Improving ADR in the States' Criminal Justice Systems: A Case that States Should Adopt the U.S. Military's System of Nonjudicial Punishment

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I. INTRODUCTION

As the push to cut costs, clear dockets, and expedite the judicial process continues, alternative dispute resolution (ADR) has begun to permeate virtually every area of law, with one major exception: Criminal Law. An obvious explanation for this is the increased constitutional and statutory assurances that criminal defendants have regarding access to courts and juries. However, this explanation ignores that criminal justice today is, for the most part, a system of pleas, not a system of trials.[1] Because criminal defendants often waive many of the assurances and rights to which they are entitled, there is no reason criminal law should not also be able to benefit from ADR to the same extent as other areas of law. In fact, the United States military has been officially engaging in a form of ADR for settling minor criminal misconduct outside the judicial system since before 1951.[2] It is time for states to take a lesson from the Services.

States should adopt a quasi-arbitration form of nonjudicial punishment akin to that in Article 15 of the Uniform Code of Military Justice (UCMJ)[3] to deal with criminal cases involving misdemeanor offenses.[4] The UCMJ is the federal criminal code that governs military personnel and U.S. civilians supporting the military under some circumstances.[5] Article 15 of the UCMJ

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[1] *See* Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012).

[2] *See* 10 U.S.C.A. § 815. *See also* Burress M. Carnahan, *Comment-Article 15 Punishments*, 13 A.F. L. REV. 270, 271 (1971), for a discussion on the ways in which the military employed a similar, albeit illegal, form of nonjudicial punishment prior to that date.

[3] Carnahan, *supra* note 2, at 271.

[4] *See* Model Penal Code § 1.04, for purposes of this analysis, a misdemeanor offense is one defined as such in the governing jurisdiction or for which the governing statute provides that persons convicted thereof may be sentenced to imprisonment for a term of which the maximum is less than one year.

[5] *See* 10 U.S.C.A. § 802 (amended in 2009). Congress revised Article 2 of the UCMJ making civilians accompanying the military in the field in times of declared war or a contingency operation subject to the UCMJ.

allows commanders in the military to impose nonjudicial punishment on their subordinates to provide swift, efficient justice.[6] The Article 15 process avoids the judicial system and allows a recipient to choose this forum to state his case in front of his commander or his commander's authorized delegate and to accept accompanying punishment in lieu of being tried in a court-martial, although the individual is still given the opportunity to appeal the commander's decision.[7]

The organization of this mechanism in a state setting would necessarily have some logistical differences.[8] While one justification for the use of the Article 15 process is military necessity, a state system similar to the one used by the military could be just as effective and would be justified by states' interest in delivering swift, efficient justice and by the time and cost savings it provides to the criminal justice system, thus freeing up limited judicial resources that could then be diverted to more important or serious offenders.

This note will first discuss in section II why a change is necessary in today's criminal justice system. Unlike the military, the civilian sector has not yet developed an effective method of diverting minor offenses in such a way as to not "clog" the rest of the system, and it has resulted in an inefficient system that has choked judicial resources. Section III then discusses the military process and some of the practical choices states choosing to adopt such a process would face. It then outlines baseline procedural characteristics a state's program should have, extrapolated from the military's systems. Next, it briefly examines critiques of the nonjudicial punishment process in general and, for the most part, explains why such concerns would be quelled by the process's application in a state context. Finally, and perhaps most importantly, section IV explains why the nonjudicial punishment process—as applied to the states—would be constitutional.

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[6] *See* 10 U.S.C.A. § 815.

[7] The appeal authority is typically the next higher commander in the chain of command. *See* 10 U.S.C.A. § 815.

[8] Civilians do not have a commander to whom they are responsible, so it would be necessary to set up a system that allows for this mechanism.

II. AN EVALUATION OF THE CURRENT STATE OF THE PLEA BARGAINING PROCESS EXPOSES A NEED FOR CHANGE IN THE CRIMINAL JUSTICE SYSTEM[9]

The threshold question is why any change should be made at all to the status quo. This question is fair because, after all, states technically use ADR in Criminal Law.[10] In fact, in Ohio, only 2.5 percent of criminal cases in common pleas courts were resolved by going to trial in 2012, with similar statistics in municipal courts, which are responsible for hearing misdemeanor cases contemplated in the scope of this note.[11] Other states post similar numbers for settling criminal cases as well. Litigation as an answer to criminal misconduct is no longer the norm, but rather a last resort. Compared to other areas of law then, perhaps Criminal Law is not an "outlier" in the sense that it does not employ ADR at all, but rather in the *manner* in which it employs ADR.[12]

Although the current system for dealing with misdemeanor offenses results in the majority of defendants never seeing a jury trial, this does not

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[9] For purposes of this note, plea bargaining refers to:

> [A]ny bargaining, negotiation, or discussion between a criminal defendant, or his or her counsel, and a prosecuting attorney or judge, whereby the defendant agrees to plead guilty or nolo contendere, in exchange for any promises, commitments, concessions, assurances, or consideration by the prosecuting attorney or judge relating to any charge against the defendant or to the sentencing of the defendant.

Cal. Penal Code § 1192.7 (West 2012).

[10] *See* BLACK'S LAW DICTIONARY (9th ed. 2009). "Alternative dispute resolution" is "A procedure for settling a dispute by means other than litigation . . .". *Id.* Under this broad definition, anything short of litigation qualifies.

[11] John Futty, *Trials a Rarity in Ohio, U.S.*, THE COLUMBUS DISPATCH, Jan. 13, 2014.

[12] Rather than defining ADR in the way the way that Black's Law Dictionary does, those more intimately familiar tend to characterize it by its components, rather than simply by the absence of litigation.

In an effort to avoid the delay, expense, technicality, and acrimony of traditional judicial litigation, a movement has emerged for parties to use forms of alternative dispute resolution (ADR). In these processes, the parties typically agree to submit their disputes before a private third-party neutral, who would either decide, as in arbitration, or facilitate, as in mediation, a resolution of the parties' disputes.

Maureen A. Weston, *Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality*, 76 IND. L.J. 591, 592 (2001).

mean that ADR is being implemented in an effective or fair manner. The current strategy of dealing with criminal defendants suspected of committing a misdemeanor offense looks very much like a different form of ADR than mediation or arbitration, which both involve a third-party neutral: It looks simply like a negotiation. While negotiations are surely a quicker way of disposing of cases than going through a trial, this is not necessarily the most efficient and certainly not the fairest way of doing so.

First, it cannot be fairly said that those in the negotiation are on the same footing in terms of power. Because of the inherent disparity in power, and because the prosecutor essentially holds all the cards—except perhaps in unique cases—the idea that the parties are involved in meaningful negotiations seems suspicious and is worth briefly discussing. When a person is arrested on suspicion of a misdemeanor offense, that person may or may not spend the night in jail awaiting a bond hearing. Often, for minor offenses, the defendant will be allowed to depart on his own recognizance.[13] Conversely, the judge may set bail, and the defendant would be responsible for posting bail or waiting in jail until the court date. At some point before the court date, the prosecutor and defendant often negotiate a plea deal that results in the defendant signing an agreement whereby the defendant essentially exchanges a guilty plea—either to the charged offenses, or some lesser offense agreed to by the prosecutor—for the terms offered by the prosecutor. They will then bring the plea in front of a judge on the scheduled date, and the judge will either provide or withhold his permission to progress with the plea bargain.

