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On Unity: A Commentary on *Discipline, Justice, and Command in the U.S. Military: Maximizing Strengths and Minimizing Weaknesses in a Special Society*

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Professor Rachel VanLandingham's article *Discipline, Justice, and Command* takes on a great issue of criminal law—how to cabin the discretion to prosecute—in a narrow but recently contested corridor of criminal law: The U.S. military justice system.¹ The power wielded by American prosecutors, in and outside of the military, is immense.² Not surprisingly, the authority of prosecutors to decide who will face criminal charges has not gone unchallenged in U.S. history. Efforts to reform the ways in which prosecutorial discretion can be exercised have been common, with the most recent focused on trying to eliminate racial bias in both charging and sentencing.³

Professor VanLandingham's topic, then, is one of the touchstones of our time. Assessing the extent and impact of prosecutorial discretion has never been more timely, given the growing realization that our criminal justice system has resulted in racially disparate outcomes that can no longer be dismissed or ignored even by those most invested in our current system.⁴ In the fall of 2015, George Gascon, the District Attorney of San Francisco, spoke at UC Hastings on a panel on government service careers.

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¹ See Rachel E. VanLandingham, *Discipline, Justice, and Command in the U.S. Military: Maximizing Strengths and Minimizing Weakness in a Special Society*, 50 NEW ENG. L. REV. 21, 21–22 (2015).

² See generally Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC'Y 18 (1940) (analyzing the duty of prosecutors).

³ See generally Rory K. Little, *The ABA's Project to Revise the Criminal Justice Standards for the Prosecution and Defense Functions*, 62 HASTINGS L.J. 1111 (2010–2011); *Prosecutorial Discretion*, VERA, <http://www.vera.org/project/prosecutorial-discretion> (last visited Jan. 11, 2016).

⁴ See *Prosecutorial Discretion*, *supra* note 3.

In response to a question about the most difficult aspect of his career in public service, Mr. Gascon said that it was realizing, after decades in law enforcement, that the system to which he had dedicated his life needed to make fundamental changes. And tougher yet, it had to continue to operate as those changes were made.⁵

Discipline, Justice, and Command suggests that mandating greater involvement of judge advocates in the exercise of prosecutorial discretion at court-martial could improve the quality of U.S. military justice. It stops short, however, of recommending that convening authorities, who are the commanding officers granted authority to prosecute under the Uniform Code of Military Justice, be removed from their central role in military justice. I have argued elsewhere that preserving command control of prosecution is misguided, especially with respect to preventing and addressing sexual assault prosecutions.⁶ Professor VanLandingham, by contrast, seeks to find middle ground between those who would preserve commanders' role in military justice and those who, like me, would reduce or eliminate it. I appreciate the thoughtfulness with which her article articulates the advantages of having judge advocates work with commanders to achieve a more transparent, guided exercise of prosecutorial discretion than the current system allows. She and Professor Geoffrey Corn advocated for similar reforms in their testimony before a congressional panel in 2013.⁷

This Comment focuses on a premise in Part II of *Discipline, Justice, and Command* entitled "Military Command and Military Discipline." That premise concerns the contexts in which commanding officers enforce discipline, and establishes battlefield success as the reason that commanders must be able to prosecute crime. This battlefield context is critical to defining the basis for the military as a "separate society" and to understanding both the role of commanders and of disciplinary measures in the contemporary U.S. armed forces.⁸ Professor VanLandingham's overview of the history of military discipline, which she explicitly acknowledges is more complex than her brief treatment can reveal,⁹

⁵ See Public Law Section of the State Bar of California, *Join Us for a Reception for New Lawyers & Students Pursuing Public Service Careers*, U.C. HASTINGS C. LAW (Sept. 16, 2015), <http://gov.uchastings.edu/docs/Public%20Service%20Careers%20Hastings%20final.pdf>.

⁶ SEPARATE STATEMENT OF DEAN ELIZABETH L. HILLMAN & MR. HARVEY BRYANT, REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 173-74 (2014), available at http://responsesystemspanel.whs.mil/Public/docs/Reports/00_Final/RSP_Report_Final_20140627.pdf.

⁷ See VanLandingham, *supra* note 1, at 35-60.

⁸ *Parker v. Levy*, 417 U.S. 733, 743-44 (1974) (noting the military has long been recognized as a special society separate from civilian society).

