K Grady, 'Disciplinary Offences at the Court Martial' [2016] 10 *Criminal Law Review* 714-742

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This article analyses the disciplinary offences under Part 1 of the Armed Forces Act 2006 which were prosecuted in the court martial between 2010 and 2015.

Introduction

The UK military justice system has been described as a "closed",[1] "obscure and overlooked field"[2] with the work of the court martial going largely unnoticed, at least for those outside of criminal defence practice. For some of us, the limit of our knowledge of that system perhaps extends to the famous Blackadder episode, *Corporal Punishment*.[3] There, our eponymous protagonist is tried for one count of disobeying orders and a (somewhat legally dubious) charge of murdering General Melchett's beloved pet pigeon Speckled Jim. During the proceedings, Blackadder portrays some understandable concern about the extent to which his fair trial rights will be respected. Not only does his court martial include a dock identification,[4] but General Melchett takes a starring role wearing all four hats of prosecution witness, judge, jury and executor. The court's distain for due process is evident from the start:

> *Captain Darling for the prosecution:* May it please the court, as this is an open and shut case, I beg leave to bring a private prosecution against the defence counsel for wasting the court's time.
>
> *Judge General Melchett:* Granted. Defence counsel is fined fifty pounds for turning up.
>
> *Lieutenant George for the defence:* This is fun! This is just like a real court!

Despite being "just like a real court", little attention is paid to military justice within the broader criminal justice systems of the UK whilst the paucity of academic literature on the practice of the court martial is notable. If the magistrates' court is the neglected younger sibling of the Crown Court as far as research is concerned, the court martial appears to be the long-lost second cousin; rarely seen or heard of. In the US, military law exists as a specific scholarly discipline yet one would be hard-pushed to say the same of the UK. In practice, numbers of solicitors and barristers specialise in proceedings before the court martial but that work has not generally translated into the university.

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[1] N. White, "Book Review: Murder, Mutiny and the Military: British Court Martial Cases 1940-1966" (2006) 11(3) *J.C.S.L.* 511, 511.

[2] R. Ponce de León, "The Coming of Age of Military Law and Jurisdiction in the English-Speaking Countries" (2010) 49 *Mil. L. and L. of War Rev.* 263, 269.

[3] BBC, *Blackadder Goes Forth*, Episode 2 (1989).

[4] A practice described as "improper" in *Cartwright* (1914) 10 Cr. App. R. 219.

"The academic study of military law within the United Kingdom, with its emphasis on military justice, has few adherents and disciples."[5]

What research has been done into the court martial tends to concentrate on the international legal aspects of the military justice system. Reflecting international law's status as the legal discipline à la mode, literature has shone light on the compliance of the military justice system with the ECHR.[6] Research has also examined the influence of international criminal law;[7] an endeavour likely to continue as the investigations of the Iraq Historic Allegations Team reach their conclusion.[8] Yet, this "flourishing status" of international law within the academy "contrasts sharply" with the relative scarcity of analysis of the court martial from a domestic law perspective.[9]

This concentration on the relationship between international and UK military law belies the reality of the caseload of the courts martial since war crimes are hardly their daily business. In fact, the bread-and-butter of the military justice system is in some ways remarkably similar to that of magistrates' and Crown courts up and down the country: common-or-garden cases of theft, actual bodily harm, criminal damage and so forth. However, aside from some different procedural arrangements,[10] there is one striking distinction between the civilian courts and their military counterparts – a feature ably illustrated by the trial of Captain Blackadder. Military courts not only try offences contrary to ordinary English criminal law – which applies to those subject to service jurisdiction anywhere in the world by virtue of s.42 of the Armed Forces Act 2006 (the AFA) – but also a series of substantive disciplinary offences, such as disobeying orders.[11]

The AFA was the culmination of a series of reforms designed to remedy violations of the ECHR found by the court in Strasbourg from the late 1990s onwards. In a succession of cases, the high water mark of which was *Findlay v United Kingdom,*[12] aspects of the military justice system were found to

[5] G. Rubin, "Why Military Law? Some United Kingdom Perspectives" (2007) 26 *University of Queensland L.J.* 353, 353, cf G. Rubin, "United Kingdom Military Law: Autonomy, Civilianisation, Juridification" (2002) 65 *M.L.R.* 36, 36.
[6] E.g. A. Lyon, "Two swords and two standards" [2005] *Crim. L.R.* 850; A. Lyon, "After Findlay: a consideration of some aspects of the military justice system" [1998] *Crim L.R.* 109; D. Richards "Appeal against Court Martial sentences: has anything changed?" [1999] *Crim. L.R.* 480; J. Cooper, "Procedural Due Process, Human Rights and the Added Value of the Right to a Fair Trial" [2006] 11(1) *J.R.* 78, 89 et seq; R. Ponce de León, "The Coming of Age of Military Law and Jurisdiction in the English-Speaking Countries" (2010) 49 *Mil. L. and L. of War Rev.* 263, 270 et seq.
[7] E.g. R. Kerr, "A Force for Good? War, Crime and Legitimacy: The British Army in Iraq" (2008) 24(4) *Defense & Security Analysis* 401; G. Simpson, "The Death of Baha Mousa" (2007) 8 *Melbourne J.I.L.* 340; N. Rasiah, "The Court-martial of Corporal Payne and Others and the Future Landscape of International Criminal Justice" (2009) 7 *J.I.C.J.* 177.
[8] See Iraq Historic Allegations Team, *Quarterly update July-September 2015*, November 2015, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/478806/20151120-Quarterly_Update_website_Final.pdf [accessed 28 June 2016]; Service Prosecuting Authority, *Annual report 2014/5*, http://spa.independent.gov.uk/linkedfiles/spa/427088spareport_aw_web_lr.pdf [accessed 28 June 2016], pp.4-5 and 16-7.
[9] G. Rubin, "Why Military Law? Some United Kingdom Perspectives" (2007) 26 *University of Queensland L.J.* 353, 353. The only exception to this seems to be military legal history on which more has been written.
[10] See below at XX.
[11] Under part 17 of the AFA, a small number of offences which can be committed by civilians are also punishable by the civilian courts, such as aiding and abetting desertion.
[12] (22107/93) (1997) 24 E.H.R.R. 221.

be in violation of the right to a fair trial[13] and the right to liberty.[14] The AFA, which introduced "wide-ranging and fundamental changes",[15] has three key features. First, the Act aimed to ensure compliance with the ECHR.[16] Secondly, it engineered the unification of the justice system across all three services. Previously, the Army, Royal Navy and Royal Air Force were each subject to different laws and procedures; by contrast, the AFA created a single prosecuting authority, and a common set of offences to which service personnel would be subject.[17] Thirdly, the AFA sought to align the court martial with the civilian criminal courts insofar as possible: "[b]y this Act Parliament has attempted to apply to the military, procedures, rules and sentences drawn directly from the civilian justice system."[18] One substantive exception to this is the disciplinary offences criminalised under the AFA.

Under Part 1 of the Act, the court martial has jurisdiction over scores of disciplinary offences which can be committed by military personnel subject to service law, or in some cases, by civilians subject to service jurisdiction.[19] I refer to these offences throughout this article as 'disciplinary offences' by contrast with 'civilian crimes' by which I mean offences contrary to ordinary English criminal law.[20] Many of these disciplinary offences have no civilian equivalent because "Parliament has decided that certain disciplinary offences that do not constitute criminal behaviour in civilian life are nevertheless to be punished as such in a Service context".[21] This is unsurprising given the dependence of the military on the maintenance of discipline and the importance of upholding hierarchical authority,[22] which many of the disciplinary offences seek to do. The effect is to make the court martial a "hybrid jurisdiction", exercising both criminal and disciplinary power in a manner unknown in other professions where those functions are split between the criminal courts and other regulatory bodies.[23]

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[13] E.g. *Findlay v UK* (22107/93) (1997) 24 E.H.R.R. 221; *Cable v UK* (2000) 30 E.H.R.R. 1032; *Moore v UK* (2000) 29 E.H.R.R. 728, [2000] E.L.R. 124; *Morris v UK* (38784/97) (2002) 34 E.H.R.R. 52, [2002] Crim. L.R. 494; *Grieves v UK* (57067/00) (2004) 39 E.H.R.R. 2, [2004] Crim. L.R. 578; *Thompson v UK* (36256/97) (2005) 40 E.H.R.R. 11; *Martin v UK* (40426/98) (2007) 44 E.H.R.R. 31.

[14] E.g. *Hood v UK* (27267/95) (2000) 29 E.H.R.R. 365, (2000) E.L.R. 112; *Thompson v UK* (36256/97) (2005) 40 E.H.R.R. 11. See also P. Camp, "Military pre-trial custody" [2001] *Crim. L.R.* 459; P. Camp, "Close arrest for military defendants – time for change?" [1998] *Crim. L.R.* 646.

[15] D. Richards, "The Armed Forces Act 2006 – civilianising military justice?" [2008] *Crim. L.R.* 191, 192.

[16] Service Prosecuting Authority, *First Report and Business Plan*, January 2009, http://spa.independent.gov.uk/linkedfiles/spa/report2008.pdf [accessed 28 June 2016], p.9; C. Gale, "Disciplinary uniformity in uniform: a success of the Human Rights At 1998?" [2008] *J.C.L.* 170; S.S. Strickey, "'Anglo-American' military justice systems and the wave of civilianization: will discipline survive?" [2013] *Cambridge J.I.C.L.* 763, 785.

[17] D. Richards, "The Armed Forces Act 2006 – civilianising military justice?" [2008] *Crim. L.R.* 191, 197; C. Gale, "Disciplinary uniformity in uniform: a success of the Human Rights At 1998?" [2008] *J.C.L.* 170, 176; L. McGowan, "Criminal law legislation update" [2007] *J.C.L.* 99, 99.

[18] D. Richards, "The Armed Forces Act 2006 – civilianising military justice?" [2008] *Crim. L.R.* 191, 192. See also A. Munt, "All change on the court martial front!" [2009] *Archbold News* 7, 7; S.S. Strickey, "'Anglo-American' military justice systems and the wave of civilianization: will discipline survive?" [2013] *Cambridge J.I.C.L.* 763, 786.

[19] There are some other disciplinary offences in other parts of the AFA and in other legislation (such as the Armed Forces Act 1991 s.18(8) and s.20(9) and the Reserve Forces Act 1996 ss.95-7) but most are now incorporated into Part 1 of the AFA 2006.

[20] The AFA uses the term "service offence" to explain which offences can be tried by the court martial. By virtue of s.50(2), "service offence" includes both disciplinary and ordinary civilian criminal offences.

[21] *Guidance on Sentencing in the Court Martial*, Version 4, JAG/MCS, October 2013, para. 6.3.

[22] P Rowe, "Military Misconduct during International Armed Operations: 'Bad Apples' or Systemic Failure?" (2008) 13(2) *J.C.S.L.* 165, 166; Ministry of Defence, *Manual of Service Law: JSP 830*, https://www.gov.uk/government/collections/manual-of-service-law-msl#manual-of-service-law-jsp-830 [accessed 28 June 2016], vol.1, ch.1, para.9(a).

[23] *Love* [1998] 1 Cr. App. R. 458, 462.

That said, the designation of these offences as 'disciplinary' should not be taken to imply that they are insignificant or unimportant: they amount to crimes for the purposes of the enhanced protections of article 6 of the ECHR[24] since all of them may be punished by imprisonment and ten of them attract a punitive potential life sentence.

The aim of this article is to examine the operation of the court martial in respect of these disciplinary offences. It does so by undertaking a doctrinal and empirical analysis of the prosecutions for offences contrary to Part 1 of the AFA in the period January 2010 to April 2015. The results of every court martial during that period of time have been made publicly available by the Ministry of Defence as part of the government's "transparency and open data initiative".[25] The article begins by examining the dataset released by the Ministry of Defence, including the limitations of the data, and the procedure by which defendants arrive at the court martial. This is significant because, as with the civilian criminal justice system, there are a number of filters in place which serve to curtail the cases which come to court. Subsequently, the article examines a number of findings from the data, including annual prosecution rates, the most common offences charged, the number of charges laid against each defendant, the spread of defendants across the three services, and conviction rates. As these findings are discussed, the article provides substantive doctrinal analysis of a number of these offences given their potential novelty to some readers.

