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# Constitutional Rights and Military Necessity: Reflections on the Society Apart

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CONSTITUTIONAL RIGHTS AND MILITARY NECESSITY:  
REFLECTIONS ON THE SOCIETY APART

*Donald N. Zillman and Edward J. Imwinkleried*

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# CONSTITUTIONAL RIGHTS AND MILITARY NECESSITY: REFLECTIONS ON THE SOCIETY APART

*Donald N. Zillman\**  
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## I. Introduction

While American involvement in Vietnam stimulated many debates, one of the most bitter questions was to what extent civilian constitutional standards should apply to the military. The educated draftee, a Vietnam phenomenon, was shocked by military practices that had never been seriously questioned. The military was seen as a lawless arm of government conducting a dubious foreign war at the expense of draftees' rights as American citizens. Conflicts arose between individual members and the military structure over such matters as the right to be free from shakedown searches, the right to wear long hair, and the right to publish and distribute antiwar newspapers. Many of these questions reached the courts.

Military proponents, besides questioning the patriotism of their critics, argued that the special nature of the Armed Forces as an organization devoted to national defense justified legal standards different from those normally applied to constitutional rights; they argued that the military is a society apart from civilian life. Yet while the military has asserted this position in varying forms in several cases, the courts have never carefully analyzed its validity.

## II. *Parker v. Levy* and the Society Apart

The clash between military necessity and servicemen's individual rights was sharply focused in the 1974 Supreme Court case of *Parker v. Levy*.<sup>1</sup> Levy was a reluctant doctor-draftee in the early years of the Vietnam war.<sup>2</sup> His assignment, training Special Forces personnel at Fort Jackson, South Carolina, quickly crystallized his opposition to the war and the Army. In addition to demonstrating an unmilitary attitude, Levy refused his commander's order to train Special Forces aidmen. He further expressed himself to several enlisted men that the Vietnam war was wrong, that he would not go to Vietnam if ordered, that black soldiers should refuse to serve in Vietnam, and that Special Forces personnel were liars, thieves, and killers.

Levy's actions resulted in a court-martial, in which he was charged with disobeying the lawful order of a superior, engaging in conduct "unbecoming an officer and gentleman," and making statements prejudicial to "good order and

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1 417 U.S. 733 (1974).

2 For a review of Levy's military career, see CONSCIENCE AND COMMAND 166-73 (J. Finn ed. 1971); R. SHERILL, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC 98-157 (1969).

discipline in the armed forces." After a well-publicized trial involving testimony about American war crimes in Vietnam, Levy was convicted and sentenced to dismissal from the Army and to three years' incarceration.

A lengthy series of appeals in the military and civilian courts followed,<sup>3</sup> culminating in a successful habeas corpus petition to the Court of Appeals for the Third Circuit.<sup>4</sup> The circuit court held that constitutional vagueness and overbreadth doctrines invalidated the "conduct unbecoming"<sup>5</sup> and "conduct prejudicial to good order and discipline"<sup>6</sup> provisions of the Uniform Code of Military Justice under which Levy was convicted. The court also held that since the evidence of these offenses was enmeshed with the disobedience of orders charge,<sup>7</sup> the latter conviction also had to be overturned.

But in a 5-3 decision the Supreme Court reversed, and reinstated Levy's conviction.<sup>8</sup> Writing for the majority, Justice Rehnquist (1) accepted the military's argument that it was a "society apart" from civilian society, (2) validated the broader reach of military criminal statutes, (3) noted that military tradition and judicial interpretation had narrowed the scope of Articles 133 and 134 under which Levy was convicted, (4) found Levy's conduct clearly proscribed by these articles, and (5) held that the articles were neither vague nor overly broad.<sup>9</sup> In a companion case, *Secretary of Navy v. Avrech*,<sup>10</sup> decided several weeks later, the Court relied on *Parker* to dismiss another vagueness challenge to Article 134.<sup>11</sup>

The majority opinion in *Parker* is rooted in a perception by the Court that the military is a unique organization. Justice Rehnquist referred to the military as a "specialized society separate from civilian society . . . [with] laws and traditions of its own,"<sup>12</sup> "a specialized community governed by a separate discipline,"<sup>13</sup> and "a society apart from civilian society."<sup>14</sup> The military officer

3 See *Parker v. Levy*, 417 U.S. 733, 740 n.7 (1974). Cf. note 7 *infra*.

4 *Parker v. Levy*, 478 F.2d 772 (3d Cir. 1973), *rev'd*, 417 U.S. 733 (1974).

5 Uniform Code of Military Justice [hereinafter cited as U.C.M.J.] art. 133, 10 U.S.C. § 933 (1970), provides: "Any commissioned officer, cadet or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct."

6 U.C.M.J. art. 134, 10 U.S.C. § 934 (1970), provides: "Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court."

7 U.C.M.J. art. 90, 10 U.S.C. § 890 (1970).

8 417 U.S. 733 (1974).

9 For a detailed study of the *Levy* and *Avrech* decisions, see Imwinkelried & Zillman, *Overbreadth, The First Amendment, and the Military Community*, 53 TEXAS L. REV. 123 (1975).

10 418 U.S. 676 (1974).

11 *Avrech*, a Marine enlisted man, was charged with attempting to publish a statement disloyal to the United States "with design to promote disloyalty and disaffection among the troops." While on active duty in Vietnam, *Avrech* had prepared a typed statement opposing American participation in the war. When he gave this statement to a fellow soldier for mimeographing, it was turned over to a superior officer. Court-martial charges followed. *Avrech's* conviction was sustained on remand. *Secretary of Navy v. Avrech*, 520 F.2d 100 (D.C. Cir. 1975).

12 417 U.S. at 743.

13 *Id.* at 744, citing *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953).

14 *Id.*

holds "a particular position of responsibility and command."<sup>15</sup> Disciplinary standards may "regulate aspects of the conduct of members . . . which in the civilian sphere are left unregulated."<sup>16</sup> Congress is allowed "greater flexibility when prescribing the rules by which the [military] shall be governed"<sup>17</sup> even where first amendment rights are involved. While the first amendment protects servicemen, the "different character of the military community and of the military mission requires a different application of those protections."<sup>18</sup> This difference is justified by the "fundamental necessity for obedience and the consequent necessity for imposition of discipline . . . ."<sup>19</sup>

Justice Rehnquist correctly noted that the Court has historically recognized the military's uniqueness. This principle, still regularly cited in military appellate briefs and judicial opinions, appears in the 1953 decision *Orloff v. Willoughby*.<sup>20</sup> While denying relief to a doctor-draftee challenging a loyalty oath provision, the Court remarked:

[J]udges are not given the task of running the Army. . . . 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.<sup>21</sup>

Similar sentiment was expressed the same year in *Burns v. Wilson*,<sup>22</sup> a case that remains the Court's most authoritative examination of the review of military courts-martial by federal courts.

Neither *Orloff*, *Burns*, nor *Levy* is adequate, however, to guide courts reviewing military actions. Several pre-*Orloff* cases show that complete judicial non-intervention has never been the rule;<sup>23</sup> and in counseling nonintervention, Justice Rehnquist relied upon an arguably outmoded appraisal of the military.<sup>24</sup>

Lower federal courts, academic commentators, and the military itself have recognized that the military community has undergone major evolution within the last two decades.<sup>25</sup> The majority opinion should have reexamined present-

15 *Id.*

16 *Id.* at 749.

17 *Id.* at 756.

18 *Id.* at 758.

19 *Id.*

20 345 U.S. 83 (1953).

21 *Id.* at 93-94.

22 346 U.S. 137 (1953). See Bishop, *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions*, 61 COLUM. L. REV. 40 (1961); Strassburg, *Civilian Judicial Review of Military Criminal Justice*, 66 MIL. L. REV. 1 (1974); Weckstein, *Federal Court Review of Court-Martial Proceedings: A Delicate Balance of Individual Rights and Military Responsibility*, 54 MIL. L. REV. 1 (1971).

23 See, e.g., *Schlesinger v. Councilman*, 420 U.S. 738 (1975).

24 Justice Rehnquist cited cases dating from 1827, 1857, 1886, 1890, 1893, and 1897 in defending the validity of articles 133 and 134. 417 U.S. at 744-49.

25 See generally M. JANOWITZ, *THE PROFESSIONAL SOLDIER* (1960); C. MOSKOS, *THE AMERICAN ENLISTED MAN: THE RANK AND FILE IN TODAY'S MILITARY* (1970); A. YARMOLINSKY, *THE MILITARY ESTABLISHMENT: ITS IMPACT ON AMERICAN SOCIETY* (1971); Sherman, *Legal Inadequacies and Doctrinal Restraints in Controlling the Military*, 49 IND. L.J. 539 (1974); Yarmolinsky, *Civilian Control: New Perspectives for New Problems*, 49 IND. L.J. 654 (1974). But see PUBLIC OPINION AND THE MILITARY ESTABLISHMENT 271-79 (C. Moskos ed. 1971) [hereinafter cited as PUBLIC OPINION].

day military and civilian society. Indeed, Justice Rehnquist ignored several factors highly relevant in assessing the current validity of claims that the military is a society apart.

First, the federal judiciary has become more sensitized to violations of individual rights and the perils of unchecked discretion. The military commander, disturbed by the courts' willingness "to run his command," can empathize with police officers,<sup>26</sup> school administrators,<sup>27</sup> and prison wardens.<sup>28</sup> These officials, like the military, argued that special circumstances of their public duties entitled them to impose greater restrictions on individual rights, arguments which during the last decade were frequently rejected.

Secondly, the military has changed substantially even in the short time since *Orloff* and *Burns* were decided in 1953. America was then only eight years removed from total victory in history's largest global war and less than 15 years removed from the small, peacetime, nonconscripted military that typified its history. The "society apart" was a valid description of the small, 19th century, regular Army fighting Indians on the frontier. The description was still largely valid when forces stood garrison or shipboard duty in the 1930's. But by 1974 the military had become a multimillion-person employer involved in almost every aspect of American life. Substantial criticism of the military-industrial complex, imperialism overseas, and domestic surveillance<sup>29</sup> has changed the military's image.

Besides growing in size, the modern military shows increasing signs of "creeping civilianism."<sup>30</sup> Officer Training Programs stress graduate civilian education, foreign affairs study, and managerial technique.<sup>31</sup> Prospective enlistees are told "the Army wants to join you." Salary scales have been made competitive with, if not superior to, civilian analogs.<sup>32</sup> Community relations and community action programs are stressed. Military public relations is big business.<sup>33</sup> The services share many of the problems of the civilian community—racial unrest, drug abuse, and job apathy.

Thirdly, America endured the ordeal of the Vietnam war. American political and military assumptions of the early sixties were badly shaken 10 years later. The war also called into question some of the assumptions underlying military law. The length of the conflict generated ample litigation against the military.<sup>34</sup> Its unpopularity generated both willing plaintiffs and capable advocates, as well as some sympathetic federal judges. The limited nature of the war

26 *E.g.*, *Miranda v. Arizona*, 384 U.S. 436 (1966).

27 *E.g.*, *Goss v. Lopez*, 419 U.S. 565 (1975); *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969).

28 *E.g.*, *Procunier v. Martinez*, 416 U.S. 396 (1974).

29 *Laird v. Tatum*, 408 U.S. 1 (1972).

30 *See Sherman, supra* note 25, at 542; *Yarmolinsky, supra* note 25.

31 *See JANOWITZ, supra* note 25, at 139-40; H. Radway, *Recent Trends at American Service Academies*, in *PUBLIC OPINION, supra* note 25, at 13.

32 *E.g.*, *N.Y. Times*, Mar. 2, 1975, at 25, col. 1. A study by the Department of Defense indicates that military pay is running ahead of comparable civilian pay. Discounting inflation, military pay increased 37 percent from 1968 to 1973; within this same period, the private sector increase was only 4.9 percent.

33 *See W. FULBRIGHT, THE PENTAGON PROPAGANDA MACHINE* (1970).

34 *See generally H. MOYER & J. SCHULZ, JUSTICE AND THE MILITARY* (1973).

allowed the courts to engage in hard thinking about the military without the fears of cataclysmic effects on the nation.

As a result, by 1974 federal courts had developed a willingness to review a variety of military actions on both procedural and substantive grounds. Courts demanded precision in the drafting of military regulations and regularity in their application.<sup>35</sup> Courts insisted that procedural due process be applied to the military.<sup>36</sup> Finally, courts recognized that the military could not deny substantive constitutional rights *ipse dixit*, solely because the military is the military.<sup>37</sup>

In light of all these factors, the Supreme Court's acquiescence in *Parker* to the society apart justification must be questioned. The military asserts this justification for legal standards different from those applied to civilian society in many areas of control over the lives of its members. While different standards may indeed be justified, they should not be accepted on faith. In each instance, the applicable civilian standard and the separate military standard should be identified and the validity of the distinction assessed.

### III. The Two Communities: Areas of Disagreement

#### A. Obedience and Attendance

Obedience to orders and attendance at one's place of duty mark fundamental distinctions between the military and civilian worlds. For the civilian community, obedience to employer orders and job attendance are private duties enforced by civil sanctions. The employee dissatisfied with his or her position may quit at will. The Armed Forces, by contrast, regard military membership as more than just employment. As expressed by a venerable Supreme Court case, military membership is a "status" creating rights and duties unknown to the civilian world.<sup>38</sup> Attendance at assigned tasks<sup>39</sup> and disobedience of lawful orders<sup>40</sup> are military duties enforceable by the criminal law. Breaches of these duties can lead to removal from the service.<sup>41</sup>

35 *E.g.*, *Hollingsworth v. Balcom*, 441 F.2d 419 (6th Cir. 1971); *Feliciano v. Laird*, 426 F.2d 424 (2d Cir. 1970).

36 *E.g.*, *Sims v. Fox*, 492 F.2d 1088 (5th Cir. 1974); *Hagopian v. Knowlton*, 470 F.2d 201 (2d Cir. 1972); *McDonald v. McLucas*, 371 F. Supp. 831 (S.D.N.Y. 1974).

37 *E.g.*, *Flower v. United States*, 407 U.S. 197 (1972); *Anderson v. Laird*, 466 F.2d 283 (D.C. Cir. 1972).

38 *In re Grimley*, 137 U.S. 147 (1890).

39 U.C.M.J. arts. 85, 86, 10 U.S.C. §§ 885-86 (1970), define the offenses of absence without leave and desertion.

40 U.C.M.J. art. 90, 10 U.S.C. § 890 (1970). Similarly, Article 91 punishes disobedience of the lawful order of a warrant officer, noncommissioned officer, or petty officer. Article 92 punishes failure to obey a lawful general order or regulation.

41 By long tradition and federal statute, separation from military service is achieved only pursuant to a specified form of discharge. Five categories of discharge are available. The most common is the honorable discharge. Dishonorable and bad conduct discharges can be given only following conviction by courts-martial. The honorable discharge under general conditions and the undesirable discharge may be given pursuant to administrative board proceeding. Substantial procedural requirements protect the serviceman wishing to contest separation from service for unfitness or unsuitability. See generally DEP'T OF THE ARMY, MILITARY ADMINISTRATIVE LAW HANDBOOK, paras. 3, 18, 321-35 (1972) (Pamphlet 27-21) [hereinafter cited as MILITARY LAW HANDBOOK]. It is widely recognized that any military discharge other than honorable discharge may significantly stigmatize the recipient on his

The tradition that attendance and obedience be enforced by criminal sanctions is deeply grounded in military history. Military proponents doubtlessly view the suggestion that military nonperformers be merely fired rather than jailed as absurd. The tradition, they argue, stems from a combination of factors distinguishing the soldier<sup>42</sup> from the civilian employee. First, the primary purpose of the military, fighting wars, is hard and dangerous.<sup>43</sup> Thousands of years of military history have not changed this basic fact. Second, the work of the military, defending national interests or even the nation itself, is a vital national activity. Third, despite rhetoric over the glory of the military, the great bulk of soldiers suffering casualties are from the lower social classes, generally poorly paid, and often lightly rewarded in prestige.<sup>44</sup> Fourth, the military is by nature an emergency force. National affairs are in their most satisfactory state when the nation is at peace—when the military is not performing its distinctive function.<sup>45</sup> In peacetime, problems arise in maintaining employee preparedness and motivation. Fifth, in many cases the objective of battle or war is only dimly perceived or even actively opposed by the combat troops. Sophisticated political, geographic, and economic theories are lost on the soldier concerned with personal survival.

