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History

Pragmatism & Discretion:
Discipline in the British Army, 1808-1818

by

Zack White

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Abstract

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Military law is poorly understood by comparison with its non-military (i.e. civilian) counterpart. This thesis offers the first detailed overview of military law in the British army at the start of the nineteenth century, exploring its provisions and practices, and how the theoretical framework of the law was imposed in reality. It draws on a wide-ranging selection of material, from works of authority on military law, to court proceedings, trial registers, soldiers' memoirs and the correspondence of leading figures and stakeholders in the administration of military justice. A core element of this research has been the transcription of a database of 9,227 court martial cases, which will be drawn upon to highlight the army's prosecution priorities and punishment practices.

Throughout it is argued that military law was more nuanced than has previously been recognised, whilst its implementation was underpinned by a pragmatic system of discretionary justice. Military law was consistently applied in a way that was bespoke to the army's immediate needs, yet the nature of these 'needs' varied according to each individual's position within the army's command structure. With these diverging priorities, military law was simultaneously pulled and manipulated in multiple directions, with some calling for softer forms of punishment and taking a lenient approach towards certain crimes, whilst others pushed for more stringent measures.

Military law was also by no means constant during this period. Competing pressures and conflicting priorities led to a diverse array of agendas which not only influenced how

the law was implemented, but also how the law was reformed. It will become apparent that these diverse priorities led to an uncoordinated programme of reforms, with some efforts undermining the intentions of others.

However military law did not operate within a vacuum. Throughout the thesis, close reference will be made to discussions and practices within the contemporaneous non-military justice system. Throughout the period under scrutiny, society was experiencing the Foucauldian shift from punishment of the body to punishment of the mind through incarceration. For much of the period, the army bucked that wider social trend in order to attend to its own needs, only embracing solitary confinement from 1817 as a result of growing pressure from senior officials in the army's administrative structure. Similarly, the growing 'lawyerisation' of civilian courts was mirrored by a militarization of the army's, with an increasing tendency to employ officers with some legal knowledge to officiate on trials, rather than civilian legal experts. It is argued that these trends indicate that whilst the army was willing to be informed by wider civilian practice, military law was applied in a manner which operated on different logic that was shaped by the army's distinct needs.

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Research Thesis: Declaration of Authorship

ZACK WHITE

Title of thesis: Pragmatism & Discretion: Discipline in the British Army, 1808-1818.

I declare that this thesis and the work presented in it are my own and has been generated by me as the result of my own original research.

I confirm that:

1. This work was done wholly or mainly while in candidature for a research degree at this University;
2. Where any part of this thesis has previously been submitted for a degree or any other qualification at this University or any other institution, this has been clearly stated;
3. Where I have consulted the published work of others, this is always clearly attributed;
4. Where I have quoted from the work of others, the source is always given. With the exception of such quotations, this thesis is entirely my own work;
5. I have acknowledged all main sources of help;
6. Where the thesis is based on work done by myself jointly with others, I have made clear exactly what was done by others and what I have contributed myself;
7. None of this work has been published before submission

Signature: Date:17/12/2021

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Completing a PhD is a long, and often challenging process, that brings with it many joys of new discoveries and just as many frustrations at setbacks. Completing a PhD in a pandemic amplifies those challenges immeasurably. Throughout the last four and quarter years I have been indebted to, and touched by, the kindness and support of a great many people. All of them have enriched the experience of carrying out this research, driven me to ask ever more probing questions about the topic, and encouraged me to believe that this project was not only feasible, but valuable.

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Zack White

17th December 2021

Definitions and Abbreviations

Despatches	Despatches of the First Duke of Wellington edited by John Gurwood
DJA	Deputy Judge Advocate
DJAG	Deputy Judge Advocate General
GCM	General Courts Martial
GCMs Ab	General Courts Martial Confirmed Abroad
GCMs @H	General Courts Martial Confirmed at Home
GRCM	General-Regimental Courts Martial
JAG	Judge Advocate General
ODNB	Oxford Dictionary of National Biography
RCM	Regimental Courts Martial
TNA	The UK National Archives
WO	War Office (Collection of Papers at TNA)
WP	Wellington Papers (Hartley Library, University of Southampton)

Chapter 1 Introduction

1.1 The challenges facing the military justice system

On the 30th March 1813, Charlton Wollaston, found himself sitting at his desk in No. 13 (now No. 12) Downing Street.[1] Wollaston was an Assistant Deputy Judge Advocate General within the British government's Judge Advocate General's Department, tasked with the administration of military law in the British army. On his desk lay a letter that had been received from a colleague, Francis Seymour Larpent. A few months before, Larpent had been sent to the Iberian Peninsula in order to assist the commander of British forces in Spain, Earl Wellington, a role which he had been specifically hired to fulfil. Wollaston needed to reply to Larpent, having previously consulted his superior, Judge Advocate General Charles Manners Sutton. From the reply that Wollaston penned, immediate insight can be gained into the complex, nuanced nature of military law. Larpent had queried whether he, as a Deputy Judge Advocate (DJA), was required to officiate in trials of the General-Regimental Courts Martial (GRCMs), the army's middle tier of court, and had also asked about whether it was legal for a soldier to be sentenced to be both flogged and transported. These were seemingly simple queries, yet it is evident from Wollaston's reply, that the matters were complex. Larpent had pointed to particular elements of military law's foundational texts, the Articles of War and Mutiny Act, to justify his thinking, showing that he had considered the matters carefully, and was familiar with a number of the law's stipulations. Yet Larpent had been mistaken in his reasoning. Instead, Wollaston had to point to different aspects of the documents to inform Larpent that DJAs were required to attend GRCMs, and that a military court could sentence a guilty man to flogging or transportation, but not both.[2] This was not the first time Larpent had written with queries on the most appropriate course of action. The previous month Wollaston's superior Manners Sutton had penned a lengthy letter to Larpent on a range of matters including how many witnesses were required to secure a conviction in a military court, the legality of prosecuting soldiers for self-harming, and the impracticality of awarding compensation

[1] 'No. 12, Downing Street', in *Survey of London: Volume 14, St Margaret, Westminster, Part III: Whitehall II*, ed. by Montagu H Cox and G Topham Forrest (London: London County Council, 1931), pp. 154-159.
[2] UK National Archives, War Office 81/47, Judge Advocate General's Office letter books, Charlton Wollaston to Francis Larpent, 30th March 1813.

to victims of soldiers' theft.[3] Yet despite the range of queries, the tone of these exchanges was always cordial. Larpent was a professional endeavouring to find his way within a legal system that, despite his training, he was unfamiliar with, and the fact that he was endeavouring to find appropriate solutions, whilst referring up in instances of uncertainty, was appreciated.

It is immediately apparent that military law was sufficiently complex that a qualified and experienced legal professional, such as Larpent, struggled to orientate themselves within its provisions. Yet the fact that two members of the department were engaging in such nuanced legal discussion also points to the effectiveness of the military justice system at ensuring that the law was applied appropriately to specific circumstances. This system was therefore seemingly bespoke to the army, and based upon careful judicial oversight, whilst simultaneously being contested in nature.

1.2 Thesis Aims

This thesis seeks to deconstruct how military law should have operated, and compare this theoretical framework with the reality of how the law was applied across the British army during the Napoleonic era. It aims to understand the nature of military law, its implementation, and its reform during the latter stages (1808-15) of the Napoleonic Wars, and the occupation of France (1815-18). This time frame allows consideration of how military law's application adapted as the army transitioned from a war footing, to a peacetime one. Beginning analysis in 1808 also offers the benefit of being able to consider the entirety of the Peninsular War (1808-14), thereby illuminating the challenges of implementing military justice on campaign. This period also saw a transformation in record keeping for trials. Detailed registers of General Courts Martial (GCMs) confirmed at home were only kept from 1806, and comprehensive records for Regimental Courts Martial (RCMs) only begin to emerge from 1811. The creation of the intermediate tier of court, the General-Regimental Courts Martial, in 1812, further highlights that this was a period of transition for the British Army's military justice system, making it a key period in which to understand the challenges and changes facing military law.

[3] WO81/47, Charles Manners Sutton to Francis Larpent, 19th February 1813.

In seeking to assess whether the law was applied rigidly or leniently to soldiers, the thesis exposes a pragmatic system of discretionary justice which pervaded the army. Firstly, therefore, it aims to establish how military justice was supposed to operate, its legal basis, its stipulations, and its procedures. It will determine how the system was managed, its safeguards against tyrannical punishments and practices by officers, and the manner in which judgements were reached, including the rules that were applied on evidence. When seeking to determine the reality of how this system was imposed in practice, particularly on campaign, the thesis will then compare the realities of the operation of military courts with that legal framework. It will explore what the army actually chose to prosecute, the manner in which it punished, and the motivations behind those courses of action, exposing the extent to which the army's needs were the leading priority in the operation of the military justice system. In turn, it asks how those of all ranks engaged with this system, utilised it to their advantage, and what the resulting impact was on the effectiveness of the military justice system.

Crucially, the thesis recognises that military law did not operate within a vacuum, but was informed by its non-military, criminal counterpart. The turn of the nineteenth century was a transformational moment in punishment practices across Europe. Michel Foucault has argued that during this period European society transitioned from an existing norm of punishment of the body through corporal punishment, to punishment of the mind by incarceration.[4] Understanding the interaction between military and non-military law, and the degree to which there was an exchange of ideas between the two legal spheres will be a key enquiry throughout. In this context, scholars have identified non-military law as an entity which was manipulated both by judges and victims. John Beattie has highlighted how guilty pleas were discouraged by judges in order to ensure that all the evidence was heard in a case, thereby creating the opportunity for sentences to involve discretion based upon individual circumstances.[5] Meanwhile, Peter King has shown that judges' approaches varied widely, with individuals being jointly tried by different judges for

[4] Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage Books, 1979), p. 231.
[5] John Beattie, *Crime and the Courts in England 1660-1800* (Oxford: Clarendon Press, 1986), p. 336. Subsequently Beattie, *Crime and Courts*.

the same offence receiving markedly different punishments.[6] Such findings point to the significance of the individual within a trial process, and emphasise that law was rarely applied in a formulaic manner. This points to a notion of authority, even legal authority, being a process of negotiation, something which has equally been echoed to a limited extent in the military context, yet requires a far more detailed examination of its manifestation and implications for military justice.[7] In this sense, our understanding of the operation of the military justice system stands to gain from an appreciation that 'we should not assume […] that the law and especially legislative texts, reflect legal reality'.[8] In exploring these questions, the thesis will argue that military law certainly referred to the practices of non-military law on occasion, but was always guided by the army's priorities and needs. The practices of non-military courts were only embraced when it was in the wider interests of the army to do so.

This thesis is also aware of the fact that military law was not constant but changed in significant ways over the course of the period under scrutiny. A vital aim of the research therefore is to determine how the law changed, and what the efforts to reform the law reveal about contemporary discussions of discipline and humanitarian ideals within early nineteenth-century British society. Equally pertinent to this thesis are the discussions themselves centring around the reform of military law, particularly in relation to punishment practices. Within Parliament, debates were held on multiple occasions over the appropriateness of corporal punishment, raising questions about notions of humanity, sympathy and empathy in this period, and the way in which they influenced the processes and reforms of military law.

Most fundamentally, this thesis seeks to offer insight into what constituted both 'discipline' and an effective military justice system. In offering an approach that combines 'history from above' and 'history from below', by exploring those of all ranks and positions within the system, it recognises that the answer to these questions varied depending on

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[6] Peter King, *Crime, Justice and Discretion in England 1740-1820* (Oxford: Oxford University Press, 2000), p. 224. Subsequently King, *Justice and Discretion*.

[7] William P. Tatum III, "The Soldiers Murmured Much on Account of this Usage': Military Justice and Negotiated Authority in the Eighteenth-Century British Army', in *Britain's Soldiers: Rethinking War and Society, 1715-1815*, ed. by Kevin Linch and Matthew McCormack (Liverpool: Liverpool University Press, 2014), pp. 95-113.

[8] Ute Gerhard & Valentine Meunier, 'Civil law and gender in Nineteenth century Europe', *Clio: Women, Gender, History*, 43 (2016), 250-275 (251).

the perspective of the individual, and their role within that system. Simultaneously, the divergent aims of key actors in the military justice system, revealed by examining the process of reform to military law, not only sheds light on the nature of reform during this period, but also the contested nature of discipline, and the extent to which the system came under strain from those divergent pressures and agendas that were exerted upon it. Whilst individuals such as Wellington issued uncompromising orders demanding the prosecution of particular crimes, and lobbied for greater powers to punish, officers within regiments were inclined to show clemency towards their men when it came to floggings, commuting or pardoning some or all of the punishment. In the process, the pragmatic and discretionary nature will be exposed in full, indicating how the definition of what was pragmatic changed at different levels in the army's command structure, which influenced how military law was implemented. Above all the thesis will show that military law was nuanced, complex, discretionary, and bespoke to the army's needs.

1.3 Historiography

However the realisation of this nuanced reality of Britain's military justice system at the turn of the nineteenth century has previously been missing from the historiography. Whilst a detailed discussion of the criminal legal system has thrived amongst scholars for over half a century, discourse on military discipline at the turn of the nineteenth century has been far more limited.[9] This lack of scholarly attention is surprising given the importance of discipline to the effectiveness of the British army to fulfil its primary function to defend and further British interests across the globe during the Napoleonic Wars.

Recent research on army psychology, command and control, in eighteenth century armies has highlighted the fundamental need to employ discretionary approaches within the army. The work of Edward Coss has drawn on the concept of 'primary group theory', a socio-military model for understanding troop motivation.[10] Developed by Morris Janowitz, this posits that soldiers are predominantly motivated by a need for support from the mess

[9] See for example John Beattie, *Crime and the Courts in England 1660-1800* (Oxford: Clarendon Press, 1986); Peter King, *Crime and Law in England, 1750-1840* (Cambridge: Cambridge University Press, 2006); D. Hay (ed.), *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (London: Allen Lane, 1975).
[10] Edward Coss, *All for the King's Shilling: The British Soldier under Wellington* (Norman: Oklahoma University Press, 2010), pp. 6-7.

group.[11] This should be considered alongside the fact that Coss's work has also indicated that the troops in Wellington's army during the Peninsular War (1808-1814) were receiving rations that nutritionally failed to meet their needs.[12] As a result, this created inherent tensions at a grass roots level in relation to the crime of theft. Nutritionally inadequate rations presented troops with the option of plundering or starving, with the former being encouraged within the mess group as all would receive a cut of the stolen food. Officers, meanwhile, faced challenges of balancing the soldiers' need to eat with a clear provision in military law that plundering was not permitted. This therefore raises clear questions about the need for a discretionary approach to plunder for subsistence within Wellington's force, and its corresponding impact upon the prosecution process. In an environment where group survival was paramount, examining responses to plunder amongst the rank and file offers an important insight into British martial cultures in this period.

