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ARTICLES

SEX AND LIES: RULES OF ETHICS, RULES OF EVIDENCE, AND OUR CONFLICTED VIEWS ON THE SIGNIFICANCE OF HONESTY

DIANE H. MAZUR*

INTRODUCTION

Perhaps no other spectacle captured the sense of our contemporary fascination with the virtues of honesty and truthfulness as well as one day’s hearing during the congressional investigation preceding President Clinton’s impeachment.¹ On that day, witnesses from three very different schools of experience testified before the House Judiciary Committee to share their respective understandings of “the consequences of perjury and related crimes.”² These witnesses created a framework for three themes that could not have been more different from one another,³ yet taken together they symbolized how dysfunctional our views of the significance of honesty and truthfulness have become.

Two classes of expertise offered by witnesses at the hearing, coupled with the respective themes they were designed to foster, were entirely predictable, given both the general subject matter and the individual target of the inquiry. A number of legal professionals, including three federal appellate judges and three law professors, testified concerning the consequences of dishonesty and untruthfulness for the legal system in general and for Presi-


² The Consequences of Perjury and Related Crimes: Hearing Before the House Comm. on the Judiciary, 105th Cong. 2 (1998) [hereinafter Perjury Hearing].

³ See id. at 15 (“We have before us 11 witnesses who share practically nothing in common.”) (statement of Rep. Charles Schumer).
dent Clinton in particular. These judges and professors were joined on the panel by several high-ranking retired military officers who testified on the effect of dishonesty and untruthfulness within a military chain of command and, more specifically, the effect of the Commander-in-Chief's failure to be truthful on the morale of the rank and file of servicemembers below. The witnesses professed to be speaking as individuals and not as representatives of the institutions with which they were affiliated, but that distinction likely made little practical difference given the purpose of their testimony, which was to speak to institutional effect and not to individual belief or conviction.

The tone for the committee's consideration of untruthfulness and its effect on the rule of law was set by its chairman, Henry Hyde, in his opening statement:

We make perjury, subornation of perjury, obstruction of justice, and witness tampering crimes because a judicial system can only succeed if its procedures expose the truth. If citizens are allowed to lie with impunity or encourage others to tell false stories or hide evidence, judges and juries cannot reach just results. At that point, the courtroom becomes an arena for artful liars and the jury a mere focus group choosing between alternative fictions.

... Lying poisons justice. If we are to defend justice and the rule of law, lying must have consequences.4

The indispensable nature of truth to legal justice was the theme of the interchange between members of the committee and witnesses from the profession of law. One witness, a law professor, observed:

[The committee has] the opportunity to promote the rule of law and to emphasize the importance of truth in judicial proceedings if it declares that no witness, not the President, not anybody, may deliberately deceive a court and deliberately create a false impression of facts.5

Without the ability to compel individuals to speak the truth in courts of law, a number of legislators argued, the legal system cannot provide justice:

Those parties to every lawsuit out there expect truth to be told. If witnesses that they call or witnesses who are called lie or encourage other people to lie or hide evidence or encourage other people to hide evidence, then the parties

4. Id. at 3.
5. Id. at 92 (testimony of Prof. Stephen Saltzburg).
to that lawsuit can't get justice, they can't get a fair judgment. That is what undermines the court system.\textsuperscript{6}

While a substantial part of the testimony of the legal experts centered on the relative technicality of whether impeachment was an appropriate constitutional sanction for lying under oath,\textsuperscript{7} the military witnesses were much more open to expansive judgments of the immorality of untruthfulness. Their theme was both simple and familiar. President Clinton's behavior had, once again, weakened the military's ability to carry out its mission by eroding the morale, good order, and discipline of the men and women who serve.\textsuperscript{8}

Exchanges between the committee members and the military men appearing before them established that truthfulness was a critical component of successful military leadership. One retired four-star admiral described that ethic of truthfulness as follows: "The integrity of an officer's word, signature, commitment to truth concerning what is right, and acting to correct what is wrong, must be natural, involved and rise to the forefront of any decision or issue."\textsuperscript{9} That responsibility extended to the very top of the chain of command, which, under our system of civilian control of the military, ends with the President. As a result, the admiral concluded, "those who hold that leadership position to be credible should meet the same standards."\textsuperscript{10}

\begin{itemize}
\item \textsuperscript{6} Id. at 105 (statement of Rep. Bill McCollum).
\item \textsuperscript{8} Committee members from the majority also spent more time questioning witnesses in uniform than witnesses out of uniform, perhaps because the President is seen as much more vulnerable to military criticism. Furthermore, the military witnesses were not encumbered by having to address differences of opinion, as were the legal experts, because no military witnesses sympathetic to the President's position appeared before the committee.
\item \textsuperscript{9} \textit{Perjury Hearing}, supra note 2, at 77 (testimony of Adm. Leon Edney).
\item \textsuperscript{10} Id.
\end{itemize}
committee's theme of the military necessity for truthfulness was nothing less than an imperative: "If we lie to ourselves as an institution, or as individuals within that institution, we are laying the seeds of our own individual and national destruction."\(^{11}\)

As predictable as the appearance of law professors, judges, and senior military officers were, the appearance of the third set of witnesses before the committee that day was equally unpredictable. Two witnesses were called in support of this third and final theme, both of them women, in contrast to the otherwise all-male panel. Their testimony, especially in the case of one of the witnesses, was also likely the saddest and most exploitative display offered by congressional Republicans during the entire impeachment investigation.\(^{12}\) Pam Parsons, a Mormon woman from Utah, was once a college basketball coach at the University of South Carolina.\(^{13}\) By the late 1970s, Parsons and Pat Head Summitt of the University of Tennessee (today's premier women's coach) were the two most successful young coaches in the women's game. Pam Parsons was (and is) also gay, and as a coach was working in a profession that tolerated only secrecy on that issue.\(^{14}\) One might reasonably ask why the Republican members of the committee chose an openly lesbian basketball coach as their first, most prominent witness in support of their themes of honesty and truthfulness.\(^{15}\) The explanation is that Pam Par-

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11. Id. at 78.
13. For descriptions of the events that would eventually lead to Pam Parsons' testimony before Congress during President Clinton's impeachment inquiry, see, for example, Liz Chandler, Coach Has Left Sad Legacy; Parsons Still Shunned; She Broke Most Essential Bond of Profession, SEATTLE TIMES, Apr. 14, 1996, at D6; John Heilprin, Perjury: The Lie: Utahns Squared Off in '84 Case That Has Resurfaced in Clinton Inquiry; Utahn Caught Coach in Perjury About Lesbian Sex, SALT LAKE TRIB., Dec. 3, 1998, at A1.
14. To this day, some college coaches engage in "negative recruiting" by scaring high school girls and their parents with reports that other universities' women's athletic programs permit lesbian coaches or players. See PAT GRIFFIN, STRONG WOMEN, DEEP CLOSETS: LESBIANS AND HOMOPHOBIA IN SPORT (1998); MARIAH BURTON NELSON, THE STRONGER WOMEN GET, THE MORE MEN LOVE FOOTBALL: SEXISM AND THE AMERICAN CULTURE OF SPORTS 189 (1994); Mike Fish, Women in Sports: Growing Pains; The Lesbian Issue Off the Court, ATLANTA CONST., Sept. 24, 1998, at 1G.
15. The committee majority endeavored to complete hours of testimony and questions without a single reference to the fact that the witness before them was gay, or that the false statement that led to her perjury conviction concerned patronage of a gay bar. They were almost successful in containing any explanations of her conviction to something in the nature of "false testimony about a sexual relationship during a civil case." Perjury Hearing, supra note 2, at 6. One congressman, certain that her false statement, like President
sons is a poster child for remorse about lying in matters involving sex.

Parsons sued Sports Illustrated magazine for libel after its February 1982 publication of an exposé (in its annual swimsuit edition, no less) reporting that Parsons had begun a relationship with a seventeen-year-old who later, after receiving a high-school-equivalency certificate, enrolled at the University of South Carolina to play basketball. Given that the allegations were fundamentally true, her decision to file suit was one of exceedingly poor and desperate judgment, but its motivation was understandable. She had already lost her position at South Carolina, and faced the end of a very promising coaching career if she could not convince other universities that the Sports Illustrated story was untrue. During the trial, which ended with a verdict for Sports Illustrated, Parsons lied in response to a question whether she had ever visited a certain gay bar in Salt Lake City, Utah. She was prosecuted for perjury, convicted, and incarcer-

Clinton's, must have involved a sex act, asked her whether the subject of her perjury was consensual sex; he quickly moved to another subject after her unexpected answer. See id. at 11 (statement of Rep. Bill McCollum). The only other reference came much later in the hearing, when Rep. Sheila Jackson Lee asked Parsons whether her motivation for lying arose from the embarrassment of "allegations dealing with another female." Id. at 31.

16. Many would say that Parsons also exhibited extraordinarily poor judgment by beginning an intimate relationship with a high school senior who later played basketball on the college team she coached. I would add, however, that comparatively little uproar follows when a young female athlete marries an older male coach. See NELSON, supra note 14, at 173, 188-89.

17. Anita Allen (now Allen-Castellitto) has written a perceptive article highlighting the similarities in how President Clinton and Oscar Wilde responded to the scandals arising from their sexual indiscretions. See Anita L. Allen, Lying to Protect Privacy, 44 VILL. L. REV. 161 (1999). Both Clinton and Wilde entered into relationships with younger, less mature partners, vilified the investigators who intrusively sought evidence of their conduct, and lied and dissembled in an effort to convince others the allegations were false. See id. at 175-76.

Pam Parsons' story is, sadly, even more a modern-day equivalent of the trials of Oscar Wilde. Desperate to maintain his respectable status, Wilde foolishly brought suit for defamation after his paramour's father condemned him as a "sodomite." Investigation by the defendant easily unearthed painfully personal evidence that the statement was true. "Thus, Wilde's futile attempt at a face-saving lawsuit against Queensberry led to his conviction for sodomy and sentencing to two grueling years of hard labor, a sentence that broke his health and ruined and shortened his life." Id. at 175.

18. The lawyer who represented Parsons in the Sports Illustrated suit believes that his client was prosecuted for perjury because she was "the architect of her own destruction." Edward Walsh & William Claiborne, Hearing on Perjury Shows Partisan Divide, WASHINGTON POST, Dec. 2, 1998, at A18. In the judge's opinion, Parsons initiated a lawsuit with the intention of lying and had there-
ated in a federal prison for four months, followed by five years of probation.

Parsons never coached again, of course, and has worked as a house painter, waitress, and yard-keeper since her release. Her remorse before the committee, however, was profuse: "Thank God I could finally say 'I'm guilty.' . . . [T]hat day that I got slapped into recognizing that, yes, there are things that you pay consequences for, my life had a chance to turn around." 19 On the day of the hearing, she became an unwitting role model for the President of the United States and, in the words of one congressman, one of those "now being talked about in terms almost of being American heroes." 20

I. JUSTIFYING UNTUREFULNESS

Sissela Bok has been one of the most prominent philosophers to study the moral judgment of dishonesty and untruthfulness. 21 Her work has often been used as a guide by those in the legal academy for the evaluation of lying in a legal context. 22

Parsons' companion witness, Barbara Battalino, had also initiated the claim that set the stage for her false testimony. Battalino was a Veterans Administration doctor who had a consensual relationship with a male veteran who was a client of the VA but not her own patient. The veteran filed suit against her for medical malpractice and sexual harassment, which was dismissed. Not knowing when to let a good thing rest, however, Battalino continued to press her claim for indemnification by the federal government. She lied in response to a question whether "anything of a sexual nature" took place in her VA office, and was prosecuted for that false answer after her paramour offered surreptitious recordings of their telephone conversations to the government. Convicted of a felony count of obstruction of justice, Battalino lost her license to practice medicine. See Perjury Hearing, supra note 2, at 7-9, 45-46, 56-57 (testimony of Barbara Battalino), 101 (testimony of Prof. Jeffrey Rosen); Walsh & Claiborne, supra, at A18.


20. Id. at 55 (statement of Rep. Lindsey Graham). This hearing provided perhaps the first and the last occasion that a gay American was praised as a "real American" during a congressional investigation. See id. at 157-58 (statement of Rep. Bob Barr).


22. For example, are lies by law enforcement personnel to criminal suspects justifiable when employed as a ruse for the purpose of gathering evidence? See Robert P. Mosteller, Moderating Investigative Lies by Disclosure and Documentation, 76 OR. L. REV. 833 (1997) (charting a middle course by relying
This article applies Bok’s framework in similar fashion, measuring the significance of honesty—or its absence—across a variety of ethical and evidentiary contexts, both military and civilian.

The congressional hearing described earlier might be described as Kantian in nature in that its majority message would broach no lying no matter what the circumstances. To the legislators controlling the hearing, truth-telling was a virtue so valuable in and of itself as to make unnecessary any balance of benefit and harm. In Kant’s words, “For a lie always harms another; if not some other particular man, still it harms mankind generally, for it vitiates the source of law itself. . . . To be truthful (honest) in all declarations, therefore, is a sacred and absolutely commanding decree of reason, limited by no expediency.”

Bok, in contrast, would not enforce such an inflexible standard. She would concede that lies could be justified under some limited circumstances, although the burden of justification placed on one seeking dispensation would be extremely high. Bok believes that truthfulness should be the default expectation: “There is an initial imbalance in the evaluation of truth-telling and lying. Lying requires a reason, while truth-telling does not. It must be excused; reasons must be produced, in any one case, to show why a particular lie is not ‘mean and culpable.’”