These characteristics allegedly create a unique military occupational status in which control must be based on more than the civilian sanction of firing unsatisfactory performers.<sup>46</sup> The very necessity of conscription in America's last four wars argues that this sanction would be inadequate. Leaving open the possibility of resignation before the start of a combat patrol or before boarding the plane to Vietnam would be intolerable; soldiers cannot be permitted to "resign" at a critical point in a battle. The military's objective, moreover, goes beyond merely demanding the presence and obedience of its men when they are needed. To ensure performance at critical times, such as in combat, all personnel must be trained and in constant readiness for peak performance. The term used to describe the soldier's preparedness is "discipline."

As defined by former Vietnam Commander William Westmoreland,

Discipline is an attitude of respect for authority which is developed by leadership, precept, and training. It is a state of mind which leads to a willingness to obey an order no matter how unpleasant or dangerous the

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return to civilian life. See Jones, *The Gravity of Administrative Discharges: A Legal and Empirical Evaluation*, 59 *MIL. L. REV.* 1 (1973). One consequence of the highly formalized military separation system has been complaints from commanders that incompetent or troublesome soldiers cannot be easily removed.

42 For ease of expression the term "soldier" is used throughout to refer to a member of any uniformed service. Unless otherwise qualified, the term includes both male and female military members.

43 See JANOWITZ, *supra* note 25, at 33-35.

44 See MOSKOS, *supra* note 25.

45 Military sociologist Morris Janowitz has noted the dilemma: "Rationality in the military profession means that it must, in the contemporary scene, accept the notion that a successful officer can be one who does not fight, but contributes to deterrence and the resolution of international conflict." M. Janowitz, *The Emergent Military*, in *PUBLIC OPINION*, *supra* note 25, at 255, 258.

46 Janowitz sees that "pervasive requirements of combat" as the major difference between the military and civilian worlds. JANOWITZ, *supra* note 25, at 33.

task that is to be performed. Discipline conditions the soldier to perform his military duty even if it requires him to act in a way that is highly inconsistent with his basic instinct for self-preservation.<sup>47</sup>

Even the sharpest opponents of the military have rarely criticized obedience and attendance regulations. Justice Douglas, one of the strongest military critics ever to sit on the Court,<sup>48</sup> has conceded broad authority to the military: "The military by tradition and by necessity demands discipline; and those necessities require obedience in training and in action. A command is speech brigaded with action and permissible commands may not be countermanded."<sup>49</sup> Popular and academic critics have also recognized the propriety of criminal sanctions to enforce attendance and obedience regulations.<sup>50</sup>

Despite the lack of judicial challenge, the tradition is not unassailable. Many of the military precepts underlying the tradition are open to challenge. First, many servicemen pursue careers little different from and no more strenuous or dangerous than numerous civilian pursuits.<sup>51</sup> Even in wartime, the combat soldier is the exception rather than the rule. Second, there is a serious question whether it is advisable to criminally punish the problem soldier. AWOL (absent without leave) studies show that certain persons do not adjust to the military lifestyle regardless of the incentive or punishment.<sup>52</sup> In a conscript Army, it may be necessary to punish incorrigibles to encourage the other troops, but that rationale substantially decreases in a volunteer force. Indeed, it may be counterproductive to retain incorrigibles in the military; it is hard to foster any sense of esprit or elitism if the unwilling and unable are kept in the group. Military efforts to administratively weed out the misfits without a stigmatizing discharge<sup>53</sup> would reflect a sounder,<sup>54</sup> more business-oriented approach.

Further, it is possible to identify those truly unique military duties meriting criminal sanction. The Uniform Code of Military Justice distinguishes between

47 Westmoreland, *Military Justice—A Commander's Viewpoint*, 10 AM. CRIM. L. REV. 1, 5 (1971).

48 See, e.g., *O'Callahan v. Parker*, 395 U.S. 258 (1969).

49 *Parker v. Levy*, 417 U.S. 733, 754 (1974).

50 See, e.g., CONSCIENCE AND COMMAND, *supra* note 1, at 33; Note, *Prior Restraints in the Military*, 73 COLUM. L. REV. 1089 (1973) [hereinafter cited as *Prior Restraints*]; Everett, Book Review, 10 AM. CRIM. L. REV. 163 (1971). See also Sherman, *The Military Courts and Servicemen's First Amendment Rights*, 22 HASTINGS L.J. 325, 326-28 (1971); Wulf, *Commentary: A Soldier's First Amendment Rights: The Art of Formally Granting and Practically Suppressing*, 18 WAYNE L. REV. 665, 679 (1972).

51 See JANOWITZ, *supra* note 25, at 64-68.

52 See F. GARDNER, *THE UNLAWFUL CONCERT* (1970) (notes that the *Presidio* "mutiny" defendants were largely emotionally unstable lower-class whites but with little preservice militancy); W. GENEROUS, *SWORDS AND SCALES* (1973) (a 1958 study showed little prospect for rehabilitation of the absentee soldier, since his conduct was "deeply rooted rejection of his role as a soldier," *id.* at 120); SHERILL, *supra* note 2, at 225-26.

53 For a discussion of the Army's Qualitative Management Program, see MILITARY LAW HANDBOOK, *supra* note 41, para. 3-39-40. Army Reg. No. 635-200, para. 5-37 (1974), states that failure to demonstrate promotion potential is a ground for discharge. Commanders are instructed to take separation action before the occurrence of "board or punitive action which would stigmatize . . . in the future." *Id.*

54 JANOWITZ, *supra* note 25, at 8-10, 38-39, emphasizes the shift to managerial techniques in securing military performance. Army Reg. No. 600-20, para. 5-7 (1971), reflects the emphasis away from a solely punitive approach to leadership: "Authority will impose its weight by the professional competence of leaders . . . rather than by the arbitrary or despotic methods of martinets."

wartime and peacetime in several provisions.<sup>55</sup> The Code's criminal provisions, which stress failure to perform rather than failure to attend or obey, relate to uniquely military activities. The Code punishes sleeping on sentry duty,<sup>56</sup> endangering the safety of a command in the presence of the enemy,<sup>57</sup> and the negligent hazarding of a vessel.<sup>58</sup>

The military itself has recognized that current values no longer support total reliance on punitive methods to enforce attendance and obedience. The initial steps toward personnel management without criminal sanction reflect a sensible approach.<sup>59</sup> Even in the volunteer era, there are many enlistees who are wasting their own and the military's time. Their prompt separation through noncriminal, nonstigmatizing means does not harm any military interest.<sup>60</sup> In short, the military appears to be taking a progressive approach, deemphasizing criminal sanctions for absenteeism and substandard performance.

Yet any wholesale elimination of punitive sanction for absenteeism or disobedience would be equally unwise. In its mission the military is a society apart. Throughout history, severe sanctions have been an important factor motivating attendance and obedience; other motivating factors, such as patriotism, support of one's comrades, and self-respect, are also present. But absent the clearest showing that punishment is totally ineffective as a motivating force for behavior, any change should be military-directed rather than civilian-directed. Cautious change, initiated within the military, is the proper direction to be taken.<sup>61</sup>

### B. Freedom of Expression

In marked contrast to attendance and obedience arguments put forth by the military, its claim that the needs of the society apart permit greater restriction in the realm of free expression has generated substantial controversy. Given the historic regard of American citizens for first amendment values, the controversy is hardly surprising. There exists a wealth of commentary examining military first amendment cases prior to the *Levy* and *Avrech* decisions; the writers have been uniformly critical of the military's attempts to restrict free expression. Without tracing these earlier cases in detail, it is worthwhile to briefly review

55 U.C.M.J. art. 2(10), 10 U.S.C. § 801(10) (1970) (jurisdiction over persons serving with and accompanying an armed force in time of war); U.C.M.J. art. 43, 10 U.S.C. § 843 (1970) (statute of limitations in time of war); U.C.M.J. art. 85, 10 U.S.C. § 885 (1970) (desertion in time of war punishable by death).

56 U.C.M.J. art. 113, 10 U.S.C. § 913 (1970).

57 U.C.M.J. art. 99(3), 10 U.S.C. § 899(3) (1970).

58 U.C.M.J. art. 110, 10 U.S.C. § 910 (1970).

59 See note 53 *supra*.

60 In general, AWOL and disobedience offenses can best be handled outside the formal criminal process. U.C.M.J. art. 15, 10 U.S.C. § 815 (1970), authorizes the imposition of limited disciplinary punishment by commanders at the company level and above. So-called Article 15 punishments can only be imposed for an offense specified under the U.C.M.J. However, the goal is correction; punishments are of limited severity, and the offenses are not treated as federal convictions. Such an action may have its intended educative effects on the basically good soldier.

61 See DeNike, *The New "Problem Soldier"—Dissenters in the Ranks*, 49 IND. L.J. 685 (1974); Sherman, *supra* note 50; Wulf, *supra* note 50; *Prior Restraints*, *supra* note 50; Note, *Military Discipline and Political Expression: A New Look At An Old Bugbear*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 525 (1971).

the areas of dispute, analyze the competing arguments, and suggest likely post-*Levy-Avrech* trends.

The litigated issues in free expression within the military have included the use of military facilities for political meetings,<sup>62</sup> the treatment of underground newspapers,<sup>63</sup> civilian access to military installations for free expression purposes,<sup>64</sup> and soldiers' rights to express views on the war and the military where such expression may influence other servicemen.<sup>65</sup> The courts have identified two primary problems. First, what limits, if any, govern a military commander's control of his installation? Control here may apply equally to servicemen and civilians. Second, what special limits restrict free expression by servicemen?

In both areas, the military has argued for a standard different from that applicable to civilian expression.<sup>66</sup> Typically, the military emphasizes the unique needs of the society apart, such as:

(1) First amendment activity questioning military and national policies may lead to violence and a loss of disciplinary control.<sup>67</sup> Servicemen trained in physical response are often eager to relieve tensions and are frequently intolerant of "different" viewpoints. The soldier also has more ready access to weapons than his civilian counterpart. Therefore, constitutional decisions requiring authorities to control the angry crowd rather than the unpopular speaker are not apt precedents for the military.<sup>68</sup>

(2) Beyond an immediate loss of control, certain types of free expression may subtly undermine the loyalty, discipline, and morale of servicemen. Military regulations permitting the commander to restrict speech<sup>69</sup> posing "a clear danger to loyalty, discipline and morale" have been upheld by civilian courts.<sup>70</sup> Civilian law rejects prior restraints; it generally allows the statement and then punishes any criminal conduct that results.<sup>71</sup> The military contends that an armed force that does not respond immediately to lawful orders is an ineffective fighting force. Particularly in a combat situation, it may be disastrous to punish disobedience or shirking after the fact.

(3) Free expression can threaten civilian control of the military.<sup>72</sup> By

62 *McGaw v. Farrow*, 472 F.2d 952 (4th Cir. 1973); *Dash v. Commanding Gen.*, 307 F. Supp. 849 (D.S.C. 1969), *aff'd*, 429 F.2d 427 (4th Cir. 1970), *cert. denied*, 401 U.S. 981 (1971).

63 *E.g.*, *Schneider v. Laird*, 453 F.2d 345 (10th Cir. 1972); *Yahr v. Resor*, 431 F.2d 690 (4th Cir. 1970); *Noland v. Irby*, 341 F. Supp. 818 (W.D. Ky. 1971).

64 *United States v. Flower*, 407 U.S. 197 (1972); *Spock v. David*, 502 F.2d 953 (3d Cir. 1974); *United States v. Gourley*, 502 F.2d 785 (10th Cir. 1973); *Burnett v. Tolson*, 474 F.2d 877 (4th Cir. 1971); *CCCO-Western v. Fellows*, 359 F. Supp. 644 (N.D. Cal. 1972).

65 *Secretary of Navy v. Avrech*, 418 U.S. 676 (1974); *Parker v. Levy*, 417 U.S. 733 (1974); *Carlson v. Schlesinger*, 511 F.2d 1327 (D.C. Cir. 1975).

66 *See Imwinkelried & Zillman, supra* note 9.

67 *Carlson v. Schlesinger*, 511 F.2d 1327, 1333 (D.C. Cir. 1975); *Dash v. Commanding Gen.*, 307 F. Supp. 849, 857 (D.S.C. 1969), *aff'd*, 429 F.2d 427 (4th Cir. 1970), *cert. denied*, 401 U.S. 983 (1971).

68 *See Cohen v. California*, 403 U.S. 15 (1971); *Street v. New York*, 394 U.S. 576, 592 (1969); *Gregory v. City of Chicago*, 394 U.S. 111 (1969); *Terminiello v. City of Chicago*, 337 U.S. 1 (1949).

69 *E.g.*, *Air Force Reg. No. 35-15* (1970); *Army Reg. No. 210-10*, para. 5-5b (1970); *Dept of Defense Directive No. 1325.6*, para. IIIA 1 (1969).

70 *Carlson v. Schlesinger*, 511 F.2d 1327 (D.C. Cir. 1975).

71 *See New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).

72 *United States v. Howe*, 17 U.S.C.M.A. 165, 175, 37 C.M.R. 429, 439 (1967).

long tradition, significant military decisions are made by civilian political leaders, not military personnel. Any expression of disagreement by servicemen might move the military into politics, or prompt a military coup.

(4) Free expression by American servicemen overseas might harm foreign relations.<sup>73</sup> The presence of foreign troops in a country inevitably grates on local sensitivities. When the troops inject themselves into the domestic politics, the local citizens' displeasure can turn into outrage.

### 1. Civilians' Access to Military Installations

Although military limitations on free expression have been strongly criticized, they have won the general approval of civilian courts. The most significant curtailment of military powers, however, has come in cases involving civilian access to military installations for first amendment purposes.

The seminal installation-access case was *United States v. Flower*.<sup>74</sup> There, the Supreme Court suggested that where all or part of a military installation has been opened to the public, civilians could not be prosecuted for the exercise of first amendment rights on the installation. The initial *Flower* per curiam opinion<sup>75</sup> was limited to one public avenue within Fort Sam Houston, Texas. Other decisions indicated that installations might remain closed.<sup>76</sup> All courts agreed that proper time, place, and manner regulations could be imposed.<sup>77</sup> Nonetheless, *Flower's* impact was not as limited as the military hoped. Subsequent cases expanded the "open post" concept. Such major bases as Fort Bragg<sup>78</sup> and Fort Dix<sup>79</sup> were found to be partly open.

The most significant open-post decision since *Flower* is *Spock v. David*.<sup>80</sup> Dr. Benjamin Spock requested access to Fort Dix, New Jersey, to campaign for the Presidency in 1972. After substantial procedural sparring,<sup>81</sup> the Court of Appeals for the Third Circuit held Spock was entitled to campaign on the post. The Supreme Court has since granted certiorari.<sup>82</sup>

The Court's eventual decision in *Spock* will hopefully resolve two issues:

- (1) What are the guidelines regarding first amendment activity on a military installation?
- (2) What special rules, if any, govern election campaigns on the installation?

