MILITARY LAW REVIEW

Volume 184 **Summer 2005**

SPIT AND POLISH: A CRITIQUE OF MILITARY OFF-DUTY PERSONAL APPEARANCE STANDARDS

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The essence of military service "is the subordination of the desires and interests of the individual to the needs of the service."[1]

I. Introduction

The U.S. military has tremendous discretion to regulate service members' on-duty appearance. Historically, this discretion has extended both to a service member's on-duty personal appearance and to his uniform appearance.[2] From regulating a service member's hair length

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[1] Parker v. Levy, 475 U.S. 503, 507 (1986) (quoting Orloff v. Willoughby, 345 U.S. 83, 92 (1953)).

[2] *See, e.g.*, U.S. DEP'T OF ARMY, REG. 670-1, WEAR AND APPEARANCE OF ARMY UNIFORMS (3 Feb. 2005) [hereinafter AR 670-1]; U.S. DEP'T OF NAVY, UNIFORM REGS. (Jan. 2005) [hereinafter NAVY UNIFORM REGS.]; U.S. DEP'T OF AIR FORCE, INSTR. 36-2903, DRESS AND PERSONAL APPEARANCE OF AIR FORCE PERSONNEL (29 Sept. 2002) [hereinafter AFI 36-2903]; U.S. MARINE CORPS, ORDER P1020.34G, MARINE CORPS UNIFORM REGULATIONS (31 Mar. 2003) [hereinafter MARINE CORPS ORDER].

and style,[3] to regulating weight,[4] the military has a latitude unequalled in the civilian sector to dictate "appropriateness" in the context of on-duty physical appearance.

Arguably, the American public has been conditioned to stereotypical depictions of what it means to "be" a member of the armed forces, as projected in the media.[5] For instance, Marine Corps commercials routinely feature images of clean-cut recruits striving to be one of "The Few, The Proud."[6] Conversely, negative public perceptions, such as those of male service members as "extremists,"[7] or those of female service members as "butch,"[8] also are prevalent.

What it means to "be" a service member has changed dramatically over the years, as more emphasis on personal freedoms and individuality[9]

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[3] *See, e.g.*, AR 670-1, *supra* note 2, para. 1-8 (dictating hair length for Army members).

[4] *See, e.g.*, U.S. DEP'T OF ARMY, REG. 600-9, THE ARMY WEIGHT CONTROL PROGRAM (1 Sept. 1986) (prescribing weight standards for Army members).

[5] *See, e.g.*, Dr. John Hillen, *The Gap Between American Society and its Military: Keep It, Defend It, Manage It*, 4 J. NAT'L SEC. L. 151, 165 (2000) (describing three recently-released Hollywood motion pictures as examples of America's "thirst" for celebration of American military culture). Dr. Hillen posits the notion that the American public would welcome an Army recruiting campaign equating the physical portrayal of today's Soldier with the heroic Soldiers depicted in the movie *Saving Private Ryan*. *Id*.

[6] *See, e.g.*, Paula Span, *The Marines Go Medieval*, WASH. POST MAG., Mar. 22, 1992, at 25; *see also* Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 501 (1991) (noting that because the armed forces are the nation's preeminent symbol of power, it is not surprising that "the Marines are looking for a few good men").

[7] For instance, former Assistant Secretary of the Army Sarah Lister publicly labeled members of the Marine Corps "extremists" due to their marked difference from the rest of American society. *See* Sydney J. Freedberg, Jr., *Taking Aim at GI Jane*, 30 NAT'L J. 590, 590 (1998) (quoting Ms. Lister as stating that "[t]he Marines are extremists . . . . The Marine Corps is – you know – they have all these fancy uniforms and stuff."); *see also* Hillen, *supra* note 5, at 156 (describing the furor over Ms. Lister's remarks); Valorie K. Vojdik, *Gender Outlaws: Challenging Masculinity in Traditionally Male Institutions*, 17 BERKELEY WOMEN'S L.J. 68, 116 (2002) (describing the nearly shaved style of haircut popular in the U.S. Army Ranger Regiment as "a symbol of hypermasculinity").

[8] *See, e.g.*, Vojdik, *supra* note 7, at 116 (noting that women with short haircuts often are considered less feminine, and even to be lesbians).

[9] *See generally* Jane McHugh, *Baldness is Authorized*, ARMY TIMES ARCHIVE (Jan. 21, 2002), *available at* www.armytimes.com/archivepaper.php?f=0-ARMYPAPER-698421.php (noting that the evolution of "hip hop" and rap cultures has greatly influenced the personal appearance expectations of the pool of military recruits); *see also* Emanuel Gonzales & Macarena Hernandez, *Army Could Loosen Regs Just a Hair*, SAN ANTONIO EXPRESS-NEWS, Jan. 9, 2002, at 1A (quoting Army spokeswoman Martha Rudd as describing the Army's justification in amending its regulation governing personal

has infiltrated military culture.[10] This change is embodied in the Army's 2001 adoption of the slogan "An Army of One," which emphasized—even if unintentionally—individual achievement and self-fulfillment,[11] perhaps at the expense of teamwork and unity.[12] By increasingly tolerating—and even welcoming—aspects of individuality in its ranks,[13] the military must anticipate that evolving social norms will manifest themselves through the physical appearance of service members.[14]

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appearance because the Army is "trying to be a lot more politically correct . . . and . . . more considerate of cultural and ethnic backgrounds").

[10] *See, e.g.*, Jonathan Turley, *The Military Pocket Republic*, 97 NW. L. REV. 1, 65-66 (2002) (describing a post-World War II study that recommended sweeping reforms in the officer-enlisted ranks to eliminate the Army's "caste" system). For an excellent discussion of the effects of emphasizing individuality in the military ranks, see Hillen, *supra* note 5, at 160. Hillen relates that, following the end of the Vietnam War, the military voluntarily altered its slogan to "Today's Army Wants to Join YOU" in an effort to "make itself look enough like the drug-plagued, race-troubled, 'question-authority!' American society at large in order to attract some volunteers." *Id*. In the early 1980s, the military dropped this disastrous slogan and replaced it with its "Be All that You Can Be" slogan. *Id*. This, according to Hillen, immediately preceded the United States' rise as the pre-eminent military power in the world. *Id*.

[11] *See generally* Thomas W. Evans, *The Wrong Campaign: Army's Latest Ad is Poor Recruiter*, ADVERTISING AGE, Jan. 29, 2001, at 28 (describing the relative inefficacy of the Army's changed recruiting slogan); *see also* Matt Labash, *The New Army: Be Whatever You Want to Be*, WKLY. STANDARD, Apr. 30, 2001, at 20 (describing the Army's "desperate" attempt to lure more recruits in an era in which it suffers from an "identity crisis"). The Army introduced its "Army of One" recruiting slogan in January 2001. *See* George Coryell, *'Army of One' Defends Ad Spots*, TAMPA TRIB., May 6, 2001, at 1.

[12] *See* Coryell, *supra* note 11, at 1 (describing the Army's new advertising campaign as abandoning the former themes of unity and cohesion).

[13] "Army officials say that, just as fashion trends in the civilian world evolve into mainstream culture, the Army must adapt as well." Sean Gill, *Being All They Can Be, but with Individuality*, L.A. TIMES, Jan. 27, 2000, at 30.

[14] "A quick survey of recent cultural criticism reveals commonly accepted characterizations of contemporary society – narcissistic, morally relativist, self-indulgent, hedonistic, consumerist, individualistic, victim-centered, nihilistic, soft, etc." Hillen, *supra* note 5, at 155 (citing A.J. Bacevich, *Tradition Abandoned: America's Military in the New Era*, NAT'L INTEREST, Summer 1997, at 22). Dr. Hillen also notes that critics have likened American culture today as one marked by "narcissism, relativism, and 'culture of complaint.'" *Id.* at 163. Applying this fatalistic view to the potential pool of current American military recruits, one commentator notes that "in the era of the all-volunteer force, as the armed services seek to induce talented, educated, upward mobile youths to choose a military career, exclusive reliance on 'duty, honor, country' has waned." C. Thomas Dienes, *When the First Amendment is Not Preferred: The Military and Other 'Special Contexts'*, 56 U. CIN. L. REV. 779, 825 (1988).

Predictably, the military's quest to permit more individual identity within its ranks has led service members to "individualize" their bodies, in much the same way that American society at large has done.[15] Thus, the military must prepare to encounter evolving societal trends within its ranks, including those of acceptable male and female appearance,[16] and those unique to particular American subcultures.[17]

Courts recognize the right to "individualize" one's body appearance as a liberty interest under the U.S. Constitution.[18] From cases involving

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[15] For an excellent description of this trend, see generally Major L.M. Campanella, *The Regulation of "Body Art" in the Military: Piercing the Veil of Service Members' Constitutional Rights*, 161 MIL. L. REV. 56 (1999) (describing the then-recent recent phenomenon of "body art").

[16] For example, young people have taken to affixing one or more gold teeth, or "grills," over their natural teeth. *See* Lynn Porter, *St. Pete Police Chomp Owner of Teeth Shop*, TAMPA TRIB., June 5, 2003, at 1. Alternatively, they may bond diamonds to their teeth using epoxy. *Id.* Moreover, the practice of "tongue splitting," in which people have their tongues surgically split down the middle to produce a "forked" appearance, is increasingly popular. *See* Bryan Smith, *Tongue-Splitting Ban Slices its Way Through Legislature*, CHI. SUN-TIMES, May 1, 2003, at 5. Finally, in addition to physically altering the appearance of one's body, emerging trends in dress are prevalent. For instance, the recent trend of wearing "low riding" or "hip hugging" jeans has caused controversy, especially in educational institutions. *See, e.g.*, Lisa Lenoir, *Jeans: How Low Can They Go?,* CHI. SUN-TIMES, Aug. 5, 2003, at 42. For a description of other such trends, see generally Campanella, *supra* note 15, at 61-66 (describing tattoos, brands, and various forms of body piercing).

[17] One example of such appearance trends is the braided, or "corn row" hairstyle that is popular and prevalent in the African-American community. This hairstyle consists of thin, tightly knitted braids hugging the scalp, and often includes adornment with beads. *See* Ruth M. Bond, *The Cornrow Tangle*, WASH. CITY PAPER, Oct. 4, 1991, at 8. African-Americans, for example, often find braided hairstyles easier to maintain and reflective of their cultural heritage. *See* Michelle L. Turner, *The Braided Uproar: A Defense of My Sister's Hair and a Contemporary Indictment of* Rogers v. American Airlines, 7 CARDOZO WOMEN'S L.J. 115, 132-33 (2001). In *Rogers v. American Airlines, Inc*., for instance, an African-American woman unsuccessfully challenged the airline's prohibition against braided hairstyles, asserting that she should be permitted to identify with traditional cultural symbols of the African-American community. 527 F. Supp. 229, 231-32 (S.D.N.Y. 1981).

[18] *See, e.g.*, Neinast v. Bd. of Trs., 346 F.3d 585, 595 (6th Cir. 2003) (noting "a considerable body of precedent" revealing the existence of a liberty interest in personal appearance); Grusendorf v. City of Oklahoma City, 816 F.2d 539, 542-43 (10th Cir. 1987) (recognizing a liberty interest in firefighter trainees' right to smoke when off duty); DeWeese v. Town of Palm Beach, 812 F.2d 1365, 1367 (11th Cir. 1987) (noting the Eleventh Circuit's recognition of a liberty interest in citizens' rights to choose their mode of hair grooming); Domico v. Rapides Parish Sch. Bd., 675 F.2d 100, 101 (5th Cir. 1982) (finding a liberty interest in choice of hair style); Pence v. Rosenquist, 573 F.2d 395, 399 (7th Cir. 1978) (noting the Seventh Circuit's finding of a liberty interest in public school students' rights to control personal appearance); *see also* Kelley v. Johnson, 425 U.S.

choice of clothing[19] to cases involving choice of hairstyle,[20] courts continuously have acknowledged individuals' rights to express themselves "in a veritable fashion show of factual scenarios."[21]

In the late 1990s, the Department of the Army confronted a mounting controversy regarding Soldiers' self-decoration propensities.[22] The Army addressed and attempted to resolve, through a series of three Army-wide messages, specific issues regarding the propriety of certain tattoos and body piercings.[23] Legal commentary has examined the military's authority to regulate service members' on-duty appearance in the context of "body art," including tattoos and body piercings.[24] That commentary concluded that regulating the natural appearance of an on-

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238, 244 (1976) (assuming that the citizenry at large possesses a liberty interest in personal appearance).

[19] *See, e.g.*, *DeWeese*, 812 F.2d at 1367 (finding unreasonable a blanket prohibition on shirtless jogging).

[20] *See, e.g.*, *Domico*, 675 F.2d at 101 (declaring "a constitutional liberty interest in choosing how to wear one's hair").

[21] Zalewska v. County of Sullivan, N.Y., 316 F.3d 314, 321 (2d Cir. 2003).

[22] *See* Campanella, *supra* note 15, at 61-66 (describing the Army's response to an alleged white supremacist killing near Fort Bragg, North Carolina, in which a soldier's alleged motivation in committing the act was to obtain a spider web tattoo on his elbow).

[23] Message, 051601Z, Jun 98, Dep't of Army, DAPE-HR-PR, subject: Wear and Appearance of Army Uniforms and Insignia [hereinafter June Uniform Message]; Message, 241710Z Aug 98, Dep't of Army, DAPE-HR-PR, subject: Wear and Appearance of Uniforms and Insignia, AR 670-1 [hereinafter August Uniform Message]; Message, 310609Z, Dec 98, Dep't of Army, DAPE-HR-PR, subject: Administrative Guidance to Army Tattoo Policy in Accordance with AR 670-1 [hereinafter December Uniform Message]. These Department of Army Messages detailed several interim changes to Army Regulation 670-1, the then-current Army regulation governing personal appearance. The first message, published in June 1998, prohibited all body piercings while soldiers were in uniform, except for earrings for females, as for which the then-current regulation already provided. June Uniform Message, *supra*. Regarding tattoos, the message prohibited "visible tattoos or brands on the neck, face or head . . . ." *Id.* The message also prohibited tattoos anywhere else on a soldier's body that would be "prejudicial to good order and discipline . . . ." *Id*. The second message, published two months later in an attempt to clarify the earring restrictions contained in the first message, prohibited male soldiers from wearing earrings while on a military installation, whether on or off-duty. August Uniform Message, *supra*. In December 1998, the Army published a third message, clarifying particulars regarding the tattoo guidance the first message contained. December Uniform Message, *supra*. This message reinforced that the Army tattoo policy did not contain a clause providing exceptions for service members who obtained tattoos before the effective date of the policy. *Id*.

[24] *See* Campanella, *supra* note 15, at 58. Major Campanella defines "body art" as "the different methods a person may use to change the natural appearance of his body through various 'additions.'" *Id*. at 59. Included in the rubric of body art are tattoos, body piercings, and brands. *Id*.

duty service member's body, insofar as it furthers "legitimate military interests" such as protecting a "soldierly appearance," is constitutional.[25] That commentary, however, specifically did not determine whether, or to what extent, the military rightfully may regulate service members' off-duty physical appearance.[26]

In February 2005, the Army published a new version of its regulation regarding uniforms and personal appearance standards.[27] The regulation governs Soldiers' general on- and off-duty appearance, and incorporates much of the Army's previous interim guidance regarding the regulation of Soldiers' body art.[28] To some extent, promulgation of the new regulation lays to rest many of the controversies regarding regulation of Soldiers' body art, at least while they are on duty. Unfortunately, the regulation continues to provide only cursory guidance regarding Soldiers' general off-duty appearance.[29]

The Army is not alone. The Marine Corps,[30] Navy,[31] and Air Force[32] regulations also contain provisions that offer vague guidance, at best, regarding off-duty appearance standards. Such guidance may consequently impinge improperly on service members' individual liberties. For example, what does it mean to avoid "eccentricities" in civilian dress while off duty?[33] A Marine who does not know is subject to potential punishment under the Uniform Code of Military Justice (UCMJ).[34] Or, is it rational for the Navy to prohibit male off-duty Sailors from wearing an earring on a military installation, when they can don one as soon as they enter the civilian community for an evening out?[35] Finally, is it a valid military concern whether or not service

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[25] *See id*. at 113-14.

[26] *Id*. at 94. ("To what extent the military can lawfully control a soldier's physical appearance off-duty, while not in uniform, is a question that remains unanswered.").

[27] *See* AR 670-1, *supra* note 2, at i. The regulation, dated 3 February 2005, became effective on 3 March 2005. *Id*.

[28] *See id.* para. 1-8 (regulating the style and placement of soldiers' tattoos).

[29] For example, the regulation dictates that "[s]oldiers must take pride in their appearance at all times, in or out of uniform, on and off duty." *Id.* para. 1-7.

[30] MARINE CORPS ORDER, *supra* note 2.

[31] NAVY UNIFORM REGS., *supra* note 2.

[32] AFI 36-2903, *supra* note 2.

[33] *See infra* note 46 and accompanying text (describing the Marine Corps' prohibition on "eccentricities" in appearance when Marines are dressed in civilian attire).

[34] *See infra* note 91 and accompanying text (describing the punitive nature of the Marine Corps regulation).

[35] *See infra* note 58 and accompanying text (noting the Navy regulation's delineation between male members' on- and off-installation wear of earrings).

members—in the privacy of their homes on a military installation—adhere strictly to off-duty personal appearance standards?[36]

Courts and commentators generally are loath to question the military services' authority, in furtherance of the services' maintenance of discipline and unity, to prescribe a service member's personal appearance while in uniform. Rather than delving into such a well-established area, this article analyzes the extent to which the military properly may—or should—regulate off-duty "personal appearance."[37]

The concept of "personal appearance" consists of "a set of meanings and understandings that are socially constructed."[38] Put bluntly, combining or altering dress items or accoutrements such as jewelry, or even adopting certain hairstyles, often help to express self-identity.[39] Such appearance choices may pose great risks to service members, for appearance standards have the perhaps unintended effect of empowering those in a position of authority to enforce stereotypes, and to discourage deviation from accepted institutional or social norms. [40]

At one extreme, the result may be criminal or administrative punishment for those service members who deviate from traditionally acceptable off-duty appearance standards that military regulations establish.[41] At the other extreme, courts may reject a military

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[36] *See infra* Part VI.B.1 (discussing off-duty, on-installation appearance standards and their potential to impact on service members who reside on military installations).

[37] The term "personal appearance" imports different meanings, depending on the context. For instance, it may refer to innate, physical characteristics, such as choice of hair style or the presence or absence of facial hair. It may refer to attempts to alter innate physical characteristics, through brandings, piercings or other "body art." It may also refer to mode of dress. For instance, the choice of clothing color or style also constitutes an appearance "choice." This article incorporates under the rubric of "personal appearance" the following: piercings, tattoos, and "body art;" hairstyle; facial hair; and mode of dress.

[38] Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395, 1408 (1992). "Social construction" refers to individuals' actions, in a cultural context, involving the creation of symbols, meanings, understandings and beliefs. *Id*. at 1407. "Dress and appearance practices can be understood as one type of meaning-creating human action situated within cultural context." *Id*. at 1408.

[39] *Id*. at 1408-09.

[40] *See id*. at 1398 ("The primary social function of appearance law is to empower employers, school officials, judges, and other authority figures to enforce the dominant expectations about appearance and to discipline deviance from the approved social norms.").

