

The First Amendment in Camouflage: Rethinking Why We Criminalize Military Speech

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An American can tweet “the president is a fucking idiot” and not go to jail. Yet if a U.S. soldier does the same, they are committing a federal crime. This example is only the tip of the iceberg representing a large swath of otherwise constitutionally-protected speech that is criminalized only for those in uniform. Like the captain of the Titanic, none of the three branches of federal government have bothered to carefully chart the dangers of such drastic speech suppression. Nor have they provided sufficient lifeboats for those on board in the form of substantive limitations regarding the types of speech that can land a servicemember in jail. This Article explores why this situation exists and recommends a safer course.

To navigate, this Article analyzes how the federal military speech crimes deviate from civilian criminal law, highlighting the former’s deficiencies while laying out a clear path of straight-forward statutory reform. The military courts’ messy speech jurisprudence is critically examined, with the Supreme Court’s seminal incitement law’s doctrinal development as the backdrop. This Article paints this larger landscape to demonstrate that the military speech doctrine, an expanded “dangerous speech” approach to what is unprotected speech, took an early off-ramp from the Court’s more protective speech law development. Linked to the worst excesses of the Espionage and Sedition Acts of 1917 and 1918, the current military speech doctrine fails to require clear causation of harm, thus allowing persecution of disliked ideas.

This Article recommends replacing the military speech doctrine with approaches that far better align with the modern Court’s speech jurisprudence. The most expansive speech crimes should be subject to strict scrutiny, and the Sedition Act crime of “service-discrediting conduct” wholly eliminated. However, due to the unique military harm some speech poses, this Article concludes that a discrete list of military speech crimes should remain unprotected by the First Amendment due

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to their nature as speech integral to crime, a long-recognized unprotected speech category.

TABLE OF CONTENTS

I.	INTRODUCTION	75
II.	MILITARY CRIMINAL SPEECH	79
	A. <i>Common Law Speech-Integral Crimes</i>	80
	B. <i>Uniquely Military Speech-Integral Crimes</i>	82
	C. <i>Catch-All Speech Crimes</i>	84
	1. <i>Article 133 Conduct Unbecoming an Officer and a Gentleman</i>	85
	2. <i>Article 134 General Disorders</i>	87
	a. <i>“To the Prejudice of Good Order and Discipline”</i>	88
	b. <i>Defining “of a Nature to Bring Discredit upon the Armed Forces”</i>	91
III.	DANGEROUS SPEECH	92
	A. <i>Tiered Speech and First Amendment Armor</i>	93
	B. <i>Military Speech Doctrine & The Espionage and Sedition Acts</i>	96
	C. <i>Why Brandenburg: The Clearly Present Bad Tendency to Punish Remote and Speculative Harm While Inferring Intent</i>	98
	1. <i>Bad Tendency Test</i>	98
	2. <i>Clear and Present Danger Is Bad Tendency</i>	100
	3. <i>Clear and Present Danger with Teeth</i>	102
IV.	MILITARY SPEECH DOCTRINE AS DENNIS	108
	A. <i>Military Speech Doctrine Adoption: Priest and Parker</i>	108
	B. <i>Military Speech Doctrine in Application</i>	111
	C. <i>More Military Speech: Other Categories Plus Wilcox</i>	117
V.	PROTECTED MILITARY SPEECH	121
	A. <i>Uniquely Military Speech-Integral Crimes</i>	121
	B. <i>The Elimination of Article 134, Clause 2</i>	124
	C. <i>Child Pornography Isn’t Criminal Because of Its Effect on the Military: Why Congress Needs to Fix the UCMJ</i>	127
	D. <i>Strict Scrutiny for Speech Crimes</i>	129
VI.	CONCLUSION	130

I. INTRODUCTION

“Congress shall make no law . . . abridging the freedom of speech.”¹

An Army officer recently tweeted that the Secretary of Defense is “the most vile, evil fuck in the current administration.”² He could go to jail for that Twitter comment because his speech is a military crime.³ And that is not the only type of speech that a civilian can utter with relative impunity, but could subject a service-member to a court-martial resulting in confinement and a punitive discharge. For example, a Marine major was sentenced to jail in 2016 for talking to a *Washington Post* reporter, a discussion in which he prevaricated about personal details regarding a previous sexual assault prosecution.⁴ The military’s reason for criminalizing such speech was that it constituted “conduct unbecoming an officer and gentleman,” hence warranting punishment.⁵

Indeed, a large swath of constitutionally protected speech for civilians falls outside the First Amendment’s protective shield if uttered by a member of our armed forces, despite the maxim that the “government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”⁶ Of course this principle does not fully hold true even outside the armed forces. Our government can lawfully and appropriately suppress speech through criminalization because of its message in contexts such as incitement, and threatening, obscene, defamatory, or fraudulent, speech.⁷

However, the military penal code criminalizes much more speech than that falling within these narrow categories. A military member can be prosecuted for, among other crimes: disloyal speech; insubordinate language against superiors; false official statements; mutinous speech; provoking speech; speech

¹ U.S. CONST. amend. I.

² Jared Keller, *Marco Rubio’s War on This Communist West Point Grad May Blow Up in His Face*, TASK & PURPOSE (Oct. 4, 2017), <https://taskandpurpose.com/communist-west-point-army-rubio/> [<https://perma.cc/B4D2-LMQN>].

³ *See id.*

⁴ *See* Hope Hodge Seck, *Marine Officer to Plead Guilty to Lying About Sex with Trainees*, BUS. INSIDER (Apr. 12, 2017), <http://www.businessinsider.com/marine-officer-to-plead-guilty-2017-4> [<https://perma.cc/X9QR-R2QD>]. *See also infra*, Part III.B.

⁵ Seck, *supra* note 4.

⁶ *United States v. Stevens*, 559 U.S. 460, 468 (2010) (quoting *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573 (2002)); *see R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *see also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) (“[T]he First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals.”); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 443 (1996) (calling this a “keystone” of First Amendment doctrine).

⁷ *See infra* Part III.B (describing traditional categories of unprotected speech); *see also* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1770–71 (2004).

considered “conduct unbecoming an officer;” and speech considered “prejudicial to good order and discipline” or “of a nature to bring discredit upon the armed services.”⁸ The Army officer’s tweet calling Secretary James Mattis an epithet is a crime punishable up to a year in prison and dismissal from the service under the provision making it a crime for an officer to refer to the President and certain other public officials using “contemptuous words.”⁹

This Article excavates the rather messy judicial rationale supporting this disparate application of the First Amendment to highlight its superficial, speculative nature and analytical weaknesses. Essentially, the courts have allowed broad criminalization of military speech for reasons of national security, a common rationale for speech persecution in this country—and as in the past, such reasoning lacks objective standards and is riddled with ambiguity.¹⁰ Using the suspect “clear and present danger” rationale borrowed from the repressive World War I Espionage and Sedition Acts era, the Supreme Court held over forty years ago that uniquely military speech crimes are constitutionally legitimate because of their supposed military necessity, and has not directly revisited the issue since.¹¹

As with all criminal law, the Uniform Code of Military Justice (UCMJ), the military’s penal code, serves as a tangible manifestation of society’s collective moral condemnation of behavior.¹² Uniquely, this code represents *two* societies’ opprobrium—that of both the military and ostensibly that of greater America. Hence, this Article urges greater scrutiny of uniquely military UCMJ speech crimes, given the seemingly disparate moral calculations of each society. And while there are relatively few military speech crime prosecutions, the ability to prosecute risks the reality that such crimes currently chill much speech—particularly given the military’s extensive disciplinary schema.¹³ Specifically,

⁸ See *infra* Part II.A–C (detailing three categories of military speech crimes found in the Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 801–946(a) (2012)).

⁹ This restriction also prohibits using contemptuous language against Congress; a safe harbor is seemingly found in “purely private” speech. See *infra* Part II.B (explaining 10 U.S.C. § 888 (2006)).

¹⁰ See *infra* Part III.C (detailing the Court’s rationale for allowing the criminalization of anti-war and other dissenting speech under the Espionage and Sedition Acts).

¹¹ See *Parker v. Levy*, 417 U.S. 733, 759 (1974); see also *infra* Part IV.A.

¹² See generally H.L.A. HART, LAW, LIBERTY AND MORALITY (1963) (explaining criminal law’s incorporation of society’s collective moral condemnation); H.L.A. Hart, *Punishment and Responsibility*, 19 U. TORONTO L.J. 642 (1969) [hereinafter Hart, *Punishment*] (critically discussing the philosophical underpinnings of criminal law in general).

¹³ Service-member speech is also suppressed through administrative measures, and such lesser actions typically revolve around the Code’s list of offenses. See LAWRENCE J. MORRIS, MILITARY JUSTICE: A GUIDE TO THE ISSUES 158–65 (2010) (describing UCMJ’s Article 15 non-judicial punishment and lesser military justice administrative measures that, along with criminal provisions, constitute the overall military justice arena). See generally Rachel E. VanLandingham, *Discipline, Justice, and Command in the U.S. Military: Maximizing Strengths and Minimizing Weaknesses in a Special Society*, 50 NEW ENG. L.

this Article focuses on UCMJ speech crimes to analyze: (1) how and why the military's speech crimes differ from the rest of American criminal law and whether structural defects in said crimes require reform; and (2) how the Supreme Court's and the military courts' doctrinal reconciliation of such divergence allows more speech to be suppressed than both necessary and desirable.¹⁴

This Article nests its inquiry in a pragmatic approach to free speech that focuses more on the usefulness of the UCMJ's speech restrictions than on their harmony with fundamental principles.¹⁵ Given that most military speech-suppressive crimes were inherited from George III's eighteenth century Army, this Article criticizes the reigning jurisprudential approach for assuming they are still functionally required; essentially, it asks whether such speech is harmful to the military.¹⁶ Furthermore, this Article asks, even if military speech is harmful, whether it is sufficiently harmful to justify suppression despite the country's preference and functional need for expressive freedom.¹⁷

Others have also urged more attention be paid to military speech crimes. Scholars have infrequently turned their sights on military speech restrictions

REV. 21 (2015) (explaining the strengths and weaknesses of the way in which the military justice system operates and attempts to control speech).

¹⁴The Uniform Code of Military Justice (UCMJ), 10 U.S.C. Chapter 47, was enacted in 1950 to comprehensively overhaul the administration of justice within the military after serious deficiencies were identified in World War II. *See generally* Walter T. Cox III, *The Army, the Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1 (1987) (detailing UCMJ reforms).

¹⁵*See* Richard A. Posner, *The Speech Market and The Legacy of Schenck*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 121, 121 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) [hereinafter *ETERNALLY VIGILANT*] (describing an instrumental approach to freedom of speech); *see also* Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737, 739 (2002) (suggesting the pragmatic approach to free speech is not foreclosed by the language of the First Amendment or case law).

¹⁶That today's military is radically different from even immediately post-World War II is an understatement; it has been an all-volunteer force since the 1970s; it is one that is highly-educated; and it is one that allows individuals to openly serve regardless of gender or sexual orientation, and hopefully soon will allow transgender personnel to openly serve as well. U.S. DEP'T OF DEF. ET AL., 2015 DEMOGRAPHICS: PROFILE OF THE MILITARY COMMUNITY 18, <http://download.militaryonesource.mil/12038/MOS/Reports/2015-Demographics-Report.pdf> [<https://perma.cc/RBL6-4CJV>] (detailing that, in 2015, 15.5% of all active duty military personnel were women, and 15.1% of all active duty enlisted military personnel were women.); *see also* Kim Parker et al., *6 Facts About the U.S. Military and Its Changing Demographics*, PEW RES. CTR. (Apr. 13, 2017), <http://www.pewresearch.org/fact-tank/2017/04/13/6-facts-about-the-u-s-military-and-its-changing-demographics/> [<https://perma.cc/W5U3-5F8G>] (explaining that more than 80% of Department of defense active-duty officers have at least a bachelor's degree, and of those, 42% have an advanced degree).

¹⁷*See* Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321, 1321 (1992) (“[R]obust free speech systems protect speech not because it is harmless, but despite the harm it may cause.”).

since the 1950s, with the most sustained scholarly focus following the Vietnam War.¹⁸ Since then attention has been sporadic, with recent emphasis on the relevance of social media.¹⁹ With a few exceptions, much of the extant scholarship rather uncritically notes the justifications given by the military and the courts for the punishment of military speech.²⁰ None carefully places the general jurisprudential approach to military speech crimes into the greater landscape that is First Amendment speech doctrine. Hence, existing literature overlooks the importance of criminal law concepts, such as causation and intent, that the Court grappled with in its foundational speech cases. It thus fails to assess how the military speech doctrine unsuccessfully resolves their roles as important limitations on the government's ability to suppress speech due to its content. This Article undertakes this missing landscape work and makes a normative argument that such criminal law concepts are needed to reinforce military speech crimes' constitutionality as well.

Part II of this Article arranges the UCMJ's penal provisions into three broad speech categories for analytical clarity, highlighting their divergence from civilian speech crimes. Part III sketches the contours of the Court's modern speech doctrine, briefly examining the early evolution of First Amendment speech jurisprudence. This short visit with Justice Holmes and the famous

¹⁸ See, e.g., Detlev F. Vagts, *Free Speech in the Armed Forces*, 57 COLUM. L. REV. 187, 187–88 (1957) (noting, as a seminal military speech article, that given Cold War exigencies, discipline and civilian control of the military require greater speech suppression in the military context); Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 183 (1962). See generally James T. Murphy, *Freedom of Speech in the Military*, 8 SUFFOLK U. L. REV. 761 (1974) (urging greater scrutiny to the general articles while finding traditional speech crimes unproblematic); Donald N. Zillman, *Free Speech and Military Command*, UTAH L. REV. 423 (1977) (focusing on command free speech based on two general officer misconduct cases); Donald N. Zillman & Edward J. Imwinkelried, *Constitutional Rights and Military Necessity: Reflections on the Society Apart*, 51 NOTRE DAME L. REV. 397 (1976) (noting that changes such as elimination of the draft require re-thinking of necessity of onerous military speech restrictions).

¹⁹ See, e.g., John A. Carr, *Free Speech in the Military Community: Striking a Balance Between Personal Rights and Military Necessity*, 45 A.F. L. REV. 303, 350 (1998) (defending military speech restrictions); Michael C. Friess, *A Specialized Society: Speech Offenses in the Military*, 2009 ARMY L. 18, 19 (2009); David Johnsen, *Free Speech on the Battlefield: Protecting the Use of Social Media by America's Soldiers*, 44 J. MARSHALL L. REV. 1085, 1085 (2011) (highlighting the increased use of social media by military members that requires more flexible responses); Lawrence Jude Morris, *Free Speech in the Military*, 65 MARQ. L. REV. 660, 660 (1982) (providing a thoughtful critique of reasons for criminal military speech suppression); Emily Reuter, *Second Class Citizen Soldiers: A Proposal for Greater First Amendment Protections for America's Military Personnel*, 16 WM. & MARY BILL RTS. J. 315, 317 (2007) (criticizing military speech doctrine); see also Jeremy S. Weber, *Political Speech, the Military, and the Age of Viral Communication*, 69 A.F. L. REV. 91, 94 (2013) (arguing that military members' political speech on social media poses a grave threat to U.S. democracy); cf. Elizabeth Lutes Hillman, *Disloyalty Among "Men in Arms": Korean War POWs at Court-Martial*, 82 N.C. L. REV. 1629, 1629 (2004) (deconstructing military aims in POW prosecutions for disloyal conduct).

²⁰ See *infra* Part IV.

Schenck line of cases demonstrates how the military speech doctrine took an early left turn off the Court's much longer road of speech jurisprudence. Part IV outlines the military appellate courts' typical approach to military speech crimes—what I call the military speech doctrine—to reveal how it retains the same analytical illnesses that the Court tried to cure in its more mature civilian speech jurisprudence.

Part V argues for both an improved statutory schema, and for a more rigorous doctrinal approach to military speech crimes that aligns with the modern Court's approach to the First Amendment. Specifically, I make three recommendations: first, replace the extant military speech doctrine with the strict scrutiny approach, while concomitantly classifying the majority of UCMJ speech crimes as unprotected "speech integral to crime."²¹ Second, I urge that the crime of service-discrediting speech (and other conduct) be dropped from the UCMJ due to its vestigial, Espionage-Sedition Act nature and anti-democratic effects. Finally, I advocate for significant UCMJ reform that transforms most Article 134 speech crimes—those currently penalized under the prejudicial to good order and discipline and service-discrediting clauses of Article 134—into standalone offenses that do not depend on any such collateral effects.²²

This Article concludes by noting that such legislative and jurisprudential changes would increase the effectiveness of sanctions against truly harmful speech by military members. These changes would also better align the military speech doctrine with the modern First Amendment, not for the sake of doctrinal neatness, but as a pragmatic push to ensure speech values, military effectiveness, and democracy are appropriately considered.

II. MILITARY CRIMINAL SPEECH

The UCMJ is the military's penal code, listing crimes drafted by Congress in fulfillment of its constitutional duty "[t]o make Rules for the Government and Regulation of the land and naval Forces."²³ This modern code has ancient roots,

²¹ See *infra* Part IV.B. See generally Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 CORNELL L. REV. 981 (2016) (providing terrific analysis of how the speech integral to crime exception can be used to cover types of content-based speech restrictions for which the Court does not want to create a "new" category).

²² This last suggestion is one for Congress to modernize the UCMJ to clearly highlight crimes for the harms they truly represent: for example, child pornography is a crime regardless of its effect on good order and discipline, yet the UCMJ criminalizes only when it has such an effect. MANUAL FOR COURTS-MARTIAL, UNITED STATES, Pt. IV, ¶ 68b (2016) [hereinafter MCM]. I suggest the same modification for non-speech "general disorders" crimes as well.

²³ U.S. CONST. art. 1, § 8, cl. 14; see also *id.* at cl. 16 ("To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States . . .").

as do most of its provisions that punish and therefore restrict speech.²⁴ This Part establishes how the UCMJ criminalizes servicemember speech through its statutory offenses, identifying three types of speech crimes amongst the UCMJ's over sixty criminal articles.²⁵ I establish this penal code speech-crime typology to highlight the distinctions between military and civilian speech crimes. This schema also allows me to later situate such crimes within the First Amendment doctrinal landscape. The following typology includes: (1) common law speech-integral crimes; (2) uniquely military speech-integral crimes; and (3) uniquely military catch-all crimes.

A. Common Law Speech-Integral Crimes

The UCMJ includes several specific speech²⁶ crimes that mirror, for the most part, similar speech crimes in civilian jurisdictions. They are speech crimes because their criminality turns on speech, or one of their listed alternative modes of commission is speech; the crimes “are actually defined in terms of communication.”²⁷ For example, perjury requires speech with a particular content.²⁸ The gravamen of harm of perjury, the damage society is trying to punish and hence prevent, is the deceit perpetrated on a court by what is said. The military, just as in the common law and modern civilian penal codes, criminalizes such deceitful speech when uttered under oath in a judicial proceeding.²⁹

This category consists only of those crimes with an element that turns on the content of speech per se, and for which an equivalent speech crime is also typically found in modern civilian jurisdictions.³⁰ Of course, the military and civilian penal codes include myriads of common law crimes that could possibly be committed by the use of speech, such as a robbery in which a bank robber

²⁴The United States inherited the Articles of War from Great Britain before formal independence; the Navy and Army used the Articles of War until May 31, 1951 when the UCMJ came into effect. See Charles J. Dunlap Jr., *Military Justice*, in THE MODERN AMERICAN MILITARY 243–44 (David M. Kennedy ed., 2013) (noting the history of the UCMJ); MORRIS, *supra* note 13, at 14.

²⁵The UCMJ contains 63 distinct punitive articles depending on one's categorization; some articles, such as Article 112, include two provisions, Article 112 and Article 112a, which I count separately; additionally, some contain several separate offenses, such as Article 92 (which outlines three distinct crimes). See MCM, *supra* note 22, at Pt. IV, ¶¶ 16 & 36–37. Additionally, Article 134, in addition to the three alternate crimes contained in its language, lists fifty-six exemplary Article 134 crimes. See *id.* at Pt. IV, ¶ 60.

²⁶Speech includes words, as well as expressive, communicative conduct. See, e.g., *United States v. O'Brien*, 391 U.S. 367, 385 (1968). See generally Erwin Chemerinsky, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723 (2011) (arguing the Roberts court has consistently ruled against free speech claims when brought by those who challenge the government's national security and military policies).

²⁷Kent Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND. RES. J. 645, 648 (1980).

²⁸18 U.S.C. § 1621 (1994) (describing the elements of perjury generally).

²⁹10 U.S.C. § 931 (2012).

³⁰See *id.*

hands a teller a demand note.³¹ These are not speech crimes because their criminality does not turn on speech, despite the fact that speech may occasionally be instrumental to their commission. Professor Greenawalt uses the example of a person with a flashlight telling someone to turn left on a dark path, knowing there is a cliff in that direction, so that the person who cannot see will fall off the cliff,³² while speech was definitely part of the killing, the crime of murder does not turn on speech.