73 *Carlson v. Schlesinger*, 511 F.2d 1327, 1339 n.14 (D.C. Cir. 1975) (Bazelon, C.J., dissenting); *Culver v. Secretary of Air Force*, 389 F. Supp. 331 (D.D.C. 1975).

74 407 U.S. 197 (1972).

75 The *Flower* case was decided without the benefit of oral argument.

76 *United States v. Gourley*, 502 F.2d 785 (10th Cir. 1973); *United States v. Floyd*, 477 F.2d 217 (10th Cir. 1973).

77 *Spock v. David*, 502 F.2d 953 (3d Cir. 1974) (opinion should not be construed as limiting Army's authority "to restrict access by non-military personnel generally to any part of the reservation, or to issue bar notices," *id.* at 958); *United States v. Gourley*, 502 F.2d 785 (10th Cir. 1973) (distinguishing between entry on public and nonpublic portions of the military installation).

78 *Burnett v. Tolson*, 474 F.2d 877 (4th Cir. 1973).

79 *Spock v. David*, 502 F.2d 953 (3d Cir. 1974).

80 *Id.*

81 469 F.2d 1047 (3d Cir. 1972). A group of leafleteers were also plaintiffs in the *Spock* litigation.

82 421 U.S. 908 (1975).

While the *Levy* and *Avrech* opinions may encourage the military to seek a complete overruling of *Flower*, the needs of the society apart do not justify an overruling. Given military willingness to open the installation to the American Legion, the Little League, and Armed Forces Day visitors, free expression should be granted to others as well.<sup>83</sup> Setting aside a limited area around the post exchange or commissary can hardly disrupt the military function. The benefits of such an approach can be substantial: servicemen can be kept informed on vital issues, and the exchange of ideas between civilian and military citizens will prevent an isolation of the military from the rest of American society.<sup>84</sup>

While *Flower* should survive *Levy* and *Avrech*, the wisdom of the *Spock* decision is questionable. The fear of military involvement in politics runs long and deep. While Spock's campaign was more symbolic protest than serious candidacy, the precedent is unsettling. The spectacle of either Lyndon Johnson in 1964 or Richard Nixon in 1972 speaking to largely friendly and possibly captive audiences at military installations exemplifies the real possibilities for abuse.<sup>85</sup> Certainly it will be the brave installation commander who provides anything less than red carpet treatment when the Commander in Chief comes electioneering. By contrast, a request from the challenging candidate for the same treatment may result in unpleasantness. A commander, conscious of the Nixon administration's "enemy list," would have struggled mightily to discourage George McGovern from an on-base appearance. Similarly, on a local level, favors might be given a promilitary member of the House Armed Services Committee, only to be withheld from his opponent.

While commentators have properly derided military arguments<sup>86</sup> about loss of civilian control in other first amendment contexts, the argument in this context is meritorious. Modern political campaigns are highly organized, well-coordinated activities. Although an isolated group of leafleteers may ask nothing more than to be let onto an agreed area of the installation and then be left alone, an appearance by a major candidate will probably involve the installation commander in the scheduling, security, traffic control, and media coverage for the event. Inevitably high military officials will be injecting themselves into political campaigns. The gains in bringing the candidate directly to the soldier-voters seem insignificant. Appearances in neighboring cities, press, radio, and television coverage, and direct mailings can provide information for the voters. The candidates have so many alternative means of reaching the voters that there is no need to run the risk of embroiling the military in politics.

While line-drawing is always a problem (e.g., a request to distribute anti-busing literature during a George Wallace Presidential campaign), the Supreme

83 See generally *United States v. Gourley*, 502 F.2d 785 (10th Cir. 1973).

84 Janowitz has noted the "great danger" of military isolation from civilian society. M. Janowitz, *The Emergent Military*, in PUBLIC OPINION, *supra* note 25, at 260.

85 A notable illustration is *Jeness v. Forbes*, 351 F. Supp. 88 (D.R.I. 1972). There the Navy denied access to a third party, antiwar candidate, arguing the necessity of keeping the military out of politics. In the middle of the litigation it was revealed that then Vice President Spiro Agnew had received an on-base welcome pursuant to a political speaking tour in Rhode Island.

86 See Kester, *Soldiers Who Insult the President: An Uneasy Look at Article 88 of the Uniform Code of Military Justice*, 81 HARV. L. REV. 1697 (1968); Sherman, *supra* note 50, at 344.

Court could reaffirm and clarify *Flower* as generally safeguarding first amendment rights with the exception of barring election activities on a military post. The recent affirmation of the Hatch Act by the Court in *Civil Service Commission v. Letter Carriers*<sup>87</sup> demonstrates that political activity can be curtailed for compelling reasons. The combination of *Letter Carriers* and the military tradition of political neutrality could well provide the basis for reversal of *Spock*.

## 2. Restrictions in Servicemen's Free Speech

The needs of the society apart have been most controversial when the military has invoked its uniqueness as the stated justification for restricting servicemen's free expression. One author views the military as formally granting but practically suppressing free expression by servicemen.<sup>88</sup> The Supreme Court in *Levy*<sup>89</sup> and the United States Court of Military Appeals in *United States v. Priest*<sup>90</sup> have recognized the application of the first amendment to the military.<sup>91</sup> In both cases, however, free expression was restricted. Other significant military-expression cases follow a similar pattern,<sup>92</sup> sanctioning unique restrictions on servicemen's speech.

The military's proclamation that it recognizes servicemen's first amendment rights is more than just rhetoric. Military regulations define the types of permissible and impermissible first amendment activities; some partisan political activities are permitted, but are regulated by military regulations paralleling the Hatch Act.<sup>93</sup> Other first amendment activity can be curtailed only for specified reasons: occurrence on duty-time, occurrence in a foreign country, or creation of a clear danger to loyalty, discipline, and morale.<sup>94</sup> In *Levy*, Justice Rehnquist adopted the Court of Military Appeals' "clear and present danger"<sup>95</sup> test, preventing commanders from capriciously curtailing servicemen's first amendment rights. Yet the *Levy* opinion left no doubt that the danger of undermining discipline allows more severe restraints on military than civilian speech.<sup>96</sup>

*Levy* was influential in determining the outcome of *Carlson v. Schlesinger*.<sup>97</sup> Airman Carlson and his coplaintiffs were arrested for gathering signatures on American airbases in Vietnam for a petition to Congress to end the Vietnam war.<sup>98</sup> Air Force regulations required prior approval of petitioning activity by

87 413 U.S. 548 (1973). See also *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

88 See Wulf, *supra* note 50.

89 417 U.S. 733, 758 (1974).

90 21 U.S.C.M.A. 564, 570, 45 C.M.R. 338, 344 (1972).

91 See generally Imwinkelried & Zillman, *supra* note 9.

92 See Sherman, *supra* note 50; Wulf, *supra* note 50.

93 Dep't of Defense Directive No. 1344, 10, Incl. 1 (1969).

94 E.g., Army Reg. No. 600-20, para. 5-16 (1974); Army Reg. No. 210-10, para. 5-5b (1970).

95 417 U.S. at 758-59.

96 Imwinkelried & Zillman, *supra* note 9.

97 511 F.2d 1327 (D.C. Cir. 1975).

98 The body of the petition read: "We, the undersigned American Servicemen on duty in Vietnam, wish to express our opposition to further United States military involvement by air, sea, or land forces in Vietnam, Laos, or Cambodia or other countries in South East Asia. We petition the United States Congress to take whatever action necessary to assure an immediate cessation of all hostilities in South East Asia; to set a near date for final and complete military withdrawal; to insure a rapid and peaceful return of American Prisoners of War; and to

the installation commander. When such permission was sought, it was denied. The Air Force based its denial on the theory that the petition presented a clear danger to the loyalty, discipline, and morale of the other servicemen on the bases.

The district court, relying on the circuit court's decision in *Avrech*, invalidated the Air Force regulation for vagueness and infringement of the statutory and constitutional right to petition.<sup>99</sup> On appeal, with the Supreme Court *Levy-Avrech* precedents to guide it, the Court of Appeals for the District of Columbia reversed, over Judge Bazelon's dissent.<sup>100</sup>

The *Carlson* opinions stressed differing aspects of the familiar "society apart" argument. The district court emphasized the statutory right of servicemen to petition Congress<sup>101</sup> and the "restrained" nature of the petition. The court downplayed the fact that the incident occurred in a combat zone, and discounted any disruption in United States-South Vietnamese relations. The majority of the court of appeals, however, repeatedly mentioned that combat activity had occurred around the air bases. The majority further observed that other servicemen had objected to the petitioning activity. Most significantly, the majority stated that the post commander's decision would stand unless "manifestly unrelated" to legitimate military needs.<sup>102</sup>

*Levy*, *Avrech*, and *Carlson* have seemingly dashed the hope that civilian courts would expansively interpret servicemen's first amendment right to free expression. *Levy* sustained imprecise regulatory language against vagueness and overbreadth challenges.<sup>103</sup> *Levy* and the Court of Military Appeals' opinion in *Priest* indicated that almost any incitement to desertion or disobedience can be punished. *Avrech* and *Carlson* allow the proscription of even moderate statements in a foreign setting or combat zone, and the *Carlson* standard puts wide discretion in the hands of military commanders.

Unsatisfactory as it may seem to many, civilian courts have committed primary authority for the balancing of first amendment expression values to the military. Unfortunately, many commanders may abuse that authority and continue to overreact to servicemen's expression of unpopular views.

Specific restrictions are most appropriate overseas.<sup>104</sup> It is there that legitimate foreign policy concerns may authorize broad time, place, or manner restrictions.<sup>105</sup> The serviceman protesting policies of his own government may incidentally be challenging those of the host country as well. Foreign citizens unfamiliar with American traditions may resent the protest or confuse the individual serviceman's views with those of the United States.

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assume and assert its responsibility for determination of future American Foreign Policy." *Id.* at 1329 n.1.

99 *Carlson v. Schlesinger*, 364 F. Supp. 626 (D.D.C. 1973).

100 *Carlson v. Schlesinger*, 511 F.2d 1327 (D.C. Cir. 1975). See also *Committee for GI Rights v. Callaway*, 518 F.2d 466, 479 (D.C. Cir. 1975).

101 10 U.S.C. § 1034 (1970).

102 511 F.2d at 1333.

103 The *Carlson* majority "entertained significant doubts" about the overbreadth of the Air Force regulations involved. However, they believed plaintiffs were ineligible to raise the overbreadth issue. *Id.* at 1333-34.

104 See *Imwinkelried & Zillman*, *supra* note 9.

105 See *Culver v. Secretary of Air Force*, 389 F. Supp. 331 (D.D.C. 1975).

Presence in a foreign land, however, should not terminate a serviceman's right of expression. Many issues of pressing concern to American servicemen—racial discrimination, abusive command practices, inadequate facilities—may be wholly irrelevant to the host government and its citizens. The serviceman's statements about these issues should be treated as if they are occurring in the United States. Where matters of foreign relations are plausibly at issue, the military should then have broad discretion to regulate the expression.

The free expression cases arising within the United States often reflect overreaction by a military fearful of criticism. The vital interests of the society apart were rarely at stake in decisions to prohibit newspaper distribution and prosecute servicemen for intemperate antiwar remarks. Assuredly, civilian control was not at stake; the protesters were largely draftees or draft-induced volunteers, obviously expressing their own views. In only a few cases was there any suggestion of imminent violence. The alleged harm was merely a remote threat to discipline; such threats should be held insufficient to override first amendment values.

In retrospect, the Vietnam free expression cases reflect the frustrations produced on all sides by an unpopular war. Hopefully, the American military will never again be forced to fight a limited war of 10 years' duration with a reluctant ally for purposes only remotely related to American interests. In the main, American military performance in Vietnam was satisfactory; and dissent by American servicemen was certainly an inconsequential factor in the outcome of the Vietnam war.

If there is a lesson from Vietnam for military attorneys and commanders, it would be that mindless censorship often is the policy most disruptive of military discipline and morale. Civilian court decisions, which entrust the future of servicemen's free speech rights to the military, present an opportunity for the military to display a new sensitivity toward first amendment rights.

### C. *Religious Beliefs*

The armed forces generally have conformed to civilian legal standards concerning freedom of religion and, for that reason, have rarely resorted to society apart justifications in the area of first amendment religious freedoms. The military's growing willingness, stimulated by federal court decisions, to recognize sincere conscientious objection as grounds for discharge is an important accommodation of military needs to religious beliefs.<sup>106</sup> The Army has also adopted the equally sensible practice of enlisting members of the Sikh religion without requiring them to conform to uniform and grooming regulations that violate their religious beliefs.<sup>107</sup> However, two military practices, compulsory chapel attendance at the military academies and the chaplaincy service, have inspired or threatened to inspire litigation.

<sup>106</sup> See Dep't of Defense Directive No. 1300.6 (1974); cf. Zillman, *In-Service Conscientious Objection: Courts, Boards and the Basis in Fact*, 10 SAN DIEGO L. REV. 108 (1972).

<sup>107</sup> Army Reg. No. 600-20, para. 5-40-47 (1974).

The Founding Fathers' twin fears of an overstrong military and an established religion bore fruit in the 1973 case of *Anderson v. Laird*.<sup>108</sup> At issue was the validity of the first practice, the service academies' compulsory chapel attendance requirement. The district court accepted the military's distinction between "attendance" and "worship," and endorsed the overall secular purpose of training military leaders in "the force religion has on the lives of men."<sup>109</sup> A majority of the District of Columbia Court of Appeals found the violation of "the core values of Establishment Clause" too blatant for even the society apart. The majority found other, nonviolative ways of achieving the educational objective, noted substantial evidence that the military's motivation was in fact religious, and heeded the pleas of military chaplains that the compulsory requirement generated "resentment, hostility and cynicism toward religion."<sup>110</sup>

Reading the evidence differently, dissenting Judge MacKinnon found the first amendment and the constitutional articles recognizing the military to be equally important. Outweighing the minimal first amendment violations was the "necessity of observing religious practices by future military leaders."<sup>111</sup>

Judge MacKinnon's findings to the contrary, the compulsory chapel argument is one of the military's weakest applications of the society apart theory. The services seem concerned with teaching a narrow form of religious orthodoxy rather than broadening students' appreciation of the varieties of religious experience.<sup>112</sup> Moreover, the chaplains' testimony as to the counterproductive nature of compulsory chapel<sup>113</sup> attendance suggests the ineffectiveness of the practice.

The second practice is the statutory authorization for the chaplain's service.<sup>114</sup> The military has justified this arguable intrusion of the establishment clause by reliance on society apart arguments. Without a Chaplain's Corps, it is contended, many servicemen in combat, overseas, and occasionally in the United States would be unable to worship.<sup>115</sup> Arguably, therefore, military service could result in a denial of the free exercise of religion.

The military's argument overlooks the fact that the great majority of military personnel are within range of civilian religious establishments. Nevertheless, tradition and the limited intrusion on religious freedom would probably protect the chaplaincy from constitutional challenge. Particularly on point is *Walz v. Tax Commissioner*,<sup>116</sup> wherein the Supreme Court noted that religious tax exemptions had not created any of the dangers feared by the drafters of the constitutional religious clauses.

A realistic look at the chaplaincy's role in the military would persuade a court to reach a result similar to *Walz*. In the vast defense budget, the "religious"

108 466 F.2d 283 (D.C. Cir. 1972).

109 *Anderson v. Laird*, 316 F. Supp. 1081, 1090 (D.D.C. 1970).