⁹ VanLandingham, *supra* note 1, at 44.

references Alexander the Great, the Greek and Roman armies, Sun Tzu's *Art of War*, and the 2001 army field manual in setting out "unity of command" as an essential element of well-disciplined forces that remains unchanged into the twenty-first century.¹⁰ She asserts:

Soldiers follow orders because their commanders, who, per the unity of command principle, must possess authority over other soldiers, and utilize disciplinary measures. Discipline, long considered "the soul of an army," is roughly the practice of training people to obey rules by using punishment to correct disobedience.¹¹

This section concludes that "millennia of experience" dictate an "organizational structure" in which a single commander controls criminal prosecution and other discipline in order to ensure battlefield results.¹² The premise that success in battle depends on a "unity of command" in which a field commander is also a court-martial convening authority is worthy of closer consideration.

History and social science can help us assess the claim that a command structure "reinforced by the ability to impose punishment"¹³ is essential for a military unit to perform well under stress. Studies in those fields suggest that service members follow orders because of social and ethical norms more than command authority, that discipline is as much an internal practice than an external system of punishment, and that the chaos of a battlefield may actually be the environment in which individuals' behavior is least likely to be influenced by an authoritarian commander.¹⁴ If "unity of command" in the contemporary U.S. armed forces means something other than an imperative for authoritarianism and command control of courts-martial, then perhaps retaining the commander as convening authority is not as necessary as *Discipline, Justice, and Command* presumes. Unity of command and coercive discipline is much less of a reality in the armed forces of the twentieth and twenty-first centuries than in past militaries. The lessening significance of coercion in military life has been driven not only by studies of combat effectiveness and human behavior, but also by changes in the way the U.S. meets its demand for military personnel.

¹⁰ *Id.* at 43–44.

¹¹ *Id.* (citing Letter from George Washington to Virginia Regiment Officers July 29, 1757, in *The George Washington Papers at the Library of Congress, 1741–1799*, available at [http://memory.loc.gov/cgi-bin/query/r?ammem/mgw:@field\(DOCID+@lit\(gw020074\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/mgw:@field(DOCID+@lit(gw020074))))).

¹² *Id.* at 46.

¹³ *Id.*

¹⁴ See Mark J. Osiel, *Obedying Orders: Atrocity, Military Discipline, and the Law of War*, 86

Historians of the U.S. military have long been interested in understanding the battlefield performance of service members in various armed conflicts. Among the many important studies of why men fight is S.L.A. Marshall's 1947 *Men Against Fire*.¹⁵ An army officer and combat historian in World War II and the Korean War, Marshall became an important figure in military history and army policy. He asserted that fewer than 25% of men under fire actually used their weapons based on informal, open-ended, group interviews of enlisted men after battles.¹⁶ Claiming to have interviewed thousands of troops after combat, Marshall attributed their failure to training that had been insufficient to overcome their fear and aversion to violence.¹⁷ His work altered infantry training and shaped future historical studies even though his scholarly methods were less than rigorous.¹⁸ Marshall became a popular source of insight into the performance of men under fire not because of the depth of his research, but because he struck a chord within and without the army. He asked fundamental questions about why service members obey some orders and disobey others—questions that lie at the heart of military service, culture, and law. His work suggested that training could make a difference in whether service members are prepared for the violence and destruction of war.

Since S.L.A. Marshall published his thinly researched yet widely influential study seven decades ago, U.S. army training and doctrine has been transformed in response to the insight of sociologists and behavioral scientists.¹⁹ Solidarity in modern armies is seen as dependent on the collective connections between the members of individual units, not on the power of commanding officers. Similar to Marshall's thesis about training and aversion to fire, studies of German draftees during World War II, who rejoined their units after being wounded and recovering, found that soldiers returned to duty because of loyalty to comrades, not because they were ordered to or because of their commitment to Nazi ideology or German expansionist aspirations.²⁰ This change in our understanding of

CALIF. L. REV. 939, 1026–27 & nn.343–44 (1998).

¹⁵ See S.L.A. MARSHALL, *MEN AGAINST FIRE: THE PROBLEM OF BATTLE COMMAND* 11 (1947).

¹⁶ *Id.* at 54.

¹⁷ *Id.* at 78.

¹⁸ See FREDERICK D.G. WILLIAMS, *SLAM: THE INFLUENCE OF S.L.A. MARSHALL ON THE UNITED STATES ARMY* 4 (1994).

