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2023]

NONJUDICIAL PUNISHMENT

FRANKLIN D. ROSENBLATT*

ABSTRACT

In the civilian world, the dispensation of punishment is reserved for judicial tribunals. Not so in the military justice systems of the United States and other nations. There, nonlawyer military leaders administer so-called “nonjudicial punishment” to address minor offenses in the ranks.

Nonjudicial punishment, despite a long and sometimes bloody history, has survived efforts to modernize military justice. In fact, it has flourished: today it is the predominant form of military justice in the United States, outnumbering courts-martial nearly twenty to one. This Article analyzes the features and purposes of this unique punishment regime. The Article argues that nonjudicial punishment should be viewed in a new and more favorable light: this relic of a torturous past now helps ensure military compliance with international human rights and humanitarian law standards.

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INTRODUCTION

IT has been said that military justice is an understudied legal discipline.¹ If that is so, then the subspecies of military justice known as nonjudicial punishment is truly the hinterlands. Military justice scholarship tends to fixate on courts-martial: those military trials popularized in movies such as *A FEW GOOD MEN*² whose procedures closely resemble criminal trials. Not as much attention is shown to nonjudicial punishment, a system that permits military commanders to serve as judge, jury, and prosecutor; to hold hearings; and to punish minor transgressions—all largely without the involvement of lawyers or formalized procedures.

The nearly exclusive attention on courts-martial is disproportionate and unwarranted. Nonjudicial punishment is far more prevalent than courts-martial. In 2022, the military services reported that they conducted 38,838 military justice cases, including 1,455 courts-martial and 37,383 cases of nonjudicial punishment.³ That means that more than ninety-six percent of all military justice cases in the U.S. were nonjudicial punishment.⁴ The following chart shows the numbers and percentages

1. See, e.g., Steven Vladeck, *Why Military Justice Doesn't Get Enough Academic Attention*, JOTWELL (Aug. 14, 2018) (reviewing Rodrigo M. Caruço, *In Order to Form a More Perfect Court: A Quantitative Measure of the Military's Highest Court's Success as a Court of Last Resort*, 41 VT. L. REV. 71 (2016)), <https://courtslaw.jotwell.com/why-military-justice-doesnt-get-enough-academic-attention/> [https://perma.cc/LW7W-9E6F] (“The military justice system receives embarrassingly little attention from the legal academy in general and from legal scholarship in particular.”).

2. *A FEW GOOD MEN* (Castle Rock Entertainment 1992).

3. The numbers of military justice cases from 2022 come from the annual reports of each of the armed services to Congress as required by the Uniform Code of Military Justice, Article 146a, 10 U.S.C. § 946a (2018). See JUDGE ADVOC. GEN., U.S. AIR FORCE, REPORT ON THE STATE OF MILITARY JUSTICE FOR FISCAL YEAR 2022, at 22 (2022), [https://jsc.defense.gov/Portals/99/Article%20146%20reports/All%20Service%27s%20Article%20146a%20reports%20for%20FY22%20\(binder\).pdf?ver=0NidRcQfxFK9M1vTff-6w%3d%3d](https://jsc.defense.gov/Portals/99/Article%20146%20reports/All%20Service%27s%20Article%20146a%20reports%20for%20FY22%20(binder).pdf?ver=0NidRcQfxFK9M1vTff-6w%3d%3d) [perma link unavailable] [hereinafter U.S. AIR FORCE 2022 REPORT]; JUDGE ADVOC. GEN., U.S. ARMY, REPORT ON MILITARY JUSTICE FOR FISCAL YEAR 2022, at 18 (2022), [https://jsc.defense.gov/Portals/99/Article%20146%20reports/All%20Service%27s%20Article%20146a%20reports%20for%20FY22%20\(binder\).pdf?ver=0NidRcQfxFK9M1vTff-6w%3d%3d](https://jsc.defense.gov/Portals/99/Article%20146%20reports/All%20Service%27s%20Article%20146a%20reports%20for%20FY22%20(binder).pdf?ver=0NidRcQfxFK9M1vTff-6w%3d%3d) [perma link unavailable] [hereinafter U.S. ARMY 2022 REPORT]; JUDGE ADVOC. GEN., U.S. COAST GUARD, MILITARY JUSTICE IN THE COAST GUARD (FY 2022), at 2 (2022), [https://jsc.defense.gov/Portals/99/Article%20146%20reports/All%20Service%27s%20Article%20146a%20reports%20for%20FY22%20\(binder\).pdf?ver=0NidRcQfxFK9M1vTff-6w%3d%3d](https://jsc.defense.gov/Portals/99/Article%20146%20reports/All%20Service%27s%20Article%20146a%20reports%20for%20FY22%20(binder).pdf?ver=0NidRcQfxFK9M1vTff-6w%3d%3d) [perma link unavailable] [hereinafter U.S. COAST GUARD 2022 REPORT]; JUDGE ADVOC. GEN., U.S. MARINE CORPS, REPORT ON MILITARY JUSTICE FOR FISCAL YEAR 2022, at 15 (2022), [https://jsc.defense.gov/Portals/99/Article%20146%20reports/All%20Service%27s%20Article%20146a%20reports%20for%20FY22%20\(binder\).pdf?ver=0NidRcQfxFK9M1vTff-6w%3d%3d](https://jsc.defense.gov/Portals/99/Article%20146%20reports/All%20Service%27s%20Article%20146a%20reports%20for%20FY22%20(binder).pdf?ver=0NidRcQfxFK9M1vTff-6w%3d%3d) [perma link unavailable] [hereinafter U.S. MARINE CORPS 2022 REPORT]; JUDGE ADVOC. GEN., U.S. NAVY, REPORT ON MILITARY JUSTICE FOR FISCAL YEAR 2022, at 18 (2022), [https://jsc.defense.gov/Portals/99/Article%20146%20reports/All%20Service%27s%20Article%20146a%20reports%20for%20FY22%20\(binder\).pdf?ver=0NidRcQfxFK9M1vTff-6w%3d%3d](https://jsc.defense.gov/Portals/99/Article%20146%20reports/All%20Service%27s%20Article%20146a%20reports%20for%20FY22%20(binder).pdf?ver=0NidRcQfxFK9M1vTff-6w%3d%3d) [perma link unavailable] [hereinafter U.S. NAVY 2022 REPORT].

4. See *supra* note 3. The totals listed here were compiled by the author from the total numbers of courts-martial and nonjudicial punishment statistics provided by the services: U.S. AIR FORCE 2022 REPORT, *supra* note 3, at 19, 22 (401 courts-martial

of cases administered by nonjudicial punishment versus court-martial by military service in 2022.⁵

SERVICE	2022 NJP CASES	2022 CM CASES	2022 TOTAL MJ CASES	2022 % OF MJ CASES AS NJP
Army	20,850	662	21,512	96.9%
Air Force	4,183	284	4,467	93.6%
Navy	5,992	190	6,182	96.9%
Marines	6,358	319	6,677	95.2%
Coast Guard	n/a	18	n/a	n/a
DoD total (excluding Coast Guard)	37,383	1,455	38,838	96.3%

While the public may not know much about nonjudicial punishment, one would expect that military lawyers would pay close attention. But military lawyers focus most of their attention on courts-martial. The military justice scholarship in military law journals also focuses mostly on courts-martial. Legal officer training courses on military justice give scant attention to nonjudicial punishment, and focus almost exclusively on courts-martial.

Perhaps the neglect of nonjudicial punishment by military lawyers is because it is viewed as a rough form of justice, hardly befitting the attention of real lawyers. Because commanders impose nonjudicial punishment, with the assistance of military paralegals but without judges, lawyers, or a recorded account of proceedings, military lawyers may believe that nonjudicial punishment is arbitrary and biased in application. They may think that only courts-martial can deliver fair and just results.

The skepticism of nonjudicial punishment may reflect the bloody heirloom of its history. Long before the Uniform Code of Military Justice

conducted and 4,183 nonjudicial punishment cases); U.S. ARMY 2022 REPORT, *supra* note 3, at 16, 18 (662 courts-martial and 20,850 nonjudicial punishment cases); U.S. COAST GUARD 2022 REPORT, *supra* note 3, at 2 (eighteen courts-martial conducted but no reporting of nonjudicial punishment case numbers for the year); U.S. MARINE CORPS 2022 REPORT, *supra* note 3, at 13, 15 (319 courts-martial and 6,358 nonjudicial punishment cases); and U.S. NAVY 2022 REPORT, *supra* note 3, at 16, 18 (190 courts-martial and 5,992 nonjudicial punishment cases). For courts-martial, the author counted all forms of courts-martial listed by the services: general, special (with or without the ability to adjudge a bad conduct discharge), military judge-alone special, and summary.

5. This chart uses “NJP” for nonjudicial punishment, “CM” for courts-martial, and “MJ” for military justice. The figures in the chart were compiled by the author using the figures for each service from the 2022 Joint Service Committee Reports. See *supra* note 3 (listing the five armed service 2022 military justice reports); *supra* note 4 (compiling case numbers per service from those five reports). For additional commentary on the general decline over time in numbers of courts-martial and military justice cases, see Eugene R. Fidell, *Military Law*, 140 DAEDALUS 165 (2011).

(UCMJ) “judicialized” military justice in 1950,⁶ many forms of military punishment were torturous and cruel. In early Roman times, military forces practiced so-called decimation, where centurions, standard-bearers, and regular soldiers who laid down their arms and refused to fight were instantly beheaded (to put it in modern terms: a loss of life without due process of law).⁷ But the name derives from the follow-on procedures that attended to the remaining soldiers: they drew lots, and the unfortunate tenth who drew a short stick were also summarily executed. The thinking was that the regular soldiers, because they had failed on their own to deter the malingering and cowardly conduct of their compatriots, merited collective punishment.⁸

In more recent centuries, the practice of flogging errant sailors or soldiers by repeatedly lashing the offender with a whip or a stick was a commonly prescribed nonjudicial punishment.⁹ And both sides of the American Civil War employed a punishment known as “bucking and gagging”:

During the Civil War, discipline was a huge problem among the soldiers on both sides of the Mason-Dixon. In order to set unruly soldiers straight, some commanding officers chose the humiliating and painful route of “bucking and gagging.” Under this penalty, the mischief maker would have to sit for long periods bent forward with his hands tied at his shins, his feet tied together at the ankles, and to top it all off—a rod or stick was shoved over the arms and under the knees, and he was gagged with a cloth. The worst part? Minor offenses—like insubordination—earned a troop this unusual punishment.¹⁰

Another grueling punishment known as the “torture horse” or “running a rail” involved sitting the offender with legs (sometimes with weights added) between a wooded plank, which was carried and shaken

6. See generally WILLIAM T. GENEROUS, JR., *SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE* (1973) (describing the formulation of the UCMJ as the settlement of a clash between reformers such as Professor Edward Morgan and Pentagon stalwarts such as Frederick Bernays Wiener). The reformers largely won the battle to “judicialize” military justice in the 1951 final version of the law, but the stalwarts secured key concessions to retain coveted features of the old Articles of War, such as command control of prosecution decisions and service-specific variance in nonjudicial punishment procedures.

7. See “*Removal of a Tenth*”—*A Brief and Bloody History of Decimation*, MIL. HIST. NOW (Feb. 26, 2014), <https://militaryhistorynow.com/2014/02/26/no-safety-in-numbers-a-brief-history-of-decimation/> [https://perma.cc/WK6C-2K25].

8. *Id.*

9. See *This Is Gonna Hurt—Military Punishment Throughout the Ages*, MIL. HIST. NOW (June 29, 2012), <https://militaryhistorynow.com/2012/06/29/this-is-gonna-hurt-military-punishment-throughout-the-ages/> [https://perma.cc/RB6V-4D5P].

10. Tahlia Y. Burton, *10 Brutal Punishments That Used To Be Legal in The Military*, TASK & PURPOSE (Aug. 10, 2016, 11:19 AM), <https://taskandpurpose.com/military-life/10-brutal-punishments-used-legal-military/> [https://perma.cc/JKN7-VAC9].

around.¹¹ This punishment resulted in extreme pain and sometimes permanent injuries. It was a common punishment used by several European nations and both Union and Confederate forces during the American Civil War.¹²

Yet nonjudicial punishment has not just survived—it has flourished. And not just in the United States but in many other national militaries.¹³ Why has this vestige, which formerly employed methods that would shock the modern conscience, not been eradicated entirely? How could this fossil of bygone eras still survive in a time of judicialized military justice systems and increased emphasis on international human rights law? Must militaries retain the ability to punish offenders not just with judicial trials, but *also* with nonjudicial punishment? This Article examines the unique utility of nonjudicial punishment in modern militaries. Nonjudicial punishment is not just understudied; the Article concludes that it may be a useful way for national militaries to comply with their obligations under international human rights and humanitarian law.

