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## Speech, Service and Sex: The Limits of First Amendment Protection of Sexual Expression in the Military

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# Speech, Service and Sex: The Limits of First Amendment Protection of Sexual Expression in the Military

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## I. INTRODUCTION

[O]ur citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes.<sup>1</sup>

The armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself. Speech that is protected [by the First Amendment] in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected.<sup>2</sup>

Since the close of the Gulf War, the United States's military organs have endured the exposure of a rash of sex-related scandals.<sup>3</sup>

1. Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 188 (1962); see *General Media Communications v. Perry*, 952 F. Supp. 1072, 1081 (S.D.N.Y. 1997) ("Citizens do not jettison their Constitutional rights simply by enlisting in the armed forces . . .").

2. *Parker v. Levy*, 417 U.S. 733, 759 (1974) (quoting *United States v. Priest*, 21 U.S.C.M.A. 564, 570 (1972) (citing *United States v. Gray*, 20 U.S.C.M.A. 63, 66 (1970) ("[S]peech by a subordinate toward a superior in the military can directly undermine the power of command; such speech, therefore, exceeds the limits of free speech that is allowable in the armed forces."))).

3. The current round of troubles dates back to allegations of dishonorable conduct by naval officers toward women at the Tailhook Convention in September 1991. See J. Richard Chema, *Arresting "Tailhook": The Prosecution of Sexual Harassment in the Military*, 140 MIL. L. REV. 1, 1 (1993) (listing a series of sexual misconduct cases in the military). In 1996 the Army opened a hotline for reporting sexual misconduct complaints. See Paul Richter, *Army Mothballs Phone Hotline for Reporting Sex Misconduct Charges*, L.A. TIMES, June 14, 1997, at A11 (discussing the history of the Army hotline). The hotline received approximately 8300 calls and over 1200 investigations were initiated, resulting, at one facility alone, in charges against a dozen soldiers. See *id.*

Some observers have seen the flurry of accusations, investigations, and prosecutions as "corroboration of the existence of an epidemic of misogynistic behavior in the military." Margo Ely, *Ruling Raises Questions About Free Speech, Military*, CHI. DAILY BULL., Feb. 27, 1997, at 6. Such critics point to a variety of sexual pathologies associated with the military to underscore their argument. They note, for instance, the incidents of hazing at the Citadel military academy, the gang rape of a Japanese 12-year-old by American servicemen, the dramatic increase of domestic violence concerning servicemen, as well as studies of pervasive sexual harassment within the ranks. See *id.* Finally, these same critics observe that "there are studies . . . that suggest a connection between the consumption of pornography and sexual violence," and they consider any measure aimed at restricting the flow of pornography into military installations a worthy effort to "snap that link." *Id.*

These embarrassments have run the gamut from alarming charges of abuse of power in integrated training environments<sup>4</sup> to the sensationalized, adultery-related discharge of the Air Force's first female bomber pilot.<sup>5</sup> In response, Congress has reconsidered the vexing issues presented by recently adopted policies that have changed the roles of gender<sup>6</sup> and sexual preference<sup>7</sup> in the military. Lawmakers have entertained a wide variety of suggested remedies.<sup>8</sup> At one extreme, Representative Barney Frank proposed lifting entirely the existing ban on sexual relations within the ranks.<sup>9</sup> Yet, in the same

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4. In 1996, numerous accusations of misconduct concerning Army drill sergeants and trainees at the Aberdeen Proving Ground in northeastern Maryland were made. See Richter, *supra* note 3, at A11 (noting that out of 1200 calls, 330 investigations were still in progress). Charges were brought against 12 soldiers at Aberdeen. The ordeal has been called the "worst sex scandal in U.S. military history." *Id.*

5. Air Force Lt. Kelly J. Flinn was the first female B-52 bomber pilot. See Helen O'Neill, *On Eve of Courtmartial, Pilot Seeks Honorable Discharge*, BOSTON GLOBE, May 20, 1997, at A3. Flinn was forced to resign after court-martial charges were brought against her for conduct stemming from an adulterous affair that she had with the husband of another service person. See *id.*

6. In August 1991, Congress passed legislation modifying the exclusion of women from combat positions in the armed services. See Pamela R. Jones, Note, *Women in the Crossfire: Should the Court Allow It?*, 78 CORNELL L. REV. 252, 252 (1993) (describing relevant congressional legislation). The Navy began the use of integrated training environments in 1992. See Stephanie Gutmann, *Sex and the Soldier*, NEW REPUBLIC, Feb. 24, 1997, at 20. The Army followed suit in 1993. See *id.*

7. The role of gays in the military shifted following the 1992 elections with the pursuit of the "so-called 'don't ask/don't tell' policy." *Philips v. Perry*, 106 F.3d 1420, 1421 (9th Cir. 1997). This program ended the practice of asking recruits if they were gay (don't ask), while retaining the prohibition on homosexual conduct (don't tell). See *id.* at 1423 (discussing parameters of the military's policy). The President proposed his "Policy on Homosexual Conduct in the Armed Forces" on July 19, 1993; legislation implementing the new procedures was enacted November 30, 1993. See *id.* at 1421 n.1. In turn, the Department of Defense and branches of the military issued their own implementing regulations. See *id.* at 1426. The validity of this policy has been the subject of considerable litigation. See *id.* The policy has been challenged on the grounds that it impermissibly interferes with First Amendment freedom of expression. See *id.* at 1429-30. At least one judge has found this argument persuasive. See *Able v. Perry*, 880 F. Supp. 968, 980 (E.D.N.Y. 1995) (Judge Eugene H. Nickerson's rejection of this policy). On remand from the appellate court, Judge Nickerson announced that "[a] military 'called on to fight for the principles of equality and free speech embodied in the United States Constitution should embrace those principles in its own ranks.'" Tom Hays, *Judge Revises Rejection of "Don't Ask, Don't Tell,"* AP, July 2, 1997, available in 1997 WL 4873431 (quoting a pending opinion by United States District Judge Eugene Nickerson). Any analytical scheme encompassing the First Amendment protections for service personnel will have implications for the current debate on homosexuals in the military, and, in particular, for the "Don't Ask, Don't Tell" policy, which, as its name implies, revolves around speech and symbolic conduct. Consistent with the analysis of this Note, a reasonable military finding that homosexual expression disrupts military function would adequately justify the "don't tell" aspect of current policy. See *infra* Part IV.D.

8. Congressman Roscoe Bartlett, who sponsored the Military Honor and Decency Act ("MHDA"), has also pushed legislation to require separate training of male and female recruits. See Sean Scully, *Bartlett's Win Surprised Him*, WASH. TIMES, June 12, 1997, at C5.

debate, self-described feminists,<sup>10</sup> noted sociologists,<sup>11</sup> and policy-makers<sup>12</sup> alike urged rethinking the wisdom of integrated military units. No one doubts the authority of Congress to regulate military affairs.<sup>13</sup> The long-standing tradition of countenancing restrictions on individual liberties in the military context<sup>14</sup> seems bound for collision

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9. See Cassandra Burrell, *Lawmaker Proposes Decriminalizing Consensual Sex in Military*, AP, June 16, 1997, available in 1997 WL 4870945 (stating Representative Frank's intention to introduce such a bill).

10. See Gutmann, *supra* note 6, at 18-19 (arguing that integration of women into the armed forces will inevitably cause disruptions such that "regulating sex will become an ever more important military sideline, one whose full costs in money, labor and morale we will not really know until the forces are called on to do what they are assembled to do: fight").

11. See Lionel Tiger, *Sex in Uniform*, WALL ST. J., May 27, 1997, at A18 (proposing that the integration "process should be rethought" because the "military needs an honest discussion of sexuality if it is going to place men and women in situations where sexual impulses can not be ignored").

12. Congressman Bartlett's proposal endeavored to "provide both men and women the necessary opportunity to successfully become military personnel without the distractions of sexuality." Norman Kempster, *Lawmakers Call for Sex-Segregated Military Training*, L.A. TIMES, May 9, 1997, at A24 (quoting Congressman Roscoe G. Bartlett). Later, Senator Robert C. Byrd secured the creation of an independent commission to consider the issue of gender-integrated training. See Robert C. Byrd, *Comment by U.S. Senator Robert C. Byrd on the Report of the Advisory Committee on Gender-Integrated Training* (Dec. 16, 1997), available in 1997 WL 12105349 (Gov't Press Releases). The advisory panel, led by former senator Nancy Kassebaum Baker, declared the proposed reintroduction of gender-segregated training "a step forward, not a step backward." Andrea Stone & Steven Komarow, *Single-Sex Boot Camps Urged; Panel Says Military Gender Integration Isn't Working*, USA TODAY, Dec. 16, 1997, at 1A (quoting former Senator Kassebaum Baker). Defense Secretary William Cohen decided not to impose the commission's recommendations of gender-specific barracks and small units on branches of the services already committed to a gender-integrated approach. See Thomas E. Ricks, *Defense Chief Won't Segregate Sexes in Basic Training, Despite Panel's Views*, WALL ST. J., Mar. 17, 1998, at A20.

13. The Constitution explicitly grants Congress the power of military oversight. See U.S. CONST. art. 1, § 8 ("The Congress shall have Power." U.S. CONST., art. 1, § 8, cl. 1, "[t]o raise and support Armies . . . [,]" U.S. CONST. art. 1, § 8, cl. 12, and "[t]o make Rules for the Government and Regulation of the land and naval Forces . . . [,]" U.S. CONST. art. 1, § 8, cl. 14); see also John N. Hostettler, *Judicial Misconduct* (May 15, 1997), available in 1997 WL 10571463 (testifying that "the present practice of the legislative branch bowing to judicial supremacy does not square with the United States Constitution" and expressing concern that "[w]hen a court declares, for example, that Congress does not have the power to ban pornography in its military commissaries, it is as if God himself has spoken"). But see *Parker v. Levy*, 417 U.S. 733, 768-69 (1974) (Douglas, J., dissenting) ("I cannot imagine . . . that Congress would think it had the power to authorize the military to curtail the reading list of books, plays, poems, periodicals, papers, and the like which a person in the Armed Services may read").

14. Only after World War II did the Supreme Court establish that service personnel had ascertainable constitutional rights, however limited. In *Burns v. Wilson*, 346 U.S. 137 (1953), the Court held, as Chief Justice Warren later articulated it, that "court martial proceedings could be challenged through habeas corpus actions brought in civil courts, if those proceedings had denied the defendant fundamental rights." Warren, *supra* note 1, at 188; see also Linda Sugin, Note, *First Amendment Rights of Military Personnel: Denying Rights to Those Who Defend Them*, 62 N.Y.U. L. REV. 855, 864 (1987) (discussing post-*Burns* development of constitutional rights for service persons). More recently, in *Goldman v. Weinberger*, 475 U.S. 503, 507-08 (1986), the Court referred to the custom of permitting the political branches broad authority over military affairs. Moreover, the *Goldman* Court justified its deferential policy

with the present social and political climate that places a high value on personal rights, especially regarding sex.<sup>15</sup>

In late 1996, the Republican Congress<sup>16</sup> passed the Military Honor and Decency Act ("MHDA")<sup>17</sup> as part of the National Security

declaring that "we have repeatedly held that 'the military is, by necessity, a specialized society separate from civilian society.'" *Id.* (quoting *Parker*, 417 U.S. at 743). Interestingly, *Parker* seems to have been the first case to explicitly raise a First Amendment issue. *See Parker*, 417 U.S. at 768 (Douglas, J., dissenting) ("This is the first case that presents to us a question of what protection, if any, the First Amendment gives people in the Armed Services . . .").

15. Commenting on the controversy that arose when an Army panel withdrew portions of a survey questionnaire dealing with soldiers' attitudes towards pornography, the Secretary of Defense averred that questions should not "cross the line into areas of privacy that remain private." *Dep't of Defense: News Briefing*, June 30, 1997, available in 1997 WL 11936939, at 9-10. Recent skirmishes over the broadening of sexual "tolerance" have concerned topics such as homosexual marriage. *See, e.g., Pruitt v. Cheney*, 943 F.2d 989, 990 (9th Cir. 1991) (discussing the circumstances surrounding the dismissal from the services of a lesbian whose sexual preference became known to the Army when she revealed her "marriages" to other women in a *Los Angeles Times* interview).

Similarly, efforts to suppress "indecent" speech have received increasing disapproval from the Court. *Compare FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (affirming administrative sanctions against a broadcaster of George Carlin's Seven Dirty Words), *with Reno v. ACLU*, 117 S. Ct. 2329, 2346 (1997) (reasoning that "[i]n evaluating the free speech rights of adults, we have made it perfectly clear that '[s]exual expression which is indecent but not obscene is protected by the First Amendment'") (quoting *FCC v. Sable Communications*, 492 U.S. 115, 126 (1989)). *See also Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 (1977) ("[W]here obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression."). Indeed, the Court in *Pacifica* admonished that "the fact that society may find speech offensive is not a sufficient reason for suppressing it." 438 U.S. at 745. While differences between broadcast media and the Internet explain the Court's distinctions to some extent, the shift from *Pacifica* to *Reno* also reflects generational changes. *See WILLIAM STRAUSS & NEIL HOWE, GENERATIONS, THE HISTORY OF AMERICA'S FUTURE, 1584 TO 2069*, at 27-40 (1991) (arguing that generations have unique but predictable personalities and that each transforms social institutions as they move from youth to "elderhood"). In the First Amendment context, this theory helps explain how process-oriented academics of the 1950s World War II generation could resist McCarthyist suppression only to be replaced as of the 1990s by individualist Baby Boomers who would condone suppression of "hate speech" on the grounds that one individual's interest in avoiding the harms of certain speech outweighs another individual's right to speak it. *See, e.g., Neil Hamilton, Academic Freedom Symposium: Speech: Contrasts and Comparisons Among McCarthyism, 1960s Student Activism and 1990s Faculty Fundamentalism*, 22 WM. MITCHELL L. REV. 369, 389 (1996). The personal rights theories, currently popular in academic circles, would engage in ad hoc balancing to determine whether sexual expression was worthy of protection. *See, e.g., Tona Trollinger, Reconceptualizing the Free Speech Clause: From a Refuse of Dualism to the Reason of Holism*, 3 GEO. MASON INDEPENDENT L. REV. 137, 224-25 (1994) (describing the contours of the expansive balancing alternative to the methodology of models predicated on the "marketplace" ideal in the context of "hate speech").

16. Representatives Robert Dornan, Roscoe Bartlett, and Chris Smith sponsored the bill. *Playboy Forum*, PLAYBOY, Sept. 1, 1996, at 46, available in 1996 WL 9258262.

17. 10 U.S.C.S. § 2489a (1997). The full text of the Act reads:

Sale or rental of sexually explicit material prohibited. (a) Prohibition of sale or rental. The Secretary of Defense may not permit the sale or rental of sexually explicit material on property under the jurisdiction of the Department of Defense.

(b) Prohibition of officially provided sexually explicit material. A member of the armed forces or a civilian officer or employee of the Department of Defense acting in an

Authorization Bill.<sup>18</sup> With the MHDA, Congress set its sights on "pornographic" magazines, barring the sale or rental on Defense Department property of materials whose "dominant theme" was the depiction or description of nudity "in a lascivious way."<sup>19</sup> Previous military regulations of sexual expression had aroused little controversy. For example, during the Gulf War, to prevent discord between American troops and their Saudi Arabian hosts, publications similar to those attacked by the MHDA were pulled from commissary shelves.<sup>20</sup> Furthermore, the Navy banned topless dancing in the late 1980s, and armed services authorities have discharged members for appearing nude in published photographs.<sup>21</sup> In early 1997, however, District Court Judge Shira Scheindlin, a Clinton appointee,<sup>22</sup> found the MHDA unconstitutional.<sup>23</sup> A split panel of the Second Circuit

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official capacity may not provide for sale, remuneration, or rental of sexually explicit material to another person.

(c) Regulations. The Secretary of Defense shall prescribe regulations to implement this section.

(d) Definitions. In this section:

(1) The term "sexually explicit material" means an audio recording, a film or video recording, or a periodical with visual depictions, produced in any medium, the dominant theme of which depicts or describes nudity, including sexual or excretory activities or organs, in a lascivious way. (2) The term "property under the jurisdiction of the Department of Defense" includes commissaries, all facilities operated by the Army and Air Force Exchange Service, the Navy Exchange Service command, the Navy Resale and Services Support Office, Marine Corps exchanges, and ships' stores.

*Id.*

18. H.R. 3230. *Playboy Forum*, *supra* note 16, at 46. President Clinton signed the Act into law on September 23, 1996 and the Act went into effect on December 22, 1996. *See Ely, supra* note 3, at 6.

19. 10 U.S.C.S. § 2489a. The procedures that the MHDA was designed to change allowed local exchanges to "[s]elect magazines based on merchandising considerations like consumer demand [and] shelf space." In other words, the MHDA sought to introduce some centrally established criteria into a wholly market-driven purchasing scheme. *See id.* *General Media Communications v. Cohen*, 131 F.3d 273, 294 (2d Cir. 1997) (Parker, J., dissenting) (quoting EOP Procedures, 40-11, Special Retail Programs, § 10-2).

20. *Playboy Forum*, *supra* note 16, at 46. According to Pentagon estimates, 12.6 million copies of pornographic magazines are sold at military bases annually. *See Ely, supra* note 3, at 6. On Army and Air Force installations, *Penthouse*, a publication of the entity that sued to prevent enforcement of the MHDA, is the third most popular magazine, selling about 19,000 issues per month. *See Joan Biskupic, Military Cannot Ban Porn; Judge Finds Law Is Unconstitutional*, ANCHORAGE DAILY NEWS, Jan. 23, 1997, at A3.

21. Sergeant Bambi Lynn Finney was dismissed in 1981 when she posed nude in *Playboy* magazine. *See Greg Moran & Darlene Hinmelspach, Adult-Video Producer Raps Marine Probe*, S.D. UNION-TRIB., Aug. 20, 1993, available in 1993 WL 7505778.

22. *See Thomas L. Jipping, The Danger of More Activist Judges*, WASH. TIMES, Jan. 28, 1997, at A19.

