The Sherman-Winthrop Debate:
The 19th Century Jurisprudential Duel about Military Law that Echoes Today

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I. The Bottom Line at the Top:

The basic debate between Gen. Sherman & Col. Winthrop was about the the very nature of military law:

Sherman contended that military law springs from entirely different roots than civil law with a singularly different purpose. One achieves justice by fairly enforcing discipline.

Winthrop believed that military law is a noble part of the great body of all law. One achieves discipline by doing justice.

II. Military-Legal-History Summary.

A. The first known reference to a judge advocate was in 1218!

B. And soldiers weren't happy about that 350 years later.

T*he Lawyer makes no plea but for privat profitte, and buildes goodly houses, and purchaseth whole countries about him . . . . The souldiour serves his countrye for a small stypende, and would be contended with alowance but to buie meate, drinke, and cloath.*

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[Lawyers] affect eloquence to maintain bad causes; they are studiously affable to procure new clients; they are devilishly subtle to cloak inconveniences. Seeming to be ministers of light, they hunt after continual darkness, concluding the truth within a golden cloude, making blacke white, and white blacke, darkenyng all things with their distinctions that should give light, so that in all things they seem civil, yet in all things they are most uncivil.

Barnaby Riche, 1577

"I find it scarcely possible to get along without some legal person in the situation of Judge Advocate."

Duke of Wellington, 1815

"He was a mere lawyer, incapable of military judgment, and vacant of military ideas."
Army-Navy Journal obituary for Secretary of War William Stanton, 1869

"Lawyers proved invaluable in the decision-making process."
Gen. Colin Powell, 1991

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III. Winthrop Who?

A. Colonel William (Woolsey) Winthrop, 1831 - 1899

B. Formidable family pedigree

C. Infantryman, from private to captain

1. 7th Regiment of the New York Militia, aka the "Silk Stocking" regiment

2. First U.S. Sharpshooters (Berdan's), with significant combat experience

D. Judge Advocate

1. Office of *t*he Judge Advocate General & Bureau of Military Justice

2. Deputy Judge Advocate General; "ever the bridesmaid, never the bride"

3. Opinions of *t*he Judge Advocate General; https://archive.org/details/digestofopinions00wintrich/mode/1up

4. Presidio & West Point

5. *Military Law,* Lieutenant Colonel W. Winthrop, W.H. Morrison, Washington, D.C. (1886) [ML], https://archive.org/details/militarylaw00wintgoog/page/n9/mode/2up?ref=ol&view=theater

6. *Abridgment of Military Law* (1887) [Abridgment], https://archive.org/details/anabridgmentmil01wintgoog

7. *Military Law and Precedents,* William Winthrop, (Second Ed. Rev. & Enlarged)(1896)(1920 U.S. Govt Reprint) [MLP] https://archive.org/details/cu31924020024570

9. Critics

10. Retirement & Death

11. Only one book-length biography, *The Blackstone of Military Law*, Joshua E. Kastenberg, Scarecrow Press, 2009. Sherman would have agreed with the title, but as an indictment. "Colonel-Professor" Kastenberg, USAF, Ret., now Professor at University of New Mexico School of Law, deserves kudos for this fine work.

IV. No one ever asks, "Sherman Who?"

A. William Tecumseh Sherman, 1820 - 1891

B. Another formidable family pedigree

C. Soldier

D. Lawyer, banker, college president

E. Civil War: More than that "The March to the Sea"

F. Post-Civil War Career

G. *The Memoirs of General W. T. Sherman*; William T. Sherman; D. Appleton and Co. (1889); https://www.gutenberg.org/files/4361/old/orig4361-h/main.htm

H. Almost countless biographies!

V. The Debate?

A. Context requires an understanding of insularity of the army after 1865.

B. Two different paths to professionalization: the Prussian v. American model

C. And, of course, there was never an actual debate! It was more of a long-distance, but deadly serious, professional duel. Yet, the collision of their jurisprudential philosophies was quite real and shaped today's military law.