True, no punishment regime resembling the inflictions on Roman legionnaires or soldiers in the American Civil War would pass a modern threshold of legitimacy or public support. But when Congress carved out and codified nonjudicial punishment powers for commanders in 1950, it did so in a way that would hardly offend the conscience. No persons subjected to the punishment can face long sentences or the death penalty as they can in the court-martial system. Punishments of old that were notable for their cruelty were (for the most part) eliminated. Authorized punishments today more closely resemble administrative rather than penal sanctions. Military members who face nonjudicial punishment bear no stigmatizing mark of a criminal conviction, and even discharge papers are free from annotations that a member was punished. Given the deprivations inherent to military service as a baseline, the modern regime of nonjudicial punishment sanctions seems tolerable.

This Article examines the understudied and underappreciated mechanisms of nonjudicial punishment. The Article challenges the conventional wisdom that courts-martial are a more legitimate and progressive form of military justice. With flexible procedures and limited sanctions, nonjudicial punishment meets what may be differing goals of military leaders and human rights advocates. Courts-martial, by contrast, raise concerns of their own about susceptibility to outside influence, overly expansive jurisdiction, punishment ranges that dramatically exceed contractual terms of service for those punished, and rigid

11. *Id.*

12. *Id.*; see also Sally Johnson Ketcham, *Guardhouse – Military Discipline*, NAT. PARK SERV. (July 25, 2016), <https://www.nps.gov/fosc/learn/education/guarddiscip.htm> [<https://perma.cc/AJP9-N6V7>] (describing harsh and cruel punishments from the U.S. Civil War era).

13. See GENEROUS, *supra* note 6, at 219 n.1 (“NJP [nonjudicial punishment] is common to the armed forces of all nations.”); see also Max Rheinstein, *Comparative Military Justice*, 15 FED. B.J. 276, 285 (1955).

procedures that may be unworkable when military forces are deployed beyond their own borders.

Modern nonjudicial punishment could present concerns in how it is implemented. It is no panacea and its dangers must be carefully considered. One concern is that nonjudicial punishment may be too *cruel* if the procedures include sanctions that fall outside the norms of fair treatment. For example, while flogging may have been considered an acceptable punishment 200 years ago, it would be less so today. Punishments animated by cruelty rather than deterrence are more likely to run afoul of national and international human rights standards. Punishments of old that amounted to torture, grave danger, and death would be entirely unacceptable today, especially if a lack of fairness and procedural safeguards attend their administration.

An opposite problem is that nonjudicial punishment might be considered too *lenient*. Nonjudicial punishment today is characterized by light sanctions and secret proceedings (that is, closed to the public). Sometimes this may be acceptable, but not when employed in response to allegations of serious military offenses such as torture or unlawful killings that would be more appropriately addressed in a public criminal trial. This danger of leniency reflects real concern that military forces will seek to protect their own rather than fully investigate and address allegations of atrocities or other wrongful behavior. A different concern with leniency is that authorized punishments might not be strong enough to dissuade potential wrongdoers and deter misconduct. In such a case, the purpose of this unique regime of sanctions is undermined.

A final concern is that nonjudicial punishment may be *unfair*, such as may happen with a commander who finds guilt against the weight of the evidence or who imposes a disproportionate punishment. Proceedings may be tainted by racism or other bias against the military member. The consequence of unfair procedures or biased administration is twofold. First, unfairness may lower military morale if nonjudicial punishment is wielded in arbitrary or discriminatory ways. Nobody likes to be unfairly blamed, even if the consequence is minor. Second, if the punishment results in a permanent stigma or a major deprivation of liberty or property, it ought to entail adequate due process.

Part I examines the jurisdiction of nonjudicial punishment. That is, who may be subjected to the treatment and what subject matter is appropriate for nonjudicial punishment. These jurisdictional limits are shaped by various concerns that nonjudicial punishment might be either too harsh, too lenient, or too unfair to address certain offenses and offenders. This Part also highlights the unique military nature of these procedures and how they differ from both judicial trials and administrative corrective regimes. It also clarifies the different meanings of the term “nonjudicial punishment.”

Part II considers nonjudicial punishment procedure (or lack thereof). The UCMJ established uniform rules for military justice across the armed services, but it expressly excepted nonjudicial punishment

procedure from that uniformity. As a result, the services were free to tinker with nonjudicial punishment procedure as they wished, or leave it blank. As a result, nonjudicial punishment procedures vary greatly from service to service, and even from commander to commander.

Part III assesses the punishments that can be imposed by nonjudicial punishment. The permissible punishments now closely resemble administrative sanctions rather than the brutal sanctions of the past. While there are authorized punishments that closely resemble penal sanctions, such as short periods of incarceration, they are exceedingly rare. Taking the authors of the UCMJ at their word that Article 15 truly is meant as *nonjudicial* punishment, this Part then situates nonjudicial punishment within the procedural due process framework of the Fifth Amendment of the U.S. Constitution. Procedural due process looks beyond merely assessing whether the summary procedures employed by non-lawyer adjudicators at nonjudicial punishment are fair or unfair. It also considers the stakes of unfairness: that procedural protections must increase depending on the risk of an erroneous deprivation of life, liberty, or property. If sanctions from nonjudicial punishments are minor and non-stigmatizing (especially the avoidance of a criminal conviction) then procedural shortcuts are more tolerable.

Part IV explores the relationship between nonjudicial punishment and judicial trials. In particular, it analyzes the unique remedy available to members of the military to “turn down” nonjudicial punishment and demand a trial by a court-martial instead. The turn-down option is a legacy of the British military that persists in nonjudicial punishment regimes around the world today, including the United States. Undergirding the turn-down right is an assumption that nonjudicial procedures are inherently unfair while courts-martial permit generous defense rights. Thus, it can be claimed that all military members facing nonjudicial punishment always have the option of a fair military justice venue. The turn-down right applies to all nonjudicial punishment except when military members are embarked on a vessel; those military members must accept nonjudicial punishment. The turn-down right provides a useful jumping off point to contrast nonjudicial procedures from judicial ones. I argue that the conventional wisdom about the inherent unfairness of nonjudicial punishment compared to courts-martial is flawed, and that the turn-down right is more harmful than helpful.

Part V examines nonjudicial punishment through the lens of three international law frameworks: international human rights law, international humanitarian law, and international criminal law. It concludes that nonjudicial punishment can play a useful role for national militaries to meet their obligations under these laws.

I. JURISDICTION

Civilian life has no equivalent for the military justice mechanism known as nonjudicial punishment. For example, think of an employee

who commits a minor theft from his employer. The employer has two basic options that could be exercised separately or together: the employer can fire the suspect, and the employer can report the crime of theft to law enforcement where the accused might face prosecution in the criminal justice system.

Mirroring civilian life, both of those options are also available in the military. On one end, a servicemember who commits a minor criminal offense can face the same administrative measures that civilian employers are authorized: he may be counseled, admonished, reprimanded, have privileges withheld, and even fired from his job (“administratively separated” in military-speak, the softer landing than a punitive discharge which can be adjudged at court-martial). On the other end of the spectrum, because the conduct involved a violation of a penal statute, the offender may be criminally prosecuted in a court-martial whose parties and procedures closely resemble those of a civilian criminal trial. The slight deviation on this is for countries which have abolished their court-martial systems or lean more heavily on civilian court adjudications for military offenses, in which case the military offender would be whisked straight over to the civilian criminal justice system.

But many militaries including the United States have another procedure as well: instead of firing or referring the errant servicemember for criminal prosecution, the military commander can personally adjudicate the disciplinary issue and adjudge a minor punishment. The commander has this power even though he or she is not a judge, or even a lawyer. Such procedures are called *nonjudicial punishment*.

Perhaps *nonjudicial procedures* would be a more accurate description, but that name has not stuck. The name *nonjudicial punishment* seems to presume guilt. Yet nonjudicial punishment includes more than the announcement of a punishment. The accused servicemember is provided notice of the offense, a chance to confer with counsel or a representative, and the chance to defend against the charge or explain any mitigating circumstances that might tend to reduce the punishment. Another name would be *summary procedures* or *summary discipline* to emphasize that the procedures are curtailed.¹⁴ Many other countries refer to their nonjudicial punishment schemes as “summary discipline.”

14. Summary discipline is not to be confused with the lowest form of court-martial called the summary court-martial. This procedure permits a single officer, usually a nonlawyer, to apply court-martial procedure to address minor offenses and adjudge minor punishments, including up to thirty days of confinement. See Uniform Code of Military Justice (UCMJ), art. 20, 10 U.S.C. § 820 (2018); *Middendorf v. Henry*, 425 U.S. 25, 42–48 (1976) (positively assessing the constitutionality of summary courts-martial despite the accused’s lack of a right to counsel in the proceedings). The Supreme Court in *Middendorf* emphasized that a summary court-martial is “procedurally quite different from a criminal trial” because it is not an adversary proceeding. See *id.* at 40. Unlike nonjudicial punishment, which is administered by commanders and does not maintain the pretense of following any form of formal court-martial procedure, summary courts-martial have declined in prevalence and popularity in the U.S. military. Last year all services conducted only 260 summary courts-martial; the U.S. Marine Corps conducted the most (113). See U.S. AIR FORCE

“Nonjudicial” can mean many things. At the outset, it is also important to distinguish the uniquely military procedure of nonjudicial punishment from other mechanisms branded as nonjudicial in international law, whose lexicon has embraced an ever-expanding list of alternatives to criminal prosecution. Transitional justice and post-conflict mechanisms such as truth commissions do not replace the need for criminal prosecution, but offer some form of accountability that serves the interests of justice where massive numbers of criminal prosecutions are not possible.¹⁵ Other mechanisms such as claims and reparations commissions are less concerned with accountability for offenders as they are with compensating victims.¹⁶ Another nonjudicial mechanism is a national commission of inquiry, whose mandate may include investigation of alleged abuses, developing a detailed factual account of the conduct in question, and recommending individuals for criminal prosecution.¹⁷

In the United States military, nonjudicial punishment is authorized by Article 15 of the UCMJ.¹⁸ Because of that enumeration in the law, nonjudicial punishment in the United States is commonly referred to simply as “Article 15.” The U.S. President promulgated further guidance on nonjudicial punishment procedure in Part V of the *Manual for Courts-Martial*.¹⁹ Beyond those uniform authorities which apply to all in the military, the services have implemented their own service-specific regulations of nonjudicial punishment.²⁰

2022 REPORT, *supra* note 3, at 19 (eighty-seven summary courts-martial); U.S. ARMY 2022 REPORT, *supra* note 3, at 16 (forty-seven summary courts-martial); U.S. COAST GUARD 2022 REPORT, *supra* note 3, at 2 (four summary courts-martial); U.S. MARINE CORPS 2022 REPORT, *supra* note 3, at 13 (113 summary courts-martial); and U.S. NAVY 2022 REPORT, *supra* note 3, at 16 (nine summary courts-martial). The summary court-martial, like nonjudicial punishment, is understudied. It may be that its current obsolescence is due in part to being duplicative of nonjudicial punishment in many respects. As with nonjudicial punishment, the accused has the right to turn down a summary court-martial and demand a full court-martial with the full panoply of rights, including the right to counsel.

15. See OFF. U.N. HIGH COMM’R FOR HUM. RTS., RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES: TRUTH COMMISSIONS, at 1, U.N. Doc. HR/PUB/06/1 (2006), <https://www.ohchr.org/sites/default/files/Documents/Publications/RuleoflawTruthCommissionsen.pdf> [<https://perma.cc/HKL2-RRKX>].

16. See OFF. U.N. HIGH COMM’R FOR HUM. RTS., INTERNATIONAL LEGAL PROTECTION OF HUMAN RIGHTS IN ARMED CONFLICT, at 91, U.N. Doc. HR/PUB/11/01, U.N. Sales No. E.11.XIV.3 (2011), https://www.ohchr.org/sites/default/files/Documents/Publications/HR_in_armed_conflict.pdf [<https://perma.cc/AFJ2-8WD7>].

17. See Juan E. Méndez (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 23, U.N. Doc. A/HRC/19/61 (Jan. 18, 2012).

18. UCMJ, art. 15, 10 U.S.C. § 815.

19. *Manual for Courts-Martial, United States* pt. V (2019 ed.) [hereinafter *MCM 2019*].