23. *See Regional Reports*, NAT'L L.J., Feb. 3, 1997, at A8. Judge Scheindlin read the Supreme Court's jurisprudence concerning deference to military decisionmaking as allowing "restrictions of First Amendment rights in the military context only when such restrictions were deemed necessary to thwart 'a clear danger to military loyalty, discipline or morale.'" *General Media Communications v. Perry*, 952 F. Supp. 1072, 1081 (S.D.N.Y. 1997) (quoting *Brown v.*

Court of Appeals vacated, instructing the lower court to give judgment affirming the Act.<sup>24</sup>

At bar, the government had argued that the purpose of the Act was, in part, to bolster the military's image.<sup>25</sup> The government had also asserted that the Act was supported by congressional findings that the sale or rental of sexually explicit materials "jeopardized the military mission of promoting core values [such as] honor, courage and commitment."<sup>26</sup> While the Congressional Record contains scarce comment linking the measure to any specific strategic military aim,<sup>27</sup> such a provision could arguably be characterized as an attempt to increase unit performance by facilitating the suppression of counter-productive sexuality.<sup>28</sup> Whether such a demand is beyond the scope of the sustainable de-humanization already expected of an

Glines, 444 U.S. 348, 355 (1980)). She also found that the classifications made under the Act were in violation of the Equal Protection Clause. *See id.* Finally, she found that the law was vague in violation of the Due Process clause. *See id.* at 1082.

24. *See Cohen*, 131 F.3d at 276 ("Congress, acting under its authority to maintain and regulate the armed forces, may constitutionally place some restrictions on the speech that occurs under military command. The Military Honor and Decency Act of 1996 embodies such a set of constitutional restrictions."). The court of appeals ruled, in effect, that the ban was a reasonable time, place, or manner restriction of expression in a non-public forum, basing its decision on the limited impact of the MHDA. *See id.* at 278-84.

In response to the *Cohen* decision, *Penthouse* publisher Bob Guccione pledged further legal and political action, including a plan to have *Penthouse* Pets picket military bases to raise awareness of the Act. *See Penthouse Refuses to Take Military Ban Lying Down*, MEDIA DAILY, Dec. 2, 1997, available in 1997 WL 14506693. The Second Circuit denied the request for rehearing, and enforcement of the MHDA remained stayed pending decision by the Supreme Court. *See Penthouse, A Shameful Act* (visited Mar. 17, 1998) <<http://www.penthousemag.com/reading/feature/military/center2.html>>.

25. *See Perry*, 952 F. Supp. at 1080 (arguing that the Act was designed to maintain the "appearance of honor and propriety and professionalism which the military seeks to establish in the community, and in the world at large") (quoting Transcript of Oral Argument at 38).

26. *See id.* (citing Govt. Memo at 17-18).

27. Congressman Dornan, a sponsor of the measure, opined that pornography was "a frontal, direct, vicious specific assault upon women" and stated that the MHDA would "help . . . commanders to take that . . . strong, manly, decent line . . . to not have this garbage up." 142 Cong. Rec. H8824 (July 30, 1996).

28. Sexuality has the potential to impair military function two ways: sexual harassment and consensual sex. Sexual harassment has increasingly bedeviled the armed forces. *See Chema*, *supra* note 3, at 9-15 (evaluating the problem of sexual harassment in the military). For an argument that pornography constitutes sexual harassment, see, for example, Morrison Torrey, *We Get The Message—Pornography in the Workplace*, 22 Sw. U. L. REV. 53 (1992) (encouraging judicial acceptance of "evidence of the presence of pornography at work as relevant to establish a hostile environment violation of the sexual harassment prohibition of Title VII"). Among the other difficulties the military faces that are fundamentally the byproducts of sex between military personnel are those stemming from pregnancy and the "non-deployable" female soldier which results. Gutmann, *supra* note 6, at 22. The atmosphere created by placing large numbers of members of opposite sexes into close quarters on Navy ships has led to these vessels being dubbed "big high school[s]" and "Love Boats." *Id.*

organizational structure that, of necessity, trains its members to kill<sup>29</sup> is not the focus of this Note. Instead, this Note's objective is to assess the appropriate judicial treatment of sexual expression in the military context by developing an ideal methodological construct and then analyzing whether the Supreme Court's public employee speech rulings offer an adaptable methodology. Because the narrow application of the MHDA lends itself to either the interpretation of the district court<sup>30</sup> or the court of appeals,<sup>31</sup> both courts were able to skirt the underlying issue approached by this Note.<sup>32</sup> How would a military regulation that criminalized all pornography<sup>33</sup> on military

29. See, e.g., James M. Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C. L. REV. 177, 220-21 (1984). The military organization is far removed from civilian norms:

The combat infantryman faces the continuing prospect of death, maiming, or injury while tired, hungry, thirsty, and exposed to the worst extremes of climate. He is isolated from his normal sources of esteem, affection, and sexual gratification, and suffers constant, debilitating uncertainty about the intentions of the enemy and his own superiors. The situation bluntly confronts him with the fact that he is a mere means to his superiors' ends, of no intrinsic human worth to them, caught in circumstances beyond his control.

*Id.*

30. See *infra* note 34.

31. The court of appeals found that the Act passed traditional time, place, or manner scrutiny. See *General Media Communications v. Cohen*, 131 F.3d 273, 287-88 (2d Cir. 1997). The *Cohen* court found first that the "military exchanges governed by the Act are nonpublic forums." *Id.* at 280. The court then determined that the Act's use of "lascivious" as a defining criteria was meant to distinguish materials based on their content, rather than their viewpoint. See *id.* at 281. This conclusion rests, to some extent, on dicta in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), and, as Judge Parker observed in his *Cohen* dissent, is debatable both as a premise and in its application to the MHDA. See *Cohen*, 131 F.3d at 291 (Parker, J., dissenting). That question aside, the majority proceeded to ask "whether the Act's restrictions on expressive activity are reasonable and therefore consistent with the Free Speech Clause of the First Amendment." *Id.* at 282. Acknowledging the traditional deference given to congressional decisions concerning the military and noting that the Act "has not banned explicit magazines and videos—soldiers and sailors may still buy them elsewhere, receive them by mail, and read or watch them," the Second Circuit declared the Act valid. *Id.* at 281, 287-88.

32. The Second Circuit panel seems to have twisted doctrines applicable to purely civilian speech beyond recognition to reach a decision consistent with its deferential instincts. See *infra* Part III.B.2. The ongoing MHDA litigation illustrates the need for conceptual clarity in this arena, lest principles essential to the protection of speech be watered down and unavailable when needed.

33. The term "pornography" is used in this Note to refer to materials comparable to those methods of sexual expression banned by the MHDA but not limited to exclude written works or books. See *supra* note 17.

The Court has treated "obscenity" as categorically excluded from First Amendment protection. See *Roth v. United States*, 354 U.S. 476, 484-85 (1957) ("[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."); see David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111, 118-19 (1994) (discussing the history of First Amendment obscenity jurisprudence). Defining what constitutes obscenity, however, has been notoriously difficult. See, e.g., *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I know it when I see it."). The Court has laid out a rough guide that leaves much to "community standards."

installations, without the limitations of the MHDA,<sup>34</sup> fare against a First Amendment<sup>35</sup> challenge?

Jenkins v. Georgia, 418 U.S. 153, 157 (1974). Reliance upon "community standards" dangerously places definition of a First Amendment category into the hands of majoritarian decisionmakers inclined to be receptive to censorship. See *infra* note 78. At a minimum, the work must be "patently offensive," Miller v. California, 413 U.S. 15, 24 (1973), and lack "serious literary, artistic, political, or scientific value to a reasonable person," Pope v. Illinois, 481 U.S. 497, 500-01 (1987), to be found obscene. Again, these criteria provide little guidance and Justice Scalia has commented that the standard implies not a "reasonable man" but a "man of tolerably good taste." *Id.* at 504-05 (Scalia, J., concurring). Among the more plausible rationalizations for categorically excluding obscenity, or "hardcore pornography," is that it is "designed to produce a purely physical effect." Frederick Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 922 (1979). Yet, even this explanation fails to account for the significant blurring between obscenity and nonobscenity, because nonobscene expression can have a nonintellectual (i.e., physical) effect and because "sex depiction" has serious intellectual impact. See Cole, *supra*, at 125-27 (discussing the theory that pornography is not speech because of its physicality).

According to the prevailing Court doctrine, sexual expression that is held not to be obscene may nonetheless be regulated because it is offensive. See, e.g., Barnes v. Glen Theatre, Inc., 501 U.S. 560, 562 (1991) (discussing totally nude dancing); FCC v. Pacifica Found., 438 U.S. 726, 729 (1978) (discussing filthy words); Young v. American Mini Theatres, Inc., 427 U.S. 50, 52 (1976) (sexually explicit movies). But see Cole, *supra*, at 112 (criticizing this doctrine and arguing that "[i]f the 'obscenity' doctrine rests on a definition that is internally incoherent, the 'offensive speech' doctrine rests on no definition at all"). The Court has maintained, however, that nonobscene offensive speech may not be restricted simply because it offends. See, e.g., Hustler Magazine v. Falwell, 485 U.S. 46, 48 (1988) (finding that the First Amendment shielded a parody of Reverend Jerry Falwell from tort liability for the intentional infliction of emotional distress). The Court has protected sexual expression not deemed to be obscene. See *Erznoznick v. City of Jacksonville*, 422 U.S. 205, 206 (1975) (protecting nonobscene nudity presented at a drive-in movie theater against a city ordinance barring such depictions visible from public places); *Cohen v. California*, 403 U.S. 15, 16 (1971) (granting protection to the words "Fuck the Draft" emblazoned on a jacket). The Court has summarized its holdings concerning offensive speech:

[W]hen the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power. Such selective restrictions have been upheld only when the speaker intrudes on the privacy of the home, or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.

*Erznoznick*, 422 U.S. at 209 (citations omitted).

34. Judge Scheindlin noted that "a plain reading of the Act shows that it proscribes only those portrayals of nudity that are 'lascivious.' The term 'lascivious' in turn is claimed to mean 'patently offensive.' Thus, the Act on its face bans protected speech on the basis of its offensiveness alone." *General Media Communications v. Perry*, 952 F. Supp. 1072, 1080 (S.D.N.Y. 1997). And, she continued, "[i]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.* at 1076. The government had argued that the Act was intended to prevent sales that "might be interpreted as an official endorsement." *Id.* at 1080. Judge Scheindlin found the endorsement argument unpersuasive for two reasons. See *id.* First, the Act lacked either a ban on the actual presence of pornography on military installations or a basis in the record to suggest that sale or rental, rather than possession, caused the harm to the military's "core values and appearance to the civilian world." *Id.* Judge Scheindlin's other criticism of the endorsement rationale was that it was "unreasonable to equate the sale or rental of sexually explicit material in military exchanges with an official 'endorsement'" since commissaries continued to sell alcohol and tobacco, which were generally perceived to be harmful to those who buy them. *Id.* at 1080-81. Judge Scheindlin also noted that the glaring

The hazards of judicial reluctance to formulate an approach more structured than simple deference to military decisionmaking are apparent in the litigation regarding the constitutionality of the MHDA.<sup>36</sup> This Note argues that the methods the Court has developed to prevent the chilling of citizen speech when the government acts as employer include a balancing formula that will sufficiently accommodate assertions of military necessity.<sup>37</sup> At the same time, formalizing the protections to which service personnel are entitled ensures access to public discourse for vital speech and, by providing consistency of judicial review, promises that liberties will not be sacrificed unduly in times of crisis.<sup>38</sup>

Part II of this Note situates the problem posed by military personnel speech within a larger constitutional and historical framework. From there, Part II proceeds with an analysis of the operative theoretical foundations of the Supreme Court's First Amendment jurisprudence. It then describes the methodological construct of categorical exclusions and limited balancing consistent with both the government process model of the First Amendment and existing Court doctrines. In light of the government process model, Part II sketches an outline of the ideal approach to the question of the First Amendment rights of military personnel. In concluding Part II, this Note briefly assesses the civilian First Amendment doctrines that judges and commentators have enlisted to evaluate military free

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absence of a factual record to support the classification undermined the government's argument that the distinctions were necessary to achieve the goals of upholding "the appearance of honor, propriety and professionalism [and] promoting core values." *Id.* at 1082. Noting that the MHDA "created classifications by banning the sale or rental of sexually explicit material that is presented in audio tapes, periodicals, and films but not sexually explicit material that is presented in books," Judge Scheindlin pointed out that nothing would stop the publishers of *Playboy* and *Penthouse* from circumventing the law by binding their publications, nor was there any suggestion in the record that the harm of pornography was more severe when the materials were in visual, as opposed to written, form. *Id.*

35. See U.S. CONST. amend. I. This Note will use the phrase "First Amendment" to designate protections of speech and expression except when protection of religion is clearly indicated.

36. See *supra* notes 31-32. Although the court of appeals may have been instinctively correct in its conclusion that congressional authority could legitimately extend to suppress speech in the military context that it could not suppress in the civilian context, "lasciviousness" is understood in the civilian context to express unconstitutional hostility toward a particular viewpoint. See *infra* note 314. Pretending that it does not is inconsistent and arguably represents unarticulated deference to Congress. See *infra* note 114.

37. See Melvyn R. Durchslag, *Misuse of Separation of Powers Theory in Cases Outside the System of Freedom of Expression*, 38 CASE W. RES. L. REV. 496, 511 (1988) ("[E]arlier cases demonstrate that the Court is capable of evaluating the impact of First Amendment claims on insular governmental institutions such as the military and is capable of resolving those claims on their merits without disrupting the institutions with respect to which the claims are made.").

38. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588-89 (1952).

speech claims focusing on the justifications for analogizing the speech of military personnel to that of public employees.

Part III of this Note surveys the existing state of the treatment of military speech. First, this Note considers the arguments for and against the "principle of deference" that has served as the lightning rod of debate at the intersection of constitutional liberties and military realities. Then, it examines the Supreme Court decisions that have resolved First Amendment challenges to military law. These cases are divided into three distinct categories: those concerning religion, those concerning civilians on military installations, and, finally, those concerning service personnel in their professional capacity. This third category, the speech of members of the armed forces, warrants comparison to public employee speech with direct consequences for the regulation of sexual expression in the military.

Part IV lays out the Supreme Court's public employee speech doctrine. After a survey of the critical cases, this Part summarizes the current state of the construct employed by the Court and then assesses this construct in terms of the theoretical model proposed in Part II. Finally, Part IV explores the implications of adapting the existing public employee speech doctrine to the military context.

Part V then discusses the role of sexual expression in a government process model of the First Amendment. In conclusion, this Note brings these themes together, arguing that application of the public employee speech doctrine to First Amendment interests implicated by sexual expression in the military context would permit some regulation of speech unreachable in civilian society.

## II. THE ANALYTICAL MODEL

### A. *Historical and Constitutional Perspective*

One of the Constitution's great strengths has been its elasticity in allowing both culturally acceptable levels of individual liberty in times of peace and effective societal mobilization in times of crisis.<sup>39</sup>

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39. Perhaps the most extreme instance of deference occurred in *Korematsu v. United States*, 323 U.S. 214, 215-24 (1944), in which the Court refused to intervene on behalf of 120,000 Japanese interned for national security reasons by agreement of military officials, the President, and Congress. Apparently the wholesale infringement of basic liberties seemed necessary at the time, but the incident has since been the subject of an official apology. See Karen DeWitt, *Japanese-Americans: "Great Day for America"*, USA TODAY, Aug. 11, 1988, at 31

The Supreme Court has facilitated these cyclical convulsions by declining to impose significant restrictions on the powers of the other branches when national security is implicated.<sup>40</sup> The political question doctrine has been particularly useful in allowing the Court to avoid setting constitutional norms against situational exigencies.<sup>41</sup> Nevertheless, the Court has recognized the paramount functional importance of the First Amendment and refrained from cluttering its evaluation of controversies implicating speech and religious interests with the invocation of non-justiciability.<sup>42</sup>

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(reporting President Reagan's signing of legislation providing for reparations and an apology to those interned).

40. See, e.g., *Snepp v. United States*, 444 U.S. 507, 507-10 (1980) (permitting punishment of a former intelligence agent for disclosing classified information); Stephanie A. Levin, *The Deference That Is Due: Rethinking the Jurisprudence of Judicial Deference to the Military*, 35 VILL. L. REV. 1009, 1059 (1990) (stating that "[j]udicial deference to the military in the face of constitutional claims for greater liberty, equity, and due process is just one facet of . . . a widespread judicial reluctance to scrutinize policies and practices declared to be necessary for national defense"); see also *Perpich v. Department of Defense*, 496 U.S. 334, 354-55 (1990) (deployment of the National Guard is not subject to state governor questioning); *Boyle v. United Techs. Corp.*, 487 U.S. 500, 514 (1988) (government contractor defense); *Feres v. United States*, 340 U.S. 135, 143-45 (1950) (tort immunity); Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1305-17 (1988) (enumerating other instances of judicial deference relating to foreign affairs). Courts have, for instance, notably stayed their hands by declining to interfere with foreign affairs activities when separation of powers disputes arise during a conflict, whether or not war has actually been declared. See generally *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990); *Ange v. Bush*, 752 F. Supp. 509 (D.D.C. 1990).

For a different perspective on the intersection of First Amendment liberties and war-time judicial deference, see Rana Jazayerli, Note, *War and the First Amendment: A Call for Legislation to Protect a Press' Right of Access to Military Operations*, 35 COLUM. J. TRANSNAT'L L. 131, 133-43 (1997).

41. The facets of the political question doctrine were compiled by the Court in *Baker v. Carr*, 369 U.S. 186 (1962).

Prominent on the surface of any case held to involve a political question is found a toxically demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Id.* at 217.

42. See, e.g., *Elrod v. Burns*, 427 U.S. 347, 351-53 (1976) (refusing to apply the political question doctrine to preclude judicial review of First Amendment challenges to the practice of political patronage dismissal); see also *Durchslag*, *supra* note 37, at 499 (arguing that, because the First Amendment protects institutional values unlike any of the other explicit limitations contained in the Bill of Rights, "separation of powers concerns, to the extent relevant at all in individual liberties cases, must stake out different ground when applied to the First Amendment").

