

The U.S. Approach to Combating Trafficking in Women: Prosecuting Military Customers. Could it Be Exported?

Michael Noone *

On 15 September 2004, the Joint Service Committee on Military Justice of the Office of the U.S. Secretary of Defense announced that it was considering changes to the *Manual for Courts Martial*. The proposed changes involved crimes that could be charged under Article 134 of the Uniform Code of Military Justice.¹ Two of the offenses—“Patronizing a Prostitute” and “Pandering by Compelling, Inducing, Enticing, or Procuring [an] Act of Prostitution”²—were described by a senior Department of Defense official as intended to address misconduct associated with human trafficking.³ Pandering, an offense calling for up to five years’ imprisonment and a dishonorable discharge from the military, and prostitution, which can be punished by a dishonorable discharge and confinement for one year, were already listed as offenses; the proposed changes to the manual were technical. However, criminalizing the patronage of a prostitute is a novel and politically attractive approach to the problem.

It is novel because those countries that forbid prostitution typically focus their enforcement efforts on suppliers rather than customers.⁴ Nor does any other country, to my knowledge, extend the reach of its military justice system so that, for example, a soldier who seeks sex from a prostitute in a country where prostitution is permitted would still be subject to criminal prosecution. It is politically attractive for several reasons. First, it evidences governmental willingness to undertake new initiatives to cope with this enormous international threat to the rule of law.⁵ Second, imposing sanctions on military customers, rather than all customers, can be justified in disciplinary terms and as an aspect of enlightened foreign policy.⁶ Finally, it is attractive because soldiers, sailors, and airmen have less domestic political influence than affluent tourists who

* Michael Noone is Professor of International and Comparative Law at Catholic University of America in Washington, D.C., and a former Judge Advocate in the U.S. Air Force.

¹ 69 *Federal Register* 55600, at 55603–604.

² Pander: “To pimp; to cater to the gratification of the lust of another.” *Black’s Law Dictionary*, 3rd ed. (St. Paul, MN: West Publishing, 1933).

³ Statement of Charles S. Abell, Principal Deputy Under Secretary of Defense (Personnel and Readiness) before the House Armed Services Committee and Commission on Security and Cooperation in Europe, 21 September 2004; available at <http://armedservices.house.gov/issue%20Forums/Helsinki%209-21-04/abdstatement.pdf>.

⁴ Isabelle Talleyrand, “Military Prostitution: How the Authorities Worldwide Aid and Abet International Trafficking in Women,” *Syracuse Journal of International Law and Commerce* 27 (2000): 166.

⁵ “According to the U.N., human trafficking is the third largest criminal enterprise worldwide, generating an estimated 9.5 billion USD in annual revenues....” United States Department of State, *Trafficking in Persons Report 2004* (June 2004), 14.

⁶ The maximum punishment: dishonorable discharge, forfeiture of all pay and allowances, and confinement for one year. 69 F.R. 33604.

claim the right to bargain for sexual services. However, before other countries propose similar laws, they should consider the peculiar legal environment in which this proposal was developed, and they should reflect on the difficulties that they would face if they were to try to transplant it.

An Initiative of the Commander in Chief

In a September 2003 speech to the United Nations General Assembly, President George W. Bush singled out human trafficking as a “special evil,” and devoted nearly twenty percent of his speech to that topic.⁷ For analytic purposes, we can treat his speech as the initial step in a process that was to culminate in the proposal to punish individual service members’ purchase of sexual services. The U.S. Constitution provides that “the President shall be Commander in Chief of the Army and Navy of the United States.”⁸ A standard Constitutional commentary, describing the president’s role as commander in chief, says: “He is the ultimate tribunal for the enforcement of the rules and regulations for the government of the forces, and which are enforced through-courts martial.”⁹ Neither presidential Executive Order 13257 issued in February 2004, which established a cabinet-level task force to combat trafficking, nor the National Security Presidential Directive (NSPD) on trafficking announced later that month, referred particularly to the Department of Defense, nor did they suggest that particular sanctions would be imposed on members of the armed forces.¹⁰ However, a memorandum dated January 30 from the deputy Secretary of Defense to secretaries of the military departments, the chairman of the Joint Chiefs of Staff, and other high-level functionaries in the Department of Defense refers to the NSPD, which must have already been issued, and reminds “all commanding officers and other Department of Defense officers and employees in positions of authority [that they] are expected to conduct themselves in a manner that is consistent with statutory requirements for exemplary conduct.”¹¹ Eight months later, that reminder had been translated into definitions of criminal behavior.