Court Martial Results January 2010 to April 2015

The dataset of court martial results released by the Ministry of Defence is a spreadsheet providing for each defendant their rank, service, trial court, sentencing date, charge(s), verdict for each charge, and (where applicable) sentence. The data is anonymous so it is not generally possible to identify specific defendants, although in some instances this can be deduced.[26] Also missing from the dataset is any record of pleas so who was convicted after trial and who pleaded guilty is unknown, although data from elsewhere suggests that contested trials are a minority.[27] The information provided relates only to the number of individuals prosecuted and not the number of cases or trials as the dataset does not identify which defendants were tried together. In addition, ethnographic data about the age, gender or ethnic background of those military personnel subject to proceedings is excluded.[28]

The data covers results (i.e. date of sentence or acquittal) from January 2010 to April 2015 – five years and four months. Since the disciplinary offences under the AFA came into force in October 2009,[29] the dataset includes some historic cases brought under the old tripartite legislation: the Army

[24] See the test set out in *Engel v The Netherlands* (5100/71) and others (1979-80) 1 E.H.R.R. 647 at [82] and also *Cooper v United Kingdom* (48843/99) (2004) 39 E.H.R.R. 8, [2004] Crim. L.R. 577 and *Bell v United Kingdom* (41534/98) (2007) 45 E.H.R.R. 24.
[25] Ministry of defence, *Court martial results from the military court centres*, https://www.gov.uk/government/publications/court-martial-results-from-the-military-court-centres [accessed 28 June 2016]; Ministry of defence, *Court martial results from the military court centres: January 2010 to April 2015*, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/425580/20150501-Court_Martial_Results_Jan2010-Apr2015_MCSOM-O.csv/preview [accessed 28 June 2016].
[26] See below at XX.
[27] Service Prosecuting Authority, *Annual Report 2014/5*, http://spa.independent.gov.uk/linkedfiles/spa/427088spareport_aw_web_lr.pdf [accessed 28 June 2016], p.13.
[28] For the cases against civilians documented in the dataset, their gender and whether the defendant is a youth can be deduced from their titles.
[29] Armed Forces Act 2006 (Commencement No. 5) Order SI 2009/1167 art. 4.

Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957. In some cases, it is possible to identify these old charges because the nomenclature of the offence has changed (for example, the offence of drunkenness under section 43 of the Army Act 1955 is now the offence of unfitness or misconduct through alcohol or drugs contrary to section 20 of the AFA). In other cases, because the name of the offence remained the same, it is not possible to tell whether the charges were brought under the new or the old legislation. In the discussion of the offences below, charges for the same type of mischief (albeit brought under different legislation) have been combined and referred to by the new nomenclature.

The data does not reflect the full extent of known offending within the services because of processes which serve to limit those cases which come before the court martial. Procedurally, the commanding officer has certain responsibilities when the suspicion that a disciplinary offence has been committed is brought to their attention.[30] As the Ministry of Defence explains, commanding officers "are at the very heart of the Service Justice System with appropriate disciplinary and administrative powers over all personnel under their command."[31] These officers (or commanders to whom this duty has been delegated) have the power to initiate proceedings for some offences (provided the suspect is "(a) an officer of or below the rank of commander, lieutenant-colonel or wing commander; or (b) a person of or below the rank or rate of warrant officer"[32]). Of those disciplinary offences criminalised under Part 1 of the AFA, commanding officers may try them all summarily with the exception of the offences contrary to: section 1 (assisting an enemy); section 2 (misconduct on operations); section 3 (obstructing operations); section 5 (failure to escape etc.); section 6 (mutiny); section 7 (failure to suppress mutiny); section 8 (desertion); section 31 (hazarding of ship); section 32 (giving false air signals etc.); section 33 (dangerous flying etc.); and sections 37 and 38 (various prize offences[33]). In addition, the offences contrary to section 4 (looting); section 16 (malingering); and section 30 (allowing escape, or unlawful release, of prisoners etc.) may only be dealt with summarily in certain circumstances.[34]

On being informed that a disciplinary offence may have been committed, the commanding officer has a duty to refer the matter to the service police if it is a Schedule 2 offence (i.e. relatively serious) or, if

[30] The procedure for civilian crimes differs in that, where committed in England and Wales by those subject to service jurisdiction, the civilian courts and the court martial have concurrent jurisdiction. A protocol between the Director of Public Prosecutions and the Director of Service Prosecutions determines which jurisdiction deals with the case: *Protocol on the Exercise of Criminal Jurisdiction in England and Wales between the Director of Service Prosecutions and the Director of Public Prosecutions and the Ministry of Defence* (2011), http://spa.independent.gov.uk/linkedfiles/spa/test/about_us/publication_scheme/20111007-juris_eng_and_wales.pdf [accessed 28 June 2016].

[31] Ministry of Defence, *Manual of Service Law: JSP 830*, https://www.gov.uk/government/collections/manual-of-service-law-msl#manual-of-service-law-jsp-830 [accessed 28 June 2016], vol.1, ch.1, para.2(b). See also S.S. Strickey, "'Anglo-American' military justice systems and the wave of civilianization: will discipline survive?" [2013] *Cambridge J.I.C.L.* 763, 764. On the definition of 'commanding officer' see Ministry of Defence, *Manual of Service Law: JSP 830*, https://www.gov.uk/government/collections/manual-of-service-law-msl#manual-of-service-law-jsp-830 [accessed 28 June 2016], vol.1, ch.2.

[32] AFA s.52(3). The powers differ depending on the identity of the suspect, the status of the commanding officer and the potential charge. See Ministry of Defence, *Manual of Service Law: JSP 830*, https://www.gov.uk/government/collections/manual-of-service-law-msl#manual-of-service-law-jsp-830 [accessed 28 June 2016], vol.1, ch.6, parts 3, 4 and 5 and ch.2 and J. Blackett, *Rant on the Court Martial and Service Law* (Oxford: OUP, 2009), para. 1.28-9.

[33] The concept of 'prize' developed historically in relation to the seizure of the spoils of war by the victorious party. Prize offences therefore address misconduct in the course of taking prize.

[34] AFA s.53(1).

not, to either involve the police or ensure that the offence is otherwise investigated.[35] If the service police investigate and consider that there is sufficient evidence to charge, they have a duty to refer the case to the Director of Service Prosecutions (DSP) if it is a Schedule 2 offence or certain other prescribed circumstances exist.[36] All other cases are referred back by the police to the commanding officer.[37] That officer then has the power to either deal with the matter summarily or refer it to the DSP themselves.[38] In consequence, "[i]t seems clear that the amendments in 2006 delineated 'serious matters' – to be kept free from the chain of command – from [minor] 'discipline matters' that could be handled within the unit."[39] In circumstances where the commanding officer decides to deal with the case, the defendant may be tried by that officer at a summary hearing, where limited penalties can be imposed.[40] Such cases are not recorded in the dataset and do not appear to be publicly available. This is potentially significant because it appears that, for some disciplinary offences, the cases brought before the court martial are merely the tip of the iceberg. For example, it has been reported that 800 personnel from the Army went absent without leave in 2010,[41] yet the dataset shows only 186 defendants prosecuted at the court martial that year. This suggests that perhaps three-quarters of those going absent without leave were either not charged with the offence at all (perhaps because of evidential problems or public interest reasons not to prosecute) or were tried summarily by their commanding officer. In consequence, the dataset provides only a partial picture of service offending.

To further complicate matters, in cases where the commanding officer is willing to proceed summarily, a defendant has a right to elect trial by court martial instead;[42] a system that is far more favourable to the defence than the civilian equivalent because the right to elect applies to all disciplinary (and civilian criminal) offences not merely either-way ones. Where the defendant does not elect and is therefore tried by their commanding officer at a summary hearing, there is a right to appeal against conviction and/or sentence by way of rehearing at the Summary Appeal Court.[43] Whether a case is tried by the court martial – and subsequently appears in the dataset – is therefore

[35] AFA ss. 113-115, s.128, sch. 2 and the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations SI 2009/2055. Simply put, the more serious the offence, the more likely it is that referral will be necessary.
[36] AFA s.116(2). Those circumstances being, in brief, repeat offences of threats/violence; serious injury or death of a subordinate or someone whom the defendant was under a duty to safeguard; or a death in custody: Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations SI 2009/2055 reg.5.
[37] AFA s.116(3). See also D. Richards, "The Armed Forces Act 2006 – civilianising military justice?" [2008] *Crim. L.R.* 191, 201.
[38] AFA s.119 and s.120.
[39] S.S. Strickey, "'Anglo-American' military justice systems and the wave of civilianization: will discipline survive?" [2013] *Cambridge J.I.C.L.* 763, 785.
[40] AFA s.124, s.132 and s.133.
[41] Ministry of Defence, *British military personnel AWOL figures 2006 to 2014*, 16 June 2014, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/320963/20140616-Military_Awol_Figures_2006-2014.pdf [accessed 28 June 2016]. Frustratingly, other sources suggest different figures including some which could be well in excess of 800: cf Ministry of Defence, *Number of military personnel going AWOL (absent without leave) for each year 2004 to 2014*, 21 August 2014, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/348103/20140821_Armed_Forces_AWOL_2004_2014.pdf [accessed 28 June 2016] and Ministry of Defence, *AWOL Stats 2000-2010 including Prosecution and Sentences for Desertion*, 4 November 2010, https://www.gov.uk/government/publications/awol-stats-2000-2010-including-prosecution-and-sentences-for-desertion [accessed 28 June 2016].
[42] AFA s.129.
[43] AFA s.141. See also P. Rowe, "A New Court to Protect Human Rights in the Armed Forces of the UK: The Summary Appeal Court" (2003) 8(1) *J.C.S.L.* 201.

determined by decisions made by the police, commanding officer and the defendant, whilst cases tried summarily are hidden from public view.

Where the case is referred to the DSP for prosecution or the defendant elects trial by court martial, matters proceed in a similar manner to those in the civilian courts. Like the Crown Prosecution Service, the Service Prosecuting Authority applies evidential sufficiency and public interest tests in determining whether to prosecute. However, in the military justice system, the public interest test is supplemented by a "service interest" test. As the Authority explains "[t]he Service interest requires the maintenance of good order and discipline within Her Majesty's Forces. Discipline is essential to the maintenance of morale and the maintenance of morale is a key component of operational effectiveness."[44] The application of these tests and the discretion afforded to the DSP therefore also serve to limit the cases tried by court martial.