D. The duel was usually fought through surrogates, e.g., Berkimer, Lieber, and others, but both Sherman and Winthrop wrote with passion about their views. Winthrop was not "one of the boys." Sherman was the first among those until his death and, for his many contemporary devotees who outlived him, beyond.

VI. Gen. Sherman fired first.

A. Inimitably, in his quintessential colorful language:

"[I]t will be a grave error if, by negligence, we permit the military law to become emasculated by allowing lawyers to inject into it principles derived from their practice in the civil courts, which belong to a totally different system of jurisprudence" The Journal Military Service Institution of the United States (1880); Vol. 1 Issue 2, p.130.

B. Sherman also quoted approvingly remarks by then-Acting "TJAG," G.N. Lieber:

"Military law is founded on the idea of a departure from the civil law, and it seems to me a grave error to suffer it to become a sacrifice to principles of civil jurisprudence at variance with its object. A limit exists somewhere, a limit within which it should be possible to say that military law has its common law, and is not controlled by the common law of another system." *Ibid*, at 129-130.

C. Never at a loss for words, Sherman added:

"In the army, we recognize the binding nature of all statutes, but claim that the oath administered to the members of all courts-martial, as prescribed in the 84th article of war, recognizes the existence of a common law for the army, as absolutely necessary to its existence as is universally accepted for the common law in civil practice." *Id,* at 130.

D. Finally, though that was a word he rarely used, Sherman then called for someone to compile the "Common Law Military."

"It is greatly to be desired that the common law for the armies of the United States should be compiled—not from the doctrines and experience of civil lawyers, but from the experience of the best ordered and best governed armies of Europe and America. No nobler or better object can present itself for the consideration of the Military Service Institution of the United States." *Id,* at 131.

E. A few months later, Sherman again asked JMSIUS readers to write about military law.

"[M]y object is only to assist some one else who may undertake the work suggested, of compiling the Common Law Military, as has long been done by Blackstone, Coke, Kent and others, for the Common Law Civil.", JMSIUS (1880); Vol. 1 Issue 3, p.320.

VII. Winthrop did not flinch. In fact, it was Winthrop who answered Sherman's call, and the latter must have groaned!

In his Preface to his 1885 *Military Law*, Winthrop fired back in his calm, modest, reasoned, and likely maddening-to- the-Army-Establishment way:

"In view of the absence and want of a comprehensive treatise on the science of Military Law, it has been for some years the purpose of the author — a member of the bar in

the practice of his profession when, in April, 1861, he entered the military service — to attempt to supply such want with a work, which, by reason of its extended plan and full presentation of principles and precedents, should constitute, not merely a text book for the army, but a law book adapted to the use of lawyers and judges.

The author, however, will be fully recompensed for his labors if the same shall result in inspiring an interest in the study of Military Law as a department of legal science not heretofore duly recognized. … [Our] military code of [is of] greater age and dignity and of a more elevated tone than any existing American civil code, as also a military procedure, which, by its freedom from the technical forms and obstructive habits that embarrass and delay the operations of the civil courts, is enabled to result in a summary and efficient administration of justice well worthy of respect and imitation …. That Military Law, from its early origin and historical associations, its experience of many wars, its moderation in time of peace, Its scrupulous regard of honor, its inflexible discipline, its simplicity, and its strength. Is fairly entitled to consideration and study, is a belief of the author which he trusts his readers will share." *Military Law*, Lieutenant Colonel W. Winthrop; W.H. Morrison, Washington, D.C. (1886) Preface at vi. https://archive.org/details/militarylaw00wintgoog/page/n9/mode/2up?ref=ol&view=theater

VIII. Predictably, many readers did not share Winthrop's jurisprudential views.

A. In 1886, Winthrop became professor of law at West Point where he prepared, as a textbook for cadets, an abridgment of his ML. Capt. William Birkhimer, an unabashed Shermanite, artillerist, and judge advocate, reviewed the abridgment for JMSIUS in a prolix style that make even Sherman and Winthrop seem concise. Birkhimer began by damning with faint praise, then quickly warmed to his task:

"In a review of this work it will be necessary frequently to refer to that from which the Abridgment is condensed. The Parent work is, in one respect, invaluable. It gives copious and, generally, accurate references. This feature has, indeed, been carried to profuseness, when, as is often the case, the authorities cited are court-martial or like records which have never been published to the Army, and lie buried out of sight, and reach in the files of the Judge-Advocate-General's office.

