
ENHANCING FAIRNESS AND COMPASSION IN MILITARY DISCIPLINARY
PROCEEDINGS

*Rinat Kitai-Sangero**

ABSTRACT

This Article critically assesses the disciplinary proceedings carried out by judicial officers within the military, shedding light on the absence of crucial procedural guarantees, such as the right to legal representation and an impartial judge. After comparing the Israeli disciplinary proceedings with the Summary Court-Martial system in the United States and considering arguments used to justify the lack of procedural guarantees, the Article emphasizes the emotional distress experienced by soldiers who feel powerless due to power imbalances with their commanders and the severity of prison sentences they may face. While the Article primarily focuses on the Israeli army, its main arguments hold relevance to disciplinary proceedings in militaries worldwide.

In light of the myriad concerns raised, the Article advocates for the preservation of fair procedural guarantees in military disciplinary proceedings. It argues that legal representation should be made available to soldiers before imposing an imprisonment sentence in such proceedings.

Furthermore, the Article introduces the integrative tribunal established in Israel in 2018, which was specifically designed to address cases of desertion. This tribunal prioritizes addressing the root causes of desertion and focuses on the rehabilitation and reintegration of soldiers into proper military service, maintaining a fair process without

* Professor Rinat Kitai-Sangero is the Head of the Multidisciplinary Studies department and a staff member at the Zefat Academic College School of Law. I thank Boaz Sangero, Ahren W. Lahvis and James H. Stitt for their helpful comments and attorney Shlomi Zipori for generously sharing materials and thoughts about the disciplinary proceedings in the Israeli army.

resorting to imprisonment. By examining the proceedings of the integrative tribunal, the Article advocates for extending equitable practices to disciplinary proceedings involving soldiers who have committed less severe offenses. It also suggests that this court could serve as a model for disciplinary proceedings worldwide. The overarching goal of this Article is to promote a more just and balanced disciplinary process that upholds the principles of fairness and ensures consistency in the treatment of all misconduct cases.

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I. INTRODUCTION

The novella *Billy Budd, Sailor* by Herman Melville portrays a tragic tale of a sailor named Billy Budd who is executed by hanging.¹ The vessel's master-at-arms, John Claggart, a personification of malevolence,² falsely accused Billy Budd of plotting a mutiny. Billy Budd, afflicted with a speech impediment, found himself unable to articulate his defense before his commander, Captain Vere, when confronted with the heinous accusation. Instinctively, Billy Budd delivered a powerful strike to Claggart's forehead, causing him to immediately collapse and die.

The brig's commander, Captain Vere, appoints three officers to serve as judges in a drumhead court-martial he convenes to adjudicate Billy's case. Captain Vere assumes multiple roles, acting as the sole witness, prosecutor, judge, and defense counsel.³ He presents his arguments without the presence of Billy, the defendant. Billy is not given an opportunity to speak, and there is no professional defense counsel to represent him. Captain Vere, as the commander of the court-martial members, influences their decision-making and controls their deliberations. Ultimately, he determines the outcome of the trial, persuading the court-martial members to set aside their sympathy and compassion and pronounce a verdict of death by hanging for Billy, as

¹ HERMAN MELVILLE, *BILLY BUDD AND OTHER STORIES* (Penguin Books, 1986).

² Juan Ramirez, Jr. & Amy D. Ronner, *Voiceless Billy Budd: Melville's Tribute to the Sixth Amendment*, 41 CAL. W. L. REV. 103, 106 (2004).

³ *Id.* at 130.

Captain Vere argues that the law demands.⁴ The sentence is carried out, and Billy is executed by hanging at dawn the following day.

The events depicted in the novella draw inspiration from the real-life Somers affair of 1842, rather than solely from Melville's imagination.⁵ Captain MacKenzie, the captain of the USS *Somers*, an American brig, possessed evidence of a mutiny plot aiming to murder him and other officers, seize control of the brig, and transform it into a pirate vessel.⁶ In order to preempt this plan and discourage any future incidents, he decided to hang the ringleaders, namely Philip Spencer, a Midshipman and the son of the English Secretary of War, along with two seamen named Samuel Cromwell and Elisha Small. Notably, Lieutenant Guert Gansevoort, Melville's first cousin, served as the court-martial judge who oversaw the conviction and execution of these individuals during a time of peace, just days away from the brig's arrival to port.⁷

Captain MacKenzie instructed Gansevoort to sentence the defendants to death, depriving them of the opportunity to appear before the court and present their arguments against the accusations.⁸ The

⁴ For criticism of Vere's legal arguments and his motives, see Richard Weisberg, *How Judges Speak: Some Lessons on Adjudication in Billy Budd, Sailor with an Application to Justice Rehnquist*, 57 N.Y.U. L. REV. 1, 19-28 (1982); RICHARD H. WEISBERG, *THE FAILURE OF THE WORD: THE PROTAGONIST AS LAWYER IN MODERN FICTION* 163 (1984).

⁵ See HARRISON HAYFORD, *THE SOMERS MUTINY AFFAIR* (1959); Richard D. Rosen, *Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial*, 108 MIL. L. REV. 5, 24 n.116 (1985); Alfred S. Konefsky, *The Accidental Legal Historian: Herman Melville and the History of American Law*, 52 BUFF. L. REV. 1179, 1247-49 (2004). The novella explicitly mentions this affair:

Not unlikely they were brought to something more or less akin to that harassed frame of mind which in the year 1842 actuated the commander of the U.S. brig-of-war *Somers* to resolve, under the so-called Articles of War, Articles modeled upon the English Mutiny Act, to resolve upon the execution at sea of a midshipman and two sailors as mutineers designing the seizure of the brig. Which resolution was carried out though in a time of peace and within not many days' sail of home. An act vindicated by a naval court of inquiry subsequently convened ashore. History, and here cited without comment. True, the circumstances on board the *Somers* were different from those on board the *Bellipotent*. But the urgency felt, well-warranted or otherwise, was much the same." MELVILLE, *supra* note 1, at 365.

⁶ HAYFORD, *supra* note 5, at 30.

⁷ Weisberg, *supra* note 4, at 28; Konefsky, *supra* note 5, at 1247; Aviam Soifer, *Status, Contract, and Promises Unkept*, 96 YALE L.J. 1916, 1953 (1987); *United States v. Mackenzie*, 30 F. Cas. 1160, 1160 (S.D.N.Y. 1800).

⁸ HAYFORD, *supra* note 5, at 8, 34; Konefsky, *supra* note 5, at 1247-48; Walter T. Cox III, *The Army, the Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1, 8 (1987).

following day, they were executed by hanging from the yardarm.⁹ The execution was carried out despite naval regulations prohibiting executions before the defendants had been heard and requiring the approval of the death sentence by at least the fleet commander or squadron.¹⁰

Nevertheless, a commission of inquiry established by the Secretary of the Navy found that Mackenzie and Gansworth's actions were legitimate.¹¹ In another case that sparked public outrage in 1917, thirteen African-American soldiers were sentenced to death for mutiny by a military tribunal. The sentencing was executed the next day before a higher court had a chance to review the sentence.¹²

These literary and real proceedings exemplify a perspective in which military trials are primarily intended to assist commanders in upholding good order and discipline, rather than focusing on the principles of due process and justice. Indeed, throughout history, general courts-martial, which handle the most severe crimes, have wielded their power to impose the death penalty.¹³ Even today, under specific stringent circumstances, this authority is still exercised.¹⁴ Furthermore, military tribunals have been known to impose and carry out disproportionately harsh sentences.¹⁵ Fortunately, drumhead military

⁹ HAYFORD, *supra* note 5, at 7.

¹⁰ *Id.* at 9.

¹¹ Soifer, *supra* note 7, at 1953; *Mackenzie*, 30 F. Cas. at 1160.

¹² John S. Cooke, *Introduction: Fiftieth Anniversary of the Uniform Code of Military Justice Symposium Edition*, 165 MIL. L. REV. 1, 5 (2000); Jeremy Stone Weber, *Sentence Appropriateness Relief in the Courts of Criminal Appeals*, 66 A.F. L. REV. 79, 85 (2010); Anthony J. Ghiotto, *Back to the Future with the Uniform Code of Military Justice: The Need to Recalibrate the Relationship Between the Military Justice System, Due Process, and Good Order and Discipline*, 90 N.D. L. REV. 485, 497 (2014).

¹³ Dwight H. Sullivan, *Playing the Numbers: Court-Martial Panel Size and the Military Death Penalty*, 158 MIL. L. REV. 1, 5-6, 12 (1998).

¹⁴ See generally Clark Smith, *Fair and Impartial? Military Jurisdiction and the Decision to Seek the Death Penalty*, 5 UNIV. MIA. NAT'L SEC. & ARMED CONFLICT L. REV. 1 (2014). For a sharp criticism of the military death penalty system, see Gregory F. Intocchia, *Constitutionality of the Death Penalty Under the Uniform Code of Military Justice*, 32 A.F. L. REV. 395 (1990).

¹⁵ S. T. Ansell, *Some Reforms in Our System of Military Justice*, 32 YALE L.J. 146, 151 (1922) (stating that "thousands of men were tried and given shockingly severe sentences for trivial infractions of military discipline"); Luther C. West, *A History of Command Influence on the Military Judicial System*, 18 UCLA L. REV. 1, 45 (1970); Andrew M. Ferris, Comment, *Military Justice: Removing the Probability of Unfairness*, 63 U. CIN. L. REV. 439, 446 (1994); George S. Prugh Jr., *Observations on the Uniform Code of Military Justice: 1954 and 2000*, 165 MIL. L. REV. 21, 23 (2000).

justice is no longer in practice.¹⁶ Moreover, soldiers involved in disciplinary proceedings conducted by officers in the United States are no longer subject to the death penalty. Such disciplinary proceedings can still lead to significant ramifications, however, including imprisonment.

The military operates under a distinct system of justice separate from the civilian justice system.¹⁷ This longstanding separation is rooted in various factors. The military paradigm centers around discipline and inherent obedience to commands.¹⁸ As such, military justice is designed to be more expeditious than civilian justice so that it can fulfill its purpose.¹⁹ Additionally, commanders generally play a role in determining appropriate punishments within the military justice system.²⁰

Although there may be disagreements about the reasons for having a separate justice system for military personnel compared to civilians for criminal offenses,²¹ it is acknowledged that some offenses specific to military service require a different approach. These service-related offenses, which are unique to the military context, justify having distinct disciplinary procedures.

Disciplinary proceedings within the military play a pivotal role in maintaining order and administering penalties to servicemembers. However, they often generate tensions between the imperative to uphold discipline and the necessity of ensuring justice, protecting individual rights, and upholding due process principles.²²

¹⁶ Max Jesse Goldberg, *Congressional Influence on Military Justice*, 130 YALE L.J. 2110, 2112 (2021).

¹⁷ *Parker v. Levy*, 417 U.S. 733, 743-44 (1974).

¹⁸ *Id.*

¹⁹ Kenneth J. Hodson, *Military Justice: Abolish or Change?*, 22 U. KAN. L. REV. 31, 35 (1973).

²⁰ *Id.*

²¹ Fredric I. Lederer, *From Rome to the Military Justice Acts of 2016 and Beyond: Continuing Civilianization of the Military Criminal Legal System*, 225 MIL. L. REV. 512, 512-13 (2017); Dan Maurer, *A Logic of Military Justice?*, 53 TEX. TECH L. REV. 669, 700, 722 (2021). *But see* *Solorio v. United States*, 483 U.S. 435 (1987) (overruling the service-connection test rule).

²² Roscoe Pound, *Introduction*, in *LAW IN ACTION: AN ANTHOLOGY OF THE LAW IN LITERATURE*, at xiv (Amicus Curiae ed., 1947); Martha Huntley Bower, *Unlawful Command Influence: Preserving the Delicate Balance*, 28 A.F. L. REV. 65, 65 (1988); David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline?*, 215 MIL. L. REV. 1, 5 (2013); Jeremy S. Weber, *Whatever Happened to Military Good Order and Discipline?*, 66 CLEV. ST. L. REV. 123, 125 (2017); *see also* John S. Reid, *Commanders in the Bedroom: A Constitutional Analysis of the Military and Substantive Due Process*, 31 GEO. MASON U. C.R. L.J. 63, 93 (2020) (regarding substantive due process).

Military justice is frequently perceived as unjust²³ and even labeled as oxymoronic.²⁴ Clemenceau's famous remark that "military justice is to justice as military music is to music" has become a commonly quoted adage.²⁵ In fact, the portrayal of Captain Vere appearing before the drumhead court as both prosecutor and defense counsel in the novella *Billy Budd* was not a mere fictional occurrence. As early as 1920, it was possible for an individual to serve in a military tribunal as both prosecutor and defense counsel within the same case.²⁶ This practice still persists in summary courts-martial. Thus, the U.S. Supreme Court has found that in such proceedings, "the presiding officer acts as judge, factfinder, prosecutor, and defense counsel."²⁷

Historically, the military justice system has faced criticism for being influenced by the whims of commanders rather than adhering to the rule of law.²⁸ While various states have endeavored to address this issue, the disciplinary law within the Israeli army continues to be largely subject to the discretion of commanders.

