Going on the Offensive: Legitimacy and Fairness Inside the Military Justice "Trinity" of Interests

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Nineteenth Century Prussian military officer and theorist Carl von Clausewitz famously described the nature of war as a "wrestling match,"[1] a "duel,"[2] a "gamble,"[3] and a "pulsation of violence."[4] Any professional member of the modern Armed Forces, however, knows intimately the truth that war fighting is as much about life at home station—training, rehearsing, preparing, and waiting—as it is about the physical and risky "management of violence"[5] against a gun-wielding enemy. Such a life, working and living in pressurized, close-knit fraternities and communities is, in many ways, alien to civilian lifestyles and expectations just outside the military installation's front gates.[6] Yet, "pulsations of

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[1] CARL VON CLAUSEWITZ, ON WAR 75 (Michael Howard & Peter Paret eds. & trans., 1984).

[2] *Id.*

[3] *Id.* at 86.

[4] *Id.* at 87. Other images include "an act of force to compel an enemy to do our will," a "game of cards," a "collision of two living forces," and—indirectly and unintentionally foreshadowing the subject matter of this Symposium—"an act of human intercourse." *Id.* at 75, 86, 77, 149.

[5] SAMUEL HUNTINGTON, THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS 11, 15 (1957).

[6] Parker v. Levy, 417 U.S. 733, 743–44 (1974) (observing that the "differences between the military and civilian communities result from the fact that 'it is the primary business of armies and navies to fight be ready to fight should the occasion arise'") (quoting United States ex rel. Toth v. Quarles, 350 U.S. 11, 17 (1955)). The Supreme Court's observation may still be valid, despite tremendous social change over the last four decades. *See, e.g.*, Philip Carter & Lieutenant General (Retired) David Barno, *How the Military Isolates Itself—and Hurts Veterans*, WASH. POST (Nov. 8, 2013), *available at* http://www.washingtonpost.com/opinions/military-bases-are-our-most-exclusive-

violence" occur inside these gated communities by service-members in much the same way and for many of the same reasons that crime occurs on the outside—in apartments, college dorm rooms, and city alleyways. Crime—just as much as chow halls, saluting superior-ranking officers, scrub brush-lined firing ranges, mowed parade grounds, and flapping American flags—characterizes the experiences lying upon the backs of professional military soldiers and officers.

The toxic effect of crimes on unit cohesion, general discipline, *esprit de corps*, and military combat preparedness drive the very purpose, scope, and detail of the American military justice system, including the Uniform Code of Military Justice [UCMJ] and its collection of Executive Orders assembled as the Manual for Courts-Martial (including the Military Rules of Evidence and Rules for Courts-Martial).[7] In this world, justice is not merely the adversarial difference between a victim's harrowing experience and a defendant's due process rights and presumption of innocence. Rather, military justice is framed by much more. It is framed by the procedural ability of a service member to self-identify as a victim and expect due diligence by law enforcement *and* command authorities. It is also framed by the opportunity of the accused service member to defend himself vigorously with all the weight of due process the Constitution demands. And, finally, it is framed by the needs of the military command in which this drama plays out, colored by combat exigencies, the discretion and personality of the commander,[8] the effect of the investigation and trial on the unit, the victim, and the accused, and a host of other considerations not commonly accounted for by civilian criminal prosecutions. And so Clausewitz's *other* description of war as "a conflict of human interests"[9] seems most suitable at capturing the nature of war holistically—that is, an all-encapsulating sum of those soldiers, both home and abroad, who will fight or have fought and the organizational culture in which both victim and accused reside. It is this "trinity" of interests[10]—victim, accused, military unit and culture—that so marks the military justice system as distinct, foreign, and unfamiliar to many critical observers.

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gated-communities--and-that-hurts-veterans/2013/11/08/27841b1e-47cb-11e3-a196-3544a03c2351_story.html.

[7] MANUAL FOR COURTS-MARTIAL, UNITED STATES, Part I (Preamble), ¶ I-1 (2008) [hereinafter *MCM*].