Research on army cultures, command and control all offer further valuable perspectives on the potentially vital role that discretion could play on the maintenance of discipline.[13] Coss, Ilya Berkovich and Andrew Bamford have all touched, either in detail or implicitly, on the concepts outlined in Stephen Westbrook's compliance model.[14] Westbrook asserts that soldiers are motivated by coercion (threat of violence),

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[11] Morris Janowitz, *Sociology and the Military Establishment*, 3rd edn (London: Sage Publications, 1974).

[12] Coss, pp. 272-274.

[13] For more on martial cultures see Scott Hughes Myerly, *British Military Spectacle: From the Napoleonic Wars through the Crimea* (London: Harvard University Press, 1996); Arthur Gilbert, 'Law and Honour among eighteenth Century British Army officers', *The Historical Journal*, 19, 1 (1976), 75-87; Stephen Conway, "The Great Mischief Complain'd of': Reflections on the Misconduct of British soldiers in the Revolutionary War', *The William and Mary Quarterly*, 47, 3 (1990), 370-390; Kevin Linch and Matthew McCormack, 'Introduction' in *Britain's Soldiers: Rethinking War and Society, 1715-1815*, ed. by Kevin Linch and Matthew McCormack (Liverpool: Liverpool University Press, 2014), pp. 1-16; Kevin Linch and Matthew McCormack, 'Defining Soldiers: Britain's Military, c. 1740-1815', *War in History*, 20, 2, (2013), 144-159. Myerly has emphasised the individuality of regimental identity in the British army during this period, describing the British army as a collection of regiments, rather than a cohesive force, with the regiment representing the average soldier's 'world'. This thesis recognises that concept but takes the notion further, in line with the work of Coss and Berkovich, to emphasise the influence that mess groups within regiments could have on a soldier's behaviour and attitudes, and the manner in which that interacted with the wider regiment and its honourable reputation. Gilbert particularly points to the fact that the *Ancien Regime* honour code stood at odds with the stipulations of the *Articles of War*. Whilst Gilbert explores the implications of this in relation to officers' behaviour, this research builds upon that to enquire into the impact on officers' behaviour in apprehending those who broke military law. Kevin Linch and Matthew McCormack meanwhile have called for a rethinking of the relationship between the military and society by analysing the transfer of ideas between the solider and civilian, something which this thesis seeks to understand within a legal context.

[14] Coss, pp. 237-238; Ilya Berkovich, *Motivation in War: The Experience of Common Soldiers in Old-Regime Europe* (Cambridge: Cambridge University Press, 2017), p. 26; Andrew Bamford, *Sickness, Suffering & the Sword: The British Regiment on Campaign* (Norman: Oklahoma University Press, 2013), p. 289.

remuneration (financial incentives, such as pay or plunder), and normative reward (like respect, praise, and affection from peers, or medals).[15] Appreciating the existence of these forms of motivation for soldiers is particularly relevant in a military justice system which was predicated on coercion, but, as will become clear, also made use of normative rewards and remuneration.

Ilya Berkovich, in his study of the armies of the *Ancien Régime*, has highlighted the tension between excessive use of coercive force, and compliance on the battlefield. He particularly highlights that the common perception that the Prussian Army was a brutally disciplined force, with soldiers being more fearful of their officers than the enemy, is a gross over-simplification.[16] This points to an incompatibility between the realities of maintaining morale within a force to enable it to fight effectively, and heavy reliance upon coercion as a means of discipline. Andrew Bamford has also shed light on this within the context of the British army in the latter stages of the Napoleonic War, indicating how extensive use of the lash actually undermined the morale, and therefore fighting capability of the unit.[17] An excessively draconian approach was therefore clearly counterproductive, raising questions about how a balance between law and morale was maintained in practice.

With specific reference to military law in this period, Roger Norman Buckley has suggested, that it was based upon 'terror and torture as public spectacle' and was 'capricious and arbitrary' in nature.[18] However, by focusing on material from the registers of the most senior military court, Buckley's perspective is more reflective of the 'top down' view on the military justice system. His assessment lacks recognition of the nuanced decision-making processes in and outside the courtroom which were integral to how the military justice system operated. Furthermore, as Gilbert has highlighted, most military trials took place at a regimental level, in the most junior military court, pointing to the need

[15] Stephen Westbrook, 'The Potential for Military Disintegration', in *Combat Effectiveness: Cohesion, Stress, and the Volunteer Military*, ed. by Samuel Sarkesian (Beverly Hills, Sage Publications, 1980), pp. 244-278 (pp. 251-252).
[16] Berkovich, p. 57.
[17] Bamford, p. 64-69.
[18] Roger Buckley, *The British Army in the West Indies Society and the Military in the Revolutionary Age* (Gainesville: University Press of Florida, 1998), p. 203, 244.

for a wide ranging study of military prosecutions which considers all levels of the courts martial.[19]

The notion of military law as a nuanced process imbued with discretion is by no means a new one. Given that military law co-existed alongside its non-military counterpart, it is useful to draw on our existing understanding of how justice was disseminated outside of the army. As has been highlighted above, John Beattie and Peter King have shown that discretionary approaches were a regular and fundamental aspect of how non-military courts operated.[20]

This is by no means the only area in which scholarship on the operation of non-military courts can inform the military context. Georges Vigarello has found that prosecutions for sexual misconduct of any description were extremely rare in criminal courts in France, and that at times charges were framed ambiguously in order to increase the prospect of successful conviction, though on a charge which carried a smaller maximum penalty. However it is noticeable that trials for sexual assault were also sparse in the military courts, despite soldiers' memoirs containing frank anecdotes about such crimes. Such attitudes conflict markedly with contemporary notions of honourable, masculine conduct, which emphasised the importance of treating women in a respectful manner.[21] This dichotomy between the visibility of such crimes in memoirs and their invisibility in court records again shows marked similarity to work on sexual assault in the non-military courts. This points to some of the ambiguities relating to martial masculinity, with Joanne Begiato highlighting the contradictions between the army's emphasis upon valour and self-control, despite its association with fighting, drinking and sexual liberty.[22] The study of the

[19] Arthur N. Gilbert, 'The Regimental Courts Martial in the Eighteenth Century British Army', *Albion*, 8, 1 (1976), 50-66 (50).

[20] Beattie, *Crime and Courts*, p. 336; King, *Justice and Discretion*, p. 224. See also Leon Radzinowicz, *A History of English Criminal Law and its Administration from 1750,* 3 vols (London: Stevens & Sons Ltd, 1948), I; Deirdre Palk, *Gender, Crime and Judicial Discretion, 1780-1830* (Woodbridge: Boydell & Brewer, 2006); J. S. Cockburn, 'Punishment and Brutalization in the English Enlightenment', Law and History Review, 12, 1 (1994), 155-179. Radzinowicz suggested that there was an intention by law makers to uphold the law precisely to the letter, a notion which Hay built upon when noting the growth of property offences in the long-eighteenth century to argue that there was a near deification of property by the English aristocracy. Beattie has offered a useful counter to the way in which this should be used to construe to realities of how the non-military justice system operated by highlighting the complexities and nuances of the implementation of the law. This thesis is particularly informed by this notion that legal stipulations and reality can be distinct entities.

[21] Catriona Kennedy, *Narratives of the Revolutionary and Napoleonic Wars* (Basingstoke: Palgrave Macmillan, 2013), pp. 103-104. Subsequently Kennedy, *Narratives*.

[22] Joanne Begiato, *Manliness in Britain, 1760-1900* (Manchester: Manchester University Press, 2020), p. 9.

handling and reception of sexual misconduct in the military courts therefore offers an additional lens through which to view a much wider social problem that, as Clive Emsley has highlighted, remained an issue throughout the nineteenth and twentieth centuries.[23] Equally, there is a question of the extent to which soldiers were fundamentally on trial for their manliness, given that trial summaries list charges of 'ungentlemanly', 'unofficerlike' and 'unsoldierlike' conduct.

Equally useful to the consideration of the motives of officers in their discretionary application of military law, and particularly the commutation of punishments, is scholarly discussion on notions of humanity and humanitarianism. The thesis is particularly informed by the work of psychologist Lauren Wispé, who argues that whilst 'sympathy is a way of relating', this is distinct from empathy which is 'a way of knowing'.[24] It is worth noting that this clashes with our understanding of humanitarianism as a process of identification of suffering and the mobilisation of empathy through philanthropy.[25] In the military context, where officers were at least partially motivated by concerns of command and control, outlined above, any clemency offered cannot be solely attributed to sympathy. The study of military law therefore offers a fresh means of exploring questions of humanity and empathy in the early nineteenth century.

1.4 Definitions

In a thesis that focuses upon precise legal terms, it is important to be clear on what is meant by terms such as 'discipline', 'the law', 'the military justice system' and 'non-

[23] Clive Emsley, *Hard Men: Violence in England since 1750* (London: Hambledon and London, 2005), p. 26-27. See also Simon Dickie, 'Fielding's Rape Jokes', *The Review of English Studies* 61, 251 (2010), 572-590; Susan Brownmiller, *Against our Will: Men, Women and Rape* (New York: Simon Schuster, 1975); Sharon Block, 'Rape in the American Revolution: Process, Reaction, and Public Re-Creation', in *Sexual Violence in Conflict Zones: From the Ancient World to the Era of Human Rights*, ed. by Elizabeth D. Heinemann (Philadelphia: University of Pennsylvania Press, 2011), pp. 25-38; Michael J. Hughes, *Forging Napoleon's Grande Armee: Motivation, Military Culture, and Masculinity in the French Army, 1800-1808* (New York: New York University Press, 2012). This thesis does not entirely ascribe to Brownmiller's suggestion that sexual assault has been utilised throughout history as a means of keeping all women in a state of fear, but agrees with the argument of Block that military personnel have drawn upon their status in the coercion of sex. In this context it is useful to note that Hughes has shed light on a culture of sexualised violence in the French army which equated sexual assault with conquest of territory.

[24] Lauren Wispé, 'The distinction between sympathy and empathy: To call for a concept, a word is needed', *Journal of Personality and Social Psychology*, 50 (1986), 314-321 (314).

[25] Abigail Green, 'Humanitarianism in Nineteenth Century Context: Religious, Gendered, National', *The Historical Journal*, 57, 4 (2014), 1157-1175 (1160). Subsequently Green, *Humanitarianism*.

military law'. Discipline is a multi-faceted entity that existed on a number of interlinked levels. It can refer simultaneously to:

1. The training that soldiers received to instil an ethos of adherence to army regulations,
2. The self-restraint expected of soldiers when they were faced with opportunities to deviate from the army's expectations,
3. The punishments used to keep the troops under control,
4. The determination of troops to stand and fight in battle, in accordance with their superiors' orders.

This thesis is predominantly concerned with the third definition outlined above, although elements of the fourth and, particularly, second definitions will also be key to informing considerations of the application of the law.

'Military law' is used throughout to refer to the body of legally binding stipulations which soldiers of the British Army were subject to upon enlistment, as laid out in the Mutiny Act, and the *Rules and Articles for the Better Government of All His Majesty's Forces*, more commonly known as the *Articles of War*. It is specifically used with reference to these codified documents, but not with reference to verbal orders issued by officers, or General Orders which were issued on a daily basis in written circulars to regiments. Although orders were legally enforceable, and could be produced as evidence in trials, they were also bespoke to particular regions or circumstances, and derived their legal authority from the Mutiny Act and *Articles of War*.

The 'military justice system' is referred to throughout this thesis to describe the apparatus and procedures through which military law was upheld. This therefore includes the process of apprehending those who broke military law, the preparations for placing them on trial, the legal procedures in the court room, and the methods of punishment used if a defendant was found guilty. By extension it therefore also encapsulates the administration and oversight of military justice, as carried out by the Judge Advocate General's department.

A careful distinction is also made throughout this work between 'military law' and 'non-military law'. The latter term is used to refer to the body of the common and statute law relating to crime and criminal procedure which governed civilian society. The term is

used to remain deliberately distinct from 'civilian law' which has a very specific legal definition. Civilian, or civil law, is limited to private relations between members of the community, rather than criminal matters, with the result that referring to 'civilian law' as an alternative to 'non-military law' would be a confusing misnomer. However to refer to 'non-military law' merely as 'criminal law' would be to imply that military law did not cover offences which were criminal in nature. This, as will become apparent, was not the case, with the result that 'non-military law' offers the best compromise to accommodate the relevant legal definitions.

The terms 'pragmatism' and 'discretion' are used repeatedly throughout this thesis in order to characterise the nature of the military justice system. Pragmatism in this context refers to dealing with matters in a practical manner, rather than being wedded to theoretical considerations, focusing upon practical considerations, rather than ideals. Discretion meanwhile is used to allude to individuals exercising their own judgement when deciding on matters relating to military law.

Finally, 'humanity' and 'humanitarianism' will arise on a number of occasions. 'Humanity' is taken simply as concern for a fellow human being and what they are experiencing. When discussing 'humanitarianism', meanwhile, the thesis draws on Abigail Green's construction of the term that it represents an 'identification with the suffering of distant others […] and the mobilisation of this empathy'.[26]

1.5 Methodology

In order to facilitate an assessment of these diverse issues, this thesis fuses qualitative and quantitative historical analysis throughout. In the process, it offers both a data-led appreciation of the army's priorities and practices, combined with an experience-driven recognition of the way in which individuals engaged with the military justice system, reflected upon it, and sort to reform it.