[41] *See infra* text accompanying notes 141-48 (describing one Marine's punishment for violating a Marine Corps regulation governing personal appearance).

commander's attempted enforcement of his own brand of "style," which the commander predicates on a misinterpretation of regulatory standards.[42] Such judicial determinations thus may undermine the perceived legitimacy of military command authority. In this sense, then, the stakes are high: regulation of off-duty appearance in the military implicates encroachment on individual liberties, as well as preservation of the military's institutional legitimacy in regulating certain aspects of service members' private lives.

In exploring the military's right to enforce off-duty appearance standards, one must understand what empowers the military to dictate the meaning of "being" and "looking like" a service member. This article examines military culture, in the context of the military as a supposed "separate society." Acknowledging that the military is, in some respects, a separate society, this article next explores what it means to "be" and "look like" a military service member, at least in the armed forces' opinion.[43]

This article next examines the constitutional implications of enforcing what it means to "be" a service member. The military's interest in promoting "order and discipline," *esprit*, and a positive public image sometimes conflicts with service members' liberty interests and personal freedoms. This article concludes that there is great potential for the military to enact vague standards for off-duty appearance, to enforce those standards arbitrarily, and to perpetuate irrational stereotypes of what it means to maintain a "soldierly appearance" out of uniform. The military properly can do so only where important military interests justify it, and where regulations are narrowly tailored.

After examining the feasibility of employing Department of Defense (DOD)-wide policies applicable to common aspects of service members' off-duty appearance, this article recommends an approach requiring the military to employ time, place, circumstances, and purpose criteria when evaluating the majority of off-duty appearance issues. A natural

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[42] *See infra* note 356 and accompanying text (describing the Military Court of Appeals' rejection of a commander's restrictive interpretation of an appearance provision regarding hair length).

[43] As Professor Klare observes, "[t]here is, for example no natural meaning to 'looking like a woman' or to 'appearing like an African-American male.'" Klare, *supra* note 38, at 1408. One might view, therefore, societal or institutional acceptance of appropriate "personal appearance" standards as dependent on and constrained by societal or institutional attitudes toward appearance.

consequence of this proposal might be the military's ability to regulate more closely off-duty appearance standards when the service member is on a military installation, based on the military's heightened interest in regulating activities under its physical jurisdiction. This article also recommends that the military more fully articulate standards of acceptable appearance, in order to avoid constitutional issues of vagueness.

II. The "Nonuniformity" of Off-Duty Military Appearance Standards

Each branch of the uniformed services has enacted rather recent appearance regulations.[44] Each regulation addresses off-duty appearance in the larger context of regulating service member uniform and dress policies. The four regulations differ significantly regarding the extent to which each branch regulates off-duty appearance. By promoting different interests and emphasizing different aspects of off-duty appearance, the uniformed services' regulations governing off-duty appearance are strikingly nonuniform. Rather than examining each service's regulation in a vacuum, this part compares and contrasts the current regulations according to five off-duty criteria: general guidelines, on- and off-installation applicability, civilian clothing, body alteration and enforcement mechanisms.

A. General Guidelines

Each of the regulations speaks, in one form or another, of the need for service members to present a respectable appearance, whether on or off duty. The Marine Corps regulation dictates that "Marines will present the best possible image at all times."[45] It further prohibits "eccentricities"[46] in appearance when in civilian attire, requiring Marines to ensure their personal appearance and dress is "conservative and

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[44] The Army enacted the most recent version of its regulation in February 2005. *See* AR 670-1, *supra* note 2. The Marine Corps enacted the most recent version of its order in 2003, while the Air Force enacted the most recent version of its regulation in 2002. *See* AFI 36-2903, *supra* note 2; MARINE CORPS ORDER, *supra* note 2. In January 2005, the Navy enacted the most recent version of its regulation. *See* NAVY UNIFORM REGS., *supra* note 2.

[45] MARINE CORPS ORDER, *supra* note 2, para. 1004(1).

[46] *Id*. para. 1005(2). The regulation does not define or provide examples of such "eccentricities."

commensurate with the high standards traditionally associated with the Marine Corps."[47]

The Air Force does not distinguish between on- and off-duty appearance, dictating only that its members will "present the proper military image"[48] and noting that an installation commander may prohibit "offensive . . . personal grooming."[49] The Navy simply provides that "those whose appearance may bring discredit upon the Navy"[50] may lose the privilege of wearing civilian clothing. The Army urges Soldiers to "take pride in their appearance at all times, in or out of uniform"[51] and to present "a neat and soldierly appearance."[52]

Not surprisingly, these guidelines provide little concrete guidance to service members or commanders regarding the manner, style or appropriateness of off-duty dress and appearance. The ramifications for those who do not adhere to these guidelines—whether intentionally or not—may include punishment for failing to understand "conservative" or "eccentric" in the same manner as those charged with enforcing the regulations.[53]

B. On-Post Versus Off-Post Applicability

Most branches of the military draw distinctions between standards of off-duty appearance, depending on whether their members are on or off of an area under military jurisdiction. The Marine Corps regulation is the exception, however; it draws no distinction between on- or off-post applicability.[54]

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[47] *Id.* The regulation does not define or provide guidance regarding what types of clothing are "conservative."

[48] AFI 36-2903, *supra* note 2, tbl. 2.5. The regulation does not define what constitutes a "proper military image."

[49] *Id*. tbl. 1.1.

[50] NAVY UNIFORM REGS., *supra* note 2, para. 7101(1).

[51] AR 670-1, *supra* note 2, para. 1-7a.

[52] *Id*. The Army regulation does not further define what constitutes "neat and soldierly" in this context.

[53] *See infra* Part II.E (discussing the service regulations' enforcement measures).

[54] MARINE CORPS ORDER, *supra* note 2, para. 1005(2) ("Marines are associated and identified with the Marine Corps in and out of uniform, and when on or off duty.").

The Air Force regulates body piercing, when off-duty and on a military installation.[55] One might rationally infer, therefore, that the regulation does not regulate off-duty, off-installation body piercings. The Air Force also prohibits "body alterations or modifications"[56] which detract "from a professional military image."[57] The Air Force draws no distinction between such alterations and modifications, on- or off-installation, implying that the Air Force prohibits them even if off-duty and not on a military installation.

The Navy draws only two distinctions between on- and off-installation appearance. First, where Navy personnel are on a military installation, only females may wear earrings, and neither males nor females may wear body piercings in other parts of their body.[58] Second, the Navy forbids the wear, on any military installation as well as anywhere else where such wear would discredit the Navy, of clothing, jewelry or tattoos depicting a controlled substance or advocating drug use.[59]

The Army prohibits males from wearing earrings while off-duty and on an "Army installation or other places under Army control."[60] The Army also prohibits males and females from wearing any other body

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[55] AFI 36-2903, *supra* note 2, tbl. 2.5. The Air Force regulation states: "*Off Duty on a military installation:* Members are prohibited from attaching, affixing or displaying objects, articles, jewelry or ornamentation to or through the ear, nose, tongue or any exposed body part . . . ." *Id*.

[56] *Id*. The regulation defines such "alteration or body modification" as those that present a "visible, physical effect that disfigures, deforms or otherwise detracts from a professional military image." *Id*. tbl. 2.5 n.1. The regulation provides examples such as, but not limited to, "tongue splitting or forking, tooth filing and acquiring visible, disfiguring skin implants." *Id*.

[57] *Id*. tbl. 2.5. This prohibition is logical, in that such "alterations" and "modifications" to which the Air Force refers—tongue splitting and tooth filing, for instance—constitute permanent or semi-permanent alterations to the Air Force member's body that cannot be changed when the member returns to duty and to uniform.

[58] NAVY UNIFORM REGS., *supra* note 2, paras. 7101(4)-(5). This applies regardless whether clothing conceals the piercings. *Id*. The restrictions on earring wear and body piercings also apply to Navy personnel "participating in any organized military recreational activities." *Id*. para. 7101(4)-(5). By its terms, the Navy regulation makes no exception for recreational activities that take place off a military installation.

[59] *Id*. para. 7101(3).

[60] AR 670-1, *supra* note 2, para. 1-14(c). The plain meaning of this provision implies that it is inapplicable to Army Soldiers on a Navy base or other armed service installation not under Army control.

piercing on an Army installation, except that females have no off-duty restriction on their wear of earrings.[61]

C. Off-Duty Civilian Clothing

The Marine order permits Marines to wear civilian clothing, in accordance with dress standards that are "conservative"[62] and not "eccentric."[63] Curiously, the Marine Corps' punitive[64] order specifically bans the wear of clothing that is "not specifically designed to normally be worn as headgear (*e.g.*, bandannas, doo rags)[,]"[65] but otherwise does not mention articles of clothing.

The Air Force regulation notes only that installation commanders may prohibit "offensive civilian clothes" based on safety, legal, sanitary, and moral grounds.[66] The Navy forbids civilian clothing if a sailor's appearance would discredit[67] the Navy, requiring that sailors' dress and personal appearance be "appropriate for the occasion" and "conservative and in good taste."[68] Specifically, the Navy forbids the wear of clothing or jewelry, while on a military installation or in any circumstance likely to discredit the Navy, that depict a controlled substance or advocate drug use.[69] The Army regulation simply permits the wear of civilian clothing when off duty, unless prohibited by certain commanders.[70] It provides

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[61] *Id.*; *see also id.* para. 1-14(d)(3) (providing that "[w]hen females are off duty, there are no restrictions on the wear of earrings"). Like the Army provision regarding male Soldiers' wear of earrings, *see supra* note 60 and accompanying text, this provision's plain meaning apparently makes it inapplicable to Soldiers who wear such piercings on a military installation not under Army control.

[62] MARINE CORPS ORDER, *supra* note 2, para. 1005(2)(a).

[63] *Id.*

[64] *See infra* text accompanying note 91 (discussing the Marine Corps regulation's punitive provisions for violation of any of its terms).

[65] *Id.* para. 1005(2)(d).

[66] AFI 36-2903, *supra* note 2, tbl. 1.1. The Air Force regulation provides no guidance regarding what clothing may be "offensive" in this context.

[67] NAVY UNIFORM REGS., *supra* note 2, para. 7101(1).

[68] *Id.* para. 7101(2).

[69] *Id.* para. 7101(3).

[70] AR 670-1, *supra* note 2, para. 1-13. Commanders who may restrict such wear are installation commanders within the United States, and Major Command commanders overseas. *Id.*

no context in which to judge the appropriateness of civilian clothing, other than the general guidance on overall appearance.[71]

D. Body Alterations

The Marine Corps prohibits any "mutilation" of body parts,[72] the display of "objects, articles, jewelry or ornamentation" on the skin or tongue (except for females' wear of earrings)[73] and tattoos or brands on the neck or head.[74] It also prohibits tattoos or brands on other parts of the body that undermine good order, discipline, and morale or that would "discredit" the Marine Corps.[75]

The Air Force prohibits body piercings through any exposed body part, including the tongue, except for females' wear of earrings.[76] This provision applies while Airmen are on duty, regardless of location, and when they are off duty and on a military installation.[77] The Air Force also prohibits "body alteration or modifications" resulting in a visible, physical effect that detracts from a professional military image.[78] The Air Force forbids certain tattoos and brands, both in and out of uniform.[79] The Air Force also forbids "excessive"[80] tattoos or brands, not otherwise prohibited, that detract from an "appropriate military image"[81] while in uniform. The regulation is silent regarding Air Force members' out-of-uniform display of tattoos or brands.

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[71] *See id*. para. 1-7 (urging soldiers to project a "conservative military image" and providing that "in the absence of specific procedures or guidelines, commanders must determine a [S]oldier's compliance with standards").

[72] MARINE CORPS ORDER, *supra* note 2, para. 1004(1)(a). The regulation does not define "mutilation."

[73] *Id.* para. 1004(1)(b).

[74] *Id*. para. 1004(1)(c).

[75] *Id*. The regulation does not provide examples of such tattoos or brands.

[76] AFI 36-2903, *supra* note 2, tbl. 2.5. The regulation provides that females' earring piercings "should not be extreme or excessive." *Id*.

[77] *Id*.

[78] *Id.* These include such alterations as "tongue splitting or forking, tooth filing and acquiring visible, disfiguring skin implants." *Id*. n.1; *see supra* note 16 (describing the practice of "tongue forking").

[79] The regulation prohibits tattoos or brands that are obscene; advocate sexual, racial, ethnic or religious discrimination; and those that are prejudicial to good order and discipline or otherwise would discredit the Air Force. AFI 36-2903, *supra* note 2, tbl. 2.5.

[80] *Id*.

[81] *Id*.

The Navy regulation forbids males to wear earrings while male members are concurrently on a military installation and off duty, as well as when they participate in organized military recreational activities, regardless of location.[82] It also forbids other body piercings, except for females' wear of earrings, on any other part of the body while Navy members are on a military installation or when they participate in an organized military recreational activity, regardless of location.[83] Moreover, the Navy forbids its members to have any tattoo or brand on their faces or necks, and other tattoos or brands anywhere else on their bodies that are "prejudicial to good order, discipline and morale" or that may "bring discredit" upon the Navy.[84] Finally, the Navy forbids body piercings, mutilations or brands that are "excessive or eccentric,"[85] as well as the use of gold, platinum or other veneers or caps for purposes of tooth ornamentation.[86] Regarding the prohibitions on piercings, mutilations, brands, and tooth ornamentations, the pertinent Navy regulatory provisions do not specifically differentiate between on- and off-installation scenarios, implying that these are blanket prohibitions.

The Army prohibits a wide variety of tattoos or brands.[87] It also prohibits male Soldiers from wearing earrings on an Army installation,[88] as well as the wear of all other body piercings (except for females' wear of earrings) on an Army installation.[89] The Army regulation is silent

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[82] NAVY UNIFORM REGS., *supra* note 2, para. 7101(4).

[83] *Id*. para. 7101(5).

[84] *Id*. para. 7101(6). Specifically, the Navy prevents tattoos, body art or brands that are "excessive, obscene, sexually explicit or advocate or symbolize sex, gender, racial, religious, ethnic or national origin discrimination." *Id*. Additionally, the Navy forbids tattoos, body art or brands "that advocate or symbolize gang affiliation, violence, supremacist or extremist groups, or drug use." *Id*.

[85] *Id*. para. 7101(7). Examples of such forbidden piercings or mutilations include tongue splitting and intentional scarring of the neck, face or scalp. *Id*.

[86] *Id*. para. 7101(8). "Teeth, whether natural, capped or veneer, will not be ornamented with designs, jewels, initials etc." *Id*.

[87] The Army prohibits those brands or tattoos that are extremist, indecent, sexist or racist, regardless of where on the body they are located. AR 670-1, *supra* note 2, para. 1-8(e)(2). The Army also prohibits those that are visible when the Soldier wears the Army's Class A green dress uniform. *Id*. para. 1-8(e)(1).

[88] *Id*. para. 1-14(c).

[89] *Id*. To this end, the Army regulation provides that "[t]he term 'skin' is not confined to external skin, but includes the tongue, lips, inside the mouth, and other surfaces of the body not readily visible." *Id*.

regarding the relatively recent phenomena of tongue splitting and tooth capping.[90]

E. Enforcement Criteria

Only the Marine Corps and Air Force regulations provide punitive measures for violations. The Marine Corps is the most draconian of all the service regulations, permitting criminal or nonjudicial punishment for violations of any provision.[91] The Air Force regulation permits punishment only for violations of its body alteration, tattoo and brand, and body piercing policies.[92] Neither the Army nor Navy regulations provide for punishment for *per se* violations, although the Navy regulation requires geographic Navy commanders to implement and publish uniform guidelines that "must be punitively enforceable with the force of a general order."[93] Punishment for a violation of the Army regulation must be based on a violation of a lawful order to comply with the regulation or, as with the Navy regulation, based on a violation of a local commander's punitive regulation or policy. The Army regulation, however, does not require commanders to implement punitive regulations or policies.

III. The Military as a "Separate Society"

If a society is slouching towards Gomorrah as some have claimed, must the military slouch along with it?[94]

The answer to this question has, when considered objectively, proven to be a resounding "No." The U.S. military has progressed from the constitutional framers' original concept of a small, necessary evil into a robust agency possessing its own specialized culture and infrastructure.

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[90] *See supra* note 16 and accompanying text (discussing the practice of tongue splitting and tooth decorating); *see supra* notes 78, 85-86 (describing recently-enacted Air Force and Navy policies addressing these recent body alteration phenomena).

[91] MARINE CORPS ORDER, *supra* note 2, para. 1000(9). The punitive provision states that "[v]iolation of the specific prohibitions and requirements . . . may result in prosecution under the Uniform Code of Military Justice . . . ." *Id*.

[92] AFI 36-2903, *supra* note 2, tbl. 2.5; *see also supra* text accompanying notes 76-81 (describing the Air Force body alteration, tattoo and brand, and piercing policies).

[93] NAVY UNIFORM REGS., *supra* note 2, para. 1201(5).

[94] Hillen, *supra* note 5, at 163.

Incorporating over two hundred years of customs and traditions, the U.S. military has, as a professional institution, drifted apart, culturally, from the rest of American society, in some respects.

The military's development of customs and traditions has produced great repercussions for military law; the "specialized society" of the military discourages and even criminalizes many actions that a civilian society, which some view as "slouching toward Gomorrah," believes permissible or otherwise takes for granted. The American judiciary has, to a great extent, been a willing accomplice in the continued bifurcation of military and civilian societies and customs. This part examines the development of a military "society apart" and explores why the military enjoys such great judicial deference in accomplishing its internal goals, including the regulation of its members' dress and appearance.

A. Military and Civilian Cultures: Drifting Further Apart?

The constitutional framers preferred a civilian militia to a standing army because of the restrictions on civil liberties that military culture threatens.[95] Nevertheless, while the framers feared and despised the thought of a standing military,[96] they created it out of necessity, intending that it be no larger than absolutely necessary.[97] Because of this fear the framers ensured effective civilian control over the military by

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[95] *See generally* Stephanie A. Levin, *The Deference that is Due: Rethinking the Jurisprudence of Judicial Deference to the Military*, 35 VILL. L. REV. 1009, 1023-61 (1990) (arguing that the constitutional framers never anticipated the monolithic military establishment that today's armed services represent, and that they preferred to rely on a civilian militia that could maintain both close connections to civilian life and tight protections of individual liberties).

[96] *See generally* Barney F. Bilello, Note, *Judicial Review and Soldiers' Rights: Is the Principle of Deference a Standard of Review?*, 17 HOFSTRA L. REV. 465, 468-71 (1989) (detailing the founders' distrust of a standing army); Katherine Hunt Federle, *The Second Amendment Rights of Children*, 89 IOWA L. REV. 609, 634 (2004) (noting that "[t]he Second Amendment . . . sought to preserve the individual right to self-defense and freedom from tyranny while expressing a preference for a militia over a standing army"); Lieutenant Colonel Michael H. Gilbert, *The Military and the Federal Judiciary: An Unexplored Part of the Civil-Military Relations Triangle*, 8 USAFA J. LEG. STUD. 197, 202-03 (1998) (describing the framers' reluctant creation of a standing army based on their distrust of British forces that previously dominated the colonies).