The power disparity arises because a defendant's only bargaining chip is his guilty plea. Conversely, the prosecutor has wide prosecutorial discretion to make deals with defendants, and judges often acquiesce to the terms of these agreements.[14] Additionally, the prosecutor's position affords him or her a great deal of information power.[15] The prosecutor has access to the facts of the case and has an intimate familiarity with the law that the defendant does not possess.[16] Additionally, the prosecutor possesses positional power, which

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[13] Often referred to as a "PR Bond."

[14] Presumably, the role of the judge would be to ensure that the defendant's rights have not been violated, especially that the defendant made the agreement of his own free will.

[15] Informational power essentially refers to superior access to information or simply expertise. For a discussion of information power in negotiations, *see* Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOT. L. REV. 1, 26 (2000).

[16] The calculus might change somewhat when counsel, who presumably has the same degree of knowledge regarding the law, represents the defendant.

the average criminal defendant does not.[17] Finally, for the prosecutor, negotiations of this type are commonplace, whereas the criminal defendant often is dealing for the first time with the criminal justice system and thus lacks familiarity with it. The unsurprising result is the very high rate of settlements that occur from plea negotiations.

In order to be successful, a program would need to address the fairness aspect of plea negotiations while still maintaining the increased efficiency over litigation that plea bargains offer. Additionally, it would need to conserve judicial resources in a way superior to that of normal plea-bargaining, while still recognizing the need for a third-party neutral's involvement in the process. Finally, it would need to not infringe upon the Accused's constitutional rights—namely a criminal defendant's right to a jury trial and his right to counsel.

III. STATES SHOULD USE THE FEATURES OF THE MILITARY'S NONJUDICIAL PUNISHMENT PROCESS AS A GUIDE[18]

The nonjudicial process being used in the military offers exactly the aforementioned features. A person suspected of committing an offense and being considered for nonjudicial punishment in the military is first given notice. He is informed of the charges for which he is under suspicion, and he is then advised of his rights.[19] The Accused makes a number of elections, including whether he will consult with counsel and whether he wishes to waive his right to a trial, which means accepting nonjudicial punishment as binding on him—notwithstanding the right to appeal—or electing not to participate in this alternative method of resolving the suspected misconduct, at which point the nonjudicial process would end.[20] The office of the Staff

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[17] In this context, position power refers to the authority the prosecutor has, a prosecutor's social position relative to the average criminal defendant, and that is associated with the prosecutor because of his relationship with the court and its accompanying authority. For a discussion on position power, *see* Omer Shapira, *Exploring the Concept of Power in Mediation: Mediators' Sources of Power and Influence Tactics*, 24 OHIO ST. J. ON DISP. RESOL. 535, 549 (2009).

[18] While each branch of service has slight variations in the nonjudicial punishment process, unless the differences are notable they are not addressed. For the sake of concision, illustrations will be limited to the context of the Air Force.

[19] In the Air Force, the commander schedules an appointment for the Accused with the defense counsel, and the Accused may elect not to consult with his provided counsel if he so chooses. *See generally* DEP'T OF THE AIR FORCE, Air Force Instruction 51-202 [hereinafter *AFI* 51-202].

[20] *AFI* 51-202, *supra*, note 19 at ¶3.20,. *See also* 10 U.S.C.A. § 815.

Judge Advocate (SJA) would then be notified, and court-martial charges would then typically be pursued against the Accused.[21] The Accused also elects at this point whether he wishes to present any written matters for consideration, whether he requests a personal appearance in front of the Commander, and whether he would like the appearance to be private or public.[22]

This process benefits the Accused because a third-party neutral hears his case—similar to a bench trial—although without some of the procedural protections afforded the defendant in those cases and typically in more of an expedited manner without expending judicial resources. Similar to plea-bargaining, the punishments available under the nonjudicial process are generally less severe than the maximum punishment if the Accused elected to have his case tried in court and was found guilty.[23] Unlike the plea-bargaining process, however, imposing nonjudicial punishment upon the Accused does not burden the Accused with a criminal history, which is probably one of the most notable features of the nonjudicial process.[24] It is also one of the reasons that this ADR system should not replace, but only augment the portion of the criminal justice system that deals with misdemeanor offenses.

Because such a device contemplates state adoption, the extent to which each state adopts the process will differ from state to state. Accordingly, one of the major issues to be decided would be to what extent nonjudicial punishment is available to the state's residents. The military offers nonjudicial punishment to essentially all of its members, although the punishment available to officers is different than those offered to enlisted members.[25] States would likely face a few different options: First, they could

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[21] The decision whether to pursue charges is in the commander's discretion. *See AFI* 51-202, *supra*, note 19 at, ¶ 3.21. The SJA's office serves many functions, including that of prosecutor, which would be the function it would serve at this point in the process.

[22] *AFI* 51-202, *supra*, note 19.

[23] *Compare* DEP'T OF THE AIR FORCE, Manual for Courts-Martial, Part V para. 5., United States (2012) [hereinafter *MCM*] *with* Manual for Courts-Martial, Part II, Ch. X, United States (2012). The constitutionality of this phenomenon will be discussed in a subsequent section of this note.

[24] *AFI* 51-202, *supra*, note 19 at ¶1.1.

[25] *See MCM, supra* note 23 at Part V para. 5. There are vast differences between the responsibilities of Officers and Enlisted members in the Armed Forces, although the difference in entrance requirements is based primarily on the level of education the individual has attained. Generally, Officers must hold an undergraduate degree, while Enlisted members are typically only required to have a high school diploma or its equivalent.

base the program on the status of the offender and make the nonjudicial punishment available only to first-time offenders or only to persons below a certain age.[26] Second, they could base the program on the status of the offense and make nonjudicial punishment available only for specific misdemeanor offenses.[27] Finally, states could make the program available to all offenders of all misdemeanor offenses. However, among any of these options, the Administrator,[28] or prosecutor, may determine that nonjudicial punishment is inappropriate for the offender based on the offender's criminal history or other factors surrounding the circumstances.[29]

Article 15 of the UCMJ gives discretion to the secretaries of the services in many areas regarding how to run the nonjudicial punishment process.[30] States should also exercise such broad discretion in crafting their nonjudicial punishment programs, but in doing so, the programs of each of the services will be instructive, as each contains slight differences, reflecting both the realities of their military missions—which must be taken into account—as well as their differing views on individual rights.