This Article discusses the procedural safeguards granted to accused soldiers in disciplinary proceedings within the Israeli Armed Forces, which are held before judicial officers for service-related offenses, and compares them to the disciplinary proceedings conducted before the summary courts-martial in the United States. It focuses on imprisonment in military correctional facilities as a punitive outcome in such proceedings. Although conducting a full trial within military disciplinary proceedings could unduly disrupt military discipline, the Article asserts that fundamental principles of due process must be upheld as a prerequisite for imposing imprisonment on accused soldiers in disciplinary proceedings.

Prompted by petitions to the Israeli Supreme Court, the Israeli military disciplinary justice system may undergo minor developments concerning offenses with criminal characteristics, such as sexual

²³ David A. Schlueter, *Military Justice for the 1990's: A Legal System Looking for Respect*, 133 MIL. L. REV. 1, 5 (1991).

²⁴ Michael I. Spak, *Military Justice: The Oxymoron of the 1980's*, 20 CAL. W. L. REV. 436, 438 (1984); Mark J. Osiel, *Obeying Orders: Atrocity, Military Discipline, and the Law of War*, 86 CALIF. L. REV. 939, 1125-26 (1998); Weber, *supra* note 22, at 128.

²⁵ Weber, *supra* note 22, at 129.

²⁶ West, *supra* note 15, at 14.

²⁷ *Middendorf v. Henry*, 425 U.S. 25, 32 (1976); *see also* Sam J. Ervin, Jr., *The Military Justice Act of 1968*, 45 MIL. L. REV. 77, 83 (1969).

²⁸ S. T. Ansell, *Military Justice*, 5 CORNELL L. Q. 1, 1 (1919); Arthur E. Farmer & Richard H. Wels, *Command Control—Or Military Justice*, 24 N.Y.U. L. Q. REV. 263, 280-81 (1949).

harassment, which are tried before judicial officers. These petitions seek to secure legal representation for accused soldiers in civil-type offenses, such as military-related sexual harassment cases that could lead to their discharge from the armed forces.²⁹

Nevertheless, a complete overhaul of the disciplinary proceedings within the Israeli Armed Forces may not be imminent. There is no current movement to extend the procedural safeguards provided to accused soldiers in military courts to ordinary disciplinary proceedings.³⁰ Establishing the right to counsel in regular disciplinary cases, for instance, is not being contemplated. However, the anticipated changes in disciplinary proceedings regarding certain offenses³¹ present an opportunity to reassess and draw attention to disciplinary proceedings conducted before judicial officers. Although the Article primarily focuses on the Israeli army, its main arguments are relevant to disciplinary proceedings in militaries worldwide.

This Article is divided into six parts. Part II focuses on the disciplinary proceedings conducted before Israeli Defense Forces (“IDF”) officers and draws a comparison to disciplinary proceedings in the U.S. army. It does not address disciplinary proceedings for major offenses that are handled in military tribunals, where accused soldiers are granted protections similar to those available in civilian criminal courts. It also does not cover cases in which the military prosecution refers individuals to disciplinary proceedings following a criminal investigation by the military police criminal investigation division. Part II also examines the procedural safeguards provided to accused soldiers during disciplinary proceedings, highlighting the absence of the right to legal representation and to an impartial hearing.

Part III delves into the arguments that commonly advocate for the necessity of conducting a speedy trial without basic fairness guarantees in disciplinary proceedings. In contrast, Part IV addresses the counterarguments against waiving procedural guarantees in army disciplinary proceedings. Part V examines the integrative military tribunal in Israel, which currently hears desertion cases and aims to reintegrate deserters into military life without imposing imprisonment. Through an examination of the proceedings conducted in the integrative tribunal, the Article advocates for extending equitable practices to disciplinary proceedings involving soldiers who are charged with less

²⁹ Major A.S. v. IDF (Jer HCJ) (Mar. 14, 2022) (on file with author).

³⁰ *Id.*

³¹ *Id.*

severe offenses. It also suggests that this court could serve as a model for military disciplinary proceedings worldwide.

Finally, Part VI concludes that the current punitive authority held by judicial military commanders does not align with Israeli constitutional provisions. Furthermore, the Article argues against imposing imprisonment as a punishment for purely military offenses, particularly by commanders who lack legal expertise, and argues that ensuring due process rights should be a precondition for imposing imprisonment. Moreover, it suggests extending the integrative tribunal model to the entire disciplinary proceedings, where accused soldiers would be judged by a military professional judge. This judge would focus on facilitating the soldiers' reintegration into military life and seeking a compromise between the soldiers and their commanders. In doing so, it aims to foster a fairer and more rehabilitative disciplinary process within the military.

II. THE CONDUCT OF DISCIPLINARY PROCEEDINGS IN THE UNITED STATES AND ISRAEL

A. Impact of Military Disciplinary Justice

Military disciplinary justice has a profound impact on the lives of a considerable number of soldiers. In the Israeli army, disciplinary proceedings are conducted routinely and on a wide scale—approximately 170,000 disciplinary proceedings take place in a single year.³² As a result, around 16,000 soldiers are held in military prisons annually.³³

In the United States, the military draft and mass recruitment during World War II exposed a significant number of individuals from various segments of society to disciplinary proceedings, including professionals such as doctors and lawyers who were well-versed in

³² Menachem Finkelstein & Yifat Tomer, *The Israeli Military Legal System—Overview of the Current Situation and a Glimpse into the Future*, 52 A.F. L. REV. 137, 143 (2002); STATE COMPTROLLER OF ISR., ANNUAL REPORT 63B OF STATE COMPTROLLER 92 (2013) [hereinafter ANNUAL REPORT 63B OF STATE COMPTROLLER], <https://www.mevaker.gov.il/sites/DigitalLibrary/Documents/63b/2013-63b-201-Din.pdf> [https://perma.cc/J4DM-NFZV] (Hebrew) (regarding 2010).

³³ STATE COMPTROLLER OF ISR., ANNUAL REPORT 60A OF STATE COMPTROLLER 66 (2010), https://www.mevaker.gov.il/he/Reports/Report_343/b095fb0b-47a4-4e04-9b38-0ed03775297a/chap-20.pdf [https://perma.cc/DXK7-UF4S] (Hebrew) (regarding 2007).

constitutional rights and the concept of due process.³⁴ During this period, two-thirds of soldiers who served sentences of confinement were imprisoned for offenses of a purely military nature.³⁵ This imprisonment led to criticism from scholars and veterans regarding the lack of fairness in the military justice system.³⁶ The mounting pressure for reform culminated in the enactment of the Uniform Code of Military Justice of 1950 ("UCMJ"), which established a comprehensive criminal law and procedure for the armed forces.³⁷ This Code, often regarded as the starting point of the modern era of military justice,³⁸ sought to strike a balance between discipline and justice by expanding due process rights for servicemembers.³⁹ It specifically addressed concerns regarding the undue influence of commanders on military tribunals and excessive penalties.⁴⁰ Since its initial enactment, Congress has made several amendments to the Code.⁴¹

B. Military Disciplinary Courts in the United States

In the United States, there are three categories of military courts: general, special, and summary.⁴² Furthermore, Article 15 of the Uniform Code of Military Justice empowers commanders to administer

³⁴ Ferris, *supra* note 15, at 449-50; Cooke, *supra* note 12, at 6-7; Karen A. Ruzic, *Military Justice and the Supreme Court's Outdated Standard of Deference: Weiss v. United States*, 70 CHI. KENT L. REV. 265, 269 (1994); James B. Roan & Cynthia Buxton, *The American Military Justice System in the New Millennium*, 52 A.F. L. REV. 185, 187 (2002); Kevin J. Barry, *A Face Lift (and Much More) For an Aging Beauty: The Cox Commission Recommendations to Rejuvenate the Uniform Code of Military Justice*, 2002 L. REV. M.S.U. – D.C.L. 57, 58 (2002); Note, *Prosecutorial Power and the Legitimacy of the Military Justice System*, 123 HARV. L. REV. 937, 940 (2010) [hereinafter *Prosecutorial Power*]; Weber, *supra* note 12, at 86.

³⁵ Prugh, *supra* note 15, at 22.

³⁶ Ervin, *supra* note 27, at 77; Samuel J. Rob, *From Treacle to Thomas: The Evolution of the Law of Unlawful Command Influence*, ARMY LAW., Nov. 1987, at 36, 37; Ferris, *supra* note 15, at 449; *Prosecutorial Power*, *supra* note 34, at 940; Weber, *supra* note 12, at 86; Ghiotto, *supra* note 12, at 499; Weber, *supra* note 22, at 128; Goldberg, *supra* note 16, at 2123.

³⁷ Ervin, *supra* note 27, at 77; Ferris, *supra* note 15, at 450.

³⁸ Cox, *supra* note 8, at 14.

³⁹ Cooke, *supra* note 12, at 8-9; Elizabeth Murphy, *The Military Justice Divide: Why Only Crimes and Lawyers Belong in the Court-Martial Process*, 220 MIL. L. REV. 129, 135 (2014).

⁴⁰ Weber, *supra* note 12, at 87-88.

⁴¹ See Goldberg, *supra* note 16, at 2118-46; Murphy, *supra* note 39, at 136.

⁴² *Weiss v. United States*, 510 U.S. 163, 167 (1994).

non-judicial punishments, including confinement, without resorting to a formal trial.⁴³

Special and general courts-martial provide accused persons with procedural guarantees similar to those in civilian criminal courts.⁴⁴ However, the notion of due process in civil law is distinct from due process in military law.⁴⁵ Notably, the right to a trial by jury is absent from courts-martial.⁴⁶ Additionally, courts-martial are not entirely free from command influence.⁴⁷ The commander is responsible for selecting the court-martial judges,⁴⁸ though the commander must not unlawfully influence them,⁴⁹ and is prohibited from discussing pending cases with the judges. Nevertheless, the requirements ensuring the independence of the judges, who operate under a different chain of command than the convening commanders, significantly mitigate the risk of direct influence on the trials' outcomes.⁵⁰

Summary courts-martial are the least serious type of courts-martial, designed for offenses that still surpass the threshold of mere non-judicial disciplinary action.⁵¹ They handle minor service-connected offenses, such as insubordination. A single commander presides over

⁴³ See also Kent S. Bernard, *Structures of American Military Justice*, 125 U. PA. L. REV. 307, 319 (1976); Ghiotto, *supra* note 12, at 515-16.

⁴⁴ Robert S. Poydasheff & William K. Suter, *Military Justice?—Definitely!*, 49 TUL. L. REV. 588, 602 (1975).

⁴⁵ *Burns v. Wilson*, 346 U.S. 137, 149 (1953) (Frankfurter J., concurring) (stating that “the content of due process in civil trials does not control what is due process in military trials”).

⁴⁶ *Ex parte Quirin*, 317 U.S. 1, 17 (1942); *O’Callahan v. Parker*, 395 U.S. 258, 261 (1969); James W. Smith III, *A Few Good Scapegoats: The Abu Ghraib Courts-Martial and the Failure of the Military Justice System*, 27 WHITTIER L. REV. 671, 687 (2006); Benjamin V. Madison III, *Trial by Jury or by Military Tribunal for Accused Terrorist Detainees Facing the Death Penalty? An Examination of Principles that Transcend the U.S. Constitution*, 17 U. FLA. J.L. & PUB. POL’Y 347, 423-24 (2006); Maurer, *supra* note 21, at 688; Jeremy S. Weber, *Court-Martial Nullification: Why Military Justice Needs a Conscience of the Commander*, 80 A.F. L. REV. 1, 35 (2019).

⁴⁷ Cox, *supra* note 8, at 17.

⁴⁸ Smith, *supra* note 46, at 687; Schlueter, *supra* note 22, at 56; David A. Schlueter & Lisa M. Schenck, *Taking Charge of Court-Martial Charges: The Important Role of the Commander in the American Military Justice System*, 14 N.Y.U. J. L. & LIBERTY 529, 542 (2020).

⁴⁹ Schlueter, *supra* note 22, at 58; Weber, *supra* note 46, at 29-30; Schlueter & Schenck, *supra* note 48, at 536; Goldberg, *supra* note 16, at 2115.

⁵⁰ Theodore Essex & Leslea Tate Pickle, *A Reply to the Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice (May 2001): “The Cox Commission”*, 52 A.F. L. REV. 233, 237 (2002).

⁵¹ Bernard, *supra* note 43, at 332.

the proceedings.⁵² While the summary courts-martial process offers a level of formality and order not present in non-judicial punishments, which typically do not involve a courtroom setting, they do not afford the defendant the comprehensive legal protections and formalities of a special or general court-martial, which are reserved for more serious offenses.⁵³ Accused soldiers have limited rights and procedural protections during these proceedings and often lack legal representation.⁵⁴ The accusing officer is authorized to convene the summary court-martial.⁵⁵ In sum, in the summary courts-martial, there is a correlation between the relative lack of procedural rights and the severity (or the lack thereof) of the potential punishment.⁵⁶

The severity of the sentence that can be imposed in summary courts-martial depends on the ranks of the judicial officers and the accused soldiers.⁵⁷ Confinement in a military jail or facility is one of the possible punishments for certain offenses, with a maximum limit of thirty days.⁵⁸ Additionally, judicial officers in summary courts-martial have the authority to impose fines and reduce a soldier's rank.⁵⁹

Accused soldiers have the option to object to non-judicial sanctions or a summary court-martial and choose to be tried before a special court-martial, however, where they must be found guilty beyond a reasonable doubt, regardless of the level of offense charged.⁶⁰ This choice helps to mitigate some of the criticism surrounding the abbreviated procedures.⁶¹ Nevertheless, the possibility of transferring the

⁵² Ervin, *supra* note 27, at 83; David A. Schlueter, *Reforming Military Justice: An Analysis of the Military Justice Act of 2016*, 49 ST. MARY'S L.J. 1, 57 (2017).