[97] *See* THE FEDERALIST NO. 46, at 299 (James Madison) (Clinton Rossiter ed., 1961) (noting that James Madison visualized the standing army as being comprised of no more than one percent of the population, and of no more than one-fourth of the population capable of bearing arms).

providing for the executive and legislative branches to oversee and control the military.[98]

For the majority of time from this country's inception to the present, the American military has been characterized as a "small, peacetime, nonsconscripted" one,[99] containing volunteers who view themselves as participants in a unique profession, rather than as indentured servants.[100] Not surprisingly, the development of a professional military has fostered a "cultural and corporate identity"[101] among its members, who view themselves as both the protectors and the "last bastion" of American values.[102] The values that have taken root in this unique "corporate culture," of course, have tended to reflect the values of those who voluntarily entered the military and made it their profession.[103]

What has developed is a "highly centralized and bureaucratic military,"[104] which even the Supreme Court labeled as "a specialized society separate from civilian society."[105] The military, as a profession,

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[98] For example, the framers vested Congress with the power to raise and support armies, maintain a navy, and to regulate the Army and Navy. U.S. CONST. art. I, § 8. The framers gave the President the power of Commander in Chief of the military. *Id*. § 2. For an excellent description of the relationship the framers envisioned between the military, Congress, and the executive branch, see generally Kaylani Robbins, *Framers' Intent and Military Power: Has Supreme Court Deference to the Military Gone Too Far?*, 78 OR. L. REV. 767, 785-89 (1999).

[99] Donald N. Zillman & Edward J. Imwinkelried, *Constitutional Rights and Military Necessity: Reflections on the Society Apart*, 51 NOTRE DAME L. REV. 396, 400 (1976).

[100] *See* Gilbert, *supra* note 96, at 202-03 (describing the transformation of military service from that as involuntary conscription to that of a profession).

[101] Turley, *supra* note 10, at 35.

[102] Gilbert, *supra* note 96, at 205.

[103] *See, e.g.*, Pat Kane, *Ambition Hitting the Glass Ceiling*, GLASGOW HERALD, Aug. 7, 1977, at 17 (describing military members as fighting to maintain the "disciplined, virtuous" military values that they and other military professionals worked so long to develop).

[104] Captain John A. Carr, *Free Speech in the Military Community: Striking a Balance Between Personal Rights and Military Necessity*, 45 A.F. L. REV. 303, 352 (1998). Conversely, Professor Jonathan Turley characterizes the military as more than a mere bureaucracy. According to Professor Turley, the military's system of accountability and hierarchy of "elite quasi-aristocratic" commanders, combined with the inability of individuals to influence local authority, lends itself more to an oligarchic, rather than bureaucratic, model. Turley, *supra* note 10, at 71.

[105] Parker v. Levy, 417 U.S. 733, 743 (1974). Ironically, Professor Jonathan Turley notes that while the constitutional framers repeatedly warned against the development of a "military class" and "separate society" within the larger republic, the Supreme Court consistently attributes its deference to all things "military" as in accordance with the intent of those same framers. *See* Turley, *supra* note 10, at 12.

views itself as requiring a hierarchy of values and a strict internal social structure in order to fulfill its primary mission of warfighting.[106] Not surprisingly, then, the military institutional bias cants toward maximizing the armed services' warfighting effectiveness, at the expense of achieving social goals or accommodating individual desires.[107] The result has been an American military particularly resistant, in many contexts, to social change where it believes such change poses a threat to its mission.[108]

Nevertheless, the notion of the military as a "society apart" arguably has lost much of its persuasiveness, in a purely cultural sense, even as courts continue to affix that label in their written opinions. For instance, in the post-Vietnam War era, the military returned to reliance on an all-volunteer force, and the armed services increasingly compete to recruit and retain a highly-talented and educated citizenry during a period of relative economic prosperity.[109] The armed services increasingly feel compelled to make themselves more attractive to civilians in order to boost recruitment. This was a prime impetus for the new push to tolerate individuality in the ranks, and to "civilianize" the military.[110]

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[106] Hillen, *supra* note 5, at 152-53.

[107] James M. Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C. L. REV. 177, 241-42 (1984).

[108] For example, the Army segregated African-American units until President Truman ordered an end to this policy. *See* STEPHEN A. AMBROSE, *Blacks in the Army in Two World Wars*, *in* THE MILITARY AND AMERICAN SOCIETY 177-91 (Stephen Ambrose ed., 1972). Moreover, the military historically opposed the inclusion of women in combat, and only recently have some combat positions opened to females in the military. *See generally* Steven A. Delchin, United States v. Virginia *and Our Evolving 'Constitution': Playing Peek-a-boo with the Standard of Scrutiny for Sex-Based Classifications*, 47 CASE W. RES. L. REV. 1121, 1135-37 (1997) (describing efforts to open combat positions to female military members); Michael J. Frevola, *Damn the Torpedoes, Full Speed Ahead: The Argument for Total Sex Integration in the Armed Services*, 28 CONN. L. REV. 621, 625 (1996) (describing congressional modification of the combat exclusion rules).

[109] *See, e.g.*, Labash, *supra* note 11, at 20 (describing the military services' increasingly intense competition to attract recruits). Military authorities also cite the U.S. military's continued operations in Iraq and Afghanistan as major reasons for the military's current recruiting shortfalls. *See, e.g.*, Michael Kilian, *Army Sees Continued Slump in Recruiting*, CHI. TRIB., Mar. 24, 2005, at C10 (describing Secretary of the Army Francis Harvey's acknowledgment that "a significant factor in the recruitment failures has been the reluctance of potential recruits' parents to let their children be put in harm's way in the U.S. occupation of Iraq").

[110] *See, e.g.*, Labash, *supra* note 11, at 20 (describing the armed forces' increasing efforts to make themselves more attractive to the "Generation X" recruiting pool).

Moreover, in the decade following the Gulf War the military experienced dual pressures to reform itself and to assimilate itself more fully into American culture—in essence, to make itself "look more like America." First came the predictions of fewer wars to be fought and rapid advances in technology, which implicated the need for a smaller, but more educated, military force.[111] Second, a series of high profile military scandals prompted public pressures to transform military culture into one that, at least facially, reflects more fully the social mores of American society.[112] The result has been a military both more cognizant of the need to reform itself from within,[113] and yet ever more protective of its perceived unique place in society.[114]

This tension between changing societal values and the unique and rather static culture of the military is not surprising.[115] Ample evidence, however, suggests that this tension has failed to impede the military from

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[111] *See generally* Rowan Scarborough, *Troops-Cut Plan Faces Wide Opposition; Civilian Service Secretaries Join Officers to Argue Against Reduction in Forces,* WASH. TIMES, Aug. 13, 2001, at A1 (describing the proposed overhaul of the military in terms of reducing and restructuring Army divisions, Air Force wings, and Navy carrier battle groups).

[112] *See, e.g.*, Kathryn R. Burke, *The Privacy Penumbra and Adultery: Does Military Necessity Justify an Adultery Regulation and What Will it Take for the Court to Declare it Unconstitutional?*, 19 HAMLINE J. PUB. L. & POL'Y 301, 302 (1997) (describing the public's dubious reaction to a thirteen-year-old adultery allegation that forced the retirement of a promising Army general); Hillen, *supra* note 5, at 154 (describing the public's dubious reaction to the Air Force's "Kelly Flinn" affair, involving adultery charges); Valorie K. Vojdik, *The Invisibility of Gender in War*, 9 DUKE J. GENDER L. & POL'Y 261, 268 (2002) (describing the Navy Tailhook incidents of the 1990s that exposed male officer misconduct against their female counterparts).

[113] "Reform," in this context, refers not only to organizational reform in terms of troop restructuring, but also to social reform, in terms of more fully assimilating societal values and norms into aspects of military culture.

[114] For example, the military vehemently opposed the integration of females into combat positions on the ground that doing so would impede its mission, until congress passed legislation that permitted it, in some limited circumstances. *See generally* Pamela R. Jones, *Women in the Crossfire: Should the Court Allow It?*, 78 CORNELL L. REV. 252, 269-70 (1993) (describing congressional legislation in the wake of military opposition to females in combat). Moreover, the military opposed integration of open homosexuals into the military on the ground that it would impede military readiness and, until 1993, continued to ask potential recruits if they were homosexuals. *See generally* Philips v. Perry, 106 F.3d 1420, 1421-23 (9th Cir. 1997) (describing the military's historical opposition to open homosexuals in the ranks and the development of the "don't ask/don't tell" policy).

[115] *See* Hillen, *supra* note 5, at 152 (noting that, historically, the values that have evolved and changed over time in America's liberal democracy have caused the "culture gap" between the military and society to be fluid).

changing from within. The military leadership, when it chooses to do so, often can change the policies and procedures governing the internal workings of the institution, despite the opinions and wishes of lawmakers, the general public, or even its own service members.[116] Should military leaders choose to allow more civilian values to infiltrate military culture, such a policy choice is constrained, to a great extent, only by the intensity with which the leaders pursue that policy objective.[117]

Thus, the notion of the military as a "society apart" relies partially on the premise that military necessity requires the armed services to insulate their members from the rest of society. History reveals, however, that the military adapts very well in the face of the need to be more attuned to societal norms.[118] The "society apart" rationale also posits that the military is unwilling, to a great extent, to change its traditions and customs. Relatively recent events reveal, however, that the armed forces are quite capable of doing this, when they choose to do so.[119] It follows, therefore, that military leaders thus can change policies on off-duty personal appearance, with little fear of opposition outside of the military ranks or the military's civilian leadership. The primary roadblock to enacting such policies emanates from within the military.

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[116] For instance, when the Army decided to outfit its Soldiers with black berets, the traditional headgear of the elite Army Ranger Regiment, the Army Chief of Staff ignored the objections of the Chairman of the Joint Chiefs of Staff, who outranked him but who had no control over such a policy choice. *See* Paul Bedard, *Outlook; Washington Whispers: Beret Mutiny*, U.S. NEWS & WORLD REP., July 23, 2001, at 14; *see generally* Labash, *supra* note 11, at 20 (describing the controversy surrounding the Army's change in beret policies). Additionally, the DOD's current initiative to prevent a mass exodus of service members whose enlistment terms otherwise would allow them to revert to civilian status—"stop loss"—has fostered resentment within the military ranks. *See, e.g.*, Dick Foster, *Troops Feeling Strain: GI Discontent Grows as Uncle Sam Struggles to Find Enough Forces*, ROCKY MOUNTAIN NEWS (Colo.), Nov. 22, 2004, at 5A.

[117] For instance, the Army in the 1990s focused, to a large extent, on sensitization to cultural differences rather than on warfighting. *See generally* Labash, *supra* note 11, at 20 (describing the Army's Consideration of Others training as a top priority of the then-Secretary of the Army). The DOD's civilian leadership, which prioritized such sensitivity training to the alleged detriment of military preparedness, made and enforced this policy choice. *Id*.

[118] *See, e.g.*, Richard Whittle, *Baldness In, Dreadlocks Out: Army Spit-Shines Dress Code*, DALLAS MORNING NEWS, Jan. 8, 2002, at 1A (describing the Army's revision of its personal appearance regulation that was "prompted by changes in [cultural] styles").

[119] *See, e.g.*, Michael Kilian, *Army Elite Blows Tops Over Berets*, CHI. TRIB., Oct. 30, 2000, at N1 (describing the Army's decision to outfit its members in black berets, despite the protests of high-ranking members in the Army).

However one views the military—whether as a "society apart" or as a microcosm reflective of larger America—it maintains some customs and traditions that are unique from its societal counterparts. Many of these traditions and customs are purely ceremonious; reveal themselves only in the daily, mundane operations of the armed forces; and are susceptible to change virtually at the whim of military leaders.[120] Other customs are more rigid, and military members perceive them as inviolable. These customs import more serious consequences for those who violate them. The emergence of this latter type of custom has led to what the Supreme Court has deemed "customary military law."

B. The Development of Customary Military Law

In 1974, the Supreme Court in *Parker v. Levy*[121] invoked early 19th Century judicial precedent to resurrect the concept of "customary military law."[122] In upholding a service member's conviction for making disloyal statements, the Supreme Court addressed the constitutionality, under the doctrines of vagueness and overbreadth, of Articles 133 and 134 of the UCMJ.[123] Specifically, the Court addressed whether the articles fairly notify service members whether conduct in which they might engage would be punishable,[124] and whether the articles are so inartfully drafted as to impinge unconstitutionally on free speech.[125]

In determining that the articles are not unconstitutionally vague, the Court quoted from an 1827 case noting that the military, in maintaining discipline, has developed "what 'may not unfitly be called the customary

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[120] *See, e.g.*, Mike Conklin, *The 'Army of One' Gets One Singular Hat*, CHI. TRIB., June 14, 2001, at N1 (describing the choice which the Army leadership made in 2001 to outfit all its members in a black beret, the traditional headgear of the Army's elite Ranger Regiment).

[121] 417 U.S. 733 (1974).

[122] *Parker* involved the prosecution of an Army physician for, among other offenses, suggesting to enlisted Soldiers that they should refuse to fight in Vietnam because of what he described as the war's illegitimacy. *Id.* at 737-38.

[123] *Id.* at 752-62. Specifically, the Army prosecuted Parker for violating Article 133, by engaging in "conduct unbecoming an officer and a gentleman" and for violating Article 134, by engaging in conduct "to the prejudice of good order and discipline in the armed forces." *Id.* at 738. The validity of Parker's conviction hinged on whether his speech to the enlisted Soldiers, to the effect they should refuse to fight in Vietnam, was "unbecoming" of an officer and "prejudicial" to discipline.

[124] *Id.* at 755.

[125] *Id*. at 758.

military law' or 'general usage of the military service.'"[126] The Court stressed that it had long acknowledged that the military has "by necessity, developed laws and traditions of its own during its long history."[127] Military officers, the Court deemed, are "more competent judges than the courts of common law" to determine the application of such military custom.[128]

Parker v. Levy is significant for two reasons. First, the Court declared that military culture does, in fact, hold special *legal* meaning and legitimacy because of its unique differences from the rest of American society. Second, the Court declared that military professionals, by virtue of their inculcation into this culture, are more fitting judges of breaches to military customs than are members of the civilian judiciary. Other courts have followed the Supreme Court's lead in acknowledging the unique importance of military customs and traditions in the context of challenges to military policies. For instance, a federal circuit court in *United States v. Bitterman*[129] found military history and custom compelling when it upheld an Air Force regulation prohibiting the wear of religious headgear by Air Force members.

Courts' recognition of the importance of "customary military law" has, however, perpetuated the notion of the military as a "society apart" in the judicial or legal sense, rather than in a merely cultural sense. It is one thing to recognize that unique customs and traditions within the military may help lend meaning to military policies, regulations, and criminal statutes. It is a far more dangerous proposition for judges, acknowledging the importance of those customs, to view themselves as unworthy or legally incapable of scrutinizing the legitimacy of those policies. Unfortunately, courts' attitudes following *Parker* have both perpetuated the myth of the military "society apart," and perpetuated the notion of courts' unfitness to delve into matters that particularly implicate military policy.

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[126] *Id*. at 744 (quoting Martin v. Mott, 25 U.S. (12 Wheat.) 19, 35 (1827)).
[127] *Id*. at 742.
[128] *Id*. at 748 (quoting Smith v. Whitney, 165 U.S. 553, 562 (1897)).
[129] 553 F. Supp. 719, 721-22 (D.D.C. 1982).

C. The Courts' Complicity in Maintaining the Cultural Gap

Following *Parker v. Levy*, courts have continuously narrowed the scope of judicial review of matters of "particular military interest." Depending on one's outlook, the courts' attitude may reflect merely the "highest degree of deference,"[130] or that attitude may equate to utter "judicial abdication"[131] of the courts' role. Two primary themes dominate the courts' rationale of extreme deference in these decisions.

The first theme is that of the judiciary as unfit to question military decision making where "important military interests" are implicated. This may fairly, if not disparagingly, be viewed as the "incompetence rationale" for judicial deference. Under this rationale, courts assert their lack of sophistication and knowledge in all matters military, when asked to assess the merits of military policies.[132] This "incompetence rationale" posits that courts are incapable of truly understanding the military interests that a policy purports to advance. Courts simply presume that the military would not enact such a policy if the military had no good reason for doing so. Under this rationale, courts often express concern that they have no judicially manageable standards for reviewing military policy decisions.[133] Distilled to its essence, the theory posits that judging the wisdom of military policies is best left to the military, the very agency that enacted the policies.[134]

The second theme rests on separation of powers grounds, with courts declaring that Congress and the executive branch have entrusted matters of particular military import to the military, not the judiciary. This may be viewed as the "prohibition rationale" for judicial deference. Under

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[130] The Honorable Sam Nunn, *The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases*, 29 WAKE FOREST L. REV. 557, 557 (1994).

[131] *See, e.g.*, Dienes, *supra* note 14, at 779.

[132] *See, e.g.*, Gilligan v. Morgan, 413 U.S. 1, 10 (1973) (refusing to overturn military training and composition determinations where the issue concerned the "complex, subtle, and professional decisions" of the policy makers, and finding that such decisions were "essentially professional judgments" better left to the military and monitored by the legislative and executive branches).

[133] *See, e.g.*, Doe v. Alexander, 510 F. Supp. 900, 904 (D. Minn. 1981) ("[C]ourts are peculiarly ill-equipped to develop judicial standards for passing on the validity of judgments concerning medical fitness for the military.").

[134] *See, e.g.*, Khalsa v. Weinberger, 779 F.2d 1393, 1395 n.1 (9th Cir. 1985) (noting that a review of "internal" military regulations, such as those governing personal appearance, requires "appropriate deference to a unique discipline, set apart from civilian society to perform the special task of national defense").

this rationale, courts view the legislative and executive branches as responsible for shaping military policy[135] and changing it,[136] in the absence of the military's willingness to do so.[137] Courts employing this "prohibition rationale" defer to military decision makers to avoid upsetting what they perceive to be a sensitive system of checks and balances[138] that the constitutional framers established. Unfortunately, the courts' ideal of civilian control over the military has been replaced with a doctrine of virtual non-interference with executive and congressional control over the institution.[139] Nothing in the Constitution, however, reveals the framers' supposed intent that legislative and executive power over the military should justify courts' refusal to review decisions affecting the military.[140]

D. *United States v. Lugo*:[141] A Case Study

On the evening of 2 April 1999, Corporal Emmanuel Lugo, an off-duty U.S. Marine, attempted to enter an enlisted club on a Marine base in North Carolina, but a military superior stopped him and told him to

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[135] *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57, 70 (1981) ("Judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged."); *see also* United States v. Priest, 45 C.M.R. 338, 345 (C.M.A. 1972) ("[T]he primary function of a military organization is to execute orders, not to debate the wisdom of decisions that the Constitution entrusts to the legislative branches of the Government and to the Commander in Chief.").

[136] *See, e.g.*, Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953) (noting that, where the procedures for processing Army grievances are concerned, "judges are not given the task of running the Army" and the resolution of controversial policy matters rests with Congress, the executive branch, and their military subordinates).

[137] History has proven that Congress will, when faced with judicial hesitancy to invade on the prerogatives of the military, proactively shape military policy through legislation. For instance, following a Supreme Court case in which the Court deferred to the military in refusing to invalidate an Air Force regulation prohibiting the wear of religious headgear while on duty, Congress legislatively mandated accommodation, provided such apparel is "neat and conservative" and does not interfere with duty performance. 10 U.S.C. § 774 (2000). *See infra* notes 281-82 and accompanying text (discussing the legislative overturning of the Supreme Court case).

[138] *See, e.g.*, *Orloff*, 345 U.S. at 94 ("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 . . . .").

[139] *See* Gilbert, *supra* note 96, at 222.