A fundamental aspect of the research underpinning this thesis has therefore been the creation of a database of some 9,227 trials which the army conducted between 1808 and 1818. This allows an assessment of how the army not only changed its practices over

[26] Green, *Humanitarianism*, p. 1160.

time, but also shifted its emphases as it transitioned from a war to a peacetime footing. Trial data has only previously been used in a relatively limited way. Whilst Danielle Coombs has used a sample of GRCM trial data in her social study of the British soldier and the context of their criminal activity, no research has drawn on such a detailed dataset across all tiers of military court.[27] The entirety of the registers of General Courts Martial (WO90/1 and WO92/1), and General Regimental Courts Martial (WO89/4) have been transcribed, amounting to 4070 and 1679 trials respectively. These registers contain the rank, name, unit of the accused, the date and place of their trial, a summary of the charge(s), the punishment issued (if applicable) and any alterations that were made to that punishment such as commuting the sentence, or pardoning the offender. Data for the Regimental Courts Martial is harder to acquire and the RCM data represents a sample of the available material, although there are issues of consistency with the material. The sample is drawn from the RCM registers in the six-monthly inspection reports held at the National Archives (TNA WO27/91–145).[28] However, due to the scale of the surviving material, it was impractical to transcribe every RCM, as this would amount to an estimated 15,000 cases. As a result, a sample of 27 regiments was chosen, amounting to approximately 20% of the army's foot regiments during the period. These regiments were chosen on the basis that they were all present at a minimum of three of the four most significant breaches of discipline in Wellington's force during the Peninsular War: the plunder of Ciudad Rodrigo (January 1812), the sacking of Badajoz (April 1812), the Battle of Vittoria (June 1813), and the plunder of San Sebastian (September 1813). This amounts to every unit that served in the 3rd, 4th, 5th and Light Divisions of his army. It should be said however that the available data is by no means consistent. Very few regiments returned copies of their RCM registers with the inspection reports prior to 1811, as there was no requirement for them to do so. Whilst a change to regulations in 1811 meant that reports were supposed to be included, the reality was that RCM details were often only sporadically returned. As a result, it is difficult to make direct comparisons between units, however it is possible to establish broader trends in the crimes tried and punishments in this tier of military court.

[27] Danielle Coombs, 'Crime and the Soldier: Identifying the Soldier-Specific Experience of Crime in the British Army, 1740-1830' (Unpublished PhD Thesis, University of Leeds, 2015).
[28] UK National Archives, War Office 27/91-145, Six-monthly inspection returns, 1808-1818.

Such a methodology shows similarities with the work of scholars of non-criminal law, such as Martin Weiner, who has used regional Assize records in order to understand trends in murder and manslaughter, or Peter King, who used Old Bailey trial records to inform understanding of the enlistment of offenders into the army and navy in lieu of punishment.[29] However, as with the work of Weiner and King, this thesis seeks to move beyond a quantitative study of crimes committed and punishments issued, to draw upon qualitative approaches to facilitate a wider understanding of the way individuals navigated and negotiated the military justice system. This research is therefore also informed by close textual analysis of a wide range of sources. Trial proceedings (WO71) are used to offer insight into the procedures in the court room, and the way in which the accused sought to construct their defence. Draft versions of the transcripts of trial proceedings are also examined to indicate how the court overcame areas of uncertainty over the law's stipulations when they arose mid-trial.

Equally, the administration of justice can be understood by examination of the papers of the Adjutant General's department of Wellington's army (Hartley Library, WP9/1/1/1-8), and 'Out Letters' of the JAG's department (TNA WO81/39-55). As the Adjutant General's department had to organise all trials, and make arrangements for discipline, these allow an insight into the challenges that the army faced in implementing the system on campaign, especially in terms of gathering sufficient numbers of officers to judge GCM cases, and persuading witnesses to attend. The letters are therefore used to determine the ways in which the army dealt with such issues. However, the most valuable source utilised to understand the administration of justice are the letters of the Judge Advocate General's Department (WO81/39-55). Whilst only the 'Out Letters' have been consulted for this study due to the Covid-19 pandemic preventing examination of the 'In Letters', these still represent a huge volume of material. As a result, a sample was used in this thesis, with the contents of every third month being examined during the period under question. This effectively amounts to the material from every March, June, September and December, with every February also being explored in order to gather any evidence on discussions about the reform of the Mutiny Act ahead of the annual debate upon it which

[29] Martin J. Weiner, *Men of Blood: Violence, Manliness and Criminal Justice in Victorian England* (Cambridge: CUP, 2004), p. 27; Peter King, 'War as a judicial resource. Press gangs and prosecution rates, 1740-1830', in *Law Crime and English Society 1660-1830*, ed. by Norma Landau (Cambridge: Cambridge University Press, 2002), pp. 97-116.

generally took place in March of each year. Those debates, contained within Hansard, themselves represent a valuable source on the reform of military law, the language surrounding reform of military law, the key actors within that discussion and the dialogue MPs were engaging in on the moral dilemma of whether flogging soldiers was both ethical and necessary.

The way in which individuals and groups sought to exploit the idiosyncrasies of the military justice system, and even manipulate it to their own ends, is an equally important facet of this study, which can be explored through the memoirs, diaries, letters of those who served during the period, in addition to court proceedings and even regimental orders. The conflicting pressures that influenced the system require the discipline system to be examined from the perspective of both those who sought to implement it, and those who were subject to it. As a result, a 'top down' approach is achieved by examination of Wellington's General Orders (Hartley Library, WP9/1/2/1-9), and Wellington's own letters (Hartley Library, WP1/209-220, 250-482). Using these documents it is possible to determine, in case of WP9/1/2 how the military justice system functioned, the procedures that were implemented in order to achieve its administration. WP1, meanwhile, offers a valuable insight into the frustrations that Wellington experienced whilst trying to impose the law, and the way he pushed for changes to the system. Similarly, the 'bottom-up' is being examined through the study of a wealth of letters, diaries and memoir testimony of officers, NCOs and privates who served throughout the period in any of Britain's campaigns. This material is clearly not without its challenges, as the scope for soldiers to misremember information when writing memoirs years after the event is considerable. Equally, there is ample possibility for stories to become embellished through the years as soldiers recounted their exploits around the fireside. Nonetheless, this material in itself is useful in revealing the wider culture amongst soldiers of all ranks about questions of crime, discipline and punishment. Furthermore, as will become apparent, such a wealth of material is available to confirm the trends that emerge from memoirs on discipline, that conclusions can be drawn with relative confidence. Where possible, claims relating to particular trials, and outcomes will be scrutinised with reference to court martial data to determine their veracity. This material can also, and will be consistently, read against the grain, exploring inconsistencies within the testimony, as well as considering soldiers' 'silence' on themes such as flogging and concerns over the judicial process. This will offer insight into the

attitudes of troops regarding criminality, the risks, and their motivations for breaking military law.

1.6 Thesis structure

Chapter Two will establish the legal framework within which military law should have operated, outlining its legal status, stipulations, the legal process, its administration, and the punishments that those breaking it could expect. A fundamental aspect of the chapter will be a direct comparison with contemporary developments in criminal law in British society, drawing on the work of Beattie, and Langbein, amongst others, alongside court martial proceedings, to assess the extent to which military courts were influenced by their criminal counterparts.[30] In the process it will be argued that military law was crafted and executed in such a way as to be bespoke to the army's needs. Whilst there is evidence of the army drawing on contemporary practices in civilian courts, these were only embraced when it was deemed to be in the army's interests.

Chapter Three then begins the process of assessing how far the theoretical legal system outlined in Chapter Two was imposed in practice. It focuses on the view 'from above', examining the perspectives of the King and Prince Regent, the Commander-in-Chief Frederick Duke of York and Albany, and Wellington to gain an insight into how those at the top of the army's command structure construed discipline. Utilising the court martial registers for GCMs and GRCMs, between 1808 and 1818, the trials of 5,700 individuals will be analysed to determine what the army's most senior courts actually prosecuted and the realities of punishment in the army.[31] In the process, it will emerge that the army's prosecution priorities were markedly skewed towards tackling crimes which, if stopped, would keep men in the ranks.

Having established the 'top down' view of military justice, Chapter Four represents a 'history from below' perspective on how discipline was maintained at a grass roots level

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[30] John H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Regime* (Chicago: University of Chicago Press, 1977); John H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford: Oxford University Press, 2003). Subsequently Langbein, *Adversary Criminal Trial*. The National Archives, War Office 71/214-229, Transcripts of General Courts Martial, 1808-1813. Travel restrictions and archive closures resulting from the Covid-19 pandemic prevented examination of boxes relating to the period 1814-1818.

[31] The National Archives, WO90/1, Register of General Courts Martial confirmed abroad; WO92/1, Register of General Courts Martial Confirmed at Home; WO89/4, Register of General Regimental Courts Martial.

within British regiments. Drawing on the cases of almost 3,500 individuals the trends identified in GCMs and GRCMs will be contrasted with those of from RCMs to determine the differences that emerged when individuals were tried and punished within their own regiments.

Finally, Chapter Five examines the variety of efforts that were made to reform the military justice system. It focuses predominantly on the actions of Charles Manners Sutton, the most prominent of three individuals to hold the position of Judge Advocate General (JAG) during the period, and therefore oversaw the administration of justice. It will become apparent that there was no coordination between individuals seeking to reform the military justice system. Instead reforms were advanced in a haphazard manner, often without consultation of key individuals, and were motivated by the ideologies, challenges, and experiences of the individuals supporting them. This lack of unity in turn created problems for military justice, as the conflicting priorities of individuals led to contradictory measures being introduced which undermined the efforts of their colleagues.

Throughout this thesis, it will be argued that the British army's military justice system was underpinned by a pragmatic system of discretionary justice, which permeated every level of the army's command structure. Pragmatism was not only visible in decision making about which individuals to try, and whether to inflict or remit their punishments, but also in the reforms instigated, and the broader strategies devised to punish guilty soldiers. Military law fundamentally existed to serve the needs to the army, with the result that the victim was reduced to the status of a witness, who received little benefit or remuneration from complaining about soldiers' crimes. Military law was not capricious and arbitrary, but it was undoubtedly self-serving.

Chapter 2 Crimes, Courts and Civilian influences upon military law

2.1 Introduction: Blackstone and the contested nature of military law

The English jurist and legal authority William Blackstone, writing in his 1765 *Commentaries on the Laws of England*, offered a scathing analysis of the nature of military law: 'martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions, is […] in truth and reality no law, but something indulged, rather than allowed as a law'.[1] Blackstone was in fact directly quoting the opinion of the seventeenth century Chief Justice of the King's Bench Matthew Hale, who had originally suggested that 'the necessity of government, order and discipline in an army is that only which can give those laws a countenance'.[2] Blackstone added that military law 'ought not to be permitted in time of peace',[3] arguing that it represented an infringement of liberties by placing soldiers in a 'state of servitude […] in a worse condition than any other subjects',[4] and even claiming that a death sentence under martial law was a breach of Magna Carta.[5] This suggestion was refuted by Alexander Tytler, a Judge Advocate for the army, in his 1806 book *An Essay on Military Law and the Practice of Courts Martial*, as he argued that 'the modern British soldier, enjoying in common with his fellow-subjects, every benefit of the law of his country, is bound by the Military Code solely to the observance of the peculiar duties of his profession'.[6]

The fact that one of the leading legal experts of the eighteenth century was so condemnatory of its practices and legal basis alludes to a number of important aspects of

[1] William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765), p. 400. Although Blackstone makes reference to 'martial law' here, his comments make it clear that he is referring to the law as it applied to the Courts Martial, rather than the declaration of martial law in a region where non-martial law would normally apply.
[2] Sir Matthew Hale, *The history of the Common Law of England*, 3rd edition (London: E and R. Nutt, 1739), p. 39.
[3] Blackstone, p. 400.
[4] *Ibid*., p. 404.
[5] *Ibid*., p. 400.
[6] Alexander Tytler, *An Essay on Military Law and the Practice of Courts Martial*, 2nd edition (London: T. Egerton, 1806), pp. 23-25.

military law at the turn of the nineteenth century.[7] The first of these is that Blackstone's assessment bears strong similarities to the conclusions that Roger Norman Buckley drew, referenced in the introduction, that military law was 'capricious and arbitrary' in nature.[8] Yet Blackstone also recognised the discretionary nature of the application of military law. When decrying the fact that the Mutiny Act, the document upon which military law was based, did not allow military courts to inflict lighter punishments in times of peace, he noted that a death sentence could be issued 'if a court martial shall think proper. This discretionary power of the court martial is indeed to be guided by the directions of the crown'.[9] The application of powers afforded to the military courts under the Mutiny Act could therefore be manipulated according to circumstances. It is important to establish the truth behind the nature of military law, its legal basis and stipulations, how it was administered, and the way in which it should have operated in order to inform a subsequent assessment of the realities of how it was implemented in practice. Determining the nature, stipulations and administration of military law will therefore form the primary focus of this chapter, and will particularly draw upon court records, Parliamentary statutes and debates, and works of authority on military law. In the process, the chapter will show that military law was, like its non-military counterpart, a nuanced system, and one which was built to provide rigorous oversight of judicial practice in order to ensure its fair implementation. Crucially, it will be argued that military law, and military-legal practices were deliberately crafted in a way which allowed for the application of discretionary practices, enabling the law to be adapted to the army's needs at any given point in time.

It is also clear that military law was a contested topic of legal discussion, with the extent to which it should mirror its non-military counterpart being open to debate and interpretation. Blackstone's position, for example, was challenged by those like Tytler who had experience of administering military law. As a result, the influence of those who were not soldiers on the military system will also be explored in this chapter, though this topic will re-emerge throughout the thesis. It will be evident from court proceedings and the papers of the Judge Advocate General (the individual tasked with administering military law) that in many respects military law was bespoke to the army's needs, something which

[7] R. Glover, *Peninsular Preparation: The Reform of the British Army, 1795-1809* (Cambridge: Cambridge University Press, 1963), p. 170. Subsequently Glover, *Peninsular Preparation*.
[8] Buckley, p. 244.
[9] Blackstone, p. 402.

was based on deliberate decision making, rather than being accidental or due to passive implementation of legal processes. Yet it will also become apparent that careful attention was paid to non-military legal process, and civilians with legal expertise remained integral to how military law developed, and was implemented. These influences, however, were only embraced if it was felt that it was in the interests of military law to do so.