⁵³ Bernard, *supra* note 43, at 332.

⁵⁴ Spak, *supra* note 24, at 458; Weber, *supra* note 22, at 129; *see also* O'Callahan v. Parker, 395 U.S. 258, 266 (1969) (stating generally that "a civilian trial . . . is held in an atmosphere conducive to the protection of individual rights, while a military trial is marked by the age-old manifest destiny of retributive justice").

⁵⁵ Spak, *supra* note 24, at 458; Victor Hansen, *The Impact of Military Justice Reforms on the Law of Armed Conflict: How to Avoid Unintended Consequences*, 21 MICH. ST. INT'L L. REV. 229, 246 (2013).

⁵⁶ Smith, *supra* note 46, at 685; Maurer, *supra* note 21, at 686.

⁵⁷ Peyton Cooke, *Post-Traumatic Stress Disorder & the Military Justice System*, 79 MISS. L.J. 485, 499 (2010).

⁵⁸ Weiss v. United States, 510 U.S. 163, 167 (1994).

⁵⁹ Ervin, *supra* note 27, at 83.

⁶⁰ Smith, *supra* note 46, at 689; Cooke, *supra* note 57, at 499; Schlueter & Schenck, *supra* note 48, at 562; *see* Uniform Code of Military Justice art. 15, 10 U.S.C. § 815; *see also* Middendorf v. Henry, 425 U.S. 25, 32-33 (1976); Weiss, 510 U.S. at 167.

⁶¹ Charles M. Schiesser & Daniel H. Benson, *Modern Military Justice*, 19 CATH. U. L. REV. 489, 511 (1969).

trial to a special court-martial does not fully compensate for the lack of procedural guarantees in disciplinary proceedings overseen by a judicial officer. Soldiers who opt for a special court-martial risk facing more severe penalties.⁶² Additionally, conducting a trial before a special court-martial may convey an incorrect message to the public regarding the seriousness of the offense attributed to the accused soldier.

Some scholars have expressed hope for the elimination of summary courts-martial from the military justice system.⁶³ However, the U.S. Supreme Court has affirmed their constitutionality. In the landmark case of *Middendorf v. Henry*, the Supreme Court ruled that servicemembers are not entitled to the same procedural protections as civilians in criminal trials.⁶⁴ Considering the distinct nature of the military and the specific features of summary court-martial proceedings such as the minor nature of the offenses, the limitation on punishment, and the non-adversarial nature of the process, the Court held that there is no requirement to appoint military counsel to represent individuals in summary court-martial cases.⁶⁵ However, soldiers may retain counsel at their own expense if they so choose.⁶⁶ In *Middendorf*, multiple soldiers received sentences ranging from twenty to thirty days of imprisonment under rigorous working conditions for the offense of unauthorized absence.⁶⁷ Nevertheless, the Supreme Court emphasized that the purpose of the tribunal was to swiftly adjudicate relatively minor offenses by following simple procedural rules.⁶⁸

C. The Role of Commanders in Military Justice

Commanders play a central role in the military justice system,⁶⁹ as emphasized by the U.S. Supreme Court, which stated that “By contrast to civilian society, nonjudicial military officers play a significant

⁶² Bernard, *supra* note 43, at 319.

⁶³ Ervin, *supra* note 27, at 95; Birch Bayh, *The Military Justice Act of 1971: The Need for Legislative Reform*, 10 AM. CRIM. L. REV. 9, 15 (1971); Hansen, *supra* note 55, at 250.

⁶⁴ *Middendorf*, 425 U.S. at 46.

⁶⁵ *Id.* at 45-46.

⁶⁶ *Id.* at 65-66.

⁶⁷ *Id.* at 28.

⁶⁸ *Id.* at 32.

⁶⁹ Lindsay Nicole Alleman, Note, *Who Is in Charge, and Who Should Be? The Disciplinary Role of the Commander in Military Justice Systems*, 16 DUKE J. COMPAR. & INT’L L. 169, 170, 191 (2006); Ghiotto, *supra* note 12, at 505; Weber, *supra* note 22, at 129; Weber, *supra* note 46, at 26-27; Schlueter & Schenck, *supra* note 48, at 536.

part in the administration of military justice.”⁷⁰ Military justice is often referred to as the domain of officers.⁷¹ However, it is unfortunate that judicial commanders lack legal training and are not bound by rules of evidence or professional ethics.⁷² They may not possess a comprehensive understanding of the distinctions between awareness and negligence, the significance of proof beyond a reasonable doubt, or the value of an acquittal when reasonable doubt exists. As a result, their competence in handling complex trials is questionable. In addition, they might not be fully aware of the devastating implications a prison sentence can have on young soldiers.

In Israel, the Comptroller has identified difficulties that judicial officers face when conducting disciplinary proceedings that involve evaluating testimonies and examining evidence.⁷³ It has been observed that some officers may lack proficiency in the relevant provisions governing these proceedings.⁷⁴ Consequently, some soldiers have been convicted based on flawed or inadequate procedures.⁷⁵

D. Challenges and Concerns in Israeli Military Disciplinary Proceedings

Disciplinary law in the Israeli army is comparable, to some extent, to proceedings conducted before summary courts-martial in the United States. It provides fewer procedural guarantees, however. In addition, disciplinary proceedings are presided over by commanders who also serve as judicial officers, alongside their numerous responsibilities as military commanders.

The normative framework governing disciplinary proceedings in the Israel Defense Forces consists of the Military Justice Law of 1955 (“Military Justice Law”) and the General Staff Ordinance on disciplinary law.⁷⁶ According to the Law, soldiers can be tried in disciplinary

⁷⁰ Weiss v. United States, 510 U.S. 163, 175 (1994).

⁷¹ Elizabeth L. Hillman, *Gentlemen Under Fire: The U.S. Military and Conduct Unbecoming*, 26 MINN. J. L. & INEQUALITY 1, 1-2 (2008).

⁷² Monu Bedi, *Unraveling Unlawful Command Influence*, 93 WASH. U. L. REV. 1401, 1406 (2016).

⁷³ ANNUAL REPORT 63B OF STATE COMPTROLLER, *supra* note 32, at 90.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Military Justice Law, 5715–1955, LSI 54 184 (1954-55) (Isr.), <https://andyreiter.com/wp-content/uploads/military-justice/il/Laws%20and%20Decrees/Israel%20-%201955%20-%20Military%20Justice%20Law.pdf> [<https://perma.cc/L9AX-BT2W>]; 07.102 General Staff of the IDF Order,

proceedings for military offenses carrying a maximum punishment of three years in prison.⁷⁷ Imprisonment is the most severe penalty that a judicial officer can impose on accused soldiers under the Military Justice Law. The maximum sentence length that a judicial officer can assign increases with their rank. A junior judicial officer can sentence a soldier to a maximum of seven days in prison, while a senior judicial officer can impose a sentence of up to thirty-five days in prison, in addition to other potential penalties like fines, reprimands, or restrictions to the base.⁷⁸ Judicial officers have complete discretion in exercising their judicial powers, subject only to the maximum penalties they are authorized to impose.⁷⁹

Commanders may also interfere with military disciplinary justice. Their regular interaction with judicial officers creates opportunities for them to taint disciplinary proceedings by discussing cases with the judicial officers before the trial without the knowledge or presence of the accused soldiers. Commanders may even recommend their desired verdict to the judicial officer. Consequently, S. T. Ansell's observation that the commander is essentially the law⁸⁰ is not far from the reality of military discipline in the Israeli army.

Furthermore, unlike summary courts-martial proceedings in the United States, disciplinary proceedings in the Israeli army can be carried out without the consent of the accused soldiers. Where the hearing is conducted before a junior judicial officer, accused soldiers are not permitted to choose to be judged by a military tribunal. Their only option is to request the referral of the case to a senior judicial officer, which may subject them to more severe punishments.⁸¹ When the complaint is initially submitted to a senior judicial officer, the accused soldiers can request that their case be transferred to a court-martial, where they are entitled to full due process rights, including the right to have a defense counsel provided at no cost.⁸² This transfer is not automatic, however, but is at the discretion of the chief military attorney, who may decline the request after giving the accused soldier an

Disciplinary Law, [hereinafter 07.102 General Staff of the IDF Order], <http://tinyurl.com/y8wdb8fd>.

⁷⁷ § 136, Military Justice Law, 5715–1955.

⁷⁸ *Id.* §§ 152-53; Finkelstein & Tomer, *supra* note 32, at 143.

⁷⁹ *Id.*

⁸⁰ Ansell, *supra* note 28, at 7; *see also* Ansell, *supra* note 15, at 149 (mentioning the conception that military-courts are the commander's "right hand for the purpose of maintaining his discipline").

⁸¹ § 148, Military Justice Law, 5715–1955.

⁸² *See id.* § 149.

opportunity to respond in writing.⁸³ As mentioned, such a transfer also exposes accused soldiers to harsher sentences.

Accused soldiers are granted specific rights, including the rights to be heard, present evidence and witnesses, and appeal the decision before a senior commander. However, unlike in civilian courts, the senior officer holds the authority to potentially increase the punishment for the accused soldier who submits an appeal subject to giving them the opportunity to respond and provide their input.⁸⁴ In any case, given that the senior officer is within the chain of command, their inclination would be to refrain from intervening in favor of the accused soldiers.

The judicial officer manages the recording of the discussion on the complaint form. They document the accused's statements concerning their culpability, including whether they admit or deny the allegations. Moreover, the judicial officer must justify their guilty verdict or acquittal. They list the accused's remarks before imposing any penalties and record the reasoning behind their decision on the sentence. Factors such as the seriousness of the offense, the circumstances of its commission, the defendant's history, and their personal circumstances are considered in determining sentence.⁸⁵

Beyond the aforementioned procedural rights, the concept of due process is alarmingly neglected. Judicial officers may rely on the accusing commanders for career advancement and promotion, leading to a concerning lack of independence.⁸⁶ For instance, commanding officers assume the role of presiding judicial officers, creating a potential for influence and pressure from the soldier's immediate commander, particularly when the presiding officer holds a lower rank than the officer who filed the complaint. This common chain of influence threatens any semblance of impartiality in the proceedings.

In organizational cultures that strongly emphasize obedience to superiors, such as the armed forces, it is often challenging for junior officers to resist the influence of higher-ranking commanders or friends.⁸⁷ A presiding officer may be legitimately concerned that

⁸³ *See id.* § 151.

⁸⁴ *Id.* § 165.

⁸⁵ ANNUAL REPORT 63B OF STATE COMPTROLLER, *supra* note 32, at 98.

⁸⁶ Diane H. Mazur, *Rehnquist's Vietnam: Constitutional Separatism and the Stealth Advance of Martial Law*, 77 IND. L.J. 701, 710 (2002).

⁸⁷ Vincent A. Marrazzo, *Apparent Unlawful Command Influence: An Unworkable Test for an Untenable Doctrine*, 12 J. NAT'L SEC. L. & POL'Y 611, 612 (2022); *see also* Anthony P. De Giulio, *Command Control: Lawful Versus Unlawful Application*, 10 SAN DIEGO L. REV. 72, 77 (1972).

rendering a judgment contradicting a superior officer's position may lead to friction and hinder the presiding officer's advancement within the army. The presiding officer is constantly aware that displeasing the convening authority with their verdict can have potential consequences, including straining important relationships with superiors.⁸⁸ Furthermore, the accusing officer often has the authority to choose a presiding officer who aligns with their expectations.⁸⁹ This discretionary power can further impact the impartiality of the proceedings, as the selecting officer may opt for an officer who is more likely to support their desired outcome.⁹⁰ These factors collectively contribute to the challenge of maintaining impartiality in disciplinary proceedings. The potential for influence, fear of repercussions, and subjective selection process can undermine the pursuit of justice in such cases.