[140] Gabriel W. Gorenstein, Note, *Judicial Review of Constitutional Claims Against the Military*, 84 COLUM. L. REV. 387, 411 (1984).

[141] 54 M.J. 558 (N-M. Ct. Crim. App. 2000).

remove the gold hoop earrings that he wore in each ear.[142] The military thereafter convicted Corporal Lugo of violating a punitive[143] Marine Corps regulation prohibiting male Marines from wearing earrings, even while off duty, and regardless of whether the Marines are on or off a military installation.[144]

Lugo appealed his conviction on the ground that the regulation unreasonably interfered with the private rights and personal affairs of Marines.[145] In rejecting Lugo's argument, the appellate court noted the "great deference" that courts must give to the professional judgment of military authorities on matters of "particular military interest."[146] The court further noted "nothing improper" in the purported purpose of the Marine regulation which, the court assumed, was to promote both a public "spit-and-polish" image of Marines and good order and discipline.[147] The court noted that military officials (presumably other than military judges), using their "considered professional judgment," are the proper authorities for determining the desirability of the challenged regulation.[148] Finally, the court observed that Congress delegated to the armed forces the regulation of matters that may discredit the military.[149]

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[142] *Id.* at 559.

[143] The military may criminally charge violations of regulations which state specifically that they are punitive in nature. Article 92 of the UCMJ cautions against charging as criminal the violation of "[r]egulations which only supply general guidance or advice for conducting military functions . . . ." MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, para. 16c(1)(e) (2002) [hereinafter MCM]. For example, Army regulation 608-99, governing financial support to family members, states that Soldiers may be punished under Article 92 for violations of some of the regulation's provisions. U.S. DEP'T OF ARMY, REG. 608-99, FAMILY SUPPORT, CHILD CUSTODY, AND PATERNITY para. 2-5 (29 Oct. 2003). More often than not, however, such regulations provide merely the "general guidance" or "advice" that Article 92 mentions; violations of those regulations are not criminally punishable, *per se*.

[144] *Lugo*, 54 M.J. at 559. The regulation to which the court referred was Marine Corps Order P1020.34F, dated 27 January 1995. *Id.*

[145] *Id*.

[146] *Id.* at 560 (quoting Goldman v. Weinberger, 475 U.S. 503, 507 (1986)).

[147] *Id*. "Public recognition and 'esprit de corps' are sufficiently rational justifications to withstand a constitutional challenge of a governmental regulation on personal appearance . . . ." *Id*. (citing Kelley v. Johnson, 425 U.S. 238, 248 (1976)).

[148] *Id*. at 560 (quoting *Goldman*, 475 U.S. at 509).

[149] *Id*. ("Congressional recognition of the importance of public confidence and trust in the armed forces . . . is apparent in the General Article of the UCMJ, which proscribes, among other things 'all conduct of a nature to bring discredit upon the armed forces.'" (quoting MCM, *supra* note 143, pt. IV, para. 60a)).

The *Lugo* court, in line with principles of judicial deference that *Parker v. Levy* established, thus deferred both on incompetence grounds and separation of powers grounds in refusing to scrutinize closely the validity of the Marine Corps regulation. *Lugo*, representing a recent case addressing off-duty military appearance, thus provides excellent insight into courts' historical deference to military decision makers.

IV. "Being" a Soldier in the Separate Society: Good Order and Discipline, *Esprit de Corps*, and Public Image

> *The desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment.*[150]

Having detailed the unique aspects of military culture that arguably make the military a "separate society," this article now examines the method by which the military regulates aspects of its members' lives. Articles 90 and 92 of the UCMJ impose an important restriction on the validity of such regulation, however: regulations must promote a valid military purpose. In examining the validity of regulations governing service members' appearance, three primary military purposes—promoting "order and discipline," *esprit de corps*, and public image—permeate court opinions.

A. Military Purpose and Substantive Due Process

The validity of military regulations depends on the purpose behind their issuance. The UCMJ provides that a service member may only be punished for violating an order or regulation if the order or regulation relates to a military duty.[151] This requires that the order or regulation be "reasonably necessary" to accomplish military missions and to promote morale, discipline, and usefulness.[152] Such orders or regulations also must be "directly connected" to maintaining good order in the service.[153]

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[150] *Goldman*, 475 U.S. at 509.

[151] MCM, *supra* note 143, pt. IV, para. 14c(2)(a)(iii). Specifically, Article 90 of the UCMJ relates to the lawfulness of orders, *id.* para. 14, while Article 92 of the UCMJ relates to the lawfulness of regulations that the military promulgates. *Id*. para. 16.

[152] *Id.*

[153] *Id*.

They may not, without such valid military purpose, interfere with service members' private rights and personal affairs.[154]

The U.S. Constitution contains certain provisions to ensure that laws are not arbitrary and unreasonable and, consequently, violative of individual rights. The Fifth Amendment's Due Process Clause,[155] for example, guards against federal government action that is arbitrary or unreasonable. Some types of government regulation, if they impinge on individual liberties, may be so unreasonable or arbitrary as to constitute an unconstitutional denial of liberty.[156] Such arbitrariness violates substantive due process,[157] the constitutional guarantee against government conduct either that interferes with fundamental rights and fundamental liberty interests[158] or that "shocks the conscience" by arbitrarily interfering with non-fundamental liberty interests.[159] Courts

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[154] *Id.*

[155] "No person shall . . . be deprived of life, liberty or property, without due process of law." U.S. CONST. amend. V. While the Fifth Amendment, by its terms, applies to federal government action, the Fourteenth Amendment's Due Process Clause, similarly, applies the same restriction to state actions that may impinge on individual rights: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." *Id*. amend. XIV, § 1.

[156] For instance, where fundamental rights such as marriage or procreation are concerned, the government must narrowly tailor its action to achieve a compelling government interest. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 718-21 (2000). Where other rights that are not considered "fundamental" are concerned, the government's action must rationally or reasonably relate to a legitimate government interest. *See, e.g.*, *id.*

[157] *See generally* Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights,* 103 COLUM. L. REV. 833 (2003) (describing the history behind, and jurisprudence regarding, substantive due process); Burke, *supra* note 112, at 312 n.52 (distinguishing substantive due process from procedural due process, which concerns itself with the procedures by which the government executes policies) (citing RALPH C. CHANDLER ET AL., CONSTITUTIONAL LAW DESKBOOK INDIVIDUAL RIGHTS 494 (1987)); *see also* Brown v. Glines, 444 U.S. 348, 357 n.15 (1980) ("Commanders sometimes may apply . . . regulations 'irrationally, invidiously, or arbitrarily,' thus giving rise to legitimate claims under the Fifth Amendment." (quoting Greer v. Spock, 424 U.S. 828, 840 (1976))).

[158] Zablocki v. Redhail, 434 U.S. 374, 386-87 (1978). The Supreme Court has identified the following nonexclusive categories of "fundamental" rights: to marry, Loving v. Virginia, 388 U.S. 1 (1967); to have children, Skinner v. Oklahoma, 316 U.S. 535 (1942); to enjoy marital privacy, Griswold v. Connecticut, 381 U.S. 479 (1965); and to vote in state elections, Kusper v. Pontikes, 414 U.S. 51 (1973). In determining what qualifies as a fundamental liberty interest, courts will examine whether the right is "deeply rooted" in American history and traditions. Moore v. City of East Cleveland, 431 U.S. 494, 503-04 (1977).

[159] Unites States v. Salerno, 481 U.S. 739, 746 (1987) (quoting Rochin v. California, 342 U.S. 165, 172 (1952)). The Supreme Court further has equated such "conscience

will scrutinize strictly the government regulation of those rights or liberty interests that the Supreme Court has deemed fundamental.[160] Conversely, courts will invalidate the regulation of non-fundamental rights or non-fundamental liberty interests only if the regulation fails to relate rationally to a legitimate government purpose.[161] Article 90 of the UCMJ, by requiring military orders or regulations to further a valid military purpose, echoes this substantive due process protection.

Besides requiring that orders or regulations be reasonable and not arbitrary, due process also dictates that service members receive "fair notice" that an act is forbidden and subject to criminal punishment.[162] Due process also requires, in accordance with *Parker v. Levy*,[163] that service members be provided fair notice of the standard that military authorities will apply in scrutinizing such conduct.[164]

In the context of personal appearance cases, courts consistently have refused to declare a fundamental right in the choice of personal appearance.[165] Rather, courts have declared that such a choice implicates "lesser" liberty interests, the government regulation of which is subject to a review for mere rationality.[166] The military's assertion that an internal regulation or order reflects a rational DOD goal, however, does not assure compliance with due process. Federal agencies often profess "rational" objectives that justify regulations, base their findings on their "internal expertise," fail to support their decisions with facts, and request

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shocking" governmental actions to those which are "arbitrary . . . in a constitutional sense." Collins v. City of Harker Heights, 503 U.S. 115, 128 (1992).

[160] *Washington*, 521 U.S. at 719; *see generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 417 (1997) (noting that the Supreme Court's "strict scrutiny" analysis requires that government action be necessary to achieve a compelling purpose, using the least restrictive method by which to do so). *See supra* note 158 (describing a non-exhaustive list of rights that the Supreme Court has deemed "fundamental").

[161] *See, e.g.*, Kadrmas v. Dickinson Public Sch., 487 U.S. 450, 458 (1988). The Supreme Court has established a semantic variation of this "rational relation" test, by also proscribing governmental action that is "arbitrary in a constitutional sense." *Collins*, 503 U.S. at 128.

[162] *See, e.g.*, United States v. Bivins, 49 M.J. 328, 330 (1998).

[163] 417 U.S. 733 (1974).

[164] *See supra* text accompanying notes 121-26 (describing the *Parker* standard of "customary military law" and "general usage of the military service").

[165] *See, e.g.*, Kelley v. Johnson, 425 U.S. 238, 244 (1976); Rathert v. Village of Peotone, 903 F.2d 510, 514 (7th Cir. 1990).

[166] *See, e.g.*, *Kelley*, 425 U.S. at 244; Neinast v. Bd. of Trs., 346 F.3d 585, 595 (6th Cir. 2003); *Rathert,* 903 F.2d at 514.

judicial deference to their particularized expertise.[167] Jurisprudence in the wake of *Parker v. Levy* virtually has obliterated the need for the military truly to articulate a rational basis for the internal regulations it promulgates. Indeed, *Parker*'s lasting legacy seemingly is that courts routinely dispense with the need for the military to demonstrate a nexus between their regulations and the purposes they seek to promote. Courts defer to the military's expertise and the supposed "necessity" for the regulation.[168] As Supreme Court Justice William Brennan warned six years after *Parker*, however, "the concept of military necessity is seductively broad."[169]

Military courts examining the validity of orders or regulations occasionally have invalidated those that, in the courts' opinion, have no legitimate military purpose. For instance, military courts have invalidated orders directing service members to report personal financial transactions while in a "leave" status,[170] regulations prohibiting all loans between service members without prior command consent,[171] and orders broadly proscribing the consumption of alcohol without limitations on the time and place for consumption.[172] These cases affirm the notion that orders and regulations must further an important military interest.

Nevertheless, the authority to regulate service members' personal affairs undoubtedly extends to the regulation of activities affecting service members' general welfare and safety,[173] as well as to the

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[167] *See, e.g.*, FCC v. Nat'l Citizen's Comm. for Broad., 436 U.S. 775 (1978) (holding that FCC determinations are committed to the judgment and expertise of the agency and refusing to require a complete factual basis for those determinations).

[168] *See, e.g.*, United States v. Young, 1 M.J. 433, 435 (C.M.A. 1976) (relieving the military of the need to articulate a basis for an appearance regulation, and placing on service members the burden to show the lack of a basis for the regulation) (citing United Public Workers v. Mitchell, 330 U.S. 75, 100-101 (1947), Jacobson v. Massachusetts, 197 U.S. 11 (1905)); *see also Kelley*, 425 U.S. at 247 (declaring the appropriate test for the constitutionality of a civilian police appearance regulation to be "whether respondent can demonstrate that there is no rational connection between the regulation . . . and the promotion of safety of persons and property").

[169] Brown v. Glines, 444 U.S. 348, 369 (1980) (Brennan, J., dissenting).

[170] United States v. Milldebrandt, 25 C.M.R. 139 (C.M.A. 1958).

[171] United States v. Smith, 1 M.J. 156 (C.M.A. 1975).

[172] United States v. Wilson, 30 C.M.R. 165 (C.M.A. 1961).

[173] *See, e.g.*, United States v. James, 52 M.J. 709 (Army Ct. Crim. App. 2000) (upholding the validity of an order prohibiting a service member from writing checks, based on that service member's history of bad check writing); United States v. Leverette, 9 M.J. 627 (A.C.M.R. 1980) (upholding the validity of a regulation requiring service members to register for safety reasons all personal firearms); United States v. Dykes, 6

regulation of on-duty appearance.[174] *United States v. Lugo* extended this reasoning to find important military interests in regulating a service member's off-duty appearance. The question remains, however, whether a rational nexus exists between enforcing *off-duty* appearance standards and furthering a valid military purpose.

B. Examining the Military Purposes Behind Military Appearance Regulations

The legitimacy of military decisions rests, to a great extent, on the military's inherent right to regulate good order and discipline within its ranks. The military, as a warfighting profession, seeks to cultivate and preserve discipline and unity in furtherance of its goals. The military also has developed a certain image of itself and its service members, which it seeks to preserve and project to the general public. Courts, recognizing these goals, often refer to them when deferring to the "military expertise" behind the issuance of regulations and orders.

1. Enforcing "Good Order and Discipline"

In the context of examining and justifying military personal appearance standards, the notion of "good order and discipline" escapes precise legal definition. Courts and legal commentators often invoke the term, but rarely define it. Article 134 of the UCMJ proscribes as criminal "all disorders and neglects to the prejudice of good order and discipline in the armed forces . . . ."[175] Recognizing that virtually any "irregular or improper act" by a service member conceivably could constitute an act that is prejudicial to good order and discipline, however, Article 134 provides that it does not contemplate within its purview the "distant effects" of an act.[176] Rather, the Article contemplates as

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M.J. 744 (N.M.C.M.R. 1978) (upholding the validity of a regulation prohibiting the possession of drug paraphernalia).

[174] *See, e.g.*, United States v. Pinkston, 49 C.M.R. 359 (N.M.C.M.R. 1974) (upholding the validity of an order to a male Marine to remove an earring while in uniform); United States v. Verdi, 5 M.J. 330 (C.M.A. 1978) (upholding the validity of an Air Force regulation prohibiting the wear of hairpieces except in limited circumstances).

[175] MCM, *supra* note 143, pt. IV, para. 60a.

[176] *Id.* para. 60c(2)(a).

criminal only those acts that have a "reasonably direct and palpable" prejudicial effect.[177]

Courts historically have shaped the parameters of service members' actions that have a "direct and palpable" effect on the erosion of good order and discipline. Military courts, for instance, have noted that Article 134 does not proscribe conduct prejudicial to good order and discipline in a purely indirect and remote sense.[178] The U.S. Supreme Court has determined that breaches of "good order and discipline" under Article 134 are "not measurable by [a judicial] sense of right and wrong, of honor and dishonor, but must be gauged by an actual knowledge and experience of military life, its usages and duties."[179]

Despite courts' reliance on the mantra of preserving "discipline" in personal appearance cases, however, there is a scarcity of cases in which a service member has been prosecuted—on the sole basis of a breach of Article 134—because of his personal, off-duty appearance. One rare case, *United States v. Guerrero*, involved the prosecution of a Navy Sailor-crossdresser.[180] The court upheld Guerrero's conviction for donning makeup and women's clothing in the presence of a fellow Sailor, on the basis that Guerrero knew the "appropriate standards of civilian attire to which sailors must adhere."[181] More importantly, however, the court found that the time, place, circumstances, and purpose for the service member's cross-dressing were critical factors in determining prejudice to good order and discipline.[182] Curiously, the court conceded that "cross-dressing can certainly be non-prejudicial and even enhance morale and discipline."[183] Outside of the cross-dressing

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[177] *Id*.

[178] *See* United States v. Caballero, 23 C.M.A. 304, 307 (1975) (noting that the possession of an otherwise legal smoking instrument does not violate Article 134 simply because a service member could, conceivably, use it for an illegal purpose).

[179] Parker v. Levy, 417 U.S. 733, 748-49 (1974) (quoting Swaim v. United States, 28 Ct. Cl. 173, 228 (1893)).

[180] 33 M.J. 295 (C.M.A. 1991).

[181] *Id.* at 298 (quoting Unites States v. Guerrero, 31 M.J. 692, 696 (N.M.C.M.R. 1990)).

[182] *Id.* Specifically, the appellant in *Guerrerro* brought a Navy recruit back to his off-base apartment, poured him whiskey, withdrew into another room, and emerged fifteen minutes later in women's clothing and makeup. *Id*. at 296. When the recruit attempted to leave the apartment, the appellant stated "I thought you had experienced it. I'll have to show you sometime." *Id*.

[183] *Id.* The court cited circumstances in which popular entertainers such as Dustin Hoffman and Jamie Farr successfully portrayed cross-dressers, much to service members' delight. *Id*. at 298.

realm,[184] *United States v. Lugo*[185] appears to be the sole military criminal case addressing the off-duty appearance of a service member that specifically references, albeit in dicta, "good order and discipline"[186] as a valid basis for enforcing off-duty personal appearance standards.

Scrutiny of each of the current armed service regulations governing personal appearance reveals that none refer specifically to "good order and discipline." The Marine Corps regulation speaks in terms of the "high standards" associated with the Corps,[187] but does not elaborate on how this applies to order and discipline. The Navy regulation cautions against "discrediting" the Navy.[188] Both the Army and Air Force urge their respective members to take pride in a military image.[189]

2. Preserving Unity and Esprit de Corps

A second mantra that courts often invoke when upholding military appearance regulations is that of preserving unity and *esprit de corps*. Defining what it means to preserve unity and *esprit de corps* is problematic, in the context of enforcing personal appearance standards.[190] Much as Supreme Court Justice Potter Stewart "knew" obscenity when he saw it,[191] courts often appear to "know" unity and *esprit de corps* when they see these concepts, and they invoke these terms often. More often than not, however, courts fail to define the terms or to reason why the concepts are so integral to the enforcement of appearance regulations.

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[184] *See, e.g.*, *id.*; *see also* United States v. Modesto, 39 M.J. 1055 (A.C.M.R. 1994), *aff'd*, 43 M.J. 315 (1995); United States v. Davis, 26 M.J. 445 (C.M.A. 1988).

[185] 54 M.J. 558 (N-M. Ct. Crim. App. 2000).

[186] *Id.* at 560.

[187] MARINE CORPS ORDER, *supra* note 2, para. 1005(2).

[188] NAVY UNIFORM REGS., *supra* note 2, paras. 7101(1)-(2).

[189] *See* AR 670-1, *supra* note 2, para. 1-7a; AFI 36-2903, *supra* note 2, tbl. 2.5.

[190] For instance, in *Goldman v. Weinberger*, regarding the Air Force's asserted need to maintain uniformity and unity in denying an exception to its uniform policy, Justice Stevens remarked, "Because professionals in the military service attach great importance to that *plausible interest*, it is one that we must recognize as legitimate . . . ." 475 U.S. 503, 512 (1986) (Stevens, J., concurring) (emphasis added).