Most category one military speech crimes date back to the 1775 Articles of War inherited from the British.³³ They include solicitation,³⁴ extortion,³⁵ perjury,³⁶ principal (accomplice) liability,³⁷ conspiracy,³⁸ criminal fraud and fraudulent enlistment,³⁹ sedition,⁴⁰ espionage,⁴¹ breach of the peace,⁴²

³¹ See also *United States v. Barnett*, 667 F.2d 835, 842 (9th Cir. 1982) (“The first amendment does not provide a defense to a criminal charge simply because the actor uses words to carry out his illegal purpose.”).

³² Greenawalt, *supra* note 27, at 648.

³³ WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 720 (2d ed. Washington Government Printing Office 1920) (1896).

³⁴ 10 U.S.C.A. § 882 (West 2016). Article 82 specifically prohibits solicitation to commit the uniquely military crimes of desertion and misbehavior before the enemy, as well as the UCMJ’s crime of sedition. Solicitation to commit other crimes listed in the UCMJ falls under the general article, Article 134, as specified by the President and includes an additional terminal element as described *infra* Part II.C.2.

³⁵ 10 U.S.C. § 927 (2012) (“Any person subject to this chapter who communicates threats to another person with the intention thereby to obtain anything of value or any acquittance, advantage, or immunity is guilty of extortion . . .”).

³⁶ 10 U.S.C. § 931 (2012).

³⁷ This provision is a hybrid because it is a mode of liability that makes the perpetrator liable for a separate UCMJ crime and speech is an alternative mode of violation. 10 U.S.C. § 877 (2012) (“[A] person . . . [who] . . . aids, abets, *counsels, commands*, or procures [the] commission [of an offense]; or . . . causes an act to be done which if directly performed by him would be punishable by this chapter.”) (emphasis added). Article 78, *Accessory After the Fact*, also criminalizes speech when someone through speech “receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial, or punishment.” 10 U.S.C. § 878 (2012).

³⁸ 10 U.S.C. § 881 (2006) (requiring an agreement and overt act).

³⁹ 10 U.S.C.A. § 932 (West 2016); 10 U.S.C.A. § 883 (West 2016) (Article 132 prohibits frauds against the United States, similar to the federal code whereas Article 83 tailors fraud to the military context by specifically carving out a prohibition for fraudulent enlistment, appointment, and separation).

⁴⁰ 10 U.S.C. § 894 (2012) (criminalizing both mutiny and sedition as separate offenses under same article; sedition is defined as any person “with intent to cause the overthrow or destruction of lawful civil authority, creates, in concert with any other person, revolt, violence, or other disturbance against that authority is guilty of sedition”).

⁴¹ 10 U.S.C. § 906(a) (2006).

⁴² 10 U.S.C. § 916 (2012).

provoking words and gestures;⁴³ and forgery.⁴⁴ Though lacking a common law bloodline, the UCMJ crimes of stalking⁴⁵ and non-consensual distribution of sexual photos⁴⁶ also turn on speech and are also criminalized in some civilian jurisdictions; hence I include them in this category as well.⁴⁷ Critically, these speech-integral military analogues of civilian common law crimes today pose little First Amendment concern, largely because of their classification into their own unprotected category of speech.⁴⁸ This leaves this overall category largely non-problematic regarding constitutional free speech concerns.⁴⁹

B. *Uniquely Military Speech-Integral Crimes*

The second type of military speech crimes this Article analyzes consists of crimes that are uniquely military—that is, with no civilian analogue—and primarily turn on the content of speech. Leading this pack is UCMJ Article 88, which criminalizes the use of contemptuous words by commissioned officers against the president and other civilian leaders of the military, as well as Congress as a body.⁵⁰ Other uniquely military crimes that turn either solely on speech or include speech as an alternative actus reus, (the element of required conduct), include: disrespect toward a superior commissioned officer;⁵¹

⁴³ 10 U.S.C. § 917 (2012) (criminalizing gestures or words that are directed “towards any other person subject to this chapter” and are “provoking or reproachful”); Analogous civilian crimes include California Penal Code breach of the peace statute, which includes a fighting words provision similar to Art. 117. CAL. PENAL CODE § 415 (West 2016). For a discussion of the constitutionality of banning fighting words see generally Sean Clark, *Misconceptions About the Fighting Words Exception*, FOUND. FOR INDIVIDUAL RTS. EDUC. (Sept. 20, 2006), <https://www.thefire.org/misconceptions-about-the-fighting-words-exception/> [<https://perma.cc/9QFR-4YFG>] (“[T]he Supreme Court has effectively limited the exception to only include abusive language, exchanged face to face, which would likely provoke a violent reaction.”).

⁴⁴ 10 U.S.C.A. § 923 (West 2016).

⁴⁵ 10 U.S.C.A. § 920(a) (West 2006). Speech is an alternative element of stalking. Expressive conduct is viewed as speech. *Cohen v. California*, 403 U.S. 15, 18 (1971).

⁴⁶ See 10 U.S.C.A. § 920(c) (West 2006), which criminalizes distributing intimate photos taken without consent whereas a new provision enacted by Congress in 2017 criminalizes those taken with consent, but non-consensually distributed (so called “revenge porn”).

⁴⁷ See, e.g., N.C. GEN. STAT. § 14-190.5A (2017) (prohibiting disclosure of private images).

⁴⁸ See *United States v. Stevens*, 559 U.S. 460, 468 (2010) (citation omitted) (listing “speech integral to criminal conduct” as one of the categories of unprotected speech). See generally Volokh, *supra* note 21.

⁴⁹ But see Andrew Koppelman, *Revenge Pornography and First Amendment Exceptions*, 65 EMORY L.J. 661, 663 (2016) (describing the constitutional speech concerns raised by similar civilian crimes).

⁵⁰ 10 U.S.C. § 888 (2006).

⁵¹ 10 U.S.C.A. § 889 (West 2016).

insubordinate conduct toward non-commissioned officer;⁵² cruelty and maltreatment;⁵³ subordinate compelling surrender;⁵⁴ improper use of countersign;⁵⁵ false official statement;⁵⁶ and mutiny.⁵⁷ I also include three other uniquely military crimes in this category because speech may, as one of the alternative acts, trigger their sanction: Articles 90, 91, and 92 each include a provision criminalizing disobedience of orders.⁵⁸ The primary difference amongst these three crimes is the source of the order disobeyed: superior commissioned officer (Article 90(2)); non-commissioned officer (Article 91); and general officer (Article 92); Article 92 also criminalizes the disobedience of specific types of regulations as well as dereliction of duty.⁵⁹

A violation of one of these provisions constitutes a uniquely military speech crime when the violated order itself prohibits a particular type of speech. For example, a superior may order a subordinate to not speak to a fellow servicemember while at work about matters unrelated to their duties.⁶⁰ Violation of this order would clearly turn on the content of the order recipient's speech, and this disobedience could be charged as a violation of one of these three provisions, depending on the rank of the superior. These provisions are not without limits, as the spectrum of speech that can be made subject to such an order is a relatively narrow one. While military orders are presumed to be lawful,⁶¹ lawful orders must be directly related to military duty.⁶²

⁵² 10 U.S.C. § 891 (2012) (“Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer.”).

⁵³ 10 U.S.C. § 893 (2012). While this crime can be committed without speech, the MCM discussion demonstrates that speech also can serve as the required act: “sexual harassment may constitute this offense . . . [this] includes influencing, offering to influence, or threatening the career, pay, or job of another person in exchange for sexual favors, and deliberate or repeated offensive comments or gestures of a sexual nature.” See MCM, *supra* note 22, at Pt. IV, ¶ IV-26.

⁵⁴ 10 U.S.C. § 900 (2012) (“Any person subject to this chapter who compels or attempts to compel the commander of any place, vessel, aircraft, or other military property, or of any body of members of the armed forces, to give it up to an enemy or to abandon it, or who strikes the colors or flag to any enemy without proper authority . . .”).

⁵⁵ 10 U.S.C. § 901 (2012) (“Any person . . . who . . . discloses the parole or countersign to any person not entitled to receive it . . .”).

⁵⁶ 10 U.S.C.A. § 907 (West 2016) (“Any person subject to this chapter who, with intent to deceive, signs any false record, return, regulation, order, or other official document, knowing it to be false, or makes any other false official statement knowing it to be false . . .”).

⁵⁷ 18 U.S.C. § 2192 (2012).

⁵⁸ Each Article separately criminalizes other behavior such as assaulting a superior officer, 10 U.S.C. § 890 (2012), or non-commissioned officer, *id.* at § 891, and dereliction of duty, *id.* at § 892.

⁵⁹ 10 U.S.C. § 892 (2012).

⁶⁰ See, e.g., *United States v. Moore*, 58 M.J. 466, 468 (C.A.A.F. 2003).

⁶¹ Orders are presumed lawful unless they involve ordering a crime. See MCM, *supra* note 22, at Part IV, ¶ 14.c.(2)(a)(i).

⁶² Directly-related “includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a

Article 92 also criminalizes failure to obey military regulations.⁶³ Similar to how Articles 90, 91, and 92 can turn on speech through the type of order given (if it involves speech), Article 92(2)'s criminalization of disobedience of a general regulation likewise turns on speech when a particular regulation prohibits types of speech. In other words, Article 92(2) constitutes a speech-integral crime for this speech typology when the underlying punitive⁶⁴ order or regulation prohibits certain speech.⁶⁵ For example, an Army regulation prohibits "recruiting or training members (including encouraging other Soldiers to join)" extremist organizations, a prohibition which, at least regarding recruiting, turns on speech, and is explicitly punishable under Article 92, UCMJ.⁶⁶

C. Catch-All Speech Crimes

The third category of this Article's military speech crimes typology consists of two unusual UCMJ provisions: Article 133, "Conduct Unbecoming of An Officer and a Gentleman," and Article 134, the "General Article."⁶⁷ These "catch-all" articles were originally designed to cover all misconduct harmful to the military that was not already criminalized in the other UCMJ provisions. Article 133 sets a vague baseline standard of behavior for officers and cadets, whereas Article 134, often referred to as the "general disorders" provision, contains three separate crimes.⁶⁸

command and directly connected with the maintenance of good order in the service." *Id.* at Part IV, ¶ 14.c.(2)(a)(iv); *see also* United States v. Womack, 29 M.J. 88, 90 (C.M.A. 1989) (explaining that a lawful order must have a valid military purpose and a specific mandate).

⁶³ 10 U.S.C. § 892 (2012).

⁶⁴ Violations of military regulations constitute Article 90 violations only when the underlying regulation is "punitive" in nature; the regulation must, in accordance with the fair notice due process principle, explicitly state that disobedience could result in prosecution. *See, e.g.*, DEP'T OF DEF., INSTR. 51-903, DISSIDENT AND PROTEST ACTIVITIES 1 (July 30, 2015), <https://www.littlerock.af.mil/Portals/25/documents/EO%20Folder/Dissident%20and%20Protest%20Activities%20afi51-903.pdf?ver=2016-06-02-113803-493> [<https://perma.cc/J387-79TP>] [hereinafter AFI 51-903] ("[M]embers who violate [these] prohibitions . . . are subject to disciplinary action under Article 92, or other applicable articles of the Uniform Code of Military Justice."); *see also* MCM, *supra* note 22, at Pt. IV, ¶ 16.c.(2)(a)–(c).

⁶⁵ In contrast, most regulations deal with physical conduct. For example, the services each have regulations that allow commanders to prohibit visiting particular off-base establishments. *See, e.g.*, U.S. DEP'T OF ARMY, INSTR. 600-20, ARMY COMMAND POLICY, ¶ 4-12b (Nov. 6, 2014) http://gordon.army.mil/sharp/downloads/Army_Command_Policy_AR_600-20.pdf [<https://perma.cc/TZP2-G67M>] [hereinafter AR600-20]; *see also* AFI 51-903, *supra* note 64, at ¶ 3.

⁶⁶ AR 600-20, *supra* note 65, at ¶ 4-12.b(4); *see also* AFI 51-903, *supra* note 64, at ¶ 4.1 (prohibiting actively participating in, such as by recruiting for, extremist organizations).

⁶⁷ 10 U.S.C. §§ 933–34 (1958).

⁶⁸ *Id.*

These articles warrant their own category because of their sheer breadth and vagueness.⁶⁹ Unlike category two speech crimes which specify the type of prohibited speech, Articles 133 and 134 fail to specify, on their face, the prohibited *actus reus* outside of such conduct's claimed effect.⁷⁰ As long as the conduct such as speech fits the required terminal elements of unbecoming an officer (Article 133), or service-discrediting or prejudicial to good order and discipline (Article 134)—then any speech will suffice.⁷¹

1. Article 133 Conduct Unbecoming an Officer and a Gentleman

*“Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.”*⁷²

Article 133 allows the military to punish officer speech it dislikes by claiming that the expressive act is unbecoming an officer and gentlemen.⁷³ This occurred in the 2017 case of Major Mark Thompson, in which the military convicted a Marine Corps officer for, among other things, lying to a *Washington Post* reporter because said speech, according to the military, was conduct unbecoming.⁷⁴ The MCM defines conduct unbecoming as that which seriously dishonors or disgraces the officer personally or officially.⁷⁵ This provision can

⁶⁹ The military courts have consistently ruled against obvious vagueness challenges, with the Supreme Court's approval. *Parker*, 417 U.S. at 759–60. See generally Edward J. Imwinkelried & Donald N. Zillman, *An Evolution in the First Amendment: Overbreadth Analysis and Free Speech Within the Military Community*, 54 TEX. L. REV. 42 (1977) (arguing that the Burger Court adopted a very liberal test for attacking proscriptions upon First Amendment activities).

⁷⁰ 10 U.S.C. §§ 933–34 (1958).

⁷¹ In exemplary contrast, the disobedience crimes provide second-order criminalization of speech in that a pre-existing order has to first exist to be violated, thereby putting a servicemember on notice regarding potential criminality.

⁷² 10 U.S.C. § 933 (1958).

⁷³ *Id.*

⁷⁴ Marine Corps Major Mark Thompson pleaded guilty to, amongst other charges, an Article 133 charge in April 2017 for giving an interview to the *Washington Post* full of prevarications about his previous conviction regarding fraternization with and sexual assault of Annapolis midshipmen. See Matthew Cox, *Major Gets 90 Days in the Brig for Lying About Sexual Misconduct*, MILITARY.COM (Apr. 14, 2017), <https://www.military.com/daily-news/2017/04/14/major-gets-90-days-brig-lying-sexual-misconduct.html> [<https://perma.cc/AQ5Y-9B7E>]; see also Ann E. Marimow, *Marine in Sexual Misconduct Case Faces Unusual Charge of Lying to a Reporter*, WASH. POST (July 20, 2016), https://www.washingtonpost.com/local/public-safety/marine-in-sexual-misconduct-case-faces-unusual-charge-of-lying-to-a-reporter/2016/07/20/c4fb5a2c-49cd-11e6-90a8-fb84201e0645_story.html?utm_term=.499020e8b70f [<https://perma.cc/B4NY-K98H>].

⁷⁵ “[A]ction or behavior in an official capacity which, in dishonoring or disgracing the person as an officer, seriously compromises the officer's character as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer

be used to charge misconduct that is already criminalized separately in the UCMJ, as well as speech that is not otherwise made criminal by the UCMJ or other federal law. Article 133 is unlike Article 134, which is limited only to the crimes not otherwise criminal per the UCMJ via the preemption doctrine.⁷⁶

Article 133 was without historical precedence in ancient armies until 1765, when the British introduced a similar provision into their Articles of War.⁷⁷ The UCMJ's Article 133, originally Article 61, was copied directly from those extant 1765 British Articles of War into the Continental Congress's first Articles of War in 1775,⁷⁸ and repeated without change until a Congressional modification in 1806 expanded its reach.⁷⁹ Article 61 originally required the dismissal of the officer upon conviction, an indication of the severity of the misconduct this Article was originally designed to punish.⁸⁰ Congress dropped this requirement in its 1950 UCMJ reform, thus allowing a range of sentences, and in doing so diluting the gravamen of harm required to charge this offense.⁸¹

The Army's military judges' benchbook's definition of conduct unbecoming echoes Colonel William Winthrop's famous early twentieth century treatise on military law, and has been cited by the Court of Appeals for the Armed Forces (CAAF), the military's highest appellate court,⁸² without criticism.⁸³ The benchbook defines "[u]nbecoming conduct" as "misbehavior more serious than slight, and of a material and pronounced character. It means conduct morally unfitting and unworthy rather than merely inappropriate or unsuitable misbehavior which is more than opposed to good taste or

personally, seriously compromises the person's standing as an officer." MCM, *supra* note 22, at Pt. IV-112, ¶ 59.c.(2) (citing without attribution WINTHROP, *supra* note 33, at 710).

⁷⁶ See *infra* Part ILC.2; MORRIS, *supra* note 13, at 85 (noting that the maximum punishment for conduct that is not otherwise criminal but violates Article 133 because of its unbecoming nature is either that provided for the most analogous UCMJ article, or one year confinement if not otherwise specified, plus dismissal and total forfeiture of pay and allowances).

⁷⁷ See Gilbert G. Ackroyd, *The General Articles, Articles 133 and 134 of the Uniform Code of Military Justice*, 35 ST. JOHN'S L. REV. 264, 271 (1961). Little is known as to the impetus behind this addition. See *id.* at 271-72.

⁷⁸ See WINTHROP, *supra* note 33, at 710.

⁷⁹ See *id.* (originally requiring that the behavior be of a "scandalous and infamous" manner, Congress deleted the requirement in 1806 in an "effort to extend materially the scope of the Article").

⁸⁰ Ackroyd, *supra* note 77, at 272.

⁸¹ See *id.* (describing the 1951 change).

⁸² The Court of Appeals for the Armed Forces (CAAF) and its predecessor, the Court of Military Appeals (CMA) was created by Congress as part of the Uniform Code of Military Justice, enacted in 1950. The services each have lower appellate criminal courts from which CAAF hears primarily discretionary appeals. See 10 U.S.C.A. § 867 (West 2016).

⁸³ See *United States v. Norvell*, 26 M.J. 477, 480 (C.M.A. 1988) (citing the judge's use of the judge's benchbook definition of conduct unbecoming in an Article 133 specification dealing with speech; specifically, appellant, an Air Force captain, pleaded guilty to the conduct unbecoming nature of her communication to an enlisted personnel regarding how to catheterize oneself to avoid illegal drug use during a urinalysis).

propriety.”⁸⁴ CAAF has further clarified that while “we accept the premise that a commissioned officer may be held to a higher standard of accountability for his conduct than an enlisted member or a civilian . . . not every delict or misstep warrants punishment under Article 133. In general, it must be so disgraceful as to render an officer unfit for service.”⁸⁵ CAAF has also stated that “it is sufficient that the offender’s behavior seriously exposes him or her to public opprobrium.”⁸⁶

2. Article 134 General Disorders

*“Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces . . . shall be punished”*⁸⁷

Whereas Article 133 only applies to officers and officers-in-training, thus setting a higher standard of daily conduct for officers than for enlisted personnel, Article 134 applies to everyone subject to court-martial jurisdiction.⁸⁸ Consisting of three distinct crimes, Article 134’s first two provisions, which are the most frequently used, set an ambiguous baseline standard of conduct regarding behavior that has a nexus to military service.⁸⁹ Article 134 prohibits conduct that is either prejudicial to good order and discipline or “of a nature to bring discredit upon the services” (typically referred to as “service-discrediting” behavior); its third prong simply allows the military to charge certain federal and state crimes.⁹⁰

⁸⁴ U.S. DEP’T OF ARMY, DA PAMPHLET 27-9, THE JUDGE’S BENCHBOOK 574 (2002), https://www.loc.gov/tr/frd/Military_Law/pdf/Military-Judges-Benchbook-2002.pdf [<https://perma.cc/7FRL-XEAR>] (providing model jury instructions regarding the UCMJ offenses). If the conduct is in an official capacity, it is that “which, in dishonoring or disgracing the individual as a (commissioned officer) (cadet) (midshipman) seriously detracts from his character as a gentleman.” *Id.* at 575. Regarding unofficial or private conduct, it defines conduct as unbecoming if “in dishonoring or disgracing the individual personally, seriously detracts from [his] standing as a[n] . . . officer.” *Id.* at 574.

⁸⁵ *United States v. Guaglione*, 27 M.J. 268, 271 (C.M.A. 1988).

⁸⁶ *United States v. Shober*, 26 M.J. 501, 502 (A.F.C.M.R. 1986). The tension is obvious—while CAAF implies that this Article should be reserved for only such conduct for which dismissal from service is warranted, which was the Article’s original mandatory penalty, it undercuts that implication through its description of requisite conduct as “morally unfitting and unworthy,” leaving the military free to charge less serious conduct including speech as conduct unbecoming. *See Cox, supra* note 74.

⁸⁷ 10 U.S.C. § 934 (1958).

⁸⁸ *Id.*; *see Solorio v. United States*, 483 U.S. 435, 436 (1987) (holding that the jurisdiction of a court-martial is dependent solely on the accused’s status as a member of the armed forces and should not take into account the service connection of the crime charged).

⁸⁹ *See* 10 U.S.C. § 934 (1958).