[8] A commander who is otherwise responsible for executive, legislative, and judicial-like duties over a significant portion of his or her soldiers' behavior. *See MCM, supra* note 7, at 303, 306, 307 (Rules for Courts-Martial); U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY, ¶ 1-5c, 1-5d, 2-1b, 4-1c; *see generally* Major Donald W. Hansen, *Judicial Functions for the Commander?*, 41 MIL. L. REV. 1 (1968), *available at* https://www.jagcnet.army.mil/jagcnetinternet/homepages/ac/tjagsweb.nsf/Main?OpenFrameset.

[9] CLAUSEWITZ, *supra* note 1, at 149.

[10] *Id.* at 89. Clausewitz's original and famous "trinity" model of war was a bit more abstract and general, and not at all related to criminology; he portrayed the nature of war as being a unique (based on time, place, and personalities involved) combination of three ingredients—passion, reason, and chance. Any particular conflict was like an object being suspended between the pull of these three "magnets."

There is, perhaps, no other class of crime currently subject to critical review and affecting military preparedness, justice, leader attention, and the institutional soul—and so ripe with a Clausewitzian trinity of conflicting human interests—as sexual assault. This Symposium of the *Ohio State Journal of Criminal Law* makes a timely detour off the main highway of criminal procedure and law into the less well-known, but perhaps more exotic back-country road that is military justice. For the first time, a civilian law journal will devote its pages, and multiple perspectives, to a critical examination of this specific and pernicious socio-cultural-political crisis affecting nearly every aspect of modern American military life. These articles—written by current and former officer-lawyers [11] with extensive experience teaching and practicing criminal law—touch not only on the convoluted substantive law that seeks to punish those who commit sexual assault, but also on the culture that may enable it, the system dynamics that may fail to mitigate the effects of it, the policies that fail to prevent it, and the external pressures and politics that may obscure and hamper all of the above.

The pages that follow were written during one of the most prolific seasons of Congressional interest in military justice in recent memory. They also come on the heels of significant changes to the way military services address, investigate, and prosecute sexual crimes allegedly committed by service members against other service members. This Symposium aims to continue the conversation and contribute to an on-going debate to a depth not usually seen during Congressional testimony, in reactionary training programs, or the op-ed pieces that traditionally fall in the wake of the kind of public turbulence we have observed over the last two years.

In *The Opaque Glass Ceiling: How Will Gender Neutrality in Combat Affect Military Sexual Assault Prevalence, Prevention, and Prosecution?*, [12] Army Captain Jenna Grassbaugh juxtaposes the apparent swelling of the military's sexual assault epidemic against the recent and historic end to the gender exclusion rule (which prohibited female service-members from applying for, training with, and being assigned to certain "combat" duty positions and specialized units). In a manner decidedly absent from public debate about either issue, Captain Grassbaugh (herself a combat veteran and future Judge Advocate officer) proposes a singular, if not controversial, hypothesis: that gender inclusionary policies are

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[11] A commissioned military officer, with an accredited law degree and license to practice before the highest court of any state or federal bar, and assigned duties by a Service (e.g., the Army, the Navy, the Air Force) to practice law as a career field, is known as a "Judge Advocate." Judge Advocates, after Service-specific screening and training, are "certified" by the senior Judge Advocate General of that branch of the Armed Forces. If assigned as trial litigator in courts-martial, these officers must also be certified to practice under UCMJ Article 27. Each branch of the Armed Forces—Army, Navy (including the Marine Corps), and Air Force, as well as the Coast Guard—have a Judge Advocate General's Corps, both on Active Duty and in the Reserves.

[12] Jenna Grassbaugh, *The Opaque Glass Ceiling: How Will Gender Neutrality in Combat Affect Military Sexual Assault Prevalence, Prevention, and Prosecution?*, 11 OHIO ST. J. CRIM. L. 319 (2014).

designed, in part, to eradicate sexual assault, but paradoxically, gender integration will actually yield an unwelcome spike in the prevalence of sexual assault and harassment within the ranks. She argues that in order to prevent this spike, it is not enough to merely increase the number of hours each service-member must attend preventive training or increase the number of victim-centric resources. She contends that such steps are intrinsically reactionary and fail to pull out the weed from its roots. Instead, Captain Grassbaugh argues that the United States military must accept and endure drastic changes to its traditional "hyper-masculine" culture in which women are stereotyped as a weaker sex.