At first glance, the process—from speech to draft offenses—is remarkable only for the relatively short time between the chief executive’s announcement of a broad policy

⁷ “An estimated 800,000 to 900,000 human beings are bought, sold, or forced across the world’s borders ... generat[ing] billions of dollars each year – much of which is used to finance organized crime.” 39 Weekly Comp. Pres. Doc. 1256 (23 September 2003). U.S. legislative responses to the problem include the Trafficking Victims Protection Act (2000), and the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act (2003).

⁸ *Constitution of the United States*, Article II, Section 2, clause 1.

⁹ Edward S. Corwin, ed., *The Constitution of the United States of America, Revised and Annotated* (Washington, D.C: Government Printing Office, 1953), 403, citing Supreme Court decisions.

¹⁰ White House Press release, 25 February 2004.

¹¹ Deputy Secretary of Defense Paul Wolfowitz, “Memorandum on Combating Trafficking in Persons in the Department of Defense”; available at <http://www.marshallcenter.org/site-graphic/lang-en/page-mc-policy-1/static/sdocs/opa/static/DSD%a20013004.pdf>.

and the bureaucracy's development of particular instruments to implement that policy. Upon a second look, however, the process raises some fundamental questions regarding the nature of law-making for the U.S. armed forces, questions that turn on the peculiar legal relationship between the president, the Congress, and the service member. While the president (as head of the executive branch) is designated by the Constitution as commander in chief of the armed forces, the Constitution grants Congress (the legislative branch) the power "To make Rules for the Government and Regulation of the land and naval forces."¹² One of the fundamental maxims of both common and civil law is *nullum crimen sine lege*: only behavior that has been previously defined as criminal can be the basis for prosecution. A corollary of that rule, applied in modern democratic societies, is that the legislature—not the executive—is responsible for setting the norms defining criminal behavior. If that is the case, how can it be that the Department of Defense—an agency of the executive branch—proposed to criminalize behavior that had hitherto been permitted?¹³ The Department of Defense can do so as an agent of the commander in chief because Congress, which enacted the Uniform Code of Military Justice (UCMJ) in 1950, provided in Article 134 (under which trafficking offenses will be charged) that:

Though not specifically mentioned in this code, 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 and crimes and offenses not capital, of which Persons subject to this code may be guilty, shall be taken cognizance of by [the various types of court-martial] according to the nature and degree of the offense, and punished at the discretion of such court.¹⁴

¹² *Constitution of the United States*, Article I, Section 8, clause 14. In 1947, Congress established the Department of the Air Force. "Shortly after the passage of this (1947) act a Joint Resolution was offered in the House of Representatives proposing an amendment to the Constitution (which would add the Air Force to provisions regarding the Army and Navy). Apparently in the belief that the broad sweep of the war power warranted the creation of the Air Force without a constitutional amendment, Congress took no action on this proposal." Corwin, *The Constitution Annotated*, 284.

¹³ For examples of nations where U.S. service members have been permitted to patronize prostitutes, see Katherine H. S. Moon, *Sex Among Allies: Military Prostitution in U.S.-Korea Relations* (New York: Columbia University Press, 1997); and Sister Mary Soledad Perpinan, "Militarism and the Sex Industry in the Philippines," in *Women and Violence*, ed. Miranda Davies (London: Zed Books, 1994), 150. Prostitution is illegal in both Korea and the Philippines, but the ban was not enforced near U.S. military installations. Julie Yuki Ralston, "Geishas, Gays and Grunts: What the Exploitation of Asian Pacific Women Reveals about Military Culture and the Legal Ban on Lesbian, Gay and Bisexual Service Members," *Law and Inequality: A Journal of Theory and Practice* 16 (1998): 694–95. With regard to Thailand, where prostitution is legal, see Elizabeth Rho-Ng, "The Conscripted of Asian Sex Slaves: Causes and Effects of U.S. Military Sex Colonialism in Thailand and the Call to Expand U.S. Asylum Law," *Asian Law Journal* 7 (2000): 103–150.