At trial, in lieu of a jury, the court martial usually takes place before a board, consisting of a judge advocate and between three and seven lay members who will generally be officers or warrant officers.[45] The rules of evidence broadly reflect those in the civilian criminal courts.[46] Unlike in the civilian system, simple majority verdicts are permitted[47] and, unless a civilian is on trial, the board collectively decides on sentence.[48] Oddly, "[t]he Court Martial is required to pass a separate sentence in respect of each offence … except where the trial was at the election of the defendant, in which case one global sentence for all offences is passed".[49] Appeal against conviction and/or sentence by the court martial is to the Court Martial Appeal Court – in essence, the Court of Appeal (Criminal Division) sitting with a different hat. The Appeal Court has generally adopted a deferential attitude towards the court martial[50] – particularly in respect of sentencing for disciplinary offences which have no civilian equivalent. After all, "the Court Martial is a specialist criminal court. That does not mean that we [the Appeal Court] accept blindly the decision of the Court Martial, but we must attach due respect to a court which is designed to deal with service issues."[51]

Despite this deference some appeals against conviction or sentence are of course successful although the dataset does not appear to have been amended to reflect that success. For example, only one defendant in the dataset was convicted of murder: a sergeant in the Royal Marines sentenced on 6 December 2013. These proceedings are presumably those against Alexander Blackman for the murder of an injured Afghan combatant. However, the dataset records that this defendant was sentenced to imprisonment for life with a minimum term of ten years – Blackman's original sentence, which on

[44] Service Prosecuting Authority, *First Report and Business Plan*, January 2009, http://spa.independent.gov.uk/linkedfiles/spa/report2008.pdf [accessed 28 June 2016], p.16 and p.13.
[45] AFA s.155-7. For the procedure generally see Armed Forces (Court Martial) Rules SI 2009/2041 and Armed Forces (Court Martial) (Amendment) Rules SI 2013/1851.
[46] J. Blackett, *Rant on the Court Martial and Service Law* (Oxford: OUP, 2009), para.1.42.
[47] Permitting simple majority verdicts has been held not to breach article 6: *Twaite* [2010] EWCA Crim 2973, or article 14: *Blackman* [2014] EWCA Crim 1029, [2015] 1 W.L.R. 1900.
[48] AFA s.160.
[49] *Guidance on Sentencing in the Court Martial*, Version 4, JAG/MCS, October 2013, para. 2.13. AFA s.255, s.165 and sch. 3A. The consequence of this is that determining from the dataset which charges attracted which penalties is exceptionally difficult.
[50] D. Richards, "Appeal against Court Martial sentences: has anything changed?" [1999] *Crim. L.R.* 480, 481-2.
[51] *Glenton* [2010] EWCA Crim 930 at [19]. See also *McKendry* [2001] EWCA Crim 578 at [12]; *Limbu* [2012] EWCA Crim 816 at [23]; *Tointon* [2010] EWCA Crim 1781 at [6]; *Calverly* [2014] EWCA Crim 1738 at [12]; *Love* [1998] 1 Cr. App. R. 458; and *Yard* [2013] EWCA Crim 2147 at [21].

appeal was reduced to eight years.[52] It seems therefore that the dataset should be taken to represent the result of the case at the court martial, rather than the final outcome of the proceedings overall.

The results in the dataset originate from five different court centres in the UK, one in Cyprus and one at Sennelager in Germany. The relatively high workload of the last of the three (some 718 defendants in the relevant period) reflects the fact that the largest regular military presence of UK forces overseas is in Germany.[53] The NATO Status of Forces Agreement 1951 gives the UK authorities "the right to exercise within the receiving State [Germany] all criminal and disciplinary jurisdiction conferred on them by the law of the sending State [the UK] over all persons subject to the military law of that State".[54] At the same time, Germany possesses a concurrent jurisdiction over UK forces where offences are committed on German territory and contrary to German law.[55] In cases of concurrent jurisdiction, the treaty makes arrangements for the jurisdiction of one state to take primacy, for example, where the offence is one of violence by a member of the UK military against another, the jurisdiction of the UK authorities would take precedence.[56] In other cases, "the authorities of the receiving State shall have the primary right to exercise jurisdiction".[57] In principle, this could mean that UK military or civilian personnel who commit offences against locals in Germany could be tried by the German authorities. However, the 1959 Supplementary Agreement to the Status of Forces Agreement granted a "general waiver of jurisdiction by the German authorities … in favour of the British military legal system".[58] This waiver may be disapplied "in any serious case of particular German public interest".[59] In practice, this allows "most servicemen and servicewomen and members of the civilian component [of the UK military] to be dealt with in [UK] service courts even when the complainant is a German national",[60] although there have been cases where British service personnel have been tried in the German system.[61] Each state also has exclusive jurisdiction over offences which are contrary to its law but not the law of the other state.[62] Similar provisions under the Treaty Concerning the Establishment of the Republic of Cyprus 1960 apply in relation to the two UK sovereign bases there[63] but comparatively fewer defendants are tried there by the court martial (19 in the period covered by the dataset). Cases prosecuted by the German or Cypriot authorities are of course not included in the court martial results.

Annual Prosecutions for Disciplinary Offences

[52] *Blackman* [2014] EWCA Crim 1029, [2015] 1 W.L.R. 1900.
[53] Ministry of Defence, *UK Defence in Numbers*, August 2015, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/467482/20151013-UK_Defence_in_Numbers_screen.pdf [accessed 28 June 2016], p.10.
[54] NATO Status of Forces Agreement 1951 art. VII(1)(a).
[55] NATO Status of Forces Agreement 1951 art. VII(1)(b).
[56] NATO Status of Forces Agreement 1951 art. VII(3).
[57] NATO Status of Forces Agreement 1951 art. VII(3)(b).
[58] P. Rowe, "The Trial of Civilians under Military Law: An Empirical Study" (1995) 46 *N.I.L.Q.* 405, 406; NATO Supplementary Agreement to the Status of Forces Agreement 1959 art. 19.
[59] P. Rowe, "The Trial of Civilians under Military Law: An Empirical Study" (1995) 46 *N.I.L.Q.* 405, 406.
[60] P. Camp, "Post-trial bail for civilians in military courts - time for change?" [1998] *Crim. L.R.* 123, 123-4; R. Beddard, "The right to a fair trial in the services" [1998] *E.L.R.* HR49, 51.
[61] G. Witzsch, "Article VII NATO Status of Forces Agreement: Some Decisions by German Courts" (1970) 9 *Mil. L. & L. War Rev.* 409.
[62] NATO Status of Forces Agreement 1951 art. VII(2)(a) and (b).
[63] Treaty Concerning the Establishment of the Republic of Cyprus 1960 annex C, s.8.

During the period January 2010 to April 2015, a total of 2,759 defendants were charged before the court martial. Of those, 48% of defendants (1,337) were charged with at least one disciplinary offence under Part 1 of the AFA.[64] Year-on-year, the number of defendants prosecuted for disciplinary offences was as follows:

Year (to end of March)	Number of defendants charged with at least one disciplinary offence
2010/11	336
2011/12	287
2012/13	201
2013/14	233
2014/15	220

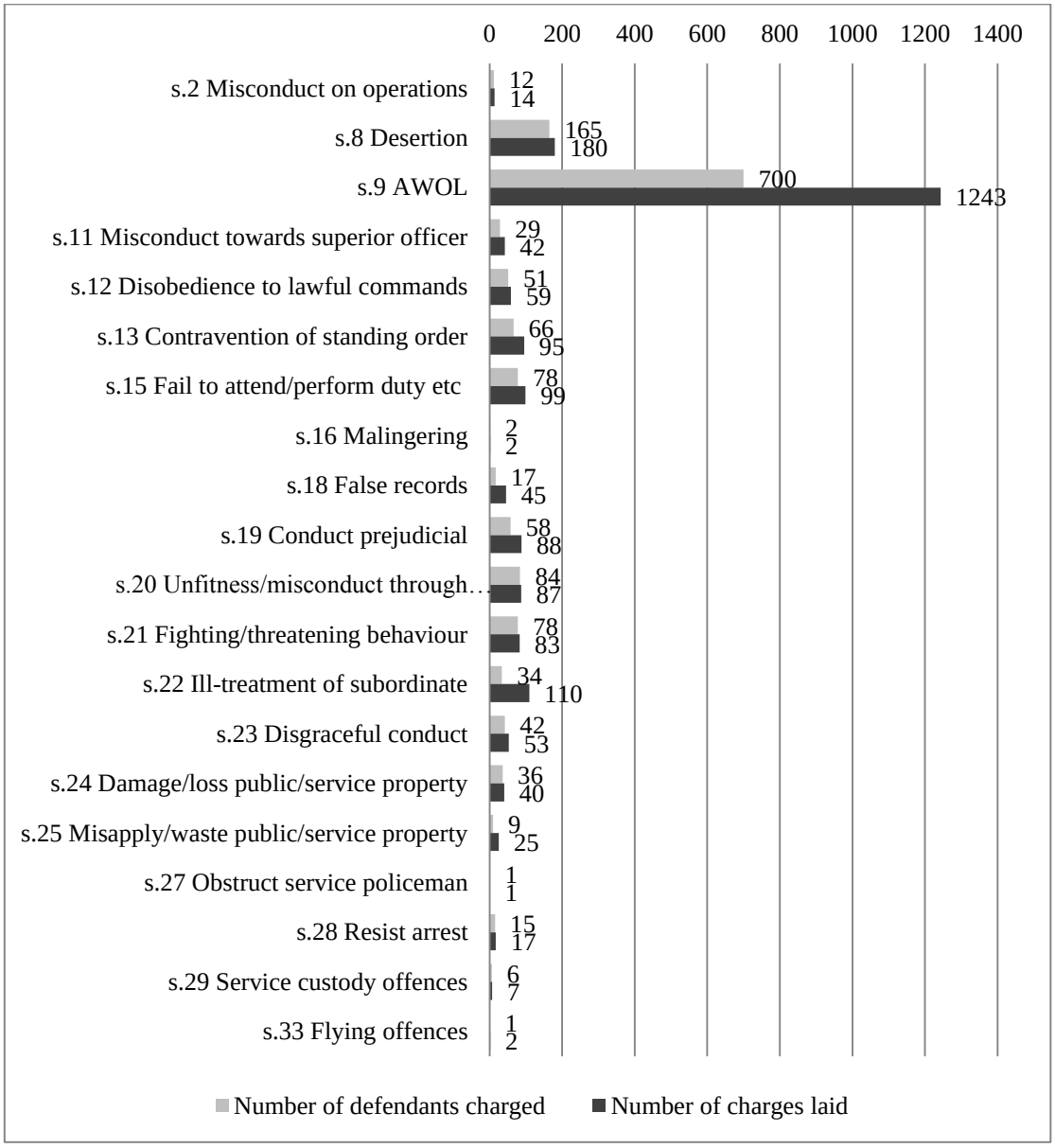
This finding is broadly consistent with the reports of the Service Prosecuting Authority in respect of numbers of proceedings for both disciplinary and civilian criminal offences, which show fewer courts martial in recent years.[65] The causes of the decline from 2010/11 are unclear. Fewer cases might reflect the broader social trend of falling crime levels, or illustrate that the AFA has had the effect of reducing the number of cases which reach the court martial – perhaps because commanding officers are dealing with more cases at summary hearing, or because the Service Prosecuting Authority is bringing fewer proceedings than the tripartite service prosecutors it replaced.

Common and Uncommon Charges

As would be expected, some offences appear more commonly before the court martial than others. Of course, the frequency with which certain offences are prosecuted does not necessarily reflect their prevalence within the services because the number of other cases being tried summarily by commanding officers (assuming the offence is one that is so triable) is unknown. Nonetheless, the different disciplinary offences with which defendants were charged before the court martial and the number of charges laid are illustrated in the graph below:

Prosecutions of military personnel for disciplinary offences contrary to Part 1 of the AFA (January 2010 to April 2015) (charges = 2292)[66]

[64] For the purpose of analysing the disciplinary offences which follow, 22 defendants were removed from the sample because of anomalies or ambiguities in the records, for example, where the description of the charges was unclear or the number of verdicts did not match the number of charges. It is not possible to check the original sources to ensure the accuracy of the data.
[65] Service Prosecuting Authority, *Annual Report 2014/5*, http://spa.independent.gov.uk/linkedfiles/spa/427088spareport_aw_web_lr.pdf [accessed 28 June 2016], p.13. C.f. Service Prosecuting Authority, *First Report and Business Plan*, January 2009, http://spa.independent.gov.uk/linkedfiles/spa/report2008.pdf [accessed 28 June 2016], p.38; CPS Inspectorate, *The Service Prosecuting Authority*, December 2010, http://www.justiceinspectorates.gov.uk/crown-prosecution-service/wp-content/uploads/sites/3/2014/04/SPA_Dec10_rpt.pdf [accessed 28 June 2016], p.11.
[66] These figures exclude the civilians who were prosecuted during this period. The number of defendants is higher because defendants charged with more than one disciplinary offence are counted for each offence. Offences which were not prosecuted at all are excluded from the graph.



As the graph shows, defendants most commonly appear before the court martial charged with deserting (contrary to section 8) or going absent without leave (AWOL) (section 9).[67] Evidently, these offences are significant because they impact upon the "operational effectiveness" of the armed forces.[68] As the Court Martial Appeal Court has explained, an absent individual "not only lets down his comrades in arms and undermines their morale generally, his conduct either exposes another Service man or woman sent to replace him to the risks that he is avoiding; or, if he is not replaced, by depleting their numbers, he exposes those in war theatres to even greater risks than those they already face."[69]

[67] The offences had the same names under the old tripartite legislation. See Army Act 1955, s.37 and s.38; Air Force Act 1955, s.37 and s.38 and Naval Discipline Act 1957, s.16 and 17.
[68] *Guidance on Sentencing in the Court Martial*, Version 4, JAG/MCS, October 2013, para. 6.6.2.
[69] *Glenton* [2010] EWCA Crim 930 at [22].