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It would seem proper that young gentlemen should be taught only to obey the law, and unhesitatingly accept the Articles of War as their rule of conduct, without bothering their heads concerning questions of constitutionality. So with regard to orders. They should be taught to obey cheerfully, implicitly. To them all orders should be lawful. The best thing that West Point does for the Army is to discipline its officers—using that term in the broad sense, as affecting both body and mind, in which it finds application in active army life. It cannot but be seriously impaired if the Corps of Cadets is turned into a debating school to pass upon the legality of orders received. Their business and duty is to obey, and never question.

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After perusing the Abridgment we are reminded that no matter, how profound may be the knowledge of common and civil law, how much so ever erudition may give facility to the pen, and variety to illustration, yet how difficult it is to produce an acceptable work on the subject of the Law-Military, if there be wanting an appreciation of the nature and importance of DISCIPLINE—the palladium of the military system." [Emphasis in the original] Review in JMSIUS, Vol X, (1888), pp. 156-57.

B. Birkhimer was hardly alone. An anonymous reviewer of a small 1890 predecessor of the Manual for Courts-Martial said:

"This thin volume is, to all intents and purposes, a reprint, with some additions, of a dozen predecessors. The additions are mainly to be found under the head of "General Instructions," and are excellent in their way.

In every new issue of this valuable Vade Mecum, the chapter containing General Instructions grow visibly larger, until there is danger that the utility of these pocket digests will be whelmed and drowned beneath the flood of superfluous detail. Winthrop's luminous—voluminous—work on military law is scarcely a handy book for the trial of a case. Let no future ''Instructions for Courts-Martial" exceed the limits of the sixty pages under review, under the penalty of being classified with that massive work, and neglected in favor of some less pretentious and more flexible rival.

This little compilation by Captain Ray contains all that can be needed for the satisfactory trial of the average court-martial case; a good deal more than is required for most of them. Though of local authority it is of general application, and will add to the reputation of the compiler as an intelligent and painstaking officer." *Instructions for Courts-Martial and Judge Advocates*. Captain P. Henry Ray, Acting Judge Advocate U. S. Army, Omaha, Neb., March 1, 1890. JMSIUS, Vol 11 (1890) p.833.

IX. Sherman continues his volleys!

"[M]y object is only to assist some one else who may undertake the work suggested, of compiling the Common Law Military, as has long been done by Blackstone, Coke, Kent and others, for the Common Law Civil."

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"Alexander Fraser Tytler, Esq., Judge Advocate D. of N. Britain, published in 1816, an Essay on Military Law and the practice of Courts Martial, which, in my judgment, better masters the subject than the hundreds of authors who have treated of it since ….

Tytler said that "the foundation of the Military or Martial Law is that which is common to all law whatever—the necessity of things.

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With what pain must every well wisher to his country … peruse the following opinions of Sir William Blackstone, drawn … from false principles, and penned in an unguarded moment … He who wishes to form rational and sound opinions … in any science, must emancipate himself from all slavish subjection to the authority of great names [such as Hale and Blackstone]."

X. Sherman reloads, then fires again!

"In continuation of the subject and in conclusion, I now submit this paper, with the hope that someone else will critically examine the opinions of that Court, and of the Court of claims, so as to group in a convenient form the many judgments and judicial opinions on military subjects, which are binding on military courts and officers.