¹⁹ See, e.g., RAND Army Research Center, RAND CORPORATION, <http://www.rand.org/ard.html> (last visited Jan. 13, 2016); CENTER FOR RESEARCH ON MILITARY ORGANIZATIONS AT THE UNIVERSITY OF MARYLAND, <http://crmo.umd.edu/> (last visited Jan. 13, 2016) (describing government-sponsored academic research into military personnel).

²⁰ MARK J. OSIEL, *OBEYING ORDERS: ATROCITY, MILITARY DISCIPLINE, AND THE LAW OF WAR* 212–13 (1999).

human behavior has altered assignment practices, training, career fields, and bureaucracy in military institutions in the U.S. and around the world.

Legal scholar and sociologist Mark Osiel's study of wartime atrocities echoes the argument that individuals fight on behalf of the state primarily because of the bonds of their military community rather than command authority.²¹ Osiel articulates several other motivations, including what he terms "class honor," which, in today's military, constitutes a commitment to upholding a professional military ethos.²² He also points out motivating factors, such as a desire to prove oneself to others and the surveillance of a superior, which are the closest to an argument supporting command authority as a motivating factor for obedience.²³ Perhaps the primary architect of our understanding of surveillance and the state, Michel Foucault, posited that discipline in a modern army depends on a "microphysics of power" rather than sovereign legal authority.²⁴ Foucault also recognized, however, that surveillance limits deviance, and that the surveillance of superior officers was a tool of obedience and conformity among troops.²⁵ Commanders, now and in the past, play a role in shaping service members' behavior, but not the central role that is sometimes assumed.

In studies of combat effectiveness in modern and post-modern armies, the essential factor is bonds of connection among troops, not the authority or unity of command. Studies of soldiers in the field repeatedly make statements like "higher commanders could exert scarcely any control over those in the field once battle had commenced."²⁶ Combat, the distinctive context that most distinguishes military from civilian justice, destroys formal authority and creates a situation in which troops are directed and deployed through personal rapport and informal leadership. Inferiors have to be negotiated with, not ordered, in many cases of extreme danger and hardship. Osiel argues that:

inducing soldiers to comply with dangerous orders, in short, is mostly an emotional game with mirrors, requiring psychological sleight of hand. At the decisive moments, effective leadership consists in persuasively redefining the situation, reconstructing the soldiers' sense of reality, so that what initially seems like a

²¹ See *id.* at 201–21.

²² *Id.* at 201, 204.

²³ *Id.* at 208–09.

²⁴ MICHEL FOUCAULT, *DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON* 138–39 (1975); OSIEL, *supra* note 20, at 210 (citing THOMAS DUMM, *MICHAEL FOUCAULT AND THE POLITICS OF FREEDOM* 104 (1996)).

²⁵ See FOUCAULT, *supra* note 24, at 210.

²⁶ OSIEL, *supra* note 20, at 215.

foolhardy or even suicidal course of action comes to seem possible, even indispensable.²⁷

The key to combat effectiveness, then, is “strength of personal ties and informal loyalties.”²⁸ The bonds that tie service members to each other, and then their professional connection to a larger, sustaining tradition of men and women under arms, shapes their performance under fire far more than the attributes of a military justice system or a specific leadership style or method.

Note that this professional connection among service members is neither new nor rooted in military justice and the availability of punishment under military law. Historian William S. Skelton, in writing about the professionalization of the U.S. Army Officer Corps in the nineteenth and early twentieth centuries, described the impact of professionalization on many aspects of military service without ever noting a growing unity of command or commitment to authoritarianism. According to Skelton, as the officer corps professionalized, it changed

professional education and socialization; the long-term career patterns and close-knit texture of the military subculture; the conception of the army as a specialized cadre oriented toward foreign war; the separation of the army from the civilian political forum; and the internalization of the officer corps’s commitment to nonpartisan national service.²⁹

The professional ethos of the military and the shift away from reliance on coercive discipline must also be considered in light of the late twentieth century shift to an all-volunteer force in the U.S. military, a far more fundamental change than any modest reform of military justice. The end of conscription changed recruiting practices and personnel policies dramatically.³⁰ Historian Beth Bailey points out that “[t]he army, competing with employers in the national labor market, dealt most directly with the rising importance of the marketplace and of consumer culture in American society.”³¹ Economic incentives and effective marketing became critical to filling the ranks of the armed forces. The U.S. war in Iraq, waged from 2003 to 2011, “took 7,500 recruiters and a budget of hundreds of millions of dollars each year to convince 80,000 young people to join the

²⁷ *Id.* at 218.

²⁸ *Id.* at 221.

