWAYS: .5%

118. Made you feel you were subtly threatened with some sort of retaliation for not being sexually cooperative (e.g. the mention of an upcoming evaluation review, etc.)?

NEVER: 90.8%; ONCE OR TWICE: 4.0%; SOMETIMES: 3.1%; OFTEN: 1.4%;

The researchers, relying on the same definition of sexual harassment found in the DoD Directive¹⁰² asked respondents whether they believed that sexual harassment was a problem in their units. "Four response choices were provided ranging from 'not a problem' to 'a severe problem.' In multiple regression analysis, which included the three SEQ subscales as independent variables, gender harassment was the strongest predictor of sexual harassment."¹⁰³

Thus, the social science researchers defined a constellation of behaviors of offensive to predominately white college women as gender harassment, applied them in an ill-defined "workplace" setting to predominately non-white high school graduates, and determined that a hostile work environment existed.¹⁰⁴ This analysis is unsatisfactory support for the researchers' conclusions.

Finally, the most recent and comprehensive survey of sexual harassment in the Army was undertaken in the winter of 1996-97 as a consequence of the Aberdeen training incidents. A Senior Review Panel sampled the perceptions of Army leaders, soldiers, and civilians through the use of surveys based on the Sexual Experiences Questionnaire (SEQ), focus group discussions, interviews and observations.¹⁰⁵ Its findings illustrate the definitional problems implicit in using civilian/legal terms in a military/social science context:

The data indicate that 80% of the sample reported experiencing at least one of the SEQ behaviors . . . More women than men reported experiencing SEQ behaviors. Crude/Offensive behaviors such as hearing suggestive stories, offensive jokes or sexual remarks were the most frequently experienced behaviors by men and women . . . However only 9% of the sample reported they had been sexually harassed. This suggests that individuals' definitions of sexual harassment may not include these behaviors.¹⁰⁶

In evaluating trainees' reports of SEQ behaviors, the Report concluded: "[T]here was a discrepancy in the percent reporting a SEQ behavior and the percent reporting sexual harassment. This was likely due to trainees *using their own definition* of what constitutes sexual harassment rather than the Army's definition when determining whether or not they had been sexually harassed."¹⁰⁷ In fact, as discussed earlier, the DoD definition of workplace harassment is ex-

ALWAYS: .6%.

2 SENIOR REVIEW REPORT, *supra* note 40, at A-35-38.

102. See *supra* text accompanying note 31. The researchers designated as the definition's source a General Accounting Office report on sexual harassment at the Service Academies. See Rosen & Martin, *supra* note 40, at 241 n.27. Perhaps they were unaware of the DoD Directive.

103. Rosen & Martin, *supra* note 40, at 226-27.

104. See *id.* at 235. I must emphasize that my criticism of the survey's use of the SEQ is not directed at its conclusion that respondents in those units which reported the highest incidence of offensive behaviors perceived those units to have a sexual harassment problem and that these units were also perceived by the respondents to be the least combat ready. That conclusion is unaffected by my criticism which is directed to the survey's unknowing misuse of legal terms devised to determine compliance with Title VII.

105. See 2 SENIOR REVIEW REPORT, *supra* note 40, at 13.

106. *Id.*

107. *Id.* at 40 (emphasis added).

tremely broad and fails to require either pervasiveness or extreme behavior.¹⁰⁸ Similarly, the SEQ survey used by the Army counts one incident as workplace harassment. In contrast, General Kennedy was quoted as believing that a single incident of unwanted sexual attention (“making a pass”) does not constitute sexual harassment.¹⁰⁹ Thus, there is confusion between the standards espoused by the military,¹¹⁰ used in the SEQ survey and stated by General Kennedy. It is therefore not surprising that a military lawyer is quoted as saying: “Parts of the policy are unclear. For example ‘unwelcome behavior’ - how do you know until you try?”¹¹¹

The three surveys analyzed in this section confirmed that there was sexual harassment in the military. However, the criteria used in the surveys to identify incidents of sexual harassment did not match the criteria established by the DoD Directive. Also, as we have seen, the criteria established by the DoD Directive does not match the criteria articulated for sexual harassment in the civilian community.¹¹² Despite this, the surveys may be useful to the military’s goal of eliminating any form of gender based behavior which would detract from the Department’s policy to “[p]romote an environment free from personal, social, or institutional barriers that prevent Service members from rising to the highest level of responsibility possible.”¹¹³ The surveys are useless and palpably misleading, however, if one seeks to determine the incidence of the severity of workplace harassment (as that term is legally defined) in the military or to compare the civilian and military experiences. The concluding section discusses the possible motivation for the dual discrepancy between the criteria used in the surveys, those used in the Directive and those used in Title VII jurisprudence.