The offence of being absent without leave has a number of forms: those intentionally or negligently absent commit an offence.[70] Further, those who do (a) "an act, being reckless as to whether it will cause him to be absent without leave; and (b) it causes him to be absent without leave" are also criminalised.[71] In either case, the maximum penalty is two years' imprisonment.[72] The offence of absence without leave differs from desertion in that, in the latter case, the defendant's absence is aggravated by one of two additional features: either intended permanence or avoidance of active service. For the first type of desertion, those absent and intending to remain permanently so may be subject to a sentence of up to two years' imprisonment.[73] As Avins explains, "[t]hat intent may be entertained for only a brief time, and then abandoned, but if formed at all it poses the danger that the accused will never return. It is this danger of permanent deprivation of the serviceman's service that the statute is designed to guard against."[74] For the second form of desertion, those absent and intending to avoid active service (even if temporarily) are subject to a potential penalty of life imprisonment.[75] For these purposes, ""active service" means service in– (a) an action or operation against an enemy; (b) an operation outside the British Islands for the protection of life or property; or (c) the military occupation of a foreign country or territory."[76] A conscientious objection and article 9 of the ECHR have been held not to provide a defence to charges of going absent without leave or desertion.[77] Whilst members of the UK military are, of course, no longer conscripts, applications for conscientious objection are not as rare as one might imagine.[78] The prevalence of the offences of desertion and absence without leave might suggest that numbers of recruits (whether conscientious objectors or otherwise) sign up in haste and repent at leisure.

The next most common sections under which defendants are charged are section 20 (unfitness or misconduct through alcohol or drugs), section 15 (failure to attend or perform a duty), and section 21 (fighting or threatening behaviour). Like absence without leave and desertion these are all offences criminalising conduct which is damaging to operational effectiveness. A specific offence of unfitness or misconduct through drugs or alcohol was created by section 20 of the AFA.[79] This offence is committed by military personnel who are "unfit to be entrusted" with any duty, or whose "behaviour is disorderly or likely to" discredit the forces, and the reason for this behaviour or unfitness is the "influence of alcohol" or drugs.[80] "Unfitness", in this context, means that the person's ability to perform a duty is "impaired".[81] For this offence "successfully to be prosecuted, it is unnecessary to

[70] AFA s.9(2).
[71] AFA s.9(3).
[72] AFA s.9(5).
[73] AFA s.8(2)(a) and s.8(4)(b).
[74] A. Avins, "The Development of the Concept of Military Desertion in Anglo-American Law" (1963-4) 4 *Melbourne U. L. Rev.* 91, 110.
[75] AFA s.8(2)(b) and s.8(4)(a).
[76] AFA s.8(3).
[77] *Khan v Royal Air Force Summary Appeal Court* [2004] EWHC (Admin) 2230, [2004] H.R.L.R. 40.
[78] See, for example, Ministry of Defence and Advisory Committee on Conscientious Objectors, *Conscientious Objectors Policy*, 3 November 2010, https://www.gov.uk/government/publications/conscientious-objectors [accessed 28 June 2016] and Ministry of Defence and Advisory Committee on Conscientious Objectors, *Conscientious Objectors 1970 to 2011*, 30 March 2011, https://www.gov.uk/government/publications/conscientious-objectors-1970-2011 [accessed 28 June 2016].
[79] This replaced the previous offences of drunkenness contrary to the Army Act 1955 s.43; Air Force Act 1955 s.43; and Naval Discipline Act 1957 s.28.
[80] AFA s.20(1).
[81] AFA s.20(1A).

demonstrate that the defendant was drunk, merely that he was under the influence of drink."[82] After all, "[t]his is in a service context. If an individual, for example, the morning after an evening of ill-judged merriment, awakens hungover, his ability to do his duty may be compromised. His safety and that of others who depend upon him may consequentially be compromised."[83] The maximum penalty is again two years' imprisonment.[84]

Where the unfitness or misconduct is caused by drugs rather than alcohol, there are exceptions to the offence if the drug was taken on medical advice and any directions complied with; if the drug was taken for medicinal purposes and there was no reason to believe impairment would follow; or if the drug was taken or administered on the orders of a superior officer.[85] This means that those with legitimate reasons for taking a drug but who experience unexpected side effects would not be caught by the provisions. The defendant bears the evidential burden in respect of these exceptions.[86] The Armed Forces Act 2011 amended the AFA to add a new companion offence of exceeding the alcohol limit for prescribed safety-critical duties – in essence, an offence akin to drink-driving but with the driving replaced by certain specified duties which entail a risk of death or serious injury to persons, or serious damage to property or the environment.[87] Examples of such specified duties include ensuring the safe conduct or navigation of a ship, piloting an aircraft, handling explosives, etc.[88] There were no charges of exceeding the alcohol limit for prescribed safety-critical duties in the dataset – perhaps unsurprisingly given that the offence only came into force 18 months before the end of the period covered.[89]

Under section 15(1) of the AFA, an offence is committed through the failure to attend for any duty, leaving any duty before being permitted, or failure to perform any duty.[90] These forms of the offence are subject to a defence of reasonable excuse, for which the defendant again carries an evidential burden.[91] An offence is also committed by the negligent performance of any duty.[92] Collectively, these provisions encompass a broad spectrum of mischief: "from [the] very minor (such as a minor bureaucratic failure), through conduct the consequences of which are very expensive (such as failure to carry out the correct navigation procedures leading to a ship running aground), to the most serious where the failure or negligence leads to serious injury or loss of life."[93] Indeed, leaving a duty can be as minor as failure to be in one's room during a notified inspection.[94] At the more serious end of the scale, a recent case involved the fatal injury of a solider by the accidental discharge of a gun during a training exercise. There, the Court Martial Appeal Court held that in determining negligence the requisite standard of care is an objective test, "to be measured against the standard to be expected of

[82] *Rabouhi* [2014] EWCA Crim 1517 at [15].
[83] *Rabouhi* [2014] EWCA Crim 1517 at [15].
[84] AFA s.20(5).
[85] AFA s.20(3)(a) and s.20(2).
[86] AFA s.20(4).
[87] AFA s.20A.
[88] Armed Forces (Alcohol Limits for Prescribed Safety-Critical Duties) Regulations SI 2013/2787 regs. 4 and 5.
[89] 1 November 2013: Armed Forces Act 2011 (Commencement No. 4) Order SI 2013/2501 art. 3.
[90] Under the previous legislation, similar offences existed under the Army Act 1955 s.29A and s.41; Air Force Act 1955 s.29A and s.41 and Naval Discipline Act 1957 s.7.
[91] AFA s.15(1) and s.325.
[92] AFA s.15(2).
[93] *Guidance on Sentencing in the Court Martial*, Version 4, JAG/MCS, October 2013, para. 6.11.1.
[94] *Scallan* [2005] EWCA Crim 2040.

the reasonable serviceman having similar training, knowledge and experience as the accused."[95] The maximum penalty for the offences contrary to section 15 is two years' imprisonment.[96]

Oddly, given the expansive array of offences against the person punishable under civilian criminal law, section 21(1) makes fighting, without reasonable excuse, a specific disciplinary offence.[97] The justification for this duplication is that "[t]he essence of fighting is the disturbance of good order, and this offence is very different from the criminal offence of assault, the essence of which is an attack on a victim."[98] In that sense, the offence seems designed to cover conduct in which both participants are equally culpable: "[t]he charge of fighting is not brought where the force used amounts to a one-sided attack because that would not be a fight in the ordinary meaning of the word in the statute, that is, a struggle or conflict."[99] Yet, in some such cases, the conduct would arguably be consensual rough horseplay.[100] Whilst there does not seem to be any specific case law addressing the point, the defence of "reasonable excuse" could presumably encompass a plea of consent. This suggests that, in order for the defendant to be convicted, there would need to be sufficient injury sustained such that consent could no longer apply.[101] Yet, the mischief which the offence seeks to address appears to be precisely the fact that it cannot be in the interests of order and discipline to have service personnel engaging in (consensual) physical fights with each other, even if no injuries result. In addition to fighting, section 21 includes provisions similar to those in section 5 of the Public Order Act 1986: it is a disciplinary offence to behave in a manner threatening, abusive, insulting or provocative and likely to cause a disturbance.[102] The mens rea is intention or knowledge that the behaviour may be threatening, abusive, insulting or provocative.[103] Again, there is a defence of reasonable excuse.[104] These disciplinary offences are subject to a maximum penalty of two years' imprisonment.[105]

By contrast with these common offences, various provisions of the AFA have seen little or no use during the period covered by the dataset. There was only one prosecution for the series of miscellaneous offences related to ships and aircraft criminalised under sections 31 to 38 of the AFA. In that case a flight lieutenant was charged with two counts of the offence contrary to s.33(2) which provides that "[a] person subject to service law commits an offence if, negligently, he does an act – (a) when flying or using an aircraft, or (b) in relation to an aircraft or aircraft material, that causes or is likely to cause loss of life or injury to any person."[106] The maximum penalty is two years' imprisonment.[107] Similarly, there was only one case of obstructing a service police officer. Under section 27 of the AFA, it is an offence to intentionally obstruct or fail to assist a service police officer acting in the course of his duty or a member of the military exercising authority on behalf of a provost

[95] *Price* [2014] EWCA Crim 229, [2014] 1 W.L.R. 3501 at [20].
[96] AFA s.15(3).
[97] Under the previous legislation: Army Act 1955 s.43A, Air Force Act 1955 s.43A and Naval Discipline Act 1957 s.13.
[98] *Guidance on Sentencing in the Court Martial*, Version 4, JAG/MCS, October 2013, para. 6.15.1.
[99] *Guidance on Sentencing in the Court Martial*, Version 4, JAG/MCS, October 2013, para. 6.15.1.
[100] It is perhaps no coincidence that the leading authority here is from the Court Martial Appeal Court: *Aitken* [1992] 1 W.L.R. 1006.
[101] *Brown* [1994] 1 A.C. 212.
[102] AFA s.21(2)(a). E.g. *Johnson* [2005] EWCA Crim 2934.
[103] AFA s.21(2)(b).
[104] AFA s.21(2)(a).
[105] AFA s.21(4).
[106] Previously the offence of dangerous flying etc: Army Act 1955 s.49; Air Force Act 1955 s.49; Naval Discipline Act 1957 s.20.
[107] AFA s.33(4)(b).

officer. The defendant must know or have "reasonable cause to believe that that person is a service policeman or a person exercising authority on behalf of a provost officer".[108] The offence is again punishable by a sentence of up to two years' imprisonment.[109]

In the same vein, malingering was charged only twice. This offence is committed where a defendant, to avoid service, causes, aggravates, prolongs, has another cause or pretends to have an injury.[110] Where a person causes, aggravates or prolongs the injury of another, at the injured party's request and with the intention of enabling them to avoid service, that too is an offence.[111] Injury, for these purposes, "includes any disease and any impairment of a person's physical or mental condition".[112] By way of illustration of this phenomenon, it is apparently "a known method of evading continuance of military service" for a member of the services to ask someone else to break their arm in order to be released from duty.[113] In one extreme case, the defendant went so far as to persuade "a friend to run over his leg as he did not want to go to Afghanistan."[114] Again, the maximum penalty is two years' imprisonment.[115]

Other offences are even rarer and some have never been prosecuted. This, of course, does not necessarily mean that such conduct never occurs – not least because prosecutors may always rely upon the most generic of all the offences in the AFA, namely conduct prejudicial to good order and discipline.[116] This offence requires an act or an omission prejudicial to good order and service discipline and, as with many other disciplinary offences, attracts a maximum penalty of two years' imprisonment.[117] In *Dodman*,[118] the Court Martial Appeal Court explained that the prosecution is required to prove the conduct, that the conduct was prejudicial to both good order and to military discipline, and that the conduct was intentional or reckless. The court rejected the defence submission that the offence should be one of specific rather than basic intent, explaining that the question of whether the conduct is prejudicial is an objective one. It does not matter therefore whether the conduct is "blameworthy" i.e. whether the defendant appreciated that it would prejudice good order and discipline. That said, the court rather complicated matters by holding that if a mental element might be crucial to the prejudicial nature of the conduct (for example, conduct which where mistaken would not be so prejudicial, but where dishonest would be), then the defendant's state of mind will require consideration. Subsequently, it was held that whether the conduct has "the potential to become known to others within the military or … it was not in fact known until it was discovered on investigation" is