[191] Justice Stewart said of obscenity, "I know it when I see it." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

In *Gadberry v. Schlesinger*,[192] for instance, an Air National Guardsman challenged an Air Force regulation governing on-duty hair length. Dismissing the Guardsman's claim, the court noted, simply, that the Air Force's desire "to instill in its members discipline and esprit de corps" was a "sufficiently rational justification"[193] for the regulation. The U.S. Supreme Court, in *Goldman v. Weinberger*,[194] upheld an Air Force regulation proscribing the wear of religious headgear on the basis, *inter alia*, that general uniformity of appearance promotes "hierarchical unity" within the military.[195] Military court cases, similarly, invoke the *esprit* mantra in the context of service member appearance cases.[196] *United States v. Lugo*, addressing the off-duty appearance issue, specifically mentioned the term as a valid basis for the enforcement of the Marine regulation in question.[197] Military courts, likewise, consistently have failed to articulate how or why *esprit de corps* suffers or flourishes as a result of military appearance policies. Moreover, courts tend to ignore that "appearance" regulations purporting to foster *esprit* may have the residual effect of fostering antipathy and resistance among service members who feel the impact of the regulations.[198]

Scrutiny of each of the current armed service regulations reveals that none refer explicitly to "*esprit de corps*" or unity as a purpose for off-duty appearance standards. The Marine Corps, Air Force, and Army policies, however, impose restrictions on racist, sexist, or otherwise offensive tattoos and brands.[199] It is possible to interpret these restrictions as meant to advance *esprit* and unity in the ranks, however,

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[192] 419 F. Supp. 949 (E.D. Va. 1976).
[193] *Id.* at 950.
[194] 475 U.S. 503 (1986).
[195] *Id*. at 508. In this context, the *Goldman* Court appears to use the term "unity" in the context of uniformity, rather than cohesion.
[196] *See, e.g.*, United States v. Young, 1 M.J. 433, 435 (1976) (approving of civilian police appearance regulations purporting to promote *esprit de corps*).
[197] United States v. Lugo, 54 M.J. 558, 560 n.1 (N-M. Ct. Crim. App. 2000) ("Public recognition and '*esprit de corps*' are sufficiently rational justifications to withstand constitutional challenge of a governmental regulation on personal appearance . . . ." (quoting Kelley v. Johnson, 425 U.S. 238, 248 (1976))).
[198] *See* Klare, *supra* note 38, at 1402-03 (arguing that grooming rules for off-duty police officers, purportedly advancing the police force's *esprit de corps*, are "absurd, given the deep resentment and staunch resistance the rules obviously provoked" in one court case (citing *Kelley*, 425 U.S. at 238)).
[199] *See supra* notes 75, 79, 84, 87 and accompanying text (describing the Marine Corps prohibition on tattoos or brands that undermine discipline or morale, and Air Force, Navy, and Army bans on racist and extremist body alterations).

by preventing exposure of divisive or racially-charged symbols to other service members.[200]

3. Promoting Public Image

A third, and perhaps more prevalent theme running through courts' justifications in military appearance cases is the notion that the military rightfully seeks to project a certain image—a "spit and polish" image[201]—in the eyes of the general public. The military does, in fact, carefully cultivate and ardently protect a positive public image.[202] Service members also cherish the status and admiration that the American public affords them.[203] Determining what makes such an image of service members "positive" in the eyes of the public, however, is a potentially impossible task.

In the context of cases involving the personal appearance of service members, courts often invoke "preservation of public image" as a laudable and rational goal of appearance regulations and orders. In *Gadberry v. Schlesinger*, for example, a federal district court noted, *sua sponte*, that the Air Force sought to promote discipline and *esprit de corps* by promulgating its personal appearance regulation.[204] According to the court, the Air Force "also desire[d] to promote these qualities as its

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[200] *See generally* Campanella, *supra* note 15, at 79-80 (describing the maintenance of morale within the Army's ranks as a legitimate reason to remove from the Army those soldiers with, *inter alia*, "extremist political or social views") (citing Major Walter M. Hudson, *Racial Extremism in the Army*, 159 MIL. L. REV. 1 (1999)).

[201] *See, e.g.*, *Lugo*, 54 M.J. at 560 ("The purposes of these restrictions [on off-duty appearance] is to ensure that off-duty Marines do not dress in extreme or eccentric civilian attire that detract from the public 'spit-and-polish' image of the United States Marine Corps . . . .").

[202] For instance, officer members of the U.S. Army's Old Guard, responsible for high profile ceremonial duties at Arlington National Cemetery, must satisfy rigorous physical appearance requirements, including standing at least five feet, ten inches tall. 3d United States Infantry Regiment, The Old Guard, *Officer's Information*, *at* http://www.mdw.ar my.mil/oldguard/officerapp.htm (last visited May 31, 2005). *See generally* Hillen, *supra* note 5 (discussing the military's historic struggle to maintain its self-identity in the wake of constant social pressures to make it comport with societal changes); *see also* Turley, *supra* note 10, at 9 (arguing that, historically, "the military culture strongly defended and maintained a unique military society despite continuing pressure from civilian society to create consistency between the military and civilian systems").

[203] Turley, *supra* note 10, at 116.

[204] 419 F. Supp. 949, 950 (E.D. Va. 1976).

public image."[205] Thus, in the court's opinion, the preservation of a clean cut public image apparently was a sufficient justification to uphold the regulation's validity. The court in *United States v. Lugo* also noted with approval the apparent goal of projecting a public "spit and polish" image of the U.S. Marine Corps.[206] Significantly, the court went on to find "[c]ongressional recognition of the importance of public confidence and trust in the armed forces" through the promulgation of Article 134 of the UCMJ.[207]

Both the U.S. Supreme Court and at least one federal circuit court have found important goals and rational bases in states' regulation of civilian police officers' personal appearance, based on promoting a positive public image. The Supreme Court found that the promotion of a positive public image justified hair length restrictions for on-duty officers.[208] The Seventh Circuit found a similar rational justification with regard to regulating officers' *off-duty* appearance: specifically, with regard to male officers' wear of earrings.[209]

What separates *United States v. Lugo* from *Gadberry v. Schlesinger*, and other military cases addressing soldierly appearance, is the court's specific reference to public perception in the context of an *off-duty* service member. Other jurisprudence discusses the importance of projecting an appropriate public image in determining the propriety of military regulations governing *on-duty* appearance.[210] The courts in those cases found rational the military's intent that service members in uniform should present a clean cut, military appearance. *Lugo* is unique for its implication that off-duty service members also have a duty to

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[205] *Id*.

[206] 54 M.J. 558, 560 (N-M. Ct. Crim. App. 2000). The Marine Corps regulation at issue stated, in pertinent part, that "Marines are associated and identified with the Marine Corps in and out of uniform, and when on or off duty. Therefore, Marines will ensure that their dress and personal appearance are conservative and commensurate with the high standards traditionally associated with the Marine Corps." *Id.*

[207] *Id*.

[208] Kelley v. Johnson, 425 U.S. 238, 248 (1976); *see also* Inturri v. City of Hartford, 365 F. Supp. 2d 240 (D. Conn. 2005) (upholding a city police department's ban on officers' display of "spider web" tattoos while in uniform). *But see* Pence v. Rosenquist, 573 F.2d 395 (7th Cir. 1978) (invalidating a public high school policy that prohibited employees who wore mustaches from driving school buses, on the basis that the policy lacked a rational relationship to any proper school purpose).

[209] Rathert v. Village of Peotone, 903 F.2d 510, 516 (7th Cir. 1990).

[210] *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503 (1986); Gadberry v. Schlesinger, 419 F. Supp. 949 (E.D. Va. 1976); United States v. Verdi, 5 M.J. 330 (C.M.A. 1978); United States v. Young, 1 M.J. 433 (C.M.A. 1976).

project a "spit and polish" image to the public, wherever the public may find them. *Lugo* fails to address, however, what image the public holds of off-duty service members, assuming the public can even identify them as service members in their civilian clothes.

Scrutiny of each of the services' regulations reveals veiled references to promoting service member images in the eyes of the public. The Marine Corps regulation, for instance, instructs Marines to "present the best possible image at all times,"[211] but does not mention public image. This provision thus could refer to promoting image within, or outside of, the Marine Corps or the larger military community. Similarly, the Air Force urges a "military image,"[212] while the Army urges a "soldierly appearance."[213] Neither service, however, speaks about how the public might view the service members. The Navy policy comes the closest, by forbidding any appearance that may discredit the Navy.[214] While this provision most likely refers to discredit in the eyes of the public, the Navy regulation does not specifically state this.

C. Public Image, or Institutional Stereotype?

No spectre is more terrifying than our own negative identity.[215]

United States v. Lugo represents the most recent case addressing the off-duty appearance of a service member, finding rational the Marine Corps' goals of promoting discipline and a public "spit and polish" image of Marines. The *Lugo* court failed to address, however, why maintaining a *public* spit-and-polish image, the purported basis of the Marine regulation, was rational in this context. This is not surprising, however; those attacking the validity of a regulation (such as Corporal Lugo, in his case) have the burden to show that regulation is irrational and arbitrary.[216]

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[211] MARINE CORPS ORDER, *supra* note 2, para. 1004(1).
[212] AFI 36-2903, *supra* note 2, tbl. 2.5.
[213] AR 670-1, *supra* note 2, para. 1-7a.
[214] NAVY UNIFORM REGS., *supra* note 2, paras. 7101(1)-(2).
[215] Karst, *supra* note 6, at 508.
[216] *See, e.g.*, Kelley v. Johnson, 425 U.S. 238, 244 (1976) (placing the burden on police officers to show that a police regulation regarding hair length was irrational and arbitrary); Grusendorf v. Oklahoma City, 816 F.2d 539, 543 (10th Cir. 1987) (placing the burden on a firefighter to show that a city regulation banning off-duty smoking by first-

Corporal Lugo entered an on-base military club,[217] presumably populated with his Marine counterparts. The court did not address any supposed "danger" that his earrings would offend the sensibilities of the club's civilian patrons, assuming any were present. Moreover, the court did not address how, even if the civilian populace viewed his earrings, this would endanger the Marine Corps' standing in the eyes of the public. Corporal Lugo apparently wore civilian clothes, rather than a military uniform. He entered the club as an off-duty Marine, not a Marine carrying out military duties. A civilian who saw Lugo would not know, with certainty, that Lugo even was a Marine, let alone a service member. Nevertheless, the *Lugo* court's rationale typifies the type of roadblock confronting a service member daring to challenge a military appearance regulation.

Lugo arguably stands for the proposition that the armed services seek to promote an image of their members in the eyes of the military establishment, at least as much as in the eyes of the civilian populace. Military members generally take great pride in their appearance and the appearance of their fellow service members.[218] Human nature dictates that military members understandably would not want to see standards relaxed or conventions flaunted, simply to accommodate the desires of some members to be more "in fashion" and in tune with the general public.[219]

There thus is strong potential that appearance regulations pay lip service to promoting *public* perception, as a subterfuge for preserving the

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year firefighters was arbitrary and irrational); United States v. Young, 1 M.J. 433, 435 (C.M.A. 1976) (requiring a service member to show that the Army's regulation governing hair length was irrational and arbitrary).

[217] United States v. Lugo, 54 M.J. 558, 559 (N-M. Ct. Crim. App. 2000).

[218] *See, e.g.*, Bill Keller, *Marines Warn Embassy Guards About their Trademark Haircuts*, N.Y. TIMES, July 9, 1985, at A11 (noting that "[t]he 'high and tight' haircut . . . has long been a badge of pride, especially among elite Marines . . . ."); Vojdik, *supra* note 7, at 116 (describing the nearly shaved haircuts of the Army's elite Ranger Regiment as "a symbol of hypermasculinity").

[219] *See* Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 987 (1995). Professor Lessig notes, for instance, that "[t]here is a picture of the 'military man'—a stereotype, no doubt, but extant nonetheless." *Id.* Professor Lessig notes that "membership in the military offers a certain status," and that "there is a strong interest in preserving the image that the military presents." *Id.* Furthermore, Professor Lessig continues, for those who join the military and who value this image, "part of the value in belonging to this military depends on the preservation of this image." *Id.*

military's *institutional* stereotypes.[220] As the court in one military case noted, with regard to appearance standards in the years before earrings for males became fashionable, "it may well be that the drafters of the regulations considered it beyond speculation that anyone who was a man and bore the name Marine . . . would ever degrade his uniform and Corps by such an affectation."[221]

Style and culture change dramatically and often.[222] The armed services are hardly groundbreakers with regard to recognizing, let alone accepting, this fact. It thus seems likely that the *Lugo* court, in paying lip service to the Marine Corps' supposed goal of promoting a positive *public* perception of Marines, failed to consider that the military's greatest benefit in regulating off-duty appearance is the ability to preserve a *military institutional* perception of what it means to look like a Soldier Sailor, Airman, or Marine.

In today's society, it is a dubious notion to believe that a private citizen's view of a male service member wearing an earring, out of uniform and off post, would tend to "discredit" the armed forces, in a legal sense. Consider that the same citizen may view a female service member, out of uniform and off post, wearing five hoop earrings in one ear. This, however, is permissible, under Army standards,[223] and yet her action arguably is more audacious, ostentatious, and "unsoldierly" than that of a male counterpart wearing a single stud earring. On this issue, the Army policy, at least, seems to be in tune with that of the opinion in *United States v. Pinkston*: that "no man" would degrade his service by daring to wear an earring.[224]

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[220] For example, Professor Kenneth Karst notes that, "[I]t should be no surprise that officers who have an important part in selecting other officers for promotion tend to respond warmly to people who look like themselves." Karst, *supra* note 6, at 575.

[221] United States v. Pinkston, 49 C.M.R. 359, 360 (N.M.C.M.R. 1974). *Pinkston* involved a Marine's prosecution for disobeying an order to remove an earring that he sported while wearing his duty uniform. *Id*.

[222] *See supra* notes 15-17 and accompanying text (describing constantly-evolving personal appearance trends).

[223] *See* AR 670-1, *supra* note 2, para. 1-14(d)(3) (providing that females have no restrictions on their off-duty wear of earrings).

[224] *See supra* text accompanying note 221 (describing a military court's dubious reaction to a male's wear of an earring).

V. Constitutional Concerns in Regulating Off-Duty Appearance

The result of the military's unique institutional status is that "[n]o other segment of American society is as vulnerable to the judgments of others, or required to comply with someone's personal will or otherwise fear criminal sanctions."[225] The military has no more "discretion" to violate service members' constitutional rights, such as freedom of speech or free exercise of religion, than other federal agencies have to violate private citizens' rights.[226] Nevertheless, regulations purporting to further a rational military interest such as regulating service members' off-duty appearance may impermissibly impinge on service members' rights. Moreover, the precise language that military appearance regulations contain may subject the regulations to attack on overbreadth and vagueness grounds.

A. Free Speech Concerns

Military regulations governing service member appearance warrant constitutional scrutiny on free speech grounds. The First Amendment's freedom of speech clause,[227] as it relates to the military community, has received virtually endless analysis from courts[228] and commentators.[229] In the civilian community context, the Supreme Court has held that content-based regulations impinging the right of free speech are

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[225] Linda Sugin, Note, *First Amendment Rights of Military Personnel: Denying Rights to Those Who Defend Them*, 62 N.Y.U. L. REV. 855, 861 (1987).

[226] *See, e.g.*, Lead Indus. Ass'n v. EPA, 647 F.2d 1130 (D.C. Cir. 1980) (refusing to defer to an agency's decision where a constitutional question presented itself); Porter v. Califano, 592 F.2d 770 (5th Cir. 1979) (refusing to defer to "agency expertise" where the issue concerned the constitutionality of that agency's actions).

[227] "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I.

[228] *See, e.g.*, Brown v. Glines, 444 U.S. 348 (1980) (upholding the validity of an Air Force regulation requiring prior command approval before circulating certain literature on a military installation); Parker v. Levy, 417 U.S. 733 (1974) (upholding Article 134 of the UCMJ against vagueness and overbreadth challenges in a free speech case); United States v. Wilson, 33 M.J. 797 (A.C.M.R. 1991) (rejecting a free speech challenge where a service member was convicted for blowing his nose on the American flag).

[229] *See generally* Carr, *supra* note 104, at 344-50 (analyzing freedom of speech restrictions in the context of cases involving purported "military necessity"); Hirschhorn, *supra* note 107, at 185-93 (discussing freedom of speech restrictions that the military, as a "separate community," imposes).

invalid,[230] except in cases involving legally unprotected speech, such as obscenity,[231] fighting words,[232] and dangerous speech.[233]

The Supreme Court has declared obscene[234] communications wholly unprotected.[235] In the context of fighting words or dangerous speech, the Supreme Court has stated unambiguously that the "First Amendment does not protect violence."[236] What lie outside of these clearly-defined areas of speech are the "gray areas" that the military's appearance standards implicate.

1. Free Speech in the Military

Despite the Supreme Court's very permissive stance on free speech in the civilian context, courts' application of these principles to military scenarios has proven not to be hard and fast. While conceding that service members enjoy freedom of speech protections that include the right to both verbal and non-verbal speech,[237] courts grant substantial deference to the military where the exercise of the right of free speech poses a perceived threat to important military interests.[238] Military necessity, especially the "fundamental necessity for discipline," may warrant limitations on service members'—as opposed to civilians'—speech.[239] In fact, the Supreme Court has stated that while service members may be entitled to First Amendment protection in certain

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[230] *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 406 (1989) (declaring that the First Amendment does not allow the government to prohibit free speech or expression based on disapproval of the ideas communicated).

[231] *See* United States v. Roth, 354 U.S. 476 (1952).

[232] *See* Cohen v. California, 403 U.S. 15 (1971).

[233] *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[234] Obscene material is material addressing sex in a manner appealing to prurient interest. *Roth*, 354 U.S. at 487.

[235] *Id*. at 485.

[236] NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982).

[237] *See, e.g.*, United States v. Wilson, 33 M.J. 797, 799 (A.C.M.R. 1991). *See infra* note 244 and accompanying text (discussing various forms of symbolic, or nonverbal, speech).

[238] *See, e.g.*, Brown v. Glines, 444 U.S. 348 (1980) (upholding the validity of an Air Force regulation requiring command approval prior to circulating certain literature on a military installation); Ethredge v. Hail, 56 F.3d 1324 (11th Cir. 1995) (upholding the validity of a military installation commander's order banning bumper stickers that disparaged the President of the United States).

[239] *Wilson*, 33 M.J. at 799. *Wilson* upheld an Army military policeman's dereliction of duty conviction for blowing his nose on an American flag while he prepared for a military flag-raising ceremony. *Id*. at 798.

circumstances, "the different character of the military community and of the military mission requires a different application of those protections."[240] Lending context to the Supreme Court's generalized statement, the Army Court of Criminal Appeals, in *United States v. Zimmerman*, declared that "[a]lthough members of the armed forces enjoy First Amendment freedoms, the fundamental need for *good order and discipline* can be compelling enough" to curtail those freedoms.[241]

In the context of a military free speech case, the Supreme Court has approved military regulations that restrict speech, as long as they do so "no more than reasonably necessary to protect a substantial government interest."[242] Courts generally relax or dispense with many free speech protections afforded to civilians, in deferring to the military's determination of the disruptive effect of the speech.[243]

2. Personal Appearance as "Speech" (Or at Least "Self Expression")

In the military off-duty appearance context, free speech or self-expression concerns may arise with regard to choice of clothing or with regard to expressive body decorations. While the Supreme Court has deemed nonverbal conduct as a form of protected speech in certain limited circumstances,[244] courts typically do not recognize people's choice of personal appearance as pure "speech," for First Amendment purposes.[245] Choice of personal appearance thus typically qualifies as a

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[240] Parker v. Levy, 417 U.S. 733, 758 (1974).