20. See U.S. DEP’T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE ch. 3 (2020), https://armypubs.army.mil/epubs/DR_pubs/DR_a/ARN31271-AR_27-10-001-WEB-2.pdf [perma link unavailable]; U.S. DEP’T OF AIR FORCE, INST. 51-202, NON-JUDICIAL PUNISHMENT (2022), https://static.e-publishing.af.mil/production/1/af_ja/publication/dafi51-202/afi51-202.pdf [<https://perma.cc/RTQ5-3LP3>]; U.S. DEP’T

The UCMJ contains the provisions of the criminal code regulating the administration of criminal trials in the military. Article 15 can be thought of as the Code's exception or set-aside. It says as much in the name of the statute: it is "nonjudicial" punishment, a series of procedures for commanders to address minor offenses that is outside the scope of the provisions and protections afforded during criminal trials, such as right to counsel, procedure, rules of evidence, military judges, and appeals. The U.S. Supreme Court has given little attention to Article 15 but in two cases categorized its informal procedures as administrative and not judicial.²¹

Article 15 is part of the "Uniform" Code, meaning that military justice was intended to be roughly the same whether the proceedings are held by the Army, Navy, Air Force, Marines, Coast Guard, or Space Force. But Article 15 procedures can hardly be described as uniform. Each service has taken the prerogative to deviate, so that one service's proceedings may bear no resemblance to another's. These differences are grounded in different service cultures. During debate over the passage of the UCMJ in 1950, the services ultimately conceded to reformers who wanted uniform court-martial procedures but insisted on maintaining distinct practices for nonjudicial punishment. In his excellent history of the passage of the UCMJ, Dr. William Generous notes that promises of uniformity with the application of a new code of military justice broke down in service parochialism when it came to nonjudicial punishment:

Commanders' arbitrary punishment power antedated any legal authorization for it. For example, statutory grant for the Army's "summary punishment" was given only in the enactment of the 1916 Articles of War, although Army commanders had long before meted out punishment for disciplinary offenses. The Navy "captain's mast" appeared in the earliest codification of the federal law, but specific legislation was never considered necessary for a ship's commander to punish his crew. As late as 1963, the Navy JAG told his lawyers that laws were not the source of NJP, but that the authority was "inherent in the disciplinary powers of the CO [commanding officer]."²²

Differences between the services arose over several issues: the right to appeal (acceptable to the Army, but offensive to the Navy because of

OF NAVY, JAG INST. 5800.7G, MANUAL OF THE JUDGE ADVOCATE GENERAL § 0110(b) (2021), <https://www.secnav.navy.mil/doni/SECNAV%20Manuals1/5800.7G.pdf> [perma link unavailable]; U.S. COAST GUARD, COMMANDANT INST. M5810.1H, MILITARY JUSTICE MANUAL ch. 2 (2021), https://media.defense.gov/2021/Jul/14/2002762684/-1/-1/0/CIM_5810_1H.pdf [<https://perma.cc/QWM2-GAND>]. The U.S. Space Force has not promulgated its own publicly available military justice instructions as of this writing on December 20, 2023.

21. *Middendorf v. Henry*, 425 U.S. 25, 31–32 (1976); *Parker v. Levy*, 417 U.S. 733, 750 (1974).

22. GENEROUS, *supra* note 6, at 122 (first citing Harold L. Miller, *A Long Look at Article 15*, MIL. L. REV. 37, 44 (1965); and then citing NAVAL COURTS AND BOARDS 455 (1937)).

the “reverence fit for a minor god traditionally bestowed on Navy commanders”²³); the right to refuse nonjudicial punishment and demand court-martial (palatable to the Army, unacceptable to the Navy); appropriate punishments; and even procedure (Navy captain’s mast resembled a trial, while Army commanders preferred to investigate the cases on their own without the personal presence of the accused).²⁴

For as little as it prescribes for procedure, Article 15 is a surprisingly lengthy statute. At the outset it helpfully sets out the levels of authority for oversight of nonjudicial punishment. In addition to the requirements contained in the statute itself, Article 15 authorizes the President to prescribe regulations for the administration of nonjudicial punishment, and then for “the Secretary concerned” to make further service-specific regulations. The President has seemingly done his part with the promulgation of Part V of the *Manual for Courts-Martial*. The *Manual for Courts-Martial* is signed off by the President as an Executive Order; the most recent iteration as of this writing was in July 2023.²⁵ While it is understandable for Congress to grant the Commander-in-Chief powers to set out the rules governing a core function of military justice such as nonjudicial punishment, there is no indication that any Presidents have shown any involvement or interest with the statute itself or the rule from Part V. That means that for all important purposes, Article 15 rulemaking is done by the Pentagon, whose work is then signed off on by the President without apparent modification. Given the significant differences in service approaches to nonjudicial punishment described above, it is easy to see why Article 15 was left open-ended, leaving it to the services to implement the details in accordance with their own traditions.

Article 15 and the rules contained in Part V have largely remained relatively stable. That is surprising given the tumult that met nearly every other aspect of the U.S. military justice system in the past ten years. Beginning with a standoff between the Pentagon and Senator Kirsten Gillibrand from New York about the military justice system’s fairness in investigating and prosecuting sex offenses,²⁶ and continuing with a wholesale modernization of the Code with the Military Justice Act of

23. *Id.* at 123.

24. *Id.* at 123–24.

25. *MCM 2019*, *supra* note 19. A recent executive order amended the 2019 version of the Manual for Courts Martial. See Exec. Order No. 14,103, 88 Fed. Reg. 50535 (July 28, 2023). Part V governing nonjudicial punishment, usually dormant in a period of great turmoil and turnover in the military justice statutes, was subject to some modification this time: a determination that the statute of limitations for nonjudicial punishment would be two years (an amendment to pt. V, ¶ 1.f.(4)); that the burden of proof throughout the services would be a preponderance of the evidence (an amendment to pt. V, ¶ 1.h); otherwise reinforcing that services could continue non-uniform practices in nonjudicial punishment (an amendment to pt. V, ¶ 1.j); and modified notification procedures to accused servicemembers (an amendment to pt. V, ¶ 4.c.(4)).

26. Military Justice Improvement and Increasing Prevention Act, S. 1520, 117th Cong. (2021).

2016,²⁷ the Code and the *Manual for Courts-Martial* implementing it have been wholly rewritten. That is, except for Article 15 and Part V of the *Manual*, which until July 2023 had remained largely unchanged except for small typographical changes and an elimination of a single authorized punishment.²⁸

The personal jurisdiction of Article 15 is not complicated: it applies to members of the military. The statute's provisions of personal jurisdiction refer to the categories of accused in relation to the commanding officer who seeks to impose nonjudicial punishment. There are two categories: "officers of his command" and "other personnel of his command."²⁹ It is surprising to read that Article 15, which is so well-known to enlisted members of the armed forces, who are so often its subjects, only refers to enlisted persons as "other personnel."

Often there is a question of whether the military has jurisdiction over a military member to administer nonjudicial punishment. This often occurs in cases involving members of the reserve elements of the armed forces, who toggle between civilian and military status and may argue that either the offense was not committed while in the military or that military punishment cannot be imposed on them when they are in a civilian status. Questions of whether speech and association were on duty, and thus subject to disciplinary proceedings, versus off duty, which were immune, are older than our nation; the most hotly contested military justice cases in the United States' early years concerned the accused's status as a private citizen or militia member. Historian Chris Bray recounts two such early cases. In 1808, Maryland Federalist Jonathan Meredith offered a toast at a private dinner: "Damnation to Democracy!"³⁰ The court-martial transcript reveals that his defense was that he "appeared as a private citizen, and not in a military character."³¹ Meredith was acquitted. Likewise, just after the American Revolution, Thomas Bevins admitted that he called his company commander a "[damned] Irish bugger" who was unfit to command "any more than my dog."³² Bevins' defense was that the statements were made at dinner when military duties were complete

27. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, §§ 5001–5542, 130 Stat. 2000, 2894–2968 (2016) (codified as amended at 10 U.S.C. §§ 801–946a). This legislation is more commonly known as the Military Justice Act of 2016, and its provisions went into effect on January 1, 2019.

28. See *infra* Part III.

29. UCMJ, art. 15(b)(1)–(2), 10 U.S.C. § 815(b)(1)–(2) (2018).

30. CHRIS BRAY, COURT-MARTIAL: HOW MILITARY JUSTICE HAS SHAPED AMERICA FROM THE REVOLUTION TO 9/11 AND BEYOND 9 (2016); see also Davis Winkie, *Colorado Guard JAG Officer Suing Superiors Over His Participation in BLM Protests*, ARMY TIMES (Apr. 22, 2021), <https://www.armytimes.com/news/your-army/2021/04/22/colorado-guard-jag-officer-suing-superiors-over-his-participation-in-blm-protests/> [https://perma.cc/TYM6-MFSS] (quoting Franklin Rosenblatt discussing Bray's lessons in a modern context).

31. BRAY, *supra* note 30, at 9 (emphases omitted).

32. *Id.* at 7.

for the day, “when as men + gentlemen, we were on the same footing.”³³ Bevins was convicted.

By its terms, Article 15 would not seem to apply to others who may be subject to other forms of military justice, such as civilians during an armed occupation or prisoners of war.³⁴ The terms of Article 15 seem to limit its application to one’s own forces. Perhaps the most likely carve-out of this, though it is not known to have ever occurred, would be civilian contractors “accompanying the force” who would be subject to military jurisdiction by UCMJ Article 2. Such persons may arguably fit within the ambit of the commander’s nonjudicial punishment authority as “other personnel of his command.”

Thus, the personal jurisdiction of Article 15 includes all military members properly subject to military authority, officers and enlisted. The basis for nonjudicial punishment has evolved from an inherent authority to a codified authorization. States have their own codes of military justice, but their rules are generally similar to those found in Article 15 of the UCMJ.

Subject matter jurisdiction refers to what conduct is prohibited and may properly be tried by nonjudicial punishment. Interestingly, Article 15 says little about this, only mentioning that the procedures are appropriate for “minor offenses” in Article 15(b) without specifying how this term is defined. It can be inferred that “minor offenses” refers specifically to certain offenses under the UCMJ rather than breaches of custom or civilian law. This is because, as described in the next Part of the Article, the accused has the right to turn down nonjudicial punishment and demand trial by court-martial instead. A proposed nonjudicial punishment which fails to state an offense under the UCMJ would not be justiciable at court-martial.

Part V of the *Manual* reflects the above presumption of what Article 15 means about “minor offenses.” It requires that nonjudicial punishment only be imposed for acts or omissions that constitute violations of the UCMJ’s punitive articles. It vests discretion in commanders to determine whether an offense is “minor.” This includes factors such as, “the nature of the offense and the circumstances surrounding its commission; the offender’s age, rank, duty assignment, record and experience; and the maximum sentence imposable for the offense if tried by general court-martial.”³⁵ That last provision is the easiest to identify; Part V goes on to define an offense as minor if the maximum sentence imposable would not include a dishonorable discharge or confinement for longer than one year if tried by general court-martial.³⁶ That would encompass, for example, minor acts of disobedience

33. *Id.*

34. For the international law regime governing military administration over civilians in occupied territories, see Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 47–78, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

35. *MCM 2019*, *supra* note 19, pt. V, ¶ 1.e.

36. *Id.*

(*Manual for Courts-Martial* Part V, with a maximum punishment of not more than one year of confinement and no dishonorable discharge), and exclude major offenses such as murder (UCMJ Article 118, with a maximum punishment of lifetime imprisonment without parole and dishonorable discharge).

Given the discretion vested in commanders to determine whether an offense is minor, there is no hard prohibition on major offenses being tried by nonjudicial punishment. Article 15 seems to contemplate that major offenses might slip in. “[T]he imposition and enforcement of disciplinary punishment under this article for any act or omission is not a bar to trial by court-martial for a serious crime or offense growing out of the same act or omission”³⁷

Article 15’s door-slightly-ajar approach to serious crimes implicates concerns that nonjudicial punishment might sometimes be too lenient. This might occur when military forces are engaged in military operations and want to prevent news of allegations by its own members from reaching the public, or even higher headquarters. Desiring to keep things under wraps, nonjudicial punishment would offer both a secretive venue and a plausible means that the military unit could also claim that they addressed the misconduct at issue.

That is the allegation of what happened in detainee abuse scandals early in the U.S. military’s participation in the wars in Iraq and Afghanistan. A human rights group analyzed the military’s responses to allegations that many members of the military were alleged to have abused detainees. These could have been addressed under any number of the UCMJ’s punitive articles for serious offenses, including provisions against maltreatment, attempted murder, and disobedience of lawful orders. Yet rather than pursue these allegations in courts-martial, military commanders frequently resorted to nonjudicial punishment:

Under U.S. military law, commanders have broad discretion to hold non-judicial hearings in lieu of criminal prosecution.

Even though non-judicial hearings are meant to adjudicate minor offenses and can result only in relatively weak penalties like reprimands, in practice, commanders in Iraq, Afghanistan, and at [Guantánamo Bay] have used these hearings in numerous cases that warranted criminal prosecution. DAA Project researchers found that in over seventy instances, commanders who were faced with evidence that supported criminal prosecution chose instead to impose non-judicial punishments or to use non-punitive administrative actions. (In addition to non-judicial punishments, commanders can impose administrative disciplinary measures.) Many of the personnel punished were implicated in serious abuses, including over ten personnel implicated in homicide cases, and approximately twenty personnel implicated in assault

37. UCMJ, art. 15(f), 10 U.S.C. § 815(f) (2018).

cases. Little is known about the results of non-judicial proceedings and other administrative processes, because the military refuses to release information about them.³⁸

It is fair to say that the subject matter jurisdiction of Article 15 is incredibly broad. It includes all the punitive articles under the UCMJ, with an encouragement to limit itself in application to minor offenses. Even if conduct does not meet all the elements of a listed offense under the Code, imagination is the only limit for a commanding officer who is determined to punish a military member. That is because the “General Articles” 133 and 134 of the UCMJ are broad enough to fit just about any dereliction or unwanted conduct. As a practical matter, military commanders are not constrained by problems of advance crime definition when they decide that a military member’s conduct warrants Article 15 punishment—there is something for everyone in the General Articles.