Additional factors present obstacles to due process for accused soldiers. For instance, they are not entitled to a defense counsel, even if they wish to retain one at their own expense.⁹¹ Furthermore, the presumption of innocence does not apply in disciplinary law. It is commonly assumed that the commanding officer's decision to file a complaint is justified. Moreover, many regulations governing the disciplinary procedure contradict the presumption of innocence. For instance, there is no established procedure for substantiating the allegations in disciplinary proceedings. The accusing officer merely submits a complaint form to the judicial officer, which provides information regarding the alleged offense committed by the soldier, including the date and specific section of the offense.⁹² During the trial, the complaint form serves as evidence instead of actual proof of the accused's guilt.⁹³ Witnesses are usually not presented to support

⁸⁸ Spak, *supra* note 24, at 459.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ HCJ 13/75 The Commander of Mil. Police Crim. Investigation Div. v. John Doe, 30(3) PD 617, 623-24 (1976) (stating that "the absence of any instruction regarding the right to legal representation in military disciplinary proceedings must be interpreted as a denial of the right to representation in these proceedings, even though these are criminal proceedings that may result in significant penalties, including the deprivation of the accused's freedom by imprisonment It was not argued before us that accused in disciplinary proceedings are entitled to representation by lawyers, and it seems this question has not yet arisen, given it was accepted by everyone, considering the nature and special purpose of disciplinary law within military life, that it would be unthinkable for an accused soldier to be represented by a lawyer in these proceedings.").

⁹² 07.102 General Staff of the IDF Order, *supra* note 76, art. 15.

⁹³ None of the instructions dealing with the disciplinary trial of soldiers require the accuser to be present at the hearing. §§ 136-49, Military Justice Law, 5715-1955,

the accusing officer, though the accused soldiers have the right to summon their own witnesses.⁹⁴ Indeed, the defendant has the right to call the accuser as a witness. However, given that the accuser is not present at the disciplinary hearing, it might not occur to the defendant to consider this option. This setup makes it challenging for the defendant to directly confront their accuser, which is a critical aspect of a fair trial.

Moreover, soldiers are not adequately informed about their right against self-incrimination, and the existence of such a right in disciplinary proceedings remains uncertain.⁹⁵ In the absence of a proper mechanism for establishing guilt, the right to remain silent holds little practical significance, as soldiers who choose not to respond to the charges will inevitably face conviction.

Article 168 of the Military Justice Law empowers the military chief attorney to review disciplinary proceedings and assess any shortcomings that may have occurred.⁹⁶ If a miscarriage of justice is identified, the military chief attorney has the authority to overturn the disciplinary verdict.⁹⁷ Nevertheless, the military chief attorney lacks the ability to establish a right to counsel and cannot address any potential influence exerted by the commander on the outcome of the accused soldier's verdict.

E. Israeli Supreme Court's Perspective on Procedural Fairness

The Israeli Supreme Court has upheld the lack of procedural fairness in military disciplinary trials, stating that such trials are not equivalent to civilian criminal trials.⁹⁸ In many instances, the presiding

LSI 54 184 (1954-55) (Isr.), <https://andyreiter.com/wp-content/uploads/military-justice/il/Laws%20and%20Decrees/Israel%20-%201955%20-%20Military%20Justice%20Law.pdf> [<https://perma.cc/L9AX-BT2W>]. General Staff Order 07.102, which deals with disciplinary law, does not require this either. 07.102 General Staff of the IDF Order, *supra* note 76.

⁹⁴ Article 104 of the General Staff Order 07.102 requires the trial officer to ask the accused whether they wish to summon witnesses or bring evidence for their defense. 07.102 General Staff of the IDF Order, *supra* note 76, art. 104.

⁹⁵ While section 366 of the Military Justice Law mandates that judges in military courts must inform accused of their right to abstain from testifying, there is no corresponding requirement for judicial officers. § 366, Military Justice Law, 5715–1955. Sections 148–149 of this law stipulate that judicial officers are only obligated to notify accused about their right to request to be tried before another authority. *Id.* §§ 148–49. In addition, in the General Staff Order 07.102 there is no provision that requires trial officers to inform the accused of their right to remain silent. 07.102 General Staff of the IDF Order, *supra* note 76.

⁹⁶ § 168, Military Justice Law, 5715–1955.

⁹⁷ *Id.*

⁹⁸ HCJ 405/74 Bar-Ad v. Madar, 29(1) PD 54, 56 (1974) (Isr.).

judicial officer is the immediate commander of the accused soldier and is responsible for enforcing discipline within their unit.⁹⁹ In the military context, commanders cannot and should not be expected to maintain a position of neutrality as judges.¹⁰⁰ They are actively involved with their soldiers and have the right to express their views on the importance of maintaining discipline even before the trial begins.¹⁰¹

The judicial officer's dual role as both an officer responsible for enforcing discipline and as a judge who determines the outcome of disciplinary proceedings requires a delicate balance between military and judicial principles.¹⁰² This balance—and the officer's primary role as a military member—may occasionally justify deviations from certain accepted judicial rules, such as the right to legal representation or the strict prohibition on conflicts of interest.¹⁰³

The Israeli Supreme Court has observed that in some cases the presiding officer is the same officer who directly witnessed the alleged disciplinary offense and initiated proceedings against the soldier.¹⁰⁴ However, being both a witness and a judge does not disqualify the disciplinary proceedings because, due to the nature of military life, commanders cannot always maintain a personal distance from the incident they are judging.¹⁰⁵

In a notable case, the Israeli Supreme Court intervened in the decision of the deputy military chief attorney to reject the request of a soldier, who had been convicted in a disciplinary proceeding, to annul the conviction due to procedural flaws identified in the disciplinary process.¹⁰⁶ The soldier involved had been convicted of a disciplinary offense and received a twenty-eight-day prison sentence after his request to be tried before a military court had been rejected.¹⁰⁷

The Court thoroughly reviewed the case and ordered the cancellation of the proceeding primarily because the judicial officer overseeing the disciplinary case failed to provide any reasoning for the

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² HCJ 243/80 Madzhinsky v. Military, Tribunal for Appeal, 35(1) PD 67, 72 (1980) (Isr.).

¹⁰³ *Id.*

¹⁰⁴ HCJ 118/80 Greenstein v. Chief Military Prosecutor, 35(1) PD 239, 243 (1980) (Isr.).

¹⁰⁵ *Id.*

¹⁰⁶ HCJ 266/05 Pilant v. Deputy Military Attorney, 59(4) PD 707, 712-13 (2005) (Isr.).

¹⁰⁷ *Id.* at 710.

soldier's conviction.¹⁰⁸ In its decision, the Court firmly emphasized that expediency in the legal process should not come at the expense of justice.¹⁰⁹ The case served as a powerful signal that even military judicial officer's judgments must be based on solid reasoning and substantial evidence. However, the Supreme Court did not overturn its previous holdings that neither judicial neutrality nor a right of representation is guaranteed in disciplinary military proceedings. At any rate, interventions by the Supreme Court in military disciplinary proceedings are infrequent and exceptional.

The next Part examines the allegations surrounding the absence of due process in Israel's military disciplinary proceedings.

III. THE NEED FOR RIGOROUS DISCIPLINE

A. The Foundations of Military Justice: Establishing Discipline

The military justice system does not engage in philosophical debates regarding the purpose of punishment. Rather, it emphasizes that the primary objective of punishment is to establish discipline.¹¹⁰ In contrast, criminal proceedings in civilian contexts aim to address violations of societal laws and norms through retribution, rehabilitation, and deterrence.

B. The Imperative of Prompt Response

To maintain discipline, the military justice system should be able to address instances of disciplinary breaches swiftly.¹¹¹ A swift response from the military justice system can ensure both specific and general deterrence.¹¹² Captain Vere, who convinced the tribunal members to sentence Billy Budd to death by hanging and opted for an immediate trial instead of involving the admiral, firmly believed that a

¹⁰⁸ *Id.* at 712-13.

¹⁰⁹ *Id.* at 713.

¹¹⁰ Schiesser & Benson, *supra* note 61, at 489 (citing John H. Wigmore, *Lessons from Military Justice*, 4 J. AM. JUD. SOC'Y 151 (1921)); Ferris, *supra* note 15, at 445 (stating that "the disciplinary function of the court-martial cannot be overstated"); Lederer, *supra* note 21, at 515.

¹¹¹ Smith, *supra* note 46, at 685; Ruzic, *supra* note 34, at 274; Ferris, *supra* note 15, at 446.

¹¹² Prugh, *supra* note 15, at 32; Lederer, *supra* note 21, at 520 (regarding Roman practice); Maurer, *supra* note 21, at 695; *see also* Ferris, *supra* note 15, at 446; Joseph W. Bishop, Jr., *Perspective: The Case for Military Justice*, 62 MIL. L. REV. 215, 216 (1973).

timely reaction to an officer's death by a soldier was crucial in averting mutiny aboard the ship.¹¹³ In military settings, expeditious disciplinary action is imperative to prevent further breaches. Expediency is particularly vital in units where soldiers frequently rotate, such as among recruits and during training courses, since a prompt disciplinary response is necessary to emphasize the consequences of violating discipline to other soldiers.

Disciplinary law equips commanders with a streamlined mechanism for swiftly enforcing discipline, emphasizing both its efficiency and expediency.¹¹⁴ Discipline serves as the cornerstone of the army, and its significance remains undisputed. Discipline has historically been regarded as the soul of the army.¹¹⁵ Roman military doctrine emphasized that a good soldier should fear their officers more than the enemy, and some argue that this principle still holds true in contemporary times.¹¹⁶ In 1759, George Washington, a renowned military officer himself, declared that the neglect of discipline is profoundly detrimental to military order.¹¹⁷

C. The Significance of Discipline and Conformity as Pillars of Military Service

The military's primary objective is to secure victory in conflicts.¹¹⁸ Throughout history, the primary objective of military justice has been to uphold discipline as a means of enhancing combat effectiveness,¹¹⁹ and discipline is indeed indispensable for achieving success in warfare.¹²⁰ Therefore, the state has a paramount interest in maintaining a strong and disciplined army. A nation's existence can hinge upon the conduct of its soldiers during combat,¹²¹ and the consequences of improper behavior during war are therefore

¹¹³ See *supra* Part I for a summary of the fictional trial of Billy Budd.

¹¹⁴ Kenneth C. Royall, *Revision of the Military Justice Process as Proposed by the War Department*, 33 VA. L. REV. 269, 269 (1947); Smith, *supra* note 46, at 674.

¹¹⁵ Weber, *supra* note 22, at 124 (citing General George Washington).

¹¹⁶ Ferris, *supra* note 15, at 449; Roan & Buxton, *supra* note 34, at 187.

¹¹⁷ Roan & Buxton, *supra* note 34, at 185.

¹¹⁸ West, *supra* note 15, at 9; Bedi, *supra* note 72, at 1403; Weber, *supra* note 22, at 129.

¹¹⁹ *Prosecutorial Power*, *supra* note 34, at 939.

¹²⁰ Hodson, *supra* note 19, at 36.

¹²¹ William C. Westmoreland & George S. Prugh, *Judges in Command: The Judicialized Uniform Code of Military Justice in Combat*, 3 HARV. J.L. & PUB. POL'Y 1, 50 (1980); see also West, *supra* note 15, at 2.

immeasurable.¹²² If commanders cannot rely on their troops to obey orders, such disobedience will severely undermine the efficiency of the army and consequently harm the national interest.¹²³

Armies operate on principles of hierarchical discipline and obedience to authority.¹²⁴ Conformity to orders is thus a fundamental aspect of military service. Unlike civilian organizations, the military emphasizes discipline and coercion, which act as the binding forces that unify its different components into a cohesive unit. Establishing soldiers' trust of fellow soldiers and commanders is an indispensable condition for an effective army.¹²⁵

Military members engaged in joint tasks, and especially those with life-threatening risks, must rely on one another.¹²⁶ The high-stakes nature of warfare necessitates an organization with rigorous behavioral standards and stern consequences for deviations from those standards. Military operations demand swift, instinctive, and unwavering compliance with orders, particularly in combat scenarios.¹²⁷ Strict discipline is essential to ensure that soldiers act contrary to their natural individual self-preservation instincts, willingly risking their lives, being separated from their families, forfeiting their freedom, and enduring challenging conditions.¹²⁸ At times, soldiers are assigned monotonous or perilous missions. They are taught to prioritize the collective interest over personal interests.¹²⁹ Without punishment for breaches of discipline, many soldiers would prefer to avoid these

¹²² Westmoreland & Prugh, *supra* note 122, at 48.

¹²³ Roan & Buxton, *supra* note 34, at 190.

¹²⁴ *Parker v. Levy*, 417 U.S. 733, 744 (1974).

¹²⁵ Bernard, *supra* note 43, at 325.

¹²⁶ *Id.*

¹²⁷ Victor Hansen, *Changes in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn from this Revolution?*, 16 TUL. J. INT'L & COMPAR. L. 419, 423 (2008); Lederer, *supra* note 21, at 515.

¹²⁸ William C. Westmoreland, *Military Justice—A Commander's Viewpoint*, 10 AM. CRIM. L. REV. 5, 5 (1971) (stating that “[d]iscipline is . . . a state of mind which leads to a willingness to obey an order no matter how unpleasant or dangerous the task to be performed. Discipline conditions the soldier to perform his military duty even if it requires him to act in a way that is highly inconsistent with his basic instinct for self-preservation.”); Ghiotto, *supra* note 12, at 522; Schlueter & Schenck, *supra* note 48, at 547 (stating that “[c]ommanders must have substantial authority, especially in combat situations, because it may be necessary to order military personnel to accomplish hazardous missions”).