[241] 43 M.J. 782, 785 (Army Ct. Crim. App. 1996) (emphasis added).

[242] *Brown*, 444 U.S. at 355.

[243] *See, e.g.*, *Parker*, 417 U.S. at 748 (upholding an Army physician's conviction for advising service members not to fight in Vietnam, on the grounds that his comments undermined the effectiveness of response to command); United States v. Brown, 45 M.J. 389, 398 (1996) (upholding a service member's conviction under an anti-union statute for organizing battalion-wide meetings to discuss living conditions).

[244] *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 418 (1989) (deeming as protected speech the burning of the American flag); Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 514 (1969) (deeming as protected speech the wearing of an armband). Such "symbolic speech" must meet a two-part test: first, the person must intend to convey a particular message; and second, those who witness the activity must understand the message that the "speaker" intends to convey. *See* Spence v. Washington, 418 U.S. 405, 409-11 (1974).

[245] *See, e.g.*, Olesen v. Bd. of Educ., 676 F. Supp. 820, 822 (N.D. Ill. 1987) (determining that in order to claim First Amendment protection, an earring wearer must show that the

form of self-expression,[246] presumed not to be intended to convey a religious, political or other message.[247] For instance, clothing choice often conveys self-expressive messages.[248]

Such a choice also may convey mutually exclusive messages of either *identifying with* or *belonging to* a particular group or genre.[249] Self-decoration[250] or hairstyle[251] may convey these same mutually exclusive "identification with" or "belonging to" messages. Because these personal appearance choices implicate recognized liberty interests, but not fundamental rights, however, military proscriptions on these forms of self-expression must be merely rational.[252]

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earring is intended to convey a message); Jackson v. Dorrier, 424 F.2d 213, 217 (6th Cir. 1970) (refusing to declare a person's choice of hair length to be protected "expression").

[246] As the Second Circuit Court of Appeals observed: "clothing and personal appearance are important forms of self-expression. For many, clothing communicates . . . cultural background and values, religious or moral disposition, creativity or its lack, awareness of current style or adherence to earlier styles . . . gender identity, and social status." Zalewska v. County of Sullivan, New York, 316 F.3d 314, 319 (2d Cir. 2003). However, the Second Circuit noted, "acknowledging the symbolic speech-like qualities of a course of conduct is 'only the beginning, and not the end, of constitutional inquiry.'" *Id*. (quoting East Hartford Educ. Ass'n v. Bd. of Educ. of the Town of East Hartford, 562 F.2d 838, 857 (2d Cir. 1977)).

[247] *See, e.g.*, Stephenson v. Davenport Cmty. Sch. Dist., 110 F.3d 1303, 1307 n.4 (8th Cir. 1997) (determining that a tattoo is merely a form of self-expression, where its wearer did not intend to convey a religious or political message).

[248] For example, the manner of wearing a pair of jeans, permitting them to sag at the waist, can convey identification with African-American culture and the styles of African-American urban youth. *See* Bivens v. Albuquerque Pub. Sch., 899 F. Supp. 556, 560-61 (D.N.M. 1985).

[249] For instance, the color of clothing may signify gang affiliation. *See, e.g.*, *Stephenson*, 110 F.3d at 1311. Similarly, the manner of wearing pants, by letting them sag at the waist, also may signify gang affiliation. *Bivens*, 899 F. Supp. at 561.

[250] Members of the "punk" and anti-establishment cultures, for example, view body piercing as a symbol of rebellion. *See* S. Samantha M. Tweeten & Leland S. Rickman, *Infectious Complications of Body Piercing*, 26 CLINICAL INFECTIOUS DISEASES 735, 735-40 (1998). Courts have considered tattoos, similarly, as indicative of self-expression. *See, e.g.*, *Stephenson*, 110 F.3d at 1307.

[251] African-American women often choose to braid their hair in a positive display of ethnic identification with their African heritage. *See* Turner, *supra* note 17, at 133.

[252] *See supra* notes 155-61 and accompanying text (discussing the difference between government regulation of fundamental rights and of those rights not deemed fundamental). Because such personal appearance choice normally would not implicate a fundamental right such as the right of freedom of speech, government regulation must merely rationally relate to a legitimate government interest. *See also, e.g.*, Neinast v. Bd. of Trs., 346 F.3d 585, 592 (6th Cir. 2003) (determining that government action impeding the right of personal appearance must rationally relate to a legitimate government interest); *Bivens*, 899 F. Supp. at 561 n.7 ("Even if the wearing of sagging pants could be

3. The "Identification"—"Affiliation" Quandary: Actions Speak Louder than Words

Where a Soldier's clothing or self-decoration is benign, in that it does not convey constitutionally-unprotected messages and it does not convey messages that clearly have a nexus to undermining military discipline or *esprit de corps*, the military walks a fine line in its attempts to quash such expression. A Soldier's off-duty choice in personal appearance may convey mere *identification* with a group or genre, for instance.[253] Where civilians are concerned, courts have affirmed the right to wear clothing identifying the wearer with a specific, even if controversial, organization.[254]

The military may forbid clothing or self-decoration that conveys constitutionally unprotected speech (such as obscenity)[255] or messages that clearly undermine military discipline and unity (such as extremist messages or glorification of drug use). For instance, an off-duty Soldier, regardless of whether he is on or off a military installation, would have no right to convey a racist or otherwise extremist message through his clothing or appearance. Such practice would undermine discipline and unity within the ranks by permitting Soldiers to convey a message that would, predictably, negatively impact fellow Soldiers who might learn of

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construed as protected speech, I would have grave doubts about the merits of Plaintiff's claim. Not all constraints on protected expressive conduct . . . are unconstitutional.").

[253] *See supra* notes 249-51 and accompanying text (describing personal appearance as potentially conveying an "association" message). For instance, a Soldier's choice to wear an earring and an athletic jersey may convey identification with "hip hop" culture. Alternatively, the Soldier's choice to wear the same garb, but only in the color red, may convey *affiliation with* a particular gang.

[254] *See, e.g.*, Collin v. Smith, 578 F.2d 1197, 1201 (7th Cir. 1978) (ruling that the first amendment permits the wear of armbands signifying membership in the American Nazi party); Hernandez v. Superintendent, Fredricksburg-Rappahannock Joint Sec. Ctr., 800 F. Supp. 1344, 1351 (E.D. Va. 1992) (authorizing the wear of robes and hoods signifying membership in the Ku Klux Klan); *see also* Hodge v. Lynd, 88 F. Supp. 2d 1234, 1245 (D.N.M. 2000) ("There is nothing in the zero-tolerance rule [against the wear of gang apparel] that in any way specifies what is meant by gang activity, gang symbols, or gang-related apparel. Due to this lack of specificity, enforcement of the dress code is [improperly] left to the unfettered discretion of individual officers . . . ."""); City of Harvard v. Gaut, 660 N.E.2d 259, 264 (Ill. App. Ct. 1996) (permitting the wear of colors and symbols signifying gang membership, but only on the grounds that the local ordinance attempting to restrict the wear of such articles was constitutionally overbroad).

[255] *See supra* text accompanying notes 231-33 (describing categories of unprotected speech).

the Soldier's "communications." Military case law supports—[256] and military regulations enforce[257]—this prohibition on such speech.[258]

For example, an off-duty Soldier may choose to dress in "punk" or "Goth" clothing that might include a black trenchcoat, military-style boots, an earring, and "moussed" hair.[259] The Soldier may be influenced by recent Hollywood productions,[260] or by his interest in alternative music. Such appearance does not, in and of itself, necessarily undermine military discipline or *esprit de corps*. While it is possible that the Soldier's off-duty appearance could suggest extremist[261] affiliation or association,[262] it may simply reveal his identification with popular culture or alternative style.

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[256] *See, e.g.*, United States v. Zimmerman, 43 M.J. 782, 786 (Army Ct. Crim. App. 1996) ("[R]acist attitudes and activities are perniciously destructive of good order and discipline in the armed services.").

[257] *See, e.g.*, U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 4-12c (13 May 2002) (authorizing commanders to prohibit soldiers from engaging in "any" extremist activities that will adversely affect morale or discipline) [hereinafter AR 600-20].

[258] For thorough analyses of the predictably detrimental effects on military order and discipline that extremist communication, conduct or affiliation produces, see generally Campanella, *supra* note 15, at 79-82; Cadet First Class Douglas Daniels, *Freedom of Hate and Service in the United States Coast Guard: Rights vs. Duty*, 9 USAFA J. L. STUD. 147, 152-54 (1998).

[259] *See, e.g.*, Dan Nailen, *Pop Stars Try to be Punk by Donning Retro T-Shirts*, AUGUSTA CHRON. (Ga.), at D1 (describing "punk" fashion as including military boots and "Mohawk" hair styles).

[260] *See, e.g.*, Marc Fisher, *'Trenchcoat Mafia' Spun Dark Fantasy*, WASH. POST, Apr. 21, 1999, at A1 (noting that the movie *The Basketball Diaries*, in which a lead character wore a trench coat, may have influenced the highly-publicized murders at Columbine High School in Littleton, Colorado).

[261] The Department of the Army defines "extremist activities" as:

> [O]nes that advocate racial, gender or ethnic hatred or intolerance; advocate, create, or engage in illegal discrimination based on race, color, gender, religion, or national origin or advocate the use of or use force or violence or unlawful means to deprive individuals of their rights . . . by unlawful means.

AR 600-20, *supra* note 257, para. 4-12.

[262] *See, e.g.*, Todd Richissin, *Five Bragg Soldiers Photographed Saluting Nazi Flag*, RALEIGH NEWS & OBSERVER, at A1 (describing suspected "skinhead" Soldiers from Fort Bragg, North Carolina wearing calf-length military style boots, a hallmark of racist skinhead dress).

Similarly, the First Amendment protects citizens' right to affiliate with groups and associate with others who hold those same beliefs.[263] However, should a service member's actions or stated intentions, combined with his personal appearance, convey affiliation with an extremist organization or gang, the military rightfully may proscribe such dress.

The U.S. Army Court of Criminal Appeals' decision in *United States v. Billings*[264] helps to illuminate the potential blurring of the line between identification and affiliation. The *Billings* court denied the service member's First Amendment challenge to her conviction for acting as a "regional chief" of a criminal street gang, finding that "[a]ssociation with a group may be punished if there is 'clear proof'" that the service member specifically intends to effect the organization's goals through violence.[265] The court then noted that the service member actually took steps to lead and participate in the street gang's activities.[266]

Another Army Court of Criminal Appeals case, *United States v. Cyrus*,[267] illuminates the hazards of attempting to criminalize or proscribe a Soldier's mere association with distasteful societal elements. In *Cyrus*, a service member faced charges of "wrongfully associating" with drug dealers by visiting them at their residences where they purportedly kept drugs.[268] The court overturned the service member's conviction, finding that while the service member did "associate" with suspected drug users and traffickers by visiting them at their residence, he did not know that they were engaged in such acts.[269] *Cyrus*, despite failing to address squarely the criminal "association" issue,[270]

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[263] *See*, *e.g.*, Dawson v. Delaware, 503 U.S. 159 (1992).

[264] 58 M.J. 861 (Army Ct. Crim. App. 2003).

[265] *Id*. at 865 (quoting Scales v. United States, 367 U.S. 203, 229 (1961)). The *Billings* court went on to note that the appellant did not merely associate with criminal elements; she led the crime syndicate and participated in the organization's activities. *Id*.

[266] *Id*. at 865-66. Specifically, the court noted that the service member conspired with gang members to commit robbery and assault, and recruited other Soldiers into the gang whose *modus operandi* involved settling disputes through murder. *Id*. at 866.

[267] 46 M.J. 722 (Army Ct. Crim. App. 1997).

[268] *Id*. at 727.

[269] *Id*. at 728. The court further noted that "whatever degree of 'association' may be . . . criminal, here the government proved no more than that the appellant was acquainted with certain person whom the *police* reasonably believed to be drug traffickers." *Id*.

[270] "We need not address [freedom of association and due process issues] here or define in what circumstances Article 134, UCMJ, may be violated by 'association' with others who may be engaged in criminal acts." *Id*. at 727-28.

nevertheless is significant for its requirement of some degree of knowledge on the part of service members whose associations or affiliations may otherwise implicate them in criminal conduct.

Billings' and *Cyrus'* directives—if applied in the context of a service member's personal appearance case—seem clear: knowing actions speak louder than words—or mere appearance. It may be necessary for the military to examine a Soldier's actions and words, in concert with his appearance, to determine whether extremist or otherwise unprotected speech is implicated. The Army, thus, might require a service member suspected of extremist or gang affiliation—identified only by his choice of dress—to rebut the presumption. If the Soldier successfully rebuts the presumption, he may remain in the service. Where visible or covered extremist body art is the catalyst for the Army's suspicion, however, Army policy does not grant the Soldier such leeway, and the Soldier is subject to separation from the service.[271]

B. Free Exercise of Religion

Military appearance regulations also warrant scrutiny on the basis that they threaten to violate the First Amendment's free exercise of religion clause.[272] Military members have challenged such regulations in the context of their right to wear facial hair[273] or religious headgear[274] while on duty, in harmony with their religious convictions. The Supreme Court, in accordance with its landmark free exercise decision in *Sherbert v. Verner*,[275] evaluated free exercise claims under a "strict scrutiny" test.[276] Subsequent cases have affirmed the Court's adherence to this

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[271] For an excellent description of the Army's policy in this regard, see generally Campanella, *supra* note 15, at 83-84 (describing the Army's interest in the "regulation of inflammatory tattoos" as necessary in maintaining unit cohesion).

[272] The First Amendment provides in part that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." U.S. CONST. amend. I.

[273] *See, e.g.*, Geller v. Sec'y of Defense, 423 F. Supp. 16 (D.D.C. 1976); *see also* Khalsa v. Weinberger, 779 F.2d 1393, 1394-95 (9th Cir. 1985) (upholding an Army regulation barring prospective applicants from enlisting, where the applicant, a member of the Sikh religion, requested an exemption to permit him to wear a beard).

[274] *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503 (1986) (upholding an Air Force regulation proscribing the wear of religious headgear while in uniform).

[275] 374 U.S. 398, 406 (1963).

[276] "Strict scrutiny" requires the government to justify significant burdens on the free exercise of religion as the least restrictive method by which to accomplish a compelling

"strict scrutiny" standard, at least in instances involving the free exercise rights of civilians.[277]

Nevertheless, courts traditionally have not come to the defense of service members attempting to exercise religious beliefs that are contrary to military policies.[278] In a similar landmark case, *Goldman v. Weinberger*,[279] the Supreme Court addressed a free exercise issue in which the petitioner, an active duty Air Force member, challenged an Air Force regulation prohibiting the wear of religious headgear. The Court, abandoning its prior "strict scrutiny" analysis in similar civilian cases, held that the regulation "reasonably and evenhandedly regulate[d] dress in the interest of the military's perceived need for uniformity."[280] However, Congress wasted little time in responding to what it perceived as *Goldman*'s improper infringement on service members' religious rights. Congress directed that military service members be permitted to wear "neat and conservative" religious apparel while in uniform,[281] thus legislatively overturning the Supreme Court's decision.[282]

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government interest. Thomas v. Review Bd. Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981). *See generally supra* note 160 and accompanying text (discussing courts' use of the "strict scrutiny" standard of review when evaluating alleged violations of fundamental rights). *See also Sherbert*, 374 U.S. at 406 (examining whether a "compelling state interest" justified South Carolina's "substantial infringement" on a Seventh-Day Adventist's religion, when the state denied her request not to work her government job on her Sabbath day).

[277] *See, e.g.*, Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 546-47 (1993) (invalidating a city ordinance prohibiting broadly the ritual sacrifice of animals for religious purposes).

[278] Major Michael J. Benjamin, *Justice, Justice Shall You Pursue: Legal Analysis of Religion Issues in the Military*, ARMY LAW., Nov. 1998, at 1, 8.

[279] 475 U.S. 503 (1986).

[280] *Id*. at 510.

[281] 10 U.S.C. § 774 (2000).

[282] Congressional legislation mandating the accommodation of religion continues to leave to the DOD the details of implementing congress's intent. In response to congress's action following *Goldman*, the DOD issued a directive implementing the legislation, which addresses a broad range of religious accommodation issues. U.S. DEP'T OF DEFENSE, DIR. 1300.17, ACCOMMODATION OF RELIGIOUS PRACTICE (3 Feb. 1988) (C1, 1988). The directive states in pertinent part that religious accommodation requests "should be approved by commanders when accommodation will not have an adverse impact on military readiness, unit cohesion, standards of discipline." *Id*. para. C1. In kind, the Army regulation governing religious accommodation provides that the Army's policy is to approve accommodation requests, absent an adverse impact on military readiness, cohesion, morale, health, safety or discipline. AR 600-20, *supra* note 257, para. 5-6a. The Army further qualifies accommodation requests by providing that requests "cannot be guaranteed," and that accommodation depends, ultimately, on military necessity. *Id.*

In the military off-duty appearance context, freedom of exercise issues may arise regarding choice of hair style, clothing, or expressive decorations. For example, the wear of dreadlocks off duty may implicate religious affiliation with Rastafarianism,[283] but the wear of dreadlocks also has been associated with advocating marijuana use.[284] The off-duty wear of a shirt depicting Native American peyote use arguably promotes the use of a controlled substance,[285] and yet the military accommodates Native American religious use of the drug.[286] As with regard to the free speech analysis, the military will walk a fine line in restricting such off-duty appearance.

C. Drafting Concerns: Vagueness and Overbreadth

The Due Process Clause of the Fifth Amendment to the U.S. Constitution protects against arbitrary and unreasonable federal government action.[287] The "void for vagueness" doctrine ensures the federal government's respect for due process by requiring "fair notice or warning" of prohibited conduct[288] and by preventing arbitrary and

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[283] *See, e.g.*, *Goldman*, 475 U.S. at 519-20 (Brennan, J., dissenting) (noting that a Rastafarian seeking accommodation of his religion could, conceivably, request that he be permitted to wear dreadlocks).

[284] *See, e.g.*, INSIGHT GUIDE: JAMAICA 103-06 (Paul Zach ed., 1984) (noting that Rastafarians frequently smoke marijuana as a sacred ritual).

[285] Federal law categorizes peyote as a controlled substance. 21 U.S.C. § 812, sched. I (c)(12) (2000).

[286] Congress has directed that the federal government, including the military, accommodate peyote use. American Indian Religious Freedom Act Amendments of 1994, Pub. L. No. 103-344, 108 Stat. 3125 (codified as amended at 42 U.S.C. § 1996a(b)(1) (2000)). *See also* Memorandum, Assistant Secretary of Defense (Force Management), subject: Sacramental Use of Peyote by Native American Service Members (25 Apr. 1997) (copy on file with author) (providing guidance to the military departments regarding accommodation of service members' religious practices involving the use of peyote in religious ceremonies).

[287] U.S. CONST. amend. V; *see generally supra* notes 155-74 and accompanying text (discussing governmental action implicating due process clause protections, and courts' scrutiny of such action).