110 *Anderson v. Laird*, 466 F.2d 283, 301 (D.C. Cir. 1972).

111 *Id.* at 307. Judge MacKinnon compared trying to teach an appreciation of the influences of religion with teaching swimming without water. *Id.* at 315.

112 The regulations were structured to discourage a sampling of other faiths. *Id.* at 296.

113 For a thorough pre-*Anderson* study of the military-religious-legal issues involved, see Foreman, *Religion, Conscience, and Military Discipline*, 52 MIL. L. REV. 77 (1971).

114 10 U.S.C. §§ 3073, 5404(b), 8067(h) (1970).

115 See *Anderson v. Laird*, 466 F.2d 283 (D.C. Cir. 1972) (Leventhal, J., concurring); Foreman, *supra* note 113.

116 397 U.S. 664 (1970).

expenditure is minute. There is no evidence that a military tour of duty has become a forced indoctrination in a state religion. Further, the military command could properly contend that chaplains often serve a valuable nonreligious counselling function.

The military has properly accommodated itself to individual religious beliefs in numerous respects. The ill-considered service academy chapel requirement was the major departure from civilian attitudes towards religion. Thus the court correctly rejected the specious argument that the requirement satisfied a unique educational need of the society apart.

#### D. *Fraternization*

The military, by the nature of the officer-enlisted man distinction, has discouraged off-duty contact between superiors and subordinates. Officers and their spouses generally mix only among themselves.<sup>117</sup> Enlisted personnel do the same, with an additional distinction drawn between career NCO's (noncommissioned officers) and initial-term enlistees.

This unwritten caste system has been largely self-enforcing. In these situations, the military is similar to any large bureaucracy where clerical workers, junior executives, and senior vice presidents live in different social worlds. In rare cases, however, the military uses the criminal process to punish excessive fraternization, usually under either Article 133 or 134. The civilian world's analogous social taboos are not buttressed by criminal sanctions. Indeed, the military sanctions have a similarity to now-invalidated racial separation statutes;<sup>118</sup> this similarity reflects the uniqueness of the military practice.

The majority of reported military fraternization cases have involved a superior borrowing money from a subordinate.<sup>119</sup> Both officer-EM (enlisted member)<sup>120</sup> and NCO-EM<sup>121</sup> cases are found. *United States v. Light*,<sup>122</sup> a 1965 Army case, rejected any per se violation in a borrowing situation. As *Light* pointed out, no provision of the Uniform Code of Military Justice, no specification in the Manual for Courts Martial, or no administrative regulation prohibits the borrowing of money. The closest model specification involves gambling with a subordinate by an NCO.<sup>123</sup> *Light* emphasized the prosecution's re-

117 "In our Army, it is strong tradition that an officer does not gamble, nor borrow money, nor drink intoxicants, nor participate in ordinary social association with enlisted men on an individual basis." R. REYNOLDS, *THE OFFICER'S GUIDE* 18 (1970).

118 See, e.g., *Adickes v. Kress & Co.*, 398 U.S. 144 (1970).

119 *United States v. Mayne*, 39 C.M.R. 628 (1967); *United States v. Light*, 36 C.M.R. 579 (1965); *United States v. Calderon*, 24 C.M.R. 338 (1957); *United States v. Wetzell*, 12 C.M.R. 269 (1953), *petition for review denied*, 3 U.S.C.M.A. 842, 14 C.M.R. 229 (1954); *United States v. Galloway*, 8 C.M.R. 323, *aff'd*, 2 U.S.C.M.A. 433, 9 C.M.R. 63 (1952); *United States v. St. Ours*, 6 C.M.R. 178 (1952).

120 *United States v. Wetzell*, 12 C.M.R. 269 (1953), *petition for review denied*, 3 U.S.C.M.A. 842, 14 C.M.R. 229 (1954); *United States v. Galloway*, 8 C.M.R. 323, *aff'd*, 2 U.S.C.M.A. 433, 9 C.M.R. 63 (1952); *United States v. St. Ours*, 6 C.M.R. 178 (1952).

121 *United States v. Mayne*, 39 C.M.R. 628 (1967); *United States v. Light*, 36 C.M.R. 579 (1965); *United States v. Villeados*, 32 C.M.R. 561 (1962); *United States v. Calderon*, 24 C.M.R. 338 (1957).

122 36 C.M.R. 579, 580 (1865).

123 U.S. DEP'T OF DEFENSE, *MANUAL FOR COURTS-MARTIAL* (1969) (App. 6, No. 153). See also *id.*, paras. 124, 138 (dishonorable failure to pay debt).

sponsibility to "establish the surrounding circumstances that show that the borrowing has a direct and palpably prejudicial impact on good order and military discipline."<sup>124</sup> Relevant circumstances include the amount of money involved, the specifics of the command relationship, and the evidence of any attempt at coercion.

*Pre-Light* cases had focused on both the detriment to the commander<sup>125</sup>—lessened respect from his men, problems of awareness of financial difficulty, difficulty in exercising command relationship over a creditor—and the dangers of oppressing the subordinate,<sup>126</sup> which include fear of consequences of refusal to loan money. Typically, the former aspect received greater stress in judicial opinions.

A more recent fraternization case was *United States v. Lovejoy*.<sup>127</sup> Lovejoy, a Navy lieutenant, established a homosexual relationship with a seaman on his ship. In addition to sodomy charges,<sup>128</sup> a separate fraternization specification was brought. The intermediate Court of Military Review sustained court-martial jurisdiction against a challenge that the offense was not service connected,<sup>129</sup> and approved the trial court's instruction that "[n]ot every association between officers and enlisted persons is prejudicial. There are recognized social and military relations between officers and enlisted persons which are legitimate and proper."<sup>130</sup> Looking to "all the surrounding circumstances," the reviewing court found sufficient evidence to sustain a fraternization conviction. The court noted that Lovejoy had command responsibilities over the seaman, and stressed the fact that the homosexual relationship was apparently common knowledge to the rest of the crew.

On appeal, the Court of Military Appeals dismissed the fraternization charge because it merged with the more serious sodomy offense.<sup>131</sup> The court, however, affirmed without significant difficulty the lower court's finding that the offense had sufficient service connection despite its off-post location.

The most interesting aspect of *Lovejoy* was Judge Darden's concurring opinion. He commented on the increasing numbers of enlisted men with educations, social standing, and intellectual capacity equal to that of officers.<sup>132</sup> While recognizing that fraternization "may have a pernicious influence" on military discipline, Judge Darden felt the matter was one for administrative rather than judicial correction.

124 *United States v. Mayne*, 39 C.M.R. 628 (1967); *United States v. Villeados*, 32 C.M.R. 561 (1962); *United States v. Calderon*, 24 C.M.R. 338 (1957); *United States v. Wetzell*, 12 C.M.R. 269 (1953), *petition for review denied*, 3 U.S.C.M.A. 842, 14 C.M.R. 229 (1954); *United States v. Galloway*, 8 C.M.R. 323, *aff'd*, 2 U.S.C.M.A. 433, 9 C.M.R. 63 (1952); *United States v. St. Ours*, 6 C.M.R. 178 (1952).

125 *United States v. Mayne*, 39 C.M.R. 628 (1967); *United States v. Villeados*, 32 C.M.R. 561 (1962); *United States v. Calderon*, 24 C.M.R. 338 (1957).

126 36 C.M.R. 579, 584 (1965).

127 20 U.S.C.M.A. 18, 42 C.M.R. 210 (1970).

128 U.C.M.J. art. 125, 10 U.S.C. § 925 (1970).

129 *United States v. Lovejoy*, 41 C.M.R. 777 (1969). The court-martial jurisdictional requirement of "service-connection" is discussed at notes 140-143 & accompanying text *infra*.

130 *Id.* at 781.

131 *United States v. Lovejoy*, 20 U.S.C.M.A. 18, 42 C.M.R. 210 (1970).

132 20 U.S.C.M.A. at 21, 42 C.M.R. at 213.

The Court of Military Appeals again sustained the military use of the fraternization specification in *United States v. Pitasi*.<sup>133</sup> While noting the extensive military custom that helped define the specification, the court did encourage the services to provide "some guidelines" to explain the offense to the "large number of citizen soldiers." In Pitasi's case, however, the Court found his offense clearly within the prohibition of fraternization despite the fact Pitasi was found not guilty of charges of sodomy with the enlisted man involved in both offenses.

A recent civilian court challenge to the fraternization charge was rejected in *Staton v. Froehlke*.<sup>134</sup> An Army warrant officer was charged with drinking with enlisted personnel and bathing a female enlisted member. On collateral attack of his Article 134 conviction, Staton claimed the fraternization specification was both vague and violative of his right of association. The district court rejected both contentions. It found that *Lovejoy* and other military cases had defined the fraternization offense sufficiently to avoid vagueness problems. The court brushed aside the associational freedom argument by a citation to *Levy* and the cryptic comment that a "valid and necessary purpose" was served by the criminal punishment of fraternization.

On balance, the military's attitude towards fraternization seems unnecessary. Two issues are involved. First, should the armed services continue their policy of strictly discouraging officer-enlisted social contact?; second, should criminal sanctions be used to enforce the prohibition?

Little evidence suggests that the present social caste system enhances military performance. Other armed forces operate with looser control and no notable loss of effectiveness.<sup>135</sup> Combat conditions typically reduce the barriers between enlisted men and junior officers.<sup>136</sup> The effective combat officer is one who relies on a degree of personal rapport with his men rather than a rigid application of the Officer's Guide's suggested distance between gentlemen and enlisted personnel. Further, the attitude of complete aloofness subtly contradicts the military contention that it is recruiting a higher quality of enlisted soldier. While the Ph.D.-draftee of the Vietnam era may be a thing of the past, many current enlistees share the social, intellectual, and cultural values of their officers. Discouraging normal social contacts arising from these mutual interests infringes on the freedom of both parties.

Even if the military determines to retain its attitude towards fraternization, the retention of criminal sanctions is indefensible. The limited number of reported cases over the last quarter century clearly indicates either the rarity of the offense or a widespread practice of ignoring its commission. Quite often, as in *Lovejoy*, specific substantive provisions of the Uniform Code of Military Justice are ample to punish the violator.<sup>137</sup> Where an abuse of the superior-

133 20 U.S.C.M.A. 601, 44 C.M.R. 31 (1971).

134 390 F. Supp. 503 (D.D.C. 1975).

135 See generally Sherman, *Military Justice Without Military Control*, 82 YALE L.J. 1398 (1973).

136 R. RIVKIN, *GI RIGHTS AND ARMY JUSTICE: THE DRAFTEE'S GUIDE TO MILITARY LIFE AND LAW* 336-38 (1970).

137 Serious abuses involving borrowing money may be handled under U.C.M.J. art. 127, 10 U.S.C. § 927 (1970) (extortion). Less significant offenses may be handled under U.C.M.J.

subordinate relationship appears, military prosecutors can argue for a more severe sentence. In the far greater number of cases, administrative regulations or informal advice from higher commanders can prevent the type of conduct that concerns the military.

Finally, military attitudes toward fraternization subject the services to overstated allegations of class elitism and deprivation of associational rights. Other means are available for preventing the rare abuses of the superior-subordinate relation. In practice, the military has relied on informal persuasion to achieve its perceived needs.<sup>138</sup> The service should announce that it no longer intends to prosecute under the fraternization specification of the Uniform Code.<sup>139</sup>

### E. Control of Drug Usage

The military has made some of its most spirited assertions of the needs of the society apart in defense of its drug control practices. Drug problems are certainly not unique to the Armed Forces. The civilian society has instituted criminal and rehabilitative measures to correct servicemen's drug problems, but the military has not been content to let civilian institutions alone control its drug problems.

#### 1. Jurisdictional Claims

The military has asserted criminal jurisdiction over most drug offenses involving servicemen. The starting point for analysis of the military's jurisdictional claims is the 1969 Supreme Court decision, *O'Callahan v. Parker*.<sup>140</sup> There the Supreme Court limited court-martial jurisdiction over the military members to offenses having a particular "service connection." Two years later, the Court's clarifying decision in *Relford v. Commandant*<sup>141</sup> strongly indicated that any offense by a serviceman on a military installation would be considered service-connected.<sup>142</sup> To some extent, *Relford* facilitated easy jurisdictional distinctions. The serviceman who robbed the post exchange could be tried by court-martial.<sup>143</sup>

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arts. 133, 134, 10 U.S.C. §§ 933, 934 (1970) (dishonorable failure to pay debts). The dishonorable failure to pay debts specifications have been criticized. See, e.g., Note, *Imprisonment for Debt: In the Military Tradition*, 80 YALE L.J. 16979 (1971).

138 H. MOYER, JUSTICE AND THE MILITARY § 4-505, at 946 (1972).

139 Moyer notes that the 1946 Doolittle Board, composed of military personnel recommended ending the prohibition on officer and enlisted men social contacts. *Id.*

140 395 U.S. 258 (1969).

141 401 U.S. 355 (1971).

142 In *Relford*, Justice Blackmun identified 12 factors to be weighed in determining whether an offense is service-connected: "1. The serviceman's proper absence from the base. 2. The crime's commission away from the base. 3. Its commission at a place not under military control. 4. Its commission within our territorial limits and not in an occupied zone of the foreign country. 5. Its commission in peacetime and its being unrelated to authority stemming from the warpower. 6. The absence of any connection between the defendant's military duties and the crime. 7. The victim's not being engaged in the performance of any duty relating to the military. 8. The presence and availability of a civilian court in which the case can be prosecuted. 9. The absence of any flouting of military authority. 10. The absence of any threat to a military post. 11. The absence of any violation of military property. 12. The offense's being among those traditionally prosecuted in civilian courts." 401 U.S. at 365.

143 While concurrent jurisdiction often exists between civilian and military courts, one side will typically waive its right to proceed. *O'Callahan* only limits the jurisdiction of courts-martial. It does not guarantee a soldier freedom from civilian jurisdiction.

The serviceman who robbed the civilian liquor store would be tried in a civilian court.

When it came to drug offenses, however, the military was most reluctant to cede off-post jurisdiction. Shortly after the *O'Callahan* decision, the United States Court of Military Appeals<sup>144</sup> faced the off-post drug offense issue. The leading case is *United States v. Beeker*.<sup>145</sup> The defendant serviceman there was charged with importing, transporting, and possessing marijuana. The possession offenses occurred both on and off the post. The court found *O'Callahan* persuasive in denying military jurisdiction over the importation and transportation charges absent evidence relating them "specially to the military." While not further explained, the court may have had in mind the use of military privilege, status, or equipment in commission of the offense, or evidence that the drugs were intended for sale in the military community.

Although the court denied jurisdiction over the importation and transportation charges, it treated the use and possession charges differently. Citing the pre-*O'Callahan* decision in *United States v. Williams*,<sup>146</sup> *Beeker* noted "the disastrous effects occasioned by the wrongful use of narcotics on the health, morale, and fitness for duty of persons in the Armed Forces." Any drug use, on or off post, therefore, had "special military significance" sufficient to establish service connection. Like use, possession was a "matter of immediate and direct concern to the military."<sup>147</sup>

Having found service connection in marijuana possession and use cases, the military high court predictably extended military jurisdiction over possession and use charges involving heroin,<sup>148</sup> cocaine,<sup>149</sup> barbiturates,<sup>150</sup> and, by implication, LSD.<sup>151</sup>

Finally the military courts claimed jurisdiction over drug sales between servicemen.<sup>152</sup> The Court of Military Appeals in nondrug areas finds service connection where a military member is a victim of another serviceman's crime.<sup>153</sup>

144 The United States Court of Military Appeals was created by U.C.M.J. art. 67, 10 U.S.C. § 867 (1970). Its three judges are appointed from civilian life and sit as a court of last review in military cases. For a discussion of the history and attitudes of the court, see Willis, *The Constitution, the United States Court of Military Appeals and the Future*, 57 MIL. L. REV. 27 (1972); Willis, *The United States Court of Military Appeals: Its Origin, Operation and Future*, 55 MIL. L. REV. 29 (1972).