The heavy burden of justification that Bok imposes arises primarily from her mistrust of the liar’s motivations. She finds it almost impossible to perform a valid comparison of risk and benefit for a given lie because those competing values are usually assigned by the individual who speaks the lie, not the one who is deceived. The bias is inherent, difficult both to detect and to neutralize. “The long-range results of an acceptance of such facile calculations, made by those most biased to favor their own primary on constitutional protections to identify permissible investigative lies); Margaret L. Paris, Lying to Ourselves, 76 Or. L. Rev. 817 (1997) (concluding that investigative lies by police are justifiable only when necessary to save lives); Christopher Slobogin, Deceit, Pretext, and Trickery: Investigative Lies by the Police, 76 Or. L. Rev. 775 (1997) (concluding that investigative lies by police are justifiable under some circumstances).

23. Describing the hearings as “Kantian” would be kind. Others, like myself, might term them merely sanctimonious or hypocritical.

24. Bok, Lying, supra note 21, at 267, 269 (excerpting Immanuel Kant, Critique of Practical Reason and Other Writings in Moral Philosophy 346-50 (Lewis White Beck ed., 1949)); see also id. at 37-39 (describing Kant’s absolutist position).

25. Id. at 22.

26. See id. at 83 (“Because claims to fairness involve deeply personal views about what one deserves or what is one’s right, they are extraordinarily prone to misinterpretation and bias.”).
interests and to disregard risks to others, would be severe."\textsuperscript{27} Despite the difficulty of assessing the risk and benefit imposed by a given lie in a manner that takes into account the perspective of both the author of the lie and its recipient, however, Bok is willing to try.\textsuperscript{28} Assessment of risk would be more important than assessment of benefit because, first, the presumption always favors the telling of truth and, second, the liar is normally unable to fairly assess risk imposed by her own untruthfulness. In keeping with that presumption of truthfulness and suspicion of purported benefit, Bok requires proponents to identify truthful alternatives, weigh moral reasons for and against the lie, and incorporate a perspective that reaches beyond individual excuses.\textsuperscript{29}

Bok's model of risk-benefit analysis first identifies the risks to be evaluated and then outlines a procedure for evaluation of their significance. The potential risks of lying are three: "immediate harm to others"; "the harm that lying does to the liars themselves"; and "the harm done to the general level of trust and social cooperation."\textsuperscript{30} Once the potential harms are identified, they should be evaluated in a manner that minimizes the inevitably biased influence of the prospective liar. First, the individual seeking to justify a failure to tell the truth should appeal to her own conscience for guidance in balancing risk and benefit.\textsuperscript{31} Second, she should appeal to her own circle of peers and colleagues to determine if they would agree with her assessment.\textsuperscript{32} The problem with the second stage, of course, is that often indi-

\textsuperscript{27} Id. at 50-51. One might consider, however, whether the equation might change if, by a false statement, an individual exposed herself to risk beyond the risks of discovery normally appurtenant to lying. I am thinking, of course, of gay servicemembers who potentially expose themselves to federal prosecution or administrative dismissal on the basis of their intimate lives, not to mention sanctions for lying. Perhaps a liar's own assessment of benefit is more accurate when the associated personal risk is extraordinary. An analogous concept is found in Federal Rule of Evidence 804, which deems hearsay statements sufficiently reliable and trustworthy to be admitted if the statement was "so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability... that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." \textit{FED. R. EVID.} 804.

\textsuperscript{28} See id. at 55 ("[T]he questions which I shall ask of justifications advanced for different lies will, in the end, be questions of benefit and harm, questions asking why lying matters and what it does to individuals and institutions.").

\textsuperscript{29} See id. at 103-04.

\textsuperscript{30} Id. at 24.

\textsuperscript{31} See id. at 94-95.

\textsuperscript{32} See id. at 96-97.
individuals seek out expert opinion only from those who would agree, something quite analogous, for example, to the selection of witnesses appearing before a congressional committee. A third stage of evaluation, therefore, is necessary. At that point, prospective liars must meet a test of publicity, which requires justification of competing risk and benefit imposed by the lie to reasonable persons of diverse allegiances. It is this third stage I seek to reach through this article.

II. Truth and the Military

There may be no other profession that embraces an ethic of truthfulness, honesty, and integrity to the degree to which the military does. Military effectiveness fundamentally depends on trust between servicemembers, whether of superior, subordinate, or equal rank. Unquestioning trust in the complete candor of information provided throughout the military chain of command is a necessity for a profession that as a matter of course asks its members to place themselves in harm's way.

The military witnesses who testified concerning this ethic of truthfulness focused on the inseparability of honesty, trust, and mission readiness. As the retired admiral on the panel explained, "Success in combat, which is our business, depends on trust and confidence in our leaders and in each other. . . . This trust and confidence must exist up and down the chain of command where operations require execution of orders that endanger lives." The importance of the ethic, therefore, matches the tremendous magnitude of the risk. "There can be no compromise on this issue, when professionally the ultimate you can

33. See id. at 97-103.

34. Bok notes her concern that, in some circumstances, members of the general public may be so incapable of imagining themselves a party to a particular lie that their perspective retains as much bias as the perspective of those more directly affected. Interestingly, though, Bok's concern is that the public may not be able to empathize with the perspective of the deceived, which might be the case, for example, with respect to investigative lies to criminal suspects by police. "An inflamed and threatened public can be unreasonable in the extreme. The more unlikely it is that the public will ever share the predicament of the deceived, the more difficult the shift of perspectives becomes, and the more bias can creep into the evaluation." Id. at 102. For purposes of this article, my concern would be that members of the general public would have difficulty imagining themselves in the role of one forced to lie, as in the case of servicemembers burdened and coerced by "Don't Ask, Don't Tell." Bok admits that her moral philosophy of lying applies poorly to coercive circumstances, which would include the military's treatment of its gay servicemembers, but hopes that her work will "shed light also on the relation between coercion and deception, whether in a family, an institution, or a society." Id. at xxii.

35. Perjury Hearing, supra note 2, at 76 (testimony of Adm. Leon Edney).
demand of a subordinate is that he or she lay down their life in the execution of your orders on behalf of this country."36

Justification of the ethic of truthfulness, however, extends beyond the immediacy of orders in the midst of combat. Servicemembers learn that military service requires a level of candor unfamiliar to the civilian world.37 Mistakes and shortcomings must be revealed, not hidden, so that they will not be repeated in less forgiving circumstances. "Mistakes will happen and can be corrected, usually with a positive learning curve. To cover up mistakes and responsibility by lying or obstruction cannot be tolerated."38

Prospective officers at each of the federal military academies are indoctrinated in a strict ethic of honesty and truthfulness. Under the Honor Code in effect at each of the academies, cadets and midshipmen vow, quite simply, that they will not lie, cheat, or steal.39 In the words of one officer-to-be, the honor system is "the ultimate reflection of what it meant to be a midshipman... Those without respect for honor, for the truth, were simply unworthy..."40 The honor system's definition of lying, moreover, extends beyond the sort of blatant, affirmative falsehood usually associated with the term. A violation of the Honor Code can also occur through mere "quibbling," verbal evasiveness that is misleading or incomplete without being directly false.41

36. Id. at 77.
37. See THOMAS E. RICKS, MAKING THE CORPS 56 (1997) (quoting a Marine Corps drill instructor's admonition to new recruits: "You must be completely honest in everything you do."). "It is a rigid code, bristling with values alien to many of these recruits." Id.
38. Perjury Hearing, supra note 2, at 77.
40. STEFFAN, supra note 39, at 46.
41. STIEHM, supra note 39, at 63.
42. See LUCIAN K. TRUSCOTT IV, DRESS GRAY 259 (1978) (defining quibbling as a "failure to tell 'the whole truth'"). One of the most well-known fictional representations of the Honor Code in action, the novel (and television movie) Dress Gray featured "quibbling" in response to an intrusive question about sexual conduct. The accuser in this best-selling book, ironically, was a closeted gay cadet; the presumably heterosexual violator of the Honor Code was forced to withdraw from the Academy because he gave a misleading and evasive (although perhaps subjectively true) answer when asked if he was a virgin. See id. at 260-75. Truscott is a graduate of the United States Military Academy at West Point, a son of a graduate, a grandson of a WWII four-star general, and a Vietnam combat veteran. His father, a retired Colonel, testified before Congress in favor of lifting the ban against gay servicemembers. See Policy Implications of Lifting the Ban on Homosexuals in the Military: Hearings Before the House Comm. on Armed Services, 103d Cong. 6-7 (1993).
That same concern with deceptive evasiveness is found in the officer's oath of office, in which the individual taking the oath swears to protect and defend the Constitution of the United States, taking that obligation "freely, without any mental reservation or purpose of evasion." 43

Far from being an academic exercise in ethics, the military's expectations for an ethic of truthfulness are grounded in day-to-day operational necessity:

Men may be inexact or even untruthful in ordinary matters and suffer as a consequence only the disesteem of their associates or the unconvenience [sic] of unfavorable litigation, but the inexact or untruthful soldier trifles with the lives of his fellow men and with the honor of his government . . . . 44

The congressional perjury hearing was therefore replete with concern that President Clinton's failure to be completely and truthfully responsive about his marital indiscretions would undermine good order and discipline in the military. A congressman from South Carolina, a state with a strong affinity for the military, 45 contended that military families "are severely affected by what is going on in the White House and that morale is dangerously low and dangerously affected by what they perceive is a clear lie by the commander in chief." 46 One of the witnesses believed, incredibly enough, that President Clinton's falsehoods and evasions would cause some citizens to opt against joining the military and cause some current servicemembers to

43. Steffan, supra note 39, at 37. "Mental reservation" is, in essence, an unstated lie or a subtle method of evasion. The speaker knowingly misleads another by her statement, but rationalizes the deception by adding a silent mental qualifier that could make the statement true—the mental equivalent of crossing one's fingers behind one's back in an effort to pardon a lie. See Bok, Lying, supra note 21, at 35-37.


45. John McCain, Senator from Arizona and presidential candidate, chose not to compete in the early Iowa caucus for the Republican presidential nomination in 2000. He instead planned to focus his campaign efforts on a strong finish in the South Carolina primary, where high concentrations of active-duty and retired military personnel would be particularly respectful of his service as a Vietnam-era naval aviator and five-year prisoner of war. See Edwin Chen, McCain Pins Presidential Hopes on Fellow Veterans; Politics: Arizona Republican Senator, a Celebrated Former POW, Aims for Tactical Victories in a Few Key States, L.A. Times, June 28, 1999, at A1. Charleston, South Carolina is also the home of The Citadel, the Military College of South Carolina, where Shannon Faulkner's lawsuit led to integration of the previously all-male institution. See Faulkner v. Jones, 51 F.3d 440 (4th Cir. 1995).

leave the military prematurely. In this admiral's words, there is now a "tendency to see the rationale that is being put forth here on the insignificance of lying and the insignificance of adultery... being used as a defense, and in that manner it will undercut the good order and discipline" necessary to internal morale and public respect.

The admiral's juxtaposition of contempt for lying and contempt for adultery may begin to explain why a military that so prides itself on instilling a powerful ethic of truthfulness can at the same time operate under the policy of "Don't Ask, Don't Tell." Contrary to its popularized name, the policy requires much more of gay servicemembers than simple abstention from "telling" others about their sexual orientation. It requires active and continuing deception in an effort to avoid triggering the investigative mechanism set out by Department of Defense regulation. The statutory ban itself is described in relatively specific prohibitions of particular intimate conduct and particular state-

47. See id. at 106 ("it might affect the quality and the numbers that make it a career") (testimony of Adm. Bud Edney). The admiral distinguished the case of former Secretary of Defense Caspar Weinberger, who was pardoned by President George Bush after his indictment for false statements to Congress in relation to the Iran-Contra affair, explaining that Weinberger's charged failure to tell the truth would not affect servicemember morale because foreign policy "is so much more complex to understand." Id. at 107; see also David Johnston, The Pardons; Bush Pardons 6 in Iran Affair, Aborting a Weinberger Trial; Prosecutor Assails 'Cover-Up", N.Y. TIMES, Dec. 25, 1992, at A1.

48. Perjury Hearing supra note 2, at 106 (testimony of Adm. Leon Edney). Of course, whenever military witnesses appear before Congress, congressmen who are military veterans sometimes engage in a bit of "me too" self-puffery in support of their opinions. One example was the soliloquy of Representative Steven Buyer, who was an Army Reserve lawyer called to duty during the Persian Gulf War:

When military leaders, to include the Commander in Chief, fall short of this idea, then there is confusion and disruption in the ranks. And today many do see a double standard.

I am out there. I have been with the Marines. I have been with the Third Fleet before they sailed.

Id. at 64. Military experience, inflated or not, however, remains a valuable badge of legislative credibility in matters related to military service. See Diane H. Mazur, A Call to Arms, 22 HARV. WOMEN'S L.J. 39, 66 (1999) (citing Rep. Buyer's disproportionate influence and arguing that women are disadvantaged by the underrepresentation of female veterans in Congress).

ments related to sexual orientation; any proceeding under the statutory ban would presumably require evidence of the prohibited conduct or statements. The circumstances that would trigger an investigation designed to discover prohibited acts and statements, however, are much more open-ended. While the investigatory resources of the United States military cannot be brought to bear on an individual solely on the basis of sheer "rumor, suspicion, or capricious claim" that an individual is gay, those same investigatory resources can be employed provided there is "credible information" supporting a "reasonable belief" that a statutory violation has occurred.

The relationship of the statutory ban itself to the scope of investigation permissible to uncover a violation is analogous to the relationship between evidence that is admissible at trial and information that is subject to discovery. Information subject to discovery need not be admissible at trial; it need only be relevant and appear "reasonably calculated to lead to the discovery of admissible evidence." The threshold of information that would warrant investigation under "Don't Ask, Don't Tell" is likewise a lower standard than the quantum of evidence necessary to sustain a finding under the statutory ban. Credible information that would qualify under this regulatory scheme is so routine, so much the content of normal day-to-day living, however, that it could only be concealed through exhaustive deception. In prac-

50. 10 U.S.C. § 654(b)(1) prohibits "a homosexual act," defined in 10 U.S.C. § 654(f)(3) as "any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires." I describe the section as "relatively" specific because it also includes as prohibited conduct any bodily contact "which a reasonable person would understand to demonstrate a propensity or intent to engage in" a homosexual act. 10 U.S.C. § 654(b)(1) (1998). The statute also requires discharge from the military if a servicemember "has stated that he or she is a homosexual or bisexual, or words to that effect." 10 U.S.C. § 654(b)(2).