There are some common elements among the services, which serve to

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[26] At least some states have programs available to first time offenders that allow the offender to plead guilty and then fulfill certain obligations in order to get record of the offense expunged from their criminal record. The difference between nonjudicial punishment and such existing programs is that this proposed program would reduce the costs of supervision. Specifically, rather than requiring the defendant to take affirmative action, the defendant would agree ahead of time to be bound by an agreement entered into with the state, which he would then be required to fulfill. Should the Accused fail to fulfill such requirements, he would be held answerable to law enforcement. There would be no need to engage in the bureaucratic practices that are currently practiced in expunging one's record.

[27] States may decide that certain classes of misdemeanor offenses are too severe for one reason or another to allow a defendant an opportunity to get only the immediate punishment, rather than the stigma that a conviction (or criminal record) carries with it.

[28] Because such a system would operate separate from, but alongside, the judicial system, states would need to appoint an administrator over the process. This administrator would act in the same capacity as commanders do in the military and decide whether nonjudicial punishment would be appropriate on an individual basis. In doing so, the Administrator would be required to review all evidence and make a determination as to whether the evidence supported the offense for which punishment was being considered. Additionally, administrators would determine the nature and type of punishment appropriate based on the circumstances.

[29] Including prior misdemeanor offenses for which the Accused received nonjudicial punishment; although this would not be a part of an individual's criminal history, evidence of prior nonjudicial punishment would be useful in determining whether it is appropriate in the current instance of misconduct.

[30] 10 U.S.C.A. § 815.

provide an understanding of where states should begin.[31] Although if adopted, many aspects of the states' processes will necessarily look different than those of the military, these common elements may be seen as the backbone of the military nonjudicial system, which is important because, among other reasons, the military's procedure has not been found unconstitutional.

A. *Nonjudicial Punishment Recipients Should Receive a Preliminary Inquiry*

As a fundamental element of the process, in that it affords some due process to the person accused of wrongdoing, states should maintain the preliminary inquiry, although their version would differ substantially from that of the military and, accordingly, would actually be less important. Commanders in the military must conduct an investigation into alleged offenses to determine whether nonjudicial punishment is appropriate. Circumstances surrounding nonjudicial punishment are diverse, and instances in which nonjudicial punishment is appropriate arise in numerous types of situations in the military.

Often, commanders receive third-party reports of misconduct in which the service member was allegedly engaged, on or off duty. The third party making the report could be a law enforcement agency that apprehended the member for some wrongdoing, but other times it could be a coworker that witnessed, or otherwise learned of, the member engaging in proscribed behavior and ultimately brought it to the attention of the commander in charge of the alleged wrongdoer.

Because chargeable misconduct is different in the states than it is in the military, and because states do not have an environment that tends to foster the reporting of misconduct in the same way as the military, state administrators would likely rely primarily, if not exclusively, on law enforcement agencies to bring forth evidence of the misconduct that would serve as the basis for which those being offered nonjudicial punishment are accused.[32] An inquiry launched by the commander, in the absence of a police

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[31] DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE, 143–44 (8th ed., Matthew Bender 2012) (including a preliminary inquiry, notice, hearing, and appeals).

[32] A significant distinction between a military member and a civilian is that a military member has specific duties, orders, and regulations he must follow, the dereliction of which may be a criminal offense under the UCMJ. 10 U.S.C.A. § 892 (2014). Because of this important distinction, it is likely that there would rarely be a case in which someone besides a law enforcement agency would bring evidence of wrongdoing to an administrator, although in rare instances an Administrator may be

investigation, could include appointing an investigating officer to investigate the underlying details of an accusation. However, when a competent police agency has conducted the investigation, there is often no reason to pursue an inquiry further. Of course, evidence and other matters submitted by the Offeree will be considered as part of the inquiry into the matter, hence rendering the preliminary inquiry indispensable. Only after this inquiry is complete—to whatever extent it is conducted or required—should the administrator decide whether nonjudicial punishment is warranted.

B. *Nonjudicial Punishment Recipients Should Receive Notice*

Another indispensable part of the process is the notice afforded to the party being offered nonjudicial punishment. This aspect of the process also touches on the due process requirements to which the party is entitled. While due process is flexible and is dictated by the demands of the situation,[33] examining the methods by which the services provide due process is a useful starting point.[34]

Each of the services has a device by which it provides the Offeree with written notice.[35] While each service differs slightly in the content of the notice given to the Offeree, each gives at least the following: the alleged offenses the Offeree committed; the right to demand trial;[36] the right to consult with counsel;[37] the right to have an open, or public, hearing; the right to the assistance of a spokesperson; and the right to examine available

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made aware of misconduct through other sources, such as witnesses to the alleged misconduct.

[33] Mathews v. Eldridge, 424 U.S. 319, 334 (1976).

[34] This note does not contemplate the full scope of due process concerns; that is, it does not purport to identify the minimum sufficient due process requirements. While a balancing under *Mathews* would be a useful place to begin, it is beyond the scope of this note. It should be noted, however, that although specific due process requirements are not identified herein, there is some level of process that would allow the administration of this system.

[35] The U.S. Army (Army) has both a summarized and formal process; in the summarized proceedings the Offeree is given notice orally. For the remainder of this note, only the Army's formal process will be considered.

[36] This right only exists in the U.S. Navy (Navy), U.S. Marine Corps (Marines), and the U.S. Coast Guard (Coast Guard) when the member is not attached to or embarked in a vessel.

[37] The right to consult with counsel is guaranteed in both the Army and Air Force, but it only exists in the other branches when the member has the right to demand trial.

evidence and to present evidence on his behalf.[38]

Accordingly, a state system of nonjudicial punishment would be well advised to allow at least this baseline notice to ensure that due process is satisfied. Although some of the services do not provide the right to demand trial by court-martial or the right to consult with counsel in all cases, this can probably be justified by military necessity.[39] Because states will not have such a justification, advisement of these rights should occur, as they do in those services that do not embark on vessels and thus do not have the same claim to military necessity for those purposes.[40]

C. *Nonjudicial Punishment Recipients Should Receive a Hearing*

In every service, the Offeree is afforded the opportunity for a hearing, where he is allowed to present matters in defense, mitigation, or extenuation to his commander.[41] The commander will then consider both the evidence against the Offeree and the evidence presented by the Offeree. After the commander's decision, the Offeree is informed both of the decision and of the punishment.

After punishment has occurred, the subject of nonjudicial punishment then has the right to appeal the commander's decision.[42] While the procedures differ slightly among the services, they follow the same basic approach. The member has five days to appeal, in writing, to the next higher commander if he feels the punishment was either excessive or unjust.[43] There is no required format, other than that it is in writing, neither are there specific requirements the appellant must submit to be considered.[44] The appeal is first routed through the commander who imposed the punishment, and that commander has a number of options available upon receipt of an appeal, including suspension, mitigation, remission, or setting aside the punishment.

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[38] SCHLUETER, *supra* note 31, at 145.

[39] *See* JOINT SERV. COMM. ON MILITARY JUSTICE, *supra*, note 23 at Part V para. 5. *See also* Weiss v. U.S., 510 U.S. 163, 177 (1994) (recognizing that due process differs with the military context).