145 18 U.S.C.M.A. 563, 40 C.M.R. 275 (1969).

146 8 U.S.C.M.A. 325, 327, 24 C.M.R. 135, 137 (1957).

147 *United States v. Beeker*, 18 U.S.C.M.A. 563, 565, 40 C.M.R. 275, 277 (1969).

148 *United States v. Boyd*, 18 U.S.C.M.A. 581, 40 C.M.R. 293 (1969).

149 *Id.*

150 *United States v. Rose*, 19 U.S.C.M.A. 3, 41 C.M.R. 3 (1969); *United States v. Castro*, 18 U.S.C.M.A. 598, 40 C.M.R. 310 (1969).

151 *United States v. Morley*, 20 U.S.C.M.A. 179, 43 C.M.R. 19 (1970).

152 The Court of Military Appeals did insist in deciding the service connection issue on the offense charged. Thus, in *Morley*, the defendant was charged with an off-post sale to a civilian. On appeal, it was argued to the intermediate reviewing court that a sale obviously implied possession, thereby providing a service connection for the offense. The Court of Military Appeals reversed, stating simply that no possession offense had been charged. Similarly, in *United States v. Teasley*, 22 U.S.C.M.A. 131, 46 C.M.R. 131 (1973), the defendant was charged with off-post possession of narcotic paraphernalia. Despite evidence that the defendant had been observed shooting heroin, the court found that possession of a syringe did not have the "same kind of direct and immediate effect upon the health, morale and good order and discipline of the possessor's armed force as possession of the drug." 22 U.S.C.M.A. at 132, 46 C.M.R. at 132.

153 *United States v. Camacho*, 19 U.S.C.M.A. 11, 41 C.M.R. 11 (1969).

By equating the military drug purchaser with the victim of a theft or assault, the military found service connection regardless of the sale's location.

Given the military courts' rather rigid position on jurisdiction, dissatisfied military drug defendants sought federal civilian court relief. In an early case, *Moylan v. Laird*,<sup>154</sup> the defendant faced a Marine court-martial for the possession of 42 ounces of marijuana. Finding no service connection in the off-post possession, the Rhode Island district court enjoined the court-martial. In dictum, the court noted that a different result might have ensued if a use charge was involved.<sup>155</sup>

After *Moylan*, many civilian court drug cases shifted focus from the service connection of drug offenses to the necessity for exhaustion of military judicial remedies. Typically, the military argued that it should be allowed to take a defendant's case through the full court-martial and military appellate process before any civilian review was appropriate.<sup>156</sup> Defendants countered that exhaustion was inappropriate where the court's jurisdiction itself was being challenged or where exhaustion was futile, since the Court of Military Appeals decisions made the eventual military outcome patent.<sup>157</sup>

Recently, the Supreme Court in *Councilman v. Schlesinger*<sup>158</sup> decided the exhaustion issue decisively in favor of the military. At issue in *Councilman* was the off-post sale of marijuana by an Army captain to a military informant identified to the captain as an enlisted man. The Tenth Circuit found that the offense affected military discipline "no more than commission of any crime by any serviceman" and it enjoined Councilman's court-martial.<sup>159</sup> Although neither side raised the exhaustion issue, the Supreme Court asked for supplemental briefing<sup>160</sup> and decided the case on the exhaustion issue.<sup>161</sup>

The majority found that, as a matter of "equitable jurisdiction," federal courts should refrain from intervention in pending courts-martial. The same considerations discouraging intervention in state criminal prosecutions and administrative proceedings "apply in equal measure" to court-martial interventions. While the concluding paragraph suggests some interventions might be proper,<sup>162</sup> they will probably be rare indeed.<sup>163</sup> *Councilman* therefore left the

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154 305 F. Supp. 551 (D.R.I. 1969).

155 *Id.* at 557.

156 *See* *Scott v. Schlesinger*, 498 F.2d 1093 (5th Cir. 1974); *Dooley v. Ploger*, 491 F.2d 608 (4th Cir. 1974); *Sedivy v. Richardson*, 485 F.2d 1115 (3d Cir. 1973).

157 *E.g.*, *Cole v. Laird*, 468 F.2d 829 (5th Cir. 1972); *Reed v. Middendorf*, 383 F. Supp. 488 (C.D. Cal. 1974); *Chastain v. Slay*, 365 F. Supp. 522 (D. Colo. 1973); *Holder v. Richardson*, 364 F. Supp. 1207 (D.D.C. 1973).

158 420 U.S. 738 (1975).

159 481 F.2d 613 (10th Cir. 1973).

160 420 U.S. 738 (1975).

161 *Id.*

162 "We have no occasion to attempt to define those circumstances, if any, in which equitable intervention into pending court-martial proceedings might be justified." *Id.* at 761.

163 *Councilman* was certainly a strong case for intervention. The challenge was to the very jurisdiction of the military court. The Court of Military Appeals' position appeared clearly defined against Councilman's position. The gravity of the offense indicated Councilman would be a long time (probably spent in confinement) exhausting the futile military remedies.

issue of the service connection of off-post sales unresolved, and thus a continuing frustration to military lawyers and commanders.<sup>164</sup>

The civilian court decisions prior to *Councilman* had generally followed *Moylan*<sup>165</sup> and had cut back court-martial jurisdiction. The civilian courts have been less inclined than the military courts to accept broad claims of compelling military interest in drug offenses. Two Fifth Circuit cases are illustrative. In *Cole v. Laird*<sup>166</sup> the circuit court found it "clear" that marijuana could not be treated as a physically addictive hard drug.<sup>167</sup> The facts of the case—defendant arrested while on leave with a small quantity of marijuana—simply did not support the military's fear of a disastrous effect on the soldier involved.<sup>168</sup> The court seemed willing to go beyond *Moylan* regarding casual off-post, off-duty use of marijuana not to be service-connected.

While *Cole* involved marijuana, the circuit court reviewed a heroin sale and possession conviction in *Peterson v. Goodwin*.<sup>169</sup> Despite defendant's being off-post and off-duty, service connection was found and the court-martial conviction upheld. The Court distinguished the case from *Cole*, and found heroin presented a "serious threat" to good order and discipline. The language suggested that possession, use, or sale of any "hard drug" would be service-connected.

The most likely area for further service connection conflict involves soft drug sales among soldiers. Looking to *Relford*, military courts have asserted the presence of a military victim (the buyer) in their efforts to retain court-martial jurisdiction over the soldier-seller. Several civilian courts have rejected the "victim" approach.<sup>170</sup> The classification of the purchaser as a victim is certainly implausible when the "victim" is a military criminal investigator. The court in *Schroth v. Warner*<sup>171</sup> adopted the previous position of a lower military court that "[t]ransfer to the agent under the circumstances has no overtones of an attempt to undermine the health, morale, or fitness for military duty of the transferee."<sup>172</sup> In essence, while the defendant had the bad luck to sell to an informant, he now has the good luck to be freed from court-martial jurisdiction because his purchaser did not intend to use the drug.

A second concern in sale cases is abuse of the command relationship. The

164 An angry dissent rebutted much of the logic underlying the majority opinion. Having found exhaustion unnecessary, the dissenters, Justices Marshall, Brennan and Douglas, agreed with the circuit court that there was no service-connection to allow military jurisdiction. None of the *Relford* factors suggesting service-connection was present. The Government's argument that drug offenses had a special effect on military preparedness was rejected for lack of evidence.

165 *Moylan v. Laird*, 305 F. Supp. 551 (D.R.I. 1969).

166 468 F.2d 829 (5th Cir. 1972).

167 In so holding, the circuit court took note of a lengthy ruling to that effect by an Army military judge. *United States v. Watson*, 3 SELEC. SERV. L. REP. 3985 (7th Cir., 4th Dis., Fort Bragg, Tex. 1970).

168 *Id.* at 832-33.

169 512 F.2d 479 (5th Cir. 1975).

170 *Councilman v. Laird*, 481 F.2d 613 (10th Cir. 1973); *Holder v. Richardson*, 364 F. Supp. 1207 (D.D.C. 1973); *Schroth v. Warner*, 353 F. Supp. 1032 (D. Hawaii 1973).

171 353 F. Supp. 1032 (D. Hawaii 1973).

172 *Id.* at 1044. See also *United States v. Blancuzzi*, 46 C.M.R. 922 (1972). A contrary military position is expressed in *United States v. Sexton*, 48 C.M.R. 662 (1974); *United States v. Johnson*, 47 C.M.R. 885 (1973).

military may disapprove of the sale of drugs from private *X* to private *Y*. When the seller is captain *X* and the purchaser is identified as private *Y*, the military's concern measurably increases. Both *Councilman*<sup>173</sup> and the Third Circuit case *Sedivy v. Richardson*,<sup>174</sup> in which defendant was the senior NCO of a military police company, involved these considerations.

## 2. Drug Abuse Programs

As observed, the military has vigorously advocated that it be allowed to punish most military drug offenders. Of even greater significance is the military's insistence on rooting out drug abuse in its own way. Two notable decisions, one civilian and one military, have suggested the limits of military drug detection activity.

The civilian courts' most thorough examination of military drug abuse programs came in a noncriminal case. Plaintiffs in *Committee for GI Rights v. Callaway*<sup>175</sup> challenged the European Command's drug abuse program.<sup>176</sup> To suppress drug abuse, the Command, covering most of the American troop strength in Europe, resorted to searches of soldiers and their property, admittedly done without probable cause. These legally questionable searches were used to identify and discipline suspected drug users. Another regulation provision prohibited the use of wall posters and other materials identified with prodrug or antimilitary causes.<sup>177</sup> In federal court, the Government conceded that the program did not comport with civilian constitutional standards but defended it on the grounds of military necessity.<sup>178</sup> The Government offered statistics and testimony to show that a drug epidemic existed in the Command. The district court was not persuaded. It found the level of drug abuse "not particularly different from drug use encountered among civilians in major United States cities" and not comparable to the epidemic proportions of abuse in Vietnam.<sup>179</sup> The court assigned the Army the burden to "demonstrate by concrete proof an urgent necessity to act unconstitutionally in order to preserve a significant aspect of discipline or morale."<sup>180</sup> While the Command's program might have been approved if it had not involved criminal sanctions or stigmatizing administrative discharges, or if it had been limited to "particular troops in highly sensitive duty assignments," it could not be maintained in its Commandwide form.<sup>181</sup>

The case was appealed to the Court of Appeals for the District of Columbia

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173 *Councilman v. Schlesinger*, 420 U.S. 738 (1975). Defendant Councilman was a Captain. The purchaser was in fact a Specialist 4, who was identified as an enlisted clerk-typist to Councilman.

174 485 F.2d 1115 (3d Cir. 1973).

175 370 F. Supp. 934 (D.D.C.), *order stayed*, Civil No. 835-73 (D.C. Cir., Mar. 7, 1974).

176 The action was brought as a class action on behalf of 145,000 lower ranking enlisted men in the European command, stationed primarily in Germany. The significance and widespread publicity given the litigation make it possibly the most serious challenge to command authority yet litigated.

177 *Committee for GI Rights v. Callaway*, 370 F. Supp. 934, 937-39, 941 (D.D.C. 1974).

178 *Id.* at 940.

179 *Id.*

180 *Id.*

181 *Id.* at 940-42.

Circuit.<sup>182</sup> The circuit court largely accepted the military's necessity claims and reversed. The constitutional discussion began with a citation to *Levy's* holding that the "different character" of the military community and mission could justify otherwise unconstitutional action. Viewed "in totality," the drug inspections satisfied a reasonableness test under the fourth amendment. The court noted (1) the "substantial threat" and "serious debilitating effect" of drugs on the military mission, (2) the lessened "expectation of privacy" in the military community, (3) the primary health and fitness objective of the drug searches, (4) the effectiveness of unannounced drug searches, and (5) the Army's attempts to guard "dignity and privacy" in conducting the searches. Similarly, the imposition of possible administrative sanctions upon a confirmed drug user was constitutionally permissible despite the lack of a prior due process hearing. Military necessity compelled the result. While the various sanctions—revocation of driving privileges, removal of civilian clothing, housing in special rehabilitation facilities, denial of pass privileges, etc.—were not "medical remedies," they were "medically related" to rehabilitating drug-dependent soldiers. The court emphasized the Command directive that the sanctions be "carefully monitored" by the commander. Finally, constitutional vagueness challenges to the poster regulation were quickly dismissed with citation to *Secretary of Navy v. Avrech*.

While the decision was a signal victory for the armed services, it should not be broadened beyond its intent. Between the initial filing of complaint and the circuit court's decision, the Command program had been subject to intense legal scrutiny by its defenders. Broad language in the directive had been narrowed. Extreme abuses had been corrected. Even so, the court in reviewing the revised circular stressed the need for protecting "dignity and privacy" and for "careful monitoring" of disciplinary measures. The circuit court upheld the major part of the drug program but did so in such a way as to require close legal assessment by the military of similar efforts.

A setback to military drug programs was administered by the Court of Military Appeals in *United States v. Ruiz*.<sup>183</sup> There an Army private refused an order to provide a urine sample for drug testing. It was conceded that the order's purpose "was not to obtain incriminating evidence from the accused but to implement a command-wide rehabilitation program."<sup>184</sup> The order was nonetheless violative of the broad self-incrimination provisions of Article 31(a) of the Uniform Code of Military Justice. The military court held that military necessity arguments for the program were unavailing. One approach open to the military was to honorably discharge Ruiz for failure to present evidence of his fitness for duty.

### 3. Conclusion

Several comments are appropriate in assessing military claims of special judicial consideration in drug cases. Initially the military undeniably has a

182 *Committee for GI Rights v. Callaway*, 518 F.2d 466 (D.C. Cir. 1975).

183 *United States v. Ruiz*, 23 U.S.C.M.A. 181, 48 C.M.R. 791 (1974).

184 U.S.C.M.A. at 182, 48 C.M.R. at 798.

legitimate interest in the fitness and combat readiness of its personnel. The drug-dependent soldier is no asset to the defense of the nation. The circuit court's opinion in *GI Rights* properly held that drug-free Armed Forces are more necessary than a drug-free civilian community.

On the other hand, the military has frequently resorted to obvious rhetoric concerning drug usage. In 1957, when the Court of Military Appeals decided *Williams*, popular opinion regarded any drug usage as something abnormal and dangerous. In the years since, attitudes have markedly changed. While debate continues over the long-term effects of marijuana, it appears highly questionable to regard casual use as addictive or significantly debilitating. Second, the fact that many young people of all social classes have at least experimented with marijuana makes military efforts to completely eradicate its use subject to skepticism, if not ridicule.

In certain respects, the military has changed its own attitudes toward drug use since the days of the *Williams* case. Military drug abuse programs now stress rehabilitative rather than punitive measures.<sup>185</sup> Even when the criminal process is used, sentences have decreased in severity, the punitive discharges are by no means automatic.<sup>186</sup> Quite often, the military has been content to let the civilian courts handle off-post drug cases. In truth, the contemporary commander expects a certain incidence of drug usage in his command. While he does not like it, he probably regards it, along with occasional AWOL's and off-post brawls, as a fact of military life.

The evolving military attitude appears to be:

- (1) separate the confirmed addict,
- (2) try to rehabilitate the casual or experimental user, and
- (3) correct the conditions of boredom, loneliness, and frustration that stimulate drug usage.