II. OPEN-ENDED PROCEDURES

Article 15 says little about procedure. That is surprising because it contrasts with the procedure-heavy requirements for courts-martial in the *Manual for Courts-Martial*. Further, military commanders who are unfamiliar with legal proceedings might appreciate a paint-by-numbers guide to procedure on how to conduct the nonjudicial proceedings. The dearth of procedure is likely a legacy of negotiations over the passage of the UCMJ in 1950 in which service leaders fought to preserve their own NJP traditions while acquiescing to a professionalized and uniform set of procedures for courts-martial.

Still, the President has provided some procedural uniformity in Part V of the *Manual* that is missing in the statute. The procedural guidelines refer to the officer convening the proceedings as the “nonjudicial punishment authority” and require that he or she first determine that disposition of an offense by nonjudicial punishment is appropriate. This refers to the initial disposition guidance of Rule for Court-Martial 306, which permits the immediate commander of the person accused to determine how to dispense of an offense unless that authority is withheld. Authority may be withheld by another higher-level commander, or now as a matter of law over certain offenses such as sexual assault and murder by the new Office of Special Trial Counsel.³⁹ If the immediate commander does not have the authority to dispose of an offense at his or her level, such as a low-level commander who believes that the appropriate

38. *By the Numbers: Findings of the Detainee Abuse and Accountability Project*, CTR. FOR HUM. RTS. & GLOB. JUST., HUM. RTS. FIRST & HUM. RTS. WATCH (Apr. 25, 2006) (footnotes omitted), <https://www.hrw.org/report/2006/04/25/numbers/findings-detainee-abuse-and-accountability-project> [<https://perma.cc/ZEP5-GJEY>].

39. National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, §§ 531–539c, 135 Stat. 1541, 1692–99 (2021) (codified as amended at 10 U.S.C. §§ 801(18), 824a).

forum is a general court-martial, he or she may forward the matter to a higher level commander with a recommendation as to disposition.

If the matter is within the commander's purview, the President's policy on nonjudicial punishment offers considerations in addition to Rule for Court-Martial 306.

Commanders are responsible for good order and discipline in their commands. Generally, discipline can be maintained through effective leadership including, when necessary, administrative corrective measures. Nonjudicial punishment is ordinarily appropriate when administrative corrective measures are inadequate due to the nature of the minor offense or the record of the Servicemember, unless it is clear that only trial by court-martial will meet the needs of justice and discipline. Nonjudicial punishment shall be considered on an individual basis. Commanders considering nonjudicial punishment should consider the nature of the offense, the record of the Servicemember, the needs for good order and discipline, and the effect of nonjudicial punishment on the Servicemember and the Servicemember's record.⁴⁰

After the commander has decided that nonjudicial punishment is appropriate, the next step for the commander is to provide notice to the military member. This notice must include the following. First, a statement that nonjudicial punishment is being considered. Second, a statement describing the alleged offenses and articles of the UCMJ the member is considered to have violated. Third, "a brief summary of the information upon which the allegations are based or a statement that the member may, upon request, examine available statements and evidence."⁴¹ Fourth, a statement of the rights the military member is afforded. Finally, a statement of the member's right to demand trial by court-martial in lieu of nonjudicial punishment, a statement of the maximum punishment, and a statement that if trial by court-martial is demanded, that charges could be referred to a summary, special, or general court-martial (but the accused could still object to a summary court-martial), and that if the case is sent to a special or general court-martial, that the member has the right to be represented by counsel.⁴²

If the military member elects for trial by court-martial, the nonjudicial punishment proceedings terminate.⁴³ It is within the discretion of the commander to determine whether to refer charges to a court-martial from there. This right of the accused to "turn down" nonjudicial punishment is further discussed in Part IV.

A military member who accepts nonjudicial punishment has additional rights. He or she has the right to appear personally before the nonjudicial punishment authority, although this right can be abrogated

40. *MCM 2019*, *supra* note 19, pt. V, ¶ 1.d(1).

41. *Id.* pt. V, ¶ 4.a(3).

42. *Id.* pt. V, ¶ 4.a(5).

43. *Id.* pt. V, ¶ 4.b(1).

in extraordinary circumstances, in which case the member can appear before a designated representative.⁴⁴ If the member requests to appear personally before the nonjudicial punishment authority, he or she shall also have the following rights: to be informed of his or her right against self-incrimination as provided by Article 31 (b) of the UCMJ; to be accompanied by a spokesperson, so long as the proposed punishment is not among the most minor varieties and the spokesperson can be procured without government expense or delay in the proceedings; to be informed of the information against the military member; to be allowed to examine documents or physical objects upon which the nonjudicial punishment authority intends to rely; to “[p]resent matters in defense, extenuation, and mitigation orally, or in writing, or both;”⁴⁵ to have witnesses, including adverse witnesses, upon request, if their statements will be relevant and they are reasonably available (meaning that their appearance can be procured without reimbursement for travel expenses, undue delay, or for military witnesses, absence from important military duties); and to have the proceedings open to the public (unless the nonjudicial punishment authority decides that the proceedings should be closed for good cause, such as military exigencies or security interests).⁴⁶

The rules of evidence do not apply at nonjudicial punishment proceedings except for those relating to privileges.⁴⁷ Nor could the rules of evidence be required, as a practical matter, since there is no requirement that any lawyers be directly involved in these proceedings. This means that commanders enjoy free reign to employ their own common sense and notions of fairness and justness to guide them to outcomes in individual cases. Hearsay, propensity evidence, secondhand information, and matters that are arguably unfairly prejudicial all might be admitted. The military member may have no idea going into the proceeding about how his or her commander will follow, or not follow, or make up, the procedural and evidentiary rules that will govern the proceeding. Former enlisted Marine Peter Lucier writes:

Discipline in the military is a *game*. It’s cat and mouse. You never know when you’ll get caught doing something you shouldn’t, you are never quite sure if what you are doing is the right thing at all, and should you be caught, you can’t ever be sure what the consequences will be. And thank god. It keeps you sharp. Keeps you on your toes. A sergeant of mine told me Marines are dog-eat-dog, we’ll throw each other under the bus for the most minor of uniform infractions. That attention to detail becomes a desirable skill when your butthole is puckered up something awful scanning and searching for a bomb buried in the road. But the playfulness of it all helps too. The whole thing, the uniforms, the

44. *Id.* pt. V, ¶ 4.c.

45. *Id.* pt. V, ¶ 4.c(1)(E).

46. *Id.* pt. V, ¶ 4.c.

47. *Id.* pt. V, ¶ 4.c(3).

pomp and circumstance, even the firefights, it's all one big joke. What can you do but laugh? The absurdity and capriciousness of enlisted life prepares you in every way for the chance and seeming senselessness of combat. Our brand of justice is the mirror of the only justice you'll find in combat. Fickle fate, not officers nor politicians, is the only one who judges us dumb apes out there on the tip of the spear.⁴⁸

A historic example from Robert Graves' *GOOD-BYE TO ALL THAT* illustrates the procedures that may be used at nonjudicial punishment:

In the first Battalion Orderly Room that I attended, a case went like this:

SERGEANT-MAJOR (*off stage*): Now, then, you 99 Davies, 'F' Company, cap off, as you were, cap off, as you were, cap off! That's better. Escort and prisoner, right *turn!* Quick *march!* Right wheel! (*On stage*) Left wheel! Mark time! Escort and prisoner, *halt!* Left *turn!*

COLONEL: Read the charge, Sergeant-Major.

SERGEANT-MAJOR: No. 99 Pte W. Davies, 'F' Company, at Wrexham on 20th August: improper conduct. Committing a nuisance on the barrack square. Witnesses: Sergeant Timmins, Corporal Jones.

COLONEL: Sergeant Timmins, your evidence.

SERGEANT TIMMINS: Sir, on the said date about two p.m., I was hacting Horderly Sar'nt. Corporal Jones reported the nuisance to me. I hinspected it. It was the prisoner's, Sir.

COLONEL: Corporal Jones! Your evidence.

CORPORAL JONES: Sir, on the said date I was crossing the barrack square, when I saw prisoner in a sitting posture. He was committing excreta, Sir. I took his name and reported to the orderly-sergeant, Sir.

COLONEL: Well, Private Davies, what have you to say for yourself?

99 DAVIES (*in a nervous sing-song*): Sir, I came over queer all of a sudden, Sir. I haad the diarrhoeas terrible baad. I haad to do it, Sir.

48. Thomas E. Ricks, *Enlisted Justice: You Know, No One Talks About It, But This Is the Real Military. And the Important Thing Is, It Always Will Be*, FOREIGN POL'Y (June 9, 2016, 10:19 AM), <https://foreignpolicy.com/2016/06/09/enlisted-justice-you-know-no-one-talks-about-it-but-this-is-the-real-military-and-the-important-thing-is-it-always-will-be/> [https://perma.cc/L7PC-XR7J].

COLONEL: But, my good man, the latrine was only a few yards away.

99 DAVIES: Colonel, Sir, you caan't stop nature!

SERGEANT-MAJOR: Don't answer an officer like that! (*Pause.*)

SERGEANT TIMMINS (*coughs*): Sir?

COLONEL: Yes, Sergeant Timmins?

SERGEANT TIMMINS: Sir, I had occasion to hexamine the nuisance, Sir, *and it was done with a heffort, Sir!*

COLONEL: Do you take my punishment, Private Davies?

99 DAVIES: Yes, Colonel, Sir.

COLONEL: You have done a very dirty act, and disgraced the Regiment and your comrades. I shall make an example of you. Ten days' detention.

SERGEANT-MAJOR: Escort and prisoner, left *turn!* Quick *march!* Left wheel!

(*Off stage*): Escort and prisoner, *halt!* Cap on! March him off to the Guard Room. Get ready for the next case!⁴⁹

Note that the hearing Graves describes, a scatological whodunit, is court-like: it involves witnesses and the presentation of evidence in support of the claim, followed by a prompt judgment. To the extent that this procedure resembles the formalities of court-martial procedure, it is only by coincidence, pomp, or a desire for crude imitation. Note the commander's unchallenged power as both prosecutor, judge, and sentencing authority.

Any discussion of procedure with Article 15 must keep in mind that the proceedings are named "nonjudicial punishment" and not "nonjudicial procedure." It is for that reason that a scholar on the history of the UCMJ labeled Article 15 as the "[c]ommanders' arbitrary punishment power."⁵⁰ Those who have been proximate to nonjudicial punishment as Lucier has may likely view the process as foreordained. Commanders have to follow the few procedural requirements contained herein, but they need not explain their reasons or even be fair. The military services have sought to ensure fairness through the implementation of standards to guide commanders in adjudicating nonjudicial punishment. These are not uniform: some services require proof beyond a reasonable doubt;

49. ROBERT GRAVES, GOOD-BYE TO ALL THAT: AN AUTOBIOGRAPHY 77-78 (2d ed. 1958).

50. GENEROUS, *supra* note 6, at 122.

others require only a preponderance of the evidence before imposing Article 15.⁵¹ Whatever standard may be imposed by service regulation, there is good reason to believe that the standard imposed has only a limited impact. That is because the commander enjoys complete control over the manner of proceedings and can allow as much or as little due process or presentation as he or she sees fit. The implementation of proof standards likely placates military lawyers but does not change the calculus of nonjudicial punishment authorities to impose whatever they wish within their powers.

A military member who feels aggrieved by a commander's decision at nonjudicial punishment has the right to appeal the punishment. Article 15(e) permits a person who believes his or her nonjudicial punishment to be "unjust or disproportionate to the offense" to appeal to the "next superior authority" of the imposing commander, who is likely not a lawyer but may have the assistance of an assigned legal advisor.⁵² The appeal must be promptly forwarded and decided, but the fact of an appeal does not act to suspend any of the punishment imposed. Because the record appealed is limited, and the appeal authority is the next higher commander in the chain from the imposing commander, appellate rights in nonjudicial punishment may be thought of as illusory. It depends on a higher level commander deciding against a trusted subordinate commander and in favor of a complaint from a lower ranking offender. Even a well-meaning appellate authority will often not have much of a basis to overturn a nonjudicial punishment decision, since there is no record of the proceedings or transcript to review. Article 15(e) does permit that the imposition of certain punishments requires the appeal to first be routed to a judge advocate for "consideration and advice," which may act to check the zeal of a commander determined to use nonjudicial punishment to orchestrate a patently unfair outcome, but otherwise provides little in the way of a record for a lawyer to meaningfully review and evaluate for legal error.⁵³

Should lawyers be more involved in the administration of nonjudicial punishment? Lawyers are not mentioned anywhere in Article 15 or the President's implementing guidance. On the one hand, the absence of lawyers may explain the popularity of the procedure: that this truly is *non-judicial* punishment—a procedure to be enjoyed by military commanders on their own—and based on the numbers, the use of the procedures has proven popular. The perception, whether earned or not, that lawyers

51. The "beyond a reasonable doubt" standard was used in the Army, while the "preponderance of the evidence" standard is used in the Navy, Air Force, and U.S. Coast Guard. *See supra* note 25 (noting the July 2023 Executive Order making the preponderance standard uniform for all services); *see also* Shane Reeves, *The Burden of Proof in Nonjudicial Punishment: Why Beyond a Reasonable Doubt Makes Sense*, ARMY LAW., Nov. 2005, at 28, 28 (advocating for a higher standard for the Army, a recommendation that was ultimately adopted until the preponderance standard was uniformly applied to all services in 2023).