53. "Credible information" is intended to be a much lower standard than "probable cause" that a violation has occurred. See Assessment of the Plan to Lift the Ban on Homosexuals in the Military: Hearings Before the Military Forces and Personnel Subcomm. of the House Comm. on Armed Services, 103d Cong. 210 (1993) (testimony of Hon. Jamie S. Gorelick, General Counsel, Department of Defense). Provided the information is anything more substantive than "rumor, suspicion, or capricious claim," investigation is justified. See Guidelines for Fact-Finding Inquiries, supra note 51, § C.
tical application, "Don't Ask, Don't Tell" requires servicemembers to continually conceal everyday information about what they do, where they go, and whom they see, far exceeding the scope of information more directly associated with intimate behavior. To keep secret the latter is difficult enough; to keep secret the former is to change the catch phrase of the policy to "Don't Ask, Don't Tell, Lie Consistently." The policy's prohibition of statements concerning sexual orientation is not its most intrusive burden:

Rather, it involves making truly unremarkable disclosures, such as with whom one goes grocery shopping, shares a checking account, takes a vacation; . . . from whom one receives a phone call, a message, or flowers on one's birthday; and with or without whom one goes home for the holidays.

Conversely, it can be these pedestrian yet very personal aspects of a life that remain hidden when one is closeted—far less interesting to some, but far more real and pervasive in the lives of most gay, lesbian, or bisexual persons, than revelations about "propensity," "prohibited conduct," or "homosexual acts," with which the leaders of the armed forces and Congress profess to be so concerned and appear, to some, to be so obsessed.

54. Those who fail to understand how difficult it can be to live under "Don't Ask, Don't Tell" are prone to use the phrase in a trivial, humorous fashion. See, e.g., George Vecsey, Sports of the Times; Samaranch Must Take the Blame for the Mess, N.Y. TIMES, Jan. 22, 1999, at D4 (describing the unstated policy under which International Olympic Committee delegates were given improper financial inducements during the site selection process as "Don't Ask, Don't Tell"). The policy is anything but amusing.

55. See Mazur, Unknown Soldier, supra note 49, at 246-48 (describing the inescapable ordinariness of "credible information" that a servicemember is gay); Tobias Barrington Wolff, Compelled Affirmations, Free Speech, and the U.S. Military's Don't Ask, Don't Tell Policy, 63 BROOK. L. REV. 1141, 1154 (1997) (describing a typical conversation between servicemembers about weekend diversions—"What did you do this weekend?"—that may require lying to avoid investigation under "Don't Ask, Don't Tell"). Gay people can serve in the military "only on condition that they acquiesce in lies—indeed, that they lie actively—about the most personal aspects of their lives and their identities. The new policy does more than mandate mere silence; it compels gay servicemembers to make involuntary and false affirmations of a heterosexual identity that is not their own." Wolff, supra, at 1144.

56. Kay Kavanagh, Don't Ask, Don't Tell: Deception Required, Disclosure Denied, 1 PSYCHOL., PUB. POL'Y & L. 142, 154 (1995). In contrast, the military's perspective on the lives of its gay servicemembers is distinctly unimaginative. While Department of Defense policy may not protect servicemembers from the consequences of these "unremarkable" disclosures, it does purport to allow the more frivolous diversions of going to gay bars, reading gay magazines, and
Federal appellate opinions have recognized the fundamental inconsistency of establishing a forced system of deception within a culture that strongly values an ethic of truth; however, that recognition has been left to those in dissent or to those later reversed.

Common sense suggests that a policy of secrecy, indeed what might be called a policy of deception or dishonesty, will call unit cohesion into question.

If there is one thing that is undisputed and seems self-evident, it is that cohesion depends on mutual trust within the unit. The honor code for servicemembers provides that they will not lie or cheat, and for good reason. Honesty is a quality that attracts respect. Secrecy and deception invite suspicion, which in turn erodes trust, the rock on which cohesion is built.

The policy of the Act is not only inherently deceptive. It also offers powerful inducements to homosexuals to lie.57 As Judge Stephen Reinhardt of the Ninth Circuit observed in dissent, "[I]t is difficult to see how the military can benefit from a policy fraught with such patent disingenuousness. 'Don't Ask, Don't Tell' seems entirely inconsistent with the proud traditions of our armed services, with the slogans such as Duty, Honor, Country, [and] the Honor Codes . . . ."58 Gay servicemembers are therefore doubly condemned: condemned for a charged breach of sexual morality and then condemned for the lie they are forced to construct. "By forcing only gays to lie about their identities in a culture in which lying is held to be deeply dishonorable, the military inculcates in them a conception of themselves as second-class citizens, not only because of their homosexuality, but also because of their duplicity."59 One has to marching in gay rights parades. "Such activity, in and of itself, does not provide evidence of homosexual conduct." Guidelines for Fact-Finding Inquiries, supra note 51, § C(3)(d).

57. Able v. United States, 880 F. Supp. 968, 979 (E.D.N.Y. 1995), vacated and remanded, 88 F.3d 1280 (2d Cir. 1996), on remand, 968 F. Supp. 850 (E.D.N.Y. 1997), rev'd, 155 F.3d 628 (1998); see also Thomasson v. Perry, 80 F.3d 915, 953 (4th Cir. 1996) (en banc) (Hall, J., dissenting) ("Another incongruity of the 'unit cohesion' hypothesis behind 'don't tell' is that it encourages lying in the interest of building and maintaining 'bonds of trust' among the troops. A relationship built on deception is anything but a 'bond of trust'.")

58. Holmes v. California Army Nat'l Guard, 124 F.3d 1126, 1139 (9th Cir. 1997) (Reinhardt, J., dissenting).

59. Kenji Yoshino, Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell", 108 YALE L.J. 485, 548 (1998). Although Professor Yoshino seems to understand the dilemma faced by gay ser-
suspect that when an institution’s ethic related to honesty and truthfulness becomes conflicted and hypocritical, another motivation is at hand. With respect to the military, its ability to moralize about intimate conduct of which it disapproves is strengthened by association of that conduct with breach of an ethic of truthfulness.

III. TRUTH AND THE LAW

How does one measure the importance of truth to justice? In the context of President Clinton’s impeachment hearings, its significance could not have been greater. Members of the majority stressed that witnesses in a court of law must be bound by an enforceable obligation to speak the truth; witnesses who withhold truth can “destroy the case of a fellow American citizen” and weaken the underlying rule of law:

Because the rule of law—if you look at Auschwitz—do you see what happens when the rule of law doesn’t prevail?

Now, I do not leap from the Oval Office on a Saturday afternoon to Auschwitz, but there are similarities when the rule of law does not obtain, or where you have one law for the powerful and one for the nonaristocratic. That is what we are discussing, the significance of the oath, the significance of truth, the breach of promise when someone lies to you having raised their hand and sworn to tell the whole truth.61

At the same time, others question whether the telling of truth is a necessary, expected, or even aspirational component of the legal system under contemporary interpretations of legal ethics in practice. This competing perspective on the significance of honesty and truthfulness in law, however, is one that concerns statements made not by lay witnesses, but by the system’s professional participants. Robert Nagel speaks of lawyers, not litigants forced to lie in service to country, I strenuously disagree with his conclusion that they have thereby “disavowed” the gay community. \textsuperscript{60}
gants, when he criticizes the general legal ethic of truthfulness, or untruthfulness: "It is not too much to say that we have a legal system that from top to bottom is built in significant part on half-truths, exaggerations, distortions, omissions, and falsehoods."

In contrast to the nominally consistent ethical standard of truthfulness that prevails within the military—at least the standard that prevails other than in matters of sexual morality—the institution of law struggles constantly with its inconsistent approach to the significance of honesty. Not only does the law permit quibbling by its professional members, it demands quibbling, if not knowing misrepresentation, in the service of representing clients zealously. Under a professional ethic (of sorts) that accepts the necessity of misrepresentation in the course of effective advocacy, it is, for example, "understandable" to a federal court of appeals that judicial sanction for a court brief flatly misrepresenting the state of existing law would cause "complete consternation in the practicing bar which sees vigorous advocacy, seemingly without regard to its possible misrepresentations to the court, as the hallmark of aggressive and justified representation of the client." "


64. Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1540 & n.4 (9th Cir. 1986), rev’d 103 F.R.D. 124 (N.D. Cal. 1984) (quoting Sanctions: Rule 11 and Other Powers, 1986 A.B.A. SECTION OF LITIGATION 8). In dissenting from a denial of hearing en banc, several judges expressed their exasperation at the ubiquitous practice of misrepresentation by lawyers: We should also take into account that district courts, more than appellate courts, are plagued by misrepresentations. We face them on occasion, but common report has it that some trial lawyers are much less scrupulous with trial judges, who do not have the staff or time an appellate tribunal has to unmask misrepresentation.
Some readers at this point might already strongly object to my unsympathetic characterization of the legal system's ethic of honesty and truthfulness, as did several of my colleagues with whom I shared the ideas that follow; nonetheless, I stand by its pointedness. One experienced practitioner who recently entered the profession of teaching law has expressed his similar disappointment: "It never fails to astonish me how many attorneys who are truly decent people—who would give strangers the shirts off their backs—will also routinely . . . draft misleading answers to interrogatories or misrepresent the holdings of cases."\textsuperscript{65}

The depreciation of the ethic of honesty begins in law school. Law students are often unable to distinguish the difference between alternative inferences from fact or law, which presumably the first-year skill of "thinking like a lawyer" should enable them to discern, and misrepresentation of fact or law, which ethical constraints ought to discourage. The two become one and the same, with the inevitable lesson to law students that there are always two arguments to be made, two versions of facts to be found, and two interpretations of existing law to be discovered. Instead of learning to recognize those circumstances in which, on the merits of fact and law, there is only one reasonable and just determination, students learn to believe that "such a thing cannot be . . . [T]he law must (be made to) say what our side needs it to say!"\textsuperscript{66}

One example from my own experience as a moot-court judge in a law school appellate advocacy competition illustrates this potential gap in ethical education. The appellate question at issue was one of Fourth Amendment law: had a minor, a ten-year old boy, validly consented to a search of the residence he shared with his father? One of the facts in the record students should have used in arguing their respective positions was that the son had, in the past, missed a year of school for health reasons. The fact was significant because the validity of the child's consent depended on the police officer's reasonable belief that the child shared joint authority over the home. While the boy was only a fourth grader, he seemed much older in appearance, and the reasonableness of the officer's subjective evaluation of the child's


\textsuperscript{66} DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 15 (1988).
age, maturity, and intelligence would be the measure of valid consent. I was stunned to find students using this fact in a truth-adjusted fashion to argue that the boy must have been lacking in intelligence because he had been held back a year in school. When, in my role as judge, I asked whether the record showed that the reason for the delayed advancement was illness and not academic deficiency, what I received in return (coupled with an embarrassed almost-smirk) was a concession that I was right, offered with an air of “OK, you got me—all I can do is try.”

When law students are taught legal analysis without an accompanying ethic of truth, they develop an approach to the practice of law that can obscure professional responsibilities. “When we treat language and facts as infinitely manipulable, we encourage our students to misrepresent law and misstate fact—indeed, we teach them that there is no such thing as misrepresenting law and misstating fact.” It is essential that students understand the difference between facts seen from a client’s standpoint and facts seen from the standpoint of a client’s interest. The former simply ensures that the client’s perspective on relevant events is heard; the latter, in contrast, is the lawyer’s version of

67. See, e.g., Saavedra v. State, 622 So. 2d 952 (Fla. 1993).
68. Schiltz, supra note 65, at 779. Professor Schiltz believes that law professors without significant experience in the practice of law are less likely to impart an ethic of truthfulness to their students.

Although it would be difficult to prove, I suspect that professors who have practiced law—who have spent several years helping real people with real problems—are more likely to “eschew the bloodless relativism that implicitly teaches students to regard law as a game akin to ‘switch sides’ as played in high school and college debating societies.” Id. at 782 (quoting Alan Hirsch, The Moral Failure of Law Schools, TROIKA, Nov.-Dec. 1996, at 31, 33). I’m not sure that I would agree with his assessment. Law professors with and without significant practice experience—and lawyers in practice—range along the spectrum of professional honesty. I believe one of the realities of the practice of law that disappoints new graduates is the realization that very little of their work relates to the merits of the matter at issue.

In addition, one should always be careful about a conclusion that depends on the assumption there is “no such thing” as the matter in question, as in there is “no such thing” as misrepresenting law and misstating fact under the demands of zealous advocacy. Often the assumption there is “no such thing” is a substitute for fair analysis of whether “such thing” really exists. Diane H. Mazur, Women, Responsibility, and the Military, 74 NOTRE DAME L. REV. 1, 16-17 (1998) 1987 (critiquing the simplicity of the assumption that there is “no such thing” as a consensual sexual relationship between a man and a woman at different levels of the workplace hierarchy); Harry I. Subin, The Criminal Lawyer’s “Different Mission”: Reflections on the “Right” to Present a False Case, 1 GEO. J. LEGAL ETHICS 125, 136 (1987) (critiquing the assumption that there is “no such thing” as a false defense in a criminal trial; truth is more than “what the trier of fact determines it to be”).
reverse engineering. "Starting from the standpoint of the client's interest, the adversarial lawyer reasons backward to what the facts must be . . . ." 69

The rule of professional responsibility governing "candor toward the tribunal" requires that lawyers "shall not knowingly . . . make a false statement of material fact or law to a tribunal." 70 How, then, did we arrive at a practice so distant from principle under such a straightforward ethical expectation? 71 David Luban and William Simon have each written thoughtful critiques of ethical rules governing the practice of law that devote prominent attention to the listless status of a lawyer's ethic of

69. Luban, supra note 66, at 73; see also Mazur, supra note 48, at 49-50 (criticizing the employment of "standpoint epistemology" in legal scholarship concerning women in the military because it encourages departure from factual context; military women are characterized primarily as sexual victims rather than as professional servicemembers).