2.2 The jurisdiction of military law, and its place in the legal hierarchy

Those enlisted in the British Army during the late eighteenth and early nineteenth century found themselves in a complex legal system, irrespective of whether they were officers, or members of the rank and file. All were in an unusual position of being subject to the jurisdiction of both non-military and military law.[10] This gave rise to what, at the time, was a rare situation where members of the army could be tried twice for the same offence, as being found 'not guilty' by a non-military court did not prevent a military court examining the case in accordance with military law.[11] Non-military courts, however, did not have the power to try soldiers for breaches of military law, and could therefore only try them if they broke laws that applied to civilians, such as theft and murder. By contrast, military courts were authorised to try soldiers serving overseas for breaches of non-military law in situations where there was no civilian criminal legal system.[12]

On the surface, therefore, military law appeared to exercise a greater degree of power than non-military law when it came to the lives of soldiers. Yet there were important limitations on the jurisdiction of military courts when it came to trying non-military offences. Firstly, the non-military offences which could be tried in military courts were limited to very specific crimes:

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[10] Charles M. Clode, *The Military Forces of the Crown, their administration and government*, 2 vols (London: John Murray, 1869), I, pp. 205-206.

[11] *Ibid*, I, p. 153. In practice, no evidence has been found of this actually happening.

[12] *Rules and Articles for the Better Management of All His Majesty's* Forces (London: Eyre & Straham, 1813), Section XXIV, Article IV. pp. 81-2. Subsequently *Articles of War*. Fresh versions of the Articles of War were issued at intervals as the articles were updated to reflect changes in the Mutiny Act. It has been possible to locate the Articles issued in 1798, 1809 and 1813. Comparison of the different versions shows remarkably little material change in relation to discipline, though the numbering of each particular article may vary depending on the year. In the footnotes of this thesis, the relevant year of the version referred to is noted in brackets. The crimes and punishments stipulated in the Articles of War (1798) are outlined in Appendix A. A full transcript of the Articles of War (1798) is provided in Appendix B.

> 'wilful Murder, Theft, Robbery, Rape, Coining or Clipping the Coin of *Great Britain*, or *Ireland* or any foreign Coin current in the Garrison or Place under his Command, or of having used Violence or committed any Offence against the Persons or Property of any of Our Subjects, or of any others entitled to Our Protection.[13]

In essence, therefore, military courts could only exercise this ability to prosecute non-military offences in cases involving capital crimes, and it is apparent that this method was only to be used in extreme circumstances. In March 1817, the Assistant Deputy Judge Advocate General, Charlton Wollaston, a senior member of the department which administrated military justice, wrote to the Deputy Judge Advocate at the Cape of Good Hope, Lieutenant-Colonel Bates. Wollaston informed Bates that in the opinion of the head of the department, Judge Advocate General Charles Manners Sutton, since 'there are Courts of Ordinary Criminal Judicature sitting at the Cape […] the prisoners would have been with more propriety brought before such a Tribunal, than before a Court Martial.'[14] In the process, the officials overseeing military law were making a tacit acknowledgement that military law was only to be resorted to when essential, and that non-military law was both preferential, and senior in status (i.e. military law was only applied outside the army as a last resort). This is a theme which will re-emerge throughout this chapter.

Such nuanced discussions around jurisdiction offer just one example of the complexities of military law, highlighting how this was not a simple system to understand. Nonetheless, it was accessible enough for army officers to engage with, and even act as judges, without any formal legal training. A number of books were written in the early nineteenth century explaining military law and its principles, to guide these officers and help offset their lack of legal expertise.[15] Over the intervening 200 years, however, very little has been written by historians about how the system functioned, either in theory or in practice. It is crucial to establish the facts of what was considered an offence under military law, the consequences, and how any breaches of the laws were dealt with. Without

[13] *Ibid*, p. 82.
[14] WO81/53, Charlton Wollaston to Lieutenant-Colonel Bates, 5th March 1817.
[15] See for example, John Williamson, *The Elements of Military Arrangement and of the Discipline of War*; Adapted to the Practice of the British Infantry, 3rd edn, 2 Vols (London: T. & J. Egerton, 1791); T. Reide, *A Treatise on the duty of infantry officers and the present system of British Military discipline* (London, T. Egerton, 1795); Stephen Adye, *A Treatise on Courts Martial* (New York: H. Gaine, 1769); Glover, *Peninsular Preparation*, pp. 167-184.

such a grounding in the legal stipulations, an accurate assessment of how the law was applied in practice, and the wider implications of that implementation, is extremely difficult. The remainder of this chapter therefore explores the system, its legal basis, and how it worked, charting the journey from crime, to arrest and the court room. In doing so it will indicate how nuanced decision making throughout the judicial process, which was provided for within military law, provided opportunities for the discretionary application of the law to each individual case.

2.3 The legal basis of military law

Military law was based on a mixture of written law, and unwritten conventions. The written element was derived from two documents. The first was the 'Act for Punishing Mutiny and Desertion and for the better payment of the army and their quarters', better known as the 'Mutiny Act'. This stipulated that it had to be reviewed annually by Parliament and provided the legal basis on which military law rested, as it empowered the King to issue the second document relating to military law: 'The Rules and Articles for the better Government of all His Majesty's Forces', more commonly known as the 'Articles of War'.[16] Parliamentary debates show that the discussions of the Mutiny Bill were detailed, making this far more than a simple 'rubber stamping' exercise. The yearly debate on the wording of the Bill in the House of Commons led to minor revisions each year as the Act was adapted and refined according to both political pressures, and the demands of the French Revolutionary and Napoleonic Wars. In 1811, for example, an amendment was made to the Bill incorporating imprisonment as a legitimate alternative to corporal punishment for NCOs and privates should the courts-martial deem it appropriate in each individual case.[17] In fact, the annual renewal of the Mutiny Act meant that it was repeatedly on the political agenda, and was subject to far higher levels of scrutiny and debate than many elements of non-military criminal law.

The Mutiny Act specified some, though not all, of the crimes that could be punished by the military courts, focusing, as its title suggests, on mutiny and desertion, both of which

[16] 49 Geo III, cap 12, sect XXX, *Act for Punishing Mutiny and Desertion and for the better payment of the army and their quarters* (London: Eyre & Strahan, 1809), p. 40. Subsequently, *Mutiny Act*.
[17] 51, George III, Cap 9, sect XXII, *The Statutes of the United Kingdom of Great Britain and Ireland, 51 George III, 1811* (London: His Majesty's Statue and Law Printers, 1811), p. 29.

were punishable with death.[18] It also enshrined in law the right of the King to write and alter the Articles of War,[19] gave him the authority to appoint a Judge Advocate General (JAG) to oversee the workings of the military courts, also known as the courts martial, and confirmed these courts' authority to try and punish anyone for infractions of the Mutiny Act and Articles of War. Despite being statute law, the only civilians who were subject to the Mutiny Act's stipulations were those who tried to persuade a soldier to desert, or civilians who worked for the army and were therefore attached to it. In 1809, a special change was made so that the Mutiny Act included civil servants of the Treasury and Board of Ordnance, in order to place civilians under military jurisdiction whilst serving with the army in the Iberian Peninsula.[20]

There were also careful stipulations within the Mutiny Act to uphold the principle that no-one could be tried twice for the same offence by a military court. The only exception to this was if NCOs and privates who had been tried in Regimental Courts Martial wished to exercise their right to appeal, and have the case heard in the superior General Courts Martial. Furthermore, a sentence could only be reviewed once, although courts were not obliged to change their sentence, even if the Commander in Chief asked them to consider a harsher, or more lenient, sentence.[21] However the stipulations against being tried twice in a military court did not mean that, having being tried under military law, an offender could not also be prosecuted for the same offence under non-military law. The Act was very clear that 'nothing in this Act contained shall exempt, or be construed to exempt any officer or soldier whatsoever from being proceeded against by the ordinary course of law'.[22]

As mentioned above, the King was empowered by the Mutiny Act to write the Articles of War. Divided into twenty-four sections, each relating to a particular area of military administration and life/activity, it specified 65 crimes which might be committed by anyone enlisted in the British Army, the court that should try each offence, and the most

[18] 49, Geo III, Cap 12, sect I, *Mutiny Act*, pp. 8-9.
[19] 49, Geo III, Cap 12, sect XXX, *Mutiny Act*, p. 40.
[20] Clode, I, pp. 181-182.
[21] 49, Geo III, Cap 12, sect XII, *Mutiny Act*, p. 22.
[22] 49, Geo III, Cap 12, sect XIII, *Mutiny Act*, pp. 22-23.

severe punishment that could be issued if the accused was found guilty.[23] Its clear layout and lack of legal language made it a more practical text than the Mutiny Act to consult for the daily running of the army, although there was huge overlap between the two. Both went to great lengths to outline offences relating to mutiny, desertion, the administration of justice, and the rules on enlistment, in wording that was virtually identical in order to prevent contradictions between the two principal foundation texts of military law. This was essential, especially for the clauses relating to the administration of military discipline, as it ensured that the military courts could operate on a sound and unquestionable legal basis, making their rulings legally enforceable. The Articles of War went much further however, outlining, amongst other things, crimes relating to religious worship, theft, embezzlement, improper conduct, and neglect of duty. Yet the Articles of War were meant to be a document that could be easily referred to, and the text was therefore accessible, using non-legal, vernacular language. It was also a much shorter document than the original act, which in conjunction with the language used made it a more practical document to work with, whilst deriving its legal premise from the Mutiny Act. Although there were, at times, similarities in the wording used in both documents, this sought to ensure that there were no contradictions between the two.

Whilst the Mutiny Act and Articles of War were the primary basis of military law, everyone in the army had to be mindful of the fact that they could be tried for failing to follow a lawful order from their superiors.[24] This therefore meant that general orders from the King, the Commander in Chief, the regional Commander of the Forces, and the regimental orders all had a legal status, as they would be used as evidence against anyone who was tried for failing to follow them. In practice the King issued relatively few direct orders, as the majority of his directions were essentially in the Articles of War. Nonetheless, for officers in particular, all of whom had been granted commissions by the Crown with a set of conditions attached to them, or for anyone who had been issued with a royal warrant to take on additional duties, such as the regional commanders who were empowered to call varying levels of court martial depending on their rank, it was vital that they carefully observed both what was expected of them, and what the limits of their role was. Failure to

[23] Appendix A details this information from the Articles for War, outlining each crime, punishment, most appropriate court to try such an offence, and the relevant article that prescribed this.
[24] *Articles of War* (1798), Section II, Article V, p. 8.

do either of these things could lead to a trial for negligence of duty, or for exceeding their own authority and therefore acting unlawfully.

The Commander in Chief, and the regional Commander of the Forces, both had the right to issue general orders which applied to all the troops under their command. Those orders could not contradict anything in the Mutiny Act or the Articles of War, but still added a further layer of rules to which everyone under their command was expected to adhere. These orders were essentially day to day instructions for the running of the army, or directions designed to resolve issues which arose, and it was expected that these orders would be adhered to without question, provided that the orders were lawful, and did not contradict orders or laws of a higher authority. These principles were also applied to regimental orders, issued by the officers commanding individual units.

General and regimental orders were, in practice, written. However, there was also a body of unwritten, but no less binding, verbal orders which were issued by officers in their thousands. Since these predominantly directed individuals in adhering to the written laws, they did not present any legal complications. Provided a verbal order, or in fact a written one, was legal, anyone who failed to follow it was liable to be tried.[25] That said, it is clear that there was a considerable body of material, which every officer was expected to acquaint himself with. Upon joining their units, newly commissioned officers were expected to obtain, at their own expense, a copy of the Articles of War, the Mutiny Act, the general orders of the army, and any regimental orders that were in force. To simplify this process, regiments, and even divisions printed 'Standing Orders', which, as the name implies, were significant instructions that were to be observed indefinitely.[26]

Soldiers can have been in no doubt about what was prohibited under military Law. The Articles of War themselves directed that the Articles were to be read to the entire regiment, whilst on parade, at least once every two months, although some historians have suggested that this was sometimes done on a monthly basis.[27] Furthermore, each day's general orders were read to the men on the day that they were received, with the result that the message on what was, and was not, permissible, and the nature of the military

[25] *Ibid*., Section 2, Article 5, p. 8.
[26] See, for example, *Standing Orders and Regulations for the 85th Light Infantry* (London: T. Egerton, 1813).
[27] Tanya Grodzinski, '"Bloody Provost": Discipline during the War of 1812', *Canadian Military History* 16, 4 (2007), 25-32 (26).

justice system that they were be subjected to, should, in theory, have been thoroughly reinforced.