52. UCMJ, art. 15(e), 10 U.S.C. § 815(e) (2018).

53. *Id.* § 815(e)(7).

tend to overly complicate everything, a habit that could severely delay even the simplest cases, may have some credence based on the continuing trajectory of courts-martial to extinction while nonjudicial punishment numbers remain robust. On the other hand, if the animating concern over nonjudicial punishment is the possibility of excessively harsh or lenient treatment, then greater involvement by lawyers who are trained in process and evidence might be thought to be the most proximate solution. For many, the rule of law means rule of lawyers.

Article 15 presents several built-in opportunities (not necessarily requirements) for engagement with lawyers. The first is the decision on whether to handle a case by nonjudicial punishment. The commander concerned may consult with legal counsel about the decision, alternatives, evidence, and seek a recommendation. Second, after the military member is notified that the command intends to seek nonjudicial punishment, he or she can confer with counsel about whether to do so. While this is not mentioned in the statute or President's guidance, service regulations have filled in the gap about what rights the military member is entitled to in this regard. This stage is important because the decision to "turn down" nonjudicial punishment could put the military member in jeopardy of a court-martial, with all the consequences that flow therefrom including a federal conviction, a punitive discharge, and a lengthy period of incarceration.

Can the accused be represented by a lawyer at the nonjudicial punishment? The statute does not mention this but instead describes the accused's right to a "spokesperson" at the hearing. Nothing says the spokesperson cannot be a lawyer, especially if it is a lawyer that the military member procures at his or her own expense and does not result in a delay to the proceedings. While service regulations have filled the gaps on the provision of military lawyers to confer with military members on the decision of whether to accept nonjudicial punishment, none go so far as to require a right to counsel in nonjudicial punishment. Even if military defense lawyers were available and inclined to provide assistance, it would seem like a lower priority because of the perceived lower stakes of nonjudicial punishment compared to the other duties of military defense counsel such as representing military members at courts-martial.

Procedures are curtailed for military members who waive their personal appearance before the nonjudicial punishment authority, but the military member may still submit written matters for consideration.⁵⁴ In such a case, the military member must still be informed of his or her right to remain silent and that any matters submitted may be used against the member in a trial by court-martial.⁵⁵ This point is seemingly unnecessary since the member has already elected for nonjudicial punishment over court-martial. This procedure tends to guard against only some fanciful possibility that in a nonjudicial punishment for, say, tardiness,

54. *MCM 2019*, *supra* note 19, pt. V, ¶ 4.c(2).

55. *Id.*

the military member would seek to excuse his conduct by confessing that he was late because at the time in question he was committing a murder.

Additional procedural guidelines are prescribed by the services in their own regulations. And within service guidelines, commanders have even more discretion to regulate the manner of the proceedings. They may review a paper case or call witnesses. They might require elaborate formalities or have a quick session in front of the commander's desk. The proceedings might occur near the front lines of a military operation or safely back at home station.

Law reform that has transformed nearly every aspect of court-martial procedure in the past decade has largely left Article 15 intact. But there are now signs that the non-uniformity of procedural rights in nonjudicial punishment is problematic. One aspect targeted for reform has to do with inconsistent approaches on the right to counsel that vary across the services. In a recent op-ed, Deputy Secretary of Defense Kathleen Hicks lamented that “[r]acial disparities in the military justice system have been a problem for too long.”⁵⁶ A Defense Department team called the Internal Review Team on Racial Disparities in the Investigative and Military Justice Systems (IRT) issued a report in 2022 examining the problem.⁵⁷ The IRT found that “[s]ignificant racial disparities exist across the investigative and military justice systems.”⁵⁸

Central to the IRT's general conclusions about racial disparities was the finding that while certain racial and ethnic groups were investigated and subject to adverse action more often than others, those disparities evened out in forums with more rigorous due process. That showed in court-martial statistics: Black and other ethnic minorities were more than twice as likely to be subjected to adverse action, but after the protections of the court-martial process the differences evened out and they were no more likely to be convicted compared to others. “Data consistently shows that where more due process is provided and Service members have greater protections, racial disparities decrease.”⁵⁹

The services did not maintain enough data on nonjudicial punishments to discern the extent of racial disparities there. But the IRT saw enough to conclude that nonjudicial punishment also suffered from prevalent disparities. “It is where there are fewer process protections and a lack of consistency in protections accorded across the Services, such as in command investigations, adverse administrative actions, and even nonjudicial punishment, that disparities are more prevalent.”⁶⁰ This problem

56. Kathleen H. Hicks, *Addressing Racial Disparities in the Military Justice System*, THE HILL (Sept. 1, 2021, 7:01 PM), <https://thehill.com/opinion/national-security/570464-addressing-racial-disparities-in-the-military-justice-system/> [https://perma.cc/KN9M-JS2D].

57. U.S. DEP'T DEF., INTERNAL REVIEW TEAM ON RACIAL DISPARITIES IN THE INVESTIGATIVE AND MILITARY JUSTICE SYSTEMS 1 (2022), <https://media.defense.gov/2023/Jun/08/2003238260/-1/-1/1/IRT-REPORT.PDF> [https://perma.cc/94X2-39MT].

58. *Id.* at 20.

59. *Id.* at 22.

60. *Id.*

demonstrates one consequence of Article 15's liberal allowance of service-specific procedures: because each armed service is free to set its own rules on recordkeeping and data collection, it is impossible to gather the data needed to indicate the extent of this problem. Perhaps reforms from the IRT and other groups will cause Congress to demand uniformity in the data collection and recordkeeping of nonjudicial punishment.

The IRT did not propose to abolish nonjudicial punishment or any other such radical remediation measures. Nonjudicial punishment, as with the rest of the court-martial system, is not for now subject to any credible or sustained assault on its overall legitimacy. Instead, the group focused on the positive value of due process that could come from greater involvement of lawyers. In particular, the IRT highlighted the lack of uniformity across the services on whether members are entitled to consult with legal counsel before accepting nonjudicial punishment. Recommendation Six from the IRT is to:

Provide all Service members subject to nonjudicial punishment with a right to counsel. When a Service member is at risk of losing liberty or property through nonjudicial punishment, the member should have an appropriate opportunity to consult legal counsel. Currently, policies and procedures regarding the right to counsel for Service members facing potential nonjudicial punishment vary across the Military Services. Although the law authorizes the Secretary of each Military Department to promulgate regulations implementing Article 15 of the UCMJ, Service members across all Services should be afforded substantially similar legal protections. Different protections and unequal rights to counsel when facing nonjudicial punishment can foster disparate outcomes.⁶¹

A mere consultation with counsel is no panacea, but it is easy to see the impact that this seemingly small change could make. Commanders may temper their zeal and not bring cases that are merely retaliatory or otherwise in bad faith knowing that an attorney will eventually review the case. Accused members can make a fully informed decision about whether to accept or reject nonjudicial punishment based on counsel's assessment of the strengths of the government's case, the likely outcome in a criminal trial (if turn-down is elected) and the possibility of collateral consequences to the military member's career, such as administrative separation or stigmatizing negative consequences which may impact promotions. There is little downside to this IRT recommendation, and much to cheer. Making uniform the right to consult with counsel has the additional impact of making the UCMJ more uniform as it was intended to be. However, this right ought to be implemented in a way that does not wholly shut down the ability of the commander to administer nonjudicial punishment. That may be the case on a ship for naval forces or during a military operation for ground forces. In such a case, the command could

61. *Id.* at 26–27 (footnotes omitted).

seemingly still easily provide the accused member with the opportunity to privately consult with counsel by phone or remote means.

III. PUNISHMENTS

Much of the text of Article 15 is a listing of permissible forms of punishments and their maximum amounts permitted. This part of the statute is clunky and lengthy. Punishments differ depending on whether the accused is an officer or enlisted. The maximum punishment for officers is as follows:

- (A) restriction to certain specified limits, with or without suspension from duty, for not more than 30 consecutive days;
- (B) if imposed by an officer exercising general court-martial jurisdiction or an officer of general or flag rank in command—
 - (i) arrest in quarters for not more than 30 consecutive days;
 - (ii) forfeiture of not more than one-half of one month's pay per month for two months;
 - (iii) restriction to certain specified limits, with or without suspension from duty, for not more than 60 consecutive days;
 - (iv) detention of not more than one-half of one month's pay per month for three months.⁶²

The maximum punishment for enlisted members (listed as “other personnel” in the statute) comes in two tiers. All nonjudicial punishment authorities can issue the following maximum punishments:

- (A) if imposed upon a person attached to or embarked in a vessel, confinement for not more than three consecutive days;
- (B) correctional custody for not more than seven consecutive days;
- (C) forfeiture of not more than seven days' pay;
- (D) reduction to the next inferior pay grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction;
- (E) extra duties, including fatigue or other duties, for not more than 14 consecutive days;
- (F) restriction to certain specified limits, with or without suspension from duty, for not more than 14 consecutive days;
- (G) detention of not more than 14 days' pay.⁶³

Beyond those, nonjudicial punishment authorities who hold the grade equivalent to Major or Lieutenant Commander (pay grade O4) can issue the follow additional punishments to enlisted members:

- (i) the punishment authorized under clause (A) [above];
- (ii) correctional custody for not more than 30 consecutive days;

62. UCMJ, art. 15(b)(1), 10 U.S.C. § 815(b)(1) (2018).

63. *Id.* § 815(b)(2)(A)–(G).

- (iii) forfeiture of not more than one-half of one month's pay per month for two months;
- (iv) reduction to the lowest or any intermediate pay grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction, but an enlisted member in a pay grade above E-4 may not be reduced more than two pay grades;
- (v) extra duties, including fatigue or other duties, for not more than 45 consecutive days;
- (vi) restrictions to certain specified limits, with or without suspension from duty, for not more than 60 consecutive days;
- (vii) detention of not more than one-half of one month's pay per month for three months.

Detention of pay shall be for a stated period of not more than one year but if the offender's term of service expires earlier, the detention shall terminate upon that expiration. No two or more of the punishments of arrest in quarters, confinement, correctional custody, extra duties, and restriction may be combined to run consecutively in the maximum amount imposable for each. Whenever any of those punishments are combined to run consecutively, there must be an apportionment. In addition, forfeiture of pay may not be combined with detention of pay without an apportionment. For the purposes of this subsection, "correctional custody" is the physical restraint of a person during duty or nonduty hours and may include extra duties, fatigue duties, or hard labor. If practicable, correctional custody will not be served in immediate association with persons awaiting trial or held in confinement pursuant to trial by court-martial.⁶⁴

Following the punishment provisions of Article 15(b) are the suspension provisions of Article 15(d). These permit the commander who imposes punishment to, in his or her discretion, impose a punishment but delay its execution for some period of time:

The officer who imposes the punishment authorized in subsection (b), or his successor in command, may, at any time, suspend probationally any part or amount of the unexecuted punishment imposed and may suspend probationally a reduction in grade or a forfeiture imposed under subsection (b), whether or not executed. In addition, he may, at any time, remit or mitigate any part or amount of the unexecuted punishment imposed and may set aside in whole or in part the punishment, whether executed or unexecuted, and restore all rights, privileges, and property affected. He may also mitigate reduction in grade to forfeiture or detention of pay. When mitigating—

- (1) arrest in quarters to restriction;

64. *Id.* § 815(b)(2)(H).