The services would suffer little by abandoning their extensive jurisdictional claims over use and possession offenses. Where serious drug usage has incapacitated a serviceman for duty, administrative discharge procedures can best sever his connection with the military. Similarly, where only casual use is involved, noncriminal rehabilitative steps are fully available within the services.<sup>187</sup> An arguably more legitimate service connection appears in the off-post sale to military personnel cases. Drug sales, unlike drug usage, have not taken on the aspect of routine criminal activity at any large installation. Even where marijuana is involved, the services can be justifiably concerned when servicemen are responsible for introducing drugs into the military community. The off-post user or possessor cases suggest that the defendant has attempted to remove his criminal

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<sup>185</sup> *Committee for GI Rights v. Callaway*, 370 F. Supp. 934, 941 (D.D.C.), *order stayed*, Civil No. 835-73 (D.C. Cir., Mar. 7, 1974).

<sup>186</sup> At first, punitive discharges for drug offenses were rather frequent. Now such discharges are quite rare, and are usually imposed for only sale offenses involving large quantities.

<sup>187</sup> In *Committee for GI Rights v. Callaway*, 370 F. Supp. 934 (D.D.C. 1974), Judge Gesell would have allowed the military considerable latitude in nonjudicial efforts to correct a command drug problem.

conduct from any military connection. The sale cases show the opposite pattern. The military population provides all or part of the seller's market. While the "victim" terminology is imprecise, the argument for service connection in sales offenses is supported by cases allowing service connection over an off-post robber where the victim is a fellow soldier. In both situations, civilian courts may be less attuned to military interests than a court-martial proceeding. In both, the military may need to assert control to preserve the impression that it places a high priority on the well-being of its members. In both, the court-martial may be a more effective means of deterring other potential offenders on the installation. Similar consideration might sustain service connection in cases involving abuse of rank where charges other than sale from superior to subordinate are involved. Thus Sergeant Sedivy,<sup>188</sup> as drug party host to his MP subordinates, could be subject to court-martial for use or possession.

*G.I. Rights* and *Ruiz* leave the status of military drug programs somewhat uncertain. At a minimum, however, all courts have recognized the need for assessing the legal issues involved. Quite possibly, *G.I. Rights* would have been decided for the military a decade earlier by a per curiam reference to *Orloff*: "Judges are not given the task of running the Army."<sup>189</sup> One may quarrel with the circuit court's balancing of the issues, but at least serious consideration was given constitutional concerns in the face of a plausible claim that the greatest of military necessities required drastic corrective action.

#### F. Personal Appearance

A significant body of civilian law has sustained the rights of citizens to wear their hair at any length they choose.<sup>190</sup> While some restriction has been allowed,<sup>191</sup> the constitutional arguments of privacy and free expression have prevailed. Courts have demanded reasonable justifications for governmental efforts to dictate grooming standards for employees. In the military, however, the struggle against long hair has been more passionate than in the civilian world. Needs of the society apart have been frequently asserted to justify a strict military standard.

At times the military's struggle against long hair has taken on aspects of the comic. While some courts have viewed the serviceman's assertions as trivial,<sup>192</sup> others see them as raising significant constitutional questions.

188 *Sedivy v. Richardson*, 485 F.2d 1115 (3d Cir. 1973).

189 *Orloff v. Willoughby*, 345 U.S. 83, 93 (1953).

190 *E.g.*, *Dwen v. Barry*, 483 F.2d 1126 (2d Cir. 1973); *Lansdale v. Tyler Junior College*, 470 F.2d 659 (5th Cir. 1972), *cert. denied*, 411 U.S. 986 (1973); *Massie v. Henry*, 455 F.2d 779 (4th Cir. 1972); *Bishop v. Colaw*, 450 F.2d 1069 (8th Cir. 1971); *Breen v. Kahl*, 419 F.2d 1034 (7th Cir. 1969).

191 *Rinehart v. Brewer*, 491 F.2d 705 (8th Cir. 1974) (prison grooming standards); *Dwen v. Barry*, 483 F.2d 1126 (2d Cir. 1973) (must show "legitimate state interest reasonably related to the regulation"); *Karr v. Schmidt*, 460 F.2d 609 (5th Cir.), *cert. denied*, 409 U.S. 989 (1972) (high school dress code).

192 *Hough v. Seaman*, 493 F.2d 298 (4th Cir. 1974) (dissenting opinion); *Whitis v. United States*, 368 F. Supp. 822 (M.D. Fla. 1974).

## 1. Hair Length

Virtually all long hair cases have involved military Reservists or National Guardsmen involved in weekly training or summer camp. Early cases sought to assert a right to wear long hair at Reserve activities.<sup>193</sup> Typically, the Reservist stressed the need for long hair in his civilian position, the limited time spent on Reserve activities, and the noninterference of long hair with the performance of duties.

An illustrative case is *Raderman v. Kaine*.<sup>194</sup> Plaintiff-Reservist let his hair grow long out of personal preference and because of his position as agent for rock music groups. Until mid-1968, Army regulations allowed long hair if it contributed "to the individual's civilian livelihood." When the regulation was rescinded, Raderman asserted constitutional grounds for his right to remain in good standing in the Reserves without trimming his locks. The military asserted that Raderman had more limited constitutional rights than a civilian, that obedience to orders would be undercut by granting relief, and that the "frequent need for expedition in call-up orders"<sup>195</sup> dictated a complying haircut.

The Second Circuit, while puzzling over some of the military's logic and noting the peculiar military-civilian nature of the Reservist, denied relief to Raderman. The court intimated that a gross abuse of discretion might be correctable, but concluded that none was present here.<sup>196</sup>

*Raderman* epitomized the lack of success of direct challenges to hair length regulations. While courts recognized the growing body of law putting civilian long hair on a constitutional basis, special military needs were allowed to control. One court upheld the regulations even though it noted that plaintiff's long hair had not affected the performance of his military duties.<sup>197</sup>

## 2. Use of Wigs

In a 1970 long-hair case, the court, while holding against plaintiff, observed that he could have met the demands of both worlds by wearing a short hair wig at his Reserve assemblies.<sup>198</sup> Long-haired Reservists soon adopted the suggestion, to the dismay of Reserve commanders. All services soon made it clear that wigs were not permissible as a substitute for complying haircuts. An early challenge reached the First Circuit in *Friedman v. Froehke*.<sup>199</sup> Army National Guardsman Friedman wore a short hair wig bringing his drill appearance in compliance with military standards. However, the then current Army regulation allowed the wearing of wigs only to cover baldness or disfigurement. Threatened with sanctions for wearing the wig, Friedman went to federal court. He conceded the

193 *Anderson v. Laird*, 437 F.2d 912 (7th Cir. 1971); *Gianatasio v. Whyte*, 426 F.2d 908 (2d Cir. 1970); *Raderman v. Kaine*, 411 F.2d 1102 (2d Cir. 1969); *Smith v. Resor*, 406 F.2d 141 (2d Cir. 1969).

194 411 F.2d 1102 (2d Cir. 1969).

195 *Id.* at 1105.

196 *Id.* at 1106.

197 *Gianatasio v. Whyte*, 426 F.2d 908 (2d Cir. 1970).

198 *Id.* at 911.

199 470 F.2d 1351 (1st Cir. 1972).

military's right to set outward appearance standards for hair, but he challenged their right to insist that only a complying haircut would be satisfactory.

The Army's response cited several justifications. Returning to the *Raderman* argument, the Army considered the regulation necessary to "insure prompt activation of Reserve units."<sup>200</sup> More practically, the wig might interfere with the wearing of gas masks. Finally, the Army alleged Friedman wore the wig only to avoid another regulation and not for a "beneficial purpose."<sup>201</sup> None of the military's arguments were persuasive to the circuit court. Reflecting on the speed of military barbers, the court found the delay in activation argument implausible. Testimony as to the wig's stability and the experiences of bald and disfigured users rebutted the gas mask argument. Finally, the court was unimpressed with "a regulation whose sole justification is that it insures that another regulation can be obeyed in only one way."<sup>202</sup> Interestingly, the court invalidated the regulation as in excess of the statutory authority granted to the military. No decision on constitutional grounds was rendered.

In the same year, a district court in New York, in *Harris v. Kaine*,<sup>203</sup> rejected the Army's position on both statutory and constitutional grounds. *Harris* found constitutional violations stemming from the fifth and fourteenth amendments. The court held the Army had admitted that Harris' wig did not interfere with his performance or prevent him from presenting a neat and soldierly appearance. Further, the court stressed that Harris was a civilian rather than a soldier the great majority of the time. Turning to constitutional analysis, the court noted the growing body of decisions recognizing freedom to wear one's hair at any chosen length. While conceding the issue "may seem trivial to some,"<sup>204</sup> the court held that constitutional due process was violated where no legitimate military interest was furthered by the no-wig regulation.

After the initial litigation, the Army amended its regulation to allow the wearing of wigs by Reservists and Guardsmen at weekly training assemblies.<sup>205</sup> This left the field to the Air Force,<sup>206</sup> Navy, and Marine Corps. What followed was one of the most widespread litigative assaults of the Vietnam war era.

While individual variations have occurred, recent wig litigation has generally taken the following posture. Plaintiff-Reservist will concede the military's right to set outward appearance standards.<sup>207</sup> Further, he will make no argument that the suggested standards be applied to active army members. Then he will return to the *Raderman-Friedman* arguments. After showing that the wig has in no way interfered with performance of duties, plaintiff will claim the regulation is invalid because it is totally unrelated to military needs. Constitutionally, the

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200 *Id.* at 1353.

201 *Id.*

202 *Id.*

203 352 F. Supp. 769 (S.D.N.Y. 1972).

204 *Id.* at 774.

205 See ARMY REG. No. 600-20, para. 5-39d (1974).

206 The Air Force has recently rescinded its wig regulation. See *Hennig v. United States*, 385 F. Supp. 1138 (N.D. Ill. 1974).

207 *Hough v. Seaman*, 493 F.2d 298 (4th Cir. 1974); *Miller v. Ackerman*, 488 F.2d 920 (8th Cir. 1973); *Friedman v. Froehke*, 470 F.2d 1351 (1st Cir. 1972); *Martin v. Schlesinger*, 371 F. Supp. 637 (N.D. Ala. 1974); *Brown v. Schlesinger*, 365 F. Supp. 1204 (E.D. Va. 1973); *Carmon v. Warner*, 358 F. Supp. 206 (W.D.N.C. 1973).

regulation is alleged to violate rights of privacy<sup>208</sup> and freedom of expression under the first and ninth amendments, in addition to raising equal protection difficulties under the fifth.<sup>209</sup> The equal protection argument turns on the bias in favor of the baldheaded or disfigured,<sup>210</sup> and occasionally on differing standards favoring female service members.<sup>211</sup> As final arguments, the plaintiff notes the Army's abandonment of the wig policy<sup>212</sup> and the great disparity between the time spent on Reserve duty and in civilian life.<sup>213</sup>

Military response, particularly from the Marine Corps, has increased in sophistication since the *Friedman* and *Harris* decisions. One line of attack is to rebut or at least downgrade any constitutional aspects involved. If hair length is not a matter of constitutional right, the military can argue that it should be given unchecked discretion over an internal military concern. The attack is most successful before a federal judge inclined to grant considerable discretion to the military in running its internal affairs, and inclined as well to regard long hair litigation as trivial. Other courts will concede constitutional dimensions to the right to govern personal appearance but will treat the freedoms involved as of lesser magnitude<sup>214</sup> than first amendment rights or constitutional rights in a criminal prosecution.

The second military approach looks for possible hindrance in the performance of duties from wig wearing. Added to the *Friedman* gas mask argument<sup>215</sup> have been claims that wig wearers could be barred from active duty installations where differing hair standards prevailed,<sup>216</sup> that wigs would interfere with combat simulated amphibious landings,<sup>217</sup> that wigs could be sucked off flight line attendants to the damage of jet engines,<sup>218</sup> that wigs could be caught in machinery<sup>219</sup> or that wigs would interfere with climbing on landing nets.<sup>220</sup> Generally, these arguments have been hypothetical and most courts, regardless of eventual decision, have treated them with skepticism.<sup>221</sup>

208 *Brown v. Schlesinger*, 365 F. Supp. 1204 (E.D. Va. 1973).

209 *Campbell v. Beaughler*, 519 F.2d 1307 (9th Cir. 1975); *Hough v. Seaman*, 493 F.2d 298 (4th Cir. 1974); *Brown v. Schlesinger*, 365 F. Supp. 1204 (E.D. Va. 1973); *Good v. Mauriello*, 358 F. Supp. 1140 (W.D.N.Y. 1973); *Harris v. Kaine*, 352 F. Supp. 769 (S.D.N.Y. 1972).

210 *Hough v. Seaman*, 493 F.2d 298 (4th Cir. 1974); *Good v. Mauriello*, 358 F. Supp. 1140 (W.D.N.Y. 1973); *Harris v. Kaine*, 352 F. Supp. 769 (S.D.N.Y. 1972). *But see* *Communale v. Mier*, 355 F. Supp. 429 (W.D. Pa. 1973).

211 *Campbell v. Beaughler*, 519 F.2d 1307 (9th Cir. 1975); *Martin v. Schlesinger*, 371 F. Supp. 637 (N.D. Ala. 1974).

212 *Hipple v. Warner*, 368 F. Supp. 301 (N.D. Ga. 1973).

213 *Hough v. Seaman*, 493 F.2d 298 (4th Cir. 1974); *Miller v. Ackerman*, 488 F.2d 920 (8th Cir. 1973).

214 *Whitis v. United States*, 368 F. Supp. 822 (M.D. Fla. 1974); *Hipple v. Warner*, 368 F. Supp. 301 (N.D. Ga. 1974).

215 *Campbell v. Beaughler*, 519 F.2d 1307 (9th Cir. 1975); *Friedman v. Froehlke*, 470 F.2d 1351 (1st Cir. 1972); *Quinn v. United States*, 397 F. Supp. 1250 (D. Mass. 1975).

216 *Brown v. Schlesinger*, 365 F. Supp. 1204 (E.D. Va. 1973).

217 *Smith v. Commanding Officer*, 380 F. Supp. 588 (S.D. Tex. 1974).

218 *Hipple v. Warner*, 368 F. Supp. 301 (N.D. Ga. 1973).

219 *Garmon v. Warner*, 358 F. Supp. 206 (W.D.N.C. 1973).

220 *Id.*

221 *Brown v. Schlesinger*, 365 F. Supp. 1204 (E.D. Va. 1973) (military arguments regarded as "bordering on the chimerical"); *Hipple v. Warner*, 368 F. Supp. 301 (N.D. Ga. 1973); *Etheridge v. Schlesinger*, 362 F. Supp. 198 (E.D. Va. 1973); *Garmon v. Warner*, 358 F. Supp. 206 (W.D.N.C. 1973) (military contentions are "totally unproved").

The third, and often surprisingly successful contention, is premised on the intangibles of discipline, loyalty, and morale. The increasing unification of the Reserves and active duty forces has allowed argument that distinctions between Reserve and active duty members in matters of grooming should not be tolerated.<sup>222</sup> The military accurately assumed that federal courts would be disinclined to interfere with active duty standards. And of course a "one force" approach would mean barbered Reservists rather than bewigged regulars. As Brigadier General Lanagan of the Marine Corps Reserve testified, such uniformity

is essential to the inculcation of group or unit identity . . . embracing within that concept such attributes as group pride and morale, interdependence and confidence in each other, military discipline and obedience, as well as self-discipline and adjustment to military life, all of which are indispensable to molding and maintaining an efficient combat-ready military force.<sup>223</sup>

The Marines further stressed the regulation's purpose in distinguishing Marines from everyone else.<sup>224</sup> As General Lanagan testified, short hair wigs and the concept of the "small, disciplined, elite fighting force"<sup>225</sup> were incompatible. Finally, the military occasionally invoked the *Friedman* argument that regulations were made to be obeyed rather than distinguished.<sup>226</sup>

One intangible factor helping the services in all hair cases may have been the conception of the Reservist-Guardsman as a privileged draft-dodger.<sup>227</sup> Decisions sustaining military discretion often suggest a judicial gut-reaction that getting a haircut was a small price to pay for avoiding full-time military duty and the possibility of Vietnam service.