⁹⁰ *See id.* Article 134’s third clause allows the military to court-martial noncapital offenses not otherwise contained in the UCMJ but found in the federal code, as well as those

Crimes similar to Article 134's prejudicial to good order and discipline provision have been part of military codes for centuries; this version was inherited from the British in 1775 by the U.S. Continental Congress.⁹¹ While Article 134's prejudice to good order and discipline clause is ancient, its service-discrediting crime clause two wasn't added until 1916.⁹² Instead of focusing on conduct that undermines the efficacy of a military unit, as its ancient cousin does, this newer provision makes punishable only the vaguely-described discrediting conduct.⁹³ Separately, military commanders are prohibited from charging conduct under either clause when that conduct is proscribed by another UCMJ crime; the preemption doctrine limits Article 134's first two clauses only to behavior that is not otherwise criminalized in the Code.⁹⁴

a. *"To the Prejudice of Good Order and Discipline"*

Despite Article 134's catch-all clauses withstanding vagueness and overbreadth challenges, their contours are not crisp. The MCM echoes CAAF, defining "to the prejudice of good order and discipline" as those "acts directly prejudicial to good order and discipline," excluding "acts which are prejudicial only in a remote or indirect sense [T]his article does not include . . . distant effects."⁹⁵ There must be "a reasonably direct and palpable connection between

found in state and local codes assimilated to the military through a separate federal statute. See MORRIS, *supra* note 13, at 88. Given that this clause simply allows the military to charge civilian crimes—which presumably have already passed First Amendment muster on the civilian side of the house—this clause is not further discussed.

⁹¹ See Ackroyd, *supra* note 77, at 270–71 (tracing the British and early American history of Article 134); see also WINTHROP, *supra* note 33, at 720 (describing its inclusion in earlier British codes and noting its Swedish roots in the 1621 code of Gustavus Adolphus (Gustavus II). Article 16 of that code punished, "[w]hatsoever is not contained in these Articles, and is repugnant to Military Discipline, or whereby the miserable and innocent country may against all right and reason be burdened withal"). While a rare configuration of this clause, the MCM provides that a "breach of custom of the service" is also a clause one violation; customs of the service are defined as those "aris[ing] out of long established practices which by common usage have attained the force of law in the military or other community affected by them." MCM, *supra* note 22, at Pt. IV, ¶ 60.b.(2)(b).

⁹² See Ackroyd, *supra* note 77, at 271–72, 274.

⁹³ 10 U.S.C. § 934 (1958)

⁹⁴ See *United States v. Guardado*, 77 M.J. 90, 95 (C.A.A.F. 2017) (finding Article 134 cannot be applied to conduct reached by Articles 80 through 132). See generally WINTHROP, *supra* note 33, at 720 n. 64, 725 (explaining that this provision long was designed "to provide a general remedy for wrongs not elsewhere provided for"). This prevents Article 134 from being abused by using it to punish other UCMJ crimes for which the government is lacking evidence of a material element. See MCM, *supra* note 22, at Pt. IV, ¶ 60.c.(5)(a).

⁹⁵ MCM, *supra* note 22, at Pt. IV, ¶ 60.c.(2)(a); see, e.g., *United States v. Priest*, 45 C.M.R. 338, 343 (C.M.A. 1972) ("From its beginning, this Court has construed Article 134 . . . as requiring punishable conduct to be 'palpably prejudicial to good order and discipline, and not merely prejudicial in an indirect and remote sense.'" (quoting *United States v. Snyder*, 4 C.M.R. 15, 18 (C.M.A. 1952))).

the speech and the military mission or military environment,”⁹⁶ though the actual harm to such mission or environment need not have already occurred.⁹⁷

While the MCM clearly requires a relatively close causal connection between the behavior at issue and the required resulting harm for clause one offenses, the MCM fails to define the harm itself, leaving one to guess as to what is conduct prejudicial to good order and discipline.⁹⁸ In his hoary treatise, Winthrop dismissively claims such prejudice is “so familiar to military persons that it hardly need be explained,” but then explains that prejudice is “the sense of detriment, depreciation or an injuriously affecting.”⁹⁹ This criminal harm indeed can be explained, and indeed must be explained to withstand constitutional scrutiny when speech is at issue. Article 134 was designed to punish behavior that injures or degrades the maintenance of an environment of strict obedience to orders: “[a] crime, therefore, to be cognizable by a court-martial under this Article, must have been committed under such circumstances as to have directly offended against the government and discipline of the military state.”¹⁰⁰

While the term “discipline” has varied meanings depending on context, discipline in Article 134’s clause one refers to a bedrock organizational and operational feature that the U.S. military, like its European forefathers, has long depended on for efficient functioning as military affairs increased in complexity.¹⁰¹ Considered “the soul of the Army” by George Washington, in this context discipline primarily refers to control of a military unit attained through the obedience of military members to orders.¹⁰² It includes the more general sense that services members are doing, and will do, what they are

⁹⁶ *United States v. Wilcox*, 66 M.J. 442, 449 (C.A.A.F. 2008).

⁹⁷ *See United States v. Priest*, 45 C.M.R. 338, 344 (C.M.A. 1972) (“[T]he danger resulting from an erosion of military morale and discipline is too great to require that discipline must already have been impaired before a prosecution for uttering statements can be sustained.”). Further, no actual prejudice needs to have resulted regarding conduct other than speech. *See United States v. Johnson*, 39 M.J. 1033, 1037 (A.C.M.R. 1994) (“Some acts are inherently prejudicial to good order and discipline or discrediting to the service.”) (internal citations omitted). *But see Friess*, *supra* note 19, at 21 (arguing that *United States v. Sadinsky*, 34 C.M.R. 343 (C.M.A. 1964) established that actual prejudice must be proven for Article 134(1) misconduct).

⁹⁸ MCM, *supra* note 22, at Pt. IV, ¶ 60.c.(2)(a).

⁹⁹ WINTHROP, *supra* note 33, at 723.

¹⁰⁰ *Id.* at 723–24.

¹⁰¹ *See Ackroyd*, *supra* note 77 at 268 (“War was an immensely complicated affair . . . [t]he maintenance of effective disciplinary control in this rough era—the one factor that distinguished an army . . . from a mere mob of bandits, plunderers, and potential deserters was a difficulty and exacting task.”); *see also Dunlap*, *supra* note 24, at 242 (noting that discipline has always helped to ensure soldiers kill on demand).

¹⁰² George Washington, Instructions to Company Captains, FOUNDERS ONLINE (July 29, 1757), <http://founders.archives.gov/documents/Washington/02-04-02-0223> [<http://perma.cc/Y67F-YF6F>].

expected to do, and discipline also refers to the overall cohesiveness and well-being of a unit.¹⁰³

As to what constitutes action sufficiently harmful to good order and discipline to make it criminal, case law reveals that the military has considered a vast amount of behavior to suffice, from cross-dressing, to indecent language, to drunkenness.¹⁰⁴ In *United States v. Priest*, CAAF concluded that speech that “directly affect[s] the capacity of the Government to discharge its responsibilities” by “undermin[ing] the effectiveness of response to command” would be violative of Article 134’s good order and discipline clause.¹⁰⁵ The Court also pointed to the “erosion of military morale and discipline” as part of the gravamen of this crime.¹⁰⁶

In ascertaining whether speech is sufficiently harmful to good order and discipline to violate Article 134, the Supreme Court in *Parker v. Levy* explained that the military’s “unwritten law or usage” had long supplied substance to Article 134.¹⁰⁷ In addition to this “military members know it when they see it” type explanation of the harm required, the *Priest* Court also pointed to the MCM’s listing, by order of the President, of numerous examples of offenses considered prejudicial to good order and discipline and/or service-discrediting.¹⁰⁸ Because of these illustrations¹⁰⁹ as well as military custom, the *Parker* Court concluded that military members were indeed on notice of what behavior is criminally harmful under Article 134 clause one.¹¹⁰

¹⁰³ See Ackroyd, *supra* note 77, at 269; see also WINTHROP, *supra* note 33, at 723 (providing that “good order” is “highly analogous to discipline” in that it may be regarded as “referring mainly to the order, i.e.—condition of tranquility, security and good government—of the military”).

¹⁰⁴ See *United States v. Guerrero*, 33 M.J. 295, 296–97 (C.M.A. 1991) (upholding conviction of navy senior enlisted member for violations of both clauses of Article 134 for cross-dressing in his apartment and in his car; cross-dressing used by the Court in an ignorant, heteronormative sense). For more on cross-dressing as speech, see Bennett Capers, *Cross Dressing and the Criminal*, 20 YALE J. L. & HUMAN. 1, 6 (2008) (“Clothing, after all, is communication: something that can be said, something that can be understood, something that can be read.”). See also WINTHROP, *supra* note 33, at 723 (highlighting that drunkenness has long been chargeable as prejudicial to good order and discipline); *United States v. Trempe*, No. 201600150, 2017 WL 411110, at *3 (N.M. Ct. Crim. App. 2017) (upholding Article 134, clause one, indecent language conviction).

¹⁰⁵ *United States v. Priest*, 45 C.M.R. 338, 344 (C.M.A. 1972).

¹⁰⁶ *Id.* More will be said in Part IV as to the standards for assessing the constitutionality of Article 134 when used to criminalize speech.

¹⁰⁷ *Parker v. Levy*, 417 U.S. 733, 748 (1974) (citing *Swaim v. United States*, 165 U.S. 553, 562 (1897)).

¹⁰⁸ *Priest*, 45 C.M.R. at 338–39.

¹⁰⁹ The MCM’s illustrations are sample charge-sheet specifications non-exhaustively listing various offenses that can be charged under Article 134. See generally *United States v. Davis*, 27 C.M.R. 908, 908 (1958) (“It is not always easy to tell what act fits in this category but one indication is the listing of the offense in the table of maximum punishments and the existence of a model specification in the Manual.”).

¹¹⁰ *Parker*, 417 U.S. at 756. What the *Parker* Court failed to notice is that the majority of these exemplar crimes are identical to crimes in most states, though their civilian

b. *Defining “of a Nature to Bring Discredit upon the Armed Forces”*

In his 1915 State of the Union Address, President Wilson, the most speech and press suppressive president in history to date, lamented that “[t]here are citizens of the United States . . . who have poured the poison of disloyalty into the very arteries of our national life; who have sought to bring the authority and good name of our Government into contempt.”¹¹¹ To deal with such disloyalty, he urged Congress to “enact such laws at the earliest possible moment and feel that in doing so I am urging you to do nothing less than save the honor and self-respect of the nation. Such creatures of passion, disloyalty, and anarchy must be crushed out.”¹¹²

Only a few months later, Congress amended Article 134 to criminalize “all conduct of a nature to bring discredit upon the armed forces.”¹¹³ In the days following, Congress passed the 1917 Espionage Act, which criminalized, *inter alia*, “wilfully caus[ing] or attempt[ing] to cause insubordination, disloyalty, mutiny, refusal of duty, in the military or naval forces of the United States” as well as “wilfully obstruct[ing] the recruiting or enlistment service of the United States, to the injury of the service or of the United States.”¹¹⁴ Congress quickly amended this Act by also, *inter alia*, criminalizing speech “disloyal, profane, scurrilous, or abusive” to the armed forces, or that bringing the armed forces into “disrepute.”¹¹⁵ The similarity between this now-discredited affront to the First Amendment and the 1916 addition to Article 134 is striking. While Congress repealed the former in 1920, Article 134’s service-discrediting crime remains, a vestigial reminder of our country’s shameful history of suppressing speech in the name of national security.¹¹⁶

Regarding what this crime means today, the MCM doesn’t help much, only providing that “discredit means to injure the reputation of . . . 134 makes

counterparts lack the element of prejudice to good order and discipline. Part V, *infra*, argues that most Article 134 crimes, clause one and two, should be their own stand-alone crimes minus the prejudice element.

¹¹¹ Woodrow Wilson, State of the Union, AM. HIST. FROM REVOLUTION TO RECONSTRUCTION & BEYOND (Dec. 7, 1915), <http://www.let.rug.nl/usa/presidents/woodrow-wilson/state-of-the-union-1915.php> [<https://perma.cc/B4QJ-HFL8>].

¹¹² *Id.*

¹¹³ 10 U.S.C. § 934 (1958). The ostensible reason given by the military at the time was to allow the military to punish retired enlisted members for service-discrediting acts such as failing to pay debts; yet by the following year the military itself had retreated from that supposed justification. See Ackroyd, *supra* note 77, at 275–77 (highlighting legislative history and tracing MCM explanations for this new clause); see also E.R. FIDELL ET AL., MILITARY JUSTICE: CASES AND MATERIALS 569–70 (2012).

¹¹⁴ Espionage Act of 1917, ch. 30, 40 Stat. 217 (codified as amended at 18 U.S.C. §§ 792–794 (2006)) [hereinafter Espionage Act].

¹¹⁵ The Sedition Act of 1918 (Pub. L. 65-150, 40 Stat. 553, enacted May 16, 1918).

¹¹⁶ See generally GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERROR 230 (2004) (discussing different parts of history in which the U.S. government suppressed speech in the name of national security).

punishable conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem.”¹¹⁷ Tendency and not actual discredit is prohibited.¹¹⁸ While the military courts have at times required public awareness of both the conduct at issue and the actor’s military status for conduct to be service-discrediting, this awareness was only required in cases in which the malfeasance was not otherwise criminal in civilian jurisdictions, such as cross-dressing,¹¹⁹ adultery,¹²⁰ and possessing a needle and syringe.¹²¹ Critically, recently CAAF clarified that, “evidence that the public was actually aware of the misconduct is not necessarily required... proof of the conduct itself may be sufficient... that, under all the circumstances, it was of a nature to bring discredit upon the armed forces.”¹²² Furthermore, while CAAF also recently found that the military courts’ long practice of finding certain conduct per se discrediting was unconstitutional, in that very same case it seemingly continued to do just that regarding Article 134 child pornography possession.¹²³

III. DANGEROUS SPEECH

There is a wide gulf between the jurisprudential standards utilized to determine the constitutionality of criminal laws restricting civilian speech and those used to muzzle military members. This variance stems from the Court’s characterization of the military as a “specialized society separate from civilian

¹¹⁷ MCM, *supra* note 22, at Pt. IV, ¶ 60.c.(3); *see also* MORRIS, *supra* note 13, at 86. It provides no further explanation except to state that violations of foreign law or of a local jurisdiction may only be punished under the clause if service-discrediting.

¹¹⁸ *See generally* United States v. Hartwig, 39 M.J. 125, 130 (C.M.A. 1994) (concluding that actual damage to military’s reputation is not required to convict as service-discrediting). Conduct charged under Article 134 must be evaluated in its entire context: the time, place, circumstances, and purpose. *See* United States v. Guerrero, 33 M.J. 295, 298 (C.M.A. 1991).

¹¹⁹ *Guerrero*, 33 M.J. at 297–98 (finding that cross-dressing is not inherently service-discrediting).

¹²⁰ United States v. Green 39 M.J. 606, 609 (C.M.R. 1994) (finding a guilty plea to service-discrediting adultery improvident because no public awareness of the act).

¹²¹ United States v. Caballero, 49 C.M.R. 594, 597 (C.M.A. 1975) (setting aside the conviction based on the Article 134 clause two offense for failure to show service-discrediting nature of possession of narcotics paraphernalia on base with no public awareness of same); *cf.* United States v. Wilcox, 66 M.J. 442, 451 (C.A.A.F. 2008) (holding that all protected speech charged as service-discrediting must have a “reasonably direct and palpable effect on the military mission or military environment”).

¹²² United States v. Phillips, 70 M.J. 161, 163, 166 (C.A.A.F. 2011) (“In general, the government is not required to present evidence that anyone witnessed or became aware of the conduct. Nor is the government required to specifically articulate how the conduct is service discrediting.”).

¹²³ *Id.* at 167–68 (Ryan, J., dissenting) (noting that the majority correctly held that a conclusive presumption of discrediting was unconstitutional while also noting that in effect that’s what the court did). *Contra* United States v. Falk, 50 M.J. 385, 394 (C.A.A.F. 1999) (finding that possession of 126 computer images of child pornography on a personal computer in government housing on a military post is per se service-discrediting conduct).

society” whose effective functioning requires greater limits; “the different character of the military community and of the military mission requires a different application of those protections.”¹²⁴ To explore this gulf, this Part initially zooms out to sketch the Court’s general approach to the constitutionality of speech, and then zooms in on the Espionage and Sedition Acts-era cases, given that the military speech doctrine’s roots are buried in such early incitement law jurisprudence.

A. Tiered Speech and First Amendment Armor

The First Amendment speech clause is generally understood today to prohibit governmental suppression of speech animated by governmental dislike of the message conveyed. The right to free expression “is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us.”¹²⁵ Given that laws may adversely burden speech, yet motivated by legitimate purposes unrelated to its content, the Supreme Court has bifurcated governmental action into content-based and content-neutral. The former—government regulation of speech based on its “its message, its ideas, its subject matter, or its content”—is “presumptively invalid,”¹²⁶ and will only be upheld in the rare case that it passes strict scrutiny.¹²⁷

Content-neutral laws—government regulations that incidentally burden speech, but are not content-based—must meet a less-demanding First

¹²⁴ *Parker v. Levy*, 417 U.S. 733, 743, 758 (1974); *see also* *Chappell v. Wallace*, 462 U.S. 296, 304 (1983) (discussing the special nature of the military life); *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953) (“The military constitutes a specialized community governed by a separate discipline from that of the civilian.”); *United States v. Brown*, 45 M.J. 389, 395–96 (C.A.A.F. 1996) (“Both military servicemembers and civilians have the right to criticize the Government and to express ideas to influence the body politic There is a difference between the rights of a civilian and the rights of a servicemember when it comes to free speech.”).

¹²⁵ *Cohen v. California*, 403 U.S. 15, 24 (1971). The term “speech” includes verbal and written communication, as well as expressive conduct, which is often referred to as “symbolic speech.” *See* *Texas v. Johnson*, 491 U.S. 397, 400, 404 (1989); *see also* *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (“[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”).

¹²⁶ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 384 n.4 (1992).

¹²⁷ That is, such regulation of speech will only be upheld if it is found to be narrowly tailored to serve a compelling state interest. *See, e.g.,* *Simon & Shuster v. N.Y. Crime Victims Bd.*, 502 U.S. 105, 123 (1991) (finding that the statute is inconsistent with the First Amendment because the Son of Sam law is not narrowly tailored to advance the objective of compensating victims from the fruits of crime); *see also* *Holder v. Humanitarian Law Project*, 561 U.S. 1, 25–26 (2015) (finding that the ban on providing material support, even to the non-violent endeavors, of terrorist organizations is within the scope of the First Amendment because the statute is narrowly tailored to prohibit material support, not pure political speech, advocacy or expression).

Amendment test.¹²⁸ While they do not face strict scrutiny, content-neutral regulations also trigger heightened judicial concerns regarding potential vagueness and overbreadth issues.¹²⁹ Not only can overly-ambiguous laws that impact speech inhibit the free expression of otherwise protected speech out of uncertainty regarding the laws' contours, overly-broad laws can sweep into their ambit both speech that the Court allows to be restricted, as well as that the First Amendment protects.¹³⁰

While content-neutral laws are often found constitutional, content-based regulations run counter to the First Amendment's core purpose, and are therefore typically invalidated. The government must clear a high hurdle of presumptive invalidity to maintain content-based restrictions on speech,¹³¹ one erected due to the Supreme Court's recognition that content-based speech regulations often seek "to suppress unpopular ideas or information or manipulate the public debate through coercion."¹³² The Court has found that "it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government;" hence content-based government regulation will only stand in exceptional circumstances.¹³³ "If there is a bedrock principle underlying the First

¹²⁸If government regulation has another purpose unrelated to content—is content-neutral—yet incidentally burdens speech, such "time, place or manner" restrictions are constitutionally permissible as long as they "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2016) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)) ("We have, however, afforded the government somewhat wider leeway to regulate features of speech unrelated to its content.").

¹²⁹The Court polices vague laws that regulate speech out of fear that such laws "will chill constitutionally protected speech." ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 988–89 (5th ed. 2015) ("[T]he Court has made it clear that greater precision is required when laws regulate speech.").

¹³⁰*See Bd. of Airport Comm'rs of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987) ("Under the First Amendment overbreadth doctrine, an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face "because it also threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid."); CHERMERINSKY, *supra* note 129, at 988–90; *see also* *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972)) ("Because appellants' claims are rooted in the First Amendment, they are entitled to rely on the impact of the ordinance on the expressive activities of others as well as their own. 'Because overbroad laws, like vague ones, deter privileged activit[ies], our cases firmly establish appellant's standing to raise an overbreadth challenge.'").

¹³¹*See* *Reed v. Gilbert*, 135 S. Ct. 2218, 2227 (2015).

¹³²*Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994).

¹³³*Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). *See, e.g.*, *Holder v. Humanitarian Law Project*, 561 U.S. 1, 40 (2015) (finding that the content-based application of the federal material support to terrorism statute is constitutional).

Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”¹³⁴

Despite this sober recognition that speech is integral to robust public debate necessary for democratic rule,¹³⁵ the Court has extended First Amendment protections unevenly. It has divided the world into types of speech deserving of greater and lesser protections; the latter consists of types of speech “of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”¹³⁶ Hence the government is relatively free to regulate such low-value speech based on its content, with no presumption of invalidity that would typically apply to content-based laws.¹³⁷ While a spectrum of low to high-valued speech seems to exist,¹³⁸ the Court’s protective schema is traditionally viewed as a bifurcation of the speech arena into two classes—protected versus unprotected speech, with the latter sub-divided into specific categories.¹³⁹

The Court in 2010 highlighted five such categories of unprotected speech: obscenity, defamation, fraud, incitement, and speech integral to crime.¹⁴⁰ The *Stevens* majority noted that these categories have long been recognized as one

¹³⁴ *Texas v. Johnson*, 491 U.S. 397, 414 (1989). See *Virginia v. Black*, 538 U.S. 343, 359–60 (2003).