[40] The Air Force is the outlier in providing counsel free of charge to all those being offered nonjudicial punishment. States could develop standards for providing public defenders to certain parties being offered nonjudicial punishment.

[41] In the event the commander is unavailable, a representative may hear the matters and present the commander with a summary of the content therein. *AFI* 51-202, *supra*, note 19 at 18.

[42] *See* JOINT SERV. COMM. ON MILITARY JUSTICE, *supra*, note 23 at Part V para. 5.

[43] *Id.*

[44] *Id.*

The commander may not increase the punishment.[45]

If the commander imposing punishment does anything but grant the appeal in full,[46] the appeal is then routed through the legal office to the next higher commander—along with all evidence considered by the commander prior to imposition of punishment—who has the same options the imposing commander had.[47] Whether the commander denies, grants in part, or grants in full the member's appeal, this commander is the final appeal authority, and the military provides the member with no further recourse.[48]

Hearings and appeals in a state system would be essentially identical to those of the military with just a few differences. First, the administrators of state-run systems would have no familiarity with the recipient of nonjudicial punishment. While this might, at first, seem to be quite significant, closer inspection reveals that, if anything, this would tend to make the system fairer. Depending on the size of a unit, the commander may or may not have met the person subject to nonjudicial punishment and accordingly may or may not be familiar with him personally or professionally.[49] If the commander has not met the individual, it is likely he will talk to the alleged offender's supervisors to inquire about him; he will also review his performance reports, which will inform him as to the efficacy of the work that person has performed for the military. The reason for these differences is easily explained.

Despite its name, one purpose of "nonjudicial *punishment*" in the military is rehabilitation.[50] Generally, states have varying reasons for imposing punishment on offenders.[51] Depending on the states' underlying rationale behind their punishment of criminal actions, the familiarity the administrator has with the alleged offender may be a negative or a positive

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[45] *Id.*

[46] I.e., denies or grants in part.

[47] *See* JOINT SERV. COMM. ON MILITARY JUSTICE, *supra* note 23 at Part V para. 5.

[48] *Id.*

[49] The word "unit" is used to describe the level of command that is typically commanded by a commander exercising nonjudicial punishment authority—each service uses different terminology (e.g., this level is called a "squadron" in the Air Force).

[50] *See* JOINT SERV. COMM. ON MILITARY JUSTICE, *supra*, note 23 at Part V para. 1 (stating that one purpose of nonjudicial punishment is to "promote[] positive behavior changes in service members without the stigma of a court-martial conviction.").

[51] There are two basic rationales behind criminal punishment: Retributive and Utilitarian. The Retributive rationale imposes upon offenders their just deserts, while the Utilitarian rationale focuses on the utility the punishment may confer upon the individual or to society.

factor.[52] On the one hand, when the administrator is highly familiar with the alleged offender, as he is in some circumstances in the military, the administrator is better positioned to determine how best to rehabilitate that individual.[53]

On the other hand, lack of familiarity with the Offeree provides another layer of impartiality not often present in the military. Accordingly, if the primary purpose of punishment is retributive—giving to the offender his just desserts for engaging in the criminal misconduct—this impartiality is beneficial. It allows the unbiased finder of fact to impartially judge the evidence against the individual in determining his guilt. The individual would still be able to submit matters in mitigation on his own behalf, enabling the administrator to impartially administer an appropriate punishment based on the facts and the circumstances rather than some potentially inappropriate basis.[54]

D. The Appropriate Standard of Proof in the Military and the Proposed State System is Beyond a Reasonable Doubt

Generally, the preliminary inquiry is the point at which the commander determines whether nonjudicial punishment would be appropriate for the individual in question. Assuming the commander determines it is appropriate, the process will move forward. The question of standard of proof for evidence becomes relevant at this point, and again after the Offeree submits matters to the commander for consideration.

Although the Manual for Courts-Martial (MCM) is silent on standard of proof, it is argued and widely accepted by the military that the acceptable burden of proof is "beyond a reasonable doubt." This makes sense because, if a person suspected of misconduct turns down the nonjudicial punishment, the Office of the SJA would be required to prove each element of the crime in a court-martial beyond a reasonable doubt.[55] Although not all branches of the military provide legal counsel free of charge, the person's right to confer

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[52] It is doubtful that whether marginally positive or negative, the impact of familiarity with the accused will be substantial.

[53] It is common in the military for a commander to impose a suspended sentence, which can be viewed as a form of probation, in that the suspended punishment does not become effective until and unless the individual engages in further misconduct.

[54] E.g., The administrator's subjective belief that the individual will or will not engage again in similar misconduct due to the person's character.

[55] *See generally*, Captain Shane Reeves, *The Burden of Proof in Nonjudicial Punishment: Why Beyond A Reasonable Doubt Makes Sense*, 2005 NOV. ARMY LAW 28 (2005). *See also AFI* 51-202, *supra* note 19 at 15.

with counsel helps ensure that the proper standard of proof is being utilized. An additional safeguard is that, in the military, nonjudicial punishment is routed through the legal office, and an attorney is responsible for reviewing each action taken.[56]

Because states will have the opportunity to address this issue head on at the adoption of the mechanism, they should expressly adopt beyond a reasonable doubt as the standard. Despite no formal adoption of this in the military, each branch has come to the same conclusion, and expressly adopting such a standard can only strengthen the legitimacy of this type of program. Moreover, it would be even more probable to provide legitimacy because a neutral administrator would often be in a better position to weigh evidence in an impartial manner in a way that may not be possible for commanders under some circumstances.

E. Although Some Realities in the Civilian Context Make Punishments Available to the Military Unavailable, Many of the Military's Methods have Parallel Civilian Counterparts that Provide States with a Starting Point

These forms of punishment available to the military are instructive for state-implementation and, for the most part, have parallel functions to those already available in the states, with some apparent exceptions. The forms of punishment available to each branch in the military are virtually identical.[57] They include correctional custody for not more than thirty consecutive days;[58] forfeiture of not more than one-half of one month's pay per month for two months;[59] reduction in grade;[60] extra duties for not more than forty-five

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[56] *AFI* 51-202, *supra* note 19 at 34. While these military attorneys do not represent the Accused, their client is their respective branch of the military. Their review helps ensure that the nonjudicial punishments are legally sufficient; should an incident arise where a commander wishes to impose nonjudicial punishment on a member where the evidence simply would not support the charges, an attorney from the legal office would advise against. This is because, if (or presumably when) the Accused turns down the nonjudicial punishment that was based on something less than probable cause, the SJA's Office would not be able to successfully prosecute the Accused, and thus their office maintains an interest in utilizing a higher standard of proof.

[57] The divergence occurring among services where the punishment is imposed upon a person attached to or embarked in a vessel; accordingly, the additional punishments allowed under these circumstances will not be considered here.

[58] 10 U.S.C.A. § 815 (b)(2)(H)(ii) (2014).