¹⁴ Act of 5 May 1950, 64 Stat. 107.

Article 36 of the Code provides that “The procedure ... in cases before courts-martial ... may be prescribed by the President by regulations....” The “regulation” which prescribes procedures is the *Manual for Courts-Martial*, an Executive Order first issued in 1951 and revised regularly.¹⁵ The *Manual for Courts Martial* contains an Appendix of forms to be used in drafting charges (alleging what punitive article was violated) and specifications (alleging the facts of the offense with sufficient precision to “enable the accused to understand what particular act or omission he is called upon to defend”).¹⁶ Article 56 of the Code provides that “The punishment which a court-martial may direct for an offense shall not exceed such limits as the President may prescribe for that offense.” Maximum punishments for individual offenses are prescribed by the president in the *Manual for Courts-Martial*. Thus, Article 56 permits the president to limit a court’s discretion to punish granted by Article 134. His agent, the Department of Defense, proposes the maximum punishments referred to earlier.

Typically, legislatures establish the sanctions that may be judicially imposed for a criminal act. The legislative grant of discretion in the UCMJ permitting the executive to set sanctions is unusual,¹⁷ and the grant of discretion in Article 134 to specify what behavior shall be deemed criminal is a unique characteristic of those military justice systems that derive from the English articles of war.¹⁸ This “general article” classifies three categories of behavior: conduct prejudicial to good order and discipline; conduct that brings discredit to the armed forces; and “crimes and offenses, not capital,” which incorporates into military law all offenses (save those calling for the death penalty) punishable by the laws of the United States. The third category does not, of course, call for laws to be made by the executive branch. The Department of Defense proposal regarding patronage of prostitution relies on the first two categories. The first category, punishing conduct prejudicial to good order and discipline, was copied from the British articles and adopted by the Continental Congress in 1775. The second, punishing behavior that brings discredit on the armed services, was adopted after World War I. Early twentieth-century British and U.S. military law manuals offered examples of illicit sexual behavior; rape, indecent assault, and sexual molestation of children were forbidden in both systems. The British military penalized prostitution in two situations: when the owner or occupier of premises permitted girls under the age of sixteen to engage in

¹⁵ E.O. 10214, 8 February 1951.

¹⁶ Thus the proposed offense of patronage would require that the government allege and prove that “(the named accused), did (at a particular place and date) wrongfully (compel), (induce), (entice), (procure) (the named prostitute), a person not the accused’s spouse, to engage in an act (or acts) of sexual intercourse in exchange for money (or other compensation).” Sample specification, proposed amendment to paragraph 97, Article 134. 69 *Federal Register* 55604.

¹⁷ Once the punitive boundaries are set by the legislature, many countries permit prosecutors, who are agents of the executive branch, to participate in determining the punishment. See Julia Fionda, *Public Prosecutors and Discretion, A Comparative Study* (Oxford: Clarendon Press, 1995).

¹⁸ William Winthrop, *Military Law and Precedents* (Washington D.C.: Government Printing Office, 1920), 720.

prostitution, or when a woman of any age was compelled by threats or intimidation to have sex with the offender or some third person.¹⁹ Neither offense is listed in the contemporaneous U.S. counterpart legislation, which lists as an offense “neglect to take proper prophylactic treatment after illicit intercourse” resulting in venereal disease.²⁰

Opponents of efforts to establish venereal clinics or to regulate prostitution claimed that such policies encouraged immorality. Feminists asserted that the laws were applied unequally, focusing on the prostitute, not on her customer.²¹ By the early 1950s, an understanding had been reached so that a member of the U.S. armed forces would not be punished for consorting with a prostitute unless he did so in violation of an order issued by a subordinate commander which declared particular premises “off limits” to military personnel. When, in the 1990s, critics sought change in U.S. military policies that were seen as condoning prostitution, they emphasized moral suasion at the national and international level rather than the punishment of individuals.²² Thus the Department of Defense initiative, founded on the commander in chief’s authority to declare behavior contrary to good order and discipline or as bringing discredit to the armed services, is on firm legal ground, although it may be seen as an intrusion on the autonomy of individual service members.