Lieutenant Colonel Janine Felsman, a professor of law at the United States Military Academy at West Point, draws a similar conclusion. In *'To Support and Defend' Against Sexual Misconduct: Calling on Future Military Leaders to Bridge the Cultural Divide*, [13] Lieutenant Colonel Felsman focuses on several well-documented aspects of military culture: a necessary hierarchical command structure and deference to authority; pride and competition; aversion to weakness; and a generalized "warrior ethos" that rewards "mental toughness." It is this context, she argues, that traditionally prefers efficient mechanisms over which commanders can exert their control—like training programs and prosecution—that focus on deterrence and retribution. Lieutenant Colonel Felsman calls the two decade-long cyclical pattern of "get tough" responses to sexual assault crises in the military, such as the traditional pushes toward expanded investigative resources and prosecution of allegations, a short-sighted effort.

Instead, she calls for a new preemptive posture that is capable of catalyzing long-term change. After exploring the history of sexual misconduct at the service academies (West Point, the United States Naval Academy at Annapolis, and the Air Force Academy in Colorado), she emphasizes the unique statutory mission and potential of military service academies to "upgrade" the military value system. These academies can reach the minds of the those young, soon-to-be officers who will—over time—assume the leadership positions from which a hierarchical organization can evolve its traditional culture away from presumptive skepticism and victim-blaming biases. Lieutenant Colonel Felsman rightly labels male officers (and cadets) as "stakeholders" with a responsibility to prevent both discrete incidents and—on a grander scale—the culture that may tolerate looking the other way. Whereas Grassbaugh suggests that stamping out the culture is immediately necessary in light of pending gender neutral combat units, Felsman suggests a complimentary and preventive "educate-it-out-of-the-culture" strategy.

What happens next, when "culture" fails to stamp out or prevent the crime of sexual assault, is the focus of Rachel VanLandingham's contribution to the debate.[14] Professor VanLandingham, a retired Air Force Judge Advocate officer,

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[13] Janine P. Felsman, *'To Support and Defend' Against Sexual Misconduct: Calling on Future Military Leaders to Bridge the Cultural Divide*, 11 OHIO ST. J. CRIM. L. 353 (2014).

[14] Rachel E. VanLandingham, *Acoustic Separation in Military Justice: Filling the Decision Rule Vacuum with Ethical Standards*, 11 OHIO ST. J. CRIM. L. 389 (2014).

identifies a significant and untenable gap in the current discussion about the military's sexual assault challenges: the incredible absence of published, transparent, and comprehensive ethical rules to guide or restrain a commander's exercise of his or her "monarchical" prosecutorial authority. The military is an organization in which commanders possess enormous "undemocratic" criminal justice discretion, and are not bound to seek or accept advice of ever-present legal counsel. Given this context, Professor VanLandingham argues that current formal and informal influences are "haphazard" and insufficient, and likens the situation to one in which nurses are bound by particular hygiene rules inside an operating room yet the surgeons themselves are not. She contends that the absence of specific, formal ethical standards directing commanders inevitably results in uneven, arbitrary treatment of crimes like sexual assault.

It is this great void or vacuum, so her argument implies, that results in ostensibly outrageous command decisions—to prosecute or not to prosecute a particular case—that so dramatically stirs the curiosity and occasionally the unrestrained ire of public officials. The emphasis of the recent statutory and policy reforms aims at removing commanders from certain key decision points and adding additional victim-focused resources. VanLandingham's argument suggests that the true aim point for reformers ought to be in rationally containing and guiding that commander's "super-prosecutorial" plenary authority rather than simply wresting control away altogether. This argument may serve as a cautionary compliment to those of Grassbaugh and Felsman, both of whom suggest that commanders—not in spite of, but *because of*, their inherent authority to shape a unit's culture, may be a key ingredient to solving the military's perceived sexual assault problem.