¹²⁹ Ghiotto, *supra* note 12, at 522.

missions.¹³⁰ The imposition of punishments deters the evasion of combat responsibilities.¹³¹

Due to the inherent reliance on trust and cooperation within the military, any offense committed within its ranks can have a profound impact on the entire military system, leading to greater perceived severity than similar offenses occurring outside of it. The unique nature of the military gives rise to relevant disparities between its internal justice system and the normal justice system that governs society, justifying different considerations and more severe punishments for similar offenses.¹³² Thus, drug-related actions that impair a soldier's personal functioning, which may be considered a legitimate activity in civilian life, can detrimentally affect the unit's ability to operate effectively, thereby warranting criminalization of drug use among military service members.¹³³ Theft committed by a soldier, even in small amounts, erodes trust among fellow soldiers. Offenses like sexual harassment not only hurt the victim and disrupt the daily military routine, but also undermine the values of friendship, social cohesion, and trust among military personnel, which are crucial for the proper functioning of military units.¹³⁴ Soldiers in the army are compelled to live and work closely together, making it easier for offenses to occur and necessitating a reliance on mutual trust.¹³⁵ Breaching that trust has implications for the feasibility of cooperative efforts toward achieving common goals. Similarly, disciplinary breaches have the potential to spread and become a contagious phenomenon.

Rituals, uniform attire, and a regulated schedule serve to reinforce discipline.¹³⁶ The military, as an institution, emphasizes conformity over individuality and soldiers are typically required to conform to the established military structure.¹³⁷ The U.S. Supreme Court decision in *Goldman v. Weinberger* exemplifies this point. Simcha Goldman, an orthodox Jew practicing his religion, served as a clinical psychologist in the U.S. military.¹³⁸ After years of wearing a yarmulke uninterrupted, he was prohibited from wearing it while in uniform due to a

¹³⁰ Westmoreland & Prugh, *supra* note 122, at 48.

¹³¹ Prugh, *supra* note 15, at 33.

¹³² Finkelstein & Tomer, *supra* note 32, at 143.

¹³³ *Id.*

¹³⁴ Major A.Y. v. Chief Mil. Pros., Appeal 16/23, ¶¶ 24-26 (Mil. Ct. App., June 1, 2023) (Hebrew).

¹³⁵ See *O'Callahan v. Parker*, 395 U.S. 258, 281 (1969).

¹³⁶ *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986).

¹³⁷ See Hansen, *supra* note 127, at 423-24.

¹³⁸ *Goldman*, 475 U.S. at 504-05.

complaint filed by a prosecutor in a trial in which Goldman served as a defense witness.¹³⁹ In a 5-4 decision, the U.S. Supreme Court rejected Goldman's petition and held that the military operates as a distinct society separate from the civilian community.¹⁴⁰ The Court observed that there is no equivalent in civilian life to the obligation to uphold discipline in the military;¹⁴¹ that discipline is crucial for the military to fulfill its duties;¹⁴² that the military is not obligated to tolerate debates or protests to the same extent as civil society;¹⁴³ that, to effectively carry out its role, the military must promote instinctive compliance and a commitment to uniformity;¹⁴⁴ that consideration must be given to the professional judgment of military authorities regarding the relative importance of specific military interests;¹⁴⁵ that courts lack the necessary expertise to determine the impact of violating a military rule on discipline;¹⁴⁶ and that uniform attire fosters the subordination of personal preferences and identities and conveys a sense of hierarchy by minimizing individual characteristics unrelated to rank.¹⁴⁷ The army deems uniformity essential during both war and peacetime, as soldiers must be prepared to obey instinctively, and the essential habit of discipline and uniformity must be cultivated before facing challenges.¹⁴⁸ The Court recognized that the reflex of immediate compliance with procedures and commands should be ingrained without hesitation.¹⁴⁹

Indeed, scholars emphasize that the study and acquisition of military member behaviors occur primarily during periods of peace.¹⁵⁰ Although the consequences of improper conduct during military operations are substantially more significant and severe than those in times of peace,¹⁵¹ the importance of military discipline and unwavering compliance cannot be learned solely on the battlefield.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 506; *see also* *Parker v. Levy*, 417 U.S. 733, 744 (1974).

¹⁴¹ *Goldman*, 475 U.S. at 507.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Goldman*, 475 U.S. at 508.

¹⁴⁸ *Id.*; *see also* Westmoreland, *supra* note 128, at 7.

¹⁴⁹ *Goldman*, 475 U.S. at 508.

¹⁵⁰ Westmoreland & Prugh, *supra* note 121, at 17.

¹⁵¹ *Id.* at 50.

Supporters argue that the military justice system should accurately reflect the unique norms and requirements of the military.¹⁵² They believe that limiting the disciplinary powers of commanders compromises the effectiveness of the military justice system.¹⁵³ Additionally, one might argue that subjecting commanders to cross-examination by accused soldiers in disciplinary proceedings may have negative consequences; doing so could undermine the military hierarchy and erode soldiers' willingness to obey their commanders.¹⁵⁴

D. The Significance of Commanders as Judicial Officers

A compelling argument highlights the significance of commanders' status in disciplinary proceedings, advocating for their role as judicial officers due to their critical responsibility in maintaining order and discipline within their ranks.¹⁵⁵ Such advocates argue that their duty to safeguard the well-being and safety of their soldiers encompasses the responsibility to administer appropriate punishments when warranted.¹⁵⁶ This responsibility presents considerable challenges,¹⁵⁷ underscoring the need for commanders to possess the authority to implement disciplinary measures and maintain a certain level of control over the proceedings.¹⁵⁸

The military justice system is regarded by some as a mechanism that enables commanders to exercise their authority over subordinates.¹⁵⁹ This approach is grounded in the belief that conducting trials within the command structure, with commanders presiding over proceedings, effectively maintains discipline within the unit. Granting commanders the power to impose punishments serves as a direct deterrent against misconduct.¹⁶⁰ In addition, proponents of the system argue that commanders possess intimate knowledge of both the

¹⁵² Hansen, *supra* note 127, at 424.

¹⁵³ Schlueter, *supra* note 23, at 17.

¹⁵⁴ *See also* Bernard, *supra* note 43, at 335.

¹⁵⁵ Schlueter, *supra* note 22, at 58; David A. Schlueter, *American Military Justice: Responding to the Siren Songs for Reform*, 73 A.F. L. REV. 193, 207-08 (2015); Murphy, *supra* note 39, at 139; Ghiotto, *supra* note 12, at 525.

¹⁵⁶ Farmer & Wels, *supra* note 28, at 277.

¹⁵⁷ Ghiotto, *supra* note 12, at 526.

¹⁵⁸ Hodson, *supra* note 19, at 43; Ghiotto, *supra* note 12, at 527; Bishop, *supra* note 113, at 219.

¹⁵⁹ *Prosecutorial Power*, *supra* note 34, at 939-40; Ruzic, *supra* note 34, at 273 (stating that “[o]riginally, the court-martial system was aimed at meeting the disciplinary needs of a commander”).

¹⁶⁰ Ghiotto, *supra* note 12, at 520.

soldiers and the unit's dynamics, making them well-equipped to make informed decisions.¹⁶¹ Their role in upholding discipline necessitates influence over the military justice system.¹⁶²

Advocates argue that soldiers should be tried by commanders rather than professional judges because commanders possess more suitable tools to accurately evaluate soldiers' behavior.¹⁶³ Such advocates emphasize that commanders are uniquely positioned to understand the specific behavioral standards expected within their units and that they can assess the appropriate punishment that serves the overall interests of the unit. Unlike professional judges who lack military experience, proponents of the current system opine that commanders are better suited to determine the gravity of offenses related to military instructions, such as violations related to dress and grooming standards, and that commanders possess the expertise to evaluate the impact of disobedience and strike an appropriate balance between individual rights and the military's operational needs.¹⁶⁴ They also note that commanders have the discretion to consider various factors including overall conduct, contributions to the unit, the impact of the offense on discipline, and the unique dynamics of the unit.¹⁶⁵ Consequently, commanders can prioritize significant military interests, such as the risk of others within the unit committing similar misconduct, over individual rights.¹⁶⁶

Additionally, commanders bear the ultimate responsibility for their subordinates' acts. Some argue that it would be unjust to hold commanders accountable for the misconduct of their soldiers without providing them with the necessary tools to maintain discipline.¹⁶⁷ Military tribunals' inclusion of service members as judges recognizes the unique circumstances of military life. Proponents state that this inclusion ensures that those who understand the intricacies of military service have a voice in the decision-making process.¹⁶⁸ By involving individuals with military experience, the composition of military

¹⁶¹ Finkelstein & Tomer, *supra* note 32, at 150; Hansen, *supra* note 55, at 261.

¹⁶² Alleman, *supra* note 69, at 189.

¹⁶³ *Id.*

¹⁶⁴ *Id.*; Hansen, *supra* note 127, at 424-25.

¹⁶⁵ Hodson, *supra* note 19, at 44.

¹⁶⁶ Hansen, *supra* note 55, at 261.

¹⁶⁷ Schlueter, *supra* note 155, at 211; Robinson O. Everett, O'Callahan v. Parker—*Milestone or Millstone in Military Justice?*, 1969 DUKE L.J. 853, 873 (1969); Hansen, *supra* note 55, at 261-62.

¹⁶⁸ Finkelstein & Tomer, *supra* note 32, at 150.

tribunals reflects a commitment to considering the particular challenges that arise within the military context.¹⁶⁹

It should be noted that familiarity between the presiding military officer and the soldier, where the soldier's identity and personal history are known, may work in favor of the soldier in certain cases. There is space for compassionate considerations within the disciplinary proceedings. The soldier's commendable character traits and contributions to the military unit can be duly considered.

Indeed, one can argue that direct engagement during disciplinary proceedings promotes inclusivity rather than exclusivity by reaffirming the soldier's continued membership within the unit. Even after the presiding military officer communicates the sentence to the soldier, an unofficial opportunity to initiate a dialogue remains, which could potentially influence the presiding officer to reassess the severity of the penalty.

E. Inclusivity and Rehabilitation: Transforming Offenders into Effective Servicemembers

Furthermore, a primary objective of the military justice system is to facilitate the rehabilitation of offenders and transform them into more effective servicemembers.¹⁷⁰ Accused soldiers are not adversaries, but integral members of a team;¹⁷¹ conducting a swift trial minimizes disruption to the soldier's routine and enables them to promptly resume their duties within the army.¹⁷²

F. Military Justice Versus Civilian Law: Addressing Disparities

The military also has specific offenses that are not present in civilian law and are closely tied to military service. These offenses include desertion, disobedience of orders, absence without leave, disrespect, disorderly conduct, dereliction of duty, and conduct unbecoming an officer.¹⁷³ Certain offenses carry significant disgrace, while others are of a more technical nature, such as dressing or grooming sloppily or refusing to fulfill a minor order. Desertion can pose a threat to the army's existence and establishing consequences for the

¹⁶⁹ *Id.*

¹⁷⁰ Mazur, *supra* note 86, at 709.

¹⁷¹ Bernard, *supra* note 43, at 325.

¹⁷² Hodson, *supra* note 19, at 40.

¹⁷³ Bishop, *supra* note 112, at 219; Roan & Buxton, *supra* note 34, at 186; Schlueter, *supra* note 22, at 52-53; Maurer, *supra* note 21, at 675.

offense is thus crucial to deterrence.¹⁷⁴ In many cases, it is not necessary to treat military-specific offenses as if they were civilian criminal offenses.

Therefore, when considering the delicate balance between strengthening discipline and ensuring fairness, it is important to remember that not all instances of military misconduct amount to criminal offenses in civilian tribunals. One might contend that full criminal procedures in military disciplinary proceedings ought to be reserved exclusively for acts that would constitute criminal offenses in a civilian context. In contrast, military offenses such as failure to adhere to dress and grooming standards, disobedience of orders, or absence without leave are unique to the military context and do not exist within the civilian system, thus not requiring criminal procedure elements.¹⁷⁵ Consequently, convictions in disciplinary proceedings are not classified as criminal convictions and do not lead to the creation of a criminal record.¹⁷⁶

The range of offenses that can be addressed through disciplinary proceedings and the severity of the available sentences are limited.¹⁷⁷ Military offenses are primarily designed to uphold military structure and discipline, and they lack condemnation outside of that context. According to the U.S. Supreme Court's ruling in *Middendorf*, deprivation of liberty resulting from a procedure in a non-civilian context, such as a summary court-martial, does not classify it as a criminal proceeding necessitating the appointment of a defense counsel.¹⁷⁸ Conviction for such an offense in the summary court-martial carries no further consequences beyond the immediate penalty.¹⁷⁹ A soldier sentenced to imprisonment within the military context does not have their employment options affected outside of the army. Furthermore, soldiers serving sentences in the military do not reside alongside individuals typically associated with criminal behavior, as the majority of the military population consists of individuals from normative backgrounds. Therefore, the social perception and implications of military imprisonment differ from those associated with civilian criminal convictions.

¹⁷⁴ Bishop, *supra* note 112, at 219.

¹⁷⁵ William R. Willis Jr., *Toth v. Quarles—For Better or for Worse*, 9 VAND. L. REV. 534, 537 (1956).