- (2) confinement to correctional custody;
- (3) correctional custody or confinement to extra duties or restriction, or both; or
- (4) extra duties to restriction; the mitigated punishment shall not be for a greater period than the punishment mitigated. When mitigating forfeiture of pay to detention of pay, the amount of the detention shall not be greater than the amount of the forfeiture. When mitigating reduction in grade to forfeiture or detention of pay, the amount of the forfeiture or detention shall not be greater than the amount that could have been imposed initially under this article by the officer who imposed the punishment mitigated.⁶⁵

It is unclear why detailed and specific suspension provisions are necessary. Such suspension measures could be viewed as part of the commander's inherent powers. It is puzzling to see the statute go into great detail on suspension provisions when it has completely left out what would seemingly be other important provisions, such as the procedure to be followed or the standard of proof. There are a couple possible explanations for the detail given to suspension procedures. First, the explication of suspension procedures might usefully serve to remind military commanders to exercise, or at least consider, using their suspension powers. Though to this end, language encouraging commanders to consider suspension would have been more useful than the current argle-bargle found in Article 15(d). A more quotidian explanation is that the inclusion is technical, to guide military administrators and finance offices to ensure that military pay is correctly disbursed or withheld when those are in play in Article 15 punishments.

As for the authorized punishments, one cannot help but notice the contrast with earlier harsh measures. Some of the authorized punishments, such as reduction in grade, extra duty, admonitions, reprimands, forfeitures of pay, or restriction to within certain limits, sound more like "mere" administrative sanctions than punishment. Some of the sanctions, such as correctional custody and arrest in quarters, sound like more traditional punishments that would be administered by a judicial tribunal. The former sanctions—the administrative-sounding ones—have proven very popular and comprise the lion's share of punishments administered. Though it is hard to pinpoint statistics because, again, the services were given the prerogative to handle data gathering and record-keeping as they each saw fit. The latter sanctions have proven to be vanishingly rare. Once again, statistics are rare. Anecdotally, based on my two decades in uniform in the Army and several years following with continued involvement in the military justice system, I have seen hundreds of cases of nonjudicial punishment but none that extended beyond mere curiosity about imposing sentences of correctional custody or arrest in

65. *Id.* § 815(d).

quarters.⁶⁶ This may be because service regulations on confinement and custody sentences have proven burdensome in administration or support requirements. It may also be that when commanders believe that an offense warrants confinement, they forgo consideration of nonjudicial punishment from the beginning and instead pursue courts-martial.

The limits of punishments are relevant to evaluating the overall fairness, and even the constitutionality, of Article 15. Fairness and constitutionality can be thought of together through the lens of the Fifth Amendment's Due Process Clause. Specifically, through the doctrine of procedural due process, which first inquires whether there involves a deprivation of life, liberty, or property.⁶⁷ The prescribed punishments in Article 15 do not include any deprivation of life but do include modest deprivations of liberty (mainly, short-term restrictions) and property (loss of pay either directly by forfeiture, or indirectly by loss of rank for enlisted members). The procedural due process inquiry next considers what process is due. For example, a loss of life by the death penalty means that the process that is due is far more exacting than the process due before a government-issued library card can be revoked. That is because the risk of an erroneous deprivation is far higher with the death penalty than with the library card.

In that way, it is inadequate to merely assess the procedures of nonjudicial punishment as more deficient than the lawyered and formalized procedures of courts-martial. The punishments available at nonjudicial punishment sound in administrative sanctions, especially after the extinction of the last vestige of an unusual punishment, bread and water. Indeed, the most common punishments such as restriction and reduction in grade, can be issued administratively as well as by nonjudicial punishment. While the loss of pay or temporary restriction may be very important to the military member punished, the deprivations of NJP are vastly smaller than the felony conviction and severe penal sanctions administrable by court-martial. The relatively light punishments at Article 15 help to frame its limited procedural rights as constitutionally tolerable.

As has been discussed, the most tortuous mechanisms of nonjudicial punishment are relics of a distant pass. Except for one that survived into the modern era: confinement on a ship on bread and water. While nearly all aspects of court-martial procedure were upended by the Military Justice Act of 2016,⁶⁸ Article 15 was left mostly undisturbed, with

66. The U.S. Supreme Court has described the Article 15 punishment of correctional custody as "not necessarily the same as confinement." *Middendorf v. Henry*, 425 U.S. 25, 32 n.9 (1976).

67. *See generally* *Mathews v. Eldridge*, 424 U.S. 319 (1976) (holding that the constitutional sufficiency of administrative procedure requires a balancing of the individual interest at stake, the risk of error through the procedures and probable value of additional procedural safeguards, the costs and administrative burden of the additional process, and the interests of the government in efficient adjudication).

68. Andrew Tilghman, *Defense Officials Propose Biggest UCMJ Changes in Decades*, MIL. TIMES (Dec. 29, 2015), <https://www.militarytimes.com/2015/12/29/>

just minor corrections such as changes to capitalization and additions or subtractions of em dashes. There is one punishment that is noteworthy for its recent deletion: the words “on bread and water or diminished rations.”⁶⁹ This was a valid punishment until January 1, 2019, but is now deleted from the statute and Part V of the *Manual for Courts-Martial*.

Often called by its shorthand “bread and water,” this punishment was permitted with nonjudicial punishments of correctional custody and confinement, to include confinement on a ship.⁷⁰ Many in the Navy had jealously guarded this punishment from deletion in years before the Military Justice Act of 2016.⁷¹ The thinking, it goes, is that service on a ship is already a form of confinement and difficulty. It would perhaps be seen as a reward to an errant sailor to permit mere “confinement” on a ship without the need to perform arduous duties. “Bread and water” offered a way to make the punishment a real punishment by inflicting pain. Although pain is not a listed purpose, it is thought that a diet of only bread and water would invoke severe constipation and gastrointestinal distress. That purpose can be discerned through the old Article 15’s

defense-officials-propose-biggest-ucmj-changes-in-decades/ [https://perma.cc/J35A-QP5V].

69. See John Ismay, *The End of the Navy’s Bread-and-Water Punishment*, N.Y. TIMES (Jan. 4, 2019), <https://www.nytimes.com/2019/01/04/magazine/navys-bread-water-punishment-newsletter.html> [https://perma.cc/LHG3-TEV9] (“In 2019, one of the oldest and most archaic punishments in the United States military—three days’ confinement on bread and water—will be no more.”); see also Dave Philipps, *No More Bread and Water: U.S. Navy Scraps an Age-Old Penalty*, N.Y. TIMES (Dec. 25, 2018), <https://www.nytimes.com/2018/12/25/us/navy-bread-water-punishment-penalty.html> [https://perma.cc/F9NM-XGPH]; Scott Wyland, *Navy to Scrap Bread-and-Water Confinement*, AM. MIL. NEWS (Jan. 2, 2019), <https://americanmilitarynews.com/2019/01/navy-to-scrap-bread-and-water-confinement/> [https://perma.cc/FN8Z-AYQ7] (“The age-old naval punishment of jailing junior sailors for three days with just bread and water soon will go the way of flogging and keelhauling.”); Exec. Order No. 13,825, 83 Fed. Reg. 9889 (Mar. 1, 2018) (approving the 2018 amendments to the *Manual for Courts-Martial*). These amendments originated in the National Defense Authorization Act for Fiscal Year 2017. See National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5141, 130 Stat. 2000, 2897 (2016) (codified as amended at 10 U.S.C. § 815(b)(1)) (striking “on bread and water or diminished rations” language).

70. Compare UCMJ, art. 15(b)(2)(A), 10 U.S.C. § 815(b)(2)(A) (2016) (amended 2019) (listing bread and water as a punishment), with UCMJ, art. 15(b)(2)(A), 10 U.S.C. § 815(b)(2)(A) (2019) (deleting bread and water as an authorized punishment).

71. See, e.g., Kevin Eyer, *Understand Bread & Water Punishment*, U.S. NAVAL INST.: PROCEEDINGS, Dec. 2017, <https://www.usni.org/magazines/proceedings/2017/december/understand-bread-water-punishment> [https://perma.cc/ER7A-K47B] (“Regardless, B&W [bread and water] may be an old punishment, but it is not a rare one in the Navy. It is awarded throughout the fleet on a regular basis. More important, it is not considered by those who have, or have had, Captain’s Mast authority to be a particularly harsh punishment. . . . The bottom line is that B&W is considered to be one of the more humane punishments, particularly for a married Sailor. Other punishments have the unintended consequence of also punishing the family. It also should be understood that B&W usually is awarded as a minor punishment to get the attention of a recalcitrant, but potentially good Sailor.”).

proviso about the conditions under which the punishment of bread and water could be administered:

The ration to be furnished a person undergoing a punishment of confinement on bread and water or diminished rations is that specified by the authority charged with the administration of the punishment, but the ration may not consist solely of bread and water unless this punishment has been specifically imposed. When punishment of confinement on bread and water or diminished rations is imposed, a signed certificate of a medical officer containing an opinion that no serious injury to the health of the person to be confined will be caused by that punishment, must be obtained before the punishment is executed.⁷²

No other nonjudicial punishment requires medical pre-approval. This punishment thus permitted severe discomfort up to the point of a “serious injury to the health.”⁷³

IV. THE “TURN-DOWN” RIGHT

One aspect of Article 15 merits special attention: the accused’s right to refuse nonjudicial punishment and instead “demand[] trial by court-martial in lieu of such punishment.”⁷⁴ This right is seemingly unique to the military, and frankly hard to fathom in other contexts. For example, a person who receives a municipal citation for a parking or speeding violation may address or contest the allegations within the confines of the venue at issue, such as a traffic or misdemeanor court. It would make little sense for someone facing such a violation to demand to be tried at a felony court. Such a scenario would seem like a losing proposition for all involved: the accused would increase his or her jeopardy from a small fine to the potential of a criminal conviction and much steeper sentences, including incarceration; while the state would need to dedicate personnel and financial resources to the full prosecution of a case that at the outset it determined was more appropriately addressed in a lower-level forum.

And yet the turn-down “right” has persisted in Article 15(a). It is not just a bug but a feature of the system; a reason offered by many for the legitimacy of nonjudicial punishment. A military member who feels that he or she will be treated unfairly in nonjudicial punishment, whether because of a lack of evidentiary rules, a biased commander, or a perceived lack of meaningful chance to assert a defense can rest assured that he or she can opt out of the crude procedure and opt in to the more enlightened venue of a court-martial.⁷⁵

72. *Manual for Courts-Martial, United States* pt. V (2016 ed.) [hereinafter *MCM 2016*].

73. *Id.*

74. UCMJ, art. 15(a), 10 U.S.C. § 815(a).

75. The 1970s were a heyday for scholarship on the turn-down predicament. See Note, *The Unconstitutional Burden of Article 15*, 82 *YALE L.J.* 1481 (1973) (arguing

Well, not exactly “opt in.” When a military member exercises his or her right to decline nonjudicial punishment and demand court-martial, the commander then has two options: acquiesce or decline. Each of these options poses problems. To acquiesce and pursue a court-martial is to invest substantial judicial resources into an utterly nonjudicial matter, one that military authorities at the outset determined to be a “minor offense.” To decline the request is to lose face: military authorities will lose credibility when they seek to impose nonjudicial punishment but are unable or unwilling to back it up with a court-martial. The offender who declines the court-martial is calling the bluff of the commander, and it would erode the credibility of the commander to have to back down because he or she was unable or unwilling to continue the pursuit of discipline with a court-martial. To elevate the status of an offender and delegitimize the command hardly seems like a useful way to maintain order and discipline in the ranks. And the offender certainly stands to lose a great deal from exercising his or her “right”: the potential for a conviction (and stigma attaching thereto) and a criminal sentence in response to a “minor offense” tends to exaggerate criminality and give a lifelong stigma as a criminal to one who may have merely been just undisciplined.

While Article 32 of the UCMJ permits the turn-down right, states and territories have been split in applying this in their own state codes of military justice. The numbers are nearly evenly split: twenty-eight states and territories allow accused military members to decline nonjudicial punishment and demand court-martial; twenty-six others do not, meaning that military members must accept nonjudicial punishment.⁷⁶

that military members are in a lose-lose situation when choosing between nonjudicial punishment and the turn-down); Edward J. Imwinkelried & Francis A. Gilligan, *The Unconstitutional Burden of Article 15: A Rebuttal*, 83 YALE L.J. 534 (1974) (arguing that the regime of a military member’s choice between nonjudicial punishment and elective court-martial is constitutionally sound).