[108] AFA s.27(1)(b). Like their civilian counterparts, service police are subject to code of practice pursuant to the Police and Criminal Evidence Act 1984: Ministry of Defence, *The Service Police Codes of Practice*, 19 March 2015, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/410011/20150319_SPCOP_Final_March_2015.pdf [accessed 28 June 2016].
[109] AFA s.27(3).
[110] AFA s.16(1). Previously the Army Act 1955 s.42; the Air Force Act 1955 s.42 and the Naval Discipline Act 1957 s.27.
[111] AFA s.16(2).
[112] AFA s.16(3).
[113] *Capill* [2011] EWCA Crim 1472 at [2].
[114] *Cross* [2010] EWCA Crim 3273 at [3].
[115] AFA s.16(4).
[116] This offence was previously criminalised by the Army Act 1955 s.69; the Air Force Act 1955 s.69 and the Naval Discipline Act 1957 s.39.
[117] AFA s.19.
[118] [1998] 2 Cr. App. R. 338, endorsed under the AFA 2006 in *Armstrong* [2012] EWCA Crim 83. See also *R (Karol Rybarczyk) v Military District Court of Poznan Poland* [2013] EWHC 180 (Admin).

irrelevant.[119] Nonetheless, the conduct must be actually, rather than merely hypothetically, prejudicial.[120]

Evidently, the parameters of this offence are potentially open ended.[121] The jurisprudence illustrates that a smorgasbord of conduct has been prosecuted as prejudicial, from breaking into a theatre and taking works of art intending to retain them for a short period,[122] to selling pirated DVDs,[123] to using a military vehicle for one's own (unauthorised) purposes,[124] to failing to pass on the benefit of a discount to troops who had pooled their money to pay for supplies,[125] to dishonouring cheques,[126] to "negligently causing the unintended discharge of a round from an Army rifle" resulting in the death of the soldier hit by the round.[127] With such a broadly drafted offence, there is obvious potential for prosecutorial misuse since it may encompass conduct falling under any number of other disciplinary offences or ordinary civilian crimes.[128] In *Armstrong*, the defendant was charged with four counts of conduct prejudicial on the basis of facts which also made out a number of serious civilian criminal offences. The Court Martial Appeal Court disapproved of the charges, explaining that "where conduct constitutes an offence under the ordinary criminal law, it must be charged as such save in wholly exceptional circumstances", not least because the sentencing regime established for the civilian crime would otherwise be circumvented.[129]

The offence of conduct prejudicial has been further criticised on three bases. First, that "charges can be drawn very widely to cover all kinds of conduct, including social conduct outside the military environment"; secondly, that "it may be too easy to … punish behaviour that may not really be prejudicial to good order and military discipline at all"; and "thirdly, it is very difficult for an individual to know in advance whether his conduct falls within the section".[130] This could mean that the compliance of the offence with the ECHR is questionable since article 7 prohibits retrospective criminalisation and incorporates a requirement for reasonable certainty in the law. The defendant must "know from the wording of the relevant provision and, if need be, with the assistance of the court's interpretation of it, what acts and omissions will make him liable".[131] In *Armstrong* the offence was said to be article 7 compliant, but this comment was not only obiter, it also lacked reasoning to support it.[132] In *Ainsworth v UK*, the European Commission of Human Rights held that on the facts of

[119] *Armstrong* [2012] EWCA Crim 83 at [24].
[120] Office of the Judge Advocate General, *Practice in the Service Courts: Collected Memoranda*, Version 5(1), 6 March 2015, 'Memorandum 1 Conduct Prejudicial to Good Order and Service Discipline: AFA06 Section 19', para 1.4.
[121] D.B. Nichols, "The Devil's Article" (1963) 22 *Mil. L.R.* 111.
[122] E.g. *Davies* [1980] Crim. L.R. 582.
[123] E.g. *Appleyard* [2005] EWCA Crim 2592.
[124] E.g. *Wilkinson* (CA, 10th April 2000)
[125] E.g. *Holden* [2005] EWCA Crim 817
[126] G. R. Rubin, "Section 146 of the Criminal Justice and Public Order Act 1994 and the 'decriminalisation' of homosexual acts in the armed forces" [1996] *Crim. L.R.* 393, 398; P. Camp, "Section 69 of the Army Act 1955" (1999) 149(6913) *N.L.J.* 1736.
[127] E.g. *Blaymire* [2005] EWCA Crim 3019 at [7].
[128] P. Camp, "Section 69 of the Army Act 1955" (1999) 149(6913) *N.L.J.* 1736.
[129] *Armstrong* [2012] EWCA Crim 83 at [21].
[130] P. Camp, "Section 69 of the Army Act 1955" (1999) 149(6913) *N.L.J.* 1736. See also E.J.D. McBrien, "An Outline of British Military Law" (1983) 22 *Mil. L. & L. War R.* 9, 14.
[131] *Kokkinakis v Greece* (14307/88) (1994) 17 E.H.R.R. 397 at [52]. See also R. Clayton and H. Tomlinson, *The Law of Human Rights* (Oxford: OUP, 2009), para. 11.511.
[132] *Armstrong* [2012] EWCA Crim 83 at [34]-[35].

that case, it was predictable that the defendant's conduct would fall within the offence.[133] Nonetheless, as a memorandum from the Judge Advocate General explains, it is evidently possible that "a specific charge … which contained an allegation that was not objectively prejudicial to good order and service discipline (that is, where a reasonable Service person could not have contemplated that the conduct alleged was prejudicial when he did it) might fail".[134]

Reliance on this 'catch-all' offence might explain why some other disciplinary offences have seen little use. Those of assisting an enemy (section 1), obstructing operations (section 3), looting (section 4), failure to escape etc. (section 5), mutiny (section 6), failure to supress mutiny (section 7), failure to cause apprehension of deserters or absentees (section 10), using force against a sentry etc. (section 14), disclosure of information useful to an enemy (section 17), allowing escape or unlawful release of prisoners etc. (section 30), hazarding of a ship (section 31), giving false air signals etc. (section 32), low flying (section 34), annoyance by flying (section 35), inaccurate certification (section 36), and various prize offences (sections 37 and 38) do not appear to have been prosecuted before the court martial within the period covered by the dataset. Some of these offences (those contrary to sections 1, 3, 5, 6, 7, 31, 32, 37 and 38) cannot be dealt with summarily by commanding officers which means they have not been prosecuted at all. If these sections of the AFA continue never to be invoked, either because prosecutors prefer alternative charges or that particular form of mischief rarely (if ever) occurs, one wonders whether the effort entailed by criminalisation was worthwhile.

Charges per Defendant

Beyond the total number of charges for each offence laid during the period covered by the dataset, it also seems that some offences are charged repeatedly in respect of the same defendants. For most offences, the average (mean) number of charges per defendant hovers between one and two. However, for others, the dataset shows that multiple charges are more common. This is potentially significant for a number of reasons: most obviously, multiple charges may indicate that particular offences are committed by serial offenders rather than in isolation. Alternatively, it may suggest that isolated cases are not reaching the court martial, perhaps because commanding officers and/or the Service Prosecuting Authority tend to try one-time offenders summarily, whilst sending to the court martial only those who show a pattern of repeated unlawful behaviour. This is potentially significant because we know very little about how commanding officers decide whether to proceed summarily against a defendant. The Manual of Service Law explains that "[a] number of factors may be relevant in reaching such a decision, but broadly speaking, the CO [commanding officer] will usually need to consider: a. The adequacy of his powers of punishment; b. The seriousness of the alleged offence; and c. The complexity of the case", along with considering whether the offence "is part of an incident where some other offences have been referred to the DSP".[135] Beyond this, there is little information about how and why commanding officers decide to proceed with some charges summarily and not others – a factor exacerbated by the fact that statistics on summary proceedings are not publicly released by the Ministry of Defence.

[133] *Ainsworth v UK* (35095/97), Commission admissibility decision of 22 October 1998.
[134] Office of the Judge Advocate General, *Practice in the Service Courts: Collected Memoranda*, Version 5(1), 6 March 2015, 'Memorandum 1 Conduct Prejudicial to Good Order and Service Discipline: AFA06 Section 19', para 1.3.
[135] Ministry of Defence, *Manual of Service Law*: JSP 830, https://www.gov.uk/government/collections/manual-of-service-law-msl#manual-of-service-law-jsp-830 [accessed 28 June 2016], vol.1, ch.6, para.17. See also para.83.

One offence where high numbers of charges per defendant are particularly evident is ill-treatment of a subordinate contrary to section 22 of the AFA. The dataset shows that 34 defendants faced 110 charges of ill-treatment – an average (mean) of 3.2 charges per defendant. Whilst most defendants charged with this offence faced only one count (the mode is 1) more than half were charged with at least two counts and more than a third faced between three and fourteen such charges (this variance is reflected in the median of 2 and standard deviation of 3.1). Ill-treatment of a subordinate is a specific offence against the person which can only be committed by officers, warrant offices or non-commissioned officers. It requires ill-treatment of a subordinate with the mens rea of intention or recklessness as to the ill-treatment and knowledge or reasonable cause to believe that the victim was a subordinate.[136] The offence covers obvious examples of the use of violence,[137] as well as matters such as imposing exercise as punishment to the point of illness or injury to the subordinate.[138] Cases involving such ill-treatment provide prosecutors with significant discretion in respect of charges, with potentially significant implications for the defendant. A case involving a slap by a superior officer of his subordinate, for example, would in civilian criminal law terms amount to a battery. Such offence, of course, may be punished by up to six months' imprisonment,[139] by contrast with a maximum penalty of two years' for the disciplinary offence.[140] A key question for each case will therefore be whether the mischief lies in the act of violence or the violation of the relationship of trust between service personnel and their commanding officer.

Prosecutorial policy (formal or informal) in respect of this offence might account for the wide variance in the number of charges laid per defendant and the high proportion of defendants facing more than one charge. Alternatively, this may be indicative of a tendency by commanding officers to refer the most serious cases (with the most allegations) to the DSP.[141] The figures could also illustrate that certain forms of criminal behaviour (or at least allegations thereof) tend to be carried out repeatedly and systematically, by comparison with some other offences which appear more commonly to be isolated events. This could be particularly significant in respect of ill-treatment as it might suggest that, in circumstances where allegations are made that commanding officers are mistreating their subordinates, the accused may tend to be a serial offender.

Also showing a high number of charges per defendant is the series of false records offences criminalised by the AFA.[142] A person who makes an official record or adopts as his own another's record, knowing it to be materially false and knowing or having reasonable cause to believe that the record is official, commits an offence.[143] There are further offences of tampering with, or suppression

[136] AFA s.22(1). Previously Army Act 1955 s.65; Air Force Act 1955 s.65 and Naval Discipline Act 1957 s.36A.
[137] E.g. *Smith* (CA, 7th February 2000).
[138] E.g. *Skeet* [2005] EWCA Crim 3412.
[139] Criminal Justice Act 1988 s.39.
[140] AFA s.22(3).
[141] Whilst conduct causing *serious injury* to a subordinate is a prescribed circumstance which means it must be referred to the DSP by the service police (see above at XX), this applies even if there is only one such offence and therefore does not seem to account for the tendency for multiple charges: AFA s.116(2)(b) and s.128 and Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009/2055 reg. 5(b).
[142] AFA s.18. Under the old tripartite legislation, similar offences were found under the Army Act 1955 s.62; the Air Force Act 1955 s.62 and the Naval Discipline Act 1957 s.35.
[143] AFA s.18(1) and (2).

of, an official document with intent to deceive,[144] and failing to make a record which one is under a duty to make, again, with intent to deceive.[145] A record or document is deemed "official if it is or is likely to be made use of, in connection with the performance of his functions as such, by a person who holds office under the Crown or is in the service of the Crown."[146] The maximum penalty here is two years' imprisonment.[147] An obvious example of such an offence would be providing false information in order to obtain an allowance to which one is not otherwise entitled.[148] As with many of the disciplinary offences under the AFA, false records "offences can vary widely in seriousness, for instance from falsifying a booking-in sheet to make it look as though an offender booked back into barracks in time, to offences in relation to accounting for arms, ammunition, or large sums of money or quantities of supplies."[149] For these offences, 17 defendants faced 45 charges – an average (mean) of 2.6 charges per defendant. Again, whilst many defendants faced only one charge (the mode is 1), the median of 2 and standard deviation of 2.1 reflect the fact that half of the defendants faced multiple counts up to a high of seven such charges. Again, the high number of charges per defendant could indicate that allegations of this misbehaviour come in groups – perhaps because lone incidents are not discovered – or that multiple allegations are referred more often by the commanding officer to the DSP.