¹⁷⁶ *Middendorf v. Henry*, 425 U.S. 25, 32, 34, 38-39 (1976).

¹⁷⁷ Mazur, *supra* note 86, at 710.

¹⁷⁸ *Middendorf*, 425 U.S. at 37.

¹⁷⁹ *Id.* at 39.

Therefore, conducting trials with standard procedural guarantees for minor disciplinary matters may appear unnecessary and even absurd.¹⁸⁰ It is unreasonable to expect military lawyers to conduct legal proceedings against a soldier solely based on minor misconduct, such as breaches of dress and grooming standards.

G. Challenges in Providing Defense Counsel Representation

In addition, one can argue that providing defense counsel could create an imbalance between the soldier and the military officer acting as the presiding judge, which might favor the soldier's interests in the proceedings. Defense counsel may also compromise the command hierarchy between the judge military officer and the soldier and undermine the authority and command structure within the military.

Furthermore, the imperative of a prompt response does not leave time for full procedural guarantees. Involving a defense attorney in the proceedings would introduce complexities and potential delays. If the decision in the disciplinary process were prolonged for weeks or months, the deterrent effect against violations of military law and order would diminish. Moreover, introducing defense counsel into the proceedings would undoubtedly alter their dynamics.¹⁸¹ If the right to legal representation were granted, the military could also be compelled to appoint prosecutors to represent their interests.¹⁸² Such a procedure would demand substantial resources and prove time-consuming for defense counsels, who would also be soldiers.¹⁸³

The argument for full criminal procedure in all disciplinary hearings, when taken to an extreme, can lead to absurd conclusions. For instance, the notion of having military defense counsels accompany soldiers into battlefields or be stationed on every ship at sea to be available for potential disciplinary proceedings is impractical. Placing non-combatant counsels in hazardous combat situations is not viable, and there is limited space and time for lengthy discussions in such scenarios.¹⁸⁴ Additionally, the placement of defense counsels in remote locations and aboard ships can present logistical challenges and potential personnel shortages.¹⁸⁵

¹⁸⁰ Bernard, *supra* note 43, at 320.

¹⁸¹ *Middendorf*, 425 U.S. at 45.

¹⁸² *Id.* at 45-46.

¹⁸³ *Id.* at 45.

¹⁸⁴ *See also* Westmoreland, *supra* note 128, at 5.

¹⁸⁵ Ervin, *supra* note 27, at 86 (stating, however, that "these logistical problems can be solved with enough effort and imagination").

IV. THE NEED FOR DUE PROCESS

Despite the arguments in favor of discipline, a question arises as to whether constraining a soldier's freedoms for military efficiency and organization justifies compromising their right to due process.

A. The Impact of Conscription on Individual Rights

Military service inherently involves a significant restriction of individual liberty. Soldiers are subject to more limitations than civilians, as they must adhere to military laws and command instructions. The obligation to obey lawful orders is stringent, and soldiers require permission to engage in work or studies outside of the military. They are obligated to remain within the confines of their assigned unit and cannot abandon their duties.¹⁸⁶ Soldiers face the vulnerability of death in both war and training. They experience separation from their family and friends, and their terms of service can be austere. Furthermore, their freedom of expression, association, and demonstration is restricted.¹⁸⁷ Soldiers are also prohibited from participating in political activities. Privacy becomes complex when soldiers are constantly supervised by their commanders. In these regards, the military's structure governs most aspects of its members' lives.¹⁸⁸ The foundational principle requiring soldiers to be willing to sacrifice their lives reduces them to tools or instruments for achieving broader military or governmental objectives. This perspective views soldiers not as individuals with their own intrinsic value and rights but as means to an end—specifically, the fulfillment of military goals and the protection of the nation. In a civilian context, such limitations would not withstand constitutional scrutiny. Transitioning from a civil society that upholds the liberties of the individual to a military framework that emphasizes the subordination of individuals to the system and prioritizes the military's requirements over personal freedoms can induce profound cultural shock.

Restricting individual rights is particularly contentious in states that impose mandatory conscription. Many states have abolished mandatory conscription.¹⁸⁹ France, for instance, which imposed

¹⁸⁶ Westmoreland & Prugh, *supra* note 121, at 45.

¹⁸⁷ Cooke, *supra* note 57, at 526.

¹⁸⁸ See also Bernard, *supra* note 43, at 325.

¹⁸⁹ Steven L. Winter, *Melville, Slavery, and the Failure of the Judicial Process*, 26 CARDOZO L. REV. 2471, 2480 (2005) (stating that the analogy between slavery and forced recruitment is clear).

compulsory military service in 1793 as a symbol of national unity, abolished this obligation in 1996, marking an important milestone in the shift away from mandatory conscription.¹⁹⁰ In contrast, Israel has maintained mandatory military service through the Security Services Law of 1986, which requires Israeli men and women over eighteen years old to serve in the military for a significant duration.¹⁹¹ Individuals are also subjected to reserve duty following their completion of regular military service.¹⁹² Israel justifies its mandatory military service with the country's unique security situation, which it believes makes waiving compulsory service impractical.¹⁹³ While it can be argued that individuals who voluntarily choose to join the military have willingly relinquished certain freedoms,¹⁹⁴ this argument loses its validity when applied in states where military service is a mandatory duty.

Moreover, the recognition that soldiers are fulfilling a mission for their country through their military service should give rise to a duty to evaluate soldiers in accordance with legal standards and afford them fair trial protections. As the state requires soldiers to make sacrifices, it also assumes the responsibility of safeguarding them against unjust convictions and disproportionate penalties. Otherwise, the state might lose its moral authority to require young people to serve in the army.

B. Challenging the Notion of a Separate Military Community

Skeptics question the notion that the military should be considered a separate community that requires constant disciplinary control. They challenge the idea that the military should have unique and extensive disciplinary powers, arguing for a more balanced approach that respects individual rights and freedoms in the military context.¹⁹⁵ The idea that the military is a distinct and separate society no longer accurately reflects the realities of the modern-day military

¹⁹⁰ MARTIN VAN CREVELD, *THE RISE AND DECLINE OF THE STATE* 412 (1999). On the compulsory military service in France, see Philip Marcus, *Some Aspects of Military Service*, 39 MICH. L. REV. 913, 927-28 (1941).

¹⁹¹ §§ 13, 15, 16, Defence Service Law, 5746-1986 (Isr.).

¹⁹² The Reserve Service Law 2008, art. 5.

¹⁹³ Hadar Aviram, *How Law Thinks of Disobedience: Perceiving and Addressing Desertion and Conscientious Objection in Israeli Military Courts*, 30 LAW & POL'Y 277, 285 (2008).

¹⁹⁴ West, *supra* note 15, at 5.

¹⁹⁵ Edward F. Sherman, *Military Justice Without Military Control*, 82 YALE L.J. 1398, 1401 (1973).

establishment.¹⁹⁶ Other roles in civilian life, such as police officers and firefighters, also entail dangerous and high-responsibility positions. While the military has traditionally been seen as unique in terms of the level of danger and responsibility it entails, these civilian roles also require individuals to risk their lives to protect others and maintain public safety. Acknowledging the parallels of these positions highlights the shared risks and responsibilities faced by individuals in different professions.¹⁹⁷ Another important aspect to consider is that a majority of the modern military is not composed of professional military personnel, and the distinction between civilians and soldiers has become less clear.¹⁹⁸ In addition, reserve personnel often come directly from civilian life and return to their civilian status after completing their required service or after a designated period of time. This temporary transition between military service and civilian life highlights the modern interconnectedness of military service with broader society and reinforces the notion that individuals who serve in the military maintain their status as civilians throughout their service. With evolving societal norms and increased emphasis on individual rights, the military is increasingly seen as an integral part of society rather than a separate entity with its own set of rules and norms. This shifting perspective challenges traditional notions of the military as a separate society and calls for a more nuanced understanding of its role within the broader societal framework.

Justice Brennan's dissenting opinion in *Goldman v. Weinberger* argued that there should be a logical and justifiable rationale for restricting the rights of servicemembers.¹⁹⁹ He argued that it is difficult to make a serious argument that wearing a yarmulke constitutes an extreme and exceptional disruption to the overall attire²⁰⁰ and noted that the yarmulke serves as a reminder that the identity of a U.S. service member encompasses religious and ethnic diversity.²⁰¹ Brennan argued that there should be a rational basis for claiming a military need when it potentially conflicts with religious freedom.²⁰² In 1987, in response to *Goldman*, Congress passed the Religious Apparel Amendment, allowing servicemembers to wear visible and conservative

¹⁹⁶ Ruzic, *supra* note 34, at 265.

¹⁹⁷ Sherman, *supra* note 195, at 1402.

¹⁹⁸ Ferris, *supra* note 15, at 487.

¹⁹⁹ *Goldman v. Weinberger*, 475 U.S. 503, 517 (1986).

²⁰⁰ *Id.* at 518.

²⁰¹ *Id.* at 519.

²⁰² *Id.* at 523.

religious apparel while in uniform.²⁰³ The law signified that diversity is an integral part of democratic life and that drawing distinctions between servicemembers and civilian society is not inherently justified.

C. Preserving the Integrity of Military Justice by the Imperative of Judicial Impartiality and Mitigating Command Influence

It is argued that commanders' involvement in proceedings has the potential to shift trials from being governed by the rule of law to being governed by the rule of the commander.²⁰⁴ Indeed, the perils of the commander's unlawful influence throughout the trial have been referred to as the "mortal enemy of military justice."²⁰⁵ Concern was raised regarding the substantial power held by the commander, which, if arbitrarily exercised, could undermine the perception of justice.²⁰⁶ Unfortunately, commander influence creates the possibility that personal vendettas, abuse, and external factors will influence proceedings against soldiers.

In addition, judicial impartiality is a fundamental aspect of judicial fairness and integral to the right to due process.²⁰⁷ Judicial impartiality guarantees that individuals involved in legal proceedings have the right to a hearing, free from any undue influence or bias.²⁰⁸ This principle is consistent with the fundamental notion that justice must be administered objectively and without favoritism. Moreover, impartiality needs to be maintained at both institutional and personal levels.²⁰⁹ The roles of the prosecutor and the judge must be distinct, and the judge should not be involved as a witness, let alone as the accuser. Justice is impeded when the commander who files a complaint also acts as the judge for the accused soldier, or when the commander of

²⁰³ Brett Curry, *Goldman v. Weinberger* (1986), FREE SPEECH CTR. <https://firstamendment.mtsu.edu/article/goldman-v-weinberger/> [https://perma.cc/2UPF-KUQ7] (Dec. 15, 2023).

²⁰⁴ Hansen, *supra* note 127, at 427.

²⁰⁵ Eugene R. Fidell, *A World-Wide Perspective on Change in Military Justice*, 48 A.F. L. REV. 195, 203 (2000); Alleman, *supra* note 69, at 172; Madison, *supra* note 46, at 423; *Prosecutorial Power*, *supra* note 34, at 946; Murphy, *supra* note 39, at 145.

²⁰⁶ *Prosecutorial Power*, *supra* note 34, at 946.

²⁰⁷ Madison, *supra* note 46, at 428; see generally Nancy B. Pridgen, *Avoiding the Appearance of Judicial Bias: Allowing a Federal Criminal Defendant to Appeal the Denial of a Recusal Motion Even After Entering an Unconditional Guilty Plea*, 53 VAND. L. REV. 983, 987 (2000).

²⁰⁸ Pridgen, *supra* note 207, at 987.

²⁰⁹ SARAH J. SUMMERS, *FAIR TRIALS: THE EUROPEAN CRIMINAL PROCEDURAL TRADITION AND THE EUROPEAN COURT OF HUMAN RIGHTS* 30 (2007).

the accused soldier instructs a judicial officer to impose a specific punishment without the soldier's awareness.

D. Upholding Justice Through Legal Representation

The right to legal representation for criminal defendants who cannot afford it on their own is enshrined in the Sixth and Fourteenth Amendments to the U.S. Constitution.²¹⁰ Legal representation is crucial to rectify the power imbalances and safeguard the judicial integrity of the disciplinary proceedings. By providing soldiers facing potential imprisonment with the opportunity to be represented by defense counsel, the integrity and justice of the disciplinary process can be safeguarded.

In most cases, disciplinary proceedings in the military occur outside of active combat or wartime.²¹¹ Soldiers often deal with legal issues of which they may be unaware, as they lack expertise in the intricacies of the law. Differentiating between awareness and unawareness is particularly crucial in many alleged disciplinary offenses.²¹² Moreover, soldiers face significant pressure and stress in disciplinary proceedings, and they often lack sufficient experience to mount a defense against charges brought against them.

Given these circumstances, soldiers need defense counsel to ensure that their rights are protected and their voice is heard. They need support from someone who can advocate for them and provide guidance throughout the procedure. Soldiers may not know whether they should call witnesses on their behalf, and having a dedicated defense counsel is even more crucial when confronted with accusations by their commanders.

If military defense attorneys are easily accessible, there is no need to unnecessarily prolong the proceedings. The majority of disciplinary

²¹⁰ *Gideon v. Wainwright*, 372 U.S. 335, 352 (1963).