VI. CONCLUSION

If one accepts the premise that the legal meaning of the term “sexual harassment” is derived from the language of Title VII of the Civil Rights Act of 1964, the implementing guidance of the Equal Opportunity Commission, and the interpretation of those provisions by the federal courts, then it follows that the Department of Defense has misused the term in three contexts by failing to make the appropriate distinctions. In the first, DoD surveys have not distinguished between incidents which are so serious that the law treats one event as harassment and those relatively trivial incidents which require a pattern of behavior. This distinction is important because Title VII criteria for workplace harassment

108. See *supra* text accompanying note 86.

109. See McElwaine, *supra* note 2, at 5.

110. 2 SENIOR REVIEW REPORT, *supra* note 40, at A-8, B-7, C-7, E-7 (1997). The Survey treated a single reported incident as sexual harassment. “The Military Focus Group Protocol consisted of 17 questions; one question asked for a definition of sexual harassment in order to determine soldiers’ understanding of the Army definition. This question was not analyzed.” *Id.* at 54.

111. *Id.* at 98.

112. See text accompanying notes 78-90 (discussing the criteria used in the DoD survey); text accompanying notes 95-97 (discussing the Rosen & Martin Army Survey which focused on sexist behavior reported by female college students); text accompanying note 108 (noting the use of the same criteria as in the Rosen & Martin Survey).

113. DoD Directive, *supra* note 29, ¶ 4.2.

at the non-violent end of the behavioral spectrum requires workplace behavior which is severe pervasive.¹¹⁴ The surveys also failed to specify the location and timing of when the harassing behavior occurred.¹¹⁵ This distinction is important because Title VII imposes employer liability only when the “totality of the circumstances lead to the inference that the employer failed to take steps to prevent the harassing behavior.”¹¹⁶ Finally, the surveys assume that harassment is determined solely by the beholder, rather than imposing both a subjective and objective standard as is required in the civilian context.

While ostensibly using language derived from the Act, the EEOC guidelines, and court decisions, the DoD Directive fails to acknowledge that the civilian definition has different purposes - to establish civil liability of the employer in a jury trial by setting criteria for fact finders. The Directive fails to acknowledge that the remedies - money damages and the doctrine of constructive discharge - available to civilian claimants are not available to military women. Moreover, the Directive’s statement that harassing behavior may be “contrary to good order and discipline” implicitly recognizes that the penalties imposed on military harassers differ in kind from those that can be levied against civilians. This article naturally leads to the following questions: “What did the Department of Defense and its researchers have in mind when they made what logicians would call a category error?”¹¹⁷ and “What are the practical consequences, if any, of the error?” To answer these questions, one must distinguish between the social science researchers who designed and carried out the surveys and the policy makers who drafted and implemented the Directive.

The evidence adduced suggests that the researchers simply didn’t recognize that the phrases “sexual harassment” and “hostile work environment” have become legal terms of art.¹¹⁸ Additionally, the researchers were unfamiliar with the DoD Directive and the law on which it is based.¹¹⁹ When researchers asked about sexual harassment, they seemed to actually mean gender based words or acts which made the recipient or an observer uncomfortable.¹²⁰ Thus, because the surveys did not address legal harassment, the question of the extent of harassment within the military is left unanswered. This does not mean the surveys

114. See OMILIAN & KAMP, *supra* note 11; see also *supra* text accompanying notes 95-99.

115. See *supra* text accompanying note 97-99.

116. See *supra* text accompanying notes 51-52.

117. Legal arguments are based on categorical syllogisms. If an object is placed in the wrong class, that is a category error, and the conclusion drawn from the syllogism may be false.