While, at present, the nation is far removed from the kind of unifying crisis that engenders wholesale judicial restraint,<sup>43</sup> the current social milieu is notable for its "inner-directedness."<sup>44</sup> This mood is consistent with cyclical, "generational" theories of history<sup>45</sup> and leads to inevitable social pressures to expand conceptions of individual liberties with a focus on self-actualization justifications.<sup>46</sup>

In contrast, this Note acknowledges that the most coherent way to explain why speech has been elevated to explicit constitutional protection,<sup>47</sup> while other equally self-realizing liberties, such as economic liberties, receive mere rational basis scrutiny,<sup>48</sup> is that the deliberative democracy embodied in the Constitution<sup>49</sup> cannot logically function without the protection of speech.<sup>50</sup> Stemming from this assumption are the conclusions that only purely political speech is necessarily protected and that such speech is protected absolutely.<sup>51</sup>

43. See WILLIAM STRAUSS & NEIL HOWE, *THE FOURTH TURNING* 118-20 (1997) (discussing the timing with respect to "generational" cycles of "concerted national responses" to "foreign provocations").

44. See *id.*

45. STRAUSS & HOWE, *GENERATIONS*, *supra* note 15, at 351.

46. See, e.g., Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1, 5-9 (1990) (discussing conflict between individual rights and community interests).

47. The First Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

48. See, e.g., *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952):

The public welfare is a broad and inclusive concept. The moral, social, economic, and physical well-being of the community is one part of it; the political well-being, another. The police power which is adequate to fix the financial burden for one is adequate for the other. . . . [I]f our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to legislative decision.

*Id.* at 424-25.

49. See, e.g., C. Thomas Dienes, *When the First Amendment Is Not Preferred: The Military and Other "Special Contexts"*, 56 U. CIN. L. REV. 779, 789 (1988).

Political power resides ultimately in the people and flows from them; governments derive their just powers from the consent of the governed; public officials exercise a trust and are answerable to the people. If we the people are to exercise our role properly in democratic society, we must be free to express our ideas and opinions and must be able to obtain information to assure that our opinions, our decisions, are informed. . . . A popular Government, without popular information, or the means of acquiring it, is hut a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.

*Id.* at 789-90 (quoting Letter from J. Madison to W.T. Barry (Aug. 4, 1822), *reprinted in* 9 *The Writings of James Madison* 103 (G. Hunt ed. 1910)).

50. See *infra* notes 63-73 and accompanying text.

51. See, e.g., Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 30 (1971); see also Risa L. Lieberwitz, *Freedom of Speech in Public Sector*

The Supreme Court has implicitly recognized that certain types of expression are not logically protected by the First Amendment.<sup>52</sup> The Court, however, has also recognized that difficulties discerning logically protected from logically unprotected speech can result in over-regulation and self-censorship, leading to the chilling of essential speech.<sup>53</sup> As a result, the Court has developed a series of balancing tests to limit the application of these categorical exclusions.<sup>54</sup>

To preserve First Amendment efficacy in light of the interplay between historic and constitutional factors, then, the Court must meet the pressures generated by advocates of the personal rights model with a doctrinal construct that will yield in times of crisis.<sup>55</sup> At least one commentator has proposed evaluating the constitutional claims of service personnel with a two-tiered framework linked to the declaration of war, with non-justiciability during periods of crisis and civilian norms at all other times.<sup>56</sup> This approach is too radical a de-

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*Employment: The Deconstitutionalization of the Public Sector Workplace*, 19 U.C. DAVIS L. REV. 597, 604-05 (1986).

52. Judge Bork argues that "speech advocating forcible overthrow of the government or violation of law" should be excluded from First Amendment protection. Bork, *supra* note 51, at 29-30. The Court has recognized similar exclusions for "fighting words," obscenity, and defamation. Lieberwitz, *supra* note 51, at 614-16 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942); *Beauharnais v. Illinois*, 343 U.S. 250, 255 (1952); *Roth v. United States*, 354 U.S. 476, 484-85 (1975)). In *Beauharnais*, the Court explained that "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem." 343 U.S. at 255. Listing "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words" among the excluded classes of speech, the Court based the lack of First Amendment protection for these categories on the observation that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.*

53. In *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749 (1985) (citing *Connick v. Myers*, 461 U.S. 138, 146-47 (1983)), the Court observed that "speech on matters of purely private concern is of less First Amendment concern." The Court went on to explain that the justification for constitutional limitations on state libel law is absent when "[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press." *Id.* at 759-60.

54. For instance, the Court has adopted the "clear and present danger" test that limits the advocacy of illegal conduct—such as speech pitched to incite a riot. *Brandenburg v. Ohio*, 395 U.S. 444, 450 (1969) (Douglas, J., concurring). Another example of a similar formulation is the requirement of "actual malice" in defamation suits. *New York Times v. Sullivan*, 376 U.S. 254, 279 (1964).

55. See, e.g., William Rehnquist, *Civil Liberty and the Civil War: The Indianapolis Treason Trials*, 72 IND. L.J. 927 (1997) ("Peacetime offers an opportunity for detached reflection on these important governmental questions which are not so calmly discussed in the midst of a war").

56. See Sugin, *supra* note 14, at 857 ("This Note argues that only service personnel in combat during war should be treated as members of a separate community. Most military personnel should be treated as a part of the civilian community, equally protected by the Constitution under which the rest of American society functions.").

parture from the current norm,<sup>57</sup> however, for it fails to take into account the ongoing need for readiness<sup>58</sup> that has become essential in modern technological warfare.<sup>59</sup> Other scholars have defended what is known as the “principle of deference” to military decisionmaking in all constitutional contexts.<sup>60</sup> This position, however, fails to sufficiently account for the “preferred position” of speech<sup>61</sup> and the serious concerns raised by critics such as Justice Stewart, who noted that “times have surely changed” since the judiciary first adopted its hands-off approach.<sup>62</sup>

## B. Systemic Approach to First Amendment Theory

### 1. Theoretical Basis

Scholars have grouped First Amendment theories into two broad categories:<sup>63</sup> the “government process,” or “systemic,” model

A variation on the two-tiered approach was proposed in John Nelson Ohlweiler, Note, *The Principle of Deference: Facial Constitutional Challenges to Military Regulations*, 10 J.L. & POL. 147, 151 (1993). This argument maintains that “[s]ince facial constitutional challenges to military regulations do not seriously threaten military effectiveness, they do not deserve the extreme deference afforded the military in other contexts.” *Id.* at 180-81. Consequently, Ohlweiler argued that facial challenges should receive judicial review and as-applied challenges should be subject to traditional deference. *See id.* at 151. This approach, however, suffers from the underinclusiveness and overinclusiveness that is the inevitable byproduct of bright-line tests. Ohlweiler may be correct that “the Court has not always applied the deference language” in its cases. *Id.* Still, an equally accurate description finds the Court undertaking to balance the interests Ohlweiler perceives as justifying a two-prong approach, but merely doing so on a case-by-case basis.

57. *See infra* Part III.A.

58. *See, e.g.*, Hirschhorn, *supra* note 29, at 218-28 (discussing the development of the complex web of psychological interactions between, and internalizations of, individuals in the military group); *see also* *Parker v. Levy*, 417 U.S. 733, 743 (1974) (“Military personnel must be ready to perform their duty whenever the occasion arises.”).

59. Any paradigm that makes its standard of review contingent upon the existence of war or peace also implicates the uncertainty of war powers disputes between the executive and legislative branches. Even if the President’s ability to deploy troops without congressional approval were resolved against the Commander-in-Chief through strict interpretation of the power to declare war, the need for rapid mobilization remains.

60. *See* Hirschhorn, *supra* note 29, at 182-83; *see also* Barney F. Bilello, Note, *Judicial Review and Soldiers’ Rights: Is the Principle of Deference a Standard of Review?*, 17 HOFSTRA L. REV. 465, 467-68 (1989).

61. Dienes, *supra* note 49, at 778-79; *see, e.g.*, *Follett v. McCormick*, 321 U.S. 573, 575 (1944) (“[F]reedom of press, speech and religion occupy a preferred position . . .”).

62. *Parker*, 417 U.S. at 781 (Stewart, J., dissenting).

63. *See* Lieberwitz, *supra* note 51, at 603. Lieberwitz describes Alexander Meiklejohn, Robert Bork, Lillian BeVier, and Vincent Blasi as the scholars most closely identified with the governmental process model. *See id.* Lieberwitz places Martin Redish and C. Edwin Baker in the camp of the self-development theorists. *See id.* Lieberwitz suggests that those theorists

and the "self-development," or "personal rights," model.<sup>64</sup> These categories differ primarily in the scope of protection that they accord speech and their underlying understandings of the purposes of the First Amendment.<sup>65</sup> The personal rights theorists support protection of speech for the expression's significance to the individual's personal development.<sup>66</sup> In contrast, the government process theorists' systemic approach interprets the First Amendment in a mode consistent with the democratic values of government embodied in the Constitution.<sup>67</sup> To the systemic theorists then, the First Amendment protects any expression necessary to the functioning of majoritarian decisionmaking.<sup>68</sup> A broad version of the systemic approach requires

pursuing the values underlying the First Amendment in epistemological terms are closely aligned with the self-development school. *See id.* at 604.

64. *Id.*

65. *See id.* For a general introduction to the comparison of the understandings of the personal rights and systemic models, see, for example, Lee Bollinger, *Free Speech and Intellectual Values*, 92 YALE L.J. 438, 442-45 (1983); Michael J. Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U. L. REV. 1137, 1142 (1983); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 601-02 (1982); FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 15-47 (1982); *see also* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-1, at 576-79 (1978).

66. *See* Bollinger, *supra* note 65, at 442-45; Lieberwitz, *supra* note 51, at 603; Redish, *supra* note 65, at 594-95; Frederick Schauer, *Must Speech Be Special?*, 78 NW. U. L. REV. 1284, 1289-90, 1301 (1983); TRIBE, *supra* note 65, at 576-79; Laurence Tribe, *Toward a Metatheory of Free Speech*, 10 SW. U. L. REV. 237, 240 (1978). One strand of self-development theory suggests that the two models differ only with regards to scope and that the values underlying both theories are compatible. Lieberwitz, *supra* note 51, at 603.

67. *See* Lillian BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principles*, 30 STAN. L. REV. 299, 300-02 (1978); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 538-42; Bork, *supra* note 51, at 23; Lieberwitz, *supra* note 51, at 604 (citing ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948)); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255; *see also* Durchslag, *supra* note 37, at 500 ("[I]n a process sense, [the First Amendment] protects the method by which that fundamental change can occur, public debate. The First Amendment is, in short, a blueprint for peaceful revolution.").

As Alexander Meiklejohn stated, the systemic First Amendment values "the freedom of those activities of thought and communication by which we 'govern.' It is concerned, not with a private right, but with a public power, a governmental responsibility." Lieberwitz, *supra* note 51, at 604 (citing Meiklejohn, *supra*, at 255).

68. *See* Lieberwitz, *supra* note 51, at 604 (citing Meiklejohn, *supra* note 67, at 255). Proponents of systemic models differ, however, as to the breadth of material they classify as essential to democratic ends. *See id.* For example, Meiklejohn included education, arts and sciences, and public discussion of public issues. *See id.* (citing Meiklejohn, *supra* note 67, at 255-57). Meiklejohn suggests that such forms of expression merit protection because they are "within the range of human communications from which the voter derives the knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment which, so far as possible, a ballot would express." Meiklejohn, *supra* note 67, at 256. Robert Bork has suggested limiting protection to speech directly concerning governmental functions. *See* Lieberwitz, *supra* note 51, at 604-05 (citing Bork, *supra* note 51, at 27-30) ("Bork would include in his category of governmental units those in the executive, legislative, judicial, or administrative branches.").

protection of speech for its social significance.<sup>69</sup> Phrased as the “search for truth” or “marketplace of ideas” justification, this view, enunciated in Justice Holmes’s opinions,<sup>70</sup> supports protection of unpopular speech because the conflict of viewpoints will result in the emergence of truth.<sup>71</sup> For the most part, the Supreme Court has adhered to the systemic theory in fashioning its First Amendment doctrines.<sup>72</sup> This Note takes an approach that resembles the one Justice Holmes outlined and assumes that expression requires explicit protection for the benefit of the marketplace of ideas.<sup>73</sup>

## 2. Exclusion by Categorization and Limitation by Balancing

Expression that fails to implicate systemic values is not logically necessary to the constitutional regime and, therefore, is excluded from the explicit protection offered by the First Amendment.<sup>74</sup> The Court has recognized these exclusions in such areas as libel<sup>75</sup> and obscenity.<sup>76</sup> Taking libel as an example, simply excluding false statements from the First Amendment domain is not the end of the matter. Systemic values may still be compromised by problems inherent in categorization. For example, the difficulty of definition and resulting gray area between protected true information and unprotected false information will always be present.<sup>77</sup> In the libel circumstance, a jury, acting as a microcosm of larger majoritarian decisionmakers, will tend to discount the value of unpopular ideas in resolving this ambiguity.<sup>78</sup> With the risks of losing at trial, or at best the costs of a successful defense, speakers will tend to self-censor. Consequently, systemically important speech will be chilled.

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69. See Lieberwitz, *supra* note 51, at 604-05.

70. *Id.*; see *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.”); see also *Bollinger*, *supra* note 65, at 463-64; *Redish*, *supra* note 65, at 616-17.

71. See Lieberwitz, *supra* note 51, at 605.

72. See *id.*

73. *But see* Dienes, *supra* note 49, at 797 (arguing that the marketplace of ideas model does not protect enough speech and suggesting that speech should be protected because it is a “liberty activity [that demands] broad protection [for its] intrinsic values”).

74. See Lieberwitz, *supra* note 51, at 614.

75. See *Beauharnais v. Illinois*, 343 U.S. 250, 255 (1952).

76. See *Roth v. United States*, 354 U.S. 476, 484-85 (1975).

77. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 278-79 (1964) (“[W]ould-be critics . . . may be deterred . . . because of doubt whether it can be proved in court . . .”).

78. See, e.g., *id.* at 295 (Black, J., concurring) (remarking on the potential for chilling of speech “where public feelings may make local as well as out-of-state newspapers easy prey for libel verdict seekers”).

Acknowledging this likely chain of consequences,<sup>79</sup> the Court has conceived a libel doctrine that attempts to strike a balance between the government's operative interests in regulating potentially damaging false information and the value of the speech.<sup>80</sup> In practice then, each necessary exclusion requires protecting logically unprotected speech so as not to impact adversely the marketplace of ideas.<sup>81</sup>

### C. *Military Speech in the Abstract*

#### 1. Exclusion

What systemic function is served by expression that occurs in the military? Much has been made of the irony of asking soldiers to fight and die to protect constitutional limitations on government power that the service personnel themselves apparently do not enjoy.<sup>82</sup> This Note contends that, in fact, no marketplace of ideas exists within the military. This insight underlies the significance of the Court's continuing characterization of the military as a "separate community."<sup>83</sup> The military system achieves decisionmaking with a

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79. *See id.*

A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.

They tend to make only statements which "steer far wider of the unlawful zone."

*Id.* (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)) (citations omitted). In *New York Times*, the Court held that a rule that "dampens the vigor and limits the variety of public debate" is inconsistent with the First Amendment. *Id.* at 279.

80. *Cf. Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *New York Times*, 376 U.S. 254.

81. The importance of the systemic model in the Court's reasoning is highlighted by the fact that in its analysis of libel law's impact on First Amendment freedom, it noted that "[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'" *New York Times*, 376 U.S. at 279 (quoting JOHN STEWART MILL, ON LIBERTY 15 (1947)).

82. *See, e.g., Richard W. Aldrich, Comment, Article 88 of the Uniform Code of Military Justice: A Military Muzzle or Just a Restraint on Military Muscle?*, 33 U.C.L.A. L. REV. 1189, 1189 (1986); Sugin, *supra* note 14, at 855; *see also supra* note 8.

83. *See infra* notes 140-44 and accompanying text.

top-down model,<sup>84</sup> starting with the constitutional attribution of Commander-in-Chief powers to the President.<sup>85</sup> Bottom-up, or majoritarian, approaches are an anathema to the successful operation of a military force.<sup>86</sup> From the perspective of the military as a discrete entity, then, *all* speech either of the service person or on the military installation is not logically necessary to the constitutional choice of majoritarian debate and power. Again, however, the analysis cannot stop there. Some truth lies in the often-stated premise that “members of the military are not excluded from the protection granted by the First Amendment.”<sup>87</sup> While an individual’s speech occurring in his military role is not protected, the individual remains a citizen whose speech remains systemically important. Therefore, to prevent the chilling of essential speech, the Court should strive for a balance that takes into account both the interest in an effective military and the interest in speech of citizens who happen to be in the military.<sup>88</sup>

## 2. Balancing Interests

What then are the interests that may come into play if an individual’s speech occurs when the individual is, metaphorically, either in or out of uniform? One variable is the systemic importance of the

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84. For a general discussion of the military justice system, see Note, *Military Justice and Article III*, 103 HARV. L. REV. 1909 (1990); see also Hirschhorn, *supra* note 29, at 218-28; Sugin, *supra* note 14, at 860-64. But see *infra* note 324 and accompanying text.

85. See U.S. CONST. art 2, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . .”).

86. See, e.g., Hirschhorn, *supra* note 29, at 218-19.

The armed forces are an example of a rational bureaucracy: a hierarchical organization characterized by a specialized division of labor according to system and authority based on role rather than personality, in which each individual’s role is to pursue goals established by the heads of the hierarchy through methods that they have calculated will attain these goals. In any such organization the needs and desires of an individual member may conflict with the demands of his role; if he chooses to follow the former, the functioning of the organization is impeded. A rational bureaucracy therefore needs a system of discipline that will induce the individual to fulfill the demands of his role even when they are inconsistent with his own interests.

*Id.* Justice Blackmun alluded to the perils of undisciplined forces in *Parker v. Levy*, 417 U.S. 733, 763 (1974) (Blackmun, J., concurring) (“One need only read the history of the permissive—and short-lived—regime of the Soviet Army in the early days of the Russian Revolution to know that command indulgence of an undisciplined rank and file can decimate a fighting force.”).

87. *Parker*, 417 U.S. at 759; see also *Chappell v. Wallace*, 462 U.S. 296, 304 (1983) (“This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service.”).