²⁹ WILLIAM B. SKELTON, AN AMERICAN PROFESSION OF ARMS: THE ARMY OFFICER CORPS, 1784–1861 362 (1992).

³⁰ See David R. Segal & Lawrence J. Korb, *Manning and Financing the Twenty-First Century Volunteer Military Force*, in THE MODERN AMERICAN MILITARY 111–33 (David M. Kennedy ed., 2013).

³¹ BETH BAILEY, AMERICA’S ARMY: MAKING THE ALL VOLUNTEER FORCE, at xi (2009).

army.”³² Aaron O’Connell’s *Underdogs*, details the U.S. Marine Corps’ remarkable success in reinventing itself after World War II to change from a “tiny, unpopular, and institutionally disadvantaged” service into an indispensable juggernaut through “careful marketing, public relations spectacles, and bare-knuckle politics” that propelled marines into American media, government, and culture.³³ Even the Marine Corps, the most martial and combat-oriented of the branches of U.S. military service, constructed its marketing and identity not on unity of command or empowered commanders, but instead on elitism, superiority, and what turned out to be a very useful paranoia.

This Comment has gestured in too many of the interesting directions suggested by Professor VanLandingham’s article to reach a clear conclusion. Instead of attempting to wrap up, it will close by pointing out that the disorder that characterizes combat situations is not the only military environment in which unity of command and a need for coercive, criminal disciplinary strategies falls short as an accurate depiction of military history and operations. If military justice is only, or primarily, about control over troops in garrison, then the results of combat studies might reasonably be set aside. Yet the idea of unity of command as a baseline premise for externally imposed military discipline fails to reflect the complexities of military organizations and personnel outside of combat as well as on the battlefield.

Two brief examples, one from the very top of military command structures, the other from the very scariest of military weapons and control systems, reveal how little explanatory power the principle of unity of command has in understanding actual military operations. Matthew Moten, a West Point historian, analyzed the interactions between generals and presidents in a study of twelve wartime episodes from the American Revolution through the post-9/11 war in Iraq.³⁴ Moten concludes that military strategy supported political ends most effectively when military and civilian leaders had “mutual trust . . . born of candor, respect, demonstrated competence, a shared worldview, and an expectation that each partner would take responsibility for the decisions made.”³⁵ Moten’s prescription for success seems applicable to any relationship, whether in a business, a family, or a sports team, rather than describing a distinctive military or wartime approach. Presidents and generals have functioned

³² *Id.* 257.

³³ AARON O’CONNELL, *UNDERDOGS: THE MAKING OF THE MODERN MARINE CORPS* 1, 3 (2012).

³⁴ MATTHEW MOTEN, *PRESIDENTS AND THEIR GENERALS: AN AMERICAN HISTORY OF COMMAND IN WAR* 7–9 (2014).

³⁵ *Id.* at 5.

best when they acted much like successful collaborators and leaders in other arenas of life and work, not when they displayed overtly martial or hierarchical values.

And not from the pinnacle of military and political strategy, but from a realm of military action likewise remote from combat but as consequential and terrifying as a battlefield, consider investigative journalist Eric Schlosser's study of Air Force control of nuclear weapons.³⁶ A thriller that celebrates the Air Force crews who took great risks and followed what in hindsight seem like absurd protocols to ensure nuclear deterrence and protect the safety of crews and civilian communities, Schlosser's book reflects on the leadership strategies of the Air Force. The Air Force mission is far from traditionally defined ground combat. Yet as a service, it relies not on coercive methods, but instead on a broad range of behavioral strategies. Those strategies ranged from the rigidly controlled, detail-oriented style of Curtis LeMay's strategic air command to fighter pilots' adaptive, decentralized, independent thinking; each of which had a place in fulfilling the widely varying missions of the Air Force itself—and none of which depended solely on the threat of punishment or unity of command.

Command, then, is far more chaotic, uncertain, and diffuse than an axiom about unity might suggest. Likewise, military discipline is rooted in interactions more extensive than the legal actions of filing charges and trying crimes. If we are to assess how prosecutorial discretion should be exercised within a justice system that exists because of a need for discipline, we should look more closely at the evolving disciplinary strategies and experiences of U.S. forces in war and peace.

³⁶ See generally ERIC SCHLOSSER, *COMMAND AND CONTROL: NUCLEAR WEAPONS, THE DAMASCUS ACCIDENT, AND THE ILLUSION OF SAFETY*, at xi (2014).