¹³⁵ See generally ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948) (arguing that there are two different freedoms of speech under the Constitution); ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* (1995) (discussing issues of the public forum and its arbitration of distinctions between the social domains of democracy and management). Other theories have been cited as animating the First Amendment, such as those involving personal autonomy, self-fulfillment and truth-seeking, in addition to sustaining democratic participation. See Schauer, *supra* note 7, at 1784–87; see also C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 *UCLA L. REV.* 964, 990–92 (1978).

¹³⁶ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

¹³⁷ However, the Court has made clear that the government cannot engage in content-based regulation of unprotected speech in a way that regulates some, but not all, of that category of speech. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (invalidating an ordinance that only banned certain types of fighting words and not others).

¹³⁸ Genevieve Lakier, *The Invention of Low-Value Speech*, 128 *HARV. L. REV.* 2166, 2170 (2015) (“Much of modern First Amendment jurisprudence is organized around a two-tier structure that in practice has devolved into more than two tiers.”). This spectrum of lesser versus greater protected speech is not a strict duality because the definitions of the types of less-protected speech are often controversial.

¹³⁹ CHEMERINSKY, *supra* note 129, at 975 (“The Supreme Court has declared that some types of expression are unprotected and may be prohibited and punished.”).

¹⁴⁰ See *United States v. Stevens*, 559 U.S. 460, 468 (2010) (listing these five categories as “historic and traditional”). However, the *Stevens* Court also found that “[m]aybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law We need not foreclose the future recognition of such additional categories.” *Id.* at 472. Traditionally, so-called “fighting words” have also been considered their own unprotected category. See CHEMERINSKY, *supra* note 129, at 1036, 1053–54 (also noting that the Court has not upheld a fighting words conviction since its 1942 *Chaplinsky* decision).

of a “few limited areas” in which speech restrictions are permissible under the First Amendment, implying that newly-proposed unprotected categories without such historic lineage are not viable.¹⁴¹ Yet the categorical boundaries of such types of speech are not clear-cut, leaving room to potentially expand the speech integral to crime exception, for example.¹⁴² Additionally, some types of speech have been given less than full First Amendment protection, while not falling into a fully unprotected category; commercial speech receives intermediate, not strict, scrutiny when it is the subject of content-based laws,¹⁴³ and various privacy laws punishing seemingly otherwise-protected speech have been upheld by lower courts against First Amendment challenges.¹⁴⁴

Military speech crimes do not fit neatly into the Court’s First Amendment template. A few military speech crimes seem to fall clearly into the speech integral to crime exception, as explained in Part V. Yet instead of using that categorical exception, the military courts, with the Supreme Court’s approval, have broadly utilized an old version of the Court’s approach to incitement to uphold content-based restrictions of otherwise-protected speech as “dangerous” speech undeserving of First Amendment protection for over forty years. The how and the why to this approach go back to the early part of the twentieth century, to which this Article now turns.

B. *Military Speech Doctrine & The Espionage and Sedition Acts*

The military’s highest appellate court has been the lead drafter of today’s military speech doctrine, declaring that a military member’s speech is unprotected if it either falls into one of the traditionally unprotected categories of speech, such as defamation or obscenity, or if it “interferes with or prevents the orderly accomplishment of the mission or presents a clear danger to loyalty, discipline, mission, or morale of the troops.”¹⁴⁵ This military speech doctrine

¹⁴¹ *Stevens*, 559 U.S. at 468–70 (citing *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 817 (2000) (“The First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits.”)).

¹⁴² See *Lakier*, *supra* note 138, at 2204–07 (noting that the definition of obscenity has long been a matter of debate).

¹⁴³ See *Central Hudson Gas v. Pub. Serv. Comm’n*, 447 U.S. 557, 563 (1980) (concluding that the “Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression”). Scholars also note that the Court has deemed “some types of sexually oriented speech” to be of low value. See, e.g., *CHEMERINKSY*, *supra* note 129, at 1037.

¹⁴⁴ See Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1069 (2000). See generally *Koppelman*, *supra* note 49, at 666 (noting that the tort of disclosure of private facts has long been upheld by the lower courts).

¹⁴⁵ *United States v. Brown*, 45 M.J. 389, 395 (C.A.A.F. 1996) (plurality opinion) (upholding the convictions of African American soldiers for so-called unionizing activity, to wit, organizing a gripe session during national guard active duty training and helping

has direct links to the 1917–1918 Espionage and Sedition Acts. First, the doctrine’s prong criminalizing speech that “interferes with or prevents the orderly accomplishment of the mission” riffs directly from the original text of the Espionage Act itself.¹⁴⁶ Passed two months after the United States entered World War I to primarily protect military secrets and punish espionage,¹⁴⁷ the Espionage Act made it a crime to “willfully make . . . false statements with intent to interfere” with U.S. military success or to promote the success of its enemies.¹⁴⁸ Today’s military speech doctrine drops the willful intent and falsity requirements without consideration of their utility, finding unprotected simply any speech that interferes with or prevents mission accomplishment.¹⁴⁹ While the military court has never admitted the Act was its inspiration, the court’s recognition of such a sweeping rationale justifying the criminal suppression of speech should immediately raise the hackles of those familiar with that Act’s excesses.

Beyond this general cautionary note, another linkage exists between military speech crimes and the largely repugnant Espionage-Sedition Act. When the Sedition Act amended the Espionage Act in 1918, it went beyond the original Act’s prohibition of willful interference with military mission and the draft to expressly target those who, in time of war, criticize the government, the flag, the military, or the Constitution.¹⁵⁰ As noted in Part II.C.2, it also specifically criminalized expression that would bring the military into “disrepute”—an

organize trips home for fellow soldiers). The dissent notes that white soldiers received non-judicial punishment for the same conduct. *Id.* at 402 (Sullivan, J., dissenting).

¹⁴⁶ Compare *Brown*, 45 M.J. at 395, with Espionage Act § 3, 18 U.S.C. § 2388 (2012).

¹⁴⁷ Sections 1 and 2 of the Espionage Act, formally Public Law 24, enacted June 15, 1917, prohibited, as the modern Espionage Act does today, obtaining national defense information “with intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation” as well as sharing the same with those with a “reason to believe that it is to be used to the injury or the United States or to the advantage of a foreign nation.” Espionage Act, Pub. L. No. 24, §§ 1–3, 40 Stat. 217, 217–20 (1917) (amended 1918) (current version at 18 U.S.C. §§ 793–98 (2012) and 18 U.S.C. §§ 2384–90 (2012)).

¹⁴⁸ Espionage Act § 3, 18 U.S.C. § 2388 (2012). The Espionage Act also punished those who, when the United States was at war, “willfully cause[d] or attempt[ed] to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or . . . willfully obstruct[ed] the recruiting or enlistment service of the United States.” *Id.* This provision remains good law. 18 U.S.C. § 2388 (2012).

¹⁴⁹ *Brown*, 45 M.J. at 395. Congress was concerned about the Act’s impact on freedom of speech and press, and attempted to narrowly cabin the original statute to address such concerns. See generally STONE, *supra* note 116, at 152 (noting that Congress struck two provisions from the original text of the statute due to freedom of expression and press concerns).

¹⁵⁰ Again at the urging of the Wilson Administration, Congress modified the Espionage Act to become a full-throttle prohibition of political dissent, indeed, the “most repressive legislation in American history.” STONE, *supra* note 116, at 185. See Sedition Act, ch. 75, sec. 1, § 3, 40 Stat. 553, 553 (1918).

almost identical offense to the 1916 military crime prohibiting “all conduct of a nature to bring discredit upon the armed forces.”¹⁵¹

Turning to the third and most important connection between the Espionage-Sedition Act and the military speech doctrine, the military speech doctrine’s “clear danger” prong stems directly from the Supreme Court’s early jurisprudence dealing with Espionage-Sedition Acts prosecutions.¹⁵² This historical connection between early seditious advocacy jurisprudence and the CAAF-developed, Supreme Court-approved jurisprudential approach to suppression of military member speech is not merely an interesting observation. Rather, this elucidation of where and how the military speech doctrine’s genealogy took a definitive off-ramp from the Court’s much greater development of incitement as an unprotected category of speech reveals flaws in the military speech doctrine itself.¹⁵³

C. *Why Brandenburg: The Clearly Present Bad Tendency to Punish Remote and Speculative Harm While Inferring Intent*

1. *Bad Tendency Test*

The victims of Espionage and Sedition Acts prosecutions encountered a federal judiciary quite hostile to First Amendment speech claims.¹⁵⁴ Prior to this the courts, following Blackstonian notions of the First Amendment as merely prohibiting prior restraints, had long borrowed the “bad tendency test” from common law attempt crime jurisprudence to deal with speech claims.¹⁵⁵ The two prongs of the bad tendency test were similar to common law attempt law in its

¹⁵¹ The Sedition Act amendment furthermore prohibited all speech opposing “the cause of the United States” or supporting that of its enemies. Sedition Act § 3.

¹⁵² Friess, *supra* note 19, at 19–20. While scholars writing about military speech jurisprudence of course cite *Schenck* and *Dennis* when noting CAAF’s approach to First Amendment speech challenges, they surprisingly fail to even as much as note that these earlier decisions were fatally flawed and have been effectively, though not formally, overruled. *See, e.g.*, Murphy, *supra* note 18, at 764. Instead, the few modern academic treatments of military speech, as well as CAAF’s jurisprudence itself, cite *Schenck* and *Dennis* with seeming pride, instead of the revulsion they warrant. *See, e.g., id.*

¹⁵³ The defects are easily recognizable, as they are those the Court worked hard to improve in its post-*Schenck* and post-*Dennis* doctrinal refinements. The Court’s later improvements are those the highly deferential Rehnquist Court in 1974 implied were not needed in the military context. *See, e.g.*, *Parker v. Levy*, 417 U.S. 733, 758–59 (1974).

¹⁵⁴ *See* DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* 15 (1977).

¹⁵⁵ *See id.* at 2; *see also* *Patterson v. Colorado*, 205 U.S. 454, 458–59, 463 (1906) (upholding newspaper journalist’s contempt conviction for articles and cartoons criticizing judges in a pending case, the Court explained that the First Amendment did not prohibit criminal punishment of speech already uttered based on its tendency to cause harm because: “if a court regards, as it may, a publication concerning a matter of law pending before it, as *tending toward* such an interference, it may punish it as in the instance put”) (emphasis added); STONE, *supra* note 116, at 171–73 (explaining the embrace of the bad tendency test by the federal courts to uphold Espionage Act convictions during World War I).

requirements of both a specific intent to commit a crime, along with an act sufficient to show that the criminal result was the natural outcome.¹⁵⁶ In the translation to speech cases, attempt law's acts became speculative and remote tendencies of harm, and specific intent inferentially merged with that same tendency. The result was a collapse of the test into one judicial guess as to whether the speech at issue could potentially cause the particular harm the given statute was ostensibly trying to prevent.

Applied to the Espionage Act, convictions required proof both that the defendant possessed a non-express criminal intent, and that his language had a "natural and reasonably probable tendency" to cause unlawful harm.¹⁵⁷ Exemplary of the latter prong, the Ninth Circuit in *Shaffer v. United States* upheld an Espionage Act conviction for mailing a book critical of the war by asking, "whether the natural and probable tendency and effect of the words . . . are such as are calculated to produce the result condemned by statute."¹⁵⁸ Despite admitting that disapproval of the war was not a crime, the court of appeals found that "the question here is . . . whether the natural and probable tendency and effect of the words quoted therefrom are such as are calculated to produce the result condemned by the statute."¹⁵⁹ Similar to the military courts' later reasoning, the Ninth Circuit reasoned that since criticizing the war as wrong could weaken patriotism and the desire to serve in the military, criminalizing such a book was non-problematic.¹⁶⁰

¹⁵⁶ See David R. Dow & R. Scott Shildes, *Rethinking the Clear and Present Danger Test*, 73 IND. L.J. 1217, 1222 (1998); see also STONE, *supra* note 116, at 174–76 (discussing how most Espionage Act convictions were for attempted obstructions, and how the courts skirted common law attempt's specific intent requirement by allowing "constructive intent").

¹⁵⁷ Brief for the United States at 75–77, *Debs v. United States*, 249 U.S. 211 (1919) (No. 714, reprinted in 19 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 680 (Philip B. Kurland & Gerhard Casper eds., 1975) (noting that Espionage Act convictions required proof both that the defendant possessed a "specific, willful, criminal intent" and that his language had "a natural and reasonably probable tendency" to cause unlawful harm).

¹⁵⁸ *Shaffer v. United States*, 255 F. 886, 887–88 (9th Cir. 1919) (upholding conviction for mailing a book containing several treasonable, disloyal, and seditious utterances, explaining that "[t]o teach that patriotism is murder and the spirit of the devil, and that the war against Germany was wrong and its prosecution a crime, is to weaken patriotism and the purpose to enlist or to render military service in the war"); see also *Goldstein v. United States*, 258 F. 908, 910–11 (9th Cir. 1919) (upholding an Espionage Act conviction and stating "circumstances surrounding [speech] . . . may well tend to show whether the [speech] would naturally, in the light of great events, be calculated to foment disloyalty or insubordination among the naval or military forces"); *Masses Publ'g Co. v. Patten*, 246 F. 24, 38 (2d Cir. 1917) ("If the natural and reasonable effect of what is said is to encourage resistance to a law, and the words are used in an endeavor to persuade to resistance, it is immaterial that the duty to resist is not mentioned, or the interest of the persons addressed in resistance is not suggested.").

¹⁵⁹ *Shaffer*, 255 F. at 887.

¹⁶⁰ *Id.* at 888.

Most concerning, courts of this era provided no temporal or other yardstick to determine such tendencies, instead rubber-stamping convictions involving quite speculative and remote harm based on war hysteria, bias, and discrimination.¹⁶¹ Adding fuel to the bad tendency test's book-burning fire was the courts' practice of allowing juries to presume that defendants intended the natural and probable consequences of their actions—instead of requiring the government to actually prove such specific intent.¹⁶² This presumption conflated the test's two prongs, guaranteeing convictions once speech's tendency to harm was established; in other words, speakers could be punished for unrealized third party action that potentially could be caused by their speech.¹⁶³ Given that the Espionage Act prohibited broad and nebulous activities such as attempting to sow disloyalty and insubordination amongst the troops—rather similar to the equally broad Articles 133 and 134 crimes—allowing the requisite intent to be inferred from the speech's speculative “natural and reasonable effect” permitted broad government suppression of disfavored speech in the World War I period of hysteria.¹⁶⁴

2. *Clear and Present Danger Is Bad Tendency*

The above discussion notes the flaws of the speech-suppressive bad tendency test because this same flawed test is the core of today's military speech doctrine, one that possesses the same speculative harm and intent defects. The logically-bankrupt bad tendency test survived in the military context because the military appellate court simply turned to the Supreme Court's famous 1919

¹⁶¹ See *id.* *Shaffer* exemplified how appellate courts speculatively concluded that unpatriotic speech had a tendency to harm the draft or troop loyalty:

Printed matter may tend to obstruct the recruiting and enlistment service, even if it contains no mention of recruiting or enlistment, and no reference to the military service of the United States . . . [t]he service may be obstructed by attacking the justice of the cause for which the war is waged, and by undermining the spirit of loyalty which inspires men to enlist . . . The greatest inspiration for entering into such service is patriotism, the love of country. To teach that patriotism is murder . . . and that the war against Germany was wrong and its prosecution a crime, is to weaken patriotism and the purpose to enlist or to render military service in the war.

Id.

¹⁶² *Dow & Shieldes*, *supra* note 156, at 1222. The speaker “must be presumed to have intended the natural and probable consequences of what he knowingly did.” *Shaffer*, 255 F. at 889. This presumption drew upon common law “natural and probable consequences” doctrine. See *e.g.*, *RABBAN*, *supra* note 154, at 2.

¹⁶³ See *Dow & Shieldes*, *supra* note 156, at 1222–23 (noting that the bad tendency approach treated speech as an act, and evaluating speech effects was simply a matter of asking “whether it was reasonable to assume that certain ill effects would follow”); see also *STONE*, *supra* note 116, at 215 (“[F]ederal courts routinely conflated these two elements and allowed juries to infer criminal intent from bad tendency.”).

¹⁶⁴ See *STONE*, *supra* note 116, at 230–31.

decision in *Schenck v. United States*,¹⁶⁵ the Court's first Espionage Act case, and uncritically adopted its approach.¹⁶⁶ *Schenck*'s "clear and present danger" test to whether speech can be criminalized consistent with the First Amendment was simply the bad tendency test by another name.¹⁶⁷

The unanimous *Schenck* Court upheld petitioners' convictions for conspiracy to distribute pamphlets "calculated to cause . . . insubordination" in the military and obstruction of the draft.¹⁶⁸ In doing so, Justice Holmes agreed with the lower courts' bad tendency approach; he inferred the requisite intent to cause insubordination and obstruction through sheer speculation that a potential effect of petitioners' pamphlet was to influence those subject to the draft to refuse their orders—this despite that the pamphlet at issue specifically called only for *lawful* draft repeal.¹⁶⁹

While the *Schenck* analysis tracked the appellate courts' bad tendency test, the opinion is well-known for Justice Holmes's potentially narrowing language: his famous false cry of fire analogy.¹⁷⁰ Just as a panic-inducing false cry of fire in a theater would not be protected by the First Amendment, the defendants' pamphlet was likewise not protected because, per Justice Holmes's famous language:

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.¹⁷¹

Such a test seemed to call for more than a remote connection between speech and harm, yet there was no such immediate danger in *Schenck*, and the conviction was nonetheless upheld—highlighting that this was actually a colorful moniker for the extant bad tendency test.¹⁷²

¹⁶⁵ *Schenck v. United States*, 249 U.S. 47, 48–49, 53 (1919).

¹⁶⁶ See *United States v. Priest*, 45 C.M.R. 338, 345–46 (C.M.A. 1972).

¹⁶⁷ See *Schenck*, 29 U.S. at 52.

¹⁶⁸ *Id.* at 49. Charles T. Schenck, the secretary general of the Socialist Party, and Elizabeth Baer were convicted of three counts of violating the Espionage Act in that they "willfully conspired to have printed and circulated to men . . . called . . . for military service . . . a document set forth and alleged to be calculated to cause . . . insubordination and obstruction" and for conspiracy to mail, and actually mailing, the same. *Id.*

¹⁶⁹ *Schenck*, 249 U.S. at 51 ("[T]he document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out."). But see STONE, *supra* note 116, at 192–93 (highlighting the irrationality of this logic).

¹⁷⁰ See Dow & Shieldes, *supra* note 156, at 1221.

¹⁷¹ *Schenck*, 249 U.S. at 52.

¹⁷² STONE, *supra* note 116, at 194–95 (discussing the lack of danger in *Schenck*, and pointing out the fallacy even if there was such a danger, given that there may be value to speech that outweighs any danger created); see Dow & Shieldes, *supra* note 156, at 1222–23 (describing the bad tendency test as "[i]f the act of speech will tend to cause ill effects, then the speech is subject to punishment . . . in measuring the potential ill effects of certain

That *Schenk's* “clear and present danger” language simply was the bad tendency approach by another name was made clear in subsequent Espionage Act cases. A mere week after *Schenck*, Justice Holmes again wrote for the unanimous Court in *Frohwerk v. United States*¹⁷³ and *Debs v. United States*.¹⁷⁴ The Court did not mention clear and present danger, and instead summarily upheld these Espionage Act convictions for dissenting speech.¹⁷⁵ In *Frohwerk*, the defendant’s conviction for conspiracy and attempt to cause “disloyalty, mutiny and refusal of duty in the military and naval forces” was based on newspaper articles protesting the draft and the war.¹⁷⁶ In *Debs*, the Socialist Party’s candidate’s conviction for inciting “insubordination, disloyalty, mutiny and refusal of duty in the military” as well as for recruitment and enlistment obstruction were based on a public speech in which he paid homage to three jailed war opponents.¹⁷⁷ The speech at issue in both cases, primarily about the virtues of socialism, were merely anti-war, again highlighting how the bad tendency test allowed speech that was disliked, in this case because it was seemingly unpatriotic, to be punished despite no real tendency of harm.¹⁷⁸

3. *Clear and Present Danger with Teeth*

It took another fifty years for the Supreme Court to fully cabin clear and present danger to its present meaning in *Brandenburg*.¹⁷⁹ While the Court’s evolutionary path from *Schenk* to *Brandenburg* has been well-tread by scholars over the years, this march reveals several points relevant to the military’s approach to speech. It highlights the susceptibility of national security speech crimes—speech made criminal because of an ostensibly deleterious impact on national security—to enormous executive branch overreach via criminalization

speech, the proper test was to ask simply whether it was reasonable to assume that certain ill effects would follow”).

¹⁷³ *Frohwerk v. United States*, 249 U.S. 204, 206 (1919) (“[T]he First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language.”).