In the federal court hair cases, the military has lost as often as it has won. Currently, three circuits have struck down the ban on short hair wigs.<sup>228</sup> Possibly more significantly, the trivial nature of the litigation has reflected adversely on the armed services. The fact that the services were forced to spend their time battling over inches of hair hardly enhanced the services' public image. Military justifications were often embarrassingly make-weight.<sup>229</sup>

Military defenders of hair length and "no wig" regulations probably view the issues as symbolic. In their view, Reservists demanding expanded grooming freedoms were more interested in protesting the military and the Vietnam war

222 *Friedman v. Froehle*, 470 F.2d 1351 (1st Cir. 1972); *Whitis v. United States*, 368 F. Supp. 822 (M.D. Fla. 1974); *Klinkhammer v. Richardson*, 359 F. Supp. 67 (D. Minn. 1973), *aff'd sub nom. Miller v. Ackerman*, 488 F.2d 920 (8th Cir. 1973).

223 *Whitis v. United States*, 368 F. Supp. 822, 825 (M.D. Fla. 1974).

224 *Campbell v. Beaughler*, 519 F.2d 1307 (9th Cir. 1975); *Quinn v. United States*, 397 F. Supp. 1250 (D. Mass. 1975); *Smith v. Commanding Officer*, 380 F. Supp. 588 (S.D. Tex. 1974); *Martin v. Schlesinger*, 371 F. Supp. 637 (N.D. Ala. 1974); *Whitis v. United States*, 368 F. Supp. 822 (M.D. Fla. 1974); *Klinkhammer v. Richardson*, 359 F. Supp. 67 (D. Minn. 1973).

225 *Klinkhammer v. Richardson*, 359 F. Supp. 67 (D. Minn. 1973).

226 *Whitis v. United States*, 368 F. Supp. 822 (M.D. Fla. 1974); *Klinkhammer v. Richardson*, 359 F. Supp. 67 (D. Minn. 1973).

227 *See Hough v. Seaman*, 493 F.2d 298 (4th Cir. 1974) (dissenting opinion); *Comunale v. Mier*, 355 F. Supp. 429 (W.D. Pa. 1973).

228 *Hough v. Seaman*, 493 F.2d 298 (4th Cir. 1974); *Miller v. Ackerman*, 488 F.2d 920 (8th Cir. 1973); *Friedman v. Froehle*, 470 F.2d 1351 (1st Cir. 1972).

229 *See notes 209-215 supra.*

than military appearance regulations. The cases suggest this "us" versus "them" confrontation.<sup>230</sup>

To be sure, many of the Reservist litigants had little love for the armed services.<sup>231</sup> However, the long hair issue is more than a convenient excuse to vent antimilitary sentiment. In defending appearance standards far more restrictive than community norms, the services have appeared not only unreasonable but slightly paranoid. The military's rather blind association of longer hair with antimilitary dissent helped segregate servicemen from the vast majority of their contemporaries of all political and social attitudes. As longer hair became increasingly stylish among all age groups, the services' litigative posture became less defensible. Efforts to persuade courts that the military could not survive a Reservist hair style similar to that worn by local businessmen, Supreme Court justices, and national political figures were understandably difficult.

In the hair cases, the military seems to have glorified society apart justifications for its own sake. The results have probably been far more harmful to recruitment and morale than any other issue. Evidence indicates the Army's standards are almost uniformly unpopular among today's soldiers, who are largely true volunteers with no political axes to grind.<sup>232</sup> Common sense rather than judicial demand should persuade the services to loosen standards for both Reservists and active duty members.

### G. Sex-Related Discriminations

In recent years, the military has encountered varied forms of the sexual revolution. The military's response has been often contradictory. Unlike other areas studied, most assertions of the separate needs of the society apart have been made in the context of administrative rather than criminal proceedings.

The problem has been compounded by civilian uncertainty over appropriate equal protection standards in the area.<sup>233</sup> Courts have differed over whether sex-based discriminations should be tested by a "rational basis," "strict rationality," or "strict scrutiny" standard.<sup>234</sup> Finally, the treatment of homosexuals may be evolving from criminal sanction to constitutional protection.<sup>235</sup>

#### 1. Pregnancy Discharges

The first sex-related cases examined the status of the pregnant servicewoman. The services had traditionally required the prompt honorable discharge of

230 Brigadier General Lanagan's testimony often suggested this distinction. See *Whitis v. United States*, 368 F. Supp. 822 (M.D. Fla. 1974); *Klinkhammer v. Richardson*, 359 F. Supp. 67 (D. Minn. 1973); *Garmon v. Warner*, 358 F. Supp. 206 (W.D.N.C. 1973).

231 See, e.g., *Klinkhammer v. Richardson*, 359 F. Supp. 67 (D. Minn. 1973).

232 See *Army Times*, May 28, 1975, at 2, col. 1 (Representative Patricia Schroeder reported receiving over 4,000 comments from soldiers on haircut policies; over 99 percent favored a liberalized standard).

233 A recent review of the Supreme Court's struggle with the proper constitutional standard to apply to sex discrimination cases is found in Johnston, *Sex Discrimination and the Supreme Court—1971-1974*, 49 N.Y.U.L. REV. 617 (1974).

234 See *id.*

235 E.g., *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969); *In re Labady*, 326 F. Supp. 924 (S.D.N.Y. 1971); Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct*, 72 MICH. L. REV. 1613 (1974) [hereinafter cited as *Homosexual Conduct*].

pregnant females.<sup>236</sup> Several cases challenged the applicable regulations as denials of equal protection, violations of due process, invasions of privacy, and infringements of religious freedom.<sup>237</sup> The most notable case was *Struck v. Secretary*.<sup>238</sup> A majority of the Ninth Circuit panel held against the officer nurse's claim that she be allowed to remain in the Air Force. The Court found a "compelling public interest" in not having pregnant soldiers, and noted Struck's particular unfitness for duty in a combat zone.<sup>239</sup>

District court cases in four other circuits split on the assertions of special military needs. All but one predate the Supreme Court teacher pregnancy case, *LaFleur v. Board of Education*.<sup>240</sup> In the post-*LaFleur* case *Crawford v. Cushman*<sup>241</sup> the Vermont district court rejected a woman Marine's request for reinstatement after a pregnancy discharge. Medical testimony indicated plaintiff's ability to perform duty through at least the seventh month of pregnancy. Nevertheless, the court was unsympathetic to the servicewoman. While it restated the familiar "inability to perform in emergency situations" argument, it refused to equate pregnancy with the normal illness or injury. Unlike a cold or a broken arm, a pregnancy creates persisting physical, emotional, and practical problems. Among the problems were the lack of child care facilities at many Marine installations and the "traumatic" effect of an enforced separation of child from mother because of overseas assignments.

Since the initial litigation, the military has shown a willingness to temper the moralism and absolutism inherent in the pregnancy regulations.<sup>242</sup> Most notable is the Army's June 1975 change of policy for enlisted personnel. In effect it reverses the prior presumption of discharge of pregnant servicewomen. Under the changed policy, pregnancy is not assumed to be a reason for discharge except for women in training on active duty status or women pregnant prior to entry. In other cases the servicewoman may remain on active duty without the special permission of the Army. A liberal discharge policy for those desiring separation for reason of pregnancy is also specified.<sup>243</sup>

This new policy is an encouraging change. Defenders of prior service policy have overrelied on "worst case" examples; positing that one pregnant nurse will materially disrupt a war is simply farfetched.<sup>244</sup> So long as the statutory prohibition on female combat participation continues,<sup>245</sup> women will probably

236 *E.g.*, Air Force Reg. No. 36-12 (1972), cited in *Struck v. Secretary of Defense*, 460 F.2d 1372, 1374 (9th Cir. 1972).

237 *Struck v. Secretary of Defense*, 460 F.2d 1372 (9th Cir. 1972); *Flores v. Secretary of Defense*, 355 F. Supp. 93 (N.D. Fla. 1973); *Gutierrez v. Laird*, 346 F. Supp. 289 (D.D.C. 1972); *Robinson v. Rand*, 340 F. Supp. 37 (D. Colo. 1972).

238 460 F.2d 1372 (9th Cir. 1972).

239 Judge Duniway's dissent argued that the military had failed to show a distinction between pregnancy and other temporary disabilities for which discharge was not mandatory. A resolution of the issue was expected when the Supreme Court granted certiorari. 409 U.S. 1071 (1972). However, the Air Force mooted the case by allowing Struck to remain on active duty.

240 414 U.S. 632 (1974).

241 *Crawford v. Cushman*, 378 F. Supp. 717 (D. Vt. 1974).

242 See Army Reg. No. 635-200, ch. 8 (1973), regarding provision for requesting waiver of discharge requirement. It has been noted that all Air Force officers and 410 out of 428 enlisted women were granted waivers in 1973. 2 MIL. L. REP. 1043 (1974).

243 Army Reg. No. 635-200 (1975) (Interim Change).

244 *Struck v. Secretary of Defense*, 460 F.2d 1372 (9th Cir. 1972).

245 *E.g.*, 10 U.S.C. §§ 6015, 8549 (1970).

compose only a small percentage of the Armed Forces serving in stabilized tour areas. The development and popularization of contraceptive techniques will help to keep pregnancies among first-term female recruits at an allowable level. The changed Army policy recognizes that career women can be both soldiers and mothers in most circumstances. As a result, efforts to secure career-oriented husband and wife teams, particularly in the professional branches, will be enhanced.

## 2. Pay, Promotions, and Other Benefits

Equally difficult sex-related cases have arisen outside the pregnancy area. Within the last three years, Supreme Court decisions have attempted to clarify standards governing pay, benefits, and promotions between the sexes. In *Frontiero v. Richardson*,<sup>246</sup> the Supreme Court reviewed a federal statute which limited a servicewoman's right to a spousal dependency allowance to cases where the servicewoman shows that her husband receives more than 50 percent of his support from her.<sup>247</sup> A male claiming his wife's dependency does not have to make an equivalent showing. The military's primary justification was mere administrative convenience. Without finding sex a suspect classification, the Supreme Court cited *Reed v. Reed*<sup>248</sup> and invalidated the statute on equal protection grounds.

A more difficult evaluation of the needs of the society apart faced the court in *Schlesinger v. Ballard*.<sup>249</sup> Ballard was a male Navy officer facing involuntary honorable discharge from service for failure of promotion.<sup>250</sup> Only a slightly longer period of active duty would have made Ballard eligible for career retirement status after 20 years of service. Instead, he faced a much less monetarily rewarding lump sum separation bonus. Ballard pointed out that a female officer in his situation would have had a longer period in which to obtain the necessary promotion. Seizing on this statutory discrepancy, Ballard claimed a denial of equal protection and a right to serve out his 20 years.

The military responded that the differential promotion periods reflected the realities of Naval service. By legislative decision, women are ineligible for combat service<sup>251</sup> and are denied other, career-enhancing opportunities. Equal competition with men was therefore a virtual impossibility. Recruitment of good women officers for career service required the differential.

Reversing a previous three-judge court decision,<sup>252</sup> the Supreme Court endorsed the military's view. Underlying the *Ballard* decision, of course, is the constitutionality of the legislative restraints on female military duties.<sup>253</sup> While

246 411 U.S. 677 (1973).

247 10 U.S.C. §§ 1072, 1076; 37 U.S.C. §§ 401, 403 (1970).

248 404 U.S. 71 (1971).

249 419 U.S. 498 (1975).

250 The military demands that officers demonstrate the ability to hold higher rank and responsibilities. Thus, at designated times all officers must be considered for promotion to the next higher grade. Failure to be selected on two occasions while at the same rank will end the officer's career. See MILITARY LAW HANDBOOK, *supra* note 41, para. 3-20-27.

251 *E.g.*, 10 U.S.C. §§ 6015, 8549 (1970).

252 *Ballard v. Laird*, 360 F. Supp. 643 (S.D. Cal. 1973) (three-judge panel).

253 See *Beans, Sex Discrimination in the Military*, 67 MIL. L. REV. 19 (1975).

significant progress has been made in integrating women into the armed services,<sup>254</sup> the restrictions on women in combat activities remain. Given that the combat branches are the heart of the military, full female equality may be some distance in the future. The Equal Rights Amendment,<sup>255</sup> if enacted, would be a powerful impetus to legal challenge of these restrictions. Realistically, while some women have the ability and interest for combat training, they will probably remain a numerically insignificant minority.

### 3. The Service Academies

For a time, it appeared that the next military sex discrimination case to reach the Supreme Court would involve sexual integration of the service academies. Several potential female applicants were denied the opportunity to apply for admission and brought suit in federal court. In defense of the traditional maleness of the academies, the military has relied on the statutory proscription of women in combat: the academies are designed to train combat leaders, women are statutorily barred from combat service, therefore women should not be admitted to the academies. Once again, theory collides with reality. Significant numbers of academy graduates serve in branches and perform duties open to women.<sup>256</sup> In addition to providing military leadership, the academies provide an expenses-paid college education for selected young citizens. In June 1974, the District of Columbia district court applied the rational basis test and granted summary judgment for the military.<sup>257</sup> In November, the court of appeals overturned the summary judgment. The appellate court questioned the district court's conclusion that the "rational basis" test was appropriate for sex discrimination cases; it further found significant unresolved issues of fact.<sup>258</sup>

While service academy coeducation poses practical problems, much of the military's reaction has been tradition-based. The academies are the repository of American military tradition.<sup>259</sup> The great majority of high commanders are academy-educated. Part of the academy tradition is that they are different from civilian educational institutions.<sup>260</sup> The absence of women has played a part in promoting the academy image of tough, ascetic, regimented training. The effect of female admission on traditions is unclear. That change would occur, however, seems undeniable. The critical question is whether valid military interests would be served by retaining male-only academies. Certainly a significant burden of proof falls on the services. A single-sex, government-funded educational institution would probably not survive even a rational basis analysis. The military's "combat training only" justification is factually incorrect. The

254 N.Y. Times, May 4, 1975, at 1, col. 2.

255 See Haley & Kanowitz, *Women and the Draft: A Response to Critics of the Equal Rights Amendment*, 23 HASTINGS L. J. 199 (1971).

256 *Waldie v. Schlesinger*, 509 F.2d 508 (D.C. Cir. 1974).

257 *Edwards v. Schlesinger*, 377 F. Supp. 1091 (D.D.C., *rev'd sub nom.* *Waldie v. Schlesinger*, 509 F.2d 508 (D.C. Cir. 1974)).

258 *Waldie v. Schlesinger*, 509 F.2d 508 (D.C. Cir. 1974).

259 See JANOWITZ, *supra* note 25, at 57-60, 127-38.

260 The academies have in recent years become more like civilian universities. See H. Radway, *Recent Trends at American Service Academies*, in PUBLIC OPINION, *supra* note 25, at 20-26.

changed-traditions argument is based far more on dubious stereotype than provable fact.

The traditionalist arguments have not impressed Congress. It has removed the bar to female admissions to West Point, Annapolis, and the Air Force Academy;<sup>261</sup> the academies will receive their first female admittees in the fall of 1976. Congress found the males-only rule to be out of step with a modern military attempting to increase its appeal to both men and women.