2.4 The Courts Martial

Before 1812, there were two tiers of courts martial: General Courts Martial (GCMs) and Regimental Courts Martial (RCMs). A third tier, the General-Regimental Courts Martial was created in 1812, which aimed to address the more serious cases that were normally tried at RCM.[28] GCMs were a superior court, being the only court that could try officers, and tried the more serious crimes committed by NCOs and Privates, such as mutiny, murder and repeated desertion. GCMs were also the only court that could order a death sentence. These courts were convened by an order of the regional commander of the forces, under the authority of a warrant which had been issued to him by the King.[29] GCMs had the power to inflict the most severe punishments, when it came to floggings, with the theoretical limit being 1,500 lashes. Although this number was never issued in the period under scrutiny, there were a number of cases where those found guilty were sentenced to 1,200 lashes, and it was possible for a soldier who could not remain conscious for the full length of his punishment to be allowed to recover for a few days, before having the remaining number of lashes inflicted. In 1807 King George III tried to influence the punishments handed out by GCMs, by stating, in an official comment when he was reviewing a case where 1,500 lashes had been awarded, that in his opinion, no corporal punishment should exceed 1,000 lashes.[30] As this was not a direct order, however, it did not have to be followed, and GCMs did subsequently award more than 1,000 lashes.[31]

The legal framework under which all three tiers of court operated were very clearly defined in both the Mutiny Act and the Articles of War. All three tiers of court consisted of a board of judges staffed by officers. Under an amendment to the Mutiny Act in 1807, any GCM that sentenced 'the loss of life and limb' had to consist of at least 13 officers, whilst a further amendment in 1808 ordered that any court trying an officer had to be the same

[28] WO81/47, 27th February 1813, John Oldham to Major Wynyard.
[29] For more information on GCMs see George Hough, *The Practice of Courts Martial*, (London: Kingsbury, 1825), pp. 367-394.
[30] Glover, *Peninsular Preparation*, p. 179
[31] *Ibid.*, p. 180.

size. In practice, when courts convened, they were often made up of 14 members, to ensure that it could continue to sit and retain its full powers if one of its members fell ill.[32] Courts that were convened in the British colonies in Africa and New South Wales were, however, exempt from all of these rules, as limitations on the size of the garrison often made it impractical to convene courts of such a large size.[33] The Mutiny Act also stipulated that in order for a death sentence to be passed, it had to be voted for by at least nine of the officers who made up the court, unless the court was made up of less than thirteen officers, in which case a two-thirds majority vote in favour of execution was required.[34]

A level of protection against a form of judicial murder was created by the fact that sentences of any kind had to be reviewed and confirmed either by the King, the Commander in Chief of the army, or a regional Commander of the Forces who had been given this authorisation by the King.[35] The Mutiny Act also created a further failsafe, by stipulating that the King had the power to commute a death sentence to transportation. Whilst by no means unique, since parallels existed in non-military law, this therefore meant that those facing execution had the ability to appeal to the King, if they were able to find someone to present their case to the King on their behalf. In practice, this seems to have taken the form of the person representing the guilty man approaching the government, who would relay the matter to the crown through the JAG when they laid the sentence before them for confirmation. In this manner, even privates, surprisingly, were able to secure commutations and even pardons on occasions.[36]

Regimental Courts Martial (RCMs) were internal courts held within each battalion, and staffed from the battalion's own officers. They were smaller courts, usually consisting of 5 officers, although if this was not possible, a court of 3 officers was permitted.[37] The president of the court was usually a captain, although lieutenants could also preside over RCMs provided that they had served in the army for 8 years, with the remainder of the officers being subalterns.[38] RCMs tried less serious offences, such as being drunk on duty,

[32] See, for example, WP9/1/2/1, General Orders, 9th July 1809.
[33] 49, Geo III, Cap 12, sect XXIII, *Mutiny Act*, pp. 30-31.
[34] *Articles of War* (1798), Section XVI, Article VIII, pp. 55-56. The implications of this will be discussed further below.
[35] *Articles of War* (1798), Section XVI, Article X, pp. 56-57.
[36] Hansard, Vol XIX, 11th March 1811, 354.
[37] Hough, pp. 402.
[38] *Ibid*., p. 404

being absent without leave (AWOL), and disobedience of orders.[39] The distinction, however, between whether an offence should be tried at General or Regimental Court Martial was almost always left open to interpretation, pointing to an important ability for those framing the charge to exercise discretion in how seriously each offence was treated.[40]

Although no warrant was needed to convene a RCM, a regimental order had to be issued by the unit's commanding officer 1-2 days before the court met, and before a sentence could be inflicted, the proceedings of the court had to be reviewed by the unit's commanding officer.[41] An adjutant had to be present throughout proceedings of the court, since he was:

> supposed to be perfectly acquainted not only with the nature of courts-martial, but further enabled to give a faithful account, when applied to, on the score of character and general conduct. He stands, moreover, in the capacity of advocate for the prisoner, to see that justice is done, and that no irregularity occurs, from any misapprehension or misinterpretation of the articles of war; a copy of which, with a specific designation of the article or articles against which the prisoners have transgressed, must be laid before the members.[42]

The point of the prisoner having an advocate to advise him is an important one, and will be addressed in more depth later, although it is worth noting that the adjutant, and therefore the defendant's legal adviser, did not have any formal legal training.

The situation with the sentences that RCMs were able to hand out shifted over the course of the Napoleonic Wars. RCMs were not entitled to pass the death penalty, and until 1812, could not give more than 500 lashes as a punishment. After this point, though the limit was reduced, on the orders of the Commander in Chief, the Duke of York, to 300 lashes, unless a higher sentence was confirmed by the Commander of the Forces in the theatre or Commander in Chief.[43] The reasons for this shift were complex, and were not the product of a unified strategy of reform, a point which will be explored further in Chapter

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[39] *Articles of War* (1798), Section VI, Article IV, pp. 18-19; Section XIV, Article IX, p. 41.
[40] For more on this, see Chapter 4, pp. 128-140, esp. 136-137.
[41] Anon, *The Military Law of England* (London: T. Goddard, 1810), p. 64.
[42] Charles James, *The Regimental Companion, containing the pay, allowances and relative duties of every officer in the British Service*, 3 vols (London: T. Egerton, 1811) II, pp. 458-458.
[43] Glover, *Peninsular Preparation*, p. 179; Hough, pp. 402-404.

Five. RCMs could also reduce an NCO to the rank of Private, and if soldiers felt that the decision of the RCM was incorrect, then they could appeal to have the case heard at a GCM, although in doing so, they ran the risk of receiving the harsher punishments that GCMs were able to inflict.[44]

In March 1812, a warrant was issued for the first time, for a middle tier of court to be convened, the General Regimental Courts Martial (GRCMs).[45] This type of court was in effect, a superior version of the RCMs, being convened by the unit's CO, and only being able to try soldiers from that unit. GRCMs were created to deal with the trials that were not quite serious enough to require a full GCM, but that merited a harsher punishment than the RCM was legally able to allocate. The process of judging whether a case merited a RCM or GRCM was, however, an organic one which was open to interpretation, and even manipulation by officers, as will be highlighted in chapter four of this thesis. As with GCMs, GRCMs could inflict up to 1,500.[46] The pro-forma for a warrant ordering the convening of a GRCM explicitly stated that it could try cases of NCOs relating to mutiny, desertion, false musters, and other breaches of the Articles of War.[47] In practice, 59% of all the cases that GRCMs dealt with between 1812 and 1818 related to desertion or being AWOL.[48] GRCMs were staffed by 9 officers, and could include the accused's battalion's commanding officer. The President had to be a Field Officer, four of the remaining members were usually captains, and the remainder were subalterns. Although there may appear to have been a conflict of interest in officers being able to try their own men in a court that could issue such large punishments, GRCMs actually faced considerable scrutiny. Their reports were submitted to the JAG, or the Commander of the Forces if the unit was overseas, for confirmation, before the sentence could be inflicted. Regardless of who confirmed the sentence, the details of all GRCMs were sent to the JAG's office, and were subsequently transcribed into registers which outlined the name, rank and unit of the offender, the charge that they had faced, and any punishments that they had received.[49]

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[44] Glover, *Peninsular Preparation*, pp. 181-182.
[45] Hough, pp. 393-394.
[46] *Ibid*, p. 396
[47] *Ibid*, p. 395
[48] WO89/4. Of 1678 individuals tried between 25th March 1812 and 31st December 1818, 654 were tried for desertion, 258 for desertion aggravated by additional crimes, 3 for attempted desertion, and 75 for being AWOL, totalling 990.
[49] WO89/4. This register covers 1812-1821 and contained the details for 2,021 trials.

There also existed a variety of courts martial that were fundamentally very similar in their nature to RCMs, which were able to operate in situations when the majority of the regiment were not together. Camp Courts Martial (also known as Line Courts Martial), Garrison Courts Martial and Detachment Courts Martial all had the same powers as RCMs, but the judges came from a different regiment. Garrison Courts Martial during this period should not be confused with the additional tier of military court, of the same name, which was created in 1829.[50] Prior to 1829, the names that each court were given, such as Garrison Court Martial, essentially related to where the trial was held. In a garrison, for example, where the force might consist of companies from multiple regiments, it was not usually possible to convene a RCM from the soldier's own unit. Detachment Courts Martial had one additional power, compared to RCMs, as they were able to try warrant officers, provided that there were five officers present, and that no more than two of those officers were from the defendant's unit.[51] They could only issue corporal punishments, or reduce the warrant officer's rank if they had enlisted as a private.[52]

There was one final manner in which NCOs and Privates could be tried: the Drum-Head Courts Martial (sometimes known as the Field Courts Martial). These were only convened in the cases of emergency, where immediate examples were needed in order to restore discipline rapidly, usually on the march. These courts usually tried privates, and the court itself could consist of officers from multiple regiments, or a single one. The proceedings were not written down, not least because these courts were often carried out on the march. The unit would be halted, the evidence heard, the members would discuss their judgement, and the president would then report the sentence to the CO, who, if he approved, would order it to be carried out immediately. The name of the court came from the practice of writing the accusation and sentence on the head of a drum. Their swift nature meant that Drum-Head Courts Martial could only effectively be held when it was obvious that the individual was guilty, and they often dealt with cases of sedition, refusal to obey orders, and plundering. Nonetheless, a record still had to be kept of these trials usually in the form of a simple entry in the regimental orderly book summarising the offender, charge, verdict and punishment.[53]

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[50] Clode, II, pp. 749-50.
[51] Hough, pp. 406-407.
[52] *Ibid*, pp. 406-407
[53] *Ibid*, pp. 381-2.

The structure of all these military courts, staffed by officers, gave rise to a system where, particularly for NCOs and Privates, the accused was always tried by his 'betters' rather than his peers. This was less true for the more senior officers, although there were specific stipulations in the Articles of War that all those judging on the trial of a 'field officer' (i.e. someone ranked Major or above in the army) must be at least a Captain. As Williamson pointed out at the time, this system was unavoidable.[54] To allow a Private or NCO to be a judge in the trial of a commissioned officer would have set dangerous precedents of the rights of the lower ranks to question the authority of their superiors, and would thereby have undermined the very system of seniority that military discipline was based upon.

This system of being tried by one's 'betters' was very similar to that which existed in civilian courts. Although contemporaries considered the trial by a jury of one's peers to be one of the great principles of the British legal system, research has shown that the working class were not under any illusion that they were being tried by their peers.[55] In reality, the jury were more likely to be the peers of the prosecutor, as propertied men.[56] Beattie has shown that across the eighteenth century, individuals were only eligible to be jurors if they had a freehold worth £10 a year, or a leasehold worth £20 a year.[57]

It is also important to re-emphasise that, since anyone in the army was also subject to non-military law, they could be tried in non-military courts. Officers were expected to hand over those accused of breaches of civilian laws to local magistrates.[58] There were contradictory pressures for civilian victims of soldiers who had ill-treated them or stolen from them. Although civilian courts had the power to try soldiers, the expenses of these trials fell on the victim in their role as prosecutor. This could be a considerable burden, not least since they had to compensate any witnesses for the time that they spent attending the trial, and their accommodation whilst they waited to give evidence.[59] As a result, associations for the prosecution of felons, which were formed to help their subscribing members cover the costs of prosecution (roughly £1-£4 in the early nineteenth century),

[54] Williamson, pp. 98-99.
[55] King, *Justice and Discretion*, p. 222; Douglas Hay, 'Property, Authority and the Criminal Law', in *Albion's Fatal Tree: Crime and Society in Eighteenth Century England*, ed. by Douglas Hay (London: Allen Lane, 1975), pp. 17-64 (p. 38).
[56] Hay, p. 38.
[57] Beattie, *Crime and Courts* pp. 378-9.
[58] *Articles of War* (1798), Section XI, Article I, pp. 30-31.
[59] Beattie, *Crime and Courts*, pp. 35-36.

advised their members who had been the victims of soldiers to exploit the opportunity to have the case heard by the military courts, as the army would cover the costs.[60] In 1801, a member of the Colchester Association enquired to the committee overseeing the Association on whether to push for a court martial, or prosecute him at the expense of the Association, with the former option being advised.[61] Equally, considering that, in 1808 alone, the JAG's department allocated only £1,500 to cover the expenses of courts martial, including paying witnesses who testified in military courts, the army would not have gone out of its way to advertise this option.[62]

Nonetheless, there is clear evidence that Wellington, as the Commander of the Forces in the Peninsula took a relaxed and pragmatic approach to this question of whether to prosecute individuals in the courts martial, or the non-military courts. The Adjutant General's Letter to the local Commandants in key towns in the Peninsula (who were each tasked with administration of military affairs in a particular region) show that even handing officers and soldiers over to a foreign civil power was not regarded as extraordinary, although it is impossible to determine how widespread this practice was. In May 1809, two officers from the 45th Regiment were tried, and acquitted by a Portuguese court of the murder of a Spaniard.[63] Similarly, Wellington directed the Adjutant General's Department to make the necessary arrangements for handing over four NCOs and Privates who had committed 'outrages' near Oporto:

> His Excellency conceives that for so heinous a robbery as they are charged with, the means exist in the Civil Power at Oporto to try them and from the evidence on the spot more fully come at the circumstances of the fact than if these men were brought to the Headquarters of the army. You will therefore be pleased, in conjunction with the magistracy, to have the affair examined to the bottom, the men being delivered to the civil powers to be tried.[64]

It is clear from this letter that this was not a case of the army 'wiping their hands' of the matter, but acknowledging that there was a greater chance of a successful prosecution if

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[60] *Ibid*., p. 47; King, *Justice and Discretion*, p. 28.
[61] King, *Justice and Discretion*, p. 28.
[62] UK National Archives, War Office 93/9, Letters (in and out) of estimates, official alterations of the Judge Advocate General's Office, f.71.
[63] WP9/1/1/1, 30th May 1809, Adjutant General to Lieutenant-Colonel Walsh.
[64] WP9/1/1/1, 17th June 1809, Adjutant General to Colonel Trant.

the individuals were tried by a local court. The letter went on to direct that two other men who were involved in a different crime were to be sent to headquarters for trial by a GCM, clearly showing that Wellington was happy for the military and civilian legal systems to complement each another.[65]

2.5 From Crime to the Court Room: Preparations for Trial

The journey from committing a crime to being caught, and subsequently tried in court could be a long one, with some waiting months for their trial to be concluded. As far as possible however, the army aimed to resolve cases as quickly as possible, primarily as it was in the interests of good military discipline. The Articles of War directed that 'no officer or soldier, who shall be put in arrest or imprisonment, shall continue in his confinement more than eight days, or until such time as a Court-martial can be conveniently assembled'.[66] However this was not a guarantee. Whilst the eight-day target was sometimes feasible, in practice the suspect could be held for much longer, especially on campaign, when gathering officers together to form a court was a more onerous logistical challenge. In one case, a sergeant who was on trial for having been an accessory to a robbery in February 1812, and for having failed to exert himself in trying to find out who had been involved in the same robbery, was held without trial until November 1812. He was found 'Not Guilty' of robbery, but 'Guilty' of the remainder of the charge and was sentenced to be reduced to the rank of Private, and receive 500 lashes. In light of how long he had been confined, however, the corporal punishment was remitted.[67]

An individual committing a crime might expect to be detained or captured in a number of ways. The first was, of course, being caught 'red-handed'. Regardless of whether it was a case of officers fighting a duel, or privates stealing a chicken to supplement their rations, there was always a possibility of being caught in the act. Plunder in particular was seemingly widespread, despite Wellington's unequivocal orders against plunder, and the clear statement in the Articles of War that:

[65] *Ibid*.
[66] *Articles of War* (1798), Section XVI, Article XVII, p. 60.
[67] WP9/1/2/6, General Orders, 23rd November 1812.