70. Model Rules of Professional Conduct Rule 3.3(a)(1) (1983). Some would contend that the requirement that a lawyer's false statements be made "knowingly" gives enormously wide, perhaps infinitely wide, latitude to misrepresent fact and law before the court. Who, after all, knows anything with absolute certainty? Under this interpretation, a lawyer is acting ethically and honorably even if he has no reason whatsoever to believe what he states is (or even could be) true, provided it is still possible he does not know it is false. Furthermore, the traditionally zealous advocate might argue that nothing is known to be false until the judge decides it is false. "[O]nly the judge's good faith determination of the case counts, and you do not yet know what that will be." Luban, supra note 66, at 27 (describing and refuting this viewpoint). In an application that sullies the alleged words of Yogi Berra, Luban refers to this ethical evasion as "[t]he trial ain't over 'til it's over" excuse. Id.

Sissela Bok dismisses the argument that "since we can never know the truth or falsity of anything anyway, it does not matter whether or not we lie when we have a good reason for doing so." Bok, Lying, supra note 21, at 12. She finds the argument unsupportable for an entirely practical reason: most who would advance it have no trouble distinguishing falsehood from truth in their daily lives in any context other than their professional one. See id. at 11-13. Still, lawyers try. Who knows beyond doubt whether a client is guilty of the crime charged? See David N. Yellen, "Thinking Like a Lawyer" or Acting Like a Judge?: A Response to Professor Simon, 27 Hofstra L. Rev. 13, 17 (1998). This contention, however, is itself misleading. Most misrepresentations made by lawyers will concern specific underlying facts and inferences from those facts, not global, existential conclusions of guilt and innocence. The truth or falsity of underlying facts and inferences are more often "knowable" by the lawyers who argue them.

71. The ethical obligation of Rule 3.3(a)(1), prohibiting false statements to a tribunal, offers the closest analogy to the legal obligation of a witness to tell the truth in testimony before a tribunal. While other professional obligations involve an ethic of truthfulness, such as the remaining sections of Rule 3.3 and Rule 11 of the Rules of Civil Procedure, this Article confines its discussion to false statements, in keeping with its overall theme.
honesty and truthfulness. Luban has observed the same sense of departure between principle and practice in a conflicted system that purports to prohibit false statements of fact or law while demanding that fact and law be manipulated to an instrumentalist end. "For the lawyer’s art is to manipulate arguments about law and fact (within the established [ethical] constraints . . . ) to bend, fold, and spindle, if not mutilate, the facts and law." The distinction between truth and falsity becomes blurred, in the context of legal advocacy, into a hybrid concept of “versions” of a legal dispute that may retain only a tenuous connection to the facts and law originally at hand. In Luban’s view, however, the assumption that competitive comparison of two “versions” of an event leads to an accurate and reasonable resolution “comes close to the undergraduate fallacy of thinking that because everyone has a right to her opinion, everyone’s opinion is equally likely to be right. Although frequently there are versions of the truth, truth does not necessarily come in versions.”

Simon similarly disputes the assumption that biased presentation of arguments that are skewed by adversarial inaccuracy is somehow the clearest path to truth. He offers instead a model of legal ethics in which ethical decisionmaking can, and should, turn on a lawyer’s evaluation of the underlying merits of a case, which of necessity relies on an ethic of truthfulness. As one of his illustrative examples, Simon examines one of the standard teaching hypotheticals in the study of legal ethics: cross-examination of the truthful witness. Is it ethical, so asks this hypothetical, for a lawyer to cross-examine a witness in a manner that invites the jury to draw an inference that the cross-examiner knows is false or, more specifically, an inference that the witness is lying when the cross-examiner knows the witness is truthful? Simon concludes that this misleading form of cross-examination would be improper because it works at cross-purposes to “truth as the central goal of adversary advocacy.” The practice thus amounts to deliberate deception, and it is difficult to see how it

73. Luban, supra note 66, at 13.
74. Id. at 72; see also Subin, supra note 68, at 136 (“it makes sense to characterize what emerges as ‘truth’ only if information, rather than ‘disinformation,’ is presented to the arbiter”).
75. See Simon, supra note 72, at 138.
76. See id. at 143 (discussing example of deceptive impeachment of truthful handwriting expert); Simon, supra note 72, at 8 (discussing example of deceptive impeachment of truthful eyewitness).
77. Simon, supra note 72, at 7.
could make any general contribution to an accurate factual determination." 78

Not surprisingly, one of the more common versions of the hypothetical concerning cross-examination of the truthful witness involves cross-examination of the truthful rape victim by the defendant's lawyer. 79 In its traditional form, prior to the enactment of rape-shield evidentiary rules that now prohibit evidence of the sexual character of victims of sexual assault, 80 the hypothetical asks whether the cross-examiner should question the complainant about her "scandalous" sexual behavior with another man in an effort to cast doubt on her credibility. 81 The "correct" answer, under the dominant understanding of adversarial ethics, is that the cross-examiner must use the information to discredit the witness, however irrational and prejudicial the exercise; anything less would be a failure of professional responsibility. 82 Even David Luban, an ethics scholar who generally condemns the prevalence of misrepresentation in legal argument, had a difficult time justifying an ethical prohibition of impeachment on the basis of sexual character. 83

78. Id. at 8; see also Subin, supra note 68, at 145 (noting "the utterly arbitrary line we have drawn between deliberately offering perjured testimony and deliberately attempting to create false 'proof' by offering truthful but misleading evidence, or by impeaching a truthful witness").

79. One teacher and writer in the field of evidence has noted the disproportionate number of hypotheticals in one particular evidence casebook that involved women as sexual objects, women as victims of violence, or combinations of the two. The casebook in question was later revised substantially in response to the critique. See Ann Althouse, The Lying Woman, The Devious Prostitute, and Other Stories From the Evidence Casebook, 88 Nw. U. L. Rev. 914 (1994).

80. See, e.g., FED. R. EVID. 412.

81. See MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 44 (1975); see also Monroe H. Freedman, Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions, 64 Mich. L. Rev. 1469, 1474-75 (1966) (justifying an ethical obligation to discredit a truthful witness). Harry Subin once represented a criminal defendant in a case that presented the real-life version of the standard hypothetical. He chose not to cross-examine a truthful rape victim on the basis of her consensual behavior with others, a decision he made out of conscience but believed was probably a violation of his ethical obligation to the client. See Subin, supra note 68, at 135.

82. See FREEDMAN, supra note 81, at 48-49.

83. See LUBAN, supra note 66, at 150-52. Luban ultimately concluded that cross-examination of the victim on the basis of sexual character was "morally wrong," primarily on the basis of women's institutional disadvantage in a patriarchal system. Id. He misses the importance of an ethic of truthfulness, however, when he confuses the right to zealous representation with the right to misrepresentation: "Thus, if cross-examining the victim about her sex life is a morally permissible part of the advocate's zeal when the accused is innocent, the same is true when he is guilty." Id. at 151. The difference is that one circumstance requires misrepresentation and the other does not.
The association of sexual character evidence with issues of credibility, honesty, and truthfulness has been a tenacious one over time. Historically, the connection between female sexuality and character for truthfulness has been quite direct. Women with "poor" sexual character lacked credibility not only because they exhibited a propensity or interest in sexual relations, but also because their general character for truthfulness was deemed deficient as well. Impeachment on the basis of sexual character evidence allowed courts of law to be used as government-sponsored forums for some of the rankest instances of sexual moralizing.

The enactment of the Federal Rules of Evidence in 1975, supplemented by a rape-shield bar in 1978, signaled through a variety of its provisions a conscious choice to eliminate the use of sexual character evidence in the courtroom. The ability to prove a case on the basis of the sexual character of the parties or their witnesses has always been of particular concern to women, who are likely to be disproportionately harmed by allegations of poor sexual character:

Certainly, women's experiences before the enactment of Rape Shield laws serve as a warning of how "character" evidence can be used as an oppressive tool. Support for the idea of "character evidence" in one context may lead to application in other contexts that injure women. Indeed, the whole notion of relying on "character" runs counter to the historical experience of women. Women branded with bad or "loose" character in rape cases must be leery of our culture's collective intuition.

IV. TRUTH AND SEXUAL MORALITY

At times there seems to be something intoxicating about the latitude to moralize about sexual matters through the power of law, which is why, in most instances, rules of evidence close the door to the tactic. Rule 412 of the Federal Rules of Evidence is the most prominent example because it addresses the subject matter most directly: the rule excludes, in both criminal and civil cases involving claims of sexual misconduct, evidence of the alleged victim's "other sexual behavior" or sexual predisposition.

85. See 3A JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 924, 924a (Chadbourn rev. 1970).
The rule permits only a few narrow exceptions for evidence of other sexual conduct—not general predisposition, reputation, or opinion—that is directly related to proof of the charged incident. The intent of the rule is to eliminate entirely the historical practice of using a woman's sexual character as a means of proving either her behavior or her credibility. It denies a defendant accused of sexual misconduct the latitude to moralize about his accuser's sexual history and, furthermore, to engage the fact-finder in a group effort in moralizing about sexuality.

Another evidentiary rule severs the connection between disfavored sexual behavior and character for truthfulness in a much more subtle, but still effective and essential way. Rule 608(b) of the Federal Rules of Evidence permits testifying witnesses to be cross-examined about prior specific instances of lying or other deceptive behavior or, in the language of the rule, specific instances of conduct that are "probative of truthfulness." The purpose of the rule is to give the fact-finder additional information with which to determine the witness's present credibility. The inference is a simple one. The fact-finder is permitted to infer that an individual who has lied before is more likely to be lying in his or her present testimony.

An analogous common-law evidentiary principle prevents "opening your own door" to the manufacture of untruthfulness in the courtroom. Under this principle, a cross-examiner cannot ask a question that is inappropriate under the rules of evidence and later contradict any lies the witness tells in response, even if the witness' lawyer failed to object to the question. The cross-examiner must accept the witness' answer in evidence, even if it is a lie. The principle against "opening your own door" in effect excuses lying for the greater good of preventing inappropriate inquiries. See United States v. Reed, 44 M.J. 825 (A.F.C.C.A. 1996) (military law opinion) (excluding evidence of defendant's sexual aggressiveness following defendant's denial that he had ever been sexually aggressive; the question attempted to solicit inadmissible propensity evidence, and therefore the prosecutor must live with the denial).

Rule 608(b) therefore permits a line of "propensity" reasoning that is otherwise largely prohibited by the Rules. Under Federal Rule of Evidence 404(a), evidence of an individual's character or trait of character, whether in the form of opinion, reputation, or instances of prior conduct, is not admissible to prove that individual's conduct on a specific occasion. Rule 404(a) contains...
The potential for abuse of Rule 608(b) as an instrument for moralizing about sexual conduct is apparent. Although a witness could not be directly discredited by cross-examination into his or her sexual history because sexual behavior in and of itself is not an act of deception or falsity, any non-conforming sexual history is no doubt accompanied by some falsehoods intended to avoid societal disapproval. While, for example, a cross-examining could not discredit a witness in open court by asking, "Haven't you committed acts of adultery (or fornication, or homosexuality)?" the cross-examining could presumably ask, "Haven't you lied to someone about your acts of adultery (or fornication, or homosexuality)?" Provided the cross-examining had a reasonable or good-faith basis for the question, which would almost certainly be the case in all instances of adultery and would likely be the case with respect to other non-conventional sexual behavior, given our current climate of judgment, the question seems technically proper under the rule. From the perspective of the witness, however, questions concerning lies about sexual behavior are just as intrusive as questions about sexual behavior itself. Whatever the form of the question, furthermore, the court is equally abused as a forum for sexual moralizing.

several relatively narrow exceptions, one of which is proof of a testifying witness' character for truthfulness under Rule 608.

92. Interestingly, Rule 608(b) was the subject of little debate prior to its enactment and has been the subject of little scholarly attention in the years since. See Robert Okun, Character and Credibility: A Proposal to Realign Federal Rules of Evidence 608 and 609, 37 VILL. L. REV. 533, 544 (1992) (noting that Rule 608 codified existing evidentiary common law). Almost all scholarly attention with respect to impeachment on the basis of character for truthfulness is devoted to Rule 609, which permits impeachment by prior convictions, and its effect on criminal defendants. See FED. R. EVID. 609. A recent colloquy on character impeachment evidence offered no substantive mention of Rule 608, even though the rule is more open-ended than Rule 609 in that any prior act in the witness' life, if "probative of truthfulness," is a potential subject for cross-examination. See Richard D. Friedman, Character Impeachment Evidence: Psycho-Bayesian Analysis and a Proposed Overhaul, 58 UCLA L. REV. 637 (1991); Richard D. Friedman, Character Impeachment Evidence: The Asymmetrical Interaction Between Personality and Situation, 43 DUKE L.J. 816 (1994); H. Richard Uviller, Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale, 42 DUKE L.J. 776 (1993); H. Richard Uviller, Unconvincing, Unreconstructed, and Unrepentant: A Reply to Professor Friedman's Response, 43 DUKE L.J. 834 (1994). Under Rule 608(b), the act need not have led to conviction; the act need not even be criminal in nature. Nonetheless, there has been relatively little interest in defining the scope of acts which are "probative of truthfulness," the primary limitation under the rule.