²¹¹ Thus, The Swedish government, for instance, eliminated military justice during peacetime in 1949. Anthony W. Pereira & Jorge Zaverucha, *The Neglected Stepchild: Military Justice and Democratic Transition in Chile*, 32 SOC. JUST. 115, 117 (2005).

²¹² For instance, according to section 133 of the Military Justice Law, a soldier failing to obey a military order faces a penalty of one year's imprisonment. § 133, Military Justice Law, 5715-1955. As stated above, however, the period of imprisonment that can be imposed in disciplinary proceedings is limited. *See supra* text accompanying notes 76-79. If the offense lacks a specified mental element, awareness is necessary. § 19, Penal Law, 5737-1977 (Isr.). Therefore, a soldier who inadvertently breaches discipline, such as missing kitchen duty due to unawareness—though a reasonable individual could have been expected to know—cannot be found guilty under this article.

cases are not factually complex and do not require extensive preparation time. Despite concerns about delays, however, the involvement of a defense attorney is crucial to ensure the fair and proper conduct of the disciplinary process. Their presence is essential in upholding the principles of justice and safeguarding the integrity of the proceedings.

Though some argue that providing defense counsel in every location where soldiers are present is infeasible, the solution to such cases is to limit judicial officers' authority to impose imprisonment penalties. In emergencies, judicial officers should be granted the authority to impose short-term detention until trial. In any case, provisions that are appropriate for addressing disciplinary violations in the midst of armed conflict are not necessarily suitable for a long-term and sustainable justice system. The exigencies and unique circumstances of combat situations may require swift and immediate action to maintain order and protect the safety of individuals, but when establishing a permanent justice system, it is essential to consider broader principles of justice, due process, and individual rights.

E. Billy Budd as a Critique of the Argument of Military Necessity

Captain Vere in *Billy Budd* epitomized the notion that the law should yield to the demands of war.²¹³ The sacrifice of one individual was deemed necessary to deter the insubordination of many. It is argued, however, that the story exposes this notion as a deception.²¹⁴ The text does not provide a reasonable basis for believing that if Billy were acquitted or given a lenient sentence, a rebellion would have ensued. Billy was regarded fondly by the crew. Considering Vere's questionable legal arguments, there is no justification for using his policy arguments or portrayal of military needs as gospel. The state of emergency appears to exist primarily in Vere's perception rather than reality.²¹⁵

As Professor Daniel J. Solove wrote on the story's meaning, "*Billy Budd* can be read as a powerful demonstration of why we should resist our tendency to readily accept arguments by our leaders that we must make certain sacrifices in times of crisis."²¹⁶ By the same token, the United States has offered apologies for the forced evacuation and

²¹³ See *supra* Part I for a summary of the fictional trial of Billy Budd; see also Daniel J. Solove, *Melville's Billy Budd and Security in Times of Crisis*, 26 CARDOZO L. REV. 2443, 2457 (2005).

²¹⁴ *Id.* at 2460.

²¹⁵ *Id.* at 2461.

²¹⁶ *Id.* at 2462.

internment of U.S. citizens of Japanese ancestry during World War II,²¹⁷ conduct which, at the time, it justified through the exigencies of war.

F. Safeguarding Liberty and Mental Well-Being

As previously mentioned, disciplinary proceedings primarily deal with relatively minor offenses. However, it is worth noting that in such proceedings, soldiers may still face the possibility of imprisonment as a form of punishment.²¹⁸ While imprisonment is more humane than historical penalties such as those imposed by the U.S. army in the eighteenth century,²¹⁹ the deprivation of liberty is—barring the death penalty—the most severe sanction that a state can impose on an individual. Justice Marshall's dissenting opinion in *Middendorf v. Henry* argued that representation must be provided when there is a potential for incarceration.²²⁰

The significance of the right to physical liberty is self-evident. It serves as a foundation for the exercise of other fundamental rights. In regular criminal trials, defendants who are at risk of imprisonment are entitled to be represented by defense counsel.²²¹ In Israel, individuals under the age of twenty-one in criminal trials may not be sentenced to imprisonment without first receiving a written report from a probation officer.²²² Conscripted soldiers in the Israeli army are typically under this age.²²³ Considering the gravity and implications of the deprivation of liberty, it becomes even more crucial to ensure that the disciplinary

²¹⁷ *Id.*

²¹⁸ See §§ 152-53, Military Justice Law, 5715-1955; Finkelstein & Tomer, *supra* note 32, at 143.78

²¹⁹ See, e.g., Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 266, 287-90 (1958); Ferris, *supra* note 15, at 446.

²²⁰ *Middendorf v. Henry*, 425 U.S. 25, 59-60 (1976).

²²¹ *Argersinger v. Hamlin*, 407 U.S. 25 (1972); § 15(a)(1), Criminal Procedure Law (Consolidated Version), 5742-1982 (Isr.).

²²² § 37(a), Penal Law, 5737-1977 (Isr.); GLORIA M. WEISMAN, WORLD FACT BOOK OF CRIMINAL JUSTICE SYSTEMS: ISRAEL 15 (1993), <https://bjs.ojp.gov/content/pub/pdf/wfbcjsis.pdf> [<https://perma.cc/DYQ6-6YMR>].

²²³ §§ 13, 15-16, Defense Service Law (Consolidated Version), 5746-1986 (Isr.). These articles require the conscription of males aged between eighteen and twenty-nine for a period ranging from thirty to thirty-two months, and females aged between eighteen and twenty-six for a period of twenty-four months. Typically, both men and women are drafted shortly after finishing their high school education, at ages ranging from eighteen to nineteen.

proceedings uphold principles of fairness, due process, and the right to a proper defense.

The impact of a relatively brief duration of imprisonment should not be underestimated. Being imprisoned can induce a profound sense of loss of control over one's life. The loss of autonomy experienced during this period can lead to severe mental distress and post-traumatic phenomena, significantly impairing an individual's quality of life over an extended period.²²⁴

Moreover, the power imbalance between the commanding officer who initiates the disciplinary process and the soldier charged can contribute to the soldier's sense of helplessness. This feeling may intensify when the soldier is confronted daily by the very commander who ordered the deprivation of their liberty, further exacerbating the psychological impact and feelings of vulnerability experienced by the soldier. The concept of the commander as a "parent surrogate" within a framework of informal and familial relationships²²⁵ may also be incompatible with the imposition of a sentence of imprisonment that has the potential to cause psychological harm to the soldier. Imprisonment represents a significant departure from the nurturing and supportive role traditionally associated with a parent figure.

In disciplinary proceedings, it is crucial to recognize the potential negative impact that such a punishment can have on the soldier's mental well-being. The imposition of imprisonment can lead to a sense of betrayal, confusion, and loss of trust in the commander. It may disrupt the informal and familial dynamics within the unit, further exacerbating the psychological strain experienced by the soldier.

Recognizing these potential consequences for the accused underscores the importance of upholding fairness, due process, and proper legal representation in disciplinary proceedings. It is crucial to address power imbalances, ensure that soldiers have the opportunity to assert their rights, and create an environment that supports their mental well-being throughout the disciplinary process.

G. The Nature of Imprisonment as a Criminal Sanction

In *Engel v. Netherlands*, the European Court of Human Rights provided three factors that should be examined to determine whether a disciplinary charge may be considered "criminal" under Article 6 of

²²⁴ Adrian T. Grounds, *Understanding the Effects of Wrongful Imprisonment*, 32 CRIME & JUST. 1, 2 (2005); Mika'il DeVeaux, *The Trauma of the Incarceration Experience*, 48 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 257, 260 (2013).

²²⁵ For this concept, see Bernard, *supra* note 43, at 325.

the European Convention of Human Rights,²²⁶ which requires fair hearings for such charges.²²⁷ These parameters include the classification of the offense as determined by the legislature, the nature of the violated offense, and the severity of the anticipated punishment in the event of a conviction.²²⁸ The court emphasized the significance of the third parameter in particular.²²⁹

Soldiers in the U.S. military who are convicted in disciplinary proceedings can also be imprisoned,²³⁰ and many disciplinary proceedings in the U.S. military actually result in imprisonment. In the U.S. context, one might consider imprisonment an excessive punishment for breaches of military norms, especially where civilian criminal conduct is punished with the same sanction.

The Israeli Military Defense has voiced concerns regarding the overuse of imprisonment as a disciplinary measure, emphasizing that this practice infringes upon fundamental rights.²³¹ It has also highlighted that this excessive use of confinement has also contributed to a higher rate of individuals abandoning their military service obligations.²³²

It is crucial to highlight the potential consequences and implications of a penalty involving the deprivation of liberty. Indeed, particularly where the sentence is disproportionate to the offense committed, soldiers can experience intense feelings of frustration and injustice that may linger for a significant period. Imprisonment can therefore harm the individual, as well as collective well-being within the ranks.

H. Striking the Balance: Constitutional Due Process in Military

²²⁶ *Engel v. Netherlands*, App. No. 5100/71, ¶ 82 (June 8, 1976), <https://hudoc.echr.coe.int/eng?i=001-57479>.

²²⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, Nov. 4, 1950, Europ.T.S. No. 5, 213 U.N.T.S. 221.

²²⁸ *Engel*, App. No. 5100/71, ¶ 82.

²²⁹ *Id.*

²³⁰ *Middendorf v. Henry*, 425 U.S. 25, 32 n.9 (1976).

²³¹ THE MILITARY DEFENSE, BIENNIAL ACCOUNTANTS 2015-2016, 26, <https://www.idf.il/media/kgsfymwk/%D7%93%D7%95%D7%97-%D7%A1%D7%A0%D7%92%D7%95%D7%A8%D7%99%D7%94.pdf> [https://perma.cc/2LMT-4XTB] (Hebrew). On the imposition of cruel punishments in the army as a major cause of desertion, see Mark. A. Vargas, *The Military Justice System and the Use of Illegal Punishments as Causes of Desertion in the U.S. Army, 1821-1835*, 55 J. MIL. HIST. 1 (1991).

²³² THE MILITARY DEFENSE, *supra* note 232, at 26.

Disciplinary Proceedings

The complex consequences that accused soldiers face in disciplinary proceedings necessitate a careful balance between safeguarding their rights and addressing the needs of the military. It is also essential that rules of procedure in disciplinary proceedings adhere to constitutional due process principles.²³³ As such, guilt should be demonstrated through evidence and not merely asserted, particularly when there are disputes over the facts.²³⁴ Due process also demands that soldiers have the opportunity to confront incriminating evidence presented against them.

When evaluating the constitutionality of the proceedings, it is imperative to consider factors such as the logical connection between the rules and the preservation of military discipline, the availability of less intrusive alternative methods to maintain discipline, and the correlation between the gained efficiency and the infringement on individual rights.²³⁵ Equally important is the assessment of whether there is a proportional relationship between the disciplinary law breached and the severity of the sentence imposed.²³⁶ By considering the aforementioned factors, a fair balance can be achieved, upholding both the rights of soldiers and the necessities of the military.

I. Fair Military Justice for Fostering Discipline and Respect

World War II demonstrated that strict military justice systems could provoke anger among soldiers and undermine confidence in military authority, rather than bolster discipline.²³⁷ It highlighted that a fair justice system is essential for fostering trust within the military ranks. As William C. Westmoreland stated, “A military trial should not have a dual function as an instrument of discipline and as an instrument of justice. It should be an instrument of justice and in fulfilling this function, it will promote discipline.”²³⁸ Indeed, the fairness of the disciplinary process is vital for establishing the legitimacy of

²³³ H CJ 266/05 *Pilant v. Deputy Mil. Att’y*, 59(4) P.D. 707, 713, 715 (2005).

²³⁴ *Id.* at 712-13.

²³⁵ On the constitutional principle of proportionality and its implementation, see Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 *YALE L.J.* 3094, 3118 (2015).

²³⁶ Regarding the implementation of the principle of proportionality to punishment, see generally *id.* at 3186-87.

²³⁷ *Prosecutorial Power*, *supra* note 34, at 940; Hansen, *supra* note 127, at 423-24; see also Goldberg, *supra* note 16, at 2147.

²³⁸ Westmoreland, *supra* note 128, at 8; see also Ruzic, *supra* note 34, at 275.

judgments and punishments.²³⁹ If a punishment is perceived as illegitimate, it is unlikely to foster discipline.²⁴⁰ Unjust punishments can undermine respect for military discipline.²⁴¹ Therefore, ensuring that the disciplinary process is fair and just is not only a matter of upholding individual rights, but is also crucial for maintaining the overall effectiveness and credibility of the military's disciplinary system. Balancing the need for discipline with the need for a fair and just system is crucial in maintaining the integrity and effectiveness of the military justice system in the long run.

Furthermore, from a utilitarian perspective, a military justice system that lacks due process for servicemembers has the potential to deter individuals from joining the armed forces.²⁴² It is also essential to recognize that the fairness of the process holds intrinsic value. The assessment of a legal procedure is not solely based on its final outcome, but also influenced by its fairness.²⁴³ Regardless of the eventual punishments, accused soldiers should feel that their voice was acknowledged, and their perspective was taken into consideration, even if ultimately not accepted. When a trial is conducted and a punishment is imposed without regard for the accused soldiers' position, it can generate feelings of detachment. Such sentiments are detrimental to the unity and cooperative bond required within the military.