88. Whether the soldier is a voluntary recruit or a draftee will not change this aspect of the analysis. For a discussion of the merits of the two alternatives, see, for example, Thomas W. Rens, *Raising an Army: A Positive Theory of Military Recruitment*, 37 J.L. & ECON. 109 (1994).

speech.<sup>89</sup> Speech that is nearly pure political speech requires greater protection than speech that is far removed from deliberative discourse—commercial speech<sup>90</sup> or visual images, for example.<sup>91</sup> An additional element of speech valuation is the ability of the system to obtain the information by other means.<sup>92</sup> A soldier has access to information concerning the operation of the armed forces that is highly relevant to democratic decisionmaking, since the armed forces remain a creature of the deliberative Congress.<sup>93</sup> The very fact that the services are a closed society raises the possibility that when the speech concerns military matters it will, perhaps counter-intuitively, deserve greater respect than if it were completely unconnected to the individual's service.

The second variable to consider is the regulatory interest at stake.<sup>94</sup> In the military context, this interest is the need to prevent disruption of the pursuit of legitimate military goals.<sup>95</sup> Specifically, maintaining the top-down command structure is of paramount concern.<sup>96</sup> As the value of the speech to the political process increases, however, so does its potential for disruptive effect. That military and

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89. See, e.g., *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964) ("The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'") (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). Cf. *Pickering v. Board of Educ.*, 391 U.S. 563, 573 (1968) ("The public interest in having free and unhindered debate on matters of public importance—the core value of the Free Speech Clause of the First Amendment—is so great that it has been held that a State cannot authorize the recovery of damages by a public official for defamatory statements directed at him except when such statements are shown to have been made either with knowledge of their falsity or with reckless disregard for their truth or falsity.").

90. See, e.g., *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

91. See, e.g., *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

92. See Bruce Bodner, Recent Decisions, *Constitutional Rights—United States Supreme Court Gives Public Employers Greater Latitude to Curb Public Employee Speech—Waters vs. Churchill*, 114 S. Ct. 1878 (1994), 68 TEMP. L. REV. 461, 461-62 (1995) ("[M]any of the theoretical and practical leaders of the [managerial reform] movement view traditional, top-down approaches to managerial control of the workplace as one of the main sources of inefficiency of government."). Advocates of workplace reform understand that the benefits of public employee commentary concerning the workplace are a product of the public worker's intimate understanding of government function. See *id.* at 490.

93. See U.S. CONST. art. 1, § 8, cl. 12, 14.

94. See, e.g., *New York Times*, 376 U.S. at 254 (stating that the government's regulatory interest was in protecting individuals from the damages of defamation).

95. See, e.g., Hirschhorn, *supra* note 29, at 208-18. According to Professor Hirschhorn, the armed forces' "primary purpose is to fight wars, i.e., to inflict violence on persons subject to other governments in order to attain the objectives of the United States." *Id.* at 208; see also *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955).

96. See *Brown v. Glines*, 444 U.S. 348, 357 (1980) ("Because the right to command and the duty to obey ordinarily must go unquestioned, this Court long ago recognized that the military must possess substantial discretion over its internal discipline.").

civilian societies have distinct, antithetical decision-making procedures means that efforts to manipulate one may constitute attempts to circumvent the other. Speech on military matters may have no other source than service personnel, but it poses the greatest threat to internal military order.

#### D. Analogous Doctrines

Before turning to the speech of public employees for guidance, other possible methods of analyzing military speech suggested in the Court's opinions and academic commentary should be considered.

##### 1. Clear and Present Danger

One existing First Amendment conception that could underlie the approach taken in cases concerning the military is the "clear and present danger" test.<sup>97</sup> This test ostensibly withdraws First Amendment protection from speech "directed to inciting or producing lawless action" that is also "likely to incite or produce such actions."<sup>98</sup> Superficially, this standard, which excludes advocacy of illegal conduct from protection so as to suppress only the most serious of such advocacy while securing advocacy targeted at, and essential to, the deliberative process, might seem suited to the military situation<sup>99</sup> when disorder and disobedience are the concern.<sup>100</sup> The clear and present danger test, however, is designed for a patently different circumstance.<sup>101</sup> Developed in cases such as those concerning demonstrations bordering on riots,<sup>102</sup> the test aims to protect speech

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97. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

98. *Id.*

99. See Sugin, *supra* note 14, at 870 (referring to the clear and present danger test as the relevant civilian standard with which to compare both *Parker* and *Brown*).

100. See, e.g., *Brown*, 444 U.S. at 354 ("To ensure that [military personnel] always are capable of performing their mission promptly and reliably, the military services 'must insist upon a respect for duty and a discipline without counterpart in civilian life.'") (quoting *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975)).

101. Commentators agree that the conduct in *Parker v. Levy*, the military case that most resembles advocacy of illegal conduct, did not amount to conduct that would be excepted from protection under the civilian standard. See Dienes, *supra* note 49, at 810 n.122 (declaring agreement with Imwinkelried & Zillman, *An Evolution in the First Amendment: Overbreadth Analyses and Free Speech Within the Military Community*, 54 TEX. L. REV. 42, 50-70 (1975)); see also *Parker v. Levy*, 417 U.S. 733, 766-72 (1974) (Douglas, J., dissenting) (finding no danger generated by Levy's speech); *infra* Part III.B.3. But see Sugin, *supra* note 14, at 870 ("Levy's speech in *Parker* may have been restricted on the grounds that he was directing his inferiors to imminently disobey lawful orders to go to Vietnam.")

102. See *Whitney v. California*, 274 U.S. 357 (1927); *Gitlow v. New York*, 268 U.S. 652 (1925); *Abrams v. United States*, 250 U.S. 616 (1919).

that is logically unnecessary to the marketplace of ideas, unnecessary because it advocates conduct of which the deliberative process has already disapproved, to protect speech legitimately designed to reopen the political debate. In the military, no such deliberative process exists so the distinction between speech directed at influencing the deliberative process and speech flaunting that process is not relevant, and the clear and present danger test is not fitting.

## 2. Non-Public Forum

An alternative approach influencing judicial reasoning is the established doctrine that tolerates greater government interference with speech occurring in non-public fora.<sup>103</sup> The Court has suggested that this line of cases is indistinguishable from others involving "reasonable time, place, or manner restrictions on expression"<sup>104</sup> and this view is probably the better one.<sup>105</sup> When service personnel express themselves during the course of their duty, however, the speech is often disruptive and censored because of its message.<sup>106</sup>

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103. See, e.g., *United States v. Albertini*, 472 U.S. 675 (1985); see also *Flower v. United States*, 407 U.S. 197 (1972). *Flower* represents one of the rare instances in which a military decision abridging speech was not upheld. See *id.* at 199. The *Flower* Court held that

where a portion of a military base constitutes a public forum because the military has abandoned any right to exclude civilian traffic and any claim of special interest in regulating expression, a person may not be excluded from that area on the basis of activity that is itself protected by the First Amendment.

*Albertini*, 472 U.S. at 685-86. In *Albertini* a civilian argued that the ruling in *Flower* should be extended so that public open houses would constitute abandonment of the right to exclude. See *id.* at 686. The Court disagreed. See *id.* The court that ruled on the constitutionality of the MHDA was presented with a dispute between the parties over whether the sales outlets on military bases were public or non-public fora. See *General Media Communications v. Perry*, 952 F. Supp. 1072, 1079 (S.D.N.Y. 1997). Judge Scheindlin acknowledged that "[r]estrictions of protected speech are subject to different levels of judicial scrutiny depending on the kind of government property to which they are applied" and that "[g]overnment-owned property has been divided into three categories for purposes of First Amendment analysis." *Id.* at 1079. These categories are: "(1) traditional public forums, which 'by long tradition or by government fiat have been devoted to assembly and debate,'" *id.* (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)), "including such areas as public streets, parks and sidewalks; (2) *public forums* by government designation that are state-created and opened for limited public use, for example, university meeting facilities and municipal theatres; and (3) *nonpublic* forums that, by tradition or design, are not appropriate platforms for unrestrained communication—military installations and federal workplaces, for instance, fall into this category," *id.*

104. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984).

105. See Thomas R. McCoy, *A Coherent Methodology for First Amendment Speech and Religion Clause Cases*, 48 VAND. L. REV. 1335, 1358-59 (1995).

106. See *Parker*, 417 U.S. at 770-71 (Douglas, J., dissenting); see also *United States v. Hartwig*, 35 M.J. 682 (A.C.M.R. 1992) (upholding Hartwig's conviction for conduct unbecoming an officer and gentleman based on sexual innuendo in an "any soldier letter" sent to a fourteen-year-old student during Operation Desert Storm). For a discussion of *Hartwig* in the context of sexual harassment law, see Chema, *supra* note 3, at 36-37. Relying principally on *Parker's*

Therefore, judicial resolutions of these disputes cannot be seen as making commonsense assessments as to how much unintentional interference with speech can be tolerated since the interferences in the military context are not accidental. The Court has been clear in stating that in the non-public forum denial of access based on the message will not be tolerated.<sup>107</sup> For this reason, the Second Circuit's ruling on the MHDA is especially disconcerting.<sup>108</sup> The panel's intuitive deference seems to have spilled over into its consideration regarding whether the message itself was being suppressed.<sup>109</sup>

### 3. Public Employee Speech

Others have alluded to the possibility that the modern military establishment lends itself to comparison with the situation of government employees.<sup>110</sup> These commentators note that the armed

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analysis that officers are held to a higher standard of conduct, the Army Court of Military Review determined that the language of the letter was offensive, vulgar, and intended to incite lust. See *Hartwig*, 35 M.J. at 683, 685. The Court therefore held that Hartwig's "conduct [fell] well within the holding of *Parker v. Levy* which limits an officer's First Amendment rights." *Id.*

107. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (The "[s]tate may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view").

108. See *General Media Communications, Inc. v. Cohen*, 131 F.3d 273, 295 (2d Cir. 1997) (Parker, J., dissenting) ("[W]e have failed to heed the Supreme Court's warning that 'deference does not mean abdication . . .'" (quoting *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981))).

109. The prevailing view is that "portrayals of nude men and women designed to elicit a sexual response illustrate an idea: that lust or sexual desire is good, that men and women are sexual beings." *Id.* at 290 (Parker, J., dissenting).

"Indecent" speech, or even "sexually explicit" speech, may be regarded as a category of speech, and the regulation of such speech is a content-based regulation. To divide that category between depictions of nudity and other depictions, is yet another division, one step closer to viewpoint discrimination. But in banning distribution of only those depictions of nudity that are "lascivious," defined as "lewd and intended to or designed to elicit a sexual response," the government is necessarily attempting to regulate a specific perspective—a point of view.

*Id.* (citations omitted).

110. See JAMES JACOBS, *SOCIO-LEGAL FOUNDATIONS OF CIVIL-MILITARY RELATIONS* 28-29 (1986); see also Sugin, *supra* note 14, at 882-83 (stating that "[t]he law as applied to government employees . . . is a particularly good model for how the law should be applied to military personnel"). Sugin argues, however, that "[t]he government can place restrictions on the constitutional expression of its employees if it has a compelling reason to do so," noting that "[t]his is the standard test in First Amendment adjudication." *Id.* *Cf. infra* notes 281-91 and accompanying text.

The Second Circuit panel also alluded to the possibility of using the government's interest as an employer to shed light on the MHDA. See *Cohen*, 131 F.3d at 284 n.14.

We also note that the government's interest in disassociating itself from sexually explicit materials may be enhanced by the military's role as an employer. Military installations are workplaces for the civilian and military personnel assigned there; like private sector employers, the military may have an interest in maintaining a workplace environment

forces are now very different from military societies of the past.<sup>111</sup> One obvious change has been the growth in sheer numbers of individuals in uniform.<sup>112</sup> Another relatively recent development has been the conversion to an all-volunteer force.<sup>113</sup> A third trend, which has coincided with the technical advancement of military weaponry, has been the shift away from short-term recruits and conscripts toward professional military workers.<sup>114</sup> Finally, a fourth change in military culture has been the emergence of new roles for women and homosexuals in the modern military community.<sup>115</sup> All of these trends make the services less like the elite they once were<sup>116</sup> and more like the public employee sector.<sup>117</sup>

This Note, however, relies on these factors not because they make one group more like the other but because the changes reinforce the systemic significance of service personnel speech. So long as citizens are in uniform,<sup>118</sup> individuals whose speech is in danger of First Amendment exclusion will exist. The greater their number, the

that is efficient and focused on the task at hand, not one littered with materials that are "intended or designed to elicit a sexual response[.]"

*Id.* (quoting DOD Directive-Type Memorandum (Dec. 22, 1996)).

111. See Dienes, *supra* note 49, at 824 ("Yet the military society has undergone significant changes since the pre-Vietnam War era when the 'society-apart' metaphor dominated . . ."); Kirstin S. Dodge, *Countenancing Corruption: A Civic Republican Case Against Judicial Deference to the Military*, 5 YALE J.L. & FEMINISM 1, 28 (1992) (discussing the effects of an all-volunteer force on membership of low-income groups and racial minorities).

112. The armed forces have grown dramatically since World War II. See Hirschhorn, *supra* note 29, at 205. Since approximately 1900 when the standing army numbered approximately 25,000 to the 2-million-plus peak of the cold-war build-up, the growth of the armed forces has far outstripped population growth. See *id.* at 204-05.

113. The United States maintained a peacetime draft from 1945 to 1973. See CONCISE COLUMBIA ENCYCLOPEDIA 193 (1983). Although *Parker v. Levy* was decided after the expiration of conscription, it arose from circumstances that occurred while it was still in effect in 1967.

114. See Sugin, *supra* note 14, at 882-83. The modern armed forces break down into three classes: 10% have combat-related jobs, 54% have technical jobs, and the remainder perform support services. See *id.* (citing Edward F. Sherman, *Justice in the Military*, in CONSCIENCE AND COMMAND 21, 45 (James Finn ed., 1971)).

115. See *supra* notes 6-7. The tentative acceptance of long-excluded minorities has been the result of the weakening of internal resistance to change and the simultaneous increase in external pressures to open opportunities for service to minorities. See Gutmann, *supra* note 6, at 20.

116. See Hirschhorn, *supra* note 29, at 205.

117. The military and civilian work environments apparently share a similar climate when sex is concerned. See Tony Perry, *Scandals in Era of Cutbacks Create Anxiety in the Navy Military*, L.A. TIMES, June 18, 1997, at A1 (quoting one Navy lieutenant's observation that "[t]he military is just like the civilian world; there is a lot of fear in the workplace these days. Managers are afraid to discipline anybody for fear they'll be accused of being unfair or harassing. That can kill a career.").

118. This systemic importance has existed ever since the militia ideal was abandoned for the efficacy of a standing army, and individuals were both citizens and soldiers in time of peace. See Levin, *supra* note 40, at 1023-55; see also Lieberwitz, *supra* note 51, at 598; Bilello, *supra* note 60, at 468-71.

greater the potential for damage to systemic First Amendment values. The fact that they come from more diverse backgrounds creates greater potential for suppression of minority views. The tendency towards professional, volunteer services reinforces the separateness of the society, increasing the value to the public discourse of information from within.

In both the military and public employment situations, the character of constitutional restrictions on government authority is necessarily different from the nature of limitations implicated when the government acts as sovereign.<sup>119</sup> Some commentators have suggested that the Court has effectively adopted a laissez-faire economic model to develop its understanding of the limited First Amendment protection allotted to government employees.<sup>120</sup> The civilian government employee workplace is, however, like the military, better understood as an exception to the marketplace of ideas. Therefore, this Note will draw on public employee speech doctrine to illuminate the analysis in the military speech context.<sup>121</sup> The two doctrines have matured together, both receiving significant attention only relatively recently.<sup>122</sup> A substantial counter-argument

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119. See, e.g., Lieberwitz, *supra* note 51, at 598.

120. See *id.* at 667; see also Bodner, *supra* note 92, at 486.

121. For further comparison, see Sugin, *supra* note 14, at 882 (stating that “[g]overnment employees have a more restricted First Amendment right than the rest of society, and their position, relative to the federal government is analogous to service personnel”) (citing JACOBS, *supra* note 110, at 40). Sugin finds that both military and civilian employees are “means to accomplish the collective national end.” *Id.* (citing Hirschhorn, *supra* note 29, at 234). The primary functional difference between the two is their sphere of influence, one domestic and the other international. See *id.* Moreover, Sugin suggests that both military workers and public employees “sacrifice personal goals for the good of the country.” *Id.* (citing United States Civil Serv. Comm’n v. National Ass’n of Letter Carriers, 413 U.S. 548 (1973) (compelling public employees to sacrifice their political activism)). Sugin also observes that both groups “are part of a democratic process that does not always function smoothly without safeguards to monitor the process.” *Id.* (citing United Pub. Workers v. Mitchell, 330 U.S. 75 (1947) (limiting political activities of public employees to promote efficiency in civil service)). Sugin finds that “[t]he major difference between civil service and military employees is often only the government entity that employs them because the content of their work is often the same.” *Id.* at 882-83. Sugin concludes that the substantial similarities between military service and public service justify identical treatment of the First Amendment claims that arise in each situation. See *id.*

122. The principal cases in each line occurred within a decade. See Parker v. Levy, 417 U.S. 733 (1974) (arising from events that took place in 1967); Pickering v. Board of Educ., 391 U.S. 563 (1968) (arising from events that took place in 1964). See, e.g., D. Keith Fortner, Note, *Constitutional Law—First Amendment and Freedom of Speech—Public Employers Must Conduct a Reasonable Investigation to Determine if an Employee’s Speech Is Protected Before Discharging the Employee Based upon the Speech*. Waters v. Churchill, 114 S. Ct. 1878 (1994), 18 U. ARK. LITTLE ROCK L.J. 463, 468 (1996) (discussing the precursors of *Pickering* and commenting on the long period of inattention to the subject that preceded it). For a discussion of the circumstances that led to the Court’s consideration of First Amendment protections in the military, see Allen Resnick, Note, *Military Dissent and the Law of War: Uneasy Bedfellows*, 58

to linking military law to civilian law contends that national defense rationales could then be used to justify curtailing liberties in the civilian context unnecessarily and harmfully.<sup>123</sup> Nonetheless, principled judicial review would seem to protect liberty better than extant broad deferential principles currently applied in the military context.<sup>124</sup>

### III. THE MILITARY DOCTRINE

Before turning to the Court's rulings on the extent to which the First Amendment applies to service personnel, an understanding of the Court's reasoning with respect to the intersection of military law and constitutional liberties generally will be helpful.<sup>125</sup> These considerations inform the Court's analysis when dealing with First Amendment claims and contribute to an appreciation of the interests that would be balanced in the adapted public employee speech model.<sup>126</sup>

#### A. *The Principle of Deference*

Faced with diverse constitutional questions raised in the military context,<sup>127</sup> the Court has consistently referred to the military as a

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S. CAL. L. REV. 871, 883-84 (1985) (focusing on the Vietnam conflict as the genesis of military dissent).