A similar picture emerges in respect of the offence of misapplying or wasting public or service property.[150] Section 26 of the AFA provides obvious definitions of service and public property and the penalty is anything other than imprisonment.[151] The dataset shows that nine defendants faced a total of 25 charges for this offence resulting in an average (mean) of 2.8 charges per defendant. However, closer examination reveals that the figures are being distorted by one defendant who was charged with the offence ten times, and another facing five charges, whilst the remainder were subject to only one or two charges.

Charges across the Services

The spread of offending across the three services is also worthy of attention. Analysis of the total number of defendants charged with at least one disciplinary offence shows that 87% (1159) were from the Army, 4% (47) from the RAF, 9% (123) from the Navy,[152] and 1% (8) civilians.[153] Roughly speaking, around 59% of the UK's armed forces personnel are in the Army, 21% in the RAF and 20% in the Navy.[154] Whilst this headline rate therefore shows that the Army is over-represented in

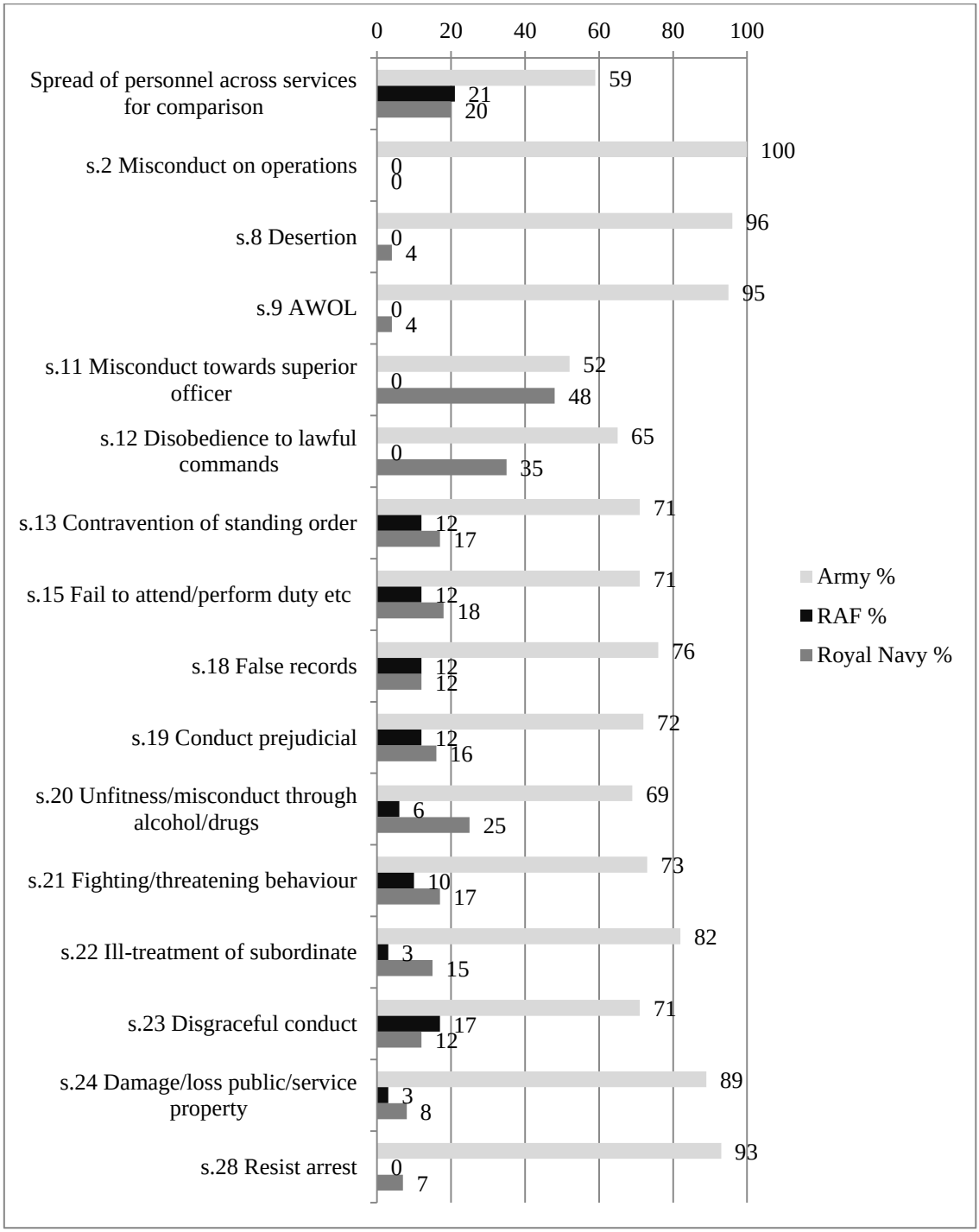
[144] AFA s.18(3).
[145] AFA s.18(4).
[146] AFA s.18(5).
[147] AFA s.18(6).
[148] E.g. *Ingram* [2010] EWCA Crim 1645.
[149] *Guidance on Sentencing in the Court Martial*, Version 4, JAG/MCS, October 2013, para. 6.12.2.
[150] AFA s.25.
[151] AFA s.25(2). This replaced some of a variety of offences under the previous legislation including Army Act 1955 ss.44-8; Air Force Act 1955 ss.44-8 and Naval Discipline Act 1957 ss.29-33.
[152] In this article statistics on charges against members of the Royal Marines have been included in those for naval personnel.
[153] Civilians can commit some but not all disciplinary offences. See Ministry of Defence, *Manual of Service Law: JSP 830*, https://www.gov.uk/government/collections/manual-of-service-law-msl#manual-of-service-law-jsp-830 [accessed 28 June 2016], vol.1, ch.7.
[154] T. Rutherford, *Defence Personnel Statistics*, House of Commons Library, SN/SG/02183, 26 September 2014, p.5. The figures vary slightly over time. Exact calculations are not possible because of periodic changes in the methods of counting personnel. See also Ministry of Defence, *UK Armed Forces Quarterly Personnel Report*, 1

proceedings before the court martial, breaking this down by each offence illustrates a more nuanced pattern. The graph below illustrates the percentage of defendants from the Army, Navy and RAF who were charged under each section of Part 1 of the AFA:

Relative proportion of defendants from each service charged with disciplinary offences contrary to Part 1 of the AFA (January 2010 to April 2015)[155]

April 2015,
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/426880/QPR_Apr2015.pdf
[accessed 28 June 2016], pp.5-8.

[155] Offences where fewer than ten defendants were charged have been excluded because of the small numbers involved. These figures also exclude the civilians who were prosecuted during this period. Defendants charged with more than one section are counted for each offence. Percentages do not always summate to 100 due to rounding.



Evidently, the Army is frequently over-represented, particularly in respect of absence without leave, desertion, misconduct on operations and resistance to arrest. The Army's over-representation in respect of the former two offences – discussed above[156] – is perhaps illustrative of the practical differences between the services since it is evidently more difficult to escape a ship or aircraft carrier that has set sail than to absent oneself from a base on dry land. Explanations in respect of the latter two offences, however, may not be so straight-forward.

[156] See above at XX.

Misconduct on operations[157] is "aimed at maintaining fighting efficiency".[158] Indeed, "[t]he misconduct always occurs on operations and in the presence of the enemy so offences under this section affect directly the fighting power of the Armed Forces, and are liable to undermine the morale of the forces."[159] The offence may be committed in a number of ways. First, a person "commits an offence if, without reasonable excuse, he – (a) surrenders any place or thing to an enemy; or (b) abandons any place or thing which it is his duty to defend against an enemy or to prevent from falling into the hands of an enemy."[160] Secondly, a person "commits an offence if he fails to use his utmost exertions to carry out the lawful commands of his superior officers."[161] Thirdly, a person "on guard duty and posted or ordered to patrol, or … on watch" who "(a) without reasonable excuse… sleeps; or (b) (without having been regularly relieved) … leaves any place where it is his duty to be" also commits the offence.[162] Fourthly, a person "commits an offence if, without reasonable excuse, he intentionally communicates with a person who is – (a) a member of any of Her Majesty's forces or of any force co-operating with them, or (b) a relevant civilian, and the communication is likely to cause that person to become despondent or alarmed."[163] The second, third and fourth forms of the offence can only be committed by someone "who is – (a) in the presence or vicinity of an enemy; (b) engaged in an action or operation against an enemy; or (c) under orders to be prepared for any action or operation by or against an enemy".[164] Under the AFA, an "enemy" includes "(a) all persons engaged in armed operations against any of Her Majesty's forces or against any force co-operating with any of Her Majesty's forces; (b) all pirates; and (c) all armed mutineers, armed rebels and armed rioters".[165] Where a defence of reasonable excuse is permitted, the evidential burden falls on the defendant.[166] The offence attracts a potential life sentence.[167]

One can easily imagine the most egregious illustration of misconduct on operations which might lead to a significant sentence of imprisonment. Nonetheless, the potential life sentence is striking for two reasons. First, the offence covers a remarkably wide range of conduct from – at the one end – "sleeping on watch" to – at the other – surrendering to an enemy.[168] Secondly, it is notable that a defendant may be subject to a life sentence where, in the presence of an enemy, they intentionally communicate with "a relevant civilian" and the communication is likely to cause that person to feel despondent or alarmed. Aside from the risk that the offence may be one of strict liability as to result (there is no authority on the point), one wonders whether it would ever be possible for such a penalty to comply with the ECHR given the need for proportionality when interfering with the right to freedom of expression.[169]

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[157] AFA s.2. This replaced a similar offence of misconduct in action under the old tripartite legislation: Army Act 1955 s.24, Air Force Act 1955 s.24 and Naval Discipline Act 1957 s.2 respectively.
[158] E.J.D. McBrien, "An Outline of British Military Law" (1983) 22(1) *Military L. and L. of War Rev.* 9, 14.
[159] *Guidance on Sentencing in the Court Martial*, Version 4, JAG/MCS, October 2013, para. 6.5.1.
[160] AFA s.2(1).
[161] AFA s.2(3). 'Superior officer' is defined in s.374.
[162] AFA s.2(4).
[163] AFA s.2(5). 'Relevant civilian' is defined in s.2(6) as "a civilian subject to service discipline" who is accompanying a member of the military and that latter person is "(i) in the presence or vicinity of an enemy; or (ii) engaged in an action or operation against an enemy."
[164] AFA s.2(2).
[165] AFA s.374.
[166] AFA s.325.
[167] AFA s.2(7).
[168] *Guidance on Sentencing in the Court Martial*, Version 4, JAG/MCS, October 2013, para. 6.5.1.
[169] See generally S. Turenne, "The Compatibility of Criminal Liability with Freedom of Expression" [2007] *Crim. L.R.* 866.

The Army is also over-represented in respect of offences contrary to section 28 of the AFA which covers disobeying an order for arrest, or using violence or threatening behaviour towards a person ordering an arrest. "Behaviour" includes things said and, again, "threatening" is not limited to threats of violence.[170] The maximum penalty for these offences is two years' imprisonment.[171] It is unclear why Army personal appear to be charged with these offences before the court martial proportionately more often than those from the other services.