Grassbaugh, Felsman, and VanLandingham focus their studies on the act of sexual assault: specifically, the culture that may enable it, shield it from view, or fail to adequately respond to it. Next, retired Army Colonel (now Dean) Lisa Schenck turns a critical—and experienced—eye to the prosecution itself in *Sex Offenses Under Military Law*.[15] Dean Schenck provides a thorough appraisal of what can only be called an unstable decade of repeated changes to the substantive military crime of sexual assault. She observes that the relatively recent amendments to Article 120 of the UCMJ were not benign tools to ease the burden on the victim as perhaps intended, but will instead result in more unnecessary, discriminatory challenges to prosecutors. Covering much ground, from the definition of "force," to the affirmative defense of mistake of fact as to consent, to the controversial "Good Soldier Defense," she offers seven specific objections and offers seven specific and implementable recommendations.

From a practitioner perspective, it goes without saying that a sexual assault incident directly impacts more than just a victim and assailant. In a thoughtful

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[15] Lisa M. Schenck, *Sex Offenses Under Military Law: Will the Recent Changes in the Uniform Code of Military Justice (UCMJ) Re-traumatize Sexual Assault Survivors in the Courtroom*, 11 OHIO ST. J. CRIM. L. 439 (2014).

review that shifts the academic discussion away from these principal actors of the drama, Major Evan Seamone offers a fascinating and first-of-its-kind analysis into the effects of sexual assault on the wider military cast. Major Seamone is a prosecutor with an equally-impressive resume in the fields of criminal defense and legal assistance for veterans suffering from combat trauma. In his *Military Justice Countertransference: Preventing Secondary Traumatization of Trial and Defense Counsel involved in Military Sex Crimes Litigation*,[16] Major Seamone applies the notion of "countertransference" from clinical psychology. He argues that this "unconscious attunement to and absorption of victim's stresses and trauma" creates an entirely new class of victims among legal counsel that current organizational structure, training, and resources largely ignore.

Major Seamone posits that empathic strain and other consequences of first-hand knowledge of these kinds of crimes (such as a defense counsel seeing his client's collection of child pornography) contain seeds for disaster. This countertransference could lead to the degradation of lawyer-client relationship and trust; emotional (as opposed to objective) evaluation of a case's merits and blindness toward exculpatory or mitigating evidence and; less-than-zealous advocacy on behalf of the defendant. Most disturbing of all, it could lead to long-lasting emotional scarring of the (often inexperienced) officers assigned to these cases, which could result in a less-than-desirable departure of young motivated officers for less-intense fields of practice. In what may be his article's most substantial contribution to the practicing bar, Major Seamone offers a welcome collection of various extant self-assessment tools and a framework by which military counsel can seek guidance from peers, leaders, or professional mental health experts particularly attuned to the professional hazards of "compassion fatigue."

Finally, Dean Schenck returns with a scathing assessment of the military's internal tactics to track, manage, and understand the sociology and statistics of sexual assault. In *Informing the Debate About Sexual Assault in the Military Services: Is the Department of Defense Its Own Worst Enemy?*,[17] she contends that the recent efforts to survey the Armed Forces in order to calculate trends and frequencies of sexual assault in the ranks have created an image of a bumbling, ineffective military more concerned with protecting its own commanders and their legal authorities than with protecting service-member victims. Dean Schenck addresses the full menu of problems engendered by the Department of Defense's [DoD] own internal metrics, as well as the problems created by publicizing these metrics. She discusses the smudging together of all types of sexual assault and harassment into a single, potentially confusing, questionnaire; ignoring traditional (and ironically, Congressionally-directed) roles for the chain-of-command and its

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[16] Major Evan Seamone, *Sex Crimes Litigation as Hazardous Duty: Practical Tools for Trauma-Exposed Prosectuors, Defense Counsel, and Paralegals*, 11 OHIO ST. J. CRIM. L. 487 (2014).