The "original practice" with respect to military personnel was that they were not entitled to protection by the Bill of Rights. Aldrich, *supra* note 82, at 1190.

123. See Hirschhorn, *supra* note 29, at 183-84.

[T]he relation of civilians who are . . . part of strongly goal-directed organizations—students, policemen, and government employees, for example—to their superiors superficially resembles the serviceman's relation to the armed forces. Their superiors may want to reduce them to the same level of subordination. Unless constitutional doctrine clearly defines and strongly emphasizes the uniqueness of the military situation, it is possible that a false analogy with the armed forces will be used to limit the rights of others against organizations that do not share these qualities.

*Id.*

124. See Dodge, *supra* note 111, at 42 ("When the judiciary asserts as a general, overriding rule that servicepersons have lesser constitutional protections than other citizens because national defense so demands, it is in danger of breeding a widespread conviction that constitutional protections are automatically subservient to national security concerns.")

125. See generally Hirschhorn, *supra* note 29; Bilello, *supra* note 60; Ohlweiler, *supra* note 56.

126. See *infra* Part IV.D.

127. See, e.g., Chappell v. Wallace, 462 U.S. 296, 300-01 (1983) (racial discrimination suit against superior officer for allegedly discriminatory behavior); Rostker v. Goldberg, 453 U.S. 57 (1981) (equal protection claim brought by registered men for failure of Congress to provide for selective service registration of women); Middendorf v. Henry, 425 U.S. 24, 25, 33-34 (1976)

special case.<sup>128</sup> Recently, some commentators have interpreted the Court's approach as sliding from principled deference into non-justiciability.<sup>129</sup> Nevertheless, the justifications discussed below, offered to support the "principle of deference," raise serious questions regarding how substantially the Court should intervene in the military sphere.

### 1. Justifications

The propositions upon which the Court has relied when invoking judicial deference to the military can be divided into four general categories:<sup>130</sup> implied textual limitations,<sup>131</sup> the practical existence of a "separate community,"<sup>132</sup> limitations inherent in the adjudicative process,<sup>133</sup> and the costs of judicial error.<sup>134</sup>

First, the Court has suggested<sup>135</sup> that Congress's broad constitutional authority<sup>136</sup> to make rules and regulations for the military operates as an implied separation of powers limitation<sup>137</sup> on judicial review of military affairs.<sup>138</sup> For example, the Court expressed reluctance to concern itself in what it perceived as the constitutionally

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(challenge of practice of summary courts-martial without providing counsel as being in violation of the Sixth Amendment).

128. Scholars have referred to the Court's approach as the "separate community" doctrine, Hirschhorn, *supra* note 29, at 247-48; the doctrine of "military necessity," Major Stanley Levine, *The Doctrine of Military Necessity in the Federal Courts*, 89 MIL. L. REV. 3 (1980); and the "principle of deference," *Solorio v. United States*, 483 U.S. 435, 447 (1987).

129. See Dodge, *supra* note 111, at 1 ("[T]he judiciary increasingly fails to engage in any analysis or balancing of military needs against individual constitutional claims and is moving toward creation of a doctrine that military matters are non-justiciable.").

130. See Bilello, *supra* note 60, at 475.

131. See *infra* notes 135-39 and accompanying text.

132. See *infra* notes 140-44 and accompanying text.

133. See *infra* notes 145-48 and accompanying text.

134. See *infra* notes 149-50 and accompanying text.

135. See *Chappell v. Wallace*, 462 U.S. 296, 301 (1983).

136. See U.S. CONST. art. 1, § 8, cls. 12, 14.

137. See *Orloff v. Willoughby*, 345 U.S. 83 (1953).

[J]udges are not given the task of running the Army. The responsibility for setting up the channels through which such grievances can be considered and fairly settled rests upon Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.

*Id.* at 93-94.

138. See Bilello, *supra* note 60, at 475.

prescribed legislative function of determining whether women were necessary to the Selective Service System.<sup>139</sup>

Second, the Court has flavored its opinions settling disputes concerning the military with observations of the armed forces' uniqueness.<sup>140</sup> In *Parker v. Levy*, Justice William Rehnquist prefaced his analysis with the observation that the Court had consistently assumed "that the military is, by necessity, a specialized society separate from civilian society."<sup>141</sup> Consequently, "the military has, again by necessity, developed laws and traditions of its own during its long history."<sup>142</sup> Justice Rehnquist understood this tradition of uniqueness to be a corollary of the military's functional role as the nation's legitimate instrument of waging war.<sup>143</sup> Commentators have interpreted Justice Rehnquist's remarks to suggest that judicial deference arises from a narrower conception of the rights of service personnel generally.<sup>144</sup>

Third, the Court has further supported the principle of deference by supposing that the Court lacks the competence to resolve military questions.<sup>145</sup> Chief Justice Earl Warren explained that this inability derives from the Court's incapacity to assess the impacts of judicial decisions on military authority.<sup>146</sup> Chief Justice Warren perceived the problems presented to the judiciary by internal military disputes as "alien" to the ordinary judicial experience.<sup>147</sup> This judicial want of competence, the Court has said, requires a narrowing of the scope of review of military decisions.<sup>148</sup>

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139. See *Rostker v. Goldberg*, 453 U.S. 57, 58 (1981) (pronouncing that "[i]n deciding the question before us we must be particularly careful not to substitute our judgment for that of Congress, or our own evaluation of evidence for a reasonable evaluation by the Legislative Branch"); see also Bilello, *supra* note 60, at 476.

140. See Bilello, *supra* note 60, at 476. Most scholars point to the purposes and functions of the military as the source of its uniqueness. See, e.g., Hirschhorn, *supra* note 29, at 208; see also Ohlweiler, *supra* note 56, at 148.

141. 417 U.S. 733, 743 (1974).

142. See *id.*

143. See *id.*

144. See Bilello, *supra* note 60, at 476.

145. See *id.* (citing *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)). In *Gilligan v. Morgan*, the Court confessed its inability to imagine a circumstance in which it had less competence than it did in the military. 413 U.S. 1, 10 (1973) ("The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches.").

146. See Bilello, *supra* note 60, at 476-77 (citing Warren, *supra* note 1, at 187).

147. See Warren, *supra* note 1, at 187.

148. See Bilello, *supra* note 60, at 477 (citing *Chappell v. Wallace*, 462 U.S. 296, 305 (1983)).

Finally, the complement of judicial incompetence in the military sphere is the severity of the consequences of judicial error. One commentator has argued that mistakes having disastrous results for national defense are of a substantially greater constitutional import than errors made in the normal course of judicial review.<sup>149</sup> A corollary to this argument is the concern that frustrating military decisionmaking with judicial review could have the perverse consequence of aiding enemy states.<sup>150</sup>

## 2. Criticism

Advocates of "civic republicanism"<sup>151</sup> leveling criticism at the principle of deference concede that a separate society exists in the military, but argue that certain systemic values can be achieved only by applying civilian constitutional principles to military policies.<sup>152</sup> One such critic has reasoned that reliance on military expertise, the chilling of service personnel speech, and policies excluding minorities from service are inconsistent with civic republican values.<sup>153</sup>

Civic republicans and judicial dissenters have directed arguments at the key justifications for the principle of deference.<sup>154</sup> Contrary to the idea of an implied, constitutional separation of powers limitation, civic republicans argue that the Bill of Rights is without explicit military limitation and thus applies equally to the military.<sup>155</sup> Civic republicans counter the proposition that judicial competence is lacking in the military area by reference to the many complicated areas in which the Court has imposed judicial criteria without hesitation.<sup>156</sup> Finally, civic republicans argue that national security

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149. See Hirschhorn, *supra* note 29, at 237-40.

150. See *id.*

151. The amorphous civic republican model conceives of political participation and personal self-development as interdependent. For a general discussion of civic republicanism, see Dodge, *supra* note 111, at 17-21 ("Civic republicanism emphasizes the process of self-government rather than the particular outcomes of this process.").

152. See *id.* at 17-18.

153. See *id.* at 25-38.

154. See Hirschhorn, *supra* note 29, at 204-07 (discussing the views of Justices Brennan, Marshall, White and Stewart); see *infra* notes 155-57 and accompanying text; see also *supra* notes 135-50 and accompanying text.

155. See *Parker v. Levy*, 417 U.S. 733, 766 (1974) (Douglas, J., dissenting). The Court stated:

So far as I can discover the only express exemption of a person in the Armed Services from the protection of the Bill of Rights is that contained in the Fifth Amendment which dispenses with the need for "a presentment or indictment" of a grand jury "in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger."

*Id.*

concerns should not end the discussion, because a civil society isolated from information from within its armed forces is in danger of being subverted by its own military.<sup>157</sup> This critique has merit but threatens to subject military decisions to unadulterated civilian standards when weight could be given to such concerns on both sides of the special balancing analysis that the Court has espoused in its public employee speech doctrine.<sup>158</sup>

Another branch of criticism of judicial deference views the changes in military culture as having ended the separate society and, thus, the need for deference.<sup>159</sup> According to this view, the typical service person is indistinguishable from a civilian because the uniformed individual has an equivalent right to political participation.<sup>160</sup> This point is well taken but tends to be offered in support of the notion that only compelling government interests can justify suppression of speech.<sup>161</sup> That conception is the hallmark of the personal rights model of the First Amendment and inconsistent with the systemic analysis of this Note.<sup>162</sup> Again, explicit balancing at the limits of an acknowledged categorical exclusion would be preferable to encouraging the articulation of compelling interests that could spread beyond the military under national defense rationales.<sup>163</sup>

156. See *Bilello*, *supra* note 60, at 480-81 (suggesting that antitrust, securities, and employment litigation are equally complicated and that the litigants had provided the information necessary to resolve the concomitant legal issues); see also *Dienes*, *supra* note 49, at 822 ("[T]he role played by [the legislative and executive] branches does not deny the power and duty of the courts to protect the constitutional rights of military personnel. Certainly the language of the First Amendment makes no exception . . . for the military sector.").

157. See *Dodge*, *supra* note 111, at 40-42. Dodge asserts that:

If the courts refuse to question the military and leave servicepersons unprotected by constitutional or other external civilian restraints, military personnel will come to rely exclusively on the command hierarchy for benefits and protection, and thus may develop a loyalty to their commanders that surpasses their loyalty to the Constitution or civilian authorities.

*Id.* Dodge also discusses another threat to civilian society posed by lax judicial review of military authority: internal decline fostered by a failure to encourage political participation in the military sector may result in civilian political apathy. See *id.* at 41-42.

158. See *infra* Part IV.D.

159. See *Hirschhorn*, *supra* note 29, at 205.

160. See *id.* ("[The serviceman] participates in civilian society when off duty, enjoys and exercises political rights, and will probably return to civil life when it is to his advantage to do so."); see also *Parker*, 417 U.S. at 782-83 (Stewart, J., dissenting) ("In my view, we do a grave disservice to citizen soldiers in subjecting them to the uncertain regime of [these regulations] simply because these provisions did not offend the sensibilities of the federal judiciary in a wholly different period of our history.").

161. See *Hirschhorn*, *supra* note 29, at 206.

162. See *supra* Part II.B.

163. For an example of questionable compelling interests intruding upon First Amendment jurisprudence, see *Board of Directors of Rotary International v. Rotary Club*, 481 U.S. 537, 549 (1987) (finding that "the State's compelling interest in assuring equal access to women extends to the acquisition of leadership skills and business contacts").

*B. Military First Amendment Cases*

The dearth of cases on the subject matter hinders analysis of the First Amendment's role in the military.<sup>164</sup> The very different kinds of claims that are litigated further frustrates development of a conceptual framework.<sup>165</sup> Consolidating them into a single, uniform line is tempting, but fraught with difficulty. In First Amendment terms, the cases must initially be split between those concerning religion and those concerning speech. Furthermore, cases concerning regulations that interfere with freedom of expression differ significantly depending on whether a soldier or a civilian made the claim.<sup>166</sup> Recognizing these distinctions is the first step toward unpacking the precedents.

*1. Free Exercise of Religion*

For critics of judicial deference to the military, the Court's most recent decision, *Goldman v. Weinberger*,<sup>167</sup> is the most troubling.<sup>168</sup> In that case, the Court permitted court-martial proceedings to go forward against commissioned officer S. Simcha Goldman, who was found to have violated an Air Force Regulation barring the wearing of headgear indoors.<sup>169</sup> Goldman, an Orthodox Jew and ordained rabbi, had insisted on wearing his yarmulke.<sup>170</sup>

The Court rejected Goldman's free exercise challenge, reiterating the familiar proposition that the standard of review for military regulations entails a degree of judicial deference not warranted in civilian settings.<sup>171</sup> Not surprisingly, the Court premised its

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164. Only two Supreme Court cases, *Parker v. Levy* and *Brown v. Glines* have required resolution of First Amendment claims made by service personnel. See *infra* Part III.B.3.

165. See *infra* notes 174, 177 and accompanying text.

166. See *infra* Part III.B.2, III.B.3.

167. 475 U.S. 503 (1986).

168. See, e.g., Sugin, *supra* note 14, at 871 ("The trend away from protecting the first amendment rights of service personnel reached its extreme expression in *Goldman v. Weinberger*."); see also Dodge, *supra* note 111, at 6 ("The most recent and most ominous case decided by the Supreme Court with regard to First Amendment rights is the 1986 decision *Goldman v. Weinberger*.").

169. See *Goldman*, 475 U.S. at 504-05; see also Air Force Regulation 35-10, Para. 1-6.h(2)(f) (1980) (stating in part "[h]eadgear will not be worn . . . [w]hile indoors except by armed security police in the performance of their duties").

170. See *Goldman*, 475 U.S. at 505. In fact, he had worn his yarmulke at his hospital station for five years before opposing counsel at a court-martial trial, in which Goldman had appeared as a defense witness, complained. See *id.*

171. See *id.* at 507 ("[O]ur review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society.").

deferential attitude on the inherent qualities of the separate military community.<sup>172</sup> More important, the Court stressed that the express constitutional grant of authority to Congress to "raise and support" armies necessitated such heightened judicial deference.<sup>173</sup>

Because the religion clauses implicate separate concerns from those of the speech clauses,<sup>174</sup> however, cases dealing with religion should not necessarily receive the same treatment as those concerning speech.<sup>175</sup> In fact, the result in *Goldman* would probably have been

172. *See id.* at 506-07.

173. *See id.* at 508 ("[J]udicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.").

174. The speech and religion clauses of the First Amendment serve different functions. Compare McCoy, *supra* note 105, at 1337 ("The religion clauses embody the express judgment that the religious preferences of the political majority do not constitute a sufficient reason for the use of governmental power to restrict the religious preferences of a political minority."), with Leiberwitz, *supra* note 51, at 609 ("[T]he Court has been influenced mainly by the governmental process theories, which are concerned with the contributions of expression to the 'marketplace of ideas,' the 'search for truth,' and the preservation of a system of 'self-government.'"). Consequently, the concerns that the Court's constructs address in each field are necessarily different. *See McCoy, supra* note 105, at 1337. The religion clauses remove matters of religious significance from governmental control based on the apprehension, which historical experience justifies, that majorities tend to trespass upon unpopular religious rights. For a discussion of the historical development of the religion clauses, see, for example, Arlin Adams & Charles Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559 (1989). As a result, while speech may be a legitimate object of regulation in the military, religion may not. For a discussion of the traditional understandings of conflicts between religious freedom and military necessity, see, for example, Paul M. Landskroener, Note, *Not the Smallest Grain of Incense: Free Exercise and Conscientious Objection to Draft Registration*, 25 VAL. U. L. REV. 455 (1991) ("The historical accommodation to the demands of conscience suggests that, even in wartime, conscientious objectors make unique, positive contributions to the community and deserve respect and accommodation."). Therefore, even in the military context, the Court should apply traditional standards that bar the imposition of religious orthodoxy or intentionally restrict religious practice. *See McCoy, supra* note 105, at 1335. A coherent understanding of the religion clauses further recommends that accidental interferences with religious liberties be scrutinized with a balancing approach. *See id.* For a discussion of the application of the Court's beleaguered "*Lemon* test" to the facts of *Goldman*, see Mary Joe Donahue, Comment, *First Amendment Rights in the Military Context: What Deference Is Due?*—*Goldman v. Weinberger*, 20 CREIGHTON L. REV. 85 (1986). Notably, this scrutiny seems to be the type advocated by Justice O'Connor in her dissent in *Goldman v. Weinberger*. *See Goldman*, 475 U.S. 503, 529-30 (1986) (O'Connor, J., dissenting). Justice O'Connor stated:

The first question that the Court should face here . . . is whether the interest that the Government asserts against the religiously based claim of the individual is of unusual importance. . . . The second question in the analysis of a free exercise claim under the Court's precedents must also be reached here: will granting an exception of the type requested by the individual do substantial harm to the especially important government interest?

*Id.* at 531-32 (O'Connor, J., dissenting). Even outside the military context, the prevailing Court doctrine permits substantial interference with religious liberties by generally applicable laws. *See infra* note 176 and accompanying text.

175. Compare, however, the coherent approach advocated by Professor McCoy. *See McCoy, supra* note 105, at 1364-82. Compare, also, Justice Scalia's approach in *Barnes v. Glen Theatre*, 501 U.S. 560, 579 (1991) (proposing the adoption in a speech controversy of the test adopted in

the same had the controversy arisen outside the military and the Court simply applied civilian doctrines.<sup>176</sup>

## 2. Civilian Speech

Religious questions aside, First Amendment claims may arise in two ways in a military setting. One occurs when restrictions affect service personnel themselves, and the other when civilian speech on the military installation is impaired.<sup>177</sup> Thus far, the Court has not treated those cases concerning civilians in a significantly different manner from accidental interferences occurring in non-military contexts.<sup>178</sup> The Court has ruled that, although certain military policies restrict speech that would be permitted outside the military base, they are aimed not at the suppression of speech but at an interest inherent in the forum.<sup>179</sup>

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the free exercise context by *Employment Division Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990)).