Meanwhile, the Navy, which is under-represented in respect of most offences, is significantly over-represented in cases of misconduct towards a superior officer, unfitness or misconduct through alcohol or drugs[172] and disobedience to lawful commands. Sections 11 to 13 of the AFA create a series of offences of insubordination designed to maintain the military's disciplinary structures, since "[t]he integrity and effectiveness of the Armed Forces rely on obedience and respect to those in authority."[173] First is the offence of misconduct towards a superior officer.[174] This involves three different forms of conduct aimed at a superior officer: the use of violence, threatening behaviour or disrespectful behaviour,[175] and the defendant must know or have reasonable cause to believe that the victim is a superior officer.[176] Behaviour includes communication to the superior officer whether or not made in the officer's presence,[177] so would therefore presumably cover matters such as sending one's commanding officer abusive emails. Using violence has been interpreted to cover indirect contact such as pouring a pint of beer over the victim[178] whilst "threatening" again has a wider definition than just threatening violence.[179] The distinction between behaviour which is threatening and that which is merely disrespectful is potentially significant because cases involving disrespectful behaviour may be punished by up to two years' imprisonment whilst an offence involving threatening behaviour or the use of violence attracts a penalty of up to ten years.[180]

Next, the offence contrary to section 12 is committed where a defendant intentionally or recklessly disobeys a lawful command,[181] and is punishable again by up to ten years' imprisonment.[182] A defendant who, for example, refuses an order to go to bed commits the offence – even when the order contains crude language.[183] The courts have held that a prosecution for refusal to obey a lawful command pending an appeal on the grounds of conscientious objection did not violate the right to freedom of thought, conscience and religion under article 9 of the ECHR.[184] The finding that the Navy is over-represented in respect of disobeying lawful commands contrary to section 12 of the AFA is

[170] AFA s.28(3)(a) and (b).
[171] AFA s.28(4).
[172] See above at XX.
[173] *Guidance on Sentencing in the Court Martial*, Version 4, JAG/MCS, October 2013, para. 6.7.1.
[174] Previously the offence of insubordinate behaviour: Army Act 1955 s.33; Air Force Act 1955 s.33; Naval Discipline Act 1957 s.11.
[175] AFA s.11(1) and (2).
[176] AFA s.11(1)(b) and (2)(b).
[177] AFA s.11(3)(a).
[178] *Singh* [2005] EWCA Crim 958.
[179] AFA s.11(3)(b).
[180] AFA s.11(4).
[181] The offence had the same name prior to the AFA: Army Act 1955 .s34; Air Force Act 1955 s.34; Naval Discipline Act 1957 s.12.
[182] AFA s.12(2).
[183] *Knott* (CA, 10th April 2000).
[184] *Lyons* [2011] EWCA Crim 2808, [2012] 1 W.L.R. 2702.

curious given that the Navy is under-represented in the statistics on contravention of standing orders contrary to section 13. Yet, but for potential penalties, the two offences are remarkably similar. The latter requires the contravention of a lawful order of which the defendant knows or could reasonably be expected to know.[185] It applies to standing or routine and continuing orders made for any part of the armed forces or any area, place, ship, train or aircraft.[186] Again, this means it covers a wide range of conduct with differing degrees of seriousness.[187] Examples of such standing orders include those which cover similar conduct on military bases as that covered by the Road Traffic Act 1988 on public roads,[188] those prohibiting possession of anabolic steroids,[189] those prohibiting financial dealings between military training staff and their students,[190] those designating certain areas "out of bounds",[191] and the "no touching rule" which often applies on Navy ships.[192] The maximum penalty for this offence is two years' imprisonment.[193]

The RAF meanwhile is consistently under-represented across all offences. Of course, the dataset does not permit qualitative analysis which would fully explain these findings. It is possible that they may indicate a particular predilection by some services for certain disciplinary offences, or that in some respects army personnel are ill-disciplined by comparison with their naval and aerial counterparts. On the other hand – and perhaps more likely – these statistics may illustrate that different services have adopted different internal practices towards the treatment of some of these offences. In respect of a number of them (such as absence without leave contrary to section 9, misconduct towards a superior officer contrary to section 11, resistance to arrest etc. contrary to section 28, unfitness or misconduct through alcohol or drugs contrary to section 20, disobedience to lawful commands contrary to section 12 and contravention of standing orders contrary to section 13) the commanding officer has discretion to deal with these charges summarily. It may be that commanding officers in some services are more reluctant to do this, resulting in more charges from that service being prosecuted by the DSP at the court martial. Similarly, it may be that defendants in some services are more willing to elect trial by court martial than be tried by their commanding officer – perhaps because of different cultures within those services or expectations about treatment after summary trial.

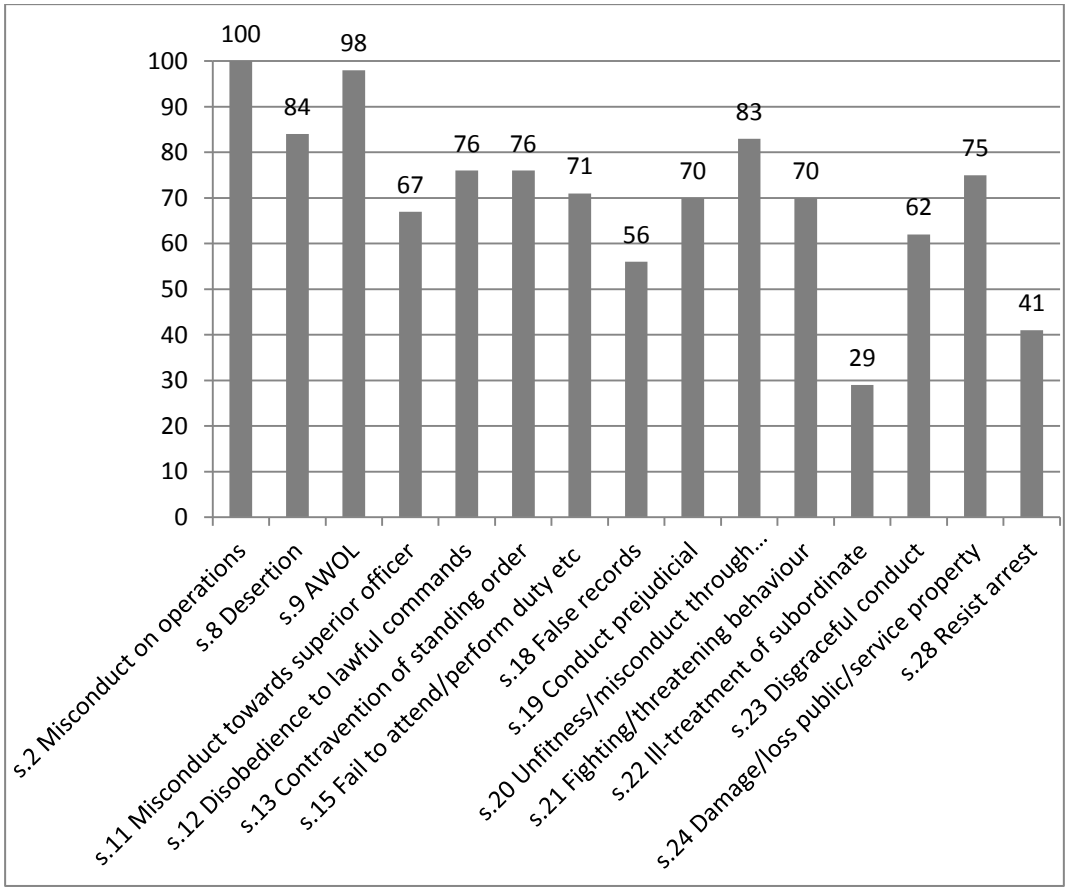
Conviction Rates

Finally, the disciplinary offences prosecuted at the court martial show significant variance in their conviction rate (i.e. the percentage of charges resulting in conviction). Of the 1,329 military defendants charged with at least one disciplinary offence, 12% (159) were either acquitted of all

[185] AFA s.13(1). Under the old legislation, the offence was entitled 'disobedience to standing orders': Army Act 1955 s.36; Air Force Act 1955 s.36; Naval Discipline Act 1957 s.14A.
[186] AFA s.13(2).
[187] *Guidance on Sentencing in the Court Martial*, Version 4, JAG/MCS, October 2013, para. 6.9.1.
[188] *Guidance on Sentencing in the Court Martial*, Version 4, JAG/MCS, October 2013, para. 6.9.4 and e.g. *Arnold* [2008] EWCA Crim 1034, [2008] 1 W.L.R. 2881; *Anson* [2006] EWCA Crim 1208; *Rheines* [2011] EWCA Crim 2397.
[189] E.g. *Hibbitt* [2008] EWCA Crim 2185.
[190] E.g. *Hughes* [2009] EWCA Crim 180.
[191] *Guidance on Sentencing in the Court Martial*, Version 4, JAG/MCS, October 2013, para. 6.9.2.
[192] *Guidance on Sentencing in the Court Martial*, Version 4, JAG/MCS, October 2013, para. 6.9.3. See, e.g. BBC News, *Royal Navy chef cleared of secretly filming sex on ship*, 13 January 2016, http://www.bbc.co.uk/news/uk-england-hampshire-35306196 [accessed 28 June 2016].
[193] AFA s.13(3).

charges or had the entire proceedings discontinued.[194] In consequence, 88% (1169) of defendants were convicted of at least one disciplinary charge. This figure is broadly consistent with the conviction rate for all types of offences (i.e. civilian criminal and disciplinary) reported by the Service Prosecuting Authority for the period 2010-2015 which was 86%.[195] When calculated on the basis of charges rather than defendants (i.e. the number of all disciplinary charges resulting in a guilty verdict), the conviction rate is 85%. However, as the graph below illustrates, when separated for each section under the AFA, the conviction rate by charge varies from 100% to 29% depending on the offence charged:

Percentage of charges resulting in conviction for disciplinary offences contrary to Part 1 of the AFA (January 2010 to April 2015)[196]



The offence with the highest conviction rate is misconduct on operations at 100%, albeit only 12 individuals were so charged.[197] The offences with the next highest conviction rates were absence without leave (98%), desertion (84%) and unfitness or misconduct through alcohol or drugs (83%). Disobedience to lawful commands and contravention of standing orders also both had a conviction

[194] Another one had their case referred to their commanding officer.
[195] Service Prosecuting Authority, *Annual Report 2014/5*, http://spa.independent.gov.uk/linkedfiles/spa/427088spareport_aw_web_lr.pdf [accessed 28 June 2016], p.13. See also CPS Inspectorate, *The Service Prosecuting Authority*, December 2010, http://www.justiceinspectorates.gov.uk/crown-prosecution-service/wp-content/uploads/sites/3/2014/04/SPA_Dec10_rpt.pdf [accessed 28 June 2016], p.11.
[196] Offences where fewer than ten defendants were charged have been excluded because of the small numbers involved. These figures exclude the civilians who were prosecuted during this period.
[197] See above at XX.

rate of 76%.[198] After that, the offence contrary to section 24 had a conviction rate of 75%. This is one of two offences under the AFA covering improper use of public property.[199] It is an offence under section 24 to damage or lose any public or service property, or property belonging to another person subject to service law. The mens rea is intention or recklessness as to the loss or damage and there is a defence of lawful excuse only in intentional cases.[200] The loss of the property may be temporary.[201] Property "means property of a tangible nature".[202] The maximum penalty for this offence is ten years' imprisonment – the same as the civilian offence of criminal damage[203] yet evidently the disciplinary offence is significantly broader covering matters as minor as the reckless temporary loss of a colleague's property, where culpability is low. There are further offences under section 24 of negligently damaging or losing public or service property, or being reckless or negligent and doing an act or omitting to do an act which is likely to cause loss or damage to public or service property.[204] This may be punished by up to two years' imprisonment.[205] Again, the range of these offences is considerable, covering minor incidents of damaging low value military property to cases involving huge financial sums, such as crashing a military aircraft.[206]