[59] *Id.* at (b)(2)(H)(iii).

consecutive days;[61] and restriction to specified limits, with or without suspension from duties, for not more than sixty consecutive days.[62]

Because every member of the military serves in a specific grade, a punishment allowing for reduction is appropriate; this, of course, is not the case outside the military context and is therefore inapplicable. Forfeiture of pay is a device that is used to garner wages from the Accused through automatic withholding from their paycheck. While this is also not a realistic punishment, the state could simply fine the Accused. The military imposes the punishment of extra duty to cause the Accused to work additional hours either at his own job or doing some form of work that usually benefits the installation on which he works. States could punish some offenders by requiring a certain reasonable number of hours of community service. Additionally, the military uses both correctional custody and restriction to specified limits as a punishment. While correctional custody would not be available in the civilian context, restriction to specified limits could be possible. This might take the form of house arrest, allowing for the individual to leave only for specified purposes[63] or some other geographically specified area in which the person must remain.

One additional administrative function the military has at its disposal that would not be available to the states deals with the actions upon which nonjudicial punishment often serves as the basis. For instance, members of the military who receive nonjudicial punishment are oftentimes administratively discharged[64]—based on the commander's recommendation—and the nonjudicial punishment serves as a sort of justification for either the discharge itself, the characterization of the

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[60] *Id.* at (b)(2)(H)(iv). The number of grades an Accused may be reduced is contingent upon his own rank and that of the Commander, but it is unhelpful to consider this further in this note.

[61] *Id.* at (b)(2)(H)(v).

[62] *Id.* at (b)(2)(H)(vi). In the military, the authorized punishment depends on the grade of the commander imposing punishment, as well as that of the Accused; these are the maximum punishments allowed based on the Commander being a sufficiently high grade to administer them. Because neither the grade of the commander nor the accused is pertinent to civilian application, it will not be further discussed in this note.

[63] For example, they could leave for employment, school, taking children to and from school, etc.

[64] Military members have a contract for a number of years that is terminable essentially when the commander has good cause to discharge that member—this can be based on one-time more serious misconduct or it could be a pattern of misconduct that is relatively less serious.

member's service, or both.[65] Accordingly, because this type of device is not available to them, states would not be subject to accusations that they were flouting the intent of lawmakers that a specific set of collateral consequences follows convictions for certain illegal acts.

As discussed earlier, the punishments actually utilized by the states would probably vary based on the underlying purpose of that punishment. Accordingly, a state that leans more toward rehabilitation of the offender might dole out punishments differently than one that viewed the primary function of punishment as retribution. Additionally, depending on how the state designed the device, the administrator might have wide latitude to determine the proper punishment based on a totality of the circumstances, to include the accused's background. Alternatively, the system could be designed such that particular offenses required particular punishment.[66]

F. *Despite Critiques of the Nonjudicial Process, it Remains a Viable Option for States and is Actually Improved Through State Adoption*

Like anything else of this nature, nonjudicial punishment has its critics.[67] First, there is an underlying concern that as alternative dispute resolution becomes more prevalent—especially in criminal law—social justice will tend to decline as a result of certain problems of public concern being "funneled" into ADR.[68] Indeed, at least one critic has pointed out that nonjudicial

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[65] Additionally, when a member is honorably discharged, that member is entitled to the benefits conferred on him due to his service in the military. A general discharge—which, for example, occurs when the member receives nonjudicial punishment for drug use and is subsequently administratively discharged—precludes that member from reaping some of the veterans' benefits associated with serving the military honorably—most notably G.I. Bill benefits. *See* Major Marshall L. Wilde, *Incomplete Justice: Unintended Consequences of Military Nonjudicial Punishment*, 60 A.F. L. REV. 115, 139 (2007).

[66] Fairness would dictate that punishment be based on a totality of the circumstances. This is especially true under these circumstances where the accused has not been found guilty and may not even have admitted guilt, necessarily.

[67] There are two primary sources of critics: those who critique the nonjudicial punishment process as it applies to the military, although some of the concerns critics have become moot when a state adopts the process, as later discussed, and those who critique the (over) use of alternative dispute resolution, specifically in the criminal justice system.

[68] *See* Andre R. Imbrogno, *Using ADR to Address Issues of Public Concern: Can ADR Become an Instrument for Social Oppression?*, 14 OHIO ST. J. ON DISP. RESOL. 855, 877 (1999).

punishment in the military deprives the public and third parties—namely, victims—of substantial justice.[69]

The first concern is one that deals more with issues, such as domestic violence, being diverted to mediation before allowing them to progress to the court-system. This phenomenon can indeed be characterized as troubling; however, this nonjudicial punishment device, which can be fairly compared to arbitration, presents none of the same problems as shifting from criminal prosecution to mediation. The complaint is that a whole segment of society—women suffering domestic violence—may be prevented from obtaining justice.

Nonjudicial punishment, however, contemplates nothing of the sort. There are essentially three parties who must acquiesce to a defendant/accused being offered nonjudicial punishment: the administrator, the prosecutor, and the defendant/accused. If either the administrator or prosecutor does not see fit to offer the defendant nonjudicial punishment, the defendant will face criminal prosecution for the misconduct. Additionally, the defendant has the right to turn down the offer of nonjudicial punishment and proceed to trial. The reason this distinction is important is because, first, a victim suffering injury at the hands of the offender would be able to make a statement, and that statement would then be available for the administrator to consider.[70] Additionally, it should be noted that the only offenses for which a domestic abuser could potentially receive nonjudicial punishment are misdemeanor offenses, so a crime involving substantial violence would typically not fall into this category.[71]

The argument against nonjudicial punishment in the military is essentially that the public and any potential victims, as well as the Treasury, are deprived of substantial justice when the offense is one of a number of categories: domestic violence, drug cases, and driving while intoxicated.[72]

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[69] *See* Wilde, *supra* note 65 at 119.

[70] In this circumstance, the victim is actually better protected in a sense because a statement made to the police could still be considered by the administrator without requiring the victim to testify. This would be possible in this case because the rules of evidence do not apply to nonjudicial punishment.

[71] This may also be an example of a class of misdemeanor that some states would choose to exempt from nonjudicial punishment consideration. Even if they did not, the administrator and prosecutor would still maintain discretion over whether nonjudicial punishment was appropriate under the circumstances, and this would conceivably result in nonjudicial punishment not being offered in many cases of domestic violence, as the punishment is admittedly lighter.

[72] *See* Wilde, *supra* note 65, at 117–119. The author recognizes that: 1) serious offenses will not be dealt with by nonjudicial punishment and 2) other strictly military-

There is a concern that where domestic violence cases are disposed of through nonjudicial punishment, families of the accused are not adequately protected. In many states, when a person is convicted of a domestic violence offense, a prohibition against carrying firearms is triggered. However, when a person is given nonjudicial punishment in the military for such an offense, this prohibition is not triggered.