176. Recent developments in the Court's free exercise jurisprudence appear to have reinvigorated the Court's decision in *Oregon v. Smith*, 494 U.S. 872 (holding that the interferences with religion resulting from generally applicable laws do not raise free exercise concerns). The Religious Freedom Restoration Act ("RFRA"), Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb (1993)), purported to overrule *Smith*, but that law was subsequently ruled unconstitutional. See *City of Boerne v. Flores*, 117 S. Ct. 2157, 2172 (1997).

For an example of a case in the military context decided by a lower court on the basis of RFRA, see *Rigdon v. Perry*, 962 F. Supp. 150 (D.D.C. 1997).

177. The reach of military courts-martial was circumscribed by the Court in a number of cases that preceded substantive challenges such as *Parker v. Levy*. See Hirschhorn, *supra* note 29, at 184-85. *Toth v. Quarles*, 350 U.S. 11 (1955), limited the reach of courts-martial to cases arising from breaches of military discipline. Similar exclusions were deployed for civilian spouses of military personnel, *Reid v. Covert*, 354 U.S. 1 (1957), civilian employees, *Gresham v. Hagen*, 361 U.S. 278 (1960), and "civilian-type" crimes of service personnel, *O'Callahan v. Parker*, 395 U.S. 258 (1969). See Hirschhorn, *supra* note 29, at 185.

178. See *infra* notes 180-91 and accompanying text. Ironically, *United States v. O'Brien*, 391 U.S. 367 (1968), the case that gives its name to the balancing formula used in accidental interference circumstances in the civilian context has military overtones. See, e.g., Keith Werhan, Note, *The O'Briening of Free Speech Methodology*, 19 ARIZ. ST. L.J. 635, 637 (1987). The *O'Brien* Court stated:

The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping. The power of Congress to classify and conscript manpower for military service is beyond question. Pursuant to this power, Congress may establish a system of registration for individuals liable for training and service, and may require such individuals within reason to cooperate in the registration system. The issuance of certificates indicating the registration and eligibility classification of individuals is a legitimate and substantial administrative aid in the functioning of this system. And legislation to insure the continuing availability of issued certificates serves a legitimate purpose in the system's administration.

*O'Brien*, 391 U.S. at 377.

179. See, e.g., *United States v. Albertini*, 472 U.S. 675, 687 (1985) ("[The regulation at issue] is content-neutral and serves a significant Government interest by barring entry to a

For instance, in *Greer v. Spock*, third-party political candidates were barred from appearing on the Fort Dix Military Reservation by discretionary application of a base regulation.<sup>180</sup> The Supreme Court permitted this denial over a First Amendment objection.<sup>181</sup> The Court relied on its finding that the regulation had been implemented to bar partisan campaigning in a neutral fashion.<sup>182</sup> While a policy of keeping anti-war advocates off military bases deprives them of a forum in which their speech might have the greatest impact,<sup>183</sup> the Court reasoned that the fundamental dangers of politicizing the military<sup>184</sup> probably outweighed the interference in their case.<sup>185</sup>

Similarly, in *United States v. Albertini* the Court again encountered a controversy concerning the rights of civilians on

military base by persons whose previous conduct demonstrates that they are a threat to security.”).

180. 424 U.S. 828, 831 (1976). The regulation gave the Adjutant General broad authority to impose prior restraints on the distribution of printed communications on the base. *See id.* at 831 (quoting Fort Dix Reg. 210-27 (1970)) (“The distribution of any publication, including newspapers, magazines, handbills, flyers, circulars, pamphlets or other writings, issued, published or otherwise prepared by any person, persons, agency or agencies . . . is prohibited . . . without prior written approval of the Adjutant General . . .”).

181. *See id.* at 840. For a discussion of the doctrine of prior restraint in the civilian context, see Marin Scordato, *Distinction Without a Difference: A Reappraisal of the Doctrine of Prior Restraint*, 68 N.C. L. REV. 1, 2 (1989) (“[T]he doctrine requires that any government action which operates as a prior restraint on speech be subjected to strict judicial scrutiny.”).

182. *See Greer*, 424 U.S. at 839 (reasoning that “the record shows . . . a considered Fort Dix policy, objectively and evenhandedly applied, of keeping official military activities there wholly free of entanglement with partisan political campaigns of any kind”).

183. The systemic importance of the political involvement of service personnel will be enhanced when the subject of the speech concerns military affairs for the same reasons that the speech of service personnel will be of greater value. *See supra* notes 92-93 and accompanying text.

From the perspective of the service person, cases such as *Greer* implicate the idea of a “right to hear.” For a discussion of this concept, see, for example, Charles N. Eberhardt, Note, *Integrating the Right of Association with the Bellotti Right to Hear—Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 72 CORNELL L. REV. 159, 165 (1986); see also *Consolidated Edison Co. v. Public Serv. Comm’n*, 447 U.S. 530, 534 n.2 (1980).

184. *See Greer*, 424 U.S. at 846 (“[C]omplete and effective civilian control could be compromised by participation of the military qua military in the political process.”). For a general discussion of this ongoing debate, see Levin, *supra* note 40.

185. Justice Powell’s concurrence in *Greer*, 424 U.S. at 847 (Powell, J., concurring) explained the details of the balancing that the Court undertook. Justice Powell first noted the serious threat to the political neutrality of the military posed by face-to-face campaigning on military bases. *See id.* The next step in Justice Powell’s analysis found that “the infringement on the individual First Amendment rights . . . is limited narrowly to the protection of the particular government interest involved.” *Id.* More important, “[t]he candidates . . . have alternative means of communicating with those who live and work on the Fort.” *Id.*

Compare *Greer* to *Burson v. Freeman*, 504 U.S. 191, 198 (1992) (noting that application of a compelling interest standard does not allow the Court to avoid serious First Amendment issues and that “among these serious issues are cases that force us to reconcile our commitment to free speech with our commitment to other constitutional rights embodied in government proceedings”). In *Burson*, the Court held that Tennessee could single out political solicitation for prohibition within 100 feet of an entrance to a polling place. *See id.* at 211.

military installations.<sup>186</sup> Albertini was convicted of violating a statute<sup>187</sup> that made it illegal to re-enter a military base once barred by the commanding officer.<sup>188</sup> Albertini was prosecuted for his participation in a peaceful demonstration that coincided with an open house at Hickam Air Force Base in Hawaii.<sup>189</sup> The Court upheld Albertini's conviction, finding that the statute was "content-neutral and serve[d] a significant government interest."<sup>190</sup> Writing for the Court, Justice O'Connor enunciated the formula commonly applied to determine whether an unintentional interference with speech constitutes too severe a burden on freedom of expression, an analysis borrowed from *United States v. O'Brien*.<sup>191</sup> Although the assignment of values to the factors in *O'Brien* balancing generally remains the subject of debate, the Court, once again, apparently applied a recognizable version of the civilian standard when civilian speech was at issue.

The dispute created by the MHDA also features civilian claimants and provides a comparison to *Greer* and *Albertini*.<sup>192</sup> In that controversy, the district judge claimed to refrain from ruling on whether military installations belonged to a particular class of fora, but never-

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186. 472 U.S. 675, 677 (1985).

187. 18 U.S.C. § 1382 (1994) ("Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof—Shall be fined not more than \$500 or imprisoned not more than six months, or both.").

188. See *Albertini*, 472 U.S. at 677. Albertini was an anti-war protester with a penchant for making his points on military installations. See *id.* at 678. Consequently, he had earned several "bar letters" from different bases, forbidding him to return (including one incident in which government documents were destroyed by having animal blood poured on them). See *id.* at 677. Albertini's bar letter informed him that he was forbidden to "reenter the confines of [Hickam Air Force Base] without the written permission of the Commander or an officer designated by him to issue a permit of reentry." *Id.*

189. See *id.* at 677.

190. *Id.* at 687. The Court found that the government interest in assuring the security of military bases was a formidable one and rejected Albertini's assertion that the existence of conceivably less speech-restrictive alternatives invalidated enforcement of the bar letter. See *id.* at 688-89.

191. See *id.* at 687-88. The Court stated that:

Application of a facially neutral regulation that incidentally burdens speech satisfies the First Amendment if it "furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

*United States v. O'Brien*, 391 U.S. 377 (1968). The *O'Brien* methodology assists courts in deciding whether government activity is genuinely aimed at an interest other than one the First Amendment protects, over-burdens speech by bringing to the fore the opposing interests and potential alternatives of the government and the individual. See McCoy, *supra* note 105, at 1358-64.

192. See *General Media Communications v. Perry*, 952 F. Supp. 1072 (S.D.N.Y. 1997).

theless dismissed the case on grounds that the Act restricted speech on the basis of its message.<sup>193</sup> This action suggests an underlying finding that the regulation failed to meet the threshold question of *O'Brien* analysis: whether the regulation was actually neutral on its face.<sup>194</sup>

The court of appeals reached the contrary conclusion.<sup>195</sup> While the key for the appellate court, consistent with *O'Brien* analysis,<sup>196</sup> seemed to be the availability of adequate speech alternatives,<sup>197</sup> that view glosses over the district court's contention,<sup>198</sup> consistent with prevailing opinion,<sup>199</sup> that an act such as the MHDA is impermissibly hostile to the message conveyed by the banned magazines.<sup>200</sup>

### 3. Military Personnel Speech

*Goldman*, *Albertini*, and *Greer* all applied variations on the familiar civilian standards of review.<sup>201</sup> Though the cases concerning religion, civilian speech, and military personnel speech all recite the language of military uniqueness and implied judicial deference,<sup>202</sup> only

193. *See id.* at 1078. Judge Schiendhn reasoned that "visual images are . . . shielded by the First Amendment." *Id.* at 1076. She further considered that "[t]he Act restricts only offensive portrayals of nudity." *Id.* at 1078. Finally, she concluded that "[s]peech may not be restricted simply because it offends." *Id.* at 1076.

194. *See supra* note 191.

195. *See supra* note 31.

196. Implicit in this outcome is the assignment of relatively low value to sexual expression, despite the presence of more traditional discourse in the publications subject to the ban. *See Penthouse Refuses*, *supra* note 24 ("The company claimed *Penthouse* to be the only main stream national magazine to carry a monthly column specifically for enlisted personnel and veterans.").

197. *See supra* note 31. The reality, however, may be different since service personnel overseas have few alternatives.

198. *See supra* note 34.

199. *See infra* note 314.

200. *See supra* note 34. Hostility toward "lascivious" materials was at least in the minds of the Act's sponsors. *See* Joyce Howard Price, *Court Revives Anti-Porn Law Taking X Out of PXs*, WASH. TIMES, Nov. 23, 1997, at A2 (quoting Roscoe Bartlett as saying that the new ruling "shows how out-of-touch these purveyors of garbage are with American society").

201. *See supra* Part III.B.1, III.B.2.

202. *See* *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) ("Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society."); *Brown v. Glines*, 444 U.S. 348, 355 (1980) ("Thus, while members of the military services are entitled to the protections of the First Amendment, 'the different character of the military community and of the military mission requires a different application of those protections.'") (quoting *Parker v. Levy*, 417 U.S. 733, 758 (1974)); *Greer v. Spock*, 424 U.S. 828, 837-38 (1976) ("One of the very purposes for which the Constitution was ordained and established was to 'provide for the common defense,' and this Court over the years has on countless occasions recognized the special constitutional function of the military in our national life, a function both explicit and indispensable.")

Likewise, scholars have treated these cases as part of the same line. *See* Dienes, *supra* note 49, at 798-816; Sugin, *supra* note 14, at 864-77.

the cases concerning service personnel are without civilian counterpart.

In *Parker v. Levy*, Army Captain Howard Levy was court-martialed for “conduct unbecoming an officer”<sup>203</sup> and engaging in behavior “to the prejudice of good order and discipline in the armed forces.”<sup>204</sup> Levy was Chief of the Dermatological Service of the United States Army Hospital at Fort Jackson, South Carolina.<sup>205</sup> Asked to train Special Forces aide personnel, he refused on grounds that the order violated his medical ethics.<sup>206</sup> Subsequently, he was heard making statements to enlisted personnel denigrating the war effort.<sup>207</sup> Levy was sentenced to three years hard labor for statements “disloyal to the United States.”<sup>208</sup>

The Court affirmed his conviction.<sup>209</sup> Writing for the Court, Justice Rehnquist pointed first to military uniqueness to justify what he termed the “different application” of First Amendment protections in military environments.<sup>210</sup> The opinion referred in passing to the outlines of a categorical exclusion for certain speech occurring in the military setting,<sup>211</sup> but ultimately subjected the regulation to little, if any, scrutiny.<sup>212</sup>

In *Brown v. Glines*, Air Force Reserve Captain Albert Glines was moved from active to standby status on grounds that he had failed “to meet the professional standards expected of an officer” by

203. *Parker v. Levy*, 417 U.S. 733, 737-38 (1974); see Uniform Code of Military Justice, Art. 133, 10 U.S.C. § 933 (1982); Bilello, *supra* note 60. For a further analysis of this case, see Dienes, *supra* note 49, at 803-13; Hirschhorn, *supra* note 29, at 186-89.

204. *Parker*, 417 U.S. at 737-38 (quoting Uniform Code of Military Justice Art. 134, 10 U.S.C. § 934 (1982)).

205. *See id.* at 735-36.

206. *See id.*

207. *See id.* For example, Levy said that

[t]he United States is wrong in being involved in the Vietnam War. I would refuse to go Vietnam if ordered to do so. I don't see why any colored soldier would go to Vietnam: they should refuse . . . to fight because . . . they are sacrificed and discriminated against in Vietnam being given all the hazardous duty . . . .

*Id.* at 736.

208. *Id.* at 736.

209. *See id.* at 761. In fact, the 1974 decision of *Parker v. Levy* was the first to directly address the question. *See id.* at 768 (Douglas, J., dissenting) (stating that “[t]his is the first case that presents to us a question of what protection, if any, the First Amendment gives people in the Armed Forces”).

210. *Id.* at 759.

211. *See supra* note 2.

212. Critics of the Court's “separate community” line of reasoning find variations on overbreadth and vagueness analysis in *Parker* that are unrecognizable relations of their civilian cousins. *See, e.g.*, Dienes, *supra* note 49, at 812-13. Even commentators generally supportive of principled judicial deference to military decisionmaking describe *Parker* as deploying a “presumption of rationality” for military regulations. *See Hirschhorn, supra* note 29, at 247.

violating certain Air Force regulations after he circulated petitions to several members of Congress expressing his complaints about the Air Force's grooming standards.<sup>213</sup> Similar to the prior restraint on political campaigning of which the court approved in *Greer*, the regulations compelled civilians and soldiers alike to seek official permission before circulating petitions on military property.<sup>214</sup> The Court upheld the Air Force's treatment of Glines, reasoning that the regulations in question "protect[ed] a substantial Government interest unrelated to the suppression of free expression."<sup>215</sup> The Court neglected to articulate, however, precisely what that interest was.<sup>216</sup> Furthermore, the Court appeared more deferential, allowing the military "unquestioned"<sup>217</sup> obedience to command whereas formerly the Court had perceived a need for only "effective"<sup>218</sup> response.<sup>219</sup> Of particular interest, however, is the Court's continued use of language implying an implicit understanding of the existence of an exclusionary category for certain military speech.<sup>220</sup>

#### IV. THE EMPLOYEE SPEECH DOCTRINE

##### A. *Systemic Approach to Public Employment*

The employer-employee relationship, unlike that of citizen to government, but like that of service personnel to military authority, does not function according to democratic principles.<sup>221</sup> Therefore, the speech of employees that relates to the employer-employee relationship, even when the government is the employer, is not logically necessary to the constitutional scheme of representative self-

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213. 444 U.S. 348, 351 (1980).

214. See *id.* at 349 (quoting Air Force Regulation 30-1(9) (1971)) (prohibiting "any person within an Air Force facility" and "any [Air Force] member . . . in uniform or . . . in a foreign country" from soliciting signatures on a petition without prior approval from the proper authority).

215. *Id.* at 354.

216. See Sugin, *supra* note 14, at 869-70.

217. *Brown*, 444 U.S. at 357.

218. See, e.g., *Parker v. Levy*, 417 U.S. 733, 760-61 (1974).

219. See Hirschhorn, *supra* note 29, at 196; see also Dodge, *supra* note 111, at 6.

220. See *Brown*, 444 U.S. at 354 ("Speech likely to interfere with . . . vital prerequisites for military effectiveness therefore can be excluded from a military base.").

221. See, e.g., Lieberwitz, *supra* note 51, at 598 ("[T]he government acts like private employers; it controls employees' speech by taking actions such as discharging them for speaking in ways of which the government/employer does not approve.").

government.<sup>222</sup> Like the service person, however, the public employee is both citizen and servant of the same government.<sup>223</sup> Government action that impacts the speech of the public employee may chill the speech of the citizen. The Court has recognized these effects and attempted to refine the limitation to the exclusion by balancing the interests of government employer and government employee.<sup>224</sup>

### B. Public Employment First Amendment Cases

Like the contemplation of First Amendment protections for the speech of military personnel, the articulation of similar protection for government employees has been a relatively recent development.<sup>225</sup> For many years, Justice Holmes's view that an individual had no right to a government job held sway.<sup>226</sup> This Part discusses four major cases that define the Court's extension of limited constitutional protection to speech of government employees.

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222. *See id.*

223. *See id.* at 598-99 (remarking on the "hybrid circumstance" facing the judiciary in public employee speech cases).

224. *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), is an early case exploring the interests concerned. In that case, the Court balanced the "requirements of orderly management of administrative personnel" against the principle of freedom of speech. *Id.* at 94. The Court found the statute, which restricted the political activities of certain federal employees, justified in light of the fear that political partisanship among government employees could undermine the democratic process. *See id.* at 96; *see also* Sugin, *supra* note 14, at 883-84.