A corollary issue to military academy admission is the proscription against marriage for academy cadets. In the civilian community, the right to marry is a fundamental one.<sup>262</sup> Ironically, later in an officer's military career, marriage is seen as a valuable career enhancement.<sup>263</sup> But at the cadet level, marriage is not authorized. Officially, the services claim that:

- (1) married men are less capable of coping with a structured environment;
- (2) the demanding academic program would place unfair demands on family responsibilities; and
- (3) the cadet attrition rate (with loss of government investment) would increase if married cadets were admitted.<sup>264</sup>

Behind these justifications lurks an unarticulated belief that the inculcation of military discipline and values is diminished by competing family loyalties.

These issues were raised in *O'Neill v. Dent*.<sup>265</sup> There a Merchant Marine Academy regulation barred not only married cadets but divorced ones. Pursuant to court order, records were collected on all cadets known to have been married while at any of the service academies. Twenty-seven cases were reported. The court found no indication that academic or disciplinary problems increased among the married students. The court noted married students' satisfactory performance in civilian schools, the lack of similar regulations at foreign military academies, and the absence of any marital prohibition on ROTC students. Using the strict scrutiny test, the court invalidated the regulation.

#### 4. Homosexual Servicemen

If the military's attitude toward the women's movement has been ambivalent, it has shown no indecision toward gay liberation.<sup>266</sup> The consistent military attitude has been that homosexuality has no place in the services. A recent Army regulation opines that the homosexual's "presence impairs the morale and discipline of the Army, and homosexuality is a manifestation of a severe personality defect which appreciably limits the abilities of such individuals

261 See H.R. 6674, 94th Cong., 1st Sess. (1975).

262 *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

263 For an examination of discrimination against bachelors in the armed services, see D. Woodward, *Marital Discrimination in the Military*, Jan. 22, 1974 (unpublished thesis in Army Judge Advocate General's School, Charlottesville, Va.).

264 *O'Neill v. Dent*, 364 F. Supp. 565 (E.D.N.Y. 1973).

265 *Id.*

266 See C. WILLIAMS & M. WEINBERG, *HOMOSEXUALS AND THE MILITARY* (1971); Note, *The Homosexual's Legal Dilemma*, 27 ARK. L. REV. 687, 703-06 (1973); Comment, *Homosexuals in the Military*, 37 FORDHAM L. REV. 465 (1969).

to function effectively in society.<sup>267</sup> The regulations authorize the removal of the homosexual from service by judicial or administrative measures.<sup>268</sup> While some sensitivity is shown to the gradations of the offense and the serious problems of false accusations,<sup>269</sup> the message is clear: homosexuals have no place in the military.

The civilian courts have thus far shown no reluctance to endorse the military's position.<sup>270</sup> Two of the most litigated military cases, those of Navy Rear Admiral Hooper<sup>271</sup> and Commander Augenblick,<sup>272</sup> involved homosexual relationships with enlisted men. In each, federal courts disapproved of the misconduct involved and found service connection as required by *O'Callahan*. Judge Nichols' remarks on "cases involving homosexuals that stain the pages of our report" leave no doubt as to his attitudes regarding homosexuals.<sup>273</sup>

The military has remained firmly opposed to homosexuality at a time when civilian homosexuals have made some progress against arbitrary discrimination. In *Norton v. Macy*,<sup>274</sup> the District of Columbia circuit court overturned a civil service homosexual discharge. The court noted four ways that homosexuality might concern the employer:

- (1) as a threat to office security by encouraging employee blackmail;
- (2) as suggestive of an unstable personality unsuited for certain work;
- (3) by presenting offensive overtures disturbing the fellow workers; and
- (4) as a general embarrassment to the agency.

On the facts of the case, the court found none of the first three elements. The fourth, general embarrassment to the agency, was insufficient to sustain a dismissal. The court required "some reasonably foreseeable, specific connection between an employee's potentially embarrassing conduct and the efficiency of the service."<sup>275</sup>

Should *Norton* apply to the military? The military would doubtlessly resist it. Their initial response would focus on the grounds cited in *Norton*, namely the dangers of security breaches through blackmail, the fear of exposure of other servicemen to homosexuality in the often confined world of barracks or ship,<sup>276</sup> and the belief that homosexuality is only one indication of a personality unsuited for military service. Certainly in the appropriate case, each may be a reason for

267 Army Reg. No. 635-89, § 2a (1960).

268 Army Reg. No. 635-200, para. 13-5a(7) (1973).

269 The converse of the problem is false admissions of homosexuality to gain an automatic discharge. See *Weir v. United States*, 474 F.2d 617 (Ct. Cl.), cert. denied, 414 U.S. 1066 (1973).

270 E.g., *Champagne v. Schlesinger*, 506 F.2d 979 (7th Cir. 1974); *Doe v. Chafee*, 355 F. Supp. 112 (N.D. Cal. 1973); *Benson v. Holloway*, 312 F. Supp. 49 (D. Neb. 1970).

271 *Hooper v. Laird*, 482 F.2d 784 (D.C. Cir. 1973); *United States v. Hooper*, 9 U.S.C.M.A. 637, 26 C.M.R. 417 (1958).

272 *United States v. Augenblick*, 393 U.S. 348 (1969); *Augenblick v. United States*, 509 F.2d 1157 (Ct. Cl. 1975).

273 *Schlegel v. United States*, 416 F.2d 1372, 1382 (Ct. Cl. 1969), cert. denied, 397 U.S. 1039 (1970).

274 417 F.2d 1161 (D.C. Cir. 1969).

275 *Id.* at 1167.

276 E.g., *Doe v. Chafee*, 355 F. Supp. 112 (N.D. Cal. 1973); *Benson v. Holloway*, 315 F. Supp. 49 (D. Neb. 1970).

disqualification from military service. However, to extrapolate these factors to an absolute ban on homosexuals within the military is to rely too heavily on stereotype. Innumerable military jobs involve no security considerations. Even where they do, blackmail has to rely on the serviceman's fear of disclosure. Given a willing admission of sexual preferences, the blackmail threat disappears. Personality instability is best judged in individual cases. Quite obviously, the military's designation of homosexuality as an undesirable personality trait may itself contribute to instability.

Action can also be taken in individual cases where homosexual advances bother coworkers. Assault provisions of the UCMJ are certainly adequate for aggravated cases. Lesser cases can be handled administratively. In brief, then, the military has sufficient regulatory and disciplinary power to prevent objectionable conduct, homosexual or heterosexual.

The hard questions involve the services' concern about off-duty homosexual acts between consenting servicemen or -women or between a consenting soldier and a civilian. Quite clearly, the military is maintaining a rigid policy in the face of crumbling homosexual stereotypes. The most notable indication is the recent litigation to enjoin discharge filed by a career Air Force sergeant, who is an admitted homosexual.<sup>277</sup> Based on combat experience, leadership, and performance of duties, the sergeant is an ideal airman. Based on sexual preferences, he is ineligible for continued service. Studies indicate that the sergeant may be only the most visible of a substantial number of military homosexuals whose honorable service has been indistinguishable from soldiers of a more accepted sexual orientation.<sup>278</sup>

The Air Force case implies that the courts may soon be giving serious attention to the homosexual issue. What unique military needs might indicate a result different from *Norton*? Initially it should be recognized that accurate information on homosexuality is lacking. Is homosexuality a healthy personal preference, a disease, or a criminal act?<sup>279</sup> Doctors, social scientists, and lawyers are divided in their opinions. The services might assert the following special military needs for a continued complete prohibition on homosexuals:

- (1) The unique physical demands of military service make it improbable that most homosexuals can adjust. Therefore, a complete prohibition on homosexuals is appropriate.
- (2) The potential for mental and emotional stress in the service far exceeds that in civilian life. Again, the average homosexual cannot cope.
- (3) The substantial military hostility toward homosexuals would be translated into physical attacks and other abuse. Protection of the indi-

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277 A spokesman for the Department of Defense, explaining the homosexual discharge provisions, stated that the military "has an obligation and responsibility to provide our young men and women . . . the most wholesome and healthful environment possible." Wash. Post, May 28, 1975, at 1, col. 1. See also N.Y. Times, Sept. 25, 1975, at 16, col. 1; N.Y. Times, Sept. 18, 1975, at 12, col. 1.

278 It is estimated that some 10 percent of the Armed Forces may be homosexual. N.Y. Times, Sept. 25, 1975, at 16, col. 1; see WILLIAMS & WEINBERG, *supra* note 266, at 60.

279 See generally *Homosexual Conduct*, *supra* note 235.

- vidual homosexual and prevention of discipline harming confrontations support the wholesale ban.
- (4) Military recruitment might suffer as potential recruits (and their parents) discovered they "might have a queer in the next bunk."<sup>280</sup> Whatever the scientific nature of homosexuality, it is probably correct that large portions of the American public regard homosexuals with fear or contempt. Therefore, the recruiting loss might seriously harm prospects for a long-term volunteer force.
  - (5) Beyond recruiting, the military's self-image and public image would suffer. Traditionally the military has conveyed an image of masculine vigor and spirit. Whether a combat rifleman or a stateside supply clerk, the services encourage pride in doing a "man's work."<sup>281</sup> Just as certainly, the male homosexual image has been one of an effeminate and misfit. Given the difficulties of recovery from Vietnam, the military should be spared such a disturbing psychological adjustment.

It is clear that the military's reasons, relying heavily on stereotype, are open to challenge. Homosexuals have survived service life. Without the burden of their homosexuality being a crime or a ground for discharge, their number and percentage would increase. Further, the homosexual could plausibly better survive long periods without women than the heterosexual. Physical assaults for reasons of race, religion, or physical appearance have long been a feature of civilian as well as military life. The appropriate corrective measure can hardly be to exclude the victimized minority member.

The fourth and fifth assertions of special military need recall the discredited *Norton* "embarrassment to the agency" standard.<sup>282</sup> Here a federal court might have significant difficulty assessing claims of special military need. If the military could offer proof that homosexual admission would harm recruiting or public confidence in the Armed Forces, judicial caution would be warranted. If such proof was lacking, the military would be on far weaker grounds. Much of the military's difficulty is that it is being thrust into the forefront of judicial homosexual reform. If homosexuality is to be constitutionally protected, the military would prefer that the landmark cases and legislation arise in the civilian world. The military could then merely respond to clear precedent at a time when public opinion had largely accepted the changed position of the homosexual in American society.

#### IV. Conclusion

As the Vietnam era recedes, historians will begin dispassionate assessment of what the decade meant to the American democracy. Certainly the American military has lessons to learn. In Vietnam, the military faced the burden of fighting a major war without broad popular support. Several of the issues dis-

280 See note 277 *supra*.

281 WILLIAMS & WEINBERG, *supra* note 266, at 56-57.

282 417 F.2d 1161 (D.C. Cir. 1969).

cussed in this article stemmed from that burden. Others were encouraged by a popular and judicial attitude that refused to view the military as a national institution above criticism. If anything, the post-Vietnam military must be impressed with the grave dangers of isolating itself from the society of which it is a part.

The military should be particularly aware that its base of support has eroded. The generation of Americans that knew the total mobilization and victory of World War II is fast approaching retirement age. Increasingly, the male voting public are draft avoiders or veterans of the Korean or Vietnamese conflicts. This electorate will view claims of special privilege for the armed services with skepticism. Skepticism will also surface in the courts when the military argues for dispensation from normal constitutional standards.

A summary of the litigated claims of military necessity indicates the need for a careful reexamination by the military of its objectives and methods. Too often the services have fought senseless battles over trivial issues. The haircut litigation,<sup>283</sup> the academy chapel case,<sup>284</sup> and certain sex discrimination cases are illustrative.<sup>285</sup> In the free expression area, the military has often overreacted to minor threats, thereby alienating many servicemen and civilians.<sup>286</sup> Justifications based on military necessity often seem manufactured after the fact to rationalize essentially arbitrary actions.

These conclusions, distilled from the foregoing analysis, suggest that courts should be skeptical of claims of military necessity. Easy deference to arguments of military uniqueness is not a satisfactory judicial policy. Vietnam and Watergate warn of the dangers of unreviewed discretion in government and excessive worship of slogans like "national security" and "executive privilege." Further, the expansion of the military since World War II has blurred any line between civilian and military concerns. As previously noted, the Rehnquist view of the military in *Parker* is inaccurate. In many areas, the military courts and agencies have assimilated civilian standards. In other areas, the federal courts have compelled the military to comply with civilian standards, and the compliance has not significantly disrupted military functions. Continuing review of military practices by Congress and the courts can encourage internal review by the military itself. Where legitimate military needs exist, military attorneys can argue the specific facts that entitle the military to different constitutional treatment. Where only outmoded tradition justifies a military policy, internal housecleaning will be encouraged.

Finally, while all arms of government desire special deference to their expertise and importance, the contemporary military should be particularly hesitant to claim unnecessary privileges separating it from civilian society. The isolation of the Vietnam years can hardly be reversed by a policy of continuing to support arbitrary action violating constitutional rights.

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283 See text accompanying notes 190-232 *supra*.

284 See text beginning at note 108 *supra*.

285 See, e.g., text beginning at note 236 *supra*.

286 See note 232 & accompanying text *supra*.

Accordingly, when considering issues involving military control over the lives of its members, a federal court should begin its analysis assuming that the prevailing civilian standard applies to the military. Given that assumption, the court should assign the burdens of going forward and proof on the existence of military necessity to the Government. Courts should be cognizant that the burdens' measure is as important as its allocation. In the past, too many courts, military and civilian, have accepted the Government's vague, general claims that the military is a society apart. Federal courts should demand more precise argumentation; they should insist that the Government articulate and substantiate the specific military interest which allegedly precludes the application of the particular civilian legal standard in question.

Obviously, the court faces a difficult task in evaluating the Government's factual showing to decide whether the Government has sustained its burdens. In some cases, such as drug abuse programs, the Government's claim of military necessity rests on its assertion that the military is experiencing an acute disciplinary problem. In such cases, the court should demand (1) a quantitative showing of the dimensions of the problem and (2) comparative military-civilian statistics. In other cases, such as in the first amendment area, the asserted government interest is more intangible, and the court faces the Solomonian task of assessing the weight of a government interest defying quantification. Certainly the court should be sympathetic to government assertions of intangible military interests during wartime, especially if the particular case arises in a combat zone. But placing the burden on the military will help to ensure that constitutional standards are accorded due respect.

There are doubtlessly those who will dispute the wisdom of this approach. Military traditionalists may argue that this analytic framework would bring disaster to the military by undermining discipline. That fear is overstated. In the first place, the recent trend in federal civilian decisions has been markedly favorable to the military. That trend bespeaks the federal judiciary's appreciation of military needs and its genuine reluctance to interfere in military matters except as a last resort. Secondly, as witnessed in many of the fields this article has reviewed, on its own initiative the military has begun to civilianize itself. Increasingly military decision-makers are questioning the assumption that given differences between military and civilian practices are defensible. Recent changes in policies regarding nonstigmatizing discharges for unsuitable recruits, retention of pregnant servicewomen, and waiver of haircut regulations to recognize religious beliefs prove the military can change without the pressure of congressional or judicial mandate.

The military community has long viewed itself as the guardian of civilian citizens' liberties. The military must now develop a broader view of its guardian role. For better or worse, the civilian courts have chosen to grant the military wide authority over servicemen's constitutional rights. The military must remember that, although in many respects it will always remain a society apart, the men and women filling its ranks are members of American society and, therefore, generally entitled to exercise the same civil liberties they have sworn to defend with their lives.