118. See *supra* text accompanying notes 85-90 (discussing the DoD Directive), notes 107-08 (discussing the SEQ survey). However, one recent survey of the literature of gender differences in perceptions of sexual harassment acknowledges the distinction between social science and legal approaches. “[S]tudies of sexual harassment perceptions need not answer the question of whether a plaintiff’s circumstances satisfy the legal criteria for harassment. Indeed, they are not expressly designed to do so. Rather, an important use of such studies is to identify potential differences in the ways subjects, and analogously jurors, might perceive and assess evidence. . . .” Jeremy A. Blumenthal, *The Reasonable Woman Standard: A Meta-Analytic Review of Gender Differences in Perceptions of Sexual Harassment*, 22 LAW & HUM. BEHAV. 33, 48 (1998). Of course, in a military context, there is no threat of civil liability imposed by jurors.

119. See *supra* text accompanying notes 41-52.

120. See *supra* note 90.

are not useful. The research established that there is evidence of gender bias in units of the armed forces,¹²¹ and that perceptions of that bias correlate with negative opinions of unit cohesion and efficiency.¹²² These surveys should cause commanders and policy makers interested in improving cohesion and efficiency to take steps to minimize the behavior which gives rise to such perceptions.¹²³

The social scientists' error may have been due to their unawareness of the fact that "sexual harassment in the workplace" has become a legal term, carefully crafted by government agencies and glossed by the judicial system. They used a legal term, but failed to properly employ the same criteria that underlies its definition. While we may conclude that the social scientists didn't intend to confuse, what of the DoD lawyers and the policymakers who sought to transplant Title VII language into an environment for which it had not been intended?

There are two traditional approaches to the understanding of an intellectual work:¹²⁴ we can examine the text, relying on its plain meaning or we can examine its context which will determine its meaning. A textual approach to the Directive doesn't explain its meaning - the words "workplace," "harassment," and "hostile environment" have been detached from their familiar EEOC moorings and have no legal consequences.¹²⁵ Likewise, a contextual approach is unhelpful. "The spirit of the age" demanded that the Department of Defense issue policy guidance which conformed with American ideals of fair treatment for women, but why was the guidance so confusing? As says J.L. Austin, the linguistic philosopher, in order to understand a speaker (or writer)'s meaning, one must grasp what he intended.¹²⁶ Austin calls this the illocutionary force of the utterance.¹²⁷

There is no legislative history of the DoD Directive, but I suggest that its drafters were driven by two conflicting needs. On the one hand, they may well have wanted to reassure their external constituencies: Congress, the press, and the segment of the public concerned with the equal treatment of women. What better way to do this than to use familiar legal terms drawn from civilian life to claim that the doctrines they represented would be applied to members of the armed forces? Neither Congress, the press, nor most feminist groups realized that the familiar terms had lost their meaning when applied within the mili-

121. See 1 SENIOR REVIEW REPORT, *supra* note 1; Rosen & Martin, *supra* note 40, at 233 tbl. 4.

122. See *supra* text accompanying note 93.

123. One would assume that these researchers, including those who devised the SEQ, would acknowledge that it would be unrealistic to expect the bias or harassment to be at the "low end" of the spectrum. Such behavior can be discouraged through the use of non-punitive measures. In civilian life, this type of harassment is considered to be among the ordinary trials and tribulations of the modern workplace. See *infra* note 121. Thus service declarations of "zero tolerance" for sexual harassment must be understood to be purely hortatory. John Pulley, *Gender-Issues Study Spurs Some Changes*, AIR FORCE TIMES, Apr. 27, 1998, at 9.

124. My approach is based on Quentin Skinner's seminal article, *Meaning and Understanding in the History of Ideas*, 8 HIST. & THEORY 3 (1969), which applies linguistic philosophy to historical concepts.

125. See *supra* text accompanying notes 47-50 (discussing the concepts of "workplace," "harassment," and "hostile environment").