In contrast, those offences with low conviction rates include disgraceful conduct of a cruel or indecent kind (62%), false records offences (56%), resisting arrest etc. (41%), and ill-treatment of a subordinate (29%).[207] The wide-ranging offence of disgraceful conduct of a cruel or indecent kind encompasses any act or omission which is cruel or indecent, and disgraceful.[208] Again, the maximum penalty is two years' imprisonment.[209] For this offence too there is obvious overlap with the civilian criminal law. A so-called hazing ceremony involving sexual behaviour, for example, could amount to both disgraceful conduct of a cruel or indecent kind and a crime of assault by penetration or sexual assault – both of which carry significantly longer potential sentences than the disciplinary offence.[210] As the court martial sentencing guidance explains, "[t]his [disgraceful conduct] offence is not intended and not adequate to deal with the situation where a sexual assault has been carried out on an unwilling victim"[211] although commonly, the offence is charged in relation to "indecent exposure or indecent words … towards female personnel".[212] Appropriate charging decisions are particularly important here because the complainant anonymity provisions of the Sexual Offences (Amendment) Act 1992 do not apply to the disciplinary offence, nor do the special measures provisions for sexual

[198] See above at XX.
[199] *Guidance on Sentencing in the Court Martial*, Version 4, JAG/MCS, October 2013, para. 6.18.2. These new offences cover parts of a variety of offences under the previous legislation, including Army Act 1955 ss.44-8; Air Force Act 1955 ss.44-8 and Naval Discipline Act 1957 ss.29-33. See above at XX for the other offence.
[200] AFA s.24(1)(b).
[201] AFA s.24(3)(c).
[202] AFA s.24(3)(d). Section 26 provides obvious definitions of service and public property.
[203] AFA s.24(4)(a); cf Criminal Damage Act 1971 s.4(2), with the exception of arson and criminal damage which endangers life which carry potential life sentences: s.4(1).
[204] AFA s.24(2) and (3)(a).
[205] AFA s.24(4)(b).
[206] E.g. *Jackson* [2006] EWCA Crim 2380.
[207] For the last three offences, see above at XX.
[208] AFA s.23(1) and (2). Under the old tripartite legislation, disgraceful conduct was criminalised by the Army Act 1955 s.66; the Air Force Act 1955 s.66 and the Naval Discipline Act 1957 s.37.
[209] AFA s.23(3).
[210] Sexual Offences Act 2003 s.2 and s.3.
[211] *Guidance on Sentencing in the Court Martial*, Version 4, JAG/MCS, October 2013, para. 6.17.1.
[212] *Guidance on Sentencing in the Court Martial*, Version 4, JAG/MCS, October 2013, para. 6.17.1. See also *Gordon* (CA, 17th July 1997).

offences found in the Youth Justice and Criminal Evidence Act 1999.[213] Examples of conduct which has been prosecuted as disgraceful include kicking and stamping a dog to death,[214] taking photographs of a fellow soldier being stripped naked and assaulted,[215] taking photographs of abuse of detainees,[216] sending photographs of the defendant's wife with offensive inscriptions to her neighbours,[217] and touching a colleague's body with one's exposed genitals.[218]

It is unclear why achieving a conviction for these offences should apparently be more difficult than for others. In respect of two offences – false records and ill-treatment of a subordinate – as we have seen,[219] the average number of charges per defendant tended to be higher than for most other offences yet the conviction rate is significantly lower. This could suggest that prosecutors are overloading the indictments, leading to a greater percentage of acquittals than for other offences where charges are more focused. There are evidently a number of factors which might lead prosecutors to pursue more charges in these cases but one possible factor relates to the extent to which those accused display a pattern of unlawful behaviour rather than merely having committed an isolated offence. In light of this, it is interesting to calculate the conviction rate for these offences on the basis of defendants rather than charges (i.e. how many defendants were convicted of at least one of these charges, rather than how many charges resulted in conviction). For ill-treatment of a subordinate, 21 out of the 34 defendants charged were acquitted of all charges: a conviction rate of only 38%. Therefore, the low number of charges resulting in guilty verdicts do not appear to be distorted by the high number of charges per defendant – instead, the low conviction rate must have some other explanation. In a context in which bullying of junior recruits by their commanding officers has become a concern in recent years,[220] particularly after the recent disclosure of problems at Deepcut barracks in the 1990s, this is worthy of further investigation. Whether it illustrates difficulties with evidence in such cases, with the willingness of board members to convict (since lay members will generally be at least officers or warrant officers and so will have subordinates) or problems with the policy being applied by the Service Prosecuting Authority requires supplementary research. For the false records offences, whilst only 56% of charges resulted in conviction, 11 out of 17 defendants charged were convicted of at least one offence: an alternative conviction rate of 65%. This suggests that defendants are likely to be convicted of some but often not all of the charges, perhaps demonstrating that fewer charges with stronger evidence would be preferable.

Conclusion

The release of government data opens up a plethora of potentially fruitful lines of enquiry for academic study – particularly for research which casts light on hitherto neglected areas of the criminal

[213] Sexual Offences (Amendment) Act 1992 s.2 and Youth Justice and Criminal Evidence Act 1999 s.17(4), s.22A and s.62.
[214] E.g. *Lee* [2005] EWCA Crim 62.
[215] E.g. *Wilby* [2013] EWCA Crim 1417.
[216] E.g. *Bartlam* [2005] EWCA Crim 1801. See the interesting discussion of the phenomenon of "war porn" by N. Whitty, "Soldier Photography of Detainee Abuse in Iraq: Digital Technology, Human Rights and the Death of Baha Mousa" (2010) 10(4) *H.R.L.R.* 689.
[217] E.g. *Holbrook* (CA 10th April 2000).
[218] E.g. *Summers* [2012] EWCA Crim 2073.
[219] See above at XX.
[220] See, for example, S. Ogilvie and E. Norton, *Military Justice: Proposals for a Fair and Independent Military Justice System*, Liberty, June 2014 and BBC News, *Army head launches 'crackdown' on bullying and harassment*, 4 September 2015, http://www.bbc.co.uk/news/uk-34148307 [accessed 28 June 2016].

justice system such as the prosecution of disciplinary offences before the court martial. As this article has illustrated, interrogating such data enhances our understanding of the justice system beyond the headline figures found in official annual reports and crime statistics. The dataset examined here discloses wide variations in the prevalence of charges for disciplinary offences tried at the court martial, with some sections of the AFA resolutely unused, and others, particularly absence without leave and desertion, making regular appearances. There are also discrepancies between the average numbers of charges faced by defendants for each offence with some more commonly subject to multiple charges. As we have seen, this may suggest that some offences are being committed by serial offenders. Analysing the proportion of defendants from each of the three services has also uncovered the frequency with which Army personnel are tried before the court marital and the general under-representation of those from the Navy and RAF (with the exception of a few notable offences). Finally, the inconsistent conviction rates between the disciplinary offences – varying from 100% and 29% – merits further investigation to understand the factors which contribute to such different outcomes.

The data on the results of courts martial between January 2010 and April 2015 are part of an array of spreadsheets recently released by the government. Even a rudimentary search of the gov.uk website for crime and policing statistics instantly provides access to data on a whole range of areas interesting to the criminal lawyer: from statistics on drug seizures to deaths following police contact to metal theft to football-related arrests and banning orders, and beyond.[221] The availability of statistics potentially more novel and interesting than the overall crime rate reported annually and with which we have become familiar has the capacity to stimulate multiple new strands of scholarly literature. One consequence of this could be increased public understanding and transparency in the criminal justice system.

Whilst this would be welcome, the data has limitations. First, embarking on research involving government data is not without pitfalls since the information is not necessarily presented in the most user-friendly format and in most cases will require coding of some form to make it usable: a time-consuming and laborious task. Secondly, transparency is weakened where only a select tranche of data is released, as in the case of the military justice system where court martial results are made public but those pertaining to proceedings brought summarily by commanding officers are not. For this article, that has meant that some inferences from the court martial dataset are speculative since only a partial picture of the system can be presented. Disclosure of the court martial results in the absence of summary hearing data promotes the importance of more serious cases (which are more likely to be tried by court martial) whilst potentially obscuring many of the more minor ones. In the absence of data about how many cases are being dealt with summarily and the results thereof, we cannot fully understand the extent of service offending nor the operation of the military justice system.

In addition, quantitative data analysis of the type undertaken in this article of course requires supplementary qualitative analysis if we are to comprehend the factors which affect the statistics. In reducing a phenomenon such as military ill-discipline to numerical values it is important not to lose

[221] See https://www.gov.uk/government/statistics?departments%5B%5D=all&from_date=&keywords=england&page=3&publication_filter_option=statistics&to_date=&topics%5B%5D=crime-and-policing [accessed 28 June 2016].

sight of its complexity and context. As Ward cautions "[t]o many an untrained eye, figures convey a form of truth that is uncontestable and incontrovertible. People regard data as facts and assume that statistics represent reality. They view statistics as a neutral, sanitized, and objective expression of an unseen truth".[222] Yet this "truth" masks a whole range of diverse influences on the military justice system. As we have seen, further qualitative research would be beneficial – particularly to make sense of the discrepancies in proportionate charging between the three services, the variable conviction rates between different offences and the number of charges per defendant. Qualitative understanding of the decisions made by actors in the military justice system – along with access to more comprehensive quantitative data – is of particular concern because many of the disciplinary offences are legally complicated. As we have seen, they have multiple criminalised manifestations, often with different actus reus or mens rea elements, and some have specific defences. This complexity might lead us to question the extent to which lay persons such as commanding officers (albeit with available legal advice), service police and defendants (who are precluded from having legal representation at a summary hearing[223]) are making appropriate decisions about whether to try charges summarily or elect trial by court martial. Such qualitative research into decision-making in the civilian criminal justice system has been undertaken[224] and equivalent research in the courts martial would extend our knowledge of the military justice system. This is particularly important because there is a double lack of transparency here. Data about cases heard before the court martial is released by the Ministry of Defence and those proceedings are also open to scrutiny by virtue of being public hearings.[225] By contrast, information in respect of summary hearings by commanding officers is not released publicly and those cases take place in private, away from the public eye. How the UK military and its justice system treats its own personnel – especially young and potentially vulnerable recruits – has recently been publicly examined through the inquest into the death of Cheryl James at Deepcut barracks in 1995.[226] Very shortly, the military justice system is likely to be subject to further public and political attention for how it treated those on the outside, as decisions are made in cases involving historic allegations from Iraq and Afghanistan. Whilst the disclosure of the court martial results analysed in this article adds to public understanding and scrutiny of the military justice system, there is still much we do not know.

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[222] M Ward, *Quantifying the World: UN Ideas and Statistics* (Bloomington, USA: Indiana University Press, 2004), p.24-5.

[223] Legal advice may be obtained before the summary hearing. At the hearing, the accused may only be represented by an "assisting officer" who is a fellow member of the military: Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules SI 2009/1216 r.10 and J. Blackett, *Rant on the Court Martial and Service Law* (Oxford: OUP, 2009), para.4.29.

[224] See e.g. S. Cunningham, "The unique nature of prosecutions in cases of fatal road traffic collisions" [2005] *Crim. L. R.* 834; O. Quick, "Prosecuting 'Gross' Medical Negligence: Manslaughter, Discretion, and the Crown Prosecution Service" (2006) 33(3) *J. of L. and Soc*. 421; M. Burton, R. Evans and A. Sanders, "Implementing special measures for vulnerable and intimidated witnesses: the problem of identification" [2006] *Crim. L. R.* 229; C. Gunby, A. Carline and C. Beynon, "Alcohol-related rape cases: barristers' perspectives on the Sexual Offences Act 2003 and its impact on practice" [2010] *J. of Crim. L.* 579; C. Thomas, "Avoiding the perfect storm of juror contempt" [2013] *Crim. L. R.* 483; V. Kemp, "'No time for a solicitor': implications for delays on the take-up of legal advice" [2013] *Crim. L. R.* 184; M. Burton, "How different are "false" allegations of rape from false complaints of GBH?" [2013] *Crim. L. R.* 203.

[225] AFA s.158.

[226] BBC News, *Who were the Deepcut four?* 1 February 2016, http://www.bbc.co.uk/news/uk-england-35458611 [accessed 28 June 2016].