¹⁷⁴ *Debs v. United States*, 249 U.S. 211, 212 (1919). The *Debs* Court continued the lower courts’ habit requiring specific intent while allowing the jury to infer intent from tendency: “if in that speech he used words tending to obstruct the recruiting service he meant that they should have that effect.” *Id.* at 216.

¹⁷⁵ *See id.* at 213, 217; *Frohwerk*, 249 U.S. at 207–08, 210.

¹⁷⁶ *Frohwerk*, 249 U.S. at 205. Given the derogatory nature in which appellant’s articles portrayed the U.S. war efforts, and despite an acknowledgement there was no special attempt to reach draft-age men, the Court upheld the convictions based on the mere possibility that the articles could negatively affect the military. *Id.* at 209–10.

¹⁷⁷ *Debs*, 249 U.S. at 212.

¹⁷⁸ *See, e.g.*, STONE, *supra* note 116, at 208 (“[T]he ‘bad tendency’ test . . . enables the government to eliminate almost all criticism . . .”).

¹⁷⁹ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (finding that the First Amendment does not “permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”).

of speech based on fear, dislike, and paranoia instead of real harm. Additionally, this history reveals how the criminal law concepts of intent and causation (via imminency) impacted the Court's analysis, and how such factors can be structured to help ensure an appropriate balance between expressive freedom and harm prevention.

The foundation for clear and present danger's eventual limits are found in the famous dissent in *Abrams v. United States*¹⁸⁰ In this Espionage-Sedition Act case, the five defendants, enraged by a little-known U.S. Marine Corps intervention in Russia, were convicted of encouraging resistance to the United States by distributing two leaflets defendants had thrown out of New York City windows.¹⁸¹ Justice Holmes, joined in dissent by Justice Brandeis, revisited *Schenk's* clear and present danger metaphor to find that the defendants' pamphlets were constitutionally protected speech.¹⁸² He argued that, unlike the bad tendency version of his test, the government needed to prove actual intent to cause the anticipated harm, and not simply allow an inference of intent from a reasonable tendency to produce such harm.¹⁸³ Also, instead of *Schenk's* clear and present danger language, Holmes substituted imminency: "[i]t is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion."¹⁸⁴

Though the Espionage Act fell into disuse after World War I, the Court continued to work on its speech jurisprudence through speech cases based on state criminal anarchy and syndicalism statutes.¹⁸⁵ In upholding the constitutionality of such Red Scare laws, the Court modified the clear and

¹⁸⁰ *Abrams v. United States*, 250 U.S. 616, 627–29 (1919) (Holmes, J., dissenting).

¹⁸¹ STONE, *supra* note 116, at 205. The pamphlets ridiculed President Wilson; decried capitalism as the enemy; urged the "[w]orkers of the [w]orld" to wake up; and warned munitions workers that "you are producing bullets . . . to murder not only the Germans, but also your dearest, best, who are in Russia." *Abrams*, 250 U.S. at 619–21.

¹⁸² *Abrams*, 250 U.S. at 627–29, 631 (Holmes, J., dissenting).

¹⁸³ *See id.* at 627–29. He also highlighted that "the principle of the right to free speech is always the same" whether in war or peace, though "war opens dangers that do not exist at other times." *Id.* at 628.

¹⁸⁴ *Id.* at 627–28 (noting that the government can "punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent" (emphasis added)); *see also* *Pierce v. United States*, 252 U.S. 239, 272 (1920) (Brandeis & Holmes, JJ., dissenting) (arguing, *inter alia*, that some charges against the defendants should be dropped because of the lack of evidence as to their intent to cause insubordination, disloyalty, mutiny, or refusal of duty); *Schaefer v. United States*, 251 U.S. 466, 482–83 (1920) (Brandeis & Holmes, JJ., dissenting) (arguing that three of the defendants' convictions should be overturned because a rational jury could not find a clear and present danger from the evidence).

¹⁸⁵ *See* Dow & Shieldes, *supra* note 156, at 1228–30. Fear of looming World War II prompted new prosecutions under the Espionage Act of 1917, such as in *United States v. Pelley*, 132 F.2d 170, 171 (7th Cir. 1942).

present danger version of the bad tendency approach.¹⁸⁶ The first modification was the Court's 1927 acknowledgment that anarchy laws only criminalized the *express* advocacy of illegality, hinting that the advocacy of lawful opposition and change, penalized in the Espionage Act cases, would be constitutionally protected.¹⁸⁷ Justices Holmes and Brandeis, in contrast, continued to emphasize that even if such advocacy is express, the resulting danger must be imminent before criminality attaches.¹⁸⁸

Justice Brandeis's famous concurrence in *Whitney v. California*, upholding a state syndicalism conviction for the formation of a local chapter of the national Communist Party, echoed Holmes's *Abrams* imminency requirement.¹⁸⁹ The clear and immediate danger approach, as outlined by these two justices, increasingly took hold in the years leading to World War II, with the Court largely sustaining First Amendment claims based on the lack of express intent and immediate danger.¹⁹⁰ By 1942, the bad tendency test was seemingly

¹⁸⁶ See, e.g., *Gitlow v. New York*, 268 U.S. 652, 664–65, 672 (1925) (upholding a conviction under New York anarchy statute for publications advocating strikes to bring about the end of the state). The Court reasoned that the statute may be appropriately applied to specific speech “if its natural tendency and probable effect was to bring about the substantive evil which the legislative body might prevent,” and that since New York had already decided that advocacy prohibited by its statute would tend to have bad effects, no further inquiry, such as a clear and present danger test, was necessary. *Id.* at 671–72.

¹⁸⁷ *Id.* at 664–65 (“The statute . . . does not restrain the advocacy of changes in the form of government by constitutional and lawful means. What it prohibits is language advocating, advising or teaching the overthrow of organized government by unlawful means.”); see also STONE, *supra* note 116, at 237 (highlighting that this acknowledgment of express advocacy resembles Judge Learned Hand's famous approach in *Masses Publ'g Co. v. Patten*, 244 F. 535, 540–41 (S.D.N.Y. 1917), an Espionage Act case in which, as trial judge, Judge Hand found the speech at issue protected because it did not expressly advocate criminal conduct).

¹⁸⁸ Noting that there was no imminent danger of a violent government overthrow in *Gitlow*, Justice Holmes famously exclaimed that “[e]very idea is an incitement . . . [e]loquence may set fire to reason,” and hence the dividing line for the First Amendment must be imminent danger. *Gitlow*, 268 U.S. at 673 (Holmes & Brandeis, JJ., dissenting).

¹⁸⁹ *Whitney v. California*, 274 U.S. 357, 376–77 (1927) (Brandeis & Holmes, JJ., concurring), *overruled in part by* *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (per curiam) (“[T]he incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”). In essence, “[o]nly an emergency can justify repression.” *Id.* at 377; see also Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CAL. L. REV. 1159, 1170 (1982).

¹⁹⁰ See, e.g., *Craig v. Harney*, 331 U.S. 367, 376 (1947) (overturning a contempt conviction stating that “[t]he danger must not be remote or even probable; it must immediately imperil”); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943); *Bridges v. California*, 314 U.S. 252, 263 (1941); *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940) (finding that speech can only be restricted when there is “a clear and present danger to a substantial interest of the State”); *Thornhill v. Alabama*, 310 U.S. 88, 105–06 (1940); *Stromberg v. California*, 283 U.S. 359, 369 (1931).

replaced by the *Whitney/Gitlow* Brandeis-Holmes clear and present danger standard for determining when speech could be criminally suppressed.¹⁹¹ From cases such as *Herndon v. Lowry* to *Bridges v. California*, bad tendency was seemingly banished, with seriousness of the harm added to the mix: “[w]hat finally emerges from the ‘clear and present danger’ cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.”¹⁹²

However, the Court retreated from its new insistence on immediate danger in its plurality decision in 1951’s *Dennis v. United States*, a case upholding charges of conspiracy to advocate for the forceful overthrow of the government under the anti-communism 1940 Smith Act.¹⁹³ This is critical, because the military high appellate court later incorporated the *Dennis* approach into its military speech doctrine, as discussed in Part IV. The *Dennis* plurality adopted the appellate court’s watered-down formulation of the clear and present danger test first crafted by Judge Learned Hand: “In each case [courts] must ask whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.”¹⁹⁴ This severely diluted version of clear and present danger functioned as a sliding scale, one subject to “ideological manipulation” that ambiguously tried to balance the value of the First Amendment against an unclear “danger to society.”¹⁹⁵ Under

¹⁹¹ See STONE, *supra* note 116, at 396 (“In the years between 1920 and 1950 . . . the Court had increasingly moved toward the Holmes-Brandeis ‘clear and present’ danger test.”); *id.* at 269, 272 (highlighting that by 1942, “criminal prosecutions for expression of the sort that were commonplace during World War I were now of doubtful constitutionality, if not downright unthinkable . . . the prosecutions in *Schenck*, *Frohwerk*, *Debs*, and *Abrams* were no longer thought consonant with the constitution”).

¹⁹² *Bridges*, 314 U.S. at 263 (overturning a contempt conviction); see also *Herndon v. Lowry*, 301 U.S. 242, 263–64 (1937) (overturning conviction under a state anti-insurrection statute that “amounts merely to a dragnet which may enmesh anyone who agitates for a change of government if a jury can be persuaded that he ought to have foreseen his words would have some effect in the future conduct of others”).

¹⁹³ *Dennis v. United States*, 341 U.S. 494, 508–10, 517 (1951). The Smith Act, passed in 1940, was another sedition act; it required resident aliens to register with the federal government and prohibited persons “knowingly or willfully” to “advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence.” See *id.* at 496. The Act was largely employed as an anti-communist Cold War tool. See Dow & Shieldes, *supra* note 156, at 1224–26 (explaining the Cold War history of this statute).

¹⁹⁴ *Dennis*, 341 U.S. at 510 (quoting *United States v. Dennis*, 183 F.2d. 201, 212 (2d Cir. 1950)).

¹⁹⁵ STONE, *supra* note 116, at 409; see e.g., Redish, *supra* note 189, at 1171 (noting that the *Dennis* version of clear and present danger was a “dramatic alteration in the test’s scope”); *id.* at 1173 (referring to the *Dennis* Court’s adoption of the “Hand sliding-scale test”). See generally THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 114 (1970) (concluding that “the Hand-Vinson formula seems to emasculate the clear and present danger test”). But see Redish, *supra* note 189, at 1170 (stating that “[m]ajority recognition of the clear and present danger test as a proper way of measuring the protection of free speech was some time in coming”).

this new approach, “threat of a great evil, even of a non-imminent one, would justify suppression of speech.”¹⁹⁶

Regrettably, this new version lacked the Holmes-Brandeis emphasis on both immediate and substantive seriousness of harm, creating an inverse relationship between these criteria instead of demanding their joint presence.¹⁹⁷ The *Dennis* Court justified this by explaining that clear and present danger “cannot mean that before the Government may act, it must wait until the putsch is about to be executed, the plans have been laid and the signal is awaited.”¹⁹⁸ Yet by killing the requirement for a tight temporal connection between speech and harm, the Court opened the door to speech suppression based on dislike of message versus real concern about harm, one the military courts later marched right through.¹⁹⁹ While no prediction of future harm is infallible, the requirement of immediacy of the harm—a “close temporal connection between speech and harm”—improves predictive odds, and further requiring *Bridges*’ emphasis on high probability of serious harm helps ensure that it really is the danger that is spurring government suppression, and not simply dislike of the ideas expressed.²⁰⁰

The *Brandenburg* Court later corrected its huge *Dennis* misstep.²⁰¹ While the *Brandenburg* opinion does not mention clear and present danger, the Court

¹⁹⁶ Redish, *supra* note 189, at 1172, 1180 (“Ultimately, however, the *Dennis* Court’s test effectively deleted the requirements that the danger be either clear or present when the potential harm was severe.”).

¹⁹⁷ *Id.* at 1172 (“The Hand test, by contrast, made the variables dependent so that probability and gravity of harm would work in inverse correlation: the graver the evil threatened by the speech, the less probable need be its occurrence before government is justified in suppressing the speech.”).

¹⁹⁸ *Dennis*, 341 U.S. at 509.

¹⁹⁹ See STONE, *supra* note 116, at 409. Instead of clear and present danger, the Court was back to the bad tendency approach. See Redish, *supra* note 189, at 1173 n.71 (citing MARTIN SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 65 (1966) (“[*Dennis*] is simply the remote bad tendency test dressed up in modern style.”)).

²⁰⁰ STONE, *supra* note 116, at 409. The *Dennis* Court was caught up in the McCarthy-era fear of communism, eventually coming “to regard *Dennis* as an embarrassment.” *Id.* at 410. The Court made a nuanced attempt to distinguish *Dennis* in *Yates v. United States* a few years later, in which the majority reversed Smith Act convictions quite similar to those upheld in *Dennis*. See *Yates v. United States*, 354 U.S. 298, 325–26 (1957) (distinguishing between advocacy to take action from advocacy to believe in ideas).

²⁰¹ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam); see, e.g., Dow & Shieldes, *supra* note 156, at 1234 (noting that *Brandenburg* has been characterized as “an extension of the Holmes/Brandeis refinement of the CPD test”) (citing RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 115 (1992)); cf. STONE, *supra* note 116, at 522 (noting that *Brandenburg* “finally and unambiguously embraced the Holmes-Brandeis version of clear and present danger”). The *Brandenburg* Court also noted that “constitutional guarantees . . . do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Brandenburg*, 395 U.S. at 447.

was clearly influenced by the Holmes-Brandeis pre-*Dennis* formulation.²⁰² Though it left open the question of how to assess imminence and likelihood of the harm, later incitement cases have all required express advocacy of immediate violation of the law and a high likelihood of such action; the Court has employed this “modern incitement test” to consistently invalidate convictions for mere advocacy.²⁰³ Because of the susceptibility that the Brandeis-Holmes clear and present danger approach could easily devolve into an *ad hoc* cost-benefit analysis, the *Brandenburg* Court also tethered its rule on the distinction made in earlier cases: the difference, in degree of importance regarding the purposes of the First Amendment, of high- versus low-value speech.²⁰⁴

The Court had earlier utilized the clear and present danger test to determine First Amendment protections in situations outside of advocacy, such as regarding fighting words,²⁰⁵ and seemingly left the Holmes-Brandeis test as the *Brandenburg* formulation of incitement.²⁰⁶ However, the clear and present danger approach—the worst bad tendency version—did not completely die; it lived on in the military speech doctrine, and is long due a silver bullet.

²⁰² See David A. Strauss, *Freedom of Speech and the Common-Law Constitution*, reprinted in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 57 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) (noting that “the Court’s emphasis on imminence and on a high probability of harm” flows directly from the Holmes-Brandeis clear and present danger approach).

²⁰³ See, e.g., *NAACP v. Caliborne Hardware Co.*, 458 U.S. 886, 902, 934 (1982) (overturning civil judgment against the NAACP for boycott of white-owned businesses based in part on statement: “If we catch any of you going in any of them racist stores, we’re gonna break your damn neck.”); *Hess v. Indiana*, 414 U.S. 105, 107, 109 (1973) (reversing conviction for shout of “[w]e’ll take the fucking street later” at an antiwar demonstration); *Watts v. United States*, 394 U.S. 705, 706, 708 (1969) (reversing conviction of man who publicly said, “If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.”); *Dow & Shieldes*, *supra* note 156, at 1234 (noting use of *Brandenburg* test to invalidate convictions for advocacy of violence).

²⁰⁴ Strauss, *supra* note 202, at 56–57 (noting that *Brandenburg* supplemented its clear and present danger approach by emphasizing “the distinction between high- and low-value speech”); see also *Brandenburg*, 395 U.S. at 448 (citing *Noto v. United States*, 367 U.S. 290, 297–98 (1961)) (“[T]he mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.”).

²⁰⁵ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (describing low-value speech as that whose “prevention and punishment . . . have never been thought to raise any Constitutional problem”); see also *CHEMERINSKY*, *supra* note 129, at 1054 (noting that the Court has narrowed *Chaplinsky* fighting words to only “speech directed at another person that is likely to produce a violence response”). Also, most fighting words convictions have not been upheld by the Court since *Chaplinsky*; such laws have been found to be unconstitutionally vague and overbroad. *Id.* at 1055.

²⁰⁶ Strauss, *supra* note 202, at 55–56 (noting that the clear and present danger test eclipsed in the 1940s).

IV. MILITARY SPEECH DOCTRINE AS *DENNIS*A. *Military Speech Doctrine Adoption: Priest and Parker*

In its 1974 decision in *Parker v. Levy*, the Supreme Court adopted the *Dennis* bad tendency version of the clear and present danger test for use when dealing with the military's ability to punish servicemember speech.²⁰⁷ The Court did so by explicitly approving the military appellate court's approach to servicemember speech as outlined by CAAF's predecessor, the Court of Military Appeals (CMA), in *United States v. Priest*.²⁰⁸ *Priest*, a 1972 military appellate case, which, like *Parker*, dealt with the military Article 134 crime of disloyal statements, established the *Parker*-Court-approved approach to military speech for nearly the next four decades.²⁰⁹

In *Priest*, the CMA upheld a conviction for conduct prejudicial to good order and discipline for "printing and distributing, with intent to promote disloyalty and disaffection among members of the armed forces, issues of a publication which, in its entirety, contained statements disloyal to the United States."²¹⁰ The *Priest* court expressly rejected the *Brandenburg* standard for determining First Amendment-protected advocacy in the military because "[t]he armed forces depend on a command structure that at times must commit men to combat."²¹¹ Therefore, speech that falls short of incitement but "undermine[s] the effectiveness of response to command" is constitutionally unprotected in the military context.²¹²

The *Priest* court identified military morale and discipline as integral to "response to command," finding that unlike in the civilian context, in which imminency and likelihood of harm are required for speech to be unprotected, "the danger resulting from an erosion of military morale and discipline is too great to require that discipline must already have been impaired before a prosecution for uttering statements can be sustained."²¹³ Specifically, the court found that the success or likelihood of success of the speaker's dangerous words is not required for conviction; instead, quoting *Schenck*, "[i]f the act (speaking, or circulating a paper), its tendency and the intent with which it is done, are the same, we perceive no ground for saying that success alone warrants making the act a crime."²¹⁴

²⁰⁷ *Parker v. Levy*, 417 U.S. 733, 760–61 (1974); see also Zillman & Imwinkelried, *supra* note 18, at 408 ("In *Levy*, Justice Rehnquist adopted the Court of Military Appeals' 'clear and present danger' test . . .").

²⁰⁸ *United States v. Priest*, 45 C.M.R. 338 (1972).

²⁰⁹ Friess, *supra* note 19, at 22–23 (highlighting that *Priest* established the approach CAAF would take for decades).

²¹⁰ *Priest*, 45 C.M.R. at 340.

²¹¹ *Id.* at 344.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* at 345 (quoting *Schenck v. United States*, 249 U.S. 47, 52 (1919)).

In other words, the *Priest* court seemingly held “that even a seemingly remote threat to good order and discipline will be sufficient in most instances to justify a criminal conviction.”²¹⁵ In order to determine this speculative harm, or in Justice Holmes’s words, “the degree of danger which must exist before” a military member’s speech can be punished,²¹⁶ the *Priest* court quoted *Schenck*’s clear and present danger language, and approvingly quoted the *Dennis* reformulation of that test.²¹⁷ Applying it to the appellant’s publications, the *Priest* court specifically asked “whether the gravity of the effect of accused’s publications on good order and discipline in the armed forces, discounted by the improbability of their effectiveness on the audience he sought to reach, justifies his conviction.”²¹⁸

Hence, as in the actual *Dennis* case, the *Priest* court’s military speech doctrine, with the *Parker* Supreme Court’s imprimatur, was and is simply the bad tendency test dressed up in Learned Hand’s eloquence. The military version of the bad tendency approach to government punishment of speech even includes the bad tendency test’s inference of intent from tendency. For example, the *Priest* court followed the *Abrams* Court’s lead in finding that,

Where the accused’s pamphlets suggested means by which the troops might actively demonstrate their own disloyalty and disaffection . . . such statements permitted an inference of the accused’s intent to promote disloyalty and disaffection among the troops from the contents of the pamphlets and their free distribution to members of the armed services.²¹⁹

By adopting the bad tendency approach to speech suppression cloaked with a clear and present danger label, *Priest* eviscerated the traditional understanding that Article 134’s uniquely military crime requires harm that is “palpably prejudicial to good order and discipline, and not merely prejudicial in an indirect and remote sense.”²²⁰ While the *Priest* court superficially required that appellant’s underground newspaper, left for free distribution to military members, have a palpably prejudicial impact, in application the court required nothing of the sort. It merely speculated that because not all military members “have the maturity of judgment to resist propaganda . . . [o]ne possible harm from the statements is the effect on others if the impression becomes widespread that revolution, smashing the state, murdering policemen, and assassination of public officials are acceptable conduct.”²²¹ How this utterly speculative harm to

²¹⁵ Carr, *supra* note 19, at 323.

²¹⁶ *Priest*, 45 C.M.R. at 344 (citing *United States v. Howe*, 37 C.M.R. 429, 437 (1967)).

²¹⁷ *Id.* (specifically acknowledging Chief Judge Learned Hand in adopting the following test: “In each case (courts) must ask whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.” (quoting *Dennis v. United States*, 341 U.S. 494, 510 (1951))).