V. THE ISRAELI INTEGRATIVE COURT MODEL AS AN APPROPRIATE APPROACH FOR ADDRESSING DISCIPLINARY VIOLATIONS WITHIN THE ARMY

In 2016, the U.S. Congress amended Article 146 of the Uniform Code of Military Justice, establishing a Military Justice Review Panel.²⁴⁴ Every eight years, this panel is responsible for conducting comprehensive evaluations of the U.S. military justice system.²⁴⁵ The ongoing commitment to regularly evaluate the military justice system is a positive measure that encourages careful conduct and helps prevent arbitrariness, while also creating avenues for improvement.

²³⁹ Ghiotto, *supra* note 12, at 500.

²⁴⁰ *Id.* at 532.

²⁴¹ Lederer, *supra* note 21, at 517-18.

²⁴² Maurer, *supra* note 21, at 726.

²⁴³ E. ALLEN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 139-43 (1988).

²⁴⁴ Schlueter & Schenck, *supra* note 48, at 593.

²⁴⁵ *Id.*

This Article specifically highlights the integrative tribunal in Israel as a model that exemplifies fairness and compassion in addressing violations of disciplinary rules. It should be considered as a potential model for addressing disciplinary proceedings worldwide, as it prioritizes justice and respects the rights of all parties involved.

The integrative tribunal was established in early 2018 by then-President of the Military Court of Appeals, Major General Doron Feiles.²⁴⁶ It is a judicial body that handles cases related to offenses of desertion.²⁴⁷ It is typically presided over by a military judge who possesses a legal education and expertise in military law.²⁴⁸ It is important to note that the integrative tribunal is not yet codified in Israeli law.

The integrative tribunal deals with deserters by providing a holistic plan to restore them to duty.²⁴⁹ It serves as a therapeutic and rehabilitative alternative to traditional criminal proceedings.²⁵⁰ Its aim is to facilitate the completion of full and proper service in the Israeli army, and in appropriate cases, the plan includes a comprehensive support system encompassing welfare factors and opportunities for personal growth.²⁵¹ By actively participating and successfully completing the program, soldiers can avoid imprisonment for their absence and prevent the creation of a criminal record.²⁵²

Soldiers who have been detained due to desertion and whose absence period warrants criminal prosecution can request to enter the integrative process.²⁵³ A prerequisite for this participation is the soldier's genuine desire and willingness to return to regular service.²⁵⁴ The soldier will undergo a quick evaluation of their suitability for the integrative process by soldiers serving in the unit belonging to the

²⁴⁶ *The Integrated Court – A Model for Promoting Change Among Those Absent from Military Service*, ISRAEL DEFENSE FORCES (Aug. 17, 2020), <http://tinyurl.com/3fzxute8> [<https://perma.cc/RTB4-2RZJ>] (available in English).

²⁴⁷ Desertion refers to the unauthorized absence of a military service member from their unit for a period of 21 days or more. § 93, The Military Justice Law, 5715-1955.

²⁴⁸ *The Integrated Court – A Model for Promoting Change Among Those Absent from Military Service*, *supra* note 246.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *President's Statement*, ISRAEL DEFENSE FORCES, <https://tinyurl.com/bdfmx595> [<https://perma.cc/3SKX-JD7T>] (last visited Jan. 10, 2024).

²⁵³ *The Integrated Court – A Model for Promoting Change Among Those Absent from Military Service*, *supra* note 246.

²⁵⁴ *Id.*

Military Police Corps, which specializes in assessing the possibility and methods of rehabilitating imprisoned soldiers.²⁵⁵ The soldier can be represented by military defense or a private lawyer of their choice.²⁵⁶ If they are deemed suitable for the integrative process, then after receiving approval from the integrative military tribunal to join it, the soldier will be released from detention and resume their service.²⁵⁷

Upon the soldier's return to their unit, a commanding officer will be assigned to accompany them throughout the proceedings and even beyond, supporting them in their military path.²⁵⁸ The accompanying commander plays a crucial role in offering guidance, support, and supervision to the soldier throughout their rehabilitation process.²⁵⁹

The integrative tribunal aims to support soldiers who face charges of absence from military service, providing them with financial and emotional assistance. In appropriate cases, with the consent of the soldier and their family, welfare officials from local authorities and the military will provide support and assistance.²⁶⁰ This support will be coordinated with the integrative tribunal, which will monitor the progress of the civilian therapeutic plan.²⁶¹ Acknowledging that personal and family circumstances can pose obstacles to the defendant's integration into the military, the integrative program emphasizes the collaboration between military and civilian welfare factors.²⁶² This comprehensive support allows soldiers to successfully prepare for their return to military service.²⁶³

As a general guideline, the integrative process will span one year.²⁶⁴ During this period, the soldier will be expected to serve dutifully and refrain from committing additional criminal offenses, including absence from service.²⁶⁵

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *The Integrated Court – A Model for Promoting Change Among Those Absent from Military Service*, *supra* note 246.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *The Integrated Court – A Model for Promoting Change Among Those Absent from Military Service*, *supra* note 246.

During the follow-up hearings, the integrative tribunal conducts reviews based on updated reports from the relevant parties, including the soldier's commanding officer.²⁶⁶ The follow-up hearings are an integral part of the integrative process, designed to ensure continuous oversight and support for the soldier undergoing rehabilitation. These hearings occur regularly and periodically throughout the duration of the integrative process. The structure of these hearings is deliberately designed to adapt to the evolving needs and circumstances of the soldier, reflecting changes in behavior, compliance with rehabilitation measures, and overall progress. By holding these hearings during the integrative process, the tribunal ensures a dynamic and responsive approach to rehabilitation, allowing for the adjustment of strategies, interventions, and supports as necessary. This ongoing review mechanism is crucial for addressing any emerging obstacles, providing targeted benefits, and, when needed, issuing warnings or highlighting the potential consequences of reverting to the standard criminal track.²⁶⁷ It is important to clarify that while desertion is an offense unique to military contexts, it is treated as a criminal offense under military law and carries a civilian criminal record for the convicted.

If the soldier successfully completes the integrative process while maintaining proper military service throughout the year, they will be convicted of an alternative offense that does not result in a civilian criminal record but may entail probationary imprisonment.²⁶⁸

Desertion is considered a serious offense within the military justice system, as it undermines discipline, compromises mission readiness, and can have severe consequences for the safety and effectiveness of the armed forces. During World War I, desertion was considered a grave offense, and deserters could face the death penalty in some cases.²⁶⁹ Under the U.S. Uniform Code of Military Justice, the death penalty can still be imposed for desertion in times of war.²⁷⁰

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ Steven R. Welch, *Military Justice, in 1914-1918-ONLINE: INTERNATIONAL ENCYCLOPEDIA OF FIRST WORLD WAR* 8 (Ute Daniel, Peter Gatrell, Oliver Janz, Heather Jones, Jennifer Keene, Alan Kramer & Bill Nasson eds., Oct. 8, 2014), https://encyclopedia.1914-1918-online.net/article/military_justice [<https://perma.cc/QKF2-GEHV>].

²⁷⁰ 10 U.S.C. § 885(c) (“Any person found guilty of desertion or attempt to desert shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, but if the desertion or attempt to desert occurs at any other time, by such punishment, other than death, as a court-martial may direct.”).

Deserters exhibit common characteristics, which often include intricate family backgrounds, financial hardships, emotional challenges, and difficulties in adjusting to the military environment.²⁷¹ These factors significantly contribute to their struggles in maintaining military service, ultimately leading to the act of desertion. Economic or personal circumstances may sometimes compel individuals to prioritize their family livelihood over military duties.²⁷² Considering the common causes of these offenses, it is evident that prison sentences have limited deterrent effect. Recognizing that many deserters genuinely desire to continue their service, a rehabilitative treatment program could prove beneficial. The primary objective of such a program is to facilitate the soldiers' smooth reintegration into the military system and foster their long-term success within the institution.

The establishment of an integrative tribunal represents a notable shift in the approach to disciplinary proceedings within the armed forces. In addition to the aspects of the tribunal that are traditionally punitive, it includes a novel emphasis on rehabilitation and re-integration. The unique characteristics of the military framework, such as stringent disciplinary requirements and an emphasis on enforcement, present challenges. Young soldiers, who comprise a significant portion of the military population, often face criminal convictions (such as in cases of desertion) and subsequent prison sentences. Unlike the civilian legal system, which offers a range of rehabilitation tools, the military judicial system has historically prioritized strict enforcement and has limited resources allocated to rehabilitation and treatment. The integrative model seeks to change this approach by incorporating rehabilitation and integration principles into the military disciplinary process.

If the army can suggest rehabilitation and care to soldiers who have committed the offense of desertion, it can certainly provide the same support to soldiers who have committed less serious disciplinary offenses. The army's ability to offer rehabilitation and care to soldiers who have deserted demonstrates its capacity to address serious transgressions and prioritize the well-being and development of its personnel. By extending similar assistance to soldiers who have committed lesser disciplinary offenses, the army can foster a culture of growth and rehabilitation, ultimately benefiting both the individual soldiers and the overall strength and effectiveness of the military. The

²⁷¹ Aviram, *supra* note 193, at 283, 287.

²⁷² *Id.*

integrative tribunal should serve as a model for the proper treatment of disciplinary offenses in militaries worldwide.

VI. CONCLUSION

This Article sheds light on the issue of fairness in military disciplinary proceedings. Within the current system of Israeli military justice, the equilibrium between discipline, security, and individual rights in disciplinary proceedings has not been adequately balanced. The procedural safeguards provided to soldiers to prevent arbitrariness in disciplinary proceedings are evidently inadequate, and the prevailing imbalance heavily favors discipline over safeguarding individual rights.

The authority vested in judicial military officers is excessive, as they may impose imprisonment for minor disciplinary offenses like the failure to adhere to proper attire standards. The commander's authority to imprison a soldier without providing the minimum procedural guarantees is unacceptable. While the distinct nature of the military framework may allow for some limitations on soldiers' rights beyond those permitted in civilian life, violating soldiers' rights to a greater extent than what is required by the military service cannot be justified. The disproportionate harm inflicted upon personal liberty undermines human dignity and erodes the public and soldiers' confidence in the military system.

This Article argues that fair trial guarantees should be a fundamental requirement when convicting and imposing penalties on accused soldiers in disciplinary proceedings. It highlights the importance of ensuring the impartiality of judicial officers and emphasizes that accused soldiers should not be treated as second-class citizens; rather, they should be entitled to a fair, impartial, and respectful trial. It argues that accused soldiers deserve constitutional protections no less than their counterparts in civilian criminal courts. Furthermore, it asserts that soldiers should be safeguarded against external pressure from commanders regarding their conviction and punishment, which undermines fairness of the system. In addition, accused soldiers should be entitled to legal representation, especially when facing the possibility of imprisonment.

The equilibrium of the disciplinary proceedings should be shifted towards upholding rights and ensuring due process guarantees. As

aptly stated by Roscoe Pound, "Security must be held. Yet the individual, too, calls for security of his personality."²⁷³

Entrusting the disciplinary judgment to unprofessional judges who exhibit a lack of interest or ability to conduct a fair trial necessitates imposing limitations on their punishment powers. In part, their authority to impose imprisonment, even for limited periods, should be restricted due to the potentially severe physical and mental consequences of incarceration. Deviations from the rules of procedure and the denial of the right to be represented by a defense counsel should only occur under exceptional and urgent circumstances. As a general principle, it is imperative that a soldier not be sentenced to prison without the representation of defense counsel.

Discipline alone cannot supersede other considerations, especially within a democratic context.²⁷⁴ It is difficult to substantiate the claim that a fair disciplinary procedure would undermine the capabilities of the army. Instead, it is in the military's interest to make every effort to prevent feelings of alienation. When the military justice system is perceived as arbitrary, it fosters resentment, diminishes loyalty, and weakens discipline.²⁷⁵ The disciplinary procedure should also prioritize the pursuit of truth, and independent discretion is vital for ensuring justice. Discipline should not be seen as an end in itself but rather as a means to an end. Discipline and justice should not be portrayed as conflicting principles, but rather as complementary elements.

The integrative tribunal, which emerged in Israel in recent years, recognizes the unique challenge posed at the intersection of the military disciplinary framework and the characteristics of the soldiers' population. It acknowledges the need to depart from the inherent rigidity of the military structure and mediate between the military's demands and the personal needs of soldiers. It entails fostering a deeper understanding and attentiveness among commanding officers. The implementation of the rehabilitation process fosters a sense of community, belonging, equal opportunities, and social integration. It establishes an environment that supports the effective execution of both discipline and treatment. It acknowledges that the army's most valuable resource is its human capital.

The integrative tribunal should be a model for addressing disciplinary violations within militaries worldwide, showcasing that

²⁷³ Pound, *supra* note 22, at xiv.

²⁷⁴ Hansen, *supra* note 127, at 423.

²⁷⁵ *Id.* at 424.

justice, compassion, and discipline are not contradictory values, but rather principles that can coexist harmoniously.