> If any officer, non-commissioned Officer, or soldier, shall leave his Commanding Officer, or his post of Colours, to go in search of plunder, he shall, upon being convicted thereof, suffer Death, or such other punishment as by a General Court-martial shall be awarded.[68]

The sheer volume of comments in letters and memoirs relating instances of plundering suggest that the military justice system failed to provide enough of a deterrent to stop soldiers from stealing. However, this is more of an indication of the scale of the task which the administrators of the system faced. Although there were no official military police, the army was in some respects ahead of its time in the measures that it employed to tackle crime amongst its workforce. At the forefront of efforts to keep the troops in line was the Provost. For centuries a provost system had been in place during times of war; however, this was a small force compared to the scale of the task that they faced.

In each region that the army was deployed, the Provost department was staffed by Assistant Provost Marshals (APM), who were forcibly chosen by their battalion commander from NCOs who demonstrated a good character, under the commend of a Provost Marshal, who was usually a field officer. The fact that Edward Costello, whose memoir openly admits to cases of casual plundering, was chosen as an APM during the occupation of France suggests that these men were not necessarily ideologically motivated in their role.[69] The APMs were tasked with patrolling behind the army's line of march, apprehending stragglers, and particularly deserters and plunderers, and inflicting punishments if necessary. They were also tasked with confining and guarding anyone who was awaiting trial, and appear to have run a military prison in Lisbon for much of the Peninsular War.[70] They therefore played an important role in the disciplinary process, ensuring that the defendants got to court to stand trial, and also informing Commanding Officers when their men were placed in their care following arrest.

The Provosts were something of a necessary anomaly in a legal system where so many safeguards seemingly existed to ensure that punishments were issued based on evidence, as both the Provost Marshal, and the Assistant Provost Marshals were authorised

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[68] *Articles of War* (1798), Section XIV, Article XVIII, p. 44.
[69] Edward Costello, *The Peninsular and Waterloo Campaigns*, ed. by Anthony Brett-James (London: Longmans, 1967), p. 97-98, 157.
[70] James, III, p. 465; R. Tyler, *Bloody Provost* (London: Phillimore & Co., 1980), p. 152.

to immediately hang anyone caught plundering, although sometimes flogging was used instead.[71] Even here, however, there appears to have been an effort towards openness and accountability, as they could only inflict punishment if they personally caught the miscreant in the act.[72] Further transparency was also created by the manner in which the individuals were punished. The nineteenth century writer on military affairs Charles James suggested that a label was fixed to every man who was executed explaining the reason for his fate, and that 'in conformity to the genuine spirit of British jurisprudence, no man can be executed or punished in any way, except in open day, and before his fellow soldiers'.[73]

The Provosts were woefully undermanned for the role that they were tasked with, as it consisted of just 8 people at the army's headquarters in late 1813.[74] Generally each division had one Assistant Provost Marshal attached to it at any one time. Considering that, in January 1811, there were 4,057 men of all ranks in the 3rd Division fighting in the Peninsular War, there was clearly a limit to how effective the Provost could be, regardless of how zealous they were in carrying out their duties.[75] As a result, in April 1813, a new initiative was trialled in the British Army serving in the Peninsular War, with the creation of the Cavalry Staff Corps, under Lieutenant Colonel George Scovell. This unit, which was staffed by volunteers, originally consisted of 11 officers and 180 soldiers, many of whom had transferred from Scovell's previous unit the Corps of Mounted Guides.[76] The Provost, and to a lesser extent the Cavalry Staff Corps, were, however, primarily concerned with stopping plundering, and would have played little part in detecting the vast majority of crimes outlined in the Articles of War.

A large proportion of the responsibility for detecting criminal activity lay in the hands of officers of all ranks, and NCOs. Strangely though, no part of the Articles of War explicitly stated that officers who either failed to investigate or who allowed their men to

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[71] Williamson, pp. 178-9; Costello, p. 157.
[72] WP9/1/2/5, General Orders, 1st November 1811.
[73] James, I, p. 43
[74] Tyler, p. 164
[75] C. Oman, *Wellington's Army* (London: Edward Arnold, 1912), p. 351. On 1st January 1811 the Third Division consisted of 1/45th, 1/74th, 1/88th, 2/5th, 3 companies of 5/60th, 2/83rd, and 94th. Andrew Bamford's monthly returns for the end of January 1811, available on the napoleonseries.com website, indicate that this totalled 4,057 men of all ranks. Andrew Bamford, British Army Theatre returns, 1808-1815, <https://www.napoleon-series.org/military-info/organization/Britain/Strength/Bamford/c_BritishArmyStrengthStudyIntroduction.html> [Accessed 4th March 2019]
[76] Tyler, p. 162.

plunder were committing an offence, despite it seemingly being an obvious responsibility. The closest the written law came to this matter were two articles, one stating that officers who failed to 'keep good order, and to the utmost of his power redress all such abuses or disorders' could be cashiered. The other ordered that officers would assist civil magistrates in apprehending anyone in the army accused of a 'capital crime, or of having used violence, or committed any offence against the persons or property of our subjects, such as is punishable by the known laws of the land.'[77] The extent to which officers exploited this loophole in order to turn a blind eye to their men's actions, and thereby adopted a 'live and let live' approach to the discipline of their troops is an important question which is addressed in subsequent chapters.

In theory however, the majority of crimes should have been noticed either by the officers, NCOs, Privates, or indeed the victims. Civilians who were robbed or ill-treated by soldiers could speak to an officer, preferably from the same unit as the man who had wronged them, and, under the article mentioned above, the officers were obliged to do their utmost to identify those responsible. Equally, if a NCO or Private reported a breach in discipline, officers were, at least in theory, compelled to investigate. Once the individual was identified, the officer would then place them under arrest, confining them to the Guard house or barrack room in the case of NCOs and Privates, or to their quarters in the case of officers.[78] It was very rare to place an officer under 'close arrest' under the supervision of a guard, although there was a legal provision for it.[79] Whilst this lax approach to the confinement of officers might seem to suggest that an indulgent attitude was taken towards the crimes of officers; in reality the risk was offset by the fact that if he absented himself whilst under arrest, he would be cashiered, and would therefore forfeit the value of this commission.[80] In an age where commissions in the army were the property of the officers, who often bought their promotions, this could represent a huge financial loss.

If the crime was one that should be tried at GCM, or if the officer was from a different unit to the accused, the individual was then handed over to the Provost, who had to obtain a written statement from the officer explaining why the individual had placed

[77] *Articles of War* (1798), Section IX, Article V, p. 28; Section XI, Article I, pp. 30-31.
[78] Tytler, pp. 202-203.
[79] Clode, Vol I, p. 170
[80] *Articles of War* (1798), Section XVI, Article XXI, p. 62.

them under arrest.[81] This document was a crucial first step in the journey towards prosecution, as it helped to frame the charge which the accused would face in court. The Provost was then obliged to inform the Commanding Officer of the accused's regiment within 24 hours of them being handed over to the Provost.[82] If the individual had committed a crime which could be tried at RCM, the Commanding Officer still had to be informed in any case, as it was he who would issue the Regimental Order that was necessary to convene a RCM. In either case, it was the CO's responsibility to conduct an initial investigation into the facts of the charge, although in cases of wilful murder, theft, robbery, rape or having used violence to commit an offence, the CO was also responsible for their arrest.[83] His findings were then passed to the Adjutant General's Department, which had responsibility for all matters relating to discipline.[84] Any relevant paperwork, including the charge, and written evidence, were therefore handed over to this department, which then proceeded to arrange the trial, including notifying witnesses that they were expected to testify in court, and who, confusingly, were often referred to as 'evidences'.

A General Order and a warrant directing a court to convene, in the case of GCMs, was then issued by the Commander in Chief, or the Commander of the Forces, depending on whether the crime had been committed in the UK, or overseas. These orders were typically issued the day before a trial, and outlined the proportion of the officers of different ranks who were to sit in the court, and their distribution across the different divisions of the army. The following example from July 1809 for the army serving in the Spain is typical:

> A General Court martial will assemble tomorrow morning at 11 o'clock, for the trial of such prisoners as will be brought before it. Major General Mackenzie President.
> Major General Mackenzie's Brigade – 1 field officer, 2 captains, 1 subaltern
> Major General Hill's Division – 2 field officers, 1 captain, 2 subalterns
> Brigadier General Campbell's division – 1 field officer, 3 captains, 1 subaltern.
> Total – 4 field officers, 6 captains, 4 subalterns

[81] Hough, p. 473.
[82] *Articles of War* (1798), Section XVI, Article XX, p. 61.
[83] Hough, p. 221.
[84] S. G. P. Ward, *Wellington's Headquarters: The Command and Administration of the British Army during the Peninsular War* (Oxford: Oxford University Press, 1957), p. 153.

> The names of the officer appointed to act of Deputy Judge Advocate, will be sent in the course of the day to the president. All evidences to proceed immediately to Headquarters, who have been permitted to march with their divisions, and to report themselves to the Adjutant General's office.[85]

Orders of this kind followed a clear template, using virtually identical phrases whenever a GCM was ordered to convene throughout the Peninsular War. It is important to highlight here that the court was not appointed to hear a single case, but, rather like the Assize courts in the non-military legal system, would hear all the cases that had arisen since a court had last sat. The court would have to sit for as long as was necessary to hear all the cases in their entirety, regardless of how long they lasted. This had the potential to cause officers to be away from their units for up to a month, and could be tiresome for witnesses who would not know when they were likely to be called to give evidence.[86] From a financial perspective, then, the Adjutant General's Department clearly had a vested interest in cases being heard swiftly, as they were obliged to pay the expenses of witnesses whilst they waited for their day in court.[87] Nonetheless, the President of the court was not entitled to rush cases, and all witnesses and explanations from both the prosecution and the defence had to be heard. This meant that officers in particular could, and did, launch into long defences and cross-examinations of witnesses in trials lasting days.

The Deputy Judge Advocate, and Judge Advocate occupied the same role in military courts, with the only difference being that the Deputy held a temporary role for as long as the court was convened, whereas the Judge Advocate held a more permanent position. Both were paid 10s a day for the length of their employment and were appointed on the grounds of a supposed knowledge of legal procedure. It is noticeable, for example that, during the Peninsular War, a handful of names appear repeatedly in the General Orders as Deputy Judge Advocates, indicating that these individuals must have had some form of legal training.[88] It was both a legal and practical necessity to have a Judge Advocate in court.

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[85] WP9/1/2/1. General Order, 9th July 1809. Notice also, as highlighted above, that 14 officers were appointed to sit on the court, rather than the 13 who were theoretically required in order to try officers or pass a death sentence.

[86] Charles Oman, 'Courts Martial of the Peninsular War, 1809-14', *Journal of the Royal United Services Institute,* 56, 2 (1912), 1699-1716 (pp. 1700-1701). Subsequently Oman, *Courts Martial*.

[87] WO93/9.

[88] Charles Oman was the first person to notice this. Oman, *Courts Martial*, p. 1700. See also WP9/1/2/1-7.

Although originally the JAG attended every trial, this was clearly impossible given the size of the British Army by the early nineteenth century. The Judge Advocate, or Deputy Judge Advocate, fulfilled a variety of roles in court in addition to acting as prosecutor. It was his responsibility to note the proceedings, he offered legal advice to the court, but also, bizarrely, had to advise the accused on how to argue against the very prosecution case that he, the Judge Advocate, had constructed.[89] In some cases, if the accused could afford it, a separate counsel assisted the accused, although there were strict limitations on what they were permitted to do in military courts. There was intense debate on the extent to which counsel could play an active role in the court process. In the early nineteenth century, the role seems to have primarily been one of advising the prisoner on points that arose over the course of the trial, and it seems that counsel were not permitted to address the court directly, or cross-examine witnesses.[90] Equally, they were not allowed to read statements on behalf of the prisoner, who was expected to address the court in person. This was seemingly a contentious point, with Williamson launching into a lengthy diatribe on the matter in his 3rd (1792) edition of *Elements of Military Arrangements*:

> I see no reason why a court-martial should not be as jealous of any encroachment of its jurisdiction and prerogative, as any other court whatever. By this I am far from meaning to urge that a prisoner should not be permitted to advise with counsel, or even to receive notes in court from counsel: all I object to, is the allowing of counsel to take an active part in the trial, as by addressing the court, questioning the evidences &c.[91]

Williamson then went on to downplay a claim by Adye, another commentator on military law, that counsel was increasingly allowed to play an active role in the trial process, saying that such cases should be in a minority.[92] The growing role of a counsel in military courts matched a wider development in non-military courts during the same period. Peter King has pointed to a growing shift towards 'lawyerization' in British courts, with approximately 25-33% of defendants and 20% of prosecutions in London making use of counsel by 1800.[93] Officially however, the Judge Advocate was not relieved of his contradictory role until the

[89] Williamson, p. 100.
[90] *Ibid*., pp. 115-116
[91] *Ibid*., p. 115.
[92] *Ibid*., p. 116.
[93] King, *Justice and Discretion*, p. 228.