I have no hesitation in pronouncing this military code of Great Britain superior to ours, because it more clearly and fully defines all military crimes and offences, provides pains and penalties with more accuracy, and provides the necessary courts and officers for administering punishment, and conferring rewards. But as Congress prefers to leave the Army, and all persons subject to military law to our imperfect and antiquated code, we are forced to search for our common law in usages and customs, and in examples derived from our own experience and history. "

XI. Sherman misfires.

A. A contemporary of both duelists here, Ralph Waldo Emerson, famously wrote in one his essays that "A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines. *Selected Essays*; Ziff, Larzer (ed.), Penguin American Library; pp. 175–203. Sherman's mind was decidedly not little, and was occasionally inconsistent. Given his penchant for the criticality of the "military common law," it is interesting to read this:

"The only complete code ever published in America was that prepared by Francis Lieber … published for the information of all concerned in General Orders, No. 100, Adjutant General's office, April 24, 1863, entitled, " Instruction for the Government of the Armies of the United States in the Field" … **But the code has never been enacted by Congress, which alone has power to make rules for the government and regulation of the land and naval forces. The code must, therefore, drop into the category of common law of war, useful and advisory, but not mandatory."** JMSIUS,

B. While scholarly studies — See, e.g., *The Scourge of War*, Brian Holden Reid, Oxford University Press, 2020 — have found that Sherman's official actions in the his March to the Sea substantially comported with GO 100, it is nonetheless fascinating to muse that, at least at the time of writing the above (1880), Sherman might have been wounded by nascent "Lost Cause" criticism and was striving to deflect that.

XII. Other examples of the collision of intellects on military jurisprudence.

A. The Arbuthnot and Ambrister Affair. Almost unknown today, it was a *cause célèbre* in 1818.

1. Andrew Jackson captured and executed two British citizens who had aided Seminole and Creek Indians against the United States. The trial court sentenced only Arbuthnot to death. Gen. Jackson "reviewed" the proceedings and had both executed. https://en.wikipedia.org/wiki/Arbuthnot_and_Ambrister_incident

2. Sherman saw it all predictably:

"General Jackson's whole management of the Seminole - Campaign of 1818 is a model of military energy, skill, and wisdom. He knew the "object[,]" was supplied with the "means," and applied them energetically till he had conquered an absolute and early peace.

He was armed with all the war power of the nation, could kill, burn, and destroy by wholesale or retail. He could have caused Ambrister, Arbuthnot, or any enemy to be shot or hung without trial, and he was responsible solely to the President …Whilst lawyers were splitting hairs about the law of Ambrister's case, the people of the whole country, south and north, knew that the prompt exercise of what seemed despotic power was in no manner usurpation, but was the proper use of military power to produce prompt results. So in every war since, those who would tie an Army down to the Statute Law, would make it impotent for good, and many a campaign has been lost or prolonged, because the Commanding General did not understand the Common Law of War, as well as the Statute Law. JMIUS

3. Winthrop saw it differently. With no doubt intentional irony, he used the case of the suspended TJAG, David Swaim, to illustrate the restrictions of a convening authority's reviewing power:

"A commanding officer charged with the duty of reviewing the proceedings of the court, cannot increase the severity of a sentence. He may approve or disapprove or mitigate, but he cannot impose a new sentence of a more severe character. Swaim v. U. S., 28 Ct. Cl., 174 (1893)"MLP [Affirmed after the publication of MLP; see, 165 U.S. 553 (1897), https://www.law.cornell.edu/supremecourt/text/165/553.] MLP, p.464, fn.68.

Undoubtedly in response to Sherman's well-known comments in JMSIUS, Winthrop used the Arbuthnot and Ambrister case — which Winthrop called "the most marked instance in our military history of a violation of this principle — to comment on the facts and law:

"The court first sentenced the accused to be shot; then, having reconsidered, as it could legally and regularly do, its judgment, substituted therefor the milder punishment — which thereupon became the legal and only sentence — 'to receive fifty stripes on the bare back and be confined with a ball and chain to hard labor for twelve calendar months.' In acting upon the case as reviewing officer, Gen. Jackson disapproved of the reconsideration, approved — as he could not legally do, since it did not legally exist — the first sentence, and ordered that the accused 'be shot to death agreeably to the sentence of the court;' and he was shot accordingly. This order not

only contained a false statement of fact, but … was wholly arbitrary and illegal. For such an order and its execution a military commander would now be indictable for murder." MLP at 464.

B. Desertion and the statute of limitations.

1. The Articles of War, of course, prohibited desertion, and desertion was the Army's most serious — almost hemorrhagic — problem. Each year, thousands of soldiers illegally left the service, sometimes reenlisted under assumed names, or hid for years before being caught. On desertion then, see McAnaney, William D., "Desertion in the United States Army." JMSIUS (Sep 1889): pp. 450-65.