²¹⁸ *Id.* at 344–45.

²¹⁹ *Id.* at 338.

²²⁰ *Id.* at 343 (quoting *United States v. Snyder*, 4 C.M.R. 15, 18 (C.M.A. 1952)).

²²¹ *Id.* at 345.

good order and discipline was anything but remote and indirect is ludicrous—a prime example of the failure of rigorous analytical thinking that Justices Holmes’s and Brandeis’s requirements of imminent serious harm and intent were meant to preclude.²²²

Regardless of such flaws, a highly deferential Supreme Court approved the CMA’s *Priest* approach in *Parker v. Levy* only two years later.²²³ In *Parker*, the Court upheld an Army captain’s conviction for telling black soldiers that he would refuse future orders to go to Vietnam if he was in their position by refusing to apply the *Brandenburg* incitement standard.²²⁴ Instead, it shielded the two charged military penal provisions from vagueness and overbreadth challenges²²⁵ by finding that the special nature of the military allows it to be “governed by a separate discipline from that of the civilian” and hence suppress a greater range of speech than is constitutional in the civilian sphere.²²⁶

Justice Rehnquist, writing for the *Parker* Court’s 5-3 majority, deferentially relied on military exceptionalism to avoid rigorous legal analysis regarding the scope of the First Amendment in the military context.²²⁷ While *Parker* found that First Amendment protections apply in the military, the Court concluded that such protections apply differently than in the civilian context—without

²²²The CMA concluded that in order to protect military members from appellant’s “purposefully written papers calling for violent and revolutionary action,” his prosecution was appropriate, given that his papers’ “publication and distribution tended palpably and directly to affect military order and discipline and were punishable under the general article.” *Priest*, 45 C.M.R. at 346. The D.C. Circuit Court of Appeals, ruling in on *Priest*’s collateral attack of his court-martial conviction, concurred that the Article 134 speech crime in *Priest*’s case was constitutionally sound, given that Congress could punish speech which “undermine[s] the effectiveness of response” to command by military personnel. *Priest v. Sec’y of Navy*, 570 F.2d 1013, 1017 (D.C. Cir. 1977) (citing *Parker v. Levy*, 417 U.S. 733, 759).

²²³*Parker*, 417 U.S. at 758.

²²⁴*Id.* at 735–37. Both Captain Levy’s Article 134 and 133 specifications characterized his statements as disloyal; the 134 charge specified that he made the comments “with design to promote disloyalty and disaffection among the troops” and the 133 unbecoming charge claimed that he “wrongfully and dishonorably” made “statements variously described as intemperate, defamatory, provoking, disloyal, contemptuous, and disrespectful.” *Id.* at 738–39.

²²⁵Dr. Levy was convicted by court-martial, receiving three years’ prison time and a dismissal from the Army, and brought a successful habeas petition in the Third Circuit, which agreed with him that the “conduct unbecoming” (Article 133) and the “conduct prejudicial to good order and discipline” (Article 134) UCMJ provisions were unconstitutional on vagueness and overbreadth grounds. *See Zillman & Imwinkelried, supra* note 18, at 398 (noting the procedural posture of the case); *see also* Murphy, *supra* note 18, at 777 (dissecting the *Parker* Circuit Court opinion and predicting that the Supreme Court would “bur[y]” Articles 133 and 134).

²²⁶*Parker*, 417 U.S. at 744 (quoting *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953)).

²²⁷*Cf. Zillman & Imwinkelried, supra* note 18, at 401 (“[T]he Supreme Court’s acquiescence in *Parker* to the society apart justification must be questioned.”).

specifying how different the protections could or should be.²²⁸ The Court rationalized its complaisance by finding that “[t]he fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.”²²⁹

Citing the need for deference to the military, the *Parker* Court explicitly approved the doctrinal approach to servicemembers’ First Amendment protections taken by the CMA in *Priest*.²³⁰ Critically, the *Parker* Court noted that while the challenged penal provisions could be indeterminate at their edges, their interpretation by the military appellate court, as well as by military tradition, made them sufficiently specific to serve requisite notice.²³¹ Hence, the *Parker* Court let stand the CMA’s test for determining when servicemembers’ speech was unprotected: when it posed a “clear and present danger” to responsiveness to command.²³²

B. Military Speech Doctrine in Application

The military appellate cases²³³ that subsequently utilized the military speech doctrine established in *Priest* and approved by the Supreme Court in

²²⁸ *Parker*, 417 U.S. at 758. See generally Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 266 (1958) (arguing that the Bill of Rights originally had no application to the military).

²²⁹ *Parker*, 417 U.S. at 758.

²³⁰ *Id.* at 759. *Parker* approvingly quoted CMA’s conclusion that “[s]peech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected.” *Id.*

²³¹ *Id.* at 760–61 (noting the “narrowing construction by the United States Court of Military Appeals” of the general articles). Regarding the narrowing function of military custom and usage, the Court referred to the hoary case of *Dynes v. Hoover*, 61 U.S. 65 (1857), as recognition that military tradition provides notice of misconduct not specified by law, and that such practice “is not liable to abuse; for what those crimes are, and how they are to be punished, is well known by practical men in the navy and army.” *Parker*, 417 U.S. at 747.

²³² See *Parker*, 417 U.S. at 758; see also Zillman & Imwinkelried, *supra* note 18, at 408 (“In *Levy*, Justice Rehnquist adopted the Court of Military Appeals’ ‘clear and present danger’ test.”). The Supreme Court subsequently reiterated its deference to the military due to its status as a special society in *Brown v. Glines*, 444 U.S. 348 (1980) and *Secretary of the Navy v. Huff*, 444 U.S. 453 (1980), companion cases in which the Court found “that discipline and efficiency outweighed any absolute right to circulate petitions on military bases.” Morris, *supra* note 19, at 665–66. However, the Court upheld the military regulations in *Greer v. Spock*, 424 U.S. 828, 848–49 (1976) that required permits prior to distributing on-base petitions as reasonable time, place and manner restrictions. The cases did not directly deal with criminal sanctions nor discuss the speech rights of military members. See *Brown v. Glines*, 444 U.S. 348 (1980) (upholding Air Force regulations requiring base commander approval prior to distribution of on-base petitions); *Sec’y of the Navy v. Huff*, 444 U.S. 453, 458 (1980) (upholding similar Navy regulations as those in *Brown*).

²³³ When a few First Amendment cases after *Priest* reached Article III courts via collateral attacks, the federal appellate courts applied great deference to the military’s adjudicative process; the D.C. Circuit stated in 1975 that it would not “overturn a [military]

Parker—the *Dennis* bad tendency formulation of the *Schenck* clear and present danger test—reveal similar logic as that used in the *Dennis* decision and earlier reviled Supreme Court cases.²³⁴ That is, the military appellate court utilized the “clear and present danger” moniker in a conclusory fashion to criminalize speech without requiring either imminence or probability of the particular danger in question nor express intent.²³⁵ Before turning to a few emblematic post-*Priest* cases, it is worth noting that the military appellate court tested its Supreme Court-approved *Priest* approach in speech cases prior to *Priest*. *United States v. Howe* exemplifies the incipient military speech doctrine prior to its formal incantation in *Priest*.²³⁶ In *Howe*, the military appellate court upheld appellant’s convictions for both conduct unbecoming an officer and using contemptuous words against the president for the same speech: carrying a sign, while not in uniform and not on a military installation, in an anti-Vietnam protest that read “[I]et’s have more than a choice between petty ignorant facists [sic] in 1968” on one side and “[e]nd Johnson’s facist [sic] aggression [sic] in Viet Nam [sic]” on the other.²³⁷ The court quoted Justice Holmes in *Frohwerk*: “[N]either Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counseling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech.”²³⁸ But the second lieutenant was not counseling murder or any other

conviction unless it is clearly apparent that, in the face of a First Amendment claim, the military lacks a legitimate interest in proscribing the defendant’s conduct.” *Avrech v. Sec’y of the Navy*, 520 F.2d 100, 103 (D.C. Cir. 1975) *rev’d per curiam sub nom. Sec’y of the Navy v. Avrech*, 418 U.S. 676 (1974) (reversing in light of the *Parker* decision).

²³⁴ See *supra* Part III.C.3 (describing cases such as *Gitlow*).

²³⁵ Calling it a test is grossly inaccurate, as it was employed by the military appellate court as window dressing for the criminalization of speech the military did not like, hence the use of the term “moniker” here instead.

²³⁶ *United States v. Howe*, 37 C.M.R. 429, 431 (C.M.A. 1967) (sentenced to a dismissal and two years hard labor, later reduced to dismissal and one year hard labor for the sign he carried protesting the Vietnam War); see also *United States v. Gray*, 41 C.M.R. 756 (1969), *rev’d*, 42 C.M.R. 255, 260 (C.M.A. 1970) (refusing to uphold conviction for disloyal statements because the prosecution failed to prove disloyalty against the government versus as against the Army, but finding that because statements were written in a military log by a servicemember with a good reputation, the prejudice to good order and discipline was “reasonably direct and palpable,” despite the fact that fellow servicemembers did not take them seriously).

²³⁷ *Howe*, 37 C.M.R. at 432. The military appellate court implied in 2001 that if tried today, the *Howe* charges would be considered multiplicitous for findings. See *United States v. Frelix-Vann*, 55 M.J. 329, 331–32 (C.A.A.F. 2001) (specifically mentioning *Howe* in its explanation that later Supreme Court lesser-included-offense jurisprudence had changed the military court’s multiplicity approach).

²³⁸ *Howe*, 37 C.M.R. at 436 (citing Justices Holmes in *Frohwerk*, 249 U.S. at 206). The *Frohwerk* quote is usually associated with speech that falls within the “speech integral to a crime” exception, such as solicitation. See Eugene Volokh, *The Speech Integral to Criminal Conduct Exception*, 101 CORNELL L. REV. 981, 989 (2016) (highlighting that the Court in *Frohwerk*, like in *Abrams*, was trying to draw a line between advocacy and criminal solicitation of illegal conduct).

crime; indeed, all he was doing was advocating for political change in both the White House and in the extant war.²³⁹ Yet the court rested its approval of the military's punishment of this reservist's speech because of the court's belief that the speech was linked to treason.²⁴⁰ To make this leap, the court canvassed the history of Article 88, finding that "[t]he evil which Article 88 . . . seeks to avoid is the impairment of discipline and the promotion of insubordination by an officer of the military service in using contemptuous words toward the Chief of State."²⁴¹

After highlighting that the United States was currently suffering casualties in Vietnam (as if that was relevant),²⁴² the CMA provided the following bald conclusion: in reference to Howe's placard, "That in the present times and circumstances such conduct by an officer constitutes a clear and present danger to discipline within our armed services, under the precedents established by the Supreme Court, seems to require no argument."²⁴³ The court did additionally emphasize the importance of civilian control of the military,²⁴⁴ implying that "[f]ree expression can threaten civilian control of the military,"²⁴⁵ though not explaining how Howe's placard could do so.²⁴⁶ Furthermore, in line with the fact that neither Article 88 nor Article 133 (then nor now) required any particular mens rea,²⁴⁷ the CMA did not, despite *Brandenburg*, require the government to prove that Howe had any intent to cause the parade of horrors the CMA marched out as speculatively possible.

The court's finding that a misspelled sign referring to a president's "fascist" policies, carried by an off-duty soldier in civilian clothes in an off-base protest, served as a gateway for mutiny and sedition certainly seems a far cry from clear and present danger by any stretch of the imagination. Though there was zero evidence that any military members had seen Howe or his sign, never mind any moved to mutiny, the court found the young officer's language contemptuous per se against President Johnson because of the circumstances of his words,

²³⁹ See *Howe*, 37 C.M.R. at 432.

²⁴⁰ See *id.* at 436–38.

²⁴¹ *Id.* at 437.

²⁴² *Id.*

²⁴³ *Id.* at 438.

²⁴⁴ *Id.* at 439 (noting that both Canada and the U.S. are "nations [that] have a long tradition based upon Anglo-Saxon jurisprudence which has consistently subordinated the military to the civilian in Government").

²⁴⁵ Zillman & Imwinkelried, *supra* note 18, at 405; see also *id.* at 405–06 (listing the four primary reasons the military uses to justify a different standard for suppression of speech in a military context than that standard which is applicable to civilians, including civilian control of the military).

²⁴⁶ Referring to the fact that the appellant was a reservist, the court explained that it "would surely be ill-advised to make an exception for the civilian soldier which would inevitably inure to the advantage of the recalcitrant professional military man by providing an entering wedge for incipient mutiny and sedition." *Howe*, 37 C.M.R. at 439.

²⁴⁷ When no intent is specified, common law principles dictate that the accused had to be acting at least negligently with regard to the *actus reus* and typically other elements too.

explaining that “[t]he language utilized on the appellant’s placard is hardly susceptible to more than one interpretation . . . [f]ascism signifies the antithesis of our own system of Government and for the public office holder imputes both malfeasance of office and the more horrendous crime of disloyalty.”²⁴⁸

This was not the military appellate court’s final word regarding conduct unbecoming, and therefore criminal, speech. Twenty years after the Supreme Court upheld *Parker*’s conduct unbecoming conviction, the military appellate court employed its military speech doctrine in typical fashion in *United States v. Hartwig* in 1994.²⁴⁹ In *Hartwig*, the military appellate court found that an officer’s sexually-suggestive letter to a fourteen-year-old girl represented a “‘clear and present danger’ that the speech will, ‘in dishonoring or disgracing the officer personally, seriously compromise[] the person’s standing as an officer.’”²⁵⁰

Given that appellant challenged his Article 133 conduct unbecoming conviction, a different crime than the Article 134 prejudicial to good order and discipline offense at issue in *Priest*, the *Hartwig* court first noted the *Schenck* maxim that speech may be restricted to prevent the “substantive evils that Congress has a right to prevent.”²⁵¹ Employing circular reasoning, it held that in the military, “those ‘substantive evils’ are violations of the Uniform Code of Military Justice.”²⁵² The court articulated that “the test is whether the officer’s speech poses a ‘clear and present danger’ that the speech will, ‘in dishonoring

²⁴⁸ *Id.* at 445; see also *Morris*, *supra* note 19, at 671 (criticizing the court’s decision as “not clear whether it was the topic of Vietnam, the fact of a public march, or Howe’s signs themselves that were the basis of the decision”).

²⁴⁹ *United States v. Hartwig*, 39 M.J. 125, 130 (C.M.A. 1994). While the military appellate court had at least one other conduct unbecoming conviction based on appellant’s speech reach it for decision after *Parker*, it avoided the constitutional question. See *United States v. Norvell*, 26 M.J. 477, 480 (C.M.A. 1988) (affirming conviction of military officer for conduct unbecoming in her official capacity by communicating to an enlisted subordinate details of how to avoid drug detection during a urinalysis and admitting that appellant had used such procedures to avoid drug detection herself; this speech was found to be “behavior . . . which, in dishonoring or disgracing the individual as a commissioned officer, seriously detracts from her character as a lady,” yet the Court did not address the constitutionality of punishing such speech).

²⁵⁰ *Hartwig*, 39 M.J. at 128, 130. While the government did not charge as an element of the crime that the appellant knew the recipient was a minor, the court concluded, in denying appellant’s legal sufficiency claim, that he knew she was of “tender age.” *Id.* at 130.

²⁵¹ *Id.* at 128. This appears to be the impermissible bootstrapping rationale outlined by Professor Volokh. See Volokh, *supra* note 21, at 1011 (explaining that “[i]t is not enough that the speech itself be labeled illegal conduct, e.g., . . . ‘breach of the peace,’ ‘sedition,’ . . . [r]ather, it must help cause or threaten other illegal conduct . . . which may make restricting the speech a justifiable means of preventing that other conduct” (emphasis omitted)). Simply stating that the evil prevented is violation of any military penal provision does not suffice to explain why that provision does not warrant First Amendment protection given that the penal provision turns on the communicative impact—the content—of the speech at issue.

²⁵² See *Hartwig*, 39 M.J. at 128.

or disgracing the officer personally, seriously compromise[] the person's standing as an officer."²⁵³

After thus deciding the approach to whether private speech is protected in the Article 133 context, the *Hartwig* court continued the military speech doctrine's approach of not requiring actual harm to support a finding of clear and present danger.²⁵⁴ That is, no showing of harm to the officer's standing as an officer is required for Article 133 speech crimes: "[t]o the extent that appellant argues that the prosecution must prove actual damage to the reputation of the military, we reject his argument. Forbidden speech is measured by 'its tendency,' not its actual effect."²⁵⁵

Furthermore, per the military speech doctrine—which, as seen in *Priest*, is simply the Supreme Court's bad tendency perversion of the clear and present danger test, drawn from *Dennis*—the military court in *Hartwig* did not require any degree of proximity between speech and potential harm, nor did it require intent to cause such harm. The opinion instead concluded that since it appeared that appellant at least suspected that the intended recipient of his sexually-suggestive letter was a minor, that was enough to conclude that "appellant's conduct presented a clear and present danger of disgracing or dishonoring appellant personally and thereby brought 'dishonor or disrepute upon the military profession he represents.'"²⁵⁶ The court failed to explain the "thereby"—how appellant's personal disgrace presented a clear and present danger of service disrepute. Indeed, the concurring opinion specifically faulted the majority for this oversight, characterizing the danger as being "cloudy and remote" instead of "clear and present."²⁵⁷

Two years later, in *United States v. Brown*, a plurality writing for CAAF cited both *Hartwig* and *Priest* to uphold a conviction for conspiracy to strike in violation of Article 81, UCMJ, against a First Amendment overbreadth challenge.²⁵⁸ The *Brown* opinion is important because it summarized the leading

²⁵³ *Id.* (quoting MCM, *supra* note 22, at Part IV, ¶ 59c(2)).

²⁵⁴ *Id.* at 130.

²⁵⁵ *Id.* (citing *United States v. Priest*, 45 C.M.R. 338, 345 (C.M.A. 1972)).

²⁵⁶ *Id.* at 129 (citing *Parker v. Levy*, 417 U.S. 733, 754 (1974)).

²⁵⁷ *Hartwig*, 39 M.J. at 130 (Cox, J., concurring) (agreeing with the majority because he found the letter "disgraceful"). Given that appellant had asked in his letter for a nude photo of appellant, *id.* at 127, it seems that the gravamen of the harm in *Hartwig* was not hypothetical service disrepute caused by an officer's dishonor but the societal harm caused by solicitation of child pornography. It seems clear that, given the evidentiary weaknesses regarding appellant's knowledge of the age of the child whom he asked, see *id.* at 130, the military chose to charge conduct unbecoming instead of solicitation to commit a federal offense, and by doing so emptied "clear and present danger" of real meaning.

²⁵⁸ See *United States v. Brown*, 45 M.J. 389, 389 (C.A.A.F. 1996) (plurality opinion) (affirming appellant's conviction for organizing in violation of a federal statute prohibiting establishing military unions, as charged through clause 3, Article 134). Appellant, a guardsman activated for the Persian Gulf War and in training at a Texas military base, had organized a battalion-wide meeting to discuss "complaints concerning living conditions,

military appellate approach to the constitutionality of military speech crimes and discussed three primary reasons why servicemembers' speech rights can be curtailed to a greater extent than those not in uniform: the need for discipline, military mission, and civilian supremacy.²⁵⁹ Furthermore, this opinion highlights the extremely ad hoc and speculative nature of the military speech doctrine; the *Brown* court spent more time both discussing UMCJ speech crimes that were not charged and emphasizing that other U.S. servicemembers were deployed to the Persian Gulf at the time of appellant's conduct than analyzing why appellant's conduct was indeed criminal despite its expressive nature.²⁶⁰

In finding that appellant's right to expression was not violated, the *Brown* plurality first noted that dangerous speech was unprotected speech.²⁶¹ Combining *Priest* and *Parker*, it proclaimed that "[t]he test in the military is whether the speech interferes with or prevents the orderly accomplishment of the mission or presents a clear danger to loyalty, discipline, mission, or morale of the troops," a test that has been later cited by lower courts and CAAF.²⁶² Interestingly, the *Brown* plurality, in passing, also noted a standard applied by the D.C. Circuit in a Vietnam-era case: "Courts will 'not overturn a conviction unless it is clearly apparent that, in the face of a First Amendment claim, the military lacks a legitimate interest in proscribing the defendant's conduct.'"²⁶³ However, a thorough review of subsequent military case law finds no use of this legitimate interest standard, though as one CAAF judge has noted, "the case law is susceptible to multiple interpretations and applications."²⁶⁴

long hours, inadequate time off, pay problems, and perceived poor leadership." *Id.* at 392 (appellant had also arranged for a charter bus home the next day for some of his colleagues).

²⁵⁹ *Id.* at 396–97 ("However, this right must be tempered in a military setting based on the mission of the military, the need for obedience of orders, and civilian supremacy.").

²⁶⁰ The concurring judge noted that appellant's conduct actually involved mutiny in violation of Article 94, UCMJ. *Id.* at 399 (Cox, J., concurring); see also *Brown*, 45 M.J. at 402 (Sullivan, J., dissenting) (noting also that the white soldiers who actually did wrongfully take a bus home from the same base were not court-martialed—only the black soldiers who talked about it were prosecuted).

²⁶¹ *Brown*, 45 M.J. at 395 (plurality opinion) ("This is a lower standard not requiring 'an intent to incite' or an 'imminent' danger.")