126. J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 99 *passim* (1962).

127. See *id.*

tary.¹²⁸ This is “The Jackalope” dimension of the Directive. The Jackalope is an artificial creature, routinely found in Western taverns and souvenir shops, constructed by a taxidermist’s addition of antelope’s horns to the head of a large jackrabbit.¹²⁹ The creators’ goals are benign: to stimulate conversation and to amuse. Certainly, the illocutionary force of the Directive is similarly benign. The Directive, however, also serves as a Chimera, a creature from Greek mythology, combining (as the Jackalope does) the members of different animals, but “possessing immense strength and ferocity which they employed for the injury and annoyance of men.”¹³⁰ Presumably, the drafters also wanted to affect the behavior of their internal constituencies - the armed services and their civilian and military members - not only to reassure military women that they would be protected by the same doctrines as civilian women (although that is not the case), but to remind military harassers and their superiors that criminal charges could be brought for conduct “contrary to good order and discipline.”¹³¹ Thus, is this artificial military creature, created from civilian parts, which simultaneously should reassure one part of the constituency while threatening another, an effective tool for combating sexual harassment?

I believe that the Department of Defense’s external constituency is satisfied that the military is taking appropriate steps to respond to harassing behavior. Internally, the response is less positive. Recently, two female former officers - one from the Navy¹³² and one from the Air Force¹³³ - wrote separate articles asserting that the incidence and severity of harassing behavior has increased disproportionately. Both relied on anecdotal evidence because, as we have seen, there are no reliable statistics.¹³⁴ Obviously, opinions may vary depending on the individual, the unit, the armed service, the sex of those surveyed and the extent of recent media exposure. Nonetheless, a 1997 survey undertaken at 8th Air Force Headquarters, Barksdale Air Force Base, Louisiana after First Lieutenant Crista Davis accepted non-judicial punishment for conduct unbecoming an officer concluded:¹³⁵

128. A few individuals realized that these terms had lost their meaning. See *supra* note 13; Shirley Sagawa & Nancy Duff Campbell, *Sexual Harassment of Women in the Military*, WOMEN IN THE MIL. ISSUE PAPER, Oct. 30, 1992.

129. See *Jackalope fans, take note*: (visited Jan. 30, 1999) <<http://www.lafayette.edu/~hollidac/jackalope.html>>.

130. THOMAS BULFINCH, *BULFINCH’S MYTHOLOGY* 101 (1934).

131. Thus, three Army officers (a second lieutenant, a captain and a major at Ft. Bliss Texas) were dismissed and imprisoned for periods up to twenty months for sexual relations with female enlisted soldiers. *Army Sexual Misconduct*, WASH. POST, Apr. 26, 1997, at A2. Civilian harassers could not be jailed for similar behavior with adult subordinates. See *id.* Idaho recently criminalized sexual encounters between doctors and patients. See Laura Vander Kay, *Doctors’ Penalties in Sex Offenses Not Harsh, Study Says*, WASH. TIMES, June 17, 1998, at A-10.

132. See Kristin K. Heimark, *Sexual Harassment in the United States Navy: A New Pair of Glasses*, 44 NAVAL L. REV. 223 (1997).

133. See Diane H. Mazur, *The Beginning of the End for Women in the Military*, 48 FLA. L. REV. 461 (1996).

134. See Karen Jowers, *Sexual Harassment Complaints Fall Overseas*, AIR FORCE TIMES, Jan. 11, 1999, at 7 (discussing a July 1998 survey which reported a dramatic decrease in harassment complaints).

135. The punishment was for writing letters to her lover’s wife boasting about the relationship

While the sample of female officers interviewed was not large, an unusually high number stated they believed that some form of discrimination took place at 8th Air Force headquarters. None could give specific examples but were relying on "feelings, intuition, and judgment."¹³⁶

Just as military women sense gender bias, so do their male coworkers fear allegations of gender based discrimination which, in a highly competitive environment, can destroy a career even if the alleged harasser is exonerated.¹³⁷ Symbolic of this fear is the fact that conferees at the July 26th, 1998 Defense Department third biennial conference on equal opportunity debated whether the MEO program should be abolished and simply become another aspect of command responsibility.¹³⁸ While this article does not offer such a radical solution, the analysis indicates that DoD's pretense that their sexual harassment policies mimic those found in the rest of the federal government obscures rather than clarifies the peculiar problems facing military women. These problems include: heightened deployment and the stresses imposed on military families,¹³⁹ many of whom are "joint service,"¹⁴⁰ and an increase in the number of young married couples which has led to a greater number of incidents of family violence and sexual abuse.¹⁴¹ Also, the increase in the number of women in uniform, from less than 6% in 1977 to nearly 14% in 1997¹⁴² has highlighted gender biases in the Uniform Code of Military Justice.¹⁴³ These are the issues policymakers should be

which had begun when he was her English teacher at the Air Force Academy. *See Study at Base Finds Widespread Perception of Sexism*, AIR FORCE TIMES, Sept. 1, 1997, at 6.