2. The Army took the position that the statute of limitations (AW 103) could not possibly apply in such circumstances. Birkhimer's review of Winthrop's "Abridgment" explained the Army leadership's view of how the statute of limitations did not apply to desertion:

"One may read in the Parent work the views of the author on the applicability of the statute of limitations (103d Article) to the offense of desertion, and who is alive to the practical importance of the subject, would naturally turn with interest to find what treatment it receives in the Abridgment. To begin with, the very satisfactory announcement is made that the War Department has determined that desertion is a continuing offense. The practice of the Service happily is in consonance with this. It were well had the Abridgment stopped here. But no; the salutary doctrine is no sooner announced than it is hedged about with limitations that render it of little practical value. 'The status, to constitute an impediment in the sense of the Article, must be one which precludes the military authorities from subjecting the party to the military jurisdiction. The mere fact that such authorities do not know, and cannot for the time ascertain, where the deserter is, will not constitute an impediment. Nor will a concealment of himself or of his identity by the deserter, or other fraud practiced by him, have such effect (Abridgment, p. 103).' The almost universal practice in the Army is flatly at variance with these views. 'The cadet, taught at West Point that a man who leaves his command, conceals himself, obliterates all traces of his whereabouts, and fraudulently deprives the Government of those services which he has contracted to render, but who, nevertheless, is to be given the benefit of his own wrong, will, upon entering the Army, find out that different ideas prevail there ; that the War Department, the General of the Army, nearly, if not quite all the generals commanding divisions and departments, repudiate the doctrine ; that the practice of courts-martial is directly opposed to it, with rare and isolated exceptions ; and that concealment and fraud are not at a premium, but, on the contrary, that deserters who resort thereto are, upon apprehension and trial, sent promptly to Coventry. He will find that this doctrine of immunity from punishment for evil deeds is confined to the sacred precincts of his Alma Mater. He will probably ask himself why this is so; why he was there taught doctrines which the Army, almost with one voice, rejects as unsound. It will be difficult for any, the wisest, to give satisfactory reasons for the anomaly."

3. Winthrop viewed the plain language of AW 103 to make no exception for desertion. As early as 1820, the US Attorney general agreed, seeing it as a jurisdictional defect in applicable cases. TJAG's Holt and Dunn concurred, too, but later, along with the Bureau of Military Justice, bowed to pressure and recanted, thus following the Adjutant General — the most powerful of the staff chiefs — and the Secretary of War. This dispute was aired publicly

and, to the consternation and disappointment of Winthrop, few paid any attention. The Army leadership did as it pleased. See, generally, Winthrop's MLP, pp. 84-86; *The Blackstone of Military Law*, Joshua E. Kastenberg, Scarecrow Press, 2009, https://books.google.com/books/about/The_Blackstone_of_Military_Law.html?id=BTBEmQEACAAJ, pp. 275-78.

4. Eventually, of course, Winthrop "won." Congress amended AW 103 in 1890. The effect was that an accused could plead that the statutory limitation had run. Ever the gentleman, Winthrop did not gloat in his 1896 MLP, but simply said, "Prior to the enactment of 1890, the question was actively disputed whether the 103d Article applied to prosecutions for desertion; the conclusion of the Judge Advocate General and Attorney General that it did so apply, though sustained by the courts, not being adopted by the Secretary of War." MLP at 254.

XIII. Who won the duel?

A. "It depends!"

B. Theirs were diametrically opposed opinions of the nature and purpose of military law, especially military justice.

C. During their lifetimes.

D. Today.

IX. The Bottom line at the bottom:

Sherman contended that military law springs from entirely different roots than civil law with a singularly different purpose. One achieves justice by fairly enforcing discipline.

Winthrop believed that military law is a noble part of the great body of all law. One achieves discipline by doing justice.

Today, both Sherman and Winthrop march together — both no doubt muttering about the other being out of step! — but Winthrop was indisputably right: Justice leads to discipline more surely than the reverse.