[288] Smith v. Goguen, 415 U.S. 566, 572 (1974) ("The [vagueness] doctrine incorporates notions of fair notice or warning."). In *Goguen*, for example, the Supreme Court invalidated for vagueness a statute that criminally punished anyone who "treats contemptuously" the U.S. flag. *Id*. at 568-69; *see also* Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) ("[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them."); United States v. Harris, 347 U.S. 612, 617 (1954) ("Void for vagueness simply means that criminal responsibility

discriminatory enforcement of laws or regulations.[289] A regulation, for instance, is "void for vagueness" if it "forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application."[290] A "void for vagueness" attack would argue, in essence, that the regulation or order lacks a standard by which to determine criminality.[291]

The overbreadth doctrine protects First Amendment freedoms of individuals where inartful regulatory drafting may impede their right of expression.[292] It also prohibits the selective enforcement of regulations.[293] An attack on a regulation as overbroad would argue that certain of its provisions implicate and prohibit constitutionally protected conduct.[294] In this way, the overbreadth doctrine requires that a regulation relate closely to furthering a stated purpose, without impinging unnecessarily on constitutional rights.

In the off-duty appearance context, the scenarios in which the military may seek to enforce vague standards are virtually endless. The services' current appearance regulations refer, for example, to standards of dress as "conservative,"[295] "offensive,"[296] and in "good taste."[297] These terms are notoriously imprecise and subject to arbitrary enforcement;[298] it is hardly inconceivable that one Soldier's fashion

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should not attach where one could not reasonably understand that his contemplated conduct is proscribed.").

[289] *Goguen*, 415 U.S. at 573; *see also* Hirschhorn, *supra* note 107, at 187 (describing the "void for vagueness" doctrine as guarding against the blurring of the lines between permitted and prohibited conduct, and prohibiting authorities charged with enforcing statutes from enforcing the laws arbitrarily or with invidious motives).

[290] Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).

[291] *See generally* Gilbert, *supra* note 96, at 216 (describing the "void for vagueness" doctrine).

[292] Massachusetts v. Oakes, 491 U.S. 576, 581 (1989).

[293] *See generally* Coates v. Cincinnati, 402 U.S. 611, 616 (1971) (invalidating as "an obvious invitation to discriminatory enforcement," a city ordinance that prohibited three or more persons to assemble on any sidewalk and "annoy" passersby).

[294] *See* Grayned v. City of Rockford, 408 U.S. 104, 114-15 (1972) (noting that overbroad laws, like vague ones, deter privileged activity); *see also* United States v. Nation, 26 C.M.R. 504, 506 (C.M.A. 1958) (invalidating a Navy regulation that imposed a waiting period on service members wishing to marry non-U.S. citizens).

[295] MARINE CORPS ORDER, *supra* note 2, para. 1005(2).

[296] AFI 36-2903, *supra* note 2, tbl. 1.1.

[297] NAVY UNIFORM REGS., *supra* note 2, para. 7101(2).

[298] *See* Klare, *supra* note 38, at 1441 (noting that appearance "standards are too nebulous and volatile, and the necessary judgments too speculative and ideologically grounded" for proper institutional monitoring and enforcement).

tastes may conflict with those of the military commander charged with enforcing the regulation.[299] Military appearance regulations similarly may implicate overbreadth concerns. By attempting to further the purposes of "good order and discipline," *esprit de corps*, and public perception, the regulations threaten to sweep up in their purview a host of otherwise protected speech and liberty interests.

The Army, Navy, and Air Force regulations, by permitting service members to express more individuality off of military installations than on them,[300] are more narrowly-tailored than their Marine Corps counterpart, which fails to distinguish between those two very different locations. Consider, for instance, a Marine on thirty days leave, traveling the countryside and not in contact with the Marine Corps. Under the Marine policy, if he dons an earring[301] or a bandana,[302] he has violated the regulation and is, according to the regulation's terms,[303] subject to potential punishment, regardless of whether those with whom he comes into contact even know that he is a service member. From this standpoint, the Marine regulation is overbroad.

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[299] Of course, if regulations come under a "vagueness" attack through the courts, it is likely that courts will rely on the "customs of the service" and "general usage" language of *Parker v. Levy* for contextual definitions of such terms as "conservative" and "good taste." In all but the most egregious instances, therefore, courts likely will look to customs of the service to uphold otherwise vague or overbroad regulatory provisions. *See supra* notes 126-28 (discussing the Supreme Court's reliance on military officers to define "customs of the service" and "general usage" in the context of a challenge to allegedly vague terms in the UCMJ).

[300] All three of these regulations do permit, for instance, male soldiers to wear earrings outside of areas under military jurisdiction. *See supra* notes 77, 82, 88 and accompanying text. Nevertheless, the Navy and Air Force's policies on body piercing remain arguably overbroad, for both policies forbid off-duty, on-installation piercings, other than for female service members' ear piercings, regardless whether the piercings may be concealed under clothing. *See supra* notes 76-77, 82-83 and accompanying text (describing the Air Force and Navy policies).

[301] The Marine regulation forbids male Marines to wear earrings while off-duty, whether or not they are on a military installation. MARINE CORPS ORDER, *supra* note 2, para. 1004(1)(b).

[302] The Marine regulation forbids specifically the wear of "bandannas [and] doo rags." *Id.* para. 1005(2)(d).

[303] The Marine Corps prohibition on males' wear of earrings and all Marines' wear of bandanas and "doo rags" does not distinguish between on- and off-duty wear. *See supra* note 54 and accompanying text (noting that the Marine Corps regulation does not distinguish between on- and off-installation scenarios).

VI. Can Military Appearance Regulations Be Improved?

The military's attempts to regulate off-duty appearance threaten service members' liberty interests in their personal appearance.[304] Moreover, the military, as a "separate society," often jealously protects its customs and traditions from social pressures to change.[305] The gravity of such a clash in interests might seem trivial in the larger legal or military sense;[306] after all, commentators[307] and judges,[308] alike, commonly assert that individuals who become service members abdicate certain rights that the citizenry at large takes for granted. Nevertheless, there is a perhaps misplaced tendency to dismiss or trivialize[309] appearance issues, under the presumption that officials have more pressing issues than "appearance choices" to resolve.[310] Such a tendency threatens to ignore the interests of service members attempting to assert their self-identity while off-duty.[311] Thus, the conundrum for the

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[304] *See supra* notes 18-21, 165-66 and accompanying text (describing liberty interests in choice of personal appearance).

[305] *See supra* Part III.A (describing the military as a "separate society," in some respects).

[306] For instance, a federal district court in one "appearance" case remarked of the controversy regarding a juvenile's method of wearing a baseball cap in a public setting: "This case involves a seemingly trivial matter, the wearing of one's baseball cap backward or forward. However, it raises important issues concerning the extent to which government officials can regulate any activity that might be an indicator of gang presence." Hodge v. Lynd, 88 F. Supp. 2d 1234, 1247 (D.N.M. 2000).

[307] "Once military status is acquired . . . that person's . . . living conditions, privacy, and grooming standards are all governed by military necessity, not personal choice. In a nation that places great value on freedom of expression, freedom of association, freedom of travel, and freedom of employment, the armed forces stand as a stark exception." Nunn, *supra* note 130, at 559.

[308] *See, e.g.*, United States v. Kazmierczak, 37 C.M.R. 214, 219 (C.M.A. 1967) (noting that the military's traditions and customs dictate that service members do not enjoy the same degree of personal liberties as the citizenry at large).

[309] *See, e.g.*, Rathert v. Village of Peotone, 903 F.2d 510, 511 (7th Cir. 1990). *Rathert*, which addressed the constitutionality of prohibiting off-duty police officers from wearing earrings, begins its analysis with the somewhat incredulous phrase, "Male police officers wearing earrings? Yes . . ." *Id*.

[310] Klare, *supra* note 38, at 1400-01.

[311] *See id*. at 1411 (noting that something so "mundane" as choice of hair style may constitute an assertion of cultural identity or celebration of self-esteem, especially where cultural or racial expression is involved); Gatto v. County of Sonoma, 98 Cal. App. 4th 744, 772 (Cal. Ct. App. 2002) ("[E]ven if a person's choice of dress and manner of appearance does not constitute the sort of expressive conduct protected by the First Amendment, it is nevertheless a form of individual expression that is constitutionally entitled to some protection against arbitrary governmental suppression."); *see also* Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards,*

military—and commanders charged with enforcing military policies—is to determine the conditions in which commanders should regulate service members' off-duty appearance.

A. Finding Common Ground

1. Should There Be One Unifying Military Policy?

Initially, it would appear that a simple first step toward demystifying the military's off-duty appearance policies would be for the DOD to unify each of the separate services' policies, by enacting an overarching DOD policy or by directing the implementation of common standards through each of the branches' regulations. Such a policy shift would interject more certainty and uniformity into the off-duty appearance debate. Differing service policies often have the residual effect of undermining cohesion and *esprit de corps*, especially in the increasingly common joint[312] operational environment[313] of the current military structure. For example, the DOD's directive to the armed services to enact common standards of conduct regarding fraternization within the military ranks[314] attempted to resolve problems of cohesion and *esprit.*[315]

Community Norms, and Workplace Equality, 92 MICH. L. REV. 2541, 2559 (1994) (noting that a prohibition against cultural appearance choices, such as braided hairstyles, may seem trivial to those who find such appearance "bizarre or threatening," but may seem significant to those wishing to assert their cultural identity through such appearance).

[312] The term "joint" refers to "activities, operations, organizations, etc., in which elements of two or more Military Departments participate." JOINT CHIEFS OF STAFF, JOINT PUBLICATION 1-02, DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS (30 Nov. 2004). For instance, a military operation incorporating Army and Marine Corps elements constitutes a joint operation.

[313] *See, e.g.*, Vivienne Heines, *Perspective from Tailhook: Time-Critical Targeting, Joint Operations Need Attention*, ARMED FORCES J., Nov. 1, 2003, at 21 (arguing for fuller integration between defense industry suppliers and the DOD, given the "increasingly joint nature of military operations" that dictates a centralized procedure for procuring military equipment).

[314] On 29 July 1998, then-Secretary of Defense William Cohen directed that the branches of the armed services "eliminate as many differences in disciplinary standards as possible and . . . adopt uniform, clear and readily understandable policies" regarding fraternization. Memorandum, Secretary of Defense, to Service Secretaries, Chairman of the Joint Chiefs of Staff, and Under Secretaries of Defense, subject: Good Order and Discipline (29 July 1998) (on file with author).

[315] "Such differences," Secretary Cohen observed, "are antithetical to good order and discipline, and are corrosive to morale, particularly so as we move towards an increasingly joint environment." *Id*.; *see also* Paul Richter, *Pentagon Toughens Fraternization Rules*, L.A. TIMES, July 30, 1998, at A11 (describing different rules on

Any DOD unification of the different services' off-duty appearance standards, however, would alter greatly at least some of the services' policies. For instance, the Marine Corps and Air Force regulations currently impose punitive sanctions for violations of certain of their provisions,[316] while the Army does not.[317] Additionally, each of the services' regulations treat issues of body art in slightly different manners.[318] More importantly, the Marine Corps regulation is the most restrictive:[319] unification of appearance standards under one DOD umbrella policy necessarily would cause the other services to move away from their more "permissive" standards and toward the Marine policy, or *vice versa*. The prospects for such a "unifying" DOD policy to reach fruition are poor. The different military branches doubtless will hesitate to abdicate tradition, as well as control over their members' appearance, simply for the sake of "uniformity."[320] More importantly, it is unlikely that the DOD would view such a policy as necessary, absent clamor for reform in this area.

2. Settling on Common Regulatory Provisions

Absent the enactment of a unifying DOD policy on personal appearance, the military services can interject more certainty and uniformity into certain off-duty appearance scenarios by reaching common ground on certain key provisions. Such commonality in prohibiting service-discrediting appearance and appearance that suggests

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fraternization and different methods of enforcement between branches of the armed services, which prompted the Secretary to dictate a unified, DOD-wide fraternization policy).

316 *See supra* notes 91-92 and accompanying text.

317 The practical effect of the Army policy, therefore, is that service members may be punished for violating orders to comply with the regulation's requirements.

318 *See supra* notes 72-90 and accompanying text (describing each branch of the military's differing standards regarding tattoos and body piercings).

319 *See supra* Part II.E (noting that the Marine Corps' regulation permits punishment for any violation of any provision, whereas Air Force, Navy, and Army policies do not provide for automatic punishment for regulatory violations).

320 The Marine Corps, for example, was widely reported to be the most vocal critic of any attempts to relax fraternization standards in the late 1990s when the services' fraternization policies came under scrutiny. *See*, *e.g.*, Bradley Graham, *New Rules on Adultery in Military Resisted*, WASH. POST, July 20, 1998, at A1; Michael Kilian, *Military Adultery Regulation Eased: Cohen Orders More Uniform Treatment Among the Services*, CHI. TRIB., July 30, 1998, at N3.

gang or extremist affiliation[321] would provide service members more certainty in terms of standards of acceptable appearance, and in terms of expected ramifications for violations. Managing service members' expectations is especially important in the current military joint operating environment.[322]

a. Service-Discrediting or Prejudicial—Profanity and Drugs

The first common requirement which each service's regulation might include relates to the wear of clothing that is prejudicial to good order and discipline or is service-discrediting. For instance, commanders may deem clothing that advocates illegal drug use[323] or that broadcasts profane or indecent messages[324] inappropriate for service member wear on a military installation. This follows from the power of and requirement for military installation commanders to regulate all that occurs on areas under their control.[325]

In cases in which appearance either communicates profanity or indecency, or advocates drug use, military commanders rightfully should be able to restrict service members' on-installation wear of such clothing or jewelry, on the basis that the message it communicates is

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[321] This recommendation ignores, obviously, mention of prohibitions on unprotected speech, such as obscenity, fighting words, or dangerous speech. *See supra* text accompanying notes 231-36 (describing these categories of unprotected speech). Overarching constitutional prohibitions on such speech apply equally across the branches of the armed services, obviously.

[322] *See supra* note 315 (describing then-Secretary of Defense William Cohen's concern that differing rules on fraternization among the armed services lowered morale in the increasingly joint operational environment).

[323] For instance, t-shirts depicting a marijuana leaf with the caption "legalize it" commonly would be viewed as advocating marijuana use. *See, e.g.*, Pyle v. South Hadley Sch. Comm., 861 F. Supp. 157, 161 (D. Mass. 1994).

[324] The most obvious example relates to the t-shirt at issue in the Supreme Court's *Cohen v. California* decision. 403 U.S. 15 (1971). *Cohen* held impermissible a ban on a private citizen's wear of a shirt stating "Fuck the Draft." *Id*. at 25. Moreover, the Army's regulation governing personal appearance defines "indecent," in the context of tattoos, as something that is "grossly offensive to modesty, decency, or propriety; [that] shock[s] the moral sense because of [a] vulgar, filthy, or disgusting nature or tendency to incite lustful thought; or [that] tend[s] reasonably to corrupt morals or incite libidinous thoughts." AR 670-1, *supra* note 2, para. 1-8(e)(2)(b).

[325] *See infra* notes 338-41 and accompanying text (describing Supreme Court jurisprudence granting military installation commanders great discretion in regulating activities on areas under their control).

inappropriate for association with the military, or that it undermines morale and discipline.[326] Where on-installation appearance is implicated, the risk that civilians—or even the military community—will know and associate the articles' wearer with the military is high enough to warrant an outright ban on such appearance.

Regarding off-post enforcement of such prohibitions, the military must tread carefully, so as not to impinge on the free speech rights of its members. Such off-installation personal appearance should warrant neither prior proscriptions nor corrective measures after the fact, without a clear nexus[327] between the service member's appearance and otherwise discrediting appearance. This, perhaps, is the reason that the Navy regulation (the only such service regulation addressing personal appearance that glorifies or advocates drug use), treads so cautiously in proscribing clothing and adornments that depict or advocate drug use.[328]

Where questions arise regarding the "profane" or otherwise service-discrediting quality of an article of clothing or jewelry, regulations should leave such determination to local commanders. This may occur, for example, where clothing conveys "double entendre"[329] messages

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[326] *See generally* Campanella, *supra* note 15, at 85-86 (describing the rationale of providing a "non-hostile" work environment for all soldiers as a proper justification for prohibiting indecent body art); *see also* United States v. Dykes, 6 M.J. 744, 748 (N.M.C.M.R. 1978) (upholding an order banning possession of drug paraphernalia on the basis that it discouraged the use of illegal narcotics, thus furthering morale and discipline).

[327] In this sense, the term "nexus" requires more than mere status of the individual as a member of the armed forces. It requires additional acts that identify that person as a service member (thus fulfilling a potential "service-discrediting" aspect of his conduct) or that imply DOD endorsement of his activities. For instance, the DOD permits service members to participate in local, nonpartisan political activities in their capacities as private citizens, provided that they do not wear their uniforms in pursuit of those activities. U.S. DEP'T OF DEFENSE, DIR. 1334.1, WEARING OF THE UNIFORM para. 3.1.2 (17 May 2004).

[328] "Wearing or displaying clothing, jewelry, tattoos, etc., depicting marijuana or any other controlled substance or advocating drug abuse is prohibited at all times on any military installation *or under any circumstance which is likely to discredit the Navy*." NAVY UNIFORM REGS., *supra* note 2, para. 7101(3) (emphasis added). The Navy regulation appears to acknowledge, without specifically stating so, that the wear of such clothing or articles may, in fact, *not* be service discrediting, if no clear nexus exists between the service member's "communication" of these messages and his status as a service member.

[329] *See, e.g.*, M. Christopher Bolen et al., *When Scandal Becomes Vogue: The Registrability of Sexual References in Trademarks and Protection of Trademarks from Tarnishment in Sexual Contexts*, 39 IDEA 435, 451 (1999) (describing the U.S.

containing both profane or indecent meanings, and those that are not profane or indecent.

b. Extremist and Gang Affiliation

A second area that each service's regulation might address in a coordinated manner relates to appearance that conveys extremist or gang affiliation. As with the identification-affiliation debate,[330] however, such a prohibition must consider the possibility that appearance might convey purely unintended and inadvertent messages of extremist or gang affiliation.[331]

Thus, such a policy should provide guidance on the types of appearance to be avoided. A key component of any military installation's proscription on "gang" or "extremist" appearance must be the proper definitions of the terms "gang" and "extremist." Without properly defining these terms, policies likely will not survive attacks on the basis of vagueness.[332] The Army policy on extremist activities, for example, provides a detailed definition of "extremist activities,"[333] and service regulations or installation-level policies might properly incorporate this definition. Regarding "gang" definitions, military case law has likened gangs to criminal organizations and extremist groups.[334]

Trademark Trial and Appeal Board's registration of trademarks for such clothing brands as "Big Pecker Brand" and "Big Johnson's," and noting that for a trademark "consisting of crude terms or references to be registrable, something must still be left to the viewer's imagination other than the vulgar or profane meaning").

330 *See supra* notes 253-54, 263 and accompanying text (describing the legality of personal appearance choices that indicate identification with or affiliation with certain groups).

331 *See, e.g.*, Stephenson v. Davenport Cmty. Sch. Dist., 110 F.3d 1303, 1311 (8th Cir. 1997) ("Sadly, gang activity is not relegated to signs and symbols otherwise indecipherable to the uninitiated. In fact, gang symbols include common, seemingly benign jewelry, words and clothing. . . . Baseball caps, gloves and bandannas are deemed gang-related attire by high schools around the country." (citations omitted)).

332 "We find no federal case upholding a regulation, challenged as vague or overbroad, that proscribes 'gang' activity without defining that term." *Id*. at 1309.