136. *Id.* Three months later Col. Wanda Wood of the Air Force reported that the data from two surveys "show that we have a good healthy human relations climate" compared with what the Air Force Times called "the institutional harassment and discrimination found in the Army." John Pulley, *Airmen Note Relatively Few Gender Woes*, AIR FORCE TIMES, Dec. 15, 1997, at 8. The Air Force's surveys were based on the same methodology utilized by the Army's Senior Review Panel. John Pulley, *Report Prompts Air Force to Analyze Sexual Harassment*, AIR FORCE TIMES, Oct. 6, 1997, at 6.

137. *See* Andrew Compart, *Fears About False Accusations Grow*, AIR FORCE TIMES, Dec. 15, 1997, at 10. Whether or not the accusations are false, a marred record can bar promotion, prevent an increase in salary, and cost thousands of dollars in lost retirement pay. Two female officers complained that Captain Everett Green, U.S.N., nominated for admiral, had "sexually harassed them with persistent and overly familiar, but never sexual or crude, cards and notes." Green was acquitted by a court-martial but removed from the promotion list, as was Captain Mark A. Rogers, U.S.N., who the Navy concluded had engaged in sexual harassment by "[r]epeatedly using coarse language in front of fellow White House Military Office workers." Ernest Blazar, *Inside the Ring*, WASH. TIMES, Oct. 1, 1998, at A11.

138. *See* Lisa Daniel, *Equal Opportunity Review*, AIR FORCE TIMES, Aug. 17, 1998, at 18.

139. The percentage of married enlisted personnel by service: Air Force, 65.2%; Army 56%; Navy 55.5%; Marine Corps, 43.6%. In 1997, 15.9 % of the enlisted people entering the Army were married; in the Air Force it was 10 percent, the Navy 5.2 percent and the Marine Corps 4.2 percent. *See Fast Facts*, AIR FORCE TIMES, July 13, 1998, at 14. In 1998, 11.4% of military women were single parents, compared with 4.7% of military men. *See* Karen Jowers, *Single-parent Families on the Rise in the Military*, AIR FORCE TIMES, Jan. 18, 1999, 16.

140. Half of all enlisted women and more than a third of all female officers have husbands who are also in the armed forces. *See* Ernest Blazar, *Inside the Ring*, WASH. TIMES, Oct. 20, 1997, at A10.

141. *See* David E. Rovella, *Jags Change With Military*, NAT'L L.J., June 22, 1998, at A1.

142. *See More Women*, AIR FORCE TIMES, July 13, 1998, at 13.

143. *See* Lt. Cdr. Peter A. Detton, U.S.N., *Spousal Battery as Aggravated Assault: A Proposal to Modify the UCMJ*, 43 NAVAL L. REV. 111 (1996); Michael F. Noone & Mary Jo Wiley, *Sticks, Stones and*

concerned with.

Department of Defense policymakers sought to ensure equal treatment of military women. Unfortunately, their policy relied on language designed to impose civil liability on the employers of civilian women. The misconceived language in their Directive reassures the uninformed, but confuses both the women whom it was intended to protect and those responsible for their protection. Social scientists, who were called on to study the incidence of sexual harassment in the military, failed to use measurements which would enable policymakers to determine whether the military has met or surpassed the civilian community's goals. There have been no criteria developed to measure the treatment of military women. Once articulated, these criteria, would for reasons of morale and unit cohesion more closely approach the general civility code, denigrated by the Supreme Court, but sought by Professor Rorty. Meanwhile, anyone who speaks of sexual harassment in the military workplace should be asked to define those terms.