[17] Lisa M. Schenck, *Informing the Debate About Sexual Assault in the Military Services: Is the Department of Defense Its Own Worst Enemy?*, 11 OHIO ST. J. CRIM. L. 579 (2014).

range of alternative dispositions; mandatory training programs that allegedly lead to over-reporting of incidents; a statistical survey method that fails to account for how each case was disposed and why; and a reporting of incidents that were filed as confidential "restricted reports," were "unfounded" by investigators, or involved *civilian* suspects—all of which remain outside of military prosecutorial jurisdiction. As an unfortunate consequence of these problems, she proposes that the public is left with a grossly-abstracted portrait of military-on-military sexual crime that appears egregious by comparison to civilian jurisdictions.

Like a falling string of dominos, this volume of frightening but fuzzy data is then, unjustifiably, used by UCMJ critics as a basis from which to knock down nearly every key element of the military justice system. Critics use this data to argue that commanders either lack the internal resources to effectively prevent their soldiers from victimizing others, lack the courage to prosecute allegations of sexual assault, or lack the skills necessary to convict the guilty. Dean Schenck attacks the supporting legs for all of these conclusions, thus undermining the recent congressional push to strip convening authorities[18] of much other inherent military discretion. Moreover, she offers proposed legislation that would require a far more nuanced and detailed accounting of what kinds of sexual offenses are being reported, how they are investigated, whether they are prosecuted, and who prosecutes them: civilian or military authorities.

Ultimately, Dean Schenck recommends serious changes to the way the Armed Forces capture and report data on sex crime incidents. Following her recommendations may make the system both more accurate and more transparent—and thus far less misleading to the public writ large, including potential female recruits and the cadre of critics. Without such changes, she contends, the DoD will continue to miscount, misreport, and misrepresent the true sexual assault landscape inside the military. Until that terrain is better mapped, honest reflection on cultural transformations (such as those advanced by Grassbaugh and Felsman), or a commander's ethical obligations as a prosecutorial authority (as discussed by VanLandingham), or the secondary traumas associated with the litigation of these crimes (as described by Seamone), is likely to be largely hollow and premature.

In sum, this eclectic Symposium aims to demonstrate the peculiarities, challenges, and opportunities inherent to the problem of military-on-military sexual crimes. For those readers more familiar with civilian practice, these articles will hopefully pry open a window looking out to an unfamiliar landscape, but one in which many of features (and concerns) remain the same. Admittedly, to the extent that military criminal law is driven in large respects by lay commanders, that window does take on a certain discomfiting patina. Clausewitz used the

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[18] A military convening authority is typically a senior commander of general officer or flag offer rank, authorized by law to refer charges under the UCMJ to a Special or General Court-Martial for adjudication, and empowered to review the conviction and grant clemency at his or her discretion. *See* 10 U.S.C. §§ 822, 860.

notion of a "trinity" of intersecting or overlapping interests to define the discomfiting nature of war as an admixture of passion and enmity (typically materialized as the people), reason (manifested by government), and probability or chance (manifesting in military operations). The image served as a premise for his now-obvious dictum that war is a "continuation of political intercourse, carried on by other means,"[19] or as one recent scholar has summarized: "[p]olitics establishes the value of the object of the conflict and thus profoundly influences the level of effort that will be devoted to it."[20] Though only a rough metaphor, his trinity can be imported into the debate about the very real and very personal nature of military justice and its responsibility to soldier-victims and soldier-defendants. In other words, the relationship of the military command and its culture to that of the two adversarial parties is akin to that of politics being the "womb" in which conflict is born.[21] Just as armed conflict cannot be understood without understanding the policy that triggered and fuels it, so too the sexual assault debate cannot be understood properly without considering the operational and cultural "womb" in which it forms.

The Trinitarian intersection of victim, accused, and command may help remind observers—both critics and supporters of the UCMJ—how the interests of the military chain-of-command are as essential to the discussion and understanding of what happened, why it happened, and what response ensued, as are the interests of the purported victim and accused. Our hope is that each of the articles represents (or at least briefly exposes) a different shade within these three intersecting components.

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[19] CLAUSEWITZ, *supra* note 1, at 87.

[20] David Kaiser, *Back to Clausewitz*, JOURNAL OF STRATEGIC STUDIES 670 (Vol. 32:4 2009).

[21] CLAUSEWITZ, *supra* note 1, at 149.