²⁶² *Id.* at 395. See, e.g., *U.S. v. Pope*, 63 M.J. 68, 75 (C.A.A.F. 2006) (citing *Brown* and *Priest* in a case involving a recruiter's inappropriate conduct towards potential recruits).

²⁶³ *Brown*, 45 M.J. at 396 (citing *Avrech v. Sec'y of the Navy*, 520 F.2d 100, 103 (D.C. Cir. 1975)). Instead of explaining how the military speech doctrine it had just clarified actually applied to appellant's speech, the plurality instead simply noted that while appellant was complaining about living conditions at Fort Hood, other soldiers were living in austere conditions in the Persian Gulf. See *id.* at 392.

²⁶⁴ *United States v. Wilcox*, 66 M.J. 442, 456 (C.A.A.F. 2008). The dissent in *Wilcox* noted that such a legitimate interest standard "does not adequately protect the liberty interests involved, for virtually anything might be viewed as a 'legitimate interest' when national security is invoked." *Id.*

C. More Military Speech: Other Categories Plus Wilcox

For the last almost fifty years, the military courts, as well as federal courts in their few military speech-related cases,²⁶⁵ have employed *Priest* and *Parker*'s bad tendency clear and present danger approach to uphold convictions for supposedly dangerous speech without demanding any showing as to seriousness, likelihood, or imminency of harm.²⁶⁶ Furthermore, dangerous speech is not the only category of unprotected speech that the military courts have seemingly expanded, though it is the one stretched the furthest. In addition to dangerous speech, the high military appellate court has also utilized the "fighting words" categorical exception to address convictions under Article 117, UCMJ's "provoking speech" provision, despite the seeming desuetude such category has fallen into on the civilian front.²⁶⁷ Additionally, the military appellate courts have also upheld military prosecution of indecent speech as obscenity, though the military definition of indecency is broader than the Court's "prurient interest" definition of obscenity.²⁶⁸ In doing so, CAAF

²⁶⁵ See, e.g., *Millican v. United States*, 744 F. Supp. 2d 296, 300, 307 (D.D.C. 2010) (finding that a reserve officer's encouragement of squadron mates to refuse anthrax vaccination orders and his statements questioning commander's credibility and concern for colleagues were not protected by First Amendment because they "may . . . undermine the effectiveness of response to command" (citing *Parker v. Levy*, 417 U.S. 733, 759 (1974)); *Wilson v. James*, 139 F. Supp. 3d 410, 426, 432 (D.D.C. 2015), *aff'd*, No. 15-5338, 2016 WL 3043746 (D.C. Cir. 2015) (finding that neither a military member's email to senior military officer urging no same-sex marriages at West Point Chapel nor his social media post complaining about superior officer were First Amendment-protected speech because "speech by a member of the military that undermines the chain of command, and the obedience, order, and discipline it is designed to ensure, does not receive First Amendment protection," though the court failed to explain how petitioner's speech had such an effect). Cf. *Goldman v. Weinberger*, 475 U.S. 503, 504, 507 (1986) (upholding military's authority to prohibit yarmulke wear by officer in uniform and stating, although a religious-expression and not speech case, that "[t]he military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment").

²⁶⁶ See, e.g., *United States v. Stone*, 37 M.J. 558, 565 (A.C.M.R. 1993), *aff'd*, 40 M.J. 420 (C.M.A. 1994) (upholding Article 134 service-discrediting conviction for giving speech in uniform at local high school falsely bragging about combat exploits because "[t]he government provided ample evidence of a diminished confidence by those who heard the appellant in the integrity of service-members in general."); see also *United States v. Hartwig*, 39 M.J. 125, 130 (C.M.A. 1994).

²⁶⁷ See, e.g., *United States v. Thompson*, 46 C.M.R. 88, 90 (C.M.A. 1972) (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (finding that Article 117 passed First Amendment muster); *United States v. Killion*, 75 M.J. 209, 215 (C.A.A.F. 2016) (reversing an Article 117 conviction based on jury instruction that utilized average instead of reasonable person standard that failed to take into account listeners' training); see also *CHEMERINSKY*, *supra* note 129, at 1053–54 (noting fighting words' current disuse as an unprotected category).

²⁶⁸ *United States v. Moore*, 38 M.J. 490, 492 (C.M.A. 1994) ("'Indecent' is synonymous with 'obscene,' and such language is not afforded constitutional protection."); *United States v. French*, 31 M.J. 57, 59 (C.M.A. 1990) ("The term [indecent] has been held equivalent to,

unsurprisingly has referred to *Parker* and *Priest* for the proposition that obedience and discipline require a different First Amendment for the military—and as with its dangerous words jurisprudence, without real explanation as to why.²⁶⁹

Despite the seeming permanence of the dangerous words military speech doctrine and its mission-creep into other unprotected categories, CAAF modified it ever so slightly in 2008, at least regarding service-discrediting speech, in *United States v. Wilcox*.²⁷⁰ In overturning appellant's Article 134 conviction for publicly espousing racist views online, CAAF emphasized that the definition of unprotected dangerous speech remained the same *Howe-Priest-Parker-Brown* approach it had taken for years.²⁷¹ But instead of deciding that the speech charged as Article 134 service-discrediting speech constitutes dangerous speech by simply inferring a tendency to discredit,²⁷² and therefore placing such speech beyond First Amendment protection as part of the dangerous speech category—as it had previously with earlier cases charging speech as service-discrediting as well as Article 133 and clause one cases²⁷³—the court for the first time overtly required a direct connection between the

or synonymous with, 'immodest,' 'immoral,' 'impure,' . . . 'obscene'" (citations omitted)); *Roth v. United States*, 354 U.S. 476, 477 (1957) ("[T]he standard for judging obscenity . . . is whether, to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest."). Military indecent language is that "grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought." MCM, *supra* note 22, at Part IV, ¶ 89(c). "Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts." *Id.*

²⁶⁹ *Moore*, 38 M.J. at 493. Indecent language is an Article 134 clause one or two offense, or Article 133 conduct unbecoming crime. *See, e.g., id.* (explaining that indecent language formed the basis of appellant's conduct unbecoming conviction); *see also* MCM, *supra* note 22, at Pt. IV, ¶ 89; *see also* *United States v. Lambert*, No. ACM 38291, 2014 WL 842966, at *2 (A.F. Ct. Crim. App. Feb. 24, 2014) (upholding indecent language conviction against *Wilcox* challenge based on status of military indecency as unprotected obscenity).

²⁷⁰ *United States v. Wilcox*, 66 M.J. 442, 448–49 (C.A.A.F. 2008).

²⁷¹ *Id.* at 448 (approvingly citing the *Brown* definition of dangerous speech).

²⁷² Following CAAF's lead, the lower service appellate court in *Wilcox* had simply concluded that appellant's speech was service-discrediting and hence dangerous because "members of the general public have access to [A]ppellant's publicly-posted comments, and upon reading them, may tend to find the Army—as represented by [A]ppellant—a disreputable institution, or one disserving [sic] less than full public esteem and respect." *Id.* at 445.

²⁷³ *See, e.g., United States v. Irvin*, 60 M.J. 23, 26 (C.A.A.F. 2004) (finding that possession of photos with minors engaging in sexually explicit conduct is service-discrediting); *United States v. Saunders*, 59 M.J. 1, 9 (C.A.A.F. 2003) (finding harassment service-discrediting); *United States v. Guerrero*, 33 M.J. 295, 297–98 (C.M.A. 1991) (upholding cross-dressing as service-discrediting); *United States v. Davis*, 26 M.J. 445, 449–50 (C.M.A. 1988) (upholding service-discrediting conviction for cross-dressing); *see also* *United States v. Greene*, 34 M.J. 713, 714 (A.C.M.R. 1992) (finding appellant's false swearing to a criminal investigator service-discrediting).

speech and the military.²⁷⁴ Specifically, CAAF required that if the speech at issue was otherwise protected speech—that is, not obscenity, fighting words, or dangerous speech per its broad *Brown* definition of the latter—the government had to prove that it had a “direct and palpable connection between speech and the military mission or military environment” in order for the charge to be legally sufficient.²⁷⁵ This was a novel twist, given that the whole point of CAAF’s dangerous speech doctrine up to that point had been a determination that if speech “interfere[d] with or prevent[ed] the orderly accomplishment of the mission or present[ed] a clear danger to loyalty, discipline, mission, or morale of the troops,” it was dangerous, and hence unprotected.²⁷⁶ Yet this was not really a new requirement. If said speech had no direct connection to the military mission or environment, it should not have fallen within CAAF’s unprotected category in the first place, though the above cases demonstrate the opposite. Speech cannot interfere with, or present a clear danger to, the military without such a nexus, surely. Hence, this supposedly “new” direct connection requirement was, at least impliedly, already a component of dangerous military speech since that doctrine’s crystallization in *Howe*, *Priest*, *Parker*, and *Brown*.

Instead of simply clarifying that unprotected dangerous military speech already required such a connection, CAAF confusingly held that even if speech was not at first blush dangerous—that is, it did not interfere with the mission or present clear danger to the troop’s morale, discipline or loyalty—it could nonetheless still be unprotected, apparently as dangerous, if it (1) had a direct and palpable connection to the military and (2) satisfied *Priest*’s ad hoc *Dennis* balancing test: “Ultimately, this Court must weigh the gravity of the effect of the speech, discounted by the improbability of its effectiveness on the audience the speaker sought to reach.”²⁷⁷ The *Wilcox* opinion seems to have simply repackaged the existing military speech doctrine in order to give its inherent nexus requirement more teeth, finding no such connection existed for appellant’s racist posts.²⁷⁸

While the *Wilcox* approach seems to cabin slightly the wide scope of service-discrediting speech crimes, its protective effect going forward is doubtful. The identical connection long required for Article 134 clause one crimes, similar to Article 133’s nexus, did little to this end. Indeed, service

²⁷⁴ *Wilcox*, 66 M.J. at 448–49.

²⁷⁵ *Id.* at 449; *cf.* *United States v. Phillips*, 70 M.J. 161, 163 (C.A.A.F. 2011) (holding that public awareness of accused’s possession of child pornography not required for service-discrediting conviction). *Phillips* is consistent with *Wilcox* in that child pornography is considered unprotected speech by the Supreme Court and *Wilcox*’s direct connection requirement only applies to speech not otherwise unprotected.

²⁷⁶ *See United States v. Brown*, 45 M.J. 389, 395 (C.A.A.F. 1996).

²⁷⁷ *Wilcox*, 66 M.J. at 449.

²⁷⁸ CAAF found no direct connection to the military because the posts were made on a non-military public online chat room, stressing that appellant had merely held himself out (“purported to be”) an Army paratrooper, ignoring, much to the dissent’s understandable chagrin, that appellant actually *was* a paratrooper. *See id.* at 453 (Baker J., dissenting).

appellate courts in speech cases following *Wilcox* have easily found its nexus requirement met, facilitated by *Wilcox*'s emphasis on the lack of evidence in that case that a civilian's opinion of the military was actually tarnished by defendant's speech.²⁷⁹ For example, in *United States v. Blair*, the lower court found that there was indeed a direct and palpable connection to the service because a civilian airport manager felt sick to his stomach when he found out that the active-duty appellant had posted KKK-recruiting posters in the public bathrooms in the airport.²⁸⁰

However, in upholding a speech conviction merely because the military found a civilian who thought poorly of the military due to appellant's speech, the service court in *Blair* did exactly what the *Wilcox* majority said it feared would happen without its new requirement: that "the entire universe of servicemember opinions, ideas, and speech would be held to the subjective standard of what some member of the public, or even many members of the public, would find offensive."²⁸¹ And this is exactly what will continue to happen with service-discrediting speech crimes, given that CAAF's nexus requirement provides no objective criteria for the military and its courts to use when analyzing the connective sufficiency of offensive speech. Instead, "connection" is simply being interpreted as evidence of actual discredit.²⁸²

Wilcox and its progeny underscore the fundamental problem that attaches to the existing military speech doctrine: the absence of objective standards for determining this supposed connection, and for weighing sufficiency and imminency of harm, exacerbated by the great deference given the military. Furthermore, *Wilcox* ultimately also reveals the inappropriateness of criminalizing service-discrediting speech (as well as other conduct), regardless of whether such speech has a direct connection to the military mission. It is simply not a bad thing for the U.S. public to think ill of the military in a democracy; indeed, the Founding Fathers were highly distrustful of a standing army, and such dislike had and can have powerful beneficial effects, as detailed in this next Part.

²⁷⁹ *Wilcox*, 66 M.J. at 451 (plurality opinion).

²⁸⁰ *United States v. Blair*, 67 M.J. 566, 571 (C.G. Ct. Crim. App. 2008); *see also* *United States v. Rapert*, 75 M.J. 164, 170–71 (C.A.A.F. 2016) (upholding an Article 134 conviction for making a threat to kill the President to civilian neighbors, despite appellant's claim he was merely "venting"; concluding that his speech met the *Wilcox* connection to military mission because his comments were "counter to the ethos of the United States armed forces" and had a tendency to undermine responsiveness to command, though there was no evidence other military members knew of appellant's speech).

²⁸¹ *Wilcox*, 66 M.J. at 449.

²⁸² *Friess*, *supra* note 19, at 25 (concluding that *Wilcox* requires actual discredit instead of tendency to discredit).

V. PROTECTED MILITARY SPEECH

The military speech doctrine is a weak ad hoc balancing approach that is extremely deferential to the military's decision that particular speech needs to be punished—a “free-floating test” of the type that the Court has rejected due to its danger to free expression.²⁸³ Current doctrine requires that courts strike a balance “between the essential needs of the armed services and the right to speak out as a free American,” and further mandate that courts must decide “whether the gravity of the effect of [the] accused's publications on good order and discipline in the armed forces, discounted by the improbability of their effectiveness on the audience he sought to reach, justifies his conviction.”²⁸⁴ This approach lacks objective standards to measure the elements that CAAF claims to be balancing: the private interest of the servicemember versus the seriousness and probability of the harm; furthermore, this approach has no imminency nor intent requirements.²⁸⁵ The result is a cession of power to the military to criminalize a huge area of speech without rigorous analysis, suppressing some speech that is harmful to the military, while also punishing speech with only a speculative chance of producing slight harm. The following Part outlines a necessary replacement for this approach and provides a concomitant statutory reform.

A. *Uniquely Military Speech-Integral Crimes*

In Part III, I establish a military speech typology and explained that category one's speech-integral crimes do not raise First Amendment concerns for the same reasons analogue civilian crimes do not.²⁸⁶ However, regarding uniquely military speech-integral crimes, the military courts apply a speech doctrine that is analytically unfit for the task. A better rationale for considering the constitutionality of such military speech crimes is the logic underlying the “speech integral to crime” categorical exception to First Amendment protection. This long-recognized category of unprotected speech far better supports the necessity and appropriateness of these crimes, despite their effect on expression. Replacing the current military speech doctrine with the crime integral to speech exception to exempt UCMJ speech crimes in category two from constitutional protection is not merely form over substance. While the end result—lack of constitutional protection for such speech—will be the same for these handful of uniquely military crimes, the process of determining why they are integral to

²⁸³ *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (quoting *United States v. Stevens*, 559 U.S. 460, 470 (2010)).

²⁸⁴ *United States v. Priest*, 45 C.M.R. 338, 344–45 (C.M.A. 1972).

²⁸⁵ See KENT GREENAWALT, *SPEECH, CRIME, & THE USES OF LANGUAGE* 222–24 (1989) (discussing the unsatisfactory nature of the clear and present danger ad hoc balancing approach to speech protection).

²⁸⁶ See *supra* Part III.A (noting the exceptions allowing crimes such as solicitation and perjury to be excepted under the speech integral to crime exception).

crime forces clarity regarding the divergence between military and civilian speech. Furthermore, it aligns the military courts' First Amendment doctrine with that of today's Supreme Court.²⁸⁷

Specifically, the Court's speech integral to crime exception allows content-based restrictions on speech that "tends to cause, attempts to cause, or makes a threat to cause some illegal conduct," with the latter being something other than the criminalized speech itself.²⁸⁸ The Court has used this exception to allow, for example, the criminalization of solicitation, child pornography, and conspiracy.²⁸⁹ Similar to these crimes, most of the category two military speech crimes are crimes due to the uncontroversial and widespread recognition of the risk of actual harm (criminality) associated with their prohibited speech.²⁹⁰ For example, like child pornography's causal link to harm to children—which has been recognized by the Supreme Court—false official statements in the military are directly linked to mission failure, and hence lack First Amendment protection due to their role as "integral to crime"—the crime, if you will, of mission failure. False official statements operationalize said harm; "Combat is too, dangerous too fast moving, and too stressful for leaders to have to doubt the truth of what they are told."²⁹¹

Category two military speech crimes—including contemptuous words by officers toward certain public officials; disrespect toward a superior commissioned officer; insubordinate conduct toward non-commissioned officer; cruelty and maltreatment; mutiny; false official statements; subordinate compelling surrender; and improper use of countersign—are similarly crimes because of their close nexus to a separate harm.²⁹² While the linked-to harm of these military crimes is not a separate, distinct crime as are the cases of solicitation and conspiracy, the crimes themselves operationalize harm that is otherwise impossible to capture as a distinct crime. Primarily, this distinct harm involves responsiveness to command, an integral component of discipline that

²⁸⁷ See Volokh, *supra* note 21, at 985 (noting the Roberts Court's revision of First Amendment doctrine to eliminate what Greenawalt calls "categorical balancing").

²⁸⁸ *Id.* at 986.

²⁸⁹ See, e.g., *United States v. Williams*, 553 U.S. 285, 288, 298 (2008) (explaining that solicitation falls into a speech integral to crime exception to the First Amendment); *New York v. Ferber*, 458 U.S. 747, 749 (1982) (acknowledging an exception for child pornography); *Giboney v. Empire Storage & Ice Co.*, 226 U.S. 490, 491 (1949) (recognizing conspiracy in restraint of trade as an exception).

²⁹⁰ See MORRIS, *supra* note 13, at 83.

²⁹¹ See *id.* (explaining "the potentially fatal consequences . . . and the potential impact on national security when such a representation has been relied on to a leader's or a unit's detriment").

²⁹² See *supra* Part II.B. However, this link does not exist for Article 88 regarding retired officers, as they no longer have a role in the disciplinary chain, and hence the crime should therefore be narrowed to active duty officers only.

the courts have long recognized as necessary for effective military functioning.²⁹³

In the case of contemptuous words, disrespect, insubordination, and cruelty crimes, the resultant harm each offense operationalizes is degradation of the superior-subordinate relationship, the DNA of the military organizational structure.²⁹⁴ Usurpation of superiors' authority in critical combat situations is the harm corresponding with countersign and compelling surrender crimes.²⁹⁵ Collective harm to the superior-subordinate relationship and hence wide-spread deterioration of military functioning results from mutiny; and mission failure and degradation of trust among military members jeopardizing military cohesion and efficacy result from false official statements.²⁹⁶ All these "harms" are on par with speech integral to crime's "illegal conduct," thus constitutionally justifying these military speech crimes' punishment of speech that causes or threatens to cause such harm.

One could argue that this re-categorization of these offenses falls within the speech integral to crime exception and is simply recognition by another name of a distinct categorical "military exception" to otherwise protected speech. My recommendation merely labels these crimes as "speech integral to crime exception" to acknowledge the Roberts Court's insistence that content-based speech restrictions only be "permitted . . . when confined to the few 'historic and traditional categories [of expression] long familiar to the bar.'" ²⁹⁷ Given that there is a historic integral to crime exception, and there has never been a distinct category of unprotected military speech—these crimes instead have been shoe-horned into a stretched and almost unrecognizable category of incitement—my proposal seems rational. This recommendation that most uniquely military speech crimes be recognized as within the speech integral to crime exception is more than just nomenclature, given my argument that these military speech crimes uniquely operationalize military-specific harm, akin to conspiracy's manifestation of the harm of collective criminality.

²⁹³ See, e.g., *In re Grimley*, 137 U.S. 147, 153 (1890) ("An army is not a deliberative body . . . [n]o question can be left open as to the right to command in the officer, or the duty of obedience in the soldier."); see also *Parker v. Levy*, 417 U.S. 733, 759 (1974) (arguing that the military may restrict the soldier's right to free speech in peace time because speech may "undermine the effectiveness of response to command").

²⁹⁴ Article 88's speech, in addition to degrading the superior-subordinate relationship between officers and the Commander-in-Chief, also is linked to degradation of civilian control of the military; this latter harm explains why not only contemptuous words against the President are criminalized, but also those against Congress and certain other civilian officials. *United States v. Howe*, 37 C.M.R. 429, 434–35 (C.M.A. 1967).

²⁹⁵ See MORRIS, *supra* note 13, at 74 (explaining the gravamen of harm of these offenses).

²⁹⁶ See *id.* at 83–84 ("A soldier must be able to be trusted to tell the truth, especially about matters that relate to the mission.").

²⁹⁷ *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991)).