225. *See* Hirschhorn, *supra* note 29, at 184 ("The Supreme Court had no precedent dealing with servicemen's constitutional rights on which to draw when it decided *Parker v. Levy* in 1974."). The only prior case raising a First Amendment issue, *Orloff v. Willoughby*, 345 U.S. 83, concerned the claim of an individual who had been denied a commission because he refused to disclose whether he had belonged to any group on the government's list of subversive organizations. *See* Hirschhorn, *supra* note 29, at 186. The Court rejected the First Amendment challenge in *Orloff* as it probably would have an identical claim raised contemporaneously by a public employee. *See id.* at 186; *see also, e.g.,* *Adler v. Board of Educ.*, 342 U.S. 485 (1952).

The first public employee case decided primarily, though not unambiguously, on First Amendment speech grounds was *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). *See* Richard Hiers, *Public Employees' Free Speech: An Endangered Species of First Amendment Rights in Supreme Court and Eleventh Circuit Jurisprudence*, 5 U. FLA. J.L. & PUB. POL'Y 169, 175 (1993). In *Keyishian*, 385 U.S. at 605-06, the Court re-examined the law that had been at issue in *Adler* and declared that "[t]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." Earlier protections afforded public employees were articulated as defending the "freedom of association." Edward J. Velazquez, Comment, *Waters v. Churchill: Government-Employer Efficiency, Judicial Deference, and the Abandonment of Public-Employee Free Speech by the Supreme Court*, 61 BROOK. L. REV. 1055, 1059 (1995).

226. At that time, the Court still echoed the sentiments of Justice Holmes that "[a policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517 (1892), *quoted in* Rankin v. McPherson, 483 U.S. 378, 395 (1987) (Scalia, J., dissenting).

In *Pickering v. Board of Education*<sup>227</sup> the Court addressed the retaliatory discharge<sup>228</sup> of a school teacher for sending a letter critical of school board policy to a local newspaper.<sup>229</sup> Pickering challenged the discharge, and the Supreme Court ruled in his favor.<sup>230</sup> The content and context of Pickering's speech played a significant role in the Court's refusal to condone the termination.<sup>231</sup> The fact that the speech at issue had occurred outside the workplace reinforced the notion that Pickering was acting primarily in his capacity as private citizen.<sup>232</sup> The Court also remarked that the value of Pickering's speech was higher since he was among "the members of the community most likely to have informed and definite opinions" regarding school funding policy.<sup>233</sup>

In reaching its decision, the Court articulated a balancing test,<sup>234</sup> purporting to weigh the interests of the government as employer against the interests of the employee as citizen.<sup>235</sup> On the speech side, the Court considered the value of informed public opinion, the need for uninhibited debate, and the need for citizens to be able to speak without fear of retaliation.<sup>236</sup> The Court called "[t]he public interest in having free and unhindered debate on matters of public importance"<sup>237</sup> the "core value of the Free Speech Clause of the First Amendment."<sup>238</sup> On the employer side of the balance, the Court noted the employer's interest in employee discipline,<sup>239</sup> worker har-

227. 391 U.S. 563 (1968).

228. Teacher dismissal cases differ from those in the military context most significantly with respect to the fact that the former concern federal judicial review of state action. See Sugin, *supra* note 14, at 886. Nevertheless, the circumstances are analogous and both arise under the United States Constitution. See *id.* at 885. Therefore, the systemic functions of the speech in contributing to the marketplace of ideas are roughly equivalent and a coherent approach should be applied to both.

229. See *Pickering*, 391 U.S. at 565-66. Pickering's letter criticized the school board's allocation of funds between athletic and academic programs. Pickering's complaint also disparaged the board's handling of a ballot measure designed to increase school tax revenues. See *id.*

230. See *id.* at 574-75.

231. See Lieberwitz, *supra* note 51, at 639.

232. See *Pickering*, 391 U.S. at 574. The Court noted that when the "fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher, . . . it is necessary to regard the teacher as the member of the general public he seeks to be." *Id.*

233. *Id.* at 571-72.

234. See Bodner, *supra* note 92, at 468.

235. See *Pickering*, 391 U.S. at 573. The Court stated: "The problem . . . is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568.

236. See *id.* at 573-74.

237. *Id.* at 573.

238. *Id.*

239. See *id.* at 570.

mony,<sup>240</sup> loyalty and confidence among co-workers,<sup>241</sup> and effective function of the public agency.<sup>242</sup> In *Pickering*, the Court found little or no evidence in the record that the teacher's comments affected the government's interests as employer.<sup>243</sup> Consequently, the Court ruled in favor of the employee.<sup>244</sup>

The Court re-examined the constitutional status of government employees in *Connick v. Myers*.<sup>245</sup> District Attorney Harry Connick had fired Sheila Myers, an assistant district attorney, for her failure to accept a transfer.<sup>246</sup> According to Myers, however, her dismissal was the result of her circulation within the office of a questionnaire that purported to measure a general deficiency in employee morale attributable to Connick's transfer policies.<sup>247</sup> The Court ruled that because Connick could "clearly demonstrate"<sup>248</sup> that Myers's questionnaire had "substantially interfered"<sup>249</sup> with the order and operation of the office, he was reasonable in terminating her.<sup>250</sup>

The *Connick* Court expressed a "content, form, and context" test<sup>251</sup> for determining whether specific employee speech addressed a matter of public concern.<sup>252</sup> The Court described matters of public concern as "any matter of political, social, or other concern to the community."<sup>253</sup> The Court noted that private expression in a personal confrontation with a superior can threaten institutional efficiency

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240. *See id.*

241. *See id.*

242. *See id.* at 572-73.

243. *See id.* at 570.

244. *See id.* at 574.

245. 461 U.S. 138 (1983).

246. *See id.* at 138.

247. *See id.* at 141.

248. *Id.* at 150.

249. *Id.* at 150-52

250. *See id.* at 150-154. For the Court, Justice White stated:

We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

*Id.* at 147. Justice White also elaborated on the public employee speech doctrine. *See id.* ("Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State.")

251. The Court employed a similar formulation to elaborate on the version of the "matters of public concern" consideration employed in the libel context in *Dun & Bradstreet*. *See* Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 34 (1990).

252. *See Connick*, 461 U.S. at 138; *see also* Hiers, *supra* note 225, at 240.

253. *Connick*, 461 U.S. at 146.

because of its content and also the "manner, time and place in which it is delivered."<sup>254</sup> The Court also stressed, in terms of context, that the balance of interests should favor the government supervisor's decision when the controversial speech arises from an active dispute concerning the policy criticized.<sup>255</sup> The Court further counted the fact that Myers had not "gone public" with her speech against the possibility that it pertained to a matter of public concern.<sup>256</sup>

The *Connick* Court enunciated four separate content categories of public employee speech with distinct standards of review depending on whether the employee was speaking predominately as a citizen or as an employee.<sup>257</sup> Speech as an employee on matters of private interest was equated with the speech of private employees and therefore worthy of no First Amendment protection.<sup>258</sup> A second category, into which the Court placed Myers's complaint that office workers were being pressured into working on political campaigns, is speech of "limited public concern,"<sup>259</sup> which receives a slightly higher degree of scrutiny.<sup>260</sup> In that analysis, the presumption favors the employer who reasonably believes the speech will disrupt working relationships.<sup>261</sup> The third category, whose standard of scrutiny was not discussed, was only alluded to and was posited to exist if "speech more substantially involved matters of public concern."<sup>262</sup> In other words, this category consists of speech on matters of public concern, related to the employment situation that the employee made as a citizen in a non-employment relationship.<sup>263</sup> The fourth category emerged in a footnote referring to "matter[s] inherently of public concern."<sup>264</sup> The Court described this scenario as one in which "an employee speaks out as a citizen on a matter of general concern, not

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254. *Id.* at 153.

255. *See id.* ("When employee speech concerning office policy arises from an employment dispute concerning the very application of that policy to the speaker, additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office.")

256. *Id.* at 148.

257. *See Lieberwitz, supra* note 51, at 643.

258. *See id.* The Court termed this first category "speech on private matters." *Connick*, 461 U.S. at 147.

259. *See Lieberwitz, supra* note 51, at 643 ("The Court did not use this exact phrase. The label for this subcategory is taken from the Court's statement that 'Myers' questionnaire touched upon matters of public concern in only a most limited sense.'") (quoting *Connick*, 461 U.S. at 154).

260. *See id.* at 644.

261. *See id.*

262. *Id.* at 645 (quoting *Connick*, 461 U.S. at 152).

263. *See id.*

264. *Connick*, 461 U.S. at 148 n.8.

... tied to an employment dispute, but arranges to do so privately.”<sup>265</sup> The elaboration of these categories reflects the Court’s efforts to articulate formulations to evaluate the systemic value of speech.<sup>266</sup>

An opportunity for the Court to refine its analysis of claimed retaliatory discharges was presented in *Rankin v. McPherson*, after Ardith McPherson, a constable’s office clerk, was fired for a statement that she made to a fellow employee in a back room.<sup>267</sup> Upon hearing of the attempted assassination of President Reagan, McPherson had expressed her opposition to Reagan’s policies and said, “I hope if they go for him again, they get him.”<sup>268</sup> The Fifth Circuit found that the government’s interests as employer were minimal because McPherson’s job did not concern law enforcement directly, even though her statements might have been understood to advocate lawless conduct.<sup>269</sup> In affirming the lower court’s ruling on McPherson’s behalf, the Supreme Court announced that whether the speech was a matter of public concern was a threshold question preceding any balancing analysis.<sup>270</sup>

In *Rankin*, the Court once more adjusted its cumulated balancing considerations, noting that “attention must be paid to the responsibilities of the employee within the agency.”<sup>271</sup> The Court found that, in McPherson’s case, the speech was unlikely to unpinge on the government’s interest in the agency’s function since she had minimal public contact.<sup>272</sup> By focusing on the agency function factor derived from *Pickering*, the Court apparently found little threat to the remaining interests of the public employer.<sup>273</sup>

In its most recent noteworthy ruling on public employee speech, *Waters v. Churchill*, the Court determined that an employee may be fired, regardless of the content of the speech, so long as the employer reasonably believed that no “substantial likelihood [existed]

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265. *Id.* (referring to *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979)).

266. *See Lieberwitz, supra* note 51, at 642.

267. 483 U.S. 378 (1987) (addressing the facts stated in detail in *McPherson v. Rankin*, 786 F.2d 1233, 1236-37 (5th Cir. 1986)).

268. *Id.* at 378-79; *see Hiers, supra* note 225, at 251.

269. *See Rankin*, 483 U.S. at 378-79.

270. *See id.*; *Hiers, supra* note 225, at 253.

271. *Rankin*, 483 U.S. at 390-91.

272. *See id.* (stating that when “an employee serves no confidential, policymaking, or public contact role, the danger to the agency’s successful functioning from that employee’s speech is minimal”).

273. *See supra* notes 239-41 and accompanying text.

that what was actually said was protected."<sup>274</sup> The Court restated its employee speech inquiry as a preliminary search for a matter of public concern followed by balancing of the speech interest against the regulatory interest.<sup>275</sup>

In this case, Cheryl Churchill had been fired from her nursing position at McDonough District Hospital for a conversation that she had had with a fellow nurse.<sup>276</sup> Churchill was alleged to have said a number of things critical of certain departments, policies, and supervisors at the hospital.<sup>277</sup> Details of the criticisms were factually disputed, however.<sup>278</sup> Using an efficiency rationale,<sup>279</sup> Justice O'Connor announced that the standard for determining whether speech would disrupt the workplace was what a reasonable employer would understand upon reasonable investigation.<sup>280</sup>

To summarize, the Court has declared that to be eligible for protection an employee's speech must first touch upon a matter of public concern, loosely defined as a matter of political or social interest to the community.<sup>281</sup> Thereafter, some type of balancing of

274. 511 U.S. 661, 677-78 (1994). For a discussion of this ruling in terms of its procedural due process aspects, see Elizabeth A. Riley, Note, *Waters v. Churchill: The Procedural Due Process Disguise of Public Employee Free Speech Rights*, 24 CAP. U. L. REV. 893 (1995).

275. See *Waters*, 511 U.S. at 668. The Court stated that:

To be protected, the speech must be on a matter of public concern, and the employee's interest in expressing herself on this matter must not be outweighed by any injury the speech could cause to "the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees."

*Id.* (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968)).

276. See *id.* at 664.

277. See *id.* at 665-66.

278. See *id.*

279. See *id.* at 675 ("The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate."). But see Patricia C. Camvel, Note, *Waters v. Churchill: The Denial of Public Employees' First Amendment Rights*, 4 WIDENER J. PUB. L. 581, 609-11 (1995) (arguing that the minimization of public employee speech rights decreases efficiency by stifling even constructive employee criticism).

280. See *Waters*, 511 U.S. at 677-79. But see Justice Scalia's complaint that this formulation adds too much to the doctrine:

Justice O'Connor would add . . . a requirement that the employer conduct an investigation before taking disciplinary action in certain circumstances. This recognition of a broad new First Amendment procedural right is in my view unprecedented, superfluous to the decision in the present case, unnecessary for protection of public-employee speech on matters of public concern, and unpredictable in its application and consequences.

*Id.* at 686 (Scalia, J., concurring); cf., e.g., *Velazquez*, *supra* note 225, at 1113-14 (advocating abandonment of the *Waters* reasonableness standard in favor of a test premised on acceptance of the jury's determination of whether the speech was protected and followed by "genuine balancing"). Yet in First Amendment terms, jury decisionmaking can have mischievous consequences. See *supra* note 78 and accompanying text.

281. See *supra* note 253 and accompanying text. The Court has suggested a similar formulation in its refinements of the standard applied to First Amendment restriction of defamation law. See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761

the *Pickering* factors, which isolate aspects of both the government's interest as employer and the value of the individual's speech, is necessary.<sup>282</sup> This analysis looks primarily at the content of the speech to see whether it is of public concern.<sup>283</sup> Consideration of the context of the speech can serve as a secondary indication that it is of public concern, if it was made public.<sup>284</sup> The context can also reveal, however, whether the speech poses a significant threat to workplace discipline.<sup>285</sup> The Court continues to indicate that it will permit the suppression of public employee speech only for public purposes and not upon the whims of supervisors.<sup>286</sup> Yet, the procedural adjustment of *Waters* places a substantial portion of the determination of the disruptive capacity of the speech into the hands of government employers.<sup>287</sup>

The cases may best be understood in terms of their holdings. In *Pickering*, although the speech concerned the employment relationship, it had occurred in a public context; thus, the Court found no workplace disruption and the speech was protected.<sup>288</sup> In *Connick*, the speech concerned the employment relationship but had occurred in a private context; the Court found significant workplace disruption and consequently the speech was not protected.<sup>289</sup> In *Rankin*, the content of the speech was not related to the employment relationship, but the speech had occurred in a private setting; as a result, the Court found little workplace disruption and the speech was protected.<sup>290</sup> The pattern in *Waters* is the same as in *Connick*: The speech concerned the employment relationship, but had occurred in private; therefore, the Court left the appraisal of workplace disruption to the discretion of

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(1985) ("[W]hether . . . speech addresses a matter of public concern must be determined by [the expression's] content, form, and context . . . as revealed by the whole record."). For a discussion of the serious concerns that the articulation of this criteria raises, see Estlund, *supra* note 251, at 3-4 ("[T]he public concern test eliminates the protective 'buffer' that has existed between the very core of freedom of expression and any category of speech that is excluded from protection.").

282. For a discussion of the difficulties of applying *Connick*, see Peter C. McCabe, Note, *Connick v. Myers: New Restrictions on the Free Speech Rights of Government Employees*, 60 IND. L.J. 339, 357-62 (1985).

283. See *supra* note 253 and accompanying text.

284. See *supra* note 256 and accompanying text.

285. See *supra* note 254 and accompanying text.

286. See *Rankin v. McPherson*, 483 U.S. 378, 384 (1987) (noting that "[v]igilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions, but simply because superiors disagree with the content of the employees' speech").

287. See *supra* notes 274, 280 and accompanying text.

288. See *supra* notes 227-44 and accompanying text.

289. See *supra* notes 245-66 and accompanying text.

290. See *supra* notes 267-73 and accompanying text.

the supervisor and the speech unprotected.<sup>291</sup> The development of increasingly subtle context and content distinctions has served as an elaboration of the *Pickering* factors originally fashioned to accomplish the balancing of broadly stated employer and employee interests.

### C. *Public Employee Speech Doctrine in Terms of the Model*

By raising the requirement of a matter of public concern to a threshold question, the Court has refined the rationale behind the First Amendment to its narrowest systemic justification.<sup>292</sup> Nevertheless, the Court has chosen a method that focuses on speech made in the role of citizen. This concentration suggests recognition of the idea that speech in the role of employee has no systemic function in the absence of a marketplace of ideas to which to contribute.

Furthermore, consistent with the systemic model, the Court has emphasized evaluation of the speech interest as weighed against the regulatory interest.<sup>293</sup> The Court's search for "content and context" or "manner, place and time" criteria, viewed through the lens of its holdings, reflects an effort to draw distinctions that will account for different speech values. The concern with whether the speech was directed outside the workplace is a shorthand for saying that the speech had greater systemic value than speech expressed exclusively in the workplace. This focus reflects the recognition that the point of view of the public employee has inherent value to political discourse, but only when it escapes the workplace and actually enters the marketplace of ideas. Alternatively, when the speech is of inherent public concern, as it was in *Rankin*, and only tenuously connected to the workplace, the Court will follow through on its promise to prevent the unjustified chilling of employee speech by requiring a reasonable finding of potential disruptive effect.<sup>294</sup>

The Court's consideration of the regulatory interest in preventing disruption is explicit. To some extent, the content and context factors also help measure the negative impact of the speech on the government interest as an employer. If the speech arises from an internal dispute, it is more likely to be aimed at the non-democratic decision-making process than at the government processes associated with the First Amendment. The *Connick* Court, in particular, was conscious of the paralysis that could be forced upon government em-

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291. See *supra* notes 274-80 and accompanying text.