This concern is no longer present when nonjudicial punishment is taken outside the military context. First, statutes requiring this prohibition may be conditioned upon a conviction of a crime, a requirement that nonjudicial punishment given in the military would not fulfill. Second, often there is a lack of reporting from the military (federal system) to the states, so even if it did fulfill the requirement, policing these individuals would likely be inconsistent at best.[73] Both of these issues are resolved by state adoption of a nonjudicial punishment. Of course, there would be no federal/state communication problem, as the federal government is taken out of the mix. Additionally, because states would be adopting the system as a whole, they could adopt language in the appropriate statutes to allow nonjudicial punishment to trigger these prohibitions.[74]

The arguments for both drug violations and driving while intoxicated cases are similar to that of domestic violence in that they involve concern over collateral "punishment" of the offender usually associated with committing a certain type of offense.[75] Again, this concern is unfounded in the state adoption context where, assuming states decided to adopt the process itself, they could also adopt/amend legislation mandating a similar effect for those who accept nonjudicial punishment for certain offenses.[76]

A final concern of nonjudicial punishment in the military is that restitution is not available for victims. Whether states should maintain this

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related misconduct—such as showing up late for duty on a regular basis or failing show up all—does not implicate social injustice.

[73] The Freedom of Information Act (FOIA) and the Privacy Act of 1974 shield the military from disclosing records of nonjudicial punishment. *See* 5 U.S.C. § 552 (2009); 5 U.S.C. § 552 (2010).

[74] Second Amendment concerns are beyond the scope of this note, but would require analysis on this point.

[75] For instance, a person arrested for DWI on a military installation and offered nonjudicial punishment typically results only in a suspension of "on-base" driving privileges rather than a suspension of the accused's state driver's license.

[76] What is unclear is whether those accused of these offenses and offered nonjudicial punishment, with the understanding that it would result automatically in the collateral "punishment" here contemplated, would reduce in any meaningful number those that turn down nonjudicial punishment and elect to take their chances in the judicial system.

feature of nonjudicial punishment should be examined before adoption, although in-depth consideration of this matter is beyond the scope of this note.[77]

After each state determines whether and to what extent nonjudicial punishment will be available to its citizens, the arguably less difficult step of designing the system to comply with due process is required. This step is made relatively easy by examining the nonjudicial punishment systems used by the different branches in the military and establishing a baseline—essentially the least common denominator used by the services—below which states should not fall. Despite this baseline, states may well decide to provide additional protections to its citizens, similar to each branch of service in the military.

IV. STATE ADOPTION OF NONJUDICIAL PUNISHMENT IS CONSTITUTIONAL[78]

Because the nonjudicial punishment process contemplates depriving persons of their liberty or property, procedural due process must be adhered to.[79] All of the other rights to which a criminal defendant is entitled in a trial in a court of law generally are not thought to raise issues.[80] This is because when a party is offered nonjudicial punishment, it is that party's prerogative to either accept the nonjudicial punishment or refuse to accept it and force the government to prosecute him as a criminal defendant, thus conferring to him all the accompanying rights of a criminal trial. Thus, in accepting nonjudicial punishment, the accused is advised of his right to a trial and must expressly and knowingly waive that right, which includes waiving some of his accompanying rights.[81]

Some have argued that the nonjudicial punishment system in the

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[77] The same question as to the effect that the availability of restitution would have on those accused of misconduct accepting nonjudicial punishment applies to the availability of other collateral punishments.

[78] While the Fifth and Sixth Amendments warrant the same analysis in the federal system (as in the military context), I will refer only to the Fourteenth Amendment in reference to the proposed nonjudicial punishment process, as this paper deals with state adoption of nonjudicial process and is thus more appropriate.

[79] *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

[80] In the military (i.e. federal) context, specifically the Fifth Amendment right to due process, the Sixth Amendment right to counsel, and the Sixth Amendment right to a jury trial.

[81] *See generally* Miranda v. Arizona, 384 U.S. 436 (1966).

military, if applied to a civilian context, may be unconstitutional.[82] This argument, however, seems to rest on two key premises: the scope of nonjudicial punishment authority in the military and the breadth of the offenses covered. In the military, nonjudicial punishment authority falls generally to officers serving in command billets. Additionally, as previously mentioned, the military punishes some offenses, which, in the civilian context could be considered trivial in certain cases, but, even cast in their worst light, would not be considered worthy of government sanction.[83]

While it is probably true that there would be constitutional problems with state adoption of a scheme identical to that of the military, those issues are not raised here because nonjudicial punishment authority would be held by a relative few who are not part of the judicial process—the administrators empowered by the jurisdictions in which they serve. Additionally, the misconduct upon which nonjudicial punishment could be based would not be substantially extended, as in the military, to include conduct that was traditionally not addressable by the courts. The process contemplated in this paper is one that would, at least in the constitutionally significant ways, be equal to the current plea bargaining process.

Another author suggested that the manner in which punishments were imposed was unconstitutional because the United States Supreme Court in *United States v. Jackson* [84] struck down as unconstitutional a death penalty clause in the Federal Kidnapping Act that would cause a criminal defendant to be subject to the risk of a death penalty only if they plead not guilty and demanded a jury trial.[85] The statute was unconstitutional because it "tend[ed] to discourage" defendants from pleading not guilty and demanding a jury and "needlessly *encourage*[d]" waiver of those rights.[86]

However, the Supreme Court's jurisprudence has developed on this issue since then,[87] and, in *Chaffin v. Stynchcombe*,[88] the Court summarized the

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[82] *See* Captain Harold L. Miller, *A Long Look at Article 15*, 28 MIL. L. REV. 37, 50 (1965).

[83] *See, e.g.*, Middendorf v. Henry, 425 U.S. 25, 28 (1976) (Accused charged with unauthorized absence). Other examples include reporting late for duty or falling asleep while on the job, both of which are punishable under the UCMJ.

[84] United States v. Jackson, 390 U.S. 570 (1970).

[85] *See* Captain Buress, *supra* note 2.

[86] *Jackson*, 390 U.S. at 583.

[87] *See, e.g.*, Corbitt v. New Jersey, 439 U.S. 212 (1978); Santobello v. New York, 404 U.S. 257 (1971); Brady v. United States, 397 U.S. 742 (1970); Parker v. North Carolina, 397 U.S. 790 (1970); North Carolina v. Alford, 400 U.S. 25 (1970).

[88] Chaffin v. Stynchcombe, 412 U.S. 17, 32 (1973).

law regarding government discouragement of a defendant's constitutional rights. [89] First, *Jackson* did not hold that every government-imposed choice in the criminal process that discourages the exercise of constitutional rights offends the Constitution.[90] "[T]he inquiry, by its very nature, must be made on a case-by-case basis" and "the threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved."[91] Finally, "waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."[92]

Additionally, the Court has developed a doctrine known as the criminal waiver doctrine. It essentially allows the criminal defendant to use the constitutional rights guaranteed to all criminal defendants, as bargaining chips to obtain a chance of a more favorable outcome than the defendant believed he had prior to engaging in the plea-bargaining, so long as he does so voluntarily and intelligently.[93] A voluntary and intelligent waiver, at least in reference to waiving the right to counsel, only means that the defendant must be made aware of the "dangers and disadvantages," so that, if he agrees, he does so with his eyes open.[94] The Court has often treated representation by counsel as sufficient evidence of voluntary and intelligent waiver when a criminal defendant waives a Constitutional right and later attempts to challenge it, despite the minimal role the attorney may have played.