93. See MUELLER & KIRKPATRICK, supra note 89, at 549.

94. See id. at 550.
For these reasons courts have consistently construed Rule 608(b) to exclude instances of lying related to sexual conduct. Litigants cannot bootstrap lies about sexual conduct into permissible cross-examination if the original conduct was not probative of truthfulness itself.95 One court's comments in 1976 concerning an attempt to impeach a witness through accusations of adultery are both illustrative and oddly prescient of current events:

In these times of recorded and widely publicized Presidential and Congressional adulterers, massage parlors with neon signs, and street corner pandering, which claims constitutional protection, we suspect that many of our jurors selected within a fifty mile radius of Foley Square are licentious, or have friends who are. Moss neither raped nor seduced Miss Gold; the activities of these mature consenting adults would not, in our view, if known to the jury, impeach any witness.96

Military courts have interpreted the scope of Rule 608(b) in similar fashion.97 The military's practice of prohibiting impeachment based on the type of lie that typically accompanies non-conforming sexual activity, however, is an even stronger statement of principle on the danger of bootstrapping issues of morality into issues of credibility. The statement is stronger because, with respect to witnesses who are servicemembers, the disfavored conduct is often also criminal.98 Nonetheless, military

95. See 3A John H. Wigmore, Evidence in Trials at Common Law § 982 (Chadbourn rev. 1970) (concluding that adultery was not probative of character for truthfulness); see also Charles W. Collier & Christopher Slobogin, Terms of Endearment and Articles of Impeachment, 51 Fla. L. Rev. 615, 640 (1999) (concluding, with respect to President Clinton's impeachment controversy, "something unimportant (that is, 'private') is not converted into something important (that is, 'public') just because someone lies about it"); Miguel A. Méndez, The Law of Evidence and the Search for a Stable Personality, 45 Emory L.J. 221, 230 (1996) (evaluating the behavioral predictiveness of different theories of personality to explain why, for example, "an individual who cheats on his spouse might not lie under oath").

96. United States v. Ostrer, 422 F. Supp. 93, 98 (S.D.N.Y. 1976); see also United States v. McMillon, 14 F.3d 948, 956 (4th Cir. 1994) (homosexuality not probative of truthfulness under Rule 608(b)); "it is exactly the type of cross-examination strategy that impairs the search for the truth and harasses, annoys or humiliates the witness in the process"); State v. Woodard, 404 S.E.2d 6 (N.C. App. 1991) ("Adultery is not the type of misconduct which falls under Rule 608(b).")

97. Military Rule of Evidence 608(b) is substantively identical to Federal Rule of Evidence 608(b).

courts do not permit impeachment on the basis of, for example, adultery, even though adultery is punishable by dishonorable discharge and imprisonment for as much as one year\textsuperscript{99} and even though "adultery by a married person involves deceit of, and fraud upon, the aggrieved spouse."\textsuperscript{100}

Significantly, the principle holds even when the witnesses are female and perhaps still subject, in some minds, to the historical connection between non-conforming sexuality and truthfulness. Cross-examination of a female servicemember alleging that she had posed nude for photographs and had engaged in promiscuous sexual relationships has been barred as irrelevant to her credibility and character for truthfulness:

Fornication is no more a barometer of untruthfulness than celibacy is an indicator of truthfulness, and it is probable that at least as many lies have been uttered by persons fully clothed as by those who were nude. We therefore hold that neither posing nude for photographs nor engaging in an active sex life is an act of corruption which is probative of a propensity for truthfulness or untruthfulness.\textsuperscript{101}

Members of the legal profession's bar, not surprisingly, have taken a similar perspective on the connection between sexual conduct in their own lives and the character for truthfulness necessary for the ethical practice of law. Under the Model Rules of Professional Conduct, "matters of personal morality, such as adultery and comparable offenses, . . . have no specific connection to fitness for the practice of law" or to "dishonesty" or "breach of trust."\textsuperscript{102}

The one event that may have disturbed this settled understanding of Rule 608(b) and related issues concerning sexuality and credibility, however, is the impeachment-related lawsuit of Jones v. Clinton.\textsuperscript{103} The trial judge in Jones apparently misunder-

\textsuperscript{99.} See Courts-Martial, supra note 98, at pt. IV, \textsuperscript{1} 62.
\textsuperscript{100.} United States v. Jacobs, 9 M.J. 794, 798 (N.C.M.R. 1980).
\textsuperscript{101.} United States v. Duty, 16 M.J. 855, 857 (N-M.C.M.R. 1983). If feminists who criticize the military were more aware of decisions such as Jacobs and Duty that were protective of women's sexuality, their arguments might be less reflexive. See Mazur, supra note 48.
\textsuperscript{102.} Model Rules of Professional Conduct Rule 8.4 cmt. (1983). Such a forgiving perspective was not always the case, of course. One applicant to the Florida Bar during the 1960s was caught in the classic Catch-22 of sexuality and credibility: he was denied admission to the bar not only for engaging in homosexual conduct, but also for lying about the homosexual conduct. See William N. Eskridge, Jr., Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961, 24 Fla. St. U. L. Rev. 703, 752-53 (1997).
stood both the language and the intent of the rule when she suggested that evidence of President Clinton’s affair with Monica Lewinsky was potentially relevant for purposes of cross-examination under Rule 608(b).\(^\text{104}\) This statement was inaccurate and probably served to feed the general public assumption that witnesses can routinely be questioned about their sexual behavior in an effort to attack their credibility.

When the evidentiary door to sexual character is left ajar either by a misinterpretation of the applicable rules, as in Jones v. Clinton, or by the unusual nature of the claims in a particular case, the urge to moralize can raise an already adversarial level of misrepresentation to new heights. One example can be seen in Shahar v. Bowers,\(^\text{105}\) a decision which permitted the state attorney general in Georgia to revoke an offer of employment to a graduating law student after she disclosed her intention to enter into a religious ceremony of commitment with a female partner. In essence, Shahar’s sexual character—and others’ perceptions of her sexual character—became an issue subject to proof in support of Bowers’ contention that her life with another woman impaired the ability of his office to enforce Georgia’s sodomy laws\(^\text{106}\) and to oppose issues such as same-sex marriage and domestic partnership benefits.\(^\text{107}\)

In a pre-trial ruling denying the attorney general’s motion to dismiss, the court censured both the defendant and his lawyers for what was apparently an alarming level of misrepresentation in briefs filed with the court:

One particular problem has been a lack of complete honesty in dealing with the court. Counsel are put on notice that the court will demand complete intellectual and professional honesty in reference to all arguments and authorities presented to this court. In a related matter, the court also notifies defendant and defense counsel that if they continue to promote improper arguments, the court will not hesitate to sanction them with attorneys’ fees under

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104. Id. at 1219 & n.3. Judge Susan Webber Wright was commenting on evidence of the affair itself, not evidence that President Clinton lied about the affair. There is no colorable argument that an adulterous affair, in and of itself, is probative of truthfulness. Part V of this Article discusses other errors in application of the Federal Rules of Evidence that occurred during Jones v. Clinton, particularly with respect to the treatment of character evidence under Rule 404.

105. 114 F.3d 1097 (11th Cir. 1997).


107. See Shahar, 114 F.3d at 1104-05.
Fed. R. Civ. P. 11. Although the court has directed its comments to both parties in this action, defense counsel is by far the greater offender. One of Bowers' ethical lapses was his persistent reference to additional "facts" that were not part of the plaintiff's complaint, even though the matter was before the court on a motion to dismiss on the pleadings alone. Those additional "facts," not unexpectedly, consisted of allegations and speculations concerning Shahar's sexual behavior. The parties later agreed to limit discovery of Shahar's sexual history and discovery of the names of any law department employees believed to have engaged in sodomy or adultery, although that agreement did not prevent Bowers from successfully arguing that Shahar's propensity to commit sodomy justified his revocation of the employment offer. The similarity of Bowers' reasoning to the reasoning of "Don't Ask, Don't Tell" went unnoticed.

Furthermore, Bowers questioned Shahar's judgment. What had reflected poor judgment in Bowers' mind, though, was not so much her relationship with another woman, but her failure to live that relationship in absolute secrecy. Her error, according to the court, was in a lack of furtiveness in life's most mundane aspects: "And, they, together, own the house in which they cohabit. These things were not done secretly, but openly." As the colloquialism goes, they had her coming and going. Had she made the decision to live furtively in the manner endorsed by the state of Georgia, her secrecy would have required a consistent level of lying designed to avoid disclosure of any information suggesting the existence of a committed rela-

108. Shahar v. Bowers, No. 1:91-CV-2397-RCF, 1992 WL 220781, at *2 (N.D. Ga. Mar. 6, 1992). Although the court addressed its remarks to both parties, the opinion suggests that its ethical concerns were with the defendant. Every instance of misrepresentation discussed by the court was committed by the attorney general. See id.

109. See id. ("this court has ignored (among other things) any reference to plaintiff's sexual conduct").

110. See Shahar v. Bowers, 120 F.3d 211, 213 (11th Cir. 1997); Shahar v. Bowers, 114 F.3d 1097, 1105 n.17 (11th Cir. 1997). Ironically, days after the final judgment in Shahar's case, Bowers made a public apology for a long-standing adulterous relationship which, under Georgia law, was presumably criminal. See Shahar, 120 F.3d at 212.

111. See Shahar, 114 F.3d at 1101.

112. Id. at 1107; see also Chai R. Feldblum, Sexual Orientation, Morality, and the Law: Devlin Revisited, 57 U. Pitt. L. Rev. 237, 326 (1996) (describing the "hiding, lying, and denying" necessary to avoid disclosure); Cynthia J. Frost, Note, Shahar v. Bowers: That Girl Just Didn't Have Good Sense!, 17 Law & Ineq. J. 57, 81-82 (1999) ("the clear message of the court is that gay and lesbian citizens can achieve legitimacy only be secretive living").
tionship. I assume that this repeated untruthfulness would have also made Shahar unfit for service as a state's lawyer, should the lies have been discovered. The ability to both engage in sexual moralizing and effectively punish any lies made in response to sexual moralizing is an unbeatable combination, particularly when the forum for either, or both, is government-sponsored.  

The story of Pam Parsons' testimony before Congress is analogous, although one would never have noted the similarity from the transcript itself. Because Parsons cooperated with the wishes of the majority by never revealing that her conviction for perjury was related to a relationship with another woman, it was easy to characterize her penitence as nothing more than regret for perjury. Anyone who understood the circumstances behind her words, however, would have realized her primary regret was living as a closeted coach, which eventually led by a path of poor judgment to her conviction and imprisonment: "Anything that I ever denied about myself was what created a spiraling journey through hell.... [T]o turn around and take a look at that other side of me took more guts than it ever took to win a ball game." Parsons also cooperated with the wishes of the majority by allowing them to re-establish a furtiveness she had discarded long ago. During the hearing, the basis for her perjury was referred to simply as "consensual sex," as if it involved some unfortunate, deplorable, and forgettable incident. No one would hear that Parsons and the woman with which she had "consensual sex" were still living together in a committed relationship, nearly twenty years later. No one would hear that they both served a federal prison term.

Even under circumstances in which the ability to moralize about matters of sex is diminished either because the legal sys-

113. There were reports during the investigation preceding Donna Shalala's confirmation as the Secretary of the Department of Health and Human Services that the Federal Bureau of Investigation was only interested in whether she had ever lied about being gay, not in whether Shalala was actually gay. See Ruthann Robson, The Specter of a Lesbian Supreme Court Justice: Problems of Identity in Lesbian Theorizing, 5 ST. THOMAS L. REV. 433, 449-50 (1993). If you believe that, you will also believe that the special prosecutor was interested only in whether ex-Housing Secretary Henry Cisneros lied about the amount of financial support he gave his mistress, not in unearthing the details of their adulterous relationship. See Neil A. Lewis, Long, Costly Case Against Cisneros Ends in Plea Deal, N.Y. TIMES, Sept. 8, 1999, at A1 (reporting Cisneros' plea of guilty to one count of lying to the F.B.I. following a four-year investigation costing $10,000,000).

114. Perjury Hearing, supra note 2, at 6.

115. See id. at 11.

sex and lies

tern provides no means to punish the behavior directly or because simple moral disapproval carries little weight, its association with character for truthfulness remains. Punishment for dishonesty or lying can become a proxy for the unavailable avenue of punishing disfavored sexual behavior; imposing a penalty for lying about the behavior is just another way of imposing a penalty for the behavior itself. Contemporary emphasis on the significance of “sexual lies” may, therefore, be little more than a subterfuge for investigation and judgment of non-conforming sexuality. The only necessary ingredients are a forum that permits the question to be asked and an enforcement mechanism that allows penalties for lies in response.

V. The Return of Sexual Character Evidence

In the context of President Clinton’s impeachment, there has been a near universal assumption that the sexual history and sexual predisposition of defendants in sexual harassment cases are properly open to review, at least with respect to sexual history and sexual predisposition related to the workplace, if not more. Congressmen, law professors, a federal judge, and an independent counsel alike—all trained in law and in evidence—agreed on what they believed to be the obvious rule.

In [Jones v. Clinton] the judge ruled that the President was required to testify, as in common in harassment cases and in any sexual relations—about any sexual relations he had or sought to have with any State or Federal employees within a relevant time frame. This information is often necessary for plaintiffs who bring civil rights sexual harassment cases, for in order to prove those cases, especially when those—when the harassing conduct occurred in private and is the “he-said, she-said” situation. This information is used in court to lend credibility to the plaintiff’s case.118

117. See Laurence H. Tribe, And the Winner Is . . ., N.Y. Times, Feb. 12, 1999, at A27 (“consensual private intimacies, even when they have secondary public dimensions, fall uneasily if at all within the Government’s powers to investigate or to punish”).