292. See Lieberwitz, *supra* note 51, at 638.

293. See *supra* notes 89-96 and accompanying text.

294. See *supra* note 286 and accompanying text.

ployers unable to terminate employees if the Court succumbed to “the attempt to constitutionalize the employee grievance.”<sup>295</sup>

Still problematic, however, is whether a formula that places high hurdles for public employee speech on both ends of the analysis strikes a desirable balance in terms of overarching First Amendment values. Does the public employee speech doctrine allow the achievement of the legitimate ends of the majoritarian democratic process, while safeguarding that process by protecting as much speech as possible from over-regulation and self-censorship? The threshold question, whether the speech at issue touches upon a matter of public concern, reflects the understanding of the dichotomy between logically protected and unprotected speech but creates definitional problems with potentially chilling effects.<sup>296</sup> Yet, this requirement seems to be a constitutional criterion within the Court’s discretion.<sup>297</sup> Therefore, although definitional problems persist, the potential for over-regulation and self-censorship is minimized when the decision is taken out of the hands of majoritarian or self-interested institutions. Nevertheless, much discretion has been left in the hands of public employers by permitting government supervisors to make their decisions based on their reasonable observations.<sup>298</sup> Seemingly, however, the invocation of the reasonableness standard is an implicit understanding of the original notion that government employment was a privilege and not a right.<sup>299</sup>

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295. *Connick v. Myers*, 461 U.S. 138, 154 (1983); *see also* Estlund, *supra* note 251, at 12.

296. The enunciation of “public concern” criteria’s gravest potential danger is that cases will generate precedents as to what is, and what is not, a matter of public concern. *See* Estlund, *supra* note 251, at 3-4. By virtue of *stare decisis* such rulings could lead to the inversion of First Amendment principles through the creation of judicially sanctioned categories of permissible speech. *See id.* The counter-argument to concerns about the potency of “public concern” rulings is that these fears presume that the Court is articulating categories of inclusion, when, as this Note supposes, “public concern” is a pivotal factor in limiting a far broader categorical exclusion of speech outside the “marketplace of ideas.”

297. *See Connick*, 461 U.S. at 147-48 n.7 (“The inquiry into the protected status of speech is one of law, not fact.”). Efforts to define public concern as being of social or political interest to the community resemble the majoritarian elements of the definition of obscenity. *See supra* note 33. This formulation, however, rests on steadier foundations when control remains in the hands of the Court, rather than jurors and legislators.

298. Justice O’Connor supported the view that “the propriety of a proposed procedure must turn on the particular context in which the question arises—on the cost of the procedure and the relative magnitude and constitutional significance of the risks it would decrease and increase.” *Waters v. Churchill*, 54 U.S. 661, 671 (1994).

299. *See supra* note 226.

*D. Public Employee Speech Doctrine in the Military Context*

While special consideration of the military situation will determine the precise contours of adapted employee speech analysis, the operative concepts should prove practicable in the military environment. The Court's constriction of the systemic rationale for First Amendment protections to its narrowest base makes particular sense in the military because the arguments made on behalf of judicial deference have enduring merit.<sup>300</sup> The categorical exclusion of speech in the military flows from the necessarily authoritarian cast of military decisionmaking.<sup>301</sup> To this extent, the military and public employee sectors are different because the establishment of a deliberative democracy merely implies that no marketplace of ideas logically exists beyond its framework, while the Constitution explicitly provides for authoritarian military institutions.<sup>302</sup> The military is also different from the public sector because the demands it places on the individual are greater. The greater involvement in the individual's life will necessarily make the potential for disruptive impact broader as well.<sup>303</sup> In effect, fewer situations will exist in which the speech will not significantly affect the government's interest in order and discipline.

The content and context factors of the public employee doctrine should translate readily into the military circumstance.<sup>304</sup> For instance, expression directed outside the military context will be more readily identifiable as valuable, political speech with the caveat that the broader scope of the military's jurisdiction over the individual will extend the sphere of potential for disruption of legitimate military interests.<sup>305</sup> In terms of content, speech that arises from internal military disputes, regardless of whether it is on a matter of public concern, has substantial potential for interfering with the military

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300. See *supra* Part III.A.1.

301. See *supra* Part II.C.1.

302. The supporters of the Constitution acknowledged that the Constitution provided for a potentially powerful military. See Hirschhorn, *supra* note 29, at 212. For example, Hamilton said, "These powers ought to exist without limitation: Because it is impossible to foresee or define the extent and variety of national exigencies, or the corresponding extent of the means which may be necessary to satisfy them." *Id.* at 212 (citing THE FEDERALIST No. 23, at 147 (Alexander Hamilton) (J. Cooke ed., 1961)).

303. See, e.g., *United States v. Hartwig*, 35 M.J. 682, 682 (A.C.M.R. 1992) (finding conduct unbecoming an officer in a serviceman's letter to a civilian); see also note 106.

304. See *supra* note 228. Standards accurately reflecting fundamental First Amendment values are more easily justified when applied to the federal government, if only for textual reasons. See Sugin, *supra* note 14, at 885.

305. See *supra* note 29.

function.<sup>306</sup> Furthermore, allowing military decisionmakers to act upon reasonable belief that the employer's functional interests outweigh the employee's speech interests comports with the authoritarian military structure as easily as it does with that of public bureaucracies. The reasonableness standard is perhaps more fitting in the military in which reliance on chain-of-command bestows broad authority on immediate superiors, since combat realities often isolate units.<sup>307</sup>

The adaptation of a unified military and public employee speech doctrine that more explicitly achieves underlying First Amendment objectives would not change the outcome of cases like *Brown v. Glines*<sup>308</sup> and *Parker v. Levy*.<sup>309</sup> Glines's effort to change military policy arose from an internal dispute, which would probably have undermined his claim when balanced against the Air Force's demonstrable interest in maintaining control over internal discourse. Similarly, Levy's harangues occurred in a context extremely threatening to military order and discipline. Thus, the adapted approach will yield results consistent with prior rulings, but without depending on the injudicious principle of deference.

## V. SEXUAL EXPRESSION IN THE MILITARY

### A. *The Political Nature of Sexual Expression*

Evaluation of congressional statutes or military regulations restricting sexual expression within the armed forces requires an understanding of whether sexual speech can ever reach a matter of public concern.<sup>310</sup> The Court has been inclined to label sexual expression as "less valuable" than political speech without much justification.<sup>311</sup> Professor David Cole has argued that First Amendment principles suggest that the opposite is true and that First Amendment protection is most needed for speech that the majority disdains.<sup>312</sup>

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306. See *supra* Part III.B.3.

307. See Hischhorn, *supra* note 29, at 218-19.

308. See *supra* note 213-20 and accompanying text.

309. See *supra* note 203-12 and accompanying text.

310. See *supra* note 292 and accompanying text.

311. Cole, *supra* note 33, at 123.

312. See *id.* at 123-24. But see Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 627 (defending anti-pornography legislation by arguing that "seemingly viewpoint-based restrictions are sometimes upheld when sufficient harm is present").

More importantly, however, sexual expression can have acute political significance.<sup>313</sup> Feminist efforts to regulate pornography are often premised on hostility for the message it conveys: the subordination of women.<sup>314</sup>

### B. Application of the Analogy—Speech, Service, and Sex

With respect to speech concerning sex, extending First Amendment protections similar to those afforded public employees to armed forces personnel entails an initial “public concern” inquiry. Crossing that threshold, the analysis turns to a comparison of speech and military interests.

#### 1. Sex—Public Concern Threshold

Notwithstanding the political import of pornography,<sup>315</sup> sexual expression will have difficulty rising to the level of a matter of public concern in the public employee speech model.<sup>316</sup> The types of government employee speech that the Supreme Court and lower courts have protected have typically been speech addressing

313. See Cole, *supra* note 33, at 123.

314. See, e.g., *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985) (rejecting anti-pornography law for content-specific restriction of protected expression). “Under the First Amendment the government must leave to the people the evaluation of ideas . . . . In the language of the legislature, ‘[p]ornography is central in creating and maintaining sex as a basis of discrimination.’ . . . Yet this simply demonstrates the power of pornography as speech.” *Id.* at 327-29 (Easterbrook, J.). Nevertheless, advocates of sexual censorship insist that the First Amendment was not “designed” to protect sexual expression because pornography’s fundamental harm is not “its capacity to shock and offend, but, rather, its tendency to corrupt and deprave.” Robert P. George, *Making Children Moral: Pornography, Parents, and the Public Interest*, 29 ARIZ. ST. L.J. 569, 571-72 (1997) (maintaining that Judge Scheindlin’s original refusal to allow enforcement of the MHDA illustrates judicial failure to recognize legislative authority to “uphold public morality . . . by protecting people . . . from the morally corrosive effects of pornography”). Like the arguments used to defend the law struck down in *Hudnut*, appeals to the vulnerability of morality simply reinforce the power of pornography as speech. See *Hudnut*, 771 F.2d at 327-29; see also *supra* note 70.

315. See Cole, *supra* note 33, at 123. For a presentation of both sides of the debate over the harms and benefits of pornography, see, for example, PORNOGRAPHY: OPPOSING VIEWPOINTS (Carol Wekesser ed., 1997).

316. *But see* Cole, *supra* note 33, at 131-39 (arguing that the impulse to censor pornography is a response to the threat that pornography poses to societal norms). Professor Cole further notes that recent disputes have centered not on discreet red light districts but on provocative public displays such as a homosexual’s “coming out.” *Id.* at 135. Professor Cole also argues that allowing regulation of a private matter that becomes public inverts fundamental values underlying the First Amendment, which “protects an ‘uninhibited, robust and wide-open’ public debate.” *Id.* at 152 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)).

For a discussion of the connection between sexual expression and military culture see Madeline Morris, *By Force of Arms: Rape, War And Military Culture*, 45 DUKE L.J. 651, 706-17 (1996).

workplace corruption or "substantive issues that could influence the public's perception of the . . . [d]epartment."<sup>317</sup> Nevertheless, in the context of a public debate over whether men and women can be barracked together without costly consequences in terms of military efficiency, sexual expression becomes highly political and relevant, especially when the debate turns to the sociological arguments that suggest a close link between sex and war.<sup>318</sup>

In addition, although the urge to censor sexual expression stems from a breaching of societal norms of the public/private distinction,<sup>319</sup> most sexual expression remains private. To the extent sexual messages are directed at others in the military hierarchy, they could be just as disruptive to the military environment as personally threatening speech is in the employer-employee relationship.<sup>320</sup> Such sexual expression, however, is generally private and reserved for non-threatening situations.<sup>321</sup> Thus, the speech starts to resemble the protected speech of *Rankin*, which had little de-stabilizing impact. Nonetheless, the extensive reach of military authority into the lives of service personnel creates the likelihood that what was private for the citizen will be "public" for the soldier.<sup>322</sup>

## 2. Speech—Interest Analysis

Assuming that sexual expression, or in other words pornography, is of public concern leads to the question whether the value of the speech outweighs its disruptive impact. Again, when the speech has greater value because it relates to a subject matter within the personal experience of the soldier, its potential to disrupt the regulatory interest in effective command also increases.<sup>323</sup> Therefore, the context analysis will necessarily be somewhat different in the military situation. While on active duty, the military demands the

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317. *Maples v. Martin*, 858 F.2d 1546, 1553 (11th Cir. 1988).

318. For example, consider the military culture that would "reward officers for a successful venture in the Persian Gulf . . . with alcohol, strippers and pornography." Yxta Murray, *Sexual Harassment in the Military*, 3 S. CAL. REV. L. & WOMEN'S STUD. 279, 297 (1994).

319. See *supra* note 316.

320. Cf. *Rankin v. McPherson*, 483 U.S. 378 (1987).

321. See Cole, *supra* note 33, at 135-36 ("The community has reached something of a compromise with pornographers; pornographers can and do flourish, as long as they know their proper place (the 'privacy' of homes and the 'red-light districts' of towns).").

322. See Hirschhorn, *supra* note 29, at 218-22 (discussing the pervasive impact of military sociology on the individual); see also Cole, *supra* note 33, at 131-40 (discussing the breach of the public/private distinction that underlies the social threat posed by pornography).

323. See *supra* Part II.C.2.

individual's full compliance in all aspects of his life.<sup>324</sup> Since military obligation permeates the soldier's existence, few contexts will arise in which deviation from imposed norms will *not* potentially threaten the maintenance of military discipline. Moreover as a result of the reasonableness standard to which the evaluations of supervisors and superiors are held, controversies will generally be resolved in favor of the military decisionmakers. Important differences exist, however, between adapted public employee criteria and simple judicial deference. First, the military will have to produce a credible record to back up the claim of military necessity.<sup>325</sup> Second, the possibility of judicial review itself will deter policies based only on dubious factual support.

### 3. Service—Assessment of the Military Interest

At issue when assessing the record will be the determination of whether the job requirements of a military employee conflict with sexual expression. The sponsors of the MHDA perceived a direct link between the dysfunctional sexual-harassment scandals and the standards embodied in toleration of sexual expression.<sup>326</sup> To the extent the ideas expressed in the materials that enactments such as the MHDA target positively endorse either sexual activity or sexual submission,<sup>327</sup> a threat could be posed to the military's traditional latitude to establish effective command.<sup>328</sup> This possibility stems from the deci-

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324. In recognition of this principle, Congress passed a statute that explicitly safeguarded the ability of service personnel to communicate with members of Congress. See 10 U.S.C. § 1034 (1994) (proscribing unjustified impediments to a serviceman's right to communicate with a member of Congress); see also *Brown v. Glines*, 444 U.S. 348, 358-60 (1980) (considering whether the regulation challenged on First Amendment grounds also violated the statute explicitly protecting communications between service personnel and congressmen).

325. Compare this requirement to the lack of a record that Judge Scheindlin bemoaned in *General Media Communications v. Perry*, 952 F. Supp. 1072, 1082 (S.D.N.Y. 1997). The dissent from the panel ruling voiced a similar concern. See *General Media Communications v. Cohen*, 131 F.3d 273, 293 (2d Cir. 1997) ("Significantly, the government offers no evidence, by way of congressional hearings, official reports, explicit congressional findings of fact, or military judgment to support its claims."). Judge Parker further pointed to the Supreme Court's similar analysis in its recent consideration of the Communications Decency Act. See *id.* at 293 (citing *Reno v. ACLU*, 117 S. Ct. 2329, 2338 n. 24 (1997) (holding that the provisions violated the First Amendment when "[n]o hearings were held on the provisions that became law"); see also note 34.

326. See *Price*, *supra* note 200, at A2 ("After Tailhook and Aberdeen and other sexual-harassment scandals, there is no question that the United States military needs policies that support the highest standards of behavior.").

327. See *supra* note 109.

328. See *supra* note 29.

sion to employ integrated training and operational environments.<sup>329</sup> While significant controversy exists as to the propriety of integrated training,<sup>330</sup> little interest exists in separating the sexes thereafter.<sup>331</sup> Although not inevitable, the military currently has a policy restricting sexual activities within units.<sup>332</sup> The justification for this stricture is that sexual relationships can distort the traditional command structure.<sup>333</sup> In public employee speech terms, threats to authoritarian command constitute workplace disruption. Ultimately, a record linking pornography to a deleterious impact on the effectiveness of command to achieve units free of distracting sexual relationships should suffice to justify reasonable restrictions on these unique government employees' sexual expression.

## VI. CONCLUSION

Applying a standard analogous to government employee speech analysis to military speech has the advantage of bringing greater consistency and predictability to this battlefield of First Amendment jurisprudence. By carving out matters of public concern, the standard protects speech that is vital to the democratic process. Forging a doctrine that significantly accounts for legitimate military interests, either in time of peace or the tumult of crisis, allows the methodology to be brought to bear in both circumstances with its consistency promising that First Amendment principles will not be dismissed in a cloak of non-justiciability.

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329. See Guttman, *supra* note 6, at 20 ("After Tailhook, the military made recruitment of women a top priority; barriers toppled, policies changed, promotions were spirited through the pipelines.").

330. See, e.g., Maggie Gallagher, *Facts of Life Apply in the Army Too*, SACRAMENTO BEE, Dec. 26, 1997, at B7 ("Separating men and women in basic training, and recruiting more female trainers, as the panel suggests, will help prevent the sexual abuse scandals that periodically rock the military."). See *supra* note 12.

331. Supporters of basic training's resegregation emphasize ensuring equal opportunities for the sexes in the armed services. See Norman Kempster, *Lawmakers Call for Sex-Segregated Military Training*, L.A. TIMES, May 9, 1997, at A24 ("Rep. Roscoe G. Bartlett (R-Md.), chief sponsor of the proposal, said segregated training would 'provide both men and women the necessary opportunity to successfully become military personnel without the distractions of sexuality.'").

332. See *supra* note 9 and accompanying text.

333. See, e.g., Stone & Komarow, *supra* note 12, at 1A ("[A]lthough the main aim of the... 'train as we fight' doctrine is to instill teamwork and discipline, the present organizational structure... is resulting in less discipline, less unit cohesion and more distraction.").

Given the limited range of First Amendment freedoms in the public sector workplace and, by their analogy, the military, the likelihood that sexual expression would often constitute a matter of public concern is low. By failing to meet the threshold test of a public concern, sexual expression would be afforded few First Amendment protections. Moreover, even if considered a matter of public concern, the Court's balancing analysis, which factors reasonableness into the regulatory interest side of the equation, would generally favor the military. In all other respects, the analysis would be a close call. To the extent the expression was directed at military issues, both its systemic value and its disruptive value would fall and rise together. Nevertheless, judicial review would, at a minimum, require the development of some record to substantiate the claim of military necessity so that the response could be termed "reasonable."

Finally, a narrow conception of First Amendment freedoms in the military should be understood in its broader constitutional context. Military institutions remain creatures of Congress. Moreover, protection of the free-flow of ideas remains the key value in the systemic approach endorsed and articulated here. While military necessity may justify far less protection for expression in the military commissary than in the civilian marketplace, the "separate community" will remain harnessed to a majoritarian institution driven by deliberative discourse. The constitutional necessity of raising the armed forces from within civil society means that civilian political culture will always serve as the ultimate check on military practice.<sup>334</sup>

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334. See Hirschhorn, *supra* note 29, at 244 (discussing the role that Congress plays); see also CNN *Worldview: A Different Attitude Towards Adultery in Israeli Army* (CNN television broadcast, June 27, 1997) (Transcript #97062707V18) (discussing the pragmatic limitations on military practice).

Lt. Shira Bar-Yosef, Israeli Army: "Maybe its OK, maybe its not. But we cannot allow it to decide if a man or a woman can or cannot get a job, because he's had an affair . . ."

Kessle (voice-over): "And perhaps the key reason adultery isn't outlawed —" Dankner: "Overnight, we will have no officers left in the army. Everyone would submit their resignation. We'll be left only with some religious soldiers. That's all."

*Id.*

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