Challenging the Initiative within the U.S. System

The Joint Services Committee’s publication of proposed changes is intended to elicit public comment, leading to changes in, or even withdrawal of, an executive branch order. No organized opposition to the trafficking provisions can be expected, because the proposal regarding patronage of prostitutes is politically attractive. There may, however, be some objection to the severity of the proposed penalties. The American Law

¹⁹ *Manual of Military Law* (London: War Office. 1914), 96.

²⁰ United States Army, *A Manual for Courts-Martial, 1928* (Washington, D.C.: Government Printing Office, 1943 ed.), 256. Military authorities assumed that venereal disease, a chronically wasting condition with profound effects on military efficiency, was acquired by contact with prostitutes. During and after the First World War they debated whether to “criminalize” the condition. See E.H. Beardsley, “Allied Against Sin: American and British Responses to Venereal Disease in World War I,” *Medical History* 20 (1976): 190–202. The debate resumed when U.S. forces occupied Germany after V-E Day, and was finally resolved by a decision to “medicalize” the condition, treating it as a health issue rather than as a result of criminal behavior. See John Willoughby, “The Sexual Behavior of American GIs During the Early Years of the Occupation of Germany,” *Journal of Military History* 62 (1998): 155–74.

²¹ G.S. Meyer, “Criminal Punishment for the Transmission of Sexually Transmitted Diseases: Lessons from Syphilis,” *Bulletin of the History of Medicine* 65 (1991): 549–64.

²² See, e.g., sources cited in note 11 above, and Gwyn Kirk and Carolyn Bowen Francis, “Redefining Security: Women Challenge U.S. Military Policy and Practice in East Asia,” *Berkeley Women’s Law Journal* 15 (2000): 229–71. The sole exception, Emily Nyen Chang, refers to the American Law Institute’s Modern Penal Code. She does not suggest that the provisions be incorporated into the UCMJ. Emily Nyen Chang, “Engagement Abroad: Enlisted Men, U.S. Military Policy and the Sex Industry,” *Notre Dame Journal of Law, Ethics & Public Policy* 15 (2001): 621–54.

Institute's Model Penal Code (for civilians) provides that prostitution be treated as a petty misdemeanor, which calls for a maximum punishment of less than a year, and patronizing a prostitute be considered a "violation, calling for a fine or forfeiture."²³ The disparity between civilian and military punishments for prostitution has always existed. The drafters of the military patronage proposal may have felt obliged to propose a punishment for (mostly male) customers equivalent to that previously in effect for (presumably) female prostitutes. Because no opposition has been heard, I predict that by the time this essay is published, the trafficking provisions will have become law. But will that law be obeyed? The *Air Force Times*—a commercial publication intended for military and former military readers—undertook an on-line reader survey between 30 September and 5 October 2004, in which 74 percent of the 2,856 readers responding concluded that the patronage proposal was "a waste of time"; 22 percent said "the change is long overdue"; and 4 percent "didn't know."²⁴ The survey results did not provide any demographic data regarding the respondents, but the results suggest that neither commanders (who will initiate the disciplinary action) nor subordinates (potential targets of any disciplinary action) expect a radical change in behavior. A few patrons will be disciplined. In September 2004 testimony before the U.S. House of Representatives Committee on Armed Services, the commander of United States forces in Korea testified that, during the prior twenty-one month period (January 2003–September 2004), "five service members have received disciplinary action for solicitation of prostitution."²⁵ His testimony suggests that when discipline is imposed it will not involve a court-martial, but rather what in U.S. terms is called non-judicial punishment, which permits limited sanctions similar to those recommended by the Model Penal Code.

An accused service member offered non-judicial punishment may, unless "attached to or embarked on a vessel," refuse to accept the punishment and request trial by court-martial.²⁶ If the commander decides to proceed to trial, then the soldier could face the maximum punishment proposed by the Joint Service Committee, but it is improbable that a service member would be punitively discharged or jailed for what is seen in civilian life as a minor offense. If the service member were to receive a punitive discharge, the court martial proceedings would be reviewed by an appellate panel of military judges. Since the offense proposed is consistent with other sexual offenses already listed in the Code, a conviction would not be overturned on the grounds that the offense is outside the "competence" (jurisdiction) of a military court. Therefore I predict that attempts to challenge the new offense will fail. If another military justice system were to adopt the proposal, can its success be predicted?