76. Twenty-eight states and territories follow the UCMJ nonjudicial punishment provision (10 U.S.C. § 815(a)) and permit military members to decline nonjudicial punishment and demand court-martial instead. See ALA. CODE § 31-2A-15(h) (2023); ARIZ. REV. STAT. ANN. § 26-1015(A) (2023); ARK. CODE ANN. § 12-64-301(c) (2023); CAL. MIL. & VET. CODE § 102 (West 2023); CONN. GEN. STAT. § 27-154(a) (2023); DEL. CODE ANN. tit. 20, § 163 (West 2023); D.C. CODE § 49-804 (2023); 10 GUAM CODE ANN. § 63715(b) (2022); IDAHO CODE § 46-1102 (2023); IOWA CODE § 29B.14(1) (2023); KAN. STAT. ANN. § 48-2301(f) (2023); KY. REV. STAT. ANN. § 35.070(6) (West 2023); LA. STAT. ANN. § 29:115(A) (2023); MD. CODE ANN., PUB. SAFETY § 13A-301(f)(1)–(3) (West 2023); MASS. GEN. LAWS ch. 33A, Art. 15(f) (2023); MINN. STAT. § 192A.0851(f) (2023); MONT. CODE ANN. § 10-1-104(2) (2023); N.J. STAT. ANN. § 38A:1-6 (West 2023); N.M. STAT. ANN. § 20-12-11 (2023); OKLA. STAT. tit. 44, § 815(I) (2023); P.R. LAWS ANN. tit. 25, § 2401 (2023); S.C. CODE ANN. § 25-1-2520(1) (2023); S.D. CODIFIED LAWS § 33-10-55 (2023); UTAH CODE ANN. § 39A-5-302(2)(a) (West 2023); VT. STAT. ANN. tit. 20, § 1156 (2023); V.I. CODE ANN. tit. 23, § 1551 (2023); WASH. REV. CODE § 38.38.132(1) (2023); W. VA. CODE § 15-1E-15(f) (2023). Twenty-six other states and territories do not extend this right, meaning that a military member must accept nonjudicial punishment. See ALASKA STAT. § 26.05.500(a) (2023); COLO. REV. STAT. § 28-3.1-114(5) (2023); FLA. STAT. § 250.35(13)(d) (2023); GA. CODE ANN. § 38-2-1015(l) (2023); HAW. REV. STAT. § 124B-21(f) (2023); ILL. ADMIN. CODE tit. 95, § 400.1205 (2023); IND. CODE. § 10-16-9-6 (2023); ME. STAT. tit. 37-B,

There are several reasons why nearly half of the U.S. jurisdictions do not follow the UCMJ, which is often the default template for states when crafting their own codes of military justice. First, some states may not conduct courts-martial, or can only convene them exceptionally, with great difficulty and expense. It would make no sense to give the right to offenders to demand a court-martial that cannot be convened. Second, many states offer other avenues of relief for military members who perceive they were treated unfairly in nonjudicial punishment, including petitions to the governor. Finally, several states may have decided that matters that were already deemed to be “minor offenses” suitable for nonjudicial punishment would be a waste of judicial resources for full-fledged courts-martial, which may correctly be deemed as solemn undertakings reserved only for the adjudication of major offenses.

The turn-down right from UCMJ Article 15(a) has one caveat: it does not apply to a “member attached to or embarked in a vessel.”⁷⁷ This is commonly called the vessel exception. Members who are attached to or embarked on a vessel must accept nonjudicial punishment and do not enjoy the “right” to demand court-martial. The President’s implementation of nonjudicial punishment procedure, Part V of the *Manual for Courts-Martial* (2019), explains that a person is “attached to” or “embarked in” a vessel, if the Service member is “assigned or attached to the vessel, is on board for passage, or is assigned or attached to an embarked . . . unit.”⁷⁸

The definition of “vessel” matters greatly here. With the advent of the U.S. Space Force, one wonders whether the vessel exception would apply to members embarked on a space shuttle during an interplanetary mission. As it turns out, it is more limited to watercraft, as defined in the U.S. Code. “The word ‘vessel’ includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.”⁷⁹ The vessel exception was an important Navy prerogative during the formation of the UCMJ,⁸⁰ and in application it is most commonly at issue in a Navy context: for Sailors, Marines, Coast Guard members when under the Department of Defense, or others who are attached to or embarked on a vessel.

The thinking behind the vessel exception is that a ship may undertake a mission for months at sea. Ships may not have all the niceties

§ 415-A(3) (2023); MICH. COMP. LAWS § 32.1015(7) (2023); MISS. CODE ANN. § 33-13-31(5) (2023); MO. REV. STAT. § 40.043(4) (2023); NEB. REV. STAT. § 55-416(5) (2023); NEV. REV. STAT. § 412.2879 (2023); N.H. REV. STAT. ANN. § 110-B:40 (2023); N.Y. MIL. LAW § 130.15(d) (McKinney 2023); N.C. GEN. STAT. § 127A-51 (2023); N.D. CENT. CODE § 37-01-03 (2023); OHIO REV. CODE ANN. § 5924.15(F) (West 2023); OR. REV. STAT. §§ 396.015–399.280 (2023); 53 PA. CONS. STAT. § 5301(h) (2023); 30 R.I. GEN. LAWS § 30-13-15(e) (2023); TENN. CODE ANN. § 58-1-101–119 (2023); TEX. GOV’T CODE ANN. § 432.015(g) (West 2023); VA. CODE ANN. § 44-40.01 (2023); WIS. STAT. § 322.015(9) (2023); WYO. STAT. ANN. § 19-12-110 (2023).

77. UCMJ, art. 15(a), 10 U.S.C. § 815(a).

78. *MCM 2019*, *supra* note 19, pt. V, ¶ 3.

79. 1 U.S.C. § 3.

80. GENEROUS, *supra* note 6, at 123.

of full-fledged military justice systems that are available on land such as courtrooms, judges, defense counsel, or prosecutors. In such a circumstance, the command may seek nonjudicial punishment against minor military offenders. But if those members exercise their right to court-martial, it effectively ties the hands of ship commanders who cannot convene courts while missions are underway. That impunity may allow indiscipline or minor misconduct to seep further through the ranks. In such a circumstance, it makes little sense to give offenders a veto over whether they should face punishment for their misconduct.⁸¹

The vessel exception might be subjected to abuse when it is used to deny the turn-down right to members who are not actually at sea, as it was intended, and are instead only technically attached to or embarked on a dockside vessel. Such abuse of the procedure seemed present in a recent case against a Navy commanding officer and executive officer who had nonjudicial punishment brought against them for an alleged poor command climate while with the destroyer USS James E. Williams:

[Commander Ed] Handley argues he and [ex-CO Commander Curtis] Calloway requested court-martial instead of submitting to NJP, but were denied. The Navy claims he was not allowed to request court-martial because he was attached to a sea-going command.

But Handley counters he was not receiving sea pay and was temporarily reassigned, therefore he should have been eligible; he was in the commanding officer training pipeline until his reassignment in September.

“I had 10 former senior JAG lawyers review this and each and every lawyer said we were eligible for the court-martial,” he wrote. “It is worthy to note, in court-martial, the rules of evidence apply, but in NJP proceedings the rules of evidence do not apply. By taking us to NJP, [Squadron Commodore Captain Fred] Pyle did not have to have tangible evidence.”⁸²

The vessel exception’s potential for abuse has recently caught the attention of military justice reformers, who for the most part have otherwise directed nearly all their attention to reform of court-martial procedure. The IRT report from 2022 highlighted the perceived problem:

81. See generally Dwight H. Sullivan, *Overhauling the Vessel Exception*, 43 NAVAL L. REV. 57 (1996) (discussing the background and purposes of the vessel exception and cautioning against how it might be abused).

82. Eugene R. Fidell, *Is the Navy Abusing the “Vessel Exception”?*, GLOB. MIL. JUST. REFORM BLOG (Mar. 7, 2015, 11:30 PM) (alterations in original), <https://globalmjrreform.blogspot.com/2015/03/is-navy-abusing-vessel-exception.html> [<https://perma.cc/8BCN-L6FF>]; David B. Larter, *Fired Destroyer XO Blasts ‘Deeply Flawed’ Navy Report*, NAVY TIMES (Mar. 7, 2015), <https://www.navytimes.com/news/your-navy/2015/03/07/fired-destroyer-xo-blasts-deeply-flawed-navy-report/> [<https://perma.cc/7L5K-9BFQ>].

The IRT recommends limiting the scope of the vessel exception so that it does not apply to ships that are in “dry dock” or long-term overhaul. The IRT found that when a ship is not afloat, availability of counsel and the ability to pursue the right to a trial by court-martial generally is not limited by the austerity of the open seas or the exigences of active operations. The IRT also recommends a review of the application of the vessel exception to a ship that is underway. In all but the most austere operational environments, modern technology could provide Service members an opportunity to exercise their rights to demand trial by court-martial and the ability to consult with counsel, without undue mission disruption. In sum, the IRT recommends that DoD proscribe invocation of the vessel exception for nonjudicial punishment imposed ashore, and allow its application only when operationally necessary, taking into account modern communications capabilities.⁸³

A reform of the vessel exception to reduce its potential for arbitrariness and abuse would seem welcome. It makes little sense to deny to military members their right while they are only administratively assigned to a ship or while the ship is in dry dock or long-term overhaul; gamesmanship in such a circumstance is contrary to the original intent behind the vessel exception.⁸⁴ But the IRT recommendation seems to miss the point about a ship that is “underway” (meaning in the water and not dockside). The IRT focuses on the ease with which a military member could “exercise their rights to demand trial by court-martial” and “consult with counsel.”⁸⁵ That much is true: there is no right to an in-person consultation with defense counsel, and members who are at sea could meaningfully have that consultation.

83. U.S. DEP’T DEF., *supra* note 57, at 27–28. This recommendation was endorsed by Deputy Secretary of Defense Kathleen Hicks on June 8, 2023. See Memorandum from Deputy Sec’y Def. Kathleen Hicks to Senior Pentagon Leadership, Commanders of the Combatant Commands Def. Agency, & DoD Field Activity Dirs. on Addressing Recommendations from the Internal Review Team on Racial Disparities in the Investigative and Military Justice Systems (June 8, 2023), <https://media.defense.gov/2023/Jun/08/2003238271/-1/-1/1/DEPUTY-SECRETARY-OF-DEFENSE-MEMORANDUM-ON-ADDRESSING-RECOMMENDATIONS-FROM-THE-INTERNAL-REVIEW-TEAM-ON-RACIAL-DISPARITIES-IN-THE-INVESTIGATIVE-AND-MILITARY-JUSTICE-SYSTEMS.PDF> [https://perma.cc/ZYQ8-4ECZ].

84. Military justice scholar Eugene Fidell points out that the background documents underlying the 1963 amendment to the *Manual for Courts-Martial* make clear that the vessel exception was not intended for application in dockside cases. See Fidell, *supra* note 82. Fidell cites a memorandum prepared by Office of Legal Counsel Assistant Attorney General Norbert Schlei that physically accompanied the Executive Order submitted to President John F. Kennedy for signature. Fidell argues that the Navy should honor its 1963 representations and abandon its unjustifiably expansive view of the scope of the vessel exception. See *id.*

85. U.S. DEP’T DEF., *supra* note 57, at 28.

But the right to consult with counsel and make an election of nonjudicial punishment or court-martial is only half of the equation. The other consideration is whether a court-martial can feasibly be conducted. That is the purpose of the vessel exception to begin with: to prevent impunity of an offender who demands court-martial while at sea where courts cannot be conducted. While the IRT recommendation did not consider the feasibility of courts at sea, its saving grace is the inclusion of “operationally necessary.” This will seem to permit the vessel exception to survive, as is warranted, while advancing reforms to curtail abuses of shoreside gamesmanship of the vessel exception.

The IRT’s mention of occasions when it is “operationally necessary” to curtail a member’s turn-down right is helpful for evaluating contexts other than ships at sea. The sea services may be justified in claiming that abrogation of the turn-down right is necessary where courts cannot be conducted, but there may be other circumstances where the same thinking applies on land. For example, in military operations such as combat, counterinsurgency, and peacekeeping missions, ground forces may find themselves operating in austere environments without a full array of life support services—support that includes courtrooms, judges, expert witnesses, and counsel for the prosecution and defense. The difficulty, admittedly, lies in how to delineate a clear standard of when mandatory nonjudicial punishment should be triggered due to operational necessity. One way could be a solemn attestation by the commanding officer who desires to impose the punishment that the conduct of a court-martial is not possible due to operational reasons, along with a statement of factual reasons for why that is so. If that sounds too permissive or subject to abuse, then a remedy can be installed to deter gamesmanship, such as permitting military members to petition for claims or correction of their military records if they feel they were unfairly aggrieved.

With an unrestrained turndown right, military members deployed in austere environments may find it to their great advantage to turn down any nonjudicial punishment, knowing that the commander’s hands are tied. A Marine judge advocate with experience both on vessels and combat deployments noted this disparity with the vessel exception:

A sailor deployed on the USS Arleigh Burke for local operations for two weeks off the coast of Virginia (as routine as it gets for the Navy) cannot refuse NJP, but a Marine in an infantry battalion in Al Qaim [Iraq], 150 miles from the nearest trial counsel or military judge, can refuse NJP and tie the hands of the commander to administer discipline.⁸⁶

86. Franklin D. Rosenblatt, *Non-Deployable: The Court-Martial System in Combat from 2001 to 2009*, 44 CREIGHTON L. REV. 1045, 1087 (2011) (alteration in original) (quoting LIEUTENANT COLONEL R. G. BRACKNELL, U.S. MARINE CORPS, AFTER ACTION REPORT (“AAR”), OPERATION IRAQI FREEDOM (“OIF”) 11 (2008)).