118. Perjury Hearing, supra note 2, at 32 (statement of Rep. Steven Buyer) (emphasis added). Representative Buyer is also a lawyer with the Army Reserve, and he has used his status as a veteran to enhance the credibility of his efforts to limit opportunities for female servicemembers. He led the failed congressional effort to re-segregate military basic training on the basis of sex. See Findings of the Federal Advisory Committee on Gender-Integrated Training and Related Issues and Department of Defense Response: Hearings Before the Subcomm. on Military Personnel of the House Comm. on National Security, 105th Cong. (1998) (opening statement of Rep. Steven Buyer, chair of the Military Personnel Subcommittee of the House
All were certain that sexual harassment cases were somehow sui generis; the usual rules of evidence would not apply. The following are just a few examples of the evidentiary assumptions that were made: "[I]n the context of a sexual harassment lawsuit, questions regarding intimate details of a person's life, protectable from disclosure in other circumstances, may be fair game."¹¹⁹ "Sexual harassment law permitted the Jones deposition questioning because that law recognizes that some curtailment of privacy rights is necessary in order to remedy the unique and harmful problems related to sexual harassment."¹²⁰ "In short, a defendant's sexual history, at least with respect to other employees, is ordinarily discoverable in a sexual harassment lawsuit."¹²¹ "[T]he questions posed to President Clinton are routinely asked in sexual harassment cases each day around the country."¹²²

Contrary to the above claims, there has never been any distinctive exception for sexual harassment claims that would permit the general use of sexual character evidence or, in other words, evidence offered to support an inference that if the defendant has behaved inappropriately or promiscuously with others, he is therefore more likely to have done so again with respect to the charged offense. In fact, sexual character evidence, like other forms of character evidence in general, is controlled by a default rule of inadmissibility. One has to suspect that when an evidence code designed to prohibit most uses of sexual character begins to drift away from that purpose not by design, but on the basis of disingenuous, misleading, and knowingly false argument, another motivation is at hand. Just as hypocrical concerns for honesty and truthfulness may serve as a subterfuge for moralizing about sexual behavior, abuse of the evidentiary rules governing character evidence may signal a similar turn toward court-sponsored forums for morality judgments.

Two classes of the defendant's prior conduct are potentially at issue in sexual harassment suits. A plaintiff's primary focus is usually on prior instances in which the defendant has similarly

¹²⁰. Id. at 686.
engaged in sexually harassing conduct against other women in the workplace. A second option, however, is to obtain evidence of the defendant's consensual sexual relationships with workplace colleagues or subordinates. The latter appears useful for two purposes, one substantive and one tactical. Consensual relationships can suggest a propensity for promiscuity, which through a character inference makes the charged harassment offense seem more likely. Disclosure of consensual relationships can also generate embarrassment or, in the case of adulterous conduct, can further threaten family relationships. It is important to understand, however, that sexual histories of both a non-consensual and a consensual nature are presumptively inadmissible for the same reason—they both generally depend on a prohibited character inference for their relevance to the claim.

On a logical rather than an evidentiary basis, of course, we have less trouble considering evidence of prior misconduct than evidence of private consensual behavior, but the rules of evidence have traditionally barred propensity proof despite that logical relevance. Even if one finds it difficult to vigorously object to proof of sexual harassment cases through the admission of prior harassing conduct, the process of discovering that conduct has come to permit extensive intrusions into private, consensual intimacy. Prevailing interpretations of the rules of evidence assume that civil plaintiffs have the latitude to explore the sexual histories of civil defendants, under the justification that discovery is the only way to determine whether any of those apparently consensual intimacies might have incorporated a non-consensual


The problem that turned up is that in any case involving a sexual harassment allegation, it is apparently open to the plaintiff, at least in some trial courts, to undertake fairly extensive discovery about the consensual sexual activity of the defendant. . . . Now we do not know the magnitude of the problem, but from talking with trial judges, I, at least, have a sense that this is not a trivial problem.

124. When the defendant is a servicemember, civil discovery could also reveal information leading to discharge. In Jones v. Commander, Kan. Army Ammunitions Plant, Dep't of the Army, 147 F.R.D. 248 (D. Kan. 1993), the female civilian plaintiff alleged acts of sexual harassment by her female military supervisor, and she sought general discovery of the defendant's sexual preference, habits, history, and behavior, apparently for the purpose of proving a homosexual propensity. The court denied the request, holding that the relevant issue was "whether or not the plaintiff was sexually harassed, not whether or not the alleged perpetrator was or could have been sexually interested in the victim because of the perpetrator's sexual preference." Id. at 252.
element. 125 This contention, however, is wholly cavalier and flip, one that would never justify similar intrusions under Rule 412 in the hope that thorough discovery of women's sexual histories might reveal past behavior that is in some way probative on the facts of the present claim. 126

It is interesting that we are experiencing a trend toward the re-introduction of sexual character evidence just two decades after the Federal Rules of Evidence sought to eradicate its use. The same good reasons that justified strict limits on sexual character evidence, particularly the limits imposed by the rape-shield rule, apply as well to some forms of character evidence now sought from sexual harassment defendants. In the words of the advisory committee drafting the most recent version of Rule 412, the amendment that extended rape-shield protection to civil cases: "The rule aims to safeguard . . . against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process." 127

125. See Appendices to the Referral to the United States House of Representatives Pursuant to Title 28, United States Code, Section 595(c) Submitted by the Office of the Independent Counsel, H.R. Doc. No. 105-311, at 290 (1998) [hereinafter Appendices to the Starr Report] (summarizing the discovery ruling issued by the trial court in Jones v. Clinton); Jane H. Aiken, Sexual Character Evidence in Civil Actions: Refining the Propensity Rule, 1997 Wis. L. Rev. 1221, 1233 n.45.

126. See Aiken, supra note 125, at 1224 n.11 (noting that Rule 412 appropriately places similar limitations on excursions into sexual character during the discovery process and during trial). In any event, it is unlikely that evidence of the plaintiff's sexual history or predisposition unconnected to the events at issue would have any probative value because its relevance would inevitably depend on a prohibited propensity-based inference of promiscuity. Under Rule 412, evidence of the victim's sexual character can be admitted in civil cases only if "probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party." Fed. R. Evid. 412(b)(2). Sexual conduct on the part of the victim that takes place within the scope of the events charged in a sexual harassment claim, however, can be probative, and admissible, on the issue of whether the defendant's sexual conduct was "welcomed" by the plaintiff. See Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68-69 (1986).

127. Fed. R. Evid. 412 advisory committee's note. On rare occasion, courts are responsive to the privacy concerns raised by general discovery into the consensual sexual histories of sexual harassment defendants. "[Plaintiff] essentially seeks a list of all the women [defendant] has worked with and slept with; this overbroad inquiry would disclose the intimate details of several persons' private lives without justification, and cannot be upheld." Boler v. Superior Court, 201 Cal. App. 3d 467, 474 (1987). It is ironic that advocates who are concerned about court-sponsored intrusions into women's intimate lives can lose that sensitivity in the context of discovery against sexual harassment defendants. Certainly that discovery intrudes on the privacy interests of women with whom the defendant has had consensual relationships; Rule 412 provides
Any discussion should begin with a review of the applicable rules of character evidence that apply when the “character” at issue pertains to any traits other than one’s inclination for truth-telling, which is treated specially under the Rules.\(^{128}\) Rule 404 of the Federal Rules of Evidence forms the fundamental structure for determining the admissibility of character or “propensity” evidence: “Evidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . . .” As a result, to offer an example, a plaintiff could not prove that the defendant shoved her roughly by offering evidence that he had shoved others when angry in the past, that others had a personal opinion that the defendant was an assaultive or violent person, or that the defendant had a reputation in the community as being an individual of assaultive or violent character. The evidence would be inadmissible because its probativeness—its relevance—rests solely on character reasoning: that because the defendant had an assaultive or violent propensity, it is therefore more likely that he behaved in accordance with that propensity on the occasion in question and shoved the plaintiff.

Rule 404(b) outlines permissible uses of an individual’s prior behavior for reasons that do not rely on character or propensity reasoning, for the rule does not necessarily bar the specific category of evidence (instances of prior conduct), but only one specific use of that evidence (inferences based on character). Therefore, although instances of prior conduct cannot be offered “to prove the character of person in order to show action in conformity therewith,” they can be admitted for other purposes, “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” The intellectual exercise is in distinguishing character proof from non-character proof, a distinction from which endless commentary and case law arises.

Recently enacted Rule 415 of the Federal Rules of Evidence adds another permutation to the usual treatment of character evidence under Rule 404. This 1995 addition to the Rules was intended to directly contradict Rule 404 in the context of certain specific civil cases, those “in which a claim for damages or other relief is predicated on a party’s alleged commission of conduct

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constituting an offense of sexual assault or child molestation."129 The usual evidentiary ban on character reasoning is turned upside down: evidence of prior offenses of sexual assault or child molestation can be offered for the inference that an individual who is by nature a sexual assaulter or a child molester is therefore more likely to have committed the similar charged acts.130

This small but complex constellation of evidentiary rules has somehow been transformed into simplistic assumptions concerning the use of sexual character evidence against sexual harassment defendants. Whenever an option to prove a case through sexual character evidence is left open, there will always be a tremendous temptation to offer it as a compelling addition to more direct proof of the facts of the charged event. Scholars of evidence have always ventured that Rule 404 prohibits proof in the nature of "he's done it before, and so he's probably done it again" not because it is irrelevant, but because it is perhaps too relevant.131 With respect to character evidence of a sexual nature, prior conduct can assume disproportionate weight for two reasons. First, as is the case with all character inferences, fact-finders may overestimate the probativeness of prior conduct in determining future behavior.132 Second, evidence of sexual history invites fact-finders to engage in sexual moralizing and punish litigants not for the events at issue, but for the nature of the intimate lives they lead.

Character evidence limitations under the rules have been stretched in two ways, through misinterpretation of the distinction between propensity and non-propensity forms of proof under Rule 404 and through abuse of the discovery of evidence under an already poorly drafted and poorly understood Rule 415. Taking Rule 404 first, one of the easiest ways to determine that a court (or lawyer, or law professor) has little understanding of how a propensity-based inference differs from a non-propensity-based inference offered to prove, for example, "motive, opportunity, intent, preparation, plan, knowledge, identity, or

129. Fed. R. Evid. 415. Rule 415 was enacted along with two other companion provisions, Rules 413 and 414, which addressed evidence of similar crimes in criminal sexual assault cases and criminal child molestation cases, respectively. See Fed. R. Evid. 413; Fed. R. Evid. 414.

130. Evidence offered under the companion provisions of Rules 413, 414, and 415 can be admitted and may be considered "on any matter to which it is relevant," including for purposes of propensity. Fed. R. Evid. 413.


absence of mistake or accident," is that he or she is unable to explain specifically how any of those purposes would be at issue in the case. Instead, the court (or the advocate) reasons in conclusory fashion that the evidence must somehow fit (who knows how?) at least one of a long line of permissible uses (who knows which one?), therefore avoiding the character bar.\textsuperscript{133} Decisions reached by this reasoning, unfortunately, are almost uniformly wrong.\textsuperscript{134}

There are three standard uses of a defendant's prior acts of sexual harassment which are properly admissible under the rules of evidence. The common thread among all of them is that they are offered to prove, and relevant to, something other than the commission of the alleged act of sexual harassment. Because Rule 404(b) prohibits use of prior acts "to show action in conformity therewith," prior incidents of sexually harassing conduct can only

\textsuperscript{133} See Jones v. Clinton, 993 F. Supp. 1217, 1222 (E.D. Ark. 1998) ("The Court readily acknowledges that evidence of the Lewinsky matter might have been relevant to plaintiff's case and, as she argues, that such evidence might possibly have helped her establish, among other things, intent, absence of mistake, motive, and habit on the part of the President.") (footnote omitted). In the context of President Clinton's denial that the alleged incident of sexual crudeness took place, questions of mental state such as intent or absence of mistake are not at issue; mental state is only at issue when the defendant concedes the act but denies the necessary mental state. The assertion of "motive" as a permissible purpose is only propensity proof dressed up in another name; presumably, Jones' argument is that the Lewinsky evidence demonstrates that Clinton has a "motive" to sexual harass employees. See also Kresko v. Rulli, 432 N.W.2d 764, 768-69 (Minn. Ct. App. 1988) (applying the analogous Minnesota version of Federal Rule of Evidence 404(b) and excluding evidence of defendant's consensual sexual behavior in part because none of the potential non-propensity purposes under 404(b) was at issue). Compare the appropriate use of prior domestic violence against the same victim to show that O.J. Simpson had a motive—jealousy, bitterness, simple animosity—to kill his ex-wife. See Myrna S. Raeder, The Admissibility of Prior Acts of Domestic Violence: Simpson and Beyond, 69 S. CAL. L. REV. 1463 (1996). Lastly, sexual inclination cannot qualify as the sort of specific, "semi-automatic" behavior, such as "going down a particular stairway two stairs at a time," contemplated by Rule 406. FED. R. EVID. 406 advisory committee's note.