²³ Model Penal Code section 251.2(1) (prostitution) and 251.2(4) (patronizing).

²⁴ "Frontlines," *Air Force Times* (18 October 2004), 4.

²⁵ 21 September 2004 Statement of General Leon J. Laporte, available at www.house.gov/hasc/issue%20forums/Helsinki%209-21-04/LaPortestatement.pdf.

²⁶ Article 15(b)(2)(A) of The Uniform Code of Military Justice, note 14 *supra*.

Challenging the Initiative in Non-U.S. Systems

As a discrete jurisprudential topic of study, comparative military law is in its infancy. However, a recent analysis of ten European countries enables us to identify several crucial differences between the U.S. and the typical Continental European approach toward military legal systems.²⁷ First, most European countries—with the exception of the United Kingdom and Denmark (whose military justice systems are similar to that of the U.S.)—distinguish between disciplinary and criminal offenses. The latter involve acts or omissions contrary to the national criminal law; the former relate to deviations from military norms. Continental Europeans tend to punish disciplinary offenses administratively, and reserve judicial punishment for criminal offenses. Thus, before the U.S. patronage offense could be transplanted into a foreign military justice system, the first question to be asked is, “Would patronage constitute a criminal offense under the national legal system?” If so, then the nation’s military legal code would determine the procedures and sanctions appropriate to the offense.

If patronage of prostitution is not a crime under a given nation’s legal system, then it would be treated administratively, and several factors would determine its incorporation into a national system. First is whether or not it can be considered a violation of the so-called “general clauses” in the national military code. These clauses—the functional counterparts of Article 134’s provisions regarding “good order and discipline”—are used in most countries to define soldiers’ duties, although their provisions have been criticized for violating the maxim *nulla poena sine lege certa* (no punishment without an explicit previously enacted prohibition).²⁸ In this regard, the *military* purpose of an order not to patronize prostitutes might be legally challenged. The British *Manual of Military Law* provides the criteria that might be used: a “superior has the right to give a command for the purpose of maintaining good order or suppressing a disturbance or for the execution of a military duty or regulation or for a purpose connected with the welfare of troops. He has no right, however, to take advantage of his military rank to give a command which does not relate to military duty or usage....”²⁹

Challengers of the provision may ask how paying for sexual favors, rather than accepting them gratuitously, affects “good order.” Second, before the clause regarding patronage could be incorporated into the national military justice code, the drafters would have to consider the application of national and international human rights norms. Would incorporation in a Canadian context, for example, be consistent with the Canadian Charter of Rights and Freedoms? Similarly, states that have assented to the European Convention on Human Rights must consider its application. Of the forty high contracting parties, ten, when they signed the Convention, entered reservations intended to insulate their military justice systems from the European Court of Human Rights’ ap-

²⁷ George Nolte, ed., *European Military Law Systems* (Berlin: De Gruyter Recht, 2003.)

²⁸ *Ibid.*, 91.

²⁹ *The Manual of Military Law, Part I* (London: HMSO, 2003), 296.

plication of the Convention.³⁰ If the incorporating state were one of the ten, then it could proceed without concern for the European Court’s oversight. If it had not entered such reservations, then it would have to prepare itself for challenges, and claim that the new offense is “in accordance with national law and is ‘necessary in a democratic society.’ The ‘hallmarks of a democratic society include pluralism, tolerance and broad-mindedness.’”³¹

Although the court’s jurisprudence, relying on the doctrine of “margin of appreciation,” permits some latitude in national decision-making, it has not granted the military’s internal disciplinary system the broad discretion authorized by the U.S. Supreme Court. The Supreme Court’s deferential treatment of the military is exemplified in its *In re Grimley* opinion: “An army is not a deliberative body. It is an executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer or the duty of obedience in the soldier.”³² Thus the European Court’s reassuring statement recognizing that “the proper functioning of an army is hardly imaginable without legal rules designed to prevent servicemen from undermining legal discipline”³³ must be evaluated in the light of its subsequent willingness to disagree with military authorities’ assessment of disciplinary requirements.³⁴ Therefore, if any of the thirty states party to the convention that did not enter any reservations sought to follow the U.S. initiative, they should expect that their decisions would be challenged before the European Court, and might well be overturned on the grounds that the measure did not enhance state security.