1829 version of the Articles of War were published, which stipulated that he did not need to prosecute the accused.[94]

At the head of the administration of military justice was the JAG, a legal officer, whose position was entrusted to him by the Crown. He received a salary of £2500 a year for his duties which included reviewing the proceedings of all GCMs, amending them if necessary, with the approval of the King or the Commander in Chief, conserving GCM proceedings and ensuring that copies were available to those who were entitled to one.[95] This included the accused themselves, who for a fee could obtain a copy at least three months after their trial.[96] In theory, a Member of Parliament could request a copy of the proceedings, and bring them to the attention of Parliament, but they rarely did so, as this would effectively have made Parliament a review court. In fact, Manners Sutton spoke during an 1811 debate on flogging in the army, discouraging the practice, remarking 'Much mischief must be done by [… this] growing into a custom. If parliament made itself a court of military appeal, it would soon find that it had taken upon it an excessive burthen'.[97] As will be explored in Chapter Five, Manners Sutton at times found himself tasked with correcting MPs on their misconceptions regarding specific cases when they were raised in the Commons, highlighting how an appreciation of the system's nuances was not widespread.[98]

Theoretically the JAG had to offer advice on the wording of every charge that was brought against anyone accused of breaking military law. In practice that was, of course, completely impractical when the British Army was deployed across the globe, and Judge Advocates therefore had to be deployed with large bodies of troops, so that they could assist with this. However, the JAG could, and did, criticise if there was an error with the wording of the charge, something which was a distinct possibility considering that if there was no Judge Advocate with a body of troops, then the charge would be framed by officers with little legal training.[99] This became a major source of irritation for Wellington during the Peninsular War, and was a significant factor in the decision to employ the lawyer Francis

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[94] S. Denison, in Appendix to Clode, II, pp.749-750.
[95] WO93/9, f.28; Clode, II, pp. 749-750.
[96] 49, Geo III, Cap 12, Sect. XXVII, *Mutiny Act*, p. 38. In the case of trials which took place at Gibraltar, the waiting period was six months, whilst for overseas territories the period was twelve months.
[97] Hansard, Vol XX, 18th June 1811, 707.
[98] See Chapter 5, pp. 188-191.
[99] James Stuart-Smith, 'Military Law: It's History, Administration and Practice', *Military Law Review*, 27, 100 (1975), 25-52 (31-32).

Larpent as Deputy Judge Advocate General and send him to serve with the British Army in Spain.[100]

From 1806 the JAG was a member of the Privy Council, and he shared the Secretary of State for War's responsibility for answering on matters relating to the army in Parliament. Whilst some JAGs during the period were MPs, this was not a pre-requisite of the job. His primary role of ensuring the Crown's powers under the Mutiny Act were properly executed was an important task, and made his role administrative rather than judicial. Instead, it was the King who often confirmed the sentence of military tribunals. Whilst this was arguably necessary given that the warrants for convening courts martial originated from the King, and that officers received their commission from the King, it was nonetheless considered necessary to ensure that this power was exercised under the advice of a minister, hence why the position was a political one.[101]

2.6 Court Procedure

The trial process itself was a relatively simple one. Notwithstanding the contradictions of the Judge Advocate's role and the advantage that a good education offered for the accused, a number of provisions existed to ensure that the process was as fair as possible.

The court met at a prescribed time. This was either established by the order which convened the court, or, if the court was continuing after adjourning the previous day, at a time specified by the President of the court. Both the Mutiny Act and Articles of War directed that courts could only sit between 8am and 3pm, except when an immediate example was required.[102] This ensured, at least in principle, that everyone in the court room was fresh and alert, thereby preventing a miscarriage of justice due to the court being exhausted.

Once all the officers of the court were present, the members of the court had to be sworn in individually, placing their hand on a copy of the New Testament, which they also

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[100] C. Oman, *Courts Martial*, p. 1701; W. A. J. Archbold, 'Francis Seymore Larpent', in *ODNB* <http://www.oxforddnb.com/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-16075?rskey=FdB5hX&result=2> [Accessed 18/04/2018];
[101] Clode, II, p. 360
[102] *Articles of War* (1798), Section XVI, Article IX, p. 56.

had to kiss upon completing their oath. The Judge Advocate was tasked with this, beginning with the President, who would subsequently swear the Judge Advocate in. The oath, prescribed in the Articles of War, directed that each member of the court would administer justice impartially according to the Articles of War and Mutiny Act, but that 'if any doubt shall arise, which is not explained by the said Articles or Act of Parliament, according to my conscience, the best of my understanding, and the Custom of War in like cases'.[103] The oath went on to say that no member of the court would attempt to learn the vote of any other member, or divulge the result of the court until it had been approved.[104] Again, this last part of the oath was a means of ensuring fairness, as it meant that each officer's judgement would not be influenced by the opinions of their colleagues. It is striking though that, if a crime or situation was not explicitly addressed according by the Articles of War or Mutiny Act, officers were expected to do essentially what they thought best based on their professional knowledge. This should not suggest in itself though that military trials were 'arbitrary', and subject to the whim of officers. The role of the Deputy Judge Advocate, outlined above, and the measures in place to check and amend punishments which were unlawful clearly show that judgements were expected to either have a strong legal basis, or to have some precedent. In order to facilitate this amongst an officer class which generally lacked formal legal training, all newly commissioned officers, upon joining their regiment, were expected to attend every RCM that occurred in the first three to six months after their arrival, with the length of time varying depending on how swiftly they progressed with their training as an officer.[105] This therefore meant that officers were at least familiar with the process of the trial, and by examining the eventual rulings were able to establish what was, and was not, an appropriate punishment in different circumstances. To assist with this process, a number of treatises on military law were available for officers, with subscriber lists showing that these were perceived to be worthwhile initiatives in military circles.[106] Adye's *A Treatise on Military law*, written when he was an artillery Lieutenant following his service as a Judge Advocate, became a work of authority, making

[103] *Articles of War* (1798), Section XVI, Article VI, pp. 53-54.
[104] *Ibid*., p. 54.
[105] T. Reide, *A Treatise on the duty of infantry officers and the present system of British Military discipline* (London, T. Egerton, 1795), pp. 8-9.
[106] See, for example, W. Hough, *Practice of Courts Martial, also the Legal Exposition and Military Explanation of the Mutiny Act and Articles of War* (London: Kingsbury, Parbury and Allen, 1825); S. P. Adye, *A Treatise on Military Law* (New York, Gaine, 1769), J. Williamson, *The Elements of Military Arrangements; comprehending the tactic, exercise manoeuvres and discipline of the British Infantry*, 2nd edn (London: T. Egerton, 1782).

clear and repeated reference to civilian law, and establishing the most appropriate course of action in light of this. His comments were often debated in subsequent publications on military law, indicating that there was no definitive position outlined by the Crown, or the JAG's department. Adye's work had 165 subscribers to the first edition of his work, whilst Williamson's 2nd edition had 153 subscribers.[107] Interestingly, the Judge Advocate's oath was much shorter, simply stating that he would only ever attempt to discover the vote of any member of the court, and disclose that information if he was required to do so in order to give evidence at a subsequent trial.[108]

With all the members of the court sworn, the first prisoner, or in some cases prisoners if more than one person was being tried for the same incident, were brought before the court.[109] The order directing the court to convene was then read, which thereby established its legal authority to consider the case, and the names of the officers who made up the court were read to the accused. The prisoner was then asked if he had any objections to those officers judging the case, although he had to have legitimate legal grounds for doing so. In practice this was usually that an officer was from their regiment, or that there had been a dispute between the prisoner and one of the judges. The court would then consider whether the objection had any legal basis, and either disregard it, or replace the officer with another.[110] This provision did not exist in RCMs where all of the officers were from the same regiment as the accused.

The President of the court would then review the charge, checking the dates, deciding if the charge needed to be considered by a superior in the cases of GRCMs and RCMs, and determining if the charge had been properly worded. Of particular concern here were whether the crime had been clearly specified, that the prisoner was charged of being guilty of the offence, and that the time and place of the offence were clearly stated.[111] The charge was then read to the prisoner, who would enter a plea.

If the prisoner pleaded 'Guilty' then the court immediately proceeded to sentencing. On pleading guilty, the prisoner could call on a someone to provide a character

[107] Adye, pp. 140-5; Williamson, pp. 1-7.
[108] *Articles of War* (1798), Section XVI, Article VI, p. 53.
[109] The following account of the court process is based on contemporary treatises on military, in addition to the Articles of War, court proceedings, the JAG's correspondence and general orders.
[110] Williamsom, pp. 113-114.
[111] Tytler, p. 209

statement, testifying to his good nature. Although this would not stop the court from issuing a sentence, it could influence their decision on whether to recommend that the punishment be reduced to some extent, or in fact pardoned completely.[112]

In practice however, pleading guilty was discouraged, a process which had long-standing precedent in non-military courts, and points to a significant point of interplay between the two legal systems.[113] This approach was fully embraced by commentators on military law, with Adye remarking that judges could refuse to record a guilty plea, and 'suffer the party to plead not guilty' if they considered that the confession arose from 'fear, menace or duress, or from weakness of ignorance'.[114] This was a remarkable failsafe for the rank and file of the British Army, meaning that if they did lack awareness of how trials proceeded, it was incumbent upon the court to make them fully aware of the implications of pleading guilty.

This sentiment was reinforced by Manners Sutton when, in March 1810, he informed Colonel Cornewall, of the Hereford Militia, that in his 'decided opinion', it was:

> the duty of the Court at all times to dissuade the prisoner from such a [guilty] plea – and even if he should persist, it is still necessary that the charge should be inquired into by addressing all such evidence as would be required even if the plea had been Not Guilty – for it is upon the report of the evidence and the proceedings that the judgement of the court is finally to rest – and it will be evident no such report could be made if the plea of guilty in the first instance were to be considered as sufficient to justify conviction.[115]

The issue was not a theoretical one, as it could, and did, emerge at trial. An example of this emerged in the case of Privates John Minshaw and Samuel Walker of the 103rd Regiment, who were tried by GRCM in Quebec in July 1817 for desertion. The proceedings for this trial, are particularly revealing in terms of the military courts being both sensitive to practices in civilian courts, whilst also embracing practices which best served the army's needs. Rather than being the final drafts of the proceedings, which are held at TNA, these

[112] Williamson, p. 117.
[113] Beattie, *Crime and Courts*, p. 336.
[114] Adye, p. 62.
[115] WO81/42, Charles Manners Sutton to Colonel Cornewall. Emphasis is Manners Sutton's, 9th March 1810.

proceedings are rougher drafts, containing sections which have been crossed out as the document has been redrafted. In the case of Minshaw and Walker, both pleaded 'guilty'. What is particularly revealing in terms of commonality with civilian practices, is that these proceedings trial contain a section which was subsequently crossed out stating:

> The court recommended both the Prisoners, that if they had any favourable circumstances to bring forward in extenuation of their crime, or anyone to bring forward in support of their former good character, to stand their trial in order to have an opportunity to bring forward those evidences, and they both still persisted in pleading guilty to the charge against them.[116]

The frank statement of motives provides further compelling evidence that military law was nuanced and discretionary in its application. What makes this case all the more curious though, is that the court then immediately proceeded to sentencing, awarding 800 lashes and branding with a letter D (for deserter). However, a legal question was then raised by an unspecified individual as to whether it was legal to proceed to sentencing without hearing evidence, even in the case of a guilty plea. This points to the degree of uncertainty that continued to surround legal procedure in the event of a guilty plea, despite Manners Sutton's efforts. The lack of awareness clearly indicates that a plea of 'Not Guilty' was presumed as a matter of course, obligating members of the court to consider the case according to the evidence presented, rather than the whims of the court's officers. The court therefore adjourned in order to consult works of legal authority. The next day it was determined that it was:

> invariably practice in the civil courts to consider the voluntary confession of the prisoner in court as countervailing the necessity of further proof, but as the members of the court had never personally witnessed such a course of proceeding they thought it advisable to hear the evidence.[117]

Quite clearly, therefore, by the end of this period, extreme caution was being exercised in military courts to ensure that any sentences issued were legally enforceable. It is noteworthy that despite the consultation with works of legal authority, and despite a clear

[116] Southampton City Archives, D/PM 20/34. Trial of Privates John Minshaw and Samuel Walker, 24th July 1817.
[117] *Ibid*.

precedent being set by civilian courts for an immediate move to sentencing following a guilty plea, the officers preferred to proceed on the basis of the convention of military courts, rather than the civilian ones. Established practice in the army's courts took precedence over practice in civilian courts, a point which further serves to highlight the marked delineation between the two.

The prisoner could, of course, refused to plead. In this case, the court was required to establish, just like in civil cases, whether he was failing to speak due to 'an act of God' or out of malice. If the latter was established, then the court proceeded as if he had pleaded guilty. The court took a very dim view of such actions, and any other improper conduct in court, from disrespectful language to threatening gestures.[118]

So far, it is clear, that every reasonable effort was made to ensure that the court, and its judgements, were free of any unfair influences. There was, however, an interesting opportunity for the Commander of the Forces indirectly to influence the attitudes of the judges who were involved in trials, at least in theory. If the Commander felt that the actions of a group of individuals merited particular censure, they were entitled to make reference to this in their general orders, explaining the damage that such behaviour could have for the army. In the process, it was possible to affect how the officers judging a particular case viewed the crime, even before they considered the evidence. In September 1809, for example, Wellington was furious at his troops repeated efforts to plunder beehives, despite his clear orders on the matter, penning a series of furious general orders chastising both the officers and men.[119] He then directed that the entire division of the latest perpetrators was to be paraded between sun rise and sun set until the plunderers were discovered, with this order only being countermanded when those responsible were discovered two days later.[120] Even then, however, Wellington was not finished, and expressed his concern about needing to resort to harsh measures, and the importance of both the soldiers and particularly the officers exerting 'themselves to prevent these outrages and discover the perpetrators', explaining that 'the whole army must suffer in character as well as the privations which are the invariable consequence of plunder by the troops'.[121] Wellington

[118] *Articles of War* (1798), Section XVI, Article XV, pp. 59-60.
[119] WP9/1/2/1, General Order, 7th September 1809.
[120] *Ibid*., General Order, 12th September 1809, 14 September 1809.
[121] *Ibid*., General Order, 14th September 1809.

then proceeded to paraphrase these points again in a further General Order, when, two days later, orders were given for the convening of the GCM which was to try the men who had plundered the beehives. Unsurprisingly the three Privates concerned, all from the 53rd Regiment, were found guilty and were sentenced to 500 lashes each.[122] Whilst this was by no means the harshest punishment available, as all three men could, according to the guidelines contained in the Articles of War, have been hanged for their actions, the whole scenario nonetheless poses interesting questions about the vulnerability of the military courts to influences outside the court room.[123] Ultimately the fact that these men were not executed for their actions, despite Wellington's obvious fury at their crime, suggests the integrity of the court process, and the extent to which discretion was a fundamental aspect of the courts' deliberations upon an appropriate sentence for each crime.