Yet this categorical exception only gets one so far. The speech integral to crime category should not avoid a searching First Amendment inquiry simply because a type of speech is argued as criminally harmful.²⁹⁸ The nexus to criminal conduct—harm that, when operationalized, takes the form of crimes such as mutiny and insubordination—must be sufficiently close, otherwise simply by calling certain speech illegal would move it into this exception, eviscerating the utility of unprotected categories. Such a close relationship between speech and illegal harm seems traditionally uncontroverted for the above crimes.²⁹⁹ But category two's disobedience crimes—Articles 90, 91, and 92—are more vulnerable to such manipulation.³⁰⁰ A superior could hypothetically order a subordinate to not engage in whatever speech that superior finds offensive, with disobedience of said order automatically made criminal through these articles. Hence, I recommend these facially content-neutral, generally-applicable crimes not fall under the speech integral to crime exception. Strict scrutiny should be used to test constitutionality when these disobedience crimes turn on the content of speech; this is explained further in *infra* Part V.D.

B. *The Elimination of Article 134, Clause 2*

Moving to the UCMJ's catch-all speech crimes: Congress should eliminate Article 134's service-discrediting crime altogether, for speech and all other conduct. This would right a wrong that Congress remedied for the rest of American society almost a century ago. CAAF in *Wilcox* exposed the fundamental flaw in finding criminal supposedly discrediting conduct, and particularly speech.³⁰¹ This crime hinges on the lawfulness of otherwise protected speech—even core political speech—on the speculative possibility that members of the public will think poorly of the military because of such speech, and somehow this lowered opinion will lead to mission ineffectiveness.³⁰²

This flawed reasoning both underestimates the common sense of the American people and overestimates the primacy of the military in our constitutional schema. Regarding the latter: if military necessity were preeminent, then the Bill of Rights would not have been needed. Our Founding Fathers distrusted a standing Army and prioritized other values above military effectiveness: “A standing force, therefore, is a dangerous, at the same time that

²⁹⁸ See Volokh, *supra* note 21, at 987.

²⁹⁹ However, Article 88 remains of dubious constitutionality when applied to retired military officers, and should be amended to apply solely to those on active duty.

³⁰⁰ See Volokh, *supra* note 21, at 1046 (citing the Third Circuit's opinion in *King v. Governor*, 767 F.3d 216, 225–26 (3d Cir. 2014)); see also 10 U.S.C. §§ 890–92 (2016).

³⁰¹ See generally *United States v. Wilcox*, 66 M.J. 442 (C.A.A.F. 2008) (holding that an Article 134 conviction requires a direct and palpable connection between the speech in question and the military mission or military environment).

³⁰² See *id.* at 448–49.

it may be a necessary, provision.”³⁰³ That the military’s reputation may be lowered in the public’s eyes is not sufficiently harmful to outweigh the servicemembers’ right to engage in otherwise lawful behavior and speech: “The only limitations that should be placed on soldiers’ rights are those directly necessary for military effectiveness.”³⁰⁴

Let’s put aside the troubling speculative harm issues this crime entails, which alone should fatally taint this offense. Even assuming that some substantial discrediting will occur due to certain speech, the fundamental question remains—is lowering the military in the public’s eye a bad thing in our constitutional democracy? If such effect is produced by actual military member speech or other conduct, I argue that despite any negative effect it could have on recruiting or support for military operations, said reduction in support is a necessary corollary of a standing military in our constitutional democracy. That is, there is a price to pay for the accounting that the constitution demands the public be able to make of its military.

While the military and judicial rationales for the service-discrediting crime have morphed over time, the leading rationale has been the effect on recruiting that theoretically could occur if Americans thought less of their standing military; unsurprisingly, this claim mirrors the rationale undergirding much of the later reviled Espionage-Sedition Act.³⁰⁵ Indeed, some parents may feel more reluctant today to have their daughters and sons serve in a military that seems incapable of adequately addressing sexual assault, or that seems replete with chauvinistic Trump supporters.³⁰⁶ But that is part of the point behind Congress’s switch to an all-volunteer force following Vietnam: the new accession policy was partially designed to make it harder for politicians to engage the military without significant public support.³⁰⁷

If such public support is lowered by military member conduct, so be it. The military needs to work harder on recruiting, training, educating, and leading a force whose values better match those of society and the Constitution, and not simply hide from America how its members really act and feel by criminalizing speech the military claims could have this effect. Public perceptions of military

³⁰³ THE FEDERALIST NO. 41, at 251 (James Madison) (“[I]t is an object of laudable circumspection and precaution.”); see also Andrew J. Bacevich, *Whose Army?*, in THE MODERN AMERICAN MILITARY 194–95, 198 (David M. Kennedy ed., 2013) (describing the post-WWII standing army as “alien to the American experience”).

³⁰⁴ See MORRIS, *supra* note 13, at 5.

³⁰⁵ See *Wilcox*, 66 M.J. at 460 (Baker, J., dissenting); STONE, *supra* note 116, at 184–85.

³⁰⁶ Military justice experts, such as retired Air Force Major General Charles Dunlap, point out that while certain members of Congress may be losing some faith in the military, public opinion polls continue to consider the military as highly respected. Could some of this high respect be artificially procured through Article 134’s chilling effect? See Dunlap, *supra* note 24, at 265.

³⁰⁷ Jim Golby et al., *Thanks for Your Service: Civilian and Veteran Attitudes after Fifteen Years of War*, in WARRIORS AND CITIZENS: AMERICAN VIEWS OF OUR MILITARY 137 (Kori Schake & Jim Mattis eds., 2016).

integrity shouldn't be artificially buoyed via criminalization of speech, or of other conduct, purely for some recruiting or support effect.³⁰⁸ Of course the military wants and needs public support; I am arguing that it needs to earn it by educating and training its members on the highest standards of integrity and not by criminalizing what it speculates erodes such support.

If some military members go below those standards by lying to the *Washington Post*, as in the case of the Marine officer cited earlier,³⁰⁹ or by lying to a room full of high school students regarding one's combat service, or by espousing white supremacist views online—then the public knows that liars and racists exist in the military and should weigh that knowledge in their personal calculus of support for the military.³¹⁰ The military's understandable desire to deter such behavior through its criminalization is outweighed by servicemembers' First Amendment expressive rights; if, as a result of such speech, public support falls too low to sustain on-going military operations, then such operations should be curtailed or a draft pursued.³¹¹ Alternatively perhaps, good leadership will inculcate American values that the public will support.

A last note on service-discrediting speech: in *Rapert*, an enlisted member's contemptuous words regarding the President formed the basis of an Article 134 communicating a threat conviction.³¹² In upholding this conviction, CAAF found that even if the *Elonis* subjective intent requirement for true threats had not been met, the speech was sufficiently service-discrediting and therefore criminal.³¹³ In so doing, CAAF essentially allowed enlisted personnel to be convicted for conduct previously limited to officers under Article 88. Its rationale was a combination of both “the principle of civilian supremacy” over the military, and more importantly, a recognition that appellant's speech “regarding the President of the United States—who also serves as the

³⁰⁸ Experts also claim that distrust of the military at the highest levels of civilian policy-making, a distrust that impedes decision-making and results in bad policy, is a direct result of “exaggerated estimate of military capabilities” stemming from public perceptions of the military. Perhaps if discrediting speech wasn't criminalized, and hence culturally condemned within the military, such exaggerated estimates wouldn't be as prevalent. See Rosa Brooks, *Civil-Military Paradoxes*, in *WARRIORS AND CITIZENS: AMERICAN VIEWS OF OUR MILITARY* 44 (Kori Schake & Jim Mattis eds., 2016).

³⁰⁹ See generally Seck, *supra* note 4 (“Maj. Mark Thompson is set to face trial Thursday on charges of false official statement and conduct unbecoming an officer and a gentleman.”).

³¹⁰ See, e.g., *United States v. Stone*, 37 M.J. 558, 565 (A.C.M.R. 1993) (upholding Article 134 service-discrediting conviction of enlisted non-commissioned officer for giving speech in uniform at local high school and falsely bragging about combat exploits: “The government provided ample evidence of a diminished confidence by those who heard the appellant in the integrity of service-members in general . . . expressed a new distrust in the truthfulness of service personnel as a result of the appellant's activity. The presentation, we note, occurred at a moment in time when confidence in the military by its nation was especially important.”).

³¹¹ See Bacevich, *supra* note 303, at 209 (explaining how the elimination of the draft has allowed the government to pursue largely unaccountable military operations).

³¹² *United States v. Rapert*, 75 M.J. 164, 165 (C.A.A.F. 2016).

³¹³ *Id.* at 169–71.

Commander in Chief of the Armed Forces—unquestionably undermines the military’s unique interest in ensuring obedience to the chain of command.”³¹⁴ While I recommend that service-discrediting no longer serve as a criminal basis for conduct in the military, I also recommend that Article 88’s aperture be widened to include enlisted personnel’s contemptuous words, and not simply that of officers. As seen in *Rapert*, military personnel are already being so charged via the backdoor of Article 134, and the gravamen of harm of such speech coincides with Article 88—which is not the harm of service-discrediting speech, but the real danger of undermining the chain of command that leads to the President through other civilian leaders.

C. *Child Pornography Isn’t Criminal Because of Its Effect on the Military: Why Congress Needs to Fix the UCMJ*

Congress has neglected to specifically enumerate in the UCMJ numerous offenses that are criminal in most civilian jurisdictions. Instead, Article 134’s expansiveness has allowed the executive branch to unilaterally criminalize a huge range of behavior not elsewhere listed in the military’s penal code. Instead of modernizing the UCMJ, as states regularly do regarding their penal codes, Congress has simply left the military alone to handle a surprisingly long list of serious criminal misconduct as Article 134 service-discrediting or prejudicial to good order and discipline crimes.³¹⁵

By unilaterally adding crimes under Article 134 instead of delineating new UCMJ offenses through legislative reform, the military has diluted the normative force of Article 134 and weakened the credibility of the entire UCMJ. The MCM’s Appendix 12 provides the President’s illustrative, non-exhaustive list of crimes that can be charged as Article 134 clause one or two offenses, along with the President’s decision regarding their maximum punishments.³¹⁶ Over sixty-three distinct crimes are currently listed, each with a common element to be satisfied either by proof that conduct was service-discrediting or prejudicial to good order and discipline.³¹⁷

Well-known speech crimes, such as communicating a threat, solicitation to commit crimes other than combat-related crimes, obtaining services by false pretenses, bribery, and child pornography, as well as a slew of non-speech crimes such as kidnapping, child endangerment, and prostitution, are MCM-

³¹⁴ *Id.*

³¹⁵ See 10 U.S.C. §§ 933–34 (1958).

³¹⁶ See MCM, *supra* note 22, at app. 12-6–12-8.

³¹⁷ Manual provisions describing offenses cognizable under Article 134 are merely illustrative. See *United States v. Johnson*, 39 M.J. 1033, 1037 (A.C.M.R. 1994), *aff’d*, 17 M.J. 251 (C.M.A. 1984) (citing *United States v. McCormick*, 30 C.M.R. 26, 28 (C.M.A. 1960)). I count sixty-three primary Article 134 offenses listed in the MCM, though the count could be higher if one broke out the various iterations of specific 134, crimes such as child endangerment, which lists six different iterations of that crime. See MCM, *supra* note 22, at app. 12-5–12-7.

listed Article 134 crimes—unlike dueling, they do not have their own stand-alone UCMJ provision.³¹⁸ As such, all these crimes require the additional element of either prejudice or service-discrediting nature.³¹⁹ The gravamen of harm of these specific crimes, speech or not, obviously has nothing to do with the military; in fact, the vast majority of the President's list of Article 134 crimes have nothing to do with the military per se. These acts constitute crimes across America because of other damage they wreak, such as violence to children and others; their harms are completely distinct from any effect they may speculatively have on a military unit's good order and discipline or the military's reputation. By shoe-horning these serious crimes into Article 134's catch-all provisions, their seriousness is undervalued.³²⁰

Furthermore, by including a wide range of misconduct that is otherwise criminal in Article 134's catch-all scope, the normative message regarding the actual harm that is true prejudice to good order and discipline is diluted; as argued previously, service-discrediting is either not a harm or is insufficient to serve as a criminal basis, so its dilution is irrelevant.³²¹ But prejudice to good order and discipline is an enormously relevant concern, given that the dynamic of good order and discipline constitutes the nervous system of the military, and as such is imperative for effective functioning. By requiring child pornography to be prejudicial to good order and discipline, and in finding that this element is met in every case regardless the circumstance, Article 134's prejudicial element is essentially read out of the crime—as it should be, but through separate enumeration, not through such a false legal fiction. Such contorted findings of prejudice undermine the normative value of criminalizing speech, as well as other conduct that is criminal exclusively because of such prejudice.

That is, the only Article 134 offenses that should remain are those whose true gravamen of harm is actual prejudice to good order and discipline. Congress should separately enumerate all Article 134 crimes that are criminal because they represent separate harms to society and were simply placed in Article 134 by the President as a matter of convenience.³²² The distinction between what stays and goes is easy to make—if the Appendix 12, MCM-listed Article 134 offense is also a crime in civilian jurisdictions, then its criminality does not, nor should, turn on its effect on military good order and discipline—it therefore

³¹⁸ *See id.*

³¹⁹ *See id.* The majority of MCM-listed Article 134 crimes are non-speech crimes, such as bigamy, animal abuse, prostitution, and feeling the scene of an accident. *Id.*

³²⁰ By failing to separately enumerate these crimes without a service-discrediting or prejudicial to good order and discipline element, as they should, Congress implies that communicating a threat is less of a crime than, for example, dueling or stalking, which have both earned their own criminal UCMJ article. *See id.* at app. 12-3–12-4.

³²¹ *See supra* Part IV.C.

³²² *See* 10 U.S.C. 934 (1958); *Avrech v. Sec'y of the Navy*, 477 F.2d 1237, 1243 (D.C. Cir. 1973) *rev'd on other grounds* (noting that the list of Article 134 offenses enumerated by the President “is patched together in the Manual for Court-Martial, issued as an Executive Order of the President under Article 36 of the Code, which authorizes the President to prescribe “procedure, including modes of proof, in cases before courts-martial”).

warrants its own UCMJ article.³²³ Such UCMJ re-structuring sends a strong message regarding what harms should be punished and why, and strengthens Article 134's normative message by narrowing it to those few crimes whose gravamen of harm truly is prejudice to good order and discipline that is not separately captured elsewhere.

D. *Strict Scrutiny for Speech Crimes*

The elimination of the service-discrediting military crime plus the penal code re-ordering recommended above leave unanswered the primary question posed at this Article's onset. What doctrinal approach regarding First Amendment constitutionality should apply to the catch-all speech crimes: Article 134 prejudicial to good order and discipline (and service-discrediting if that crime unfortunately remains); Article 133 conduct-unbecoming; or Articles 90, 91, and 92 disobedience crimes, when they turn on refusal to obey an order restricting speech?

Examples abound. Regarding Article 133, these are crimes such as that committed by Major Thompson in 2017 when he was convicted of conduct unbecoming for lying to the *Washington Post*;³²⁴ for Article 92, these are crimes such as violating a regulation governing political activities for political comments made on Facebook;³²⁵ and for Article 134, for making disloyal statements as in the famous *Parker* case,³²⁶ or more recently, for making threatening comments about the President that do not constitute true threats.³²⁷

The answer: when Article 133, Article 134, or a disobedience article (Articles 90, 91, or 92) criminalizes speech, strict scrutiny should apply.³²⁸ These offenses are simply not obvious manifestations of unique military harm like the category two crimes described in Part IV.A and therefore should not

³²³ For example, the Article 134 crime of false swearing has been used to convict lying to a military criminal investigator because the court found such lying to be service-discrediting. *United States v. Greene*, 34 M.J. 713, 713 (A.C.M.R. 1992). Instead, false swearing to a criminal investigator should be a stand-alone offense, analogous to 18 U.S.C. § 1001 (2012).

³²⁴ See Cox, *supra* note 74.

³²⁵ See, e.g., *Stein v. Dowling*, 867 F. Supp. 2d 1087, 1090–93 (S.D. Cal. 2012) (discussing military administrative board dismissal of Marine for, inter alia, an Article 92 violation).

³²⁶ See *Parker v. Levy*, 417 U.S. 733, 753 (1974).

³²⁷ Of the President's list of exemplar Article 134 crimes, this includes disloyal statements; indecent language that falls outside the traditional category of obscenity; disrespect to a sentinel; wrongful refusal to testify; communicating a threat (but only if the military uses it to charge speech that does not meet the *Elonis* standard of true threats); and wearing unauthorized insignia. See *Elonis v. United States*, 135 S. Ct. 2001, 2017–18 (2015) (deferring to the appellate courts to determine whether a true threat requires a subjective intent to threaten).

³²⁸ See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27–28 (2010) (concluding that generally applicable laws that punish based on content of speech receive strict scrutiny).

benefit from the speech-integral to crime exception. As recognized by the Court in *Holder v. Humanitarian Law Project*, citing *Cohen v. California*, when “the generally applicable law was directed at Cohen *because of what his speech communicated*—he violated the breach of the peace statute because of the offensive content of his particular message. We accordingly applied more rigorous scrutiny.”³²⁹

Just as the Court accordingly applied strict scrutiny to the generally applicable terrorism statute at issue in *Humanitarian Law Project*, strict scrutiny should apply to these five UCMJ articles when they punish speech “because of what [the] speech communicate[s].”³³⁰ There is simply too great a possibility, given the malleability of Articles 133, 134, and the disobedience articles, for the military to declare speech prejudicial to good order and discipline, or conduct unbecoming, or prohibited by regulation or order, without requiring a close causal connection to serious harm, and that deserves the closest of judicial examination.³³¹ While I believe that the military’s application of these articles will many times fail strict scrutiny due to lack of narrow tailoring, in other instances such crimes may, like in *Humanitarian Law Project* itself, withstand such close circumspection.³³² For example, the Article 134 crime of disloyal speech, which includes an express intent, appears ready to withstand such scrutiny, once the old bad tendency test’s inference of said intent is no longer allowed, and the military changes accordingly.

VI. CONCLUSION

Justice Blackmun noted in *Parker v. Levy* that “it is not desirable that the standard of the Army shall come down to the requirements of a criminal code.”³³³ He is right in the fact that military standards go above and beyond the UCMJ and that the Armed Forces commensurately have numerous non-criminal means to enforce such standards and manage the behavior of their forces. While military standards don’t have to come down, the UCMJ does have to measure up to the standards of a modern military code, one that is reconciled with the First Amendment and with the role of the military in American democracy.

³²⁹ *Id.* at 28 (emphasis added) (citing *Cohen v. California*, 403 U.S. 15, 18 (1971)).

³³⁰ *Id.*

³³¹ The disobedience crimes presuppose lawful orders, with the criteria for lawfulness erecting a partial shield against abuse. Per the MCM, “[t]he order must relate to military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the service.” MCM, *supra* note 22, at Pt. IV, ¶ 14.c.(2)(a)(iv). “[A]n order is presumed lawful, provided it has a valid military purpose and is a clear, specific, narrowly drawn mandate.” *United States v. Moore*, 58 M.J. 466, 468 (C.A.A.F. 2003) (citing *United States v. Womack*, 29 M.J. 88, 90 (C.M.A. 1989)).

³³² See, e.g., *Holder*, 56 U.S. at 39.

³³³ *Parker v. Levy*, 417 U.S. 733, 765 (1974). (Blackmun, J., concurring) (quoting *Fletcher v. United States*, 26 Ct. Cl. 541, 563 (Ct. Cl. 1891)).

Replacing the untethered, speculative approach to military speech crimes that courts have used for the last forty-plus years will align military criminal law with modern First Amendment doctrine. This recalibration is necessary as an expression of modern American society's moral support for most speech. Despite the UCMJ's theoretical reflection of American society's values, it has for too long primarily mirrored military society's reflexive, unanalyzed assumptions regarding what is good and necessary for internal and external military effectiveness.

This Article is not purely an academic exercise, untethered from the reality of today's heightened partisan divide, politicization of the military, and ease of the military's current speech crimes. The flawed jurisprudence supporting servicemembers' prosecution are and will continue to allow the gross trampling of their First Amendment right to free speech, to the detriment of our entire society. Case in point: an Oregon National Guard member was disciplined in June of 2018 for merely tweeting his opinion about a political issue; his command publicly stated that "[y]ou can't endorse any sort of political action while in uniform," despite no such endorsement being made, and of course missing the point that service members remain supposedly free to express personal political opinions.³³⁴ This eyebrow-raising failure to comprehend that military members do not shed all their expressive freedoms when they don the uniform except in discrete, limited situations flows in part from the UCMJ's vague and overly-broad criminalization of speech.

The courts can and should hold the military criminal code's speech crimes to the same constitutional standards applied to the rest of the nation by adopting the approaches recommended in this Article. Congress can ensure the UCMJ supports good order and discipline, and hence military effectiveness, through the straightforward statutory reform this Article recommends. Our national security is strengthened when American core values are thoroughly operationalized, and that is the goal of such changes.

³³⁴ The guardsman tweeted, regarding a fundraiser to raise money to reunite immigrant children with their parents, that it was a "[w]aste of money" and that "[t]hey're lucky we aren't executing them." Everton Bailey Jr., *Oregon National Guardsman Writes of 'Executing' Migrant Families, Gets Disciplined*, OR. LIVE (June 22, 2018), https://www.oregonlive.com/pacific-northwest-news/index.ssf/2018/06/oregon_national_guardisman_writ.html. [<https://perma.cc/X7TK-URGP>].