Other reports from Iraq and Afghanistan indicate that military defense counsel would frequently advise clients to turn down nonjudicial punishment, not because of the merit or lack of merit from the charges, but simply because the military would be unable to convene courts in an austere environment.⁸⁷ For the offending military member, the worst case scenario with a turn-down would be a return ticket stateside away from the dangers of combat to possibly face a court-martial.

All that said, the turn-down “right” makes for great literature. In 1850, Herman Melville wrote about the unfairness of nonjudicial punishment in the English Navy:

In the English Navy, it is said, they had a law which authorised the sailor to appeal, if he chose, from the decision of the Captain—even in a comparatively trivial case—to the higher tribunal of a court-martial. It was an English seaman who related this to me. When I said that such a law must be a fatal clog to the exercise of the penal power in the Captain, he, in substance, told me the following story.

A top-man guilty of drunkenness being sent to the gratings, and the scourge about to be inflicted, he turned round and demanded a court-martial. The Captain smiled, and ordered him to be taken down and put into the “brig[.]” There he was kept in irons some weeks, when, despairing of being liberated, he offered to compromise at two dozen lashes. “Sick of your bargain, then, are you?” said the Captain. “No, no! a court-martial you demanded, and a court-martial you shall have!” Being at last tried before the bar of quarter-deck officers, he was condemned to two hundred lashes. What for? [F]or his having been drunk? No! [F]or his having had the insolence to appeal from an authority, in maintaining which the men who tried and condemned him had so strong a sympathetic interest.

Whether this story be wholly true or not, or whether the particular law involved prevails, or ever did prevail, in the English Navy, the thing, nevertheless, illustrates the ideas that man-of-war’s-men themselves have touching the tribunals in question.

. . . .

In final reference to all that has been said in previous chapters touching the severity and unusualness of the laws of the American Navy, and the large authority vested in its commanding officers, be it here observed, that White-Jacket is not unaware of the fact, that the responsibility of an officer commanding at sea—whether in the merchant service or the national marine—is unparalleled by that of any other relation in which man may stand to man. Nor is he unmindful that both wisdom and humanity dictate that, from

87. *See id.*

the peculiarity of his position, a sea-officer in command should be clothed with a degree of authority and discretion inadmissible in any master ashore. But, at the same time, these principles—recognised by all writers on maritime law—have undoubtedly furnished warrant for clothing modern sea-commanders and naval courts-martial with powers which exceed the due limits of reason and necessity. Nor is this the only instance where right and salutary principles, in themselves almost self-evident and infallible, have been advanced in justification of things, which in themselves are just as self-evidently wrong and pernicious.

. . . .

. . . [I]t cannot admit of a reasonable doubt, in any unbiased mind conversant with the interior life of a man-of-war, that most of the sailor iniquities practiced therein are indirectly to be ascribed to the morally debasing effects of the unjust, despotic, and degrading laws under which the man-of-war's-man lives.⁸⁸

Interestingly, Melville's hapless British sailor, despite being embarked on a vessel, was still able to exercise his "right" to turn down nonjudicial punishment. Under the modern American regime, the vessel exception would apply and the sailor would be forced to accept whatever nonjudicial punishment the Captain deemed appropriate.

V. NONJUDICIAL PUNISHMENT AND INTERNATIONAL LAW

This Part considers the purposes of summary discipline through three international law disciplines: international human rights law, international humanitarian law, and international criminal law. Each has a different focus.

International human rights law focuses on the rights of the individual soldier who faces military trial and whether those procedures comport with fair trial guarantees. These guarantees are expressed in Article 14

88. HERMAN MELVILLE, *WHITE JACKET; OR THE WORLD IN A MAN-OF-WAR* 282–86 (1850). Melville was widely denounced by British Navy leaders and their supporters after this passage was published.

[T]he author an unalloyed villain, has given us through his talents & lies, the worst stab yet—one that we will reel under, if it do not swamp us— . . . you can conceive an educated, gifted, unprincipled man, brought by his vices to a whaler & a man of war, ascribing his condition to any thing and any body but his own worthless self, with his intellect keen and his sense of depredation complete—a precious fellow this to [word illegible] of a system or to speak for sailors—his lies are plausible difficult often to meet & yet more false, in the inference they produce, than if they were of the most barefaced description—the time was propitious for his making money too. Letter from Rear Admiral Samuel F. Du Pont to Sen. [sic; Mr. Davis was not a Senator. He served in the House of Representatives from 1855 to 1865.] Henry Winter Davis (Apr. 17, 1850) (alterations in original), *in* JAMES E. VALLE, *ROCKS & SHOALS: ORDER AND DISCIPLINE IN THE OLD NAVY 1800–1861*, at 253–54 (1980).

of the International Covenant for Civil and Political Rights (ICCPR). In 2018, an expert group analyzed the international human rights aspects of military justice, and in particular with how military justice proceedings comported with ICCPR Article 14.⁸⁹ Following that effort, another expert group convened the following year to specifically analyze international human rights aspects of military summary discipline. This group developed eighteen principles called the 2019 Yale Draft Principles for Military Summary Proceedings.⁹⁰ Called the Yale Draft for short, this product accepts the legitimacy of nonjudicial punishment under international human rights law, in most circumstances:

The case for summary disciplinary action is strongest when that power is exercised promptly and for minor misconduct. It should not involve lengthy legal processes, complicated points of law or extensive evidence. If significant punishment is warranted, fine points of law are likely to be presented, or the evidence is complex, the matter should be dealt with in a forum that complies with Article 14 of the *International Covenant on Civil and Political Rights*.⁹¹

The principles contained in the Yale Draft include broad guidelines similar to what is already found in the U.S. formulation of Article 15. The Yale Draft states that summary proceedings, in order to be compliant with human rights law, must be used only as a military disciplinary tool and never against civilians (Principle 2); advance notice of summary discipline maximum penalties (Principle 4); a prohibition on “cruel, unusual, inhuman, degrading, or disproportionate” (Principle 5); non-use when true penal consequences are at stake, such as a deprivation of liberty or substantial financial penalty (Principle 8); presumption of innocence (Principles 9 and 10); basic procedural rights (Principles 11 and 12); the right to consult with an attorney (to the extent practicable) (Principle 13); appeal (Principle 14); and status of the proceedings as not a criminal trial (Principle 16).⁹²

International humanitarian law is concerned with the conduct of armed forces in armed conflict, including the need for military forces to be able to control and swiftly discipline their members. Violations of the

89. YALE L. SCH. DECAUX PRINCIPLES WORKSHOP, PRINCIPLES GOVERNING THE ADMINISTRATION OF JUSTICE THROUGH MILITARY TRIBUNALS (2018), <https://www.court-martial-ucmj.com/files/2018/06/The-Yale-Draft.pdf> [https://perma.cc/78PM-2QRW]. The author was a participant in this 2018 workshop (Yale Draft on Decaux Principles) as well as the 2019 workshop (Yale Draft Principles for Military Summary Proceedings).

90. YALE L. SCH., 2019 YALE DRAFT PRINCIPLES FOR MILITARY SUMMARY PROCEEDINGS (2019), https://puc.overheid.nl/PUC/Handlers/DownloadBijlage.ashx?pucid=PUC_311298_11_1&bestand=Bijlage_bij_bijdrage_Tijd_om_het_militair_tuchtrecht_te_evalueren.pdf&bestandsnaam=Bijlage+bij+bijdrage+Tijd+om+het+militair+tuchtre.pdf [perma link unavailable].

91. *Id.* at 1 (footnote omitted). The document, however, refers to summary disciplinary proceedings as judicial rather than administrative.

92. *Id.* at 2–4.

laws of war are forbidden by international humanitarian law's customs and treaties; in particular, the four 1949 Geneva Conventions and their later additional protocols. Common to the four Geneva Conventions of 1949 (though the number differs by convention) is the signing state's obligation to repress abuses and infractions of their Convention obligations. In each of the four Geneva Conventions, this common language follows the header "Penal Sanctions":

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.⁹³

The mandate from these 1949 Geneva Conventions that state parties must provide effective penal sanctions for military members in breach of their obligations under international humanitarian law seems to infer that internal disciplinary measures are authorized, encouraged even. That is especially so where the disciplinary measures are the only meaningful ways to address minor misconduct before it snowballs into something worse such as grave breaches. This possibility would seem

93. See Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field art. 49, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 50, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 129, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention IV, *supra* note 34, art. 146. This language is common to all four of the Geneva Conventions except that the words "Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949" are replaced by "the present convention" in Geneva Convention III.

likely in austere operational circumstances such as on a ship or during a ground combat or peacekeeping mission where access to courts is impracticable. In such cases, nonjudicial punishment will often be a preferred alternative to sending offenders back to their home countries—a measure that may be perceived by victims and affected communities as exoneration for bad acts.

While the 1949 Geneva Conventions merely imply support for nonjudicial punishment, the 1977 First Additional Protocol more directly condones the measures. Article 87(3) requires the following of military commanders:

The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.⁹⁴

This new passage shows the central importance to armed forces of being able to control their own members. The Geneva Conventions involve not only penal sanctions for grave breaches but also disciplinary control of their own members. “An armed force without discipline is nothing more than a mob. An effective armed force must be a disciplined force, able to efficiently carry out lawful orders in a collective purpose towards the accomplishment of the military mission.”⁹⁵

As it relates to considering the role of nonjudicial punishment, the aim of international criminal law is similar to that of international humanitarian law. A subset of international criminal law has to do with accountability for the four core international crimes, also known as “atrocities crimes”—genocide, crimes against humanity, war crimes, and aggression.⁹⁶ While crimes of such gravity would seemingly never be appropriate in a forum intended for minor offenses and permitting only minor sanctions, nonjudicial punishment may nevertheless play a useful role in ensuring that armed forces will remain disciplined and professional. Most members of the armed forces are not likely to commit grave breaches of the Geneva Conventions right off the bat; it is likely to be only after repeated bouts of indiscipline that go unchecked that minor transgressions grow into tendencies to commit major ones. Nonjudicial punishment could usefully nip in the bud minor transgressions before they evolve into worse behavior.

94. *See generally* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 87, June 8, 1977, 1125 U.N.T.S. 3.

95. EUGENE R. FIDELL, BRENNER M. FISSELL, FRANKLIN D. ROSENBLATT & DWIGHT H. SULLIVAN, *MILITARY JUSTICE: CASES AND MATERIALS* 605 (4th ed. 2023).

96. *See* Rome Statute of the International Criminal Court arts. 6, 7, 8 & 8 *bis*, A/CONF.183/9, at 3–7 (July 17, 1998).

Commanders may be liable for the acts of their subordinates under a theory of command responsibility. The flagship statute for international criminal law, the Rome Statute, defines the responsibility of military commanders for the acts of their subordinates in Article 28(a):

A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

- (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
- (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.⁹⁷

It is thus imperative that military forces possess adequate measures to prevent, dissuade, and deter members from misconduct. In this circumstance, nonjudicial punishment may be a useful tool for military commanders, especially during military deployments where normal courts and even courts-martial are not practicable or functional. The practical importance of nonjudicial punishment during military operations goes a long way to explain why so many national militaries, including those which fastidiously adhere to international human rights norms, have maintained systems of nonjudicial punishment.

Minding this, a persuasive case can be made that the real international law concern with nonjudicial punishment is the *restriction* on its exercise. For example, the turn-down right, widely heralded by skeptics of nonjudicial punishment, effectively serves to tie the hands of armed forces who seek to administer discipline when it is needed most. The turn-down right and other such well-intentioned measures that limit the exercise of nonjudicial punishment have the unintended consequence of permitting impunity for military misconduct.

CONCLUSION

Nonjudicial punishment deserves more attention from scholars, the public, and even military lawyers. It is the predominant form of military justice in the United States, meaning that tens of thousands of veterans and military members are more familiar with it—its rituals, punishments, and fairness—than with courts-martial. Nonjudicial punishment is the Uniform Code's exception not just to courts-martial but also to uniformity itself, as every service maintains its own prerogative to shape

97. *See id.* art. 28(a), at 15.

the procedure in accordance with service customs and traditions. The statute lists several aspects in great detail but leaves out seemingly the most important of all: the actual procedures that military leaders should employ when administering discipline.

When it is thought of at all by lawyers, nonjudicial punishment is viewed skeptically by seemingly opposite camps—military lawyers and human rights lawyers. But perhaps in its modern-day incarnation, nonjudicial punishment ought to be viewed in a more positive light. For one, its sanctions are minor, falling short of the life-altering consequences of court-martial sanctions, and the vestiges of cruel punishments (now, even bread and water) have been extinguished. A military member can endure nonjudicial punishment as a part of service life and then leave without any permanent blemish on his or her record. From the military leader's perspective, the tool has proven useful as a regime that can travel wherever military forces go and be administered without all the fuss of formal courts-martial.

Perhaps what is most interesting of all about nonjudicial punishment is its underappreciated evolution. The procedures that arose from a legacy of inhumanity and cruelty have evolved into a modern incantation that can usefully assist armed forces in complying with their obligations to respect international humanitarian and human rights laws.