333 *See supra* note 257 and accompanying text.

334 *See* United States v. Billings, 58 M.J. 861, 865-66 (Army Ct. Crim. App. 2003). Moreover, the U.S. Supreme Court has implicitly validated the definition of "criminal street gang" as

> [A]ny ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of one or more . . . criminal acts

Service regulations should then direct local military installation commanders, when they deem necessary, to further define and prohibit on their installations the wear of specific articles of clothing, jewelry, or tattoos—or the mode of wearing clothing—that import gang or extremist affiliation. Permitting this latitude to local commanders has the additional advantage of allowing them to address and quash known gang or extremist affiliation problems that are common in the areas surrounding their installations. Courts have upheld bans on the wear of specific articles of clothing that signify gang affiliation, based on "public safety" and "prevention of disruption" rationales, for instance.[335]

B. Other Regulatory Improvements

As noted in the preceding section, each branch of the military can fairly easily enact regulations that establish common standards regarding service-discrediting appearance or extremist and gang affiliation. The harder issue—and one in which each branch of the service should receive leeway in regulating—regards the "grayer" areas of "appropriateness." For instance, what type of clothing is so "revealing" that it warrants censure on a military installation? Or, where unofficial military events, such as office parties or military unit functions, permit the wear of civilian clothing, jewelry or hairstyles, what constitutes "inappropriate" appearance?

In regulating off-duty personal appearance, each branch of the armed services should afford commanders the discretion to make "appropriateness" determinations on a case-by-case basis. A necessary corollary of this approach is that commanders should be permitted to exercise more control over the appearance of service members who

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> . . . and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

See City of Chi. v. Morales, 527 U.S. 41, 47 n.2 (1999); *see also Stephenson*, 110 F.3d at 1309-11 (noting the fatally flawed definition of "gangs" in relation to a statute proscribing "gang activity").

[335] *See, e.g.*, Bivens v. Albuquerque Pub. Sch., 899 F. Supp. 556, 560-61 (D.N.M. 1985) ("[T]he dress code adopted at [the public school] was a reasonable response to the perceived problem of gangs within the school. Together with other measures taken by school administrators, adoption of the dress code may have been responsible for the perception of an improved climate and learning environment at the school."); Jeglin v. San Jacinto Unified Sch. Dist., 827 F. Supp. 1429, 1462 (C.D. Cal. 1993).

remain within the confines of the "separate society" of a military installation.

1. On- Versus Off-Installation Application

The military has great discretion to govern its affairs on installations under its control. A military installation is, after all, a limited-access area subject to the installation commander's control.[336] Arguably, therefore, the military rightfully has a greater interest in regulating the appearance of its members when they physically are on military installations or other areas under military control, as opposed to off of those areas. Military off-duty appearance regulations should thus differentiate between a service member's on-installation and off-installation appearance.

Military regulations should clearly delineate that off-duty appearance standards apply to service members on areas under military control, with some limited exceptions.[337] The military has great authority to control the appearance of, and actions taking place within, its installations. From controlling the right of civilian entry,[338] to imposing reasonable limits on speech,[339] virtually everything that happens on a military installation, a publicly-owned but limited-access area,[340] rests within the considered discretion of its commander.

It follows that a commander, having considerable discretion to control the lives of the service members under his or her command,[341]

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[336] *See, e.g.*, Greer v. Spock, 424 U.S. 828, 838 (1976) (noting that the government does not abandon control over a military installation simply by virtue of permitting limited public access).

[337] Such exceptions are for service members who live in government housing on military installations. *See infra* text accompanying notes 343-44 and accompanying text (describing government housing of service members).

[338] *See, e.g.*, Brown v. Glines, 444 U.S. 348, 354-57 (1980); *Greer*, 424 U.S. at 840.

[339] *See, e.g.*, Ethredge v. Hail, 56 F.3d 1324 (11th Cir. 1995) (upholding the validity of a military installation commander's order banning bumper stickers that disparaged the President of the United States).

[340] *See, e.g.*, *Brown*, 444 U.S. at 356 & n.13 (noting that civilians have "no specific right to enter a military base"); Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886, 893 (1961) (noting the installation commander's extensive and exclusive authority to control entrance to, and residence in, a military installation).

[341] *See, e.g.*, *Brown*, 444 U.S. at 356 (describing installation commanders' duty to maintain morale, discipline, and readiness); *Greer*, 424 U.S. at 837-38 (noting an installation commander's authority to ban certain written materials from the installation).

also has considerable discretion to regulate their off-duty appearance, at least while they remain physically within this "separate society." Courts generally uphold civilian dress codes differentiating between male and female appearance standards, for instance, if the codes rely on "generally accepted community standards" regarding appearance.[342]

Nevertheless, military installations also are "home" to many service members who occupy government housing.[343] These service members live on the installation, and are subject to the installation's rules.[344] No military regulation governing personal appearance currently includes exceptions for service members who remain in the confines of their homes on the military installation. This, perhaps, is an unintended result of military appearance regulations, but it remains a significant concern.

The practical—even if unintended and unenforced—effect of these regulations, when they mandate certain "on-installation" and, therefore, "in-home" appearance, is that service members forfeit some of their liberty interests if they choose to dress in certain ways in the privacy of their own homes on a military installation. Each branch of the military should consider amending their regulations to permit relaxed standards of personal appearance when service members remain inside their homes or on their property on military installations.

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[342] *See, e.g.*, Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1092 (5th Cir. 1975) (upholding, in the face of a Civil Rights Act challenge, a private employer's dress code requiring different hair lengths for men and women, on the basis that such requirements rely only upon "generally accepted community standards of dress and appearance").

[343] In Fiscal Year 2004, for instance, the DOD owned and managed about 230,000 family housing units for military families. GENERAL ACCOUNTING OFFICE, MILITARY HOUSING: OPPORTUNITIES EXIST TO BETTER EXPLAIN FAMILY HOUSING O&M BUDGET REQUESTS AND INCREASE VISIBILITY OVER REPROGRAMMING OF FUNDS, GAO-04-583, at 4 (May 27, 2004). As of February 2004, the DOD "privatized" about 55,000 housing units by transferring them over to civilian companies to manage, and expected to privatize another 160,000 more by the end of Fiscal Year 2007. *Id*. at 5.

[344] For instance, installation commanders may suspend or revoke driving privileges on their installation, for cause. U.S. DEP'T OF ARMY, REG. 190-5, MOTOR VEHICLE TRAFFIC SUPERVISION para. 2-5 (8 July 1988). Installation commanders also may evict tenants of government housing on the installation, for cause. *See* U.S. DEP'T OF ARMY, REG. 210-50, HOUSING MANAGEMENT para. 3-23 (26 Feb. 1999) (detailing steps that commanders should take in determining whether to evict installation housing occupants). Commanders also may dictate the circumstances under which solicitors may frequent a military installation to sell products or services. U.S. DEP'T OF ARMY, REG. 210-7, COMMERCIAL SOLICITATION ON ARMY INSTALLATIONS para. 2-1 (22 Apr. 1986).

Once a service member departs a military installation, and provided his appearance does not implicate aforementioned modes of unacceptable communication,[345] his liberty interest in expressing his individuality normally will outweigh the military's interest in forcing him to conform to the military's notion of "good taste." While service members retain their legal status as military members when they depart an installation, they shed some of the characteristics that help to identify them, physically, as service members. Their off-duty time is uniquely their own, to a great extent, and their self-identities should be their own, as well.[346]

2. Time, Place, Circumstances, and Purpose Considerations

Current military case law regarding personal appearance can assist military appearance regulations to achieve some degree of uniformity and certainty. Specifically regulations can require commanders to utilize the same "time, place, circumstances, and purpose" test regarding off-duty appearance which military case law has utilized in certain circumstances.[347] Such a test would permit commanders to balance the physical appearance of off-duty Soldiers against the circumstances involved, in a particular case.[348] Before permitting commanders to curtail a service member's personal appearance choices, regulations

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[345] *See supra* text accompanying notes 231-33 (describing the regulation of unprotected speech); *supra* notes 256-57 and accompanying text (describing the military's regulation of personal appearance that advocates discrimination).

[346] Obviously, military members have no liberty interest outweighing military interests where their choice of appearance infers allegiance with, for instance, gangs or extremist groups. This article does not suggest that the military's interest in maintaining discipline outside the installation gates lessens, in this context.

[347] *See, e.g.*, United States v. Modesto, 39 M.J. 1055 (A.C.M.R. 1994), *aff'd*, 43 M.J. 315 (1995); United States v. Guerrero, 33 M.J. 295 (C.M.A. 1991). Both *Guerrero* and *Modesto* examined the allegedly discrediting or prejudicial nature of service members' off-duty conduct involving cross-dressing. *See supra* notes 180-84 (describing military case law addressing off-duty appearance standards, including situations involving cross-dressing).

[348] Such is the approach of the *Guerrero* decision. The court declared, for example, that "if a service member cross-dresses in the privacy of his home, with his curtains or drapes closed and no reasonable belief that he was being observed by others or bringing discredit to his rating as a petty officer or to the U.S. Navy, it would not constitute the offense." *Guerrero*, 33 M.J. at 298. The court also noted that the off-duty appearance conundrum is "one not easily disposed of under the general rubric of prejudice or discredit. It is difficult because [controversial appearance] can certainly be non-prejudicial and even enhance morale and discipline." *Id*.

should require a clear nexus between an individual's off-duty appearance and other facts that identify him as a service member, *other than* his mere status as a member of the military.

Regulations should permit a relaxed appearance standard for off-installation appearance, based on the "lesser" military interests involved in regulating personal appearance. However, where certain special circumstances involving a military nexus are involved,[349] regulations should permit commanders to determine whether—based on all attendant circumstances—a service member's appearance is appropriate. For instance, a service member's wear of cutoff shorts and a tank top may be "acceptable" in a legal sense, for everyday off-post wear. However, the same clothing may be inappropriate for wear in certain public areas of a military installation[350] or at a military event hosted off the installation.[351] In the aforementioned two circumstances, the nexus between the service member's status (either as a service member taking advantage of opportunities offered on the installation, or as a military member attending a military event) is clear. A provision permitting commanders to dictate the appropriateness of such clothing, in such circumstances, thus is rational.

Or, consider the case of body piercings: the military legally might forbid a male service member's wear of an earring on at least the *public* areas of an installation,[352] based on commanders' heightened interest in regulating activities that occur there. The nexus between the service member's right to be present on the installation and his status as a service member is obvious.

However, regulations should provide that the same service member has a heightened liberty interest in his personal appearance once he steps outside the gate of that installation. Regulations should permit the male

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[349] These circumstances are as varied as are the controversial appearance issues that they raise. They include, for example, situations involving off-duty, unofficial military events, such as unit or office picnics. They also might include situations in which a service member's appearance borders on service-discrediting, such as her wear of clothing that conveys a profane message, and in which she takes other actions drawing attention to her status as a service member.

[350] Such public areas include, for example, installation movie theaters, commissaries, and exchanges.

[351] Such events include, for example, office picnics or other gatherings that occur outside the boundaries of a military installation.

[352] *See supra* notes 336-41 and accompanying text (discussing commanders' exercise of discretionary functions over installations that they control).

service member to wear an earring under those circumstances, if there is no military nexus—other than his mere status as a service member—to his off-installation activities.[353] Again, a regulatory provision that requires a military nexus before limiting off-installation appearance is rational, and will provide more certainty both for service members and for commanders charged with enforcing appearance standards.

C. Addressing Vagueness Concerns

By attempting to provide descriptions of manners of appearance that are acceptable, military regulations governing appearance understandably muddy the water. The outer limits of terms such as "conservative" and "in good taste" rest in the eyes of the beholder. Regulation drafters undoubtedly have one ideal, while eighteen-year-old recruits may have another. Thus, it is disconcerting that regulations which are drafted, approved, and implemented by officers threaten to impact disproportionately on the military's enlisted ranks. The terms "conservative" and "good taste" perhaps import certain meaning within the officer corps, which they may not, within the enlisted ranks. The U.S. military is a tradition-laden institution, and its ranks remain rather sharply divided along socioeconomic, or "class" lines.[354] Put more bluntly, military members commonly understand that officers are expected to "act and dress the part."[355] Therefore, when regulations leave commanders to their own devices to decide what is—or is not—

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[353] The Army, Navy, and Air Force regulations currently permit male members to wear earrings when off duty and off of military installations. *See supra* notes 77, 82, 88 and accompanying text. However, the Marine Corps maintains a blanket prohibition on such wear. *See supra* note 54 and accompanying text.

[354] *See, e.g.*, Turley, *supra* note 10, at 63 n.288. Professor Turley argues, for instance, that "officers remain part of the educated and relatively affluent class. . . . [T]hey remain 'officers and gentlemen' who are separated by more than simple rank. Officers do not socialize or fraternize with enlisted personnel and share a common identity as the managing class . . . ." *Id*. Moreover, Professor Turley adds, "the sharp division of enlisted personnel and officers—as well as such preferred entry qualifications like college degrees—preserve social stratification and class elements in military service." *Id.* at 66 n.296. *But see* LIEUTENANT COLONEL KEITH E. BONN, ARMY OFFICER'S GUIDE 83 (49th ed. 2002) (observing that "[t]he Army is *not* a caste system" and that it represents a "contract between *equals* serving in different capacities with different roles, responsibilities, and compensation").

[355] For instance, the Army Officer's Guide advises officers that for casual get-togethers, "[g]entlemen are never wrong to wear a sport jacket and dress slacks . . . and ladies should wear a blouse and skirt or slacks or a simple dress." BONN, *supra* note 354, at 414.

"conservative," "eccentric" or in "good taste," the risks are two-fold. First, commanders may improperly attempt to enforce more stringent standards throughout the officer and enlisted ranks than even the regulations intend.[356] Second, commanders may fail to apply the standards evenhandedly throughout the officer and enlisted ranks, under the demeaning presumption that enlisted members do not "know" how to, or are not expected to, dress or appear appropriately.

If regulations choose to refer to terms such as "good taste" or "conservative," it is more prudent to describe what manner of dress definitely does not meet the definition. Numerous installation-level policies, for instance, detail the types of clothing which installation commanders have determined are inappropriate and thus prohibited.[357] Some of those local appearance standards rightfully may be reactions to particular problems observed by the installation commander.

Service regulations should consider incorporating such descriptions, in order to contextualize otherwise vague terms. Each service's regulation also should mandate that installation commanders, in implementing the regulation, further define the potentially vague terms at the local level through those commanders' promulgation of policy letters.

D. Considering Punitive Measures

The potential for commanders to enforce vague standards of "acceptability" in arbitrary ways warrants that service regulations governing personal appearance should not be punitive in their entirety. There is too great a potential for arbitrary enforcement of standards that

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[356] The United States Court of Military Appeals, for instance, noted this when overturning a Soldier's conviction for failing to obtain a hair cut to conform to an Army appearance regulation that his commander interpreted. United States v. Young, 1 M.J. 433, 436 (C.M.A. 1976). As the *Young* court noted, where regulations use descriptors such as "excessive," such regulations may still import far more permissible appearance standards than a commander is prepared to tolerate. *Id*. at 435.

[357] *See, e.g.*, XVIII AIRBORNE CORPS AND FORT BRAGG REG. 600-2, INSTALLATION DRESS CODE (23 Sept. 1994) (prohibiting the on-post wear of clothing such as that which depicts drug use or drug paraphernalia or that "is immodest or likely to offend other patrons"), *available at* https://airborne.bragg.army.mil/pubs/Regs/reg600-2.doc; Policy Letter CSM-01, Headquarters, III Corps and Fort Hood, subject: Uniform and Appearance Policy (Apr. 2004) (forbidding the on-post wear of shorts, skirts or "cut-off" pants that expose "any part of the buttocks," as well as the on-post wear of halter tops and tank tops in any Army and Air Force Exchange Service facility) (copy on file with author).

do not lend themselves to easy interpretation.[358] Service members should not face the threat of punishment simply for violating prohibitions on "eccentric" appearance, or for failing to maintain a "conservative" appearance. However, where regulations specifically articulate certain standards,[359] the violations of which are punishable under the UCMJ, regulations place service members on notice that their actions regarding appearance are punishable.

As this article notes, the U.S. Marine Corps has made a conscious policy choice that a violation of *any* of its appearance regulation's provisions could prompt punishment under the UCMJ. Concomitantly, the Army apparently has determined that violations of its appearance regulation's terms do not, in and of themselves, warrant punishment, *per se*. This difference in approaches reveals, apparently, the strength of the respective services' feelings, regarding how their members should appear out of uniform. A perhaps more even-handed approach is that which the Air Force takes: to provide for possible punitive sanctions for certain enumerated appearance infractions, the violations of which the Air Force apparently believes are especially serious.

VII. Conclusion

This article calls for the different branches of the armed services to revisit their off-duty appearance policies; it does not call for the retraction of those policies. Judicial deference to the military "separate society" virtually has eliminated the need for the armed services to articulate the bases for many—if not most—service regulation provisions, even outside of the "appearance" realm. Nevertheless, it is time for the services to undertake a more circumspect examination[360] of

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[358] For instance, former Secretary of the Navy John Lehman commented about changing attitudes toward hairstyles among service members: "Braids and cornrows are perfectly appropriate, as long as they're kept neat, clean, trimmed, and compatible with military headwear." Whittle, *supra* note 118, at A1. Conversely, a Marine Corps spokesman confided that "I don't think that cornrows would be necessarily welcome, simply because they would be considered eccentric." *Id*.

[359] For instance, regulations might specifically state that the on-installation wear of clothing or jewelry that conveys a clearly profane message, or that glorifies or advocates drug use, is punishable as a violation of those regulations.

[360] In this context, a "circumspect examination" would require services to examine whether and to what extent the implementation of off-duty appearance standards promotes good order and discipline, *esprit de corps*, and promoting a positive public image. *See supra* Part IV.B (discussing the rationales of good order and discipline, *esprit*

the policies they enact, in light of the historical underpinnings for those policies. This type of evaluation by the services is overdue. A service review will not automatically prompt the retraction of those policies, necessarily. Instead, it merely will require the services to articulate more fully the bases for their decisions.

The liberty interests involved in choice of off-duty personal appearance will always conflict, to some extent, with valid military interests in maintaining discipline, unity, and public image. This is not a remarkable proposition; societal and cultural values have clashed with the customs of the "separate society" virtually since the inception of the military. To a great extent, the military has a valid interest in regulating the appearance of its off-duty members, at least where service members' individuality threatens to undermine important military interests.

Nevertheless, military off-duty appearance standards will continue to evolve, even if slowly over time, as the military faces greater pressures to make itself "look like America." The challenge the military faces will be to hold firm where off-duty personal appearance trends threaten truly valid military interests, and yet to abandon irrational stereotypes of what it means to "be" a service member, where no rational bases exist for its off-duty appearance policies. The debate over these competing interests is healthy; it will force the military to articulate its rationales, and potentially show service members the dangers involved in some of their appearance decisions.

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de corps, and public image). Such an examination need not rise to the same level of agency review of its own actions under the "Hard Look" doctrine, which governs federal agency rulemaking. *See, e.g.*, John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 662-63 (1996) (describing the "Hard Look" doctrine as requiring agencies to produce "elaborate justifications" for their determinations in order to survive judicial scrutiny of their rulemaking). Rather, such an examination would require, for instance, that the services describe within their appearance regulations the purposes that are furthered.