A. *The Constitution Would Not Require States to Provide Counsel to Those Being Offered Nonjudicial Punishment*

If states adopt nonjudicial punishment and counsel is not provided to the accused, it is likely to invite constitutional challenges of the procedure; however, such challenges should fail for two reasons. "Absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."[95] If states do not create a mechanism through which to provide legal counsel, they will require that assistance of counsel be waived

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[89] *Id.*

[90] *Id.* at 30.

[91] *Id.* at 32. *See also* Mcgautha v. State of California, 402 U.S. 183, 213 (1971).

[92] *Brady*, 397 U.S. at 748 (citing Brockhart v. Janis, 384 U.S. 1 (1966).

[93] *See* Hill v. Lockhart, 474 U.S. 52, 56 (1985).

[94] *See* Faretta v. California, 422 U.S. 806, 835 (1975).

[95] Argersinger v. Hamlin, 407 U.S. 25, 37 (2006).

if the accused wishes to take part in nonjudicial punishment rather than the judicial process. If the standard is knowing and voluntary and this truly means that the person accused of wrongdoing must be made aware of the dangers and disadvantages of pursuing the course of action he is contemplating, this requirement is not a difficult one to fulfill and could be easily fulfilled by a layperson. This is because the dangers and disadvantages will, in most cases, remain constant and will not amount to anything very threatening, due to the nature of the underlying misconduct and the process itself.

Accordingly, the person being offered nonjudicial punishment must be made aware that he probably will not escape punishment,[96] and of course advised of the maximum punishment that may be imposed upon him. At this point, the dangers and disadvantages are merged into a description of what nonjudicial punishment is and how it functions, which would be described to the individual in the ordinary course of the process, with or without such a requirement, in order to induce him to choose the forum over proceeding in court. Aside from that minor complication, there is nothing to suggest that nonjudicial punishment is any less constitutional than plea-bargaining, or that courts would not encourage nonjudicial punishment if it were available as an option in the same manner in which they now encourage plea-bargaining,[97] which is recognized as necessary, as well as more efficient than a jury trial in most cases.

Second, even in the absence of waiver, the Fourteenth Amendment would not require that counsel be provided. The Supreme Court held in *Argersinger v. Hamlin* that counsel must be provided when "incarceration is a practical possibility."[98] Because incarceration is not even a theoretical possibility in the nonjudicial punishment context, much less a practical one, the right to counsel is not triggered. In a concurring opinion, Justice Powell addressed the broader issue of whether petty offenses for which no incarceration was contemplated triggered the right to counsel and stated that he believes the Fourteenth Amendment requires the right to counsel in petty cases whenever assistance of counsel is necessary to assure a fair trial.[99] Even assuming this were the standard, and assuming that it could be applied to nonjudicial punishment proceedings, which are not equivalent to a trial, counsel would still not be required. There is a built-in fairness, in that the

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[96] Of course, he will escape a criminal record, which is arguably the most valuable aspect to recipients of nonjudicial punishment.

[97] *See* Corbitt v. New Jersey, 439 U.S. 212, 219 (1978).

[98] *See Argersinger*, 407 U.S. at 39.

[99] *Id.* at 47 (Powell, J., concurring).

accused must opt in and agree to be bound by the limited assortment of punishments, with which the accused would already be familiar. Additionally, the rules of evidence would not be in effect, thereby making it easier for a layperson to present matters in his own defense to the administrator for consideration. Finally, the neutral administrator must consider all relevant evidence before making a judgment as to whether and to what extent the accused should be punished. Accordingly, regardless of the standard, the Constitution would not require assistance of counsel be provided under these circumstances.

B. *The Nonjudicial Punishment Recipient has no Right to a Jury Trial*

The constitutional right a criminal defendant has to a jury trial is not implicated here, and accordingly does not make unconstitutional the proposed nonjudicial punishment process. First, not all criminal defendants are entitled to a jury trial. Only those not involving petty offenses are afforded that right. Whether an offense is petty is determined essentially by looking at the authorized penalty for the offense and using it as a gauge of its social and ethical judgments.[100] Although the outer limits of this method are unknown, it is known that a crime carrying possible penalties up to six months does not require a jury trial if it otherwise qualifies as a petty offense.[101]

Because nonjudicial punishment does not contemplate the use of confinement or allow punishment that nears six months, it is clear that this requirement is not met, and, accordingly, nonjudicial punishment does not trigger the right to a jury trial. Although some of the underlying misconduct being charged may carry a maximum punishment exceeding six months,[102] when the accused elects to accept nonjudicial punishment, he has elected it as a forum, and, in that forum, the maximum punishment is dictated by the maximum punishments allowed in nonjudicial punishment proceedings. Accordingly, there will never be a right to a jury under such a scheme. Finally, as discussed in other similar contexts, the defendant also waives his constitutional rights when he elects the nonjudicial forum, and, so long as he does so voluntarily and knowingly, the waiver should be effective. Thus,

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[100] Duncan v. State of La., 391 U.S. 145, 159 (1968). That is, there is a rebuttable presumption that offenses punishable by six months' imprisonment or less are petty and thus do not require a jury trial. *See* S. Union Co. v. United States, 132 S. Ct. 2344, 2351 (2012) (citing *Duncan*, 391 U.S. at 159-162).

[101] *Id.*

[102] For example, a year for some misdemeanor charges.

there is no constitutional issue regarding a jury trial in relation to nonjudicial punishment.

C. *Although Many Believe Military Necessity is the Constitutional Justification for Nonjudicial Punishment in the Military, it is not Required in the State Context*

From this author's experience, it is generally assumed that the military is allowed to have its nonjudicial punishment regime due to military necessity, the absence of which would cause nonjudicial punishment in the military to be constitutionally infirm. While this might be true, this argument is properly understood as a concern for the sufficiency of due process, that is, a concern that the system as it exists in the military would be unconstitutional but for military necessity. But the states would not adopt the military's system wholesale, and when key aspects of the nonjudicial punishment system are changed, any constitutional deficiencies that may exist are cured.