\textsuperscript{134} Another common error in Rule 404(b) reasoning is to admit prior acts for the purpose of enhancing the plaintiff's credibility or corroborating her testimony. In this context, credibility or corroboration are just different words for propensity; the plaintiff's credibility is enhanced, or her testimony corroborated, only because she has accused someone who already has a propensity for the charged conduct. Cf. Horn v. Duke Homes, 755 F.2d 599, 602 (7th Cir. 1985) (incorrectly admitting evidence of defendant's consensual and non-consensual sexual conduct with other employees to corroborate plaintiff's testimony and to "establish [defendant's] propensity to use his power . . . to sexually exploit women") (emphasis added); Campbell v. Board of Regents, 770 F. Supp. 1479, 1486 (D. Kan. 1991) (incorrectly admitting other incidents of sexual harassment for credibility purposes under Rule 404(b)).
be admitted to prove something short of, or less than, the charged act of sexual harassment itself. Much as it might seem appropriate to identify a particular defendant as a "sexual harasser" who has continued to behave in character, the evidence is inadmissible for that purpose, just as it is inadmissible with respect to defendants charged with theft who have engaged in thievery in the past.¹³⁵

First, prior acts of sexual harassment by an individual defendant can be offered under Rule 404(b) on the issue of notice to the employer, in cases in which the plaintiff seeks to hold the employer liable for failing to remedy or prevent a hostile working environment.¹³⁶ The relevance of the evidence is not solely dependent on a propensity inference; regardless of the defendant's character, his commission of frequent acts of sexual harassment in the workplace makes it more likely that the harassment had come to the notice of the employer (or should have).¹³⁷ The second common avenue for admission follows similar reasoning in that the other acts of harassment are themselves relevant to establishing the claim, rather than relevant only for their tendency to corroborate the plaintiff's allegations by showing the nature of the defendant's character. Under this second common use, the defendant's harassment of employees other than the plaintiff is relevant to establish that the plaintiff was subject to a hostile working environment, provided the plaintiff observed the incidents or was at least contemporaneously aware

¹³⁵. See, e.g., McCue v. Kansas, Dep't of Human Resources, 165 F.3d 784, 790 (10th Cir. 1999) (excluding evidence of supervisor's acts of sex discrimination two years after plaintiff's termination; basis for relevance could only be propensity).

¹³⁶. Under Title VII of the Civil Rights Act of 1964, it is unlawful for employers to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (1994). Prohibited sexual harassment can occur in two forms: 1) "quid pro quo" sexual harassment, or "the conditioning of concrete employment benefits on sexual favors"; and 2) "hostile working environment" sexual harassment, or harassment that "creates a hostile or offensive working environment." Meritor Sav. Bank v. Vinson, 477 U.S. 57, 62 (1986); see generally Susan Estrich, Sex at Work, 43 STAN. L. REV. 813 (1991) (distinguishing and critiquing quid pro quo and hostile environment definitions of sexual harassment).

of them. Even if the harassment was directed at others, the harassment still affected the conditions under which the plaintiff worked.

The third common basis for admission of other instances of sexual harassment by the defendant depends on a more subtle understanding of Rule 404(b). Prior acts can be admitted in order to prove “intent,” but only if the underlying reasoning is something better than “he’s sexually harassed others before, so he must have intended to do it again.” Use of prior acts to prove intent is likely the most misunderstood (and over-applied) aspect of Rule 404(b). The defendant’s intent should be at issue only when the defendant concedes the commission of some relevant act, and the only matter contested is the mental state with which the act was committed. Because defendants are unlikely to argue that undeniably crude behavior took place by accident, intent will normally not be at issue with respect to whether sexually harassing behavior actually took place.

Intent can be at issue, however, in quid pro quo claims of sexual harassment with respect to the reason (a form of mental state) some adverse personnel action was taken against an employee. Using a standard example in sexual harassment cases, a plaintiff alleges that she was fired on the basis of sex or, more specifically, fired because of her unwillingness to tolerate sexual harassment or accede to sexual demands. The employer, in turn, alleges the plaintiff was fired for poor work performance. At this point, the relevant act for purposes of recovery is the firing, not the sexually harassing act itself. As a result, the plaintiff is usually permitted to introduce other acts of sexual harassment committed by the defendant because they are probative of the

138. Compare Hirase-Doi v. U.S. West Communications, Inc., 61 F.3d 777, 782 (10th Cir. 1995) (noting that plaintiff may offer other instances of sexual harassment in support of a hostile environment claim only if she was contemporaneously aware of the defendant’s conduct and, as a result, that conduct contributed to the hostile nature of her own work environment), with Tinsman v. Hott, 424 S.E.2d 584, 587-88 (W. Va. 1992) (excluding evidence of other instances of sexual harassment in support of a hostile environment claim when the conduct took place four years prior to the plaintiff’s employment, in a different workplace, and in a different state).

139. For an example of misapplication of the “intent” provision of Rule 404(b), see Russell v. Buchanan, 500 S.E.2d 728 (N.C. App. 1998) (applying the analogous North Carolina version of Federal Rule of Evidence 404). In Russell, the court admitted evidence of a supervisor’s adulterous, consensual affair with another employee for the purpose of proving an “intent to sexually prey on female subordinates.” Id. at 730. Given that the supervisor denied any acts of sexual harassment, this use of prior conduct is nothing more than propensity dressed up as “intent.”

140. See supra note 136.
mind set with which he views employees.\textsuperscript{141} Is that just a round-about way of using propensity reasoning? Many have argued that it may be.\textsuperscript{142} If it is, however, it is a limited form of propensity reasoning that seems permissible under the rule. Provided the prior acts are offered only to prove a mental state and not the underlying act, the rule's prohibition of character proof to show "action in conformity therewith" is not violated. In contrast, in cases in which the plaintiff's remedy is tied to commission of the sexually harassing act itself, prior acts of sexual harassment should not be admissible.\textsuperscript{143} Their only possible relevance would be to suggest the continuing nature of the defendant's propensity to sexually harass.\textsuperscript{144}

In the same manner that lawyers and judges have blithely, and wrongly, contended that sexual harassment lawsuits always permit proof of the "pattern and practice"\textsuperscript{145} of defendants' sexual behavior with others—in complete disregard of the language of Rule 404—lawyers and judges have characterized the addition of Rule 415 as an invitation to characterize sexual harassment

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141. See, e.g., Hawkins v. Hennepin Technical Ctr., 900 F.2d 153, 155-56 (8th Cir. 1990) (admitting other incidents of sexual harassment for the purpose of proving a retaliatory termination).


143. Neither should they be discoverable, because the inquiry cannot, as a matter of law, be "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b). If the only possible relevance of other conduct is to demonstrate a pertinent propensity, all the discovery in the world cannot make that propensity evidence admissible. For that reason, trial courts should not grant requests for discovery of other sexual conduct until the proponent has identified a potential non-propensity basis for admission.

144. One court has explained the difference with uncommon evidentiary precision:

In light of these cases, we evaluate the propriety of introducing in evidence the employer's alleged sexual harassment of employees other than the plaintiff to prove the employer's motive behind firing the plaintiff in a quid pro quo sexual harassment claim. At the outset, we note that [defendant's] alleged harassment of other female employees cannot be used to prove that [he] propositioned [plaintiff] on the night before she was fired. . . . Evidence of [defendant's] sexual harassment of other female workers may be used, however, to prove his motive or intent in discharging [plaintiff].

Heyne v. Caruso, 69 F.3d 1475, 1480 (9th Cir. 1995).

defendants as “sexual predators.”\textsuperscript{146} One teacher of evidence law offered the following expert opinion: “Evidence professors know that the amendment to Rule 415 caused President Clinton’s activities with Monica Lewinsky to be relevant at the Paula Jones deposition.”\textsuperscript{147} Evidence professors should, in fact, know better.

Rule 415 is a remarkable addition to the Federal Rules of Evidence in that its intended effect diverges almost entirely from its express language. Normally that degree of divergence would be difficult to accomplish, because legislators are almost certainly aware of the words before them. But in the case of Rule 415, most of the relevant language is incorporated by reference from elsewhere in the United States Code,\textsuperscript{148} and legislators were almost certainly unaware of the full text. By permitting plaintiffs in civil cases involving sexual assault to introduce the defendant’s other offenses of sexual assault for purposes of propensity reasoning, the new rule was universally intended to address a crisis involving serious crimes—rape and child molestation—committed by “a small class of depraved criminals.”\textsuperscript{150} By its terms,

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\textsuperscript{146} See Joelle Anne Moreno, “Whoever Fights Monsters Should See to It That in the Process She Does Not Become a Monster”: Hunting the Sexual Predator with Silver Bullets—Federal Rules of Evidence 413-415—And a Stake Through the Heart—Kansas v. Hendricks, 49 FLA. L. REV. 505, 510 n.15 (1997); see also APPENDICES TO THE STARR REPORT, supra note 125, at 67 (quoting the trial judge in Jones v. Clinton as saying, "I'm also aware that in sexual assault cases, the Rules of Evidence promulgated by the Violence Against Women Act has certainly opened it up.").

\textsuperscript{147} Margaret A. Berger, Does the Search for Truth in Our Scholarship Continue in Our Classrooms?, 49 HASTINGS L.J. 1179, 1183 (1998). Rule 415 has never been amended, but it does in effect “amend” Rule 404’s character evidence bar in cases involving sexual assault.

\textsuperscript{148} Rule 415 relies on the same definition of “offense of sexual assault” found in Rules 413 and 414, which incorporates “any conduct proscribed by chapter 109A of title 18, United States Code.” FED. R. EVID. 413; FED. R. EVID. 414. Chapter 109A sets out the criminal offenses of aggravated sexual abuse, sexual abuse, sexual abuse of a minor or ward, and abusive sexual contact. See 18 U.S.C. §§ 2241-2246 (1994).


\textsuperscript{150} David J. Karp, Evidence of Propensity and Probability in Sex Offense Cases and Other Cases, 70 CHI.-KENT L. REV. 15, 24 (1994). Karp’s address was incorporated as part of the Rule’s legislative history by its Senate and House sponsors. See Dale A. Nance, Foreward: Do We Really Want to Know the Defendant?, 70 CHI.-KENT L. REV. 3, 8 (1994).
\end{quote}

In the context of so-called “acquaintance rape,” two feminist evidence scholars have argued that the propensity proof contemplated by Federal Rules of Evidence 413 and 415 is not particularly relevant and, in addition, may
however, buried by reference elsewhere, crimes of "sexual assault" were defined as broadly as the indirect touching of another's buttocks or breast from the outside of their clothing, without consent.\(^{151}\) Although it was never contemplated at its enactment that Rule 415 would permit character proof in sexual harassment cases,\(^ {152}\) sexual harassment plaintiffs eventually realized that its expansive definition of "sexual assault" could encompass the physical intrusions that sometimes accompany verbal sexual harassment, whether in or out of the workplace. As with Rule 404, however, the greater harm is not that Rule 415 will expose other instances of sexual harassment; its principal danger is in providing another platform for routine examination of consensual sexual behavior under the justification that any relatively minor unconsented touching could emerge.\(^ {153}\)

How did Rule 415 come to incorporate such a comprehensive spectrum of greater and lesser forms of sexual misconduct? The answer is difficult to discern, because none of the contemporaneous commentary noted the scope of conduct covered by the Rule. Ironically, the adoption of Rule 415's definition of sexual assault may be another illustration of how completely the initial

151. "Whoever . . . knowingly engages in sexual contact with another person without that other person's permission shall be fined under this title, imprisoned not more than six months, or both." 18 U.S.C. § 2244(b) (1994) (incorporated by reference in Rule 413 and 414, which are incorporated by reference in Rule 415). Sexual contact is defined as "the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." 18 U.S.C. § 2246(3) (1994). The legislative history of this provision, part of the Sexual Abuse Act of 1986, does not reveal why Congress felt it was necessary to federally criminalize relatively minor instances of sexual misconduct, except to explain that the drafters wished to establish a graded system of offenses "so that the more serious the conduct, the more serious the punishment." 132 CONG. REC. 2598 (1986).

152. See Aiken, supra note 125, at 1237.

153. Any concerns for the defendant's privacy interest in the disclosure of sexual history were dismissed almost without discussion under the assumption that the rule encompassed only serious sexual assaults; there could be no privacy interest in the commission of rape. "One who commits a crime is not entitled to keep that fact secret." Bryden & Park, supra note 149, at 568; see also Karp, supra note 150, at 24; Park, supra note 149, at 277.
intention of the Federal Rules of Evidence to bar most forms of sexual character proof has been turned on its head. The same incorporated-by-reference definition of sexual assault has appeared in the Rules before, as part of an earlier version of Rule 412’s rape shield bar. It made sense in that context to adopt a definition of sexual assault that would apply in the broadest possible range of sexual misconduct cases and therefore provide victims the broadest possible range of protection against sexual character impeachment. Yet Congress adopted this same definition within Rule 415 in a context in which the focus was intended to be specific and narrow: a legislative response to crimes of rape and child molestation. Under the federal rules, avenues for sexual character proof have always been narrowly crafted to meet a specific point of probativeness. The unintended reach of Rule 415, furthermore, is only exacerbated by false, misleading, and deceptive evidentiary arguments that presume a right to intrude on private intimacy in the name of finding “truth.”

CONCLUSION: LYING AS NULLIFICATION

How would Sissela Bok evaluate the significance of honesty in response to governmental intrusions on private intimacy? Should lying be significant if in response to questions that legal or military institutions should have no power to ask? Should some “sexual lies” be characterized as assertions of privacy rather than as breaches of honesty? As discussed in Part I, Bok would place a heavy burden of justification on the prospective liar because of his or her inevitably biased evaluation of the risk imposed. The proponent should first identify any truthful alternatives, weigh moral reasons for and against the lie in balancing benefit and risk, and incorporate a perspective that reaches beyond individual excuses. It would be essential, in Bok’s view, to consider more than the immediate harms flowing from a particular lie, including its effects on both the recipient and on the liar; relevant harms should also include long-term losses to a community’s “general level of trust and social cooperation.”