Conclusion

The U.S. Department of Defense has over 400,000 personnel overseas and afloat. The traditional view of U.S. commanders toward overseas prostitution was evidenced by the comments of CINCPAC Admiral Richard Macke when, in 1996, three servicemen were arrested after raping a twelve-year-old Japanese girl: “Absolutely stupid. For the price they paid to rent the car (to kidnap the child) they could have had a girl.”³⁵ Since then, the military command structure in the United States has belatedly come to the conclu-

³⁰ These ten nations are the Czech Republic, France, Lithuania, Moldova, Portugal, Russia, Slovakia, Spain, Turkey, and Ukraine.

³¹ Peter Rowe, *Control Over Armed Forces Exercised by the European Court of Human Rights* (Geneva: Geneva Centre for Democratic Control of Armed Forces, 2001), 1, citing extracts from *Lustig-Prean, v. UK* (27 September 1999), para. 80, setting the Court’s criteria.

³² 137 U.S. 147, 153 (1890). See also *United States v. Shearer*, 473 U.S. 52 at 58 (1985) in which the Court spoke critically of suits which go directly to the “management of the military ... question[ing] basic choices about discipline, supervision and control of a serviceman.”

³³ *Engel and others v. Netherlands* (8 June 1976), para. 100.

³⁴ Rowe, *Control Over Armed Forces*, 8, citing *Hadjianastassiou v. Greece* (16 December 1992), *Vereinigung Demokratischer Soldaten Österreich* and *Gubi v. Austria* (19 December 1994), *Gregoriades v. Greece* (25 November 1997), *Lustig-Prean* and *Beckett v. UK* (27 September 1999).

³⁵ Available online at <http://www.chinfo.navy.mil/navpalib/people/flags/macke/retire.txt>.

sion that prostitution may not be a voluntary activity,³⁶ and military officials have begun assessing their responsibility for supporting and maintaining local sex industries.³⁷ Other nations' military contingents serving overseas in peacekeeping operations have, by their presence and relative wealth, encouraged prostitution and, thus, human trafficking.³⁸ Those other nations will be pressed to consider additional steps to deter trafficking. If the U.S. initiative intended to punish military patrons of prostitutes is offered as a model, policy-makers must consider the peculiar legal environment in which the proposal was promulgated and compare it to their own situation. The unique characteristics of this legal environment that must be considered are:

- The U.S. has a comprehensive military justice system which makes no distinction between disciplinary and criminal offenses, and which permits the executive branch to create offenses and designate punishments without legislative intervention.
- The U.S. "general article," under which charges would be brought, is more comprehensive than those of other nations that have a similar provision.
- The fact that U.S. military law provides for more severe punishment of prostitution-related offenses in general, and for patronage of prostitutes in particular, than the model civilian law, has no judicial consequences.
- The U.S. Supreme Court, which claims to protect the rights of all citizens, has traditionally accorded far greater deference to military disciplinary decisions than the European Court of Human Rights.
- Finally, one may ask whether the U.S. military—or any other military force—has an enforcement mechanism capable of identifying offenders and their sexual partners and then bringing the offender to trial.

³⁶ See, for example, Human Rights Watch, "Hopes Betrayed: Trafficking of Women and Girls to Post-Conflict Bosnia and Herzegovina for Forced Prostitution" (November 2002); available at www.hrw.org/reports/2002/Bosnia.

³⁷ See, for example, Department of Defense Office of the Inspector General, "Assessment of DoD Efforts to Combat Trafficking in Persons: Phase I – United States Forces in Korea," (July 2003); available at www.DODig.osd.mil/aim/alsd/HO3L88433128PhaseI.pdf.

³⁸ For sources describing peacekeepers' creation of prostitution industries in Kampuchea, Mozambique, and Yugoslavia, see Talleyrand, "Military Prostitution," 156–57.