The Supreme Court explained in *Parker v. Levy* that nonjudicial punishment is administrative rather than judicial, and it deals with the most minor offenses. [103] Another author, defending the constitutionality of Article 15 in the military, unwittingly analyzed the constitutionality, at least in part, in such a way that would extend constitutionality to similar state processes.[104] In *Colten v. Kentucky*,[105] the Supreme Court upheld the constitutionality of a prosecuting scheme that required the prosecutor to try certain cases initially in courts of limited jurisdiction in a summary bench trial, where *de novo* review was available after the trial. If the appeal to the appeals court was made for *de novo* review, not only could the court overturn the lower court's ruling in the appellant's favor, but also a more severe sentence could be given as a result of the review.[106] In upholding this scheme, the Court emphasized the weight of the state's interest in providing a

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[103] Parker v. Levy, 417 U.S. 733 (1974) (holding that articles of Uniform Code of Military Justice authorizing court-martial for conduct unbecoming of an officer and a gentleman and court-martial for disorders and neglects to prejudice of good order and discipline were not unconstitutionally vague and explaining the significance of the difference between the relationship military and civilians have with the government).

[104] Edward J. Imwinkelried & Francis A. Gilligan, *The Unconstitutional Burden of Article 15: A Rebuttal*, 83 YALE L.J. 534, 546–47 (1974). I will be borrowing the applicable portion of the author's analysis to (implicitly) argue for the constitutionality not only of the nonjudicial punishment process in the military, but also as it extends to states that would adopt a similar process.

[105] Colten v. Kentucky, 407 U.S. 105, 110 (1972).

[106] *Id.* at 117.

quick and "inexpensive means of disposition of charges of minor offenses."[107] However, there were two justifications upon which the Court based its decision: First, was the state's interest in this day of increasing burdens on state judiciaries.[108] Second, was the defendant's unconditional right to a new trial in a superior court, unprejudiced by the proceedings or the outcome in the inferior courts.[109]

The nonjudicial process is similar to the summary courts in *Colten,* and similar states that the Court notes, in that it lacks many of the same safeguards, such as not providing for a jury,[110] no recording of the proceedings, and the lack of training on the judge's part.[111] Additionally, it is clear that the nonjudicial punishment process would serve states' strong interest in quickly and cheaply disposing of charges of minor offenses. However, where the processes diverge is the availability of an absolute right to appeal to a court for a new trial. This right is so important and prominent in *Colten* because of the fact that the defendant was not provided all the constitutional protections to which he was entitled in a trial.

Despite this divergence, however, those being offered nonjudicial punishment do not greatly differ from those in the defendant's position in *Colten.* This is because, rather than allow an appeal to a superior court for *de novo* review, the nonjudicial punishment process instead provides the alleged offender with the opportunity to opt out altogether of the nonjudicial process and exercise his constitutional rights that must be afforded criminal defendants. Offering this cure to otherwise unconstitutional conduct on the front end rather than the back end to ensure the process passes constitutional muster should not make a difference, as the defendant is provided an opportunity to exercise his rights.[112]

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[107] *Id.* The authors, upon whose analysis I am building, indicated that the analogy to the Article 15 process in the military is immediately apparent to the two-tier system in *Colten*; although perhaps apparent, there is certainly a difference worth mentioning, discussed above—namely, the second justification for a two-tier system in *Colten.*

[108] *Id.* at 114.

[109] *Id.*

[110] Although the Court notes that at times a jury is not provided, even in instances in which the defendant is entitled to one.

[111] Although administrators would presumably be trained as administrators, they would certainly not be trained as judges.

[112] Additionally, it is noteworthy that nonjudicial punishment does not put the defendants in the awkward situation they are in under two-tier systems, as they know the maximum punishment they may receive in nonjudicial punishment and whether it is acceptable—which it often will be, as the maximum in a trial will frequently exceed that of nonjudicial punishment, as it does in the military.

Finally, it is important to note that the accused would have a right to appeal, and, assuming an appeal system that is similar to that of the military's, the review would be equivalent to *de novo*, as it would simply be another review of all the information without deference to the administrator's findings. However, if nothing else, *Colten* made clear that if the opportunity to a trial, with all of its constitutional safeguards that the accused could exercise, was insufficient, states could allow an absolute right to a trial when demanded by a defendant who received nonjudicial punishment. This would give the accused identical protection afforded to the defendant in *Colten*, and, while probably not the top choice for states, would still provide an improvement and would not likely seriously impose on judicial resources.[113] Therefore, the absence of military necessity does not make unconstitutional the state adoption of the slightly tailored nonjudicial punishment process.

Accordingly, state adoption of a system providing nonjudicial punishment would not be unconstitutional. The criminal defendant's right to a trial is not at all compromised, as the criminal defendant always has a choice whether to accept nonjudicial punishment or take his chances in a trial. An inquiry into the constitutionality of the device could probably end there, but, when looked at even closer, it becomes clear that whatever concerns are left are dealt with through other features of the device. In addition to the defendant's waiver of both the right to a jury trial and the right to counsel, the recipient of nonjudicial punishment is entitled to neither, as the risk of incarceration is required to trigger any such right, and nonjudicial punishment simply does not present such a risk.

V. CONCLUSION

In this age of settling disputes with a focus on efficiency and speed, ADR has unsurprisingly and quickly gained enormous popularity and success in virtually every area of law but criminal law. The thought of infringing upon criminal defendants' rights have surely been the reason for this, but the risks are overestimated when considering the frequency of plea-bargains in the criminal justice process.

Unfortunately, the holdout on adopting a neutral ADR process for minor crimes results in criminal defendants engaging in a plea-bargaining process that consists, generally, of a poorly educated, often indigent individual, negotiating with the government. The negotiation can hardly be referred to as

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[113] This is because it is unlikely that a recipient of nonjudicial punishment, even if slightly dissatisfied with the punishment, would wish to take on the risk of being found guilty (again) in court and stuck with a stiffer penalty than before.

such when such a disparity in bargaining power is present, yet more than ninety-five percent of state cases settle through similar processes rather than going to trial.

Because so many cases already settle, a system that more fairly disposes of minor cases by diverting them outside the judicial system without sacrificing speed, yet increasing efficiency, and of course freeing scarce judicial resources, should seriously be considered by states. The model used by the military for over half a century—nonjudicial punishment—would provide exactly the relief state judicial systems need.

By examining the military's model of nonjudicial punishment, which varies slightly in each branch, a readily adoptable system becomes apparent. The procedural safeguards common among the branches, such as a preliminary inquiry, notice, and a hearing, provide a starting point for determining the procedure due the nonjudicial punishment recipient. Additionally, military nonjudicial punishment regimes should serve as a standard against which states can measure contemplated forms of punishment. Despite critiques of the system as it exists in the military, state-adoption subdues the potential issues raised, actually improving the process as a result.

Finally, states can rest easy knowing that the adoption of such a mechanism would not violate the Constitution. Defendants do not lose the right to a trial simply because nonjudicial punishment is available to them. Accordingly, defendants may elect to go to trial, but, should they choose to avail themselves of nonjudicial punishment instead, they waive their right to a trial, as well as the accompanying rights to a jury and counsel.[114] This is not a problem, constitutionally speaking, because nonjudicial punishment does not trigger these rights, due to the nature of punishment being offered. Accordingly, this superior method of disposing of certain instances of minor criminal misconduct is available to any state interested, and its utilization would be constitutional; therefore, states should adopt it.

[114] Unless the state provides the right to counsel.