In Bok’s view, and perhaps counterintuitively, the burden of justifying lies by gay servicemembers under “Don’t Ask, Don’t

154. In an earlier form, Rule 412 was applicable to cases “in which a person is accused of an offense under chapter 109A of title 18, United States Code.” Minor and Technical Criminal Law Amendments, Act of 1988, § 7046, Pub. L. No. 100-690, 102 Stat. 4400-01. The current version of Rule 412 substitutes the more expansive (and less cryptic) phrase “any civil or criminal proceeding involving alleged sexual misconduct.” FED. R. EVID. 412.
155. See BOK, LYING, supra note 21, at 103-04.
156. Id. at 24.
Tell” should be particularly heavy. She would identify the continuing and deliberative nature of the lying necessary to serve under the policy as a potentially greater danger than the infrequent or spontaneous lie: “Lies which are planned are judged more harshly than those told without forethought; single lies less severely than repeated ones. Planned practices of deception are therefore especially suspect . . .”.157

At the same time, however, Bok does recognize that intrusive inquiries regarding sexual practices and, in particular, institutional and societal pressures to “pass” as heterosexual, can engender a persistent network of lying.158 She seems to agree, despite her fundamental distrust of justifications for failures of truthfulness, that lying can, under some circumstances, be an appropriate response to inappropriate intrusions on sexual privacy:159

In this category fall also all the illegitimate inquiries regarding political beliefs, sexual practices, or religious faith. In times of persecution, honest answers to such inquiries rob people of their freedom, their employment, respect in their communities. Refusing to give information that could blacklist a friend is then justified; and in cases where refusal is difficult or dangerous, lying may fall into the category of response to a crisis. One has a right to protect oneself and others from illegitimate inquiries, whether they come from intruders, from an oppressive government, or from an inquisitorial religious institution. A large area of each person’s life is clearly his to keep as secret as he wishes. This is the region of privacy . . . .160

Bok’s reference to “illegitimate inquiries” would almost certainly apply to the system of “Don’t Ask, Don’t Tell”; it might also con-

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157. Id. at 79; see also id. at 60 (noting that utilitarians “often fail to look at practices of deception and the ways in which these multiply and reinforce one another”).

158. See id. at 79 (“Self-defensive lies can permeate all one does, so that life turns into ‘living a lie.’ . . . Political beliefs or sexual preferences unacceptable to a community compel many to a similar life-long duplicity . . . .”).

159. I use the term “privacy” with respect to “Don’t Ask, Don’t Tell” with some reservation because the policy requires so much more than maintenance of privacy; it would be more accurate to say that “Don’t Ask, Don’t Tell” imposes a requirement to maintain secrecy. The two concepts overlap but are not the same. One can make a voluntary choice to keep certain aspects of life private, but a much greater effort would be required to keep that information secret. “But privacy need not hide; and secrecy hides far more than what is private. A private garden need not be a secret garden; a private life is rarely a secret life.” Bok, Secrets, supra note 21, at 11.

160. Bok, Lynic, supra note 21, at 150.
ceivably apply to misuse of the legal system as a forum for moralizing about sexuality. But this is precisely what Bok’s analysis lacks—any specific application of the latitude for lying she grants. Under what circumstances can individuals justifiably lie in response to inappropriate intrusions into private intimacy? Does that mean that one may lie in response to government inquiry under either military or civilian authority? It may be that most people—not just most moral philosophers or most academics—would have trouble answering that question with any specificity because they cannot possibly fathom the factual circumstances in which the resources of the government would be deployed in an effort to compel them to discuss their sexual lives.161 For gay servicemembers, that circumstance is a realistic possibility each day they serve, and the statements they make, whether official or casual, false or carefully true, are often crafted with that possibility in mind.

Bok’s analysis of “lies in a crisis” incorporates an evaluation of lies in response to a crisis that is chronic, rather than acute or episodic, developing as a result of some ongoing institutional coerciveness. The questions she raises concerning an ethic of truthfulness in the context of chronic crisis could easily have been asked by servicemembers seeking ethical guidance for their service under “Don’t Ask, Don’t Tell”: “How do we respond to a law, a procedure, a whole network of corruption, perhaps oppression? ... Should [we] adopt its standards merely to subsist and get [the] job done? Or should [we] resist? Openly or secretly? And at what risk?”162 Interestingly, Bok illustrates these questions with the now obsolete hypothetical concerning false claims of physical or mental disqualification (including, I suppose, homosexuality) for the purpose of avoiding military service. Bok dismisses any justification for lying under these circumstances, as “there are honest alternatives to going along with the request they consider unjust: they can refuse to submit, and accept the consequences.”163 In the case of “Don’t Ask, Don’t Tell,” in contrast, there are no alternatives that combine service to country and an ethic of truthfulness: lying is part and parcel of service. Overt resistance is obviously not an option

161. But see Sissela Bok, Lies: They Come with Consequences, WASHINGTON POST, Aug. 23, 1998, at C1 (finding no justification for President Clinton’s sexual lies, even though “[f]ew among us would want to live in an inquisitorial society in which our most intimate concerns were subjected to relentless public scrutiny,” because lies by public officials undermine democracy).

162. BOK, LYING, supra note 21, at 114-15.

163. Id. at 117.
when even unintended failure of secrecy constitutes a violation under the policy.164

When institutional practices all but encourage lying as a solution to a coercive choice between dishonesty and compliance, Bok may give the greatest potential latitude for dishonesty: [I]t is the system which, in presenting the choice in the first place, is degrading and in need of change. . . . And the system obviously encourages the spread of dishonesty in a way that the individual crisis response does not. The system is, therefore, much less excusable than the individual deceit which forms a part of it.165

A rule of law can, in application, present such a coercive choice. Bok crafts a hypothetical involving a law of divorce that permits dissolution of marriage only upon the commission of adultery.166 Spouses who wish to divorce but have not committed adultery are offered three coercive choices: to comply with the system's expectation and falsely allege adultery, to actually commit adultery against their inclination, or to forego divorce. It is probably no accident that the hypothetical arises in the context of intimate relations—the persistent link between sexual conduct and character for truthfulness will more often tend to create such coercive choices.167

How, then, does one judge the lying required by “Don’t Ask, Don’t Tell” or, more broadly, the lying that will inevitably be prompted by the association between evidence of sexual character and evidence of truthful character? How does risk balance against benefit when risk and benefit are measured from not only an individual but also a community perspective? The exercise of contextual judgment will be a necessary ingredient—a distinctly non-Kantian approach and, in the context of the institution of law and of the military, also a distinctly uncomforta-

164. See id. (“In evaluating such choices one has to take into account the degree to which the request is indeed unjust, the available alternatives, the severity of the consequences of overt resistance, and the effects of lying, not least on the liars themselves.”).
165. Id.
166. See id.
167. Bok notes that the Talmud permits untruthful answers in response to inquiries about marital relations. See id. at 73. Similarly, Jesuit priests at Georgetown University have argued, in the context of the Clinton impeachment, that it can be honorable to lie in response to inquiries about private sexual intimacy that the questioner has no right to ask. “It’s something no one has any right to know. If someone has no right to know something, you are forbidden to disclose that kind of information about yourself or about another.” Aaron Davis, Alma Mater Hates Sin, Loves Sinner, USA Today, Oct. 5, 1998, at 4A.
ble one. It is, of course, difficult to reach any legal consensus on a contextual ethic of truthfulness when lawyers speak of “abstract norms as subjective and of facts as indeterminate... One person’s justice is another person’s oppression.”168 It is also difficult to discern any military consensus on a contextual ethic of truthfulness when the military is willing to accept a regulatory scheme that demands lying within an environment that otherwise condemns it.

The advantage of categorical judgment with respect to an ethic of truthfulness is that it is simple—at times also simplistic. It is easy to conclude, for example, that civil defendants should never be excused for lying, no matter what the nature of the inquiry. It becomes especially easy if we assume the rule of law provides litigants with the right to demand and to obtain truthful answers, with the appropriateness of the demand taking a distant second place to an insistence on the importance of truth. Dishonesty, in this view, directly denies what the questioner has the right to obtain; dishonesty in and of itself denies justice:

And it is absurd, I believe, to argue that forcing the civil defendant to choose between lying and revealing facts that indicate that she indeed owes compensation affronts her human dignity more than permitting her to preserve her honor by eluding a just judgment affronts the human dignity of her victim.... Here the victim’s right, and her dignity as a human, outweigh the right and dignity of the victimizer.169

With respect to sexual character evidence, the quoted author’s use of gender pronouns above is ironic. He never considers that a civil litigant might be forced to reveal intimate information for purposes unrelated to the merits, even though the paradigmatic example of use of the legal system for moralizing about sexuality would be the cross-examination of women who are victims of sexual assault. A more interesting argument would have addressed whether the same stringent expectation of truthfulness should be imposed on women under those circumstances.

There has been far too little attention paid to the inappropriateness of the intrusions and far too much attention paid to the truthfulness of the responses. The simplistic ethic of “the right to remain silent is not a right to lie”170 means little when there is no practical option to remain silent and lying is the only means available for preservation of privacy for oneself and others.
and, in the case of "Don’t Ask, Don’t Tell," the only means available for preservation of the opportunity for honorable military service. Contrary to Bok’s concern that the skewed perspective of the liar might be privileged at the expense of the deceived, in the context of lies as assertions of sexual privacy, only the perspective of the deceived seems to be heard. Whether justified in terms of providing legal redress or in terms of ensuring military readiness, the question is always privileged over the answer, and the right to demand disclosure is always privileged over the right to maintain privacy.

When moral reasons that support lying in a particular context—the benefit as opposed to the risk—are given fair hearing, the simple, reflexive assumption favoring truthfulness fails. When expectations for disclosure are largely based on expectations for sexual morality, lies in response can discourage the use of government authority for the purpose of moralizing about sex-

171. The doctrine of the “exculpatory no” provides an interesting comparison. In Brogan v. United States, 118 S. Ct. 805 (1998), the Supreme Court held that a criminal defendant’s false denial of culpability in response to an investigator’s interrogation (the “exculpatory no”) could be prosecuted as a false statement under 18 U.S.C. § 1001 (1994), contrary to the prevailing practice in a number of federal circuits. Justice Scalia dismissed the argument that the “exculpatory no” exception was necessary under the Fifth Amendment because otherwise suspects would face the coercive choice of “admitting guilt, remaining silent, or falsely denying guilt.” Id. at 810. In the Court’s view, the consequence, if any, of exercising the option to remain silent “does not exert a form of pressure that exonerates an otherwise unlawful lie.” Id. Justice Scalia also rejected the more persuasive practical concern of prosecutorial abuse: that investigators who are unable to prove a substantive violation of the law will instead manufacture an offense by fishing for lies during the investigatory process. See id. at 812-17 (Ginsburg & Souter, JJ., concurring). For general discussion of the “exculpatory no” doctrine,” see United States v. Solis, 46 M.J. 31 (C.A.A.F. 1997) (rejecting the “exculpatory no’ exception for military courts); Stephen M. Everhart, Can You Lie to the Government and Get Away With It? The Exculpatory-No Defense Under 18 U.S.C. § 1001, 99 W. VA. L. Rev. 687 (1997); Lt. Brent G. Filbert, Article 107, Uniform Code of Military Justice: Not a License to Lie, ARMY LAW., Mar. 1994, at 3; Lt. Col. Bart Hillyer & Maj. Ann D. Shane, The "Exculpatory No"—Where Did It Go?, 45 A.F. L. Rev. 133 (1998); Richard H. Underwood, Perjury! The Charges and the Defenses, 36 DUQ. L. Rev. 715, 784-788 (1998); Scott D. Pomfret, Note, A Tempered "Yes" to the "Exculpatory No", 96 MICH. L. Rev. 754 (1997).

Defendants in civil cases, of course, do not have the right to remain silent and may be compelled to respond to discovery and to testify at trial. As a practical matter, gay servicemembers cannot indefinitely decline to discuss the sort of routine, everyday circumstances that could reveal credible information related to violation of "Don’t Ask, Don’t Tell". Even if the "exculpatory no" exception had been upheld, however, it generally applied only to brief, simple denials and not to the more elaborate lying that is necessary under the policy. See Brogan, 118 S. Ct. at 808.
uality and can facilitate appropriate assertions of privacy. In the case of “Don’t Ask, Don’t Tell,” requisite lies by gay servicemembers—lies which put them at risk of reprisal by their own countrymen, even as they contribute in service to country—can constitute one of the highest forms of patriotism. Judgments on the appropriateness of intrusions are, of course, individual and contextual judgments. One has to consider the intrusiveness of “Don’t Ask, Don’t Tell” improper before one can justify lying as a form of servicemember nullification of the policy. One has to believe in the fundamental importance of excluding sexual character proof from the resolution of legal disputes—even if it results in fewer verdicts for plaintiffs in sexual harassment cases—before one can justify lying as a form of citizen nullification in response to questions grounded in false and misleading evidentiary argument.

The employment of contextual judgment would require that the inquiry or intrusion be evaluated in the same manner as the prospective lie given in response. Are there alternatives to the demand for disclosure of private intimacies? How does benefit compare to risk in weighing moral reasons for and against inquiries or intrusions related to sexual morality? Consideration of risk, moreover, should include a measure of the harm that results to the community, not just to the individual, from the misuse of military and legal institutions as forums for moral judgments about sexuality. Under this reverse perspective, one that asks that the intrusion be justified in the same manner that a lie in response has always had to be justified, lies would no longer considered in isolation from the circumstances that produce them

172. Both Professor Simon and Professor Luban address the issue of whether lawyers can ethically disobey the law for a greater cause, and their discussions are helpful in evaluating whether individuals can ethically disregard an expectation of truthfulness. See LUBAN, supra note 66, at 31–49; SIMON, supra note 72, at 77–108. Can lying in effect serve as a form of nullification of legal duty in the same sense that jurors sometimes engage in nullification? In Simon’s view, “obligation to ‘law’ may require violation of some legal norms in order to vindicate more basic ones.” SIMON, supra note 72, at 106. Luban similarly distinguishes between “conscientious disobedience to law” and “willful disregard of the law with a view to obtaining advantages over one’s fellow-citizens.” LUBAN, supra note 66, at 35. Conscientious disobedience does not mean an individual considers herself “above the law” or feels no obligation to “play by the rules,” see id. at 54; President Clinton similarly believed that gay servicemembers could serve without secrecy and still “play by the rules.” See Eric Schmitt, The Transition: News Analysis—Challenging the Military; In Promising to End Ban on Homosexuals, Clinton Is Confronting a Wall of Tradition, N.Y. TIMES, Nov. 12, 1992, at A1.
and no longer viewed as the inevitably greater harm. Under the most dishonorable of circumstances, lies could constitute the most honorable of responses.