Provided that the prisoner had pleaded 'not guilty', the prosecutor would make his opening statement, and the first witness for the prosecution would be brought in, sworn and questioned. The witnesses' oath was a simple one, also sworn on the New Testament, to essentially tell 'the truth, the whole truth, and nothing but the truth'.[124] The rules governing evidence were important, and were basically the same as those that existed in the non-military courts.[125] This was a further reason why officers were required to attend RCMs as part of their early training, as it was important that both the judges and the Judge Advocate were mindful of what could and could not be accepted as legitimate evidence. There were two categories of evidence: verbal and written. The first was, of course, obtained from witnesses in court, who would be questioned by whichever side had called them, and could be cross-examined by the opposing side if necessary. Written evidence generally took the form of records, especially in cases of embezzlement, letters, in cases of duelling, and warrants or other official documents, whose authenticity could be verified.[126] Documents had to be produced to the court, and had to be original.

Written evidence and statements from a witness were permitted in certain circumstances, although it was generally not preferred, with witnesses being required to attend in person in order to be questioned by the prosecution, defence and, if necessary,

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[122] *Ibid*., General Order, 22nd September 1809.
[123] *Articles of War* (1798), Section XIV, Article XVIII, p. 44.
[124] Williamson, p. 120.
[125] Tytler, p. 258.
[126] *Ibid*., p. 259. See for example WO71/214, Trial of Lieutenant Dobbins.

the court.[127] This could create significant issues if a witness failed to attend a trial, as was the case in some trials for theft from civilians during the Peninsular War.[128] It is impossible to determine precisely why these civilians decided not to testify, although the phenomenon was by no means unprecedented, with similar situations arising in civilian courts during the period. One possible reason for this failure to testify may have been civilians losing interest in the prosecution process once they had been reimbursed. However there is no record of any reimbursement being recouped from a convicted soldier's wages, calling this motivation into question. A humanitarian desire to prevent the soldier from being flogged or executed may also have been a potential motivator here. John Beattie has also suggested that a humanitarian element sometimes affected witness testimony in non-military courts, citing examples such as that of a woman who insisted that the accused had only stolen property worth thirty-nine shillings from her in order to prevent him from being sentenced to death for theft of an item worth 40s or £2.[129] Framing a witness statement in such a way as to avoid a particular type of charge was therefore a well-established phenomenon, and represented just one way in which the court process could be manipulated by witnesses, victims and officers, as will be seen in Chapter Four.

The principles underpinning 'good' evidence were relatively simple. A single trustworthy witness's evidence was more valuable than multiple accounts that contradicted this testimony if those accounts came from untrustworthy sources, whilst the evidence of obviously biased witnesses was to be considered inferior to those who were not 'influenced by their passion'.[130] Precise witnesses were considered to be more reliable, and desirable, than vague ones, and evidence that was 'positive' in nature was preferred to evidence that was 'negative'.[131] Alexander Tytler, a former Judge Advocate, explained this last concept's implications in a military court:

> Supposing two credible witnesses shall depose pointedly to certain words spoken by A, as, that he called B a scoundrel; and two or three others of equal credibility

[127] WO81/44, Charles Manners Sutton to Major Augustus Northey, 4th March 1811.
[128] WP1/269/33, Sir A. Wellesley to J. C. Villiers, 9th July 1809. See below Chapter 3, pp. 94-96.
[129] Beattie, *Crime and Courts*, p. 333.
[130] Tytler, pp. 260-262.
[131] *Ibid.*, pp. 261.

> shall swear, that though high words were used, they did not hear that particular expression; the former evidence ought to preponderate over the latter.[132]

There were complex rules on the weighting of evidence though, which at times required Manners Sutton's intervention.[133] The military courts worked on the principle that two or three witnesses were the minimum required to secure a conviction.[134] However, as Manners Sutton reminded Colonel Torrens at Horse Guards, the character of those testifying (whether they were reliable, and therefore credible, witnesses), was highly significant, and merited investigation in circumstances where there was uncertainty on whether a charge had been proved.[135] Trial proceedings themselves were also not permissible as legal evidence, and could not be called upon to support a charge, unless they were corroborated by a witness.[136]

Attempts to agitate or confuse witnesses during cross-examination were frowned upon, in part as evidence given in 'passion' was deemed inferior, and the Articles of War sought to create an air of respect in the military courts.[137] The President of the court was therefore expected to step in should either the prosecution or defence attempt to do this. This was a significant difference from the non-military courts, with William Garrow having gained a reputation from 1783 as a particularly vigorous cross-examiner.[138] Nonetheless, cross-examination could be an important part of the trial process, although this was an advantage that the better educated officers were able to exploit far more effectively than the NCOs and Privates. Court proceedings show that whilst officers engaged in lengthy attempts at cross-examination, asking pertinent questions, the efforts of NCOs and Privates were often much clumsier, consisting of simple statements contradicting the witness, framed as questions. When on trial for desertion in July 1813, Rufus Moon of the Canadian Regiment, for example, asked a witness, who claimed that he taken Moon's musket from him by force 'when you clenched the gun, did I not ask you to let it go, and I would be your prisoner'. Moon was clearly trying to suggest that violence had not been necessary, which

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[132] *Ibid*., pp. 261-262.
[133] WO81/49, Charles Manners Sutton to Colonel Torrens, 20th December 1813.
[134] Tytler, pp. 260-262.
[135] WO81/49, Charles Manners Sutton to Colonel Torrens, 20th December 1813.
[136] WO81/49, Charles Manners Sutton to the Adjutant General, 16th December 1813.
[137] Tytler, p. 263.
[138] John Beattie, 'Garrow and the Detectives: lawyers and policemen at the Old Bailey in the late eighteenth century', *Crime, History & Societies*, 11, 2 (2007), 5-23, (12).

would therefore have made it much harder to prove that he had no intention of ever returning to his unit. However, the awkward framing of the question inevitably led to an uncompromising response: 'No, but I told him that he should not have the gun for he was my prisoner, and he offered me five dollars to let him escape'. Moon had no further questions for any of the other witnesses, was found guilty of desertion and shot.[139]

The witnesses' evidence, all of which was written down by the Judge Advocate as part of his duties in court, was then read back to the witness prior to them leaving court, before the second witness was called.[140] This process of questioning and cross-examining witnesses continued until all the prosecution's witnesses has been examined. This was not necessarily a long process, though, as it is particularly apparent from the trials of some NCOs and Privates for charges of being AWOL, and desertion, that witnesses could be questioned relatively quickly if the matter was a simple one, and attempts at cross-examination were limited. The prosecution then gave a concluding statement, and the accused was offered time to prepare his defence. In some cases, individuals chose to change their pleas, and acknowledge their guilt, although this was rare. The court could then adjourn as long as necessary to give the prisoner time to prepare their defence.

Although officers were often keen to capitalise on this opportunity, NCOs and Privates rarely took advantage of this. Once the court had reassembled following its adjournment, the whole process that the prosecution had engaged with was repeated for the defence, with an opening statement from the defence, and the defence's witnesses being examined. Although the prisoner was entitled to read a written defence which he had prepared, and was not expected to conduct his case from memory, he was not allowed to have his opening or closing statement read to the court by his counsel.[141] Indeed, the role of counsel was strictly limited in military courts during this period. This is a curious distinction between the military and non-military systems. John Langbein has argued that the system of the 'adversarial criminal trial', which developed across the eighteenth and nineteenth century, was actually a damaging process, creating a 'combat effect', whereby the truth was deliberately distorted by both sides through practices such as abusive cross-examination,

[139] Southampton City Archives, Page and Moody papers, D/PM 20/26, Trial of Private Rufus Moon, 21st July 1813.
[140] Glover, *Peninsular Preparation*, p. 173.
[141] Hough, p. 952.

withholding evidence and preparing witnesses.[142] Langbein argues that this system was allowed to develop due British civilian law's reliance on 'Bloody Code' which heavily emphasised the use of capital punishment.[143]

This particular problem does not appear to have manifested itself in military courts, despite the army's equally heavy reliance on both capital and corporal punishment. The styles of questioning, and the presentation of evidence were well developed in military courts by the 1800s, and trial proceedings show that the army's process was not 'adversarial' or combative in nature. All questions put to a witness adhered to a formula, usually consisting of a statement prefixed by 'was it not the case that' or 'did I not', as demonstrated in Moon's case above.[144] In these instances both sides were trying to establish their own narratives of events, however the simple framing of these questions meant that the witness could easily refute the comment with a simple 'yes or no' response if they wished. Questions by the court, meanwhile, were usually more open, seeking to establish the facts of a situation when the officers were unconvinced about details.[145]

Once all the defence's witnesses had been heard, and the defence had made a closing statement, the whole of the proceedings were read aloud to the court. This served as a summary for the officers, who were not allowed to take any written notes over the course of the trial, and assisted with the next phase of court business: voting on a verdict and sentencing.

The verdict on guilt was reached by the process of a vote, which involved a series of measures intended to maximise secrecy and reduce influence. All the votes were written on a single piece of paper, with the youngest officer voting first, and then folding the page over to cover their vote before passing it on to the next person. A majority vote determined whether the prisoner was guilty. If so, then the court would use the same voting process to decide on the most appropriate sentence. Sadly no examples of this document have been found, although the Page and Moody collection at Southampton City Archives does include copies of the voting document. These are simple copied lists of the punishment which each

[142] Langbein, *Adversary Criminal Trial*, pp. 1-2.
[143] *Ibid*., pp. 334-335.
[144] See also, for example, WO71/214, Trial of Lieutenant Lewis Luderitz, 26th September 1808; D/PM 20/29/a, Trial of Private Thomas Lambert, 11th April 1814.
[145] See for example, WO71/214, Trial of Cornet John Proby, 30th August 1808.

of the judges considered appropriate, something which is apparent from the lack of folds in the paper, and the fact that all the sentences are clearly written in the same hand.[146] If corporal punishment was being issued, then an average was supposed to be taken of all the punishments. At times this was adhered too, with the result that a very precise number of lashes was sometimes issued as a sentence. However, the fact that the majority of sentences involving the lash were issued in denominations of a hundred suggests that in reality the most commonly occurring vote, instead of the mathematical average was taken as the sentence.

It is telling that, once again, the army's practices on reaching a verdict were very distinct from non-military ones. Whilst a jury's verdict was required to be unanimous, military courts could convict in the event of a simple majority vote in favour by the officers judging the case, except when capital punishment was being issued, when nine of the thirteen officers had to vote in favour. Adye actually considered this to be more advantageous than the civilian system, calling into question the validity of the claim that a unanimous decision gave weight to the jury verdict, when in all likelihood a unanimous verdict would require some jurymen to acquiesce.[147] The army's willingness to accept a majority verdict made it more responsive to the task of maintaining discipline, by ensuring that conviction could be secured even when some judges were unconvinced of the accused's guilt. It is therefore clear that whilst the military and civilian legal systems may have co-existed, and even run in parallel to one another, military law was both bespoke in nature, and tailored closely to the army's needs.

With the court's role concluded, the proceedings were written up and sent to the Commander of the Forces, or Commander in Chief, in the case of GCMs, or the CO in the case of GRCMs and RCMs, who would review them, and could modify the sentence if he felt it was necessary, increasing, decreasing, or even pardoning the sentence. Wellington sometimes used this power as a means of rewarding the offender's unit, issuing a pardon on grounds that the unit had behaved well in a recent battle.[148] More commonly, a sentence might be remitted on the recommendations of the court, based on the soldier's good character, especially if it was his first offence. On a handful of occasions, the

[146] See, for example, D/PM 20/33, Trial of Private Charles Cannon, 6th June 1817.
[147] Adye, pp. 19-21.
[148] WP9/1/2/4, General Orders, 27th July 1811.

proceedings would be sent back to the court for reconsideration, although this could only be done once, and if the court returned the same verdict, then the commander had to accept this. The commander would then issue orders for the punishment to be carried out in either General Orders, or Regimental Orders, unless the punishment was cashiering in the case of officers, which had to be confirmed by the King.

2.7 Conclusion

It is therefore apparent that the provisions surrounding the operation of the army's military justice system were nuanced, and firmly grounded in what was legally permissible. This assessment on permissibility was driven by the directions of the system's foundational texts: the Mutiny Act and Articles of War. These ensured that the areas of military law's jurisdiction and its powers were carefully defined. The court room environment was a respectful one, in which the manipulation of evidence through a combative system was discouraged. With safeguards to ensure that all appropriate evidence was heard and considered before a sentence was passed, courts martial verdicts were by no means subject to the whims of the officers judging the case, instead focusing upon building a consensus on guilt and appropriate punishments. Whilst the non-military legal system was acknowledged by some as legally superior to its military counterpart, this fact was not something which hindered it in fulfilling its primary function of maintaining discipline within the army.

It is also clear that, whilst partially informed by developments and practices in the wider civilian legal system, military law was always operated in a way which attended to the army's specific needs. Where overlap existed, it was because the army's officials considered a mirroring of the civilian legal process to be in the army's interests. Whilst the courts themselves were willing to consider the established practices and conventions of civilian systems when determining how to proceed in moments of uncertainty, the paths chosen were always designed to ensure that the army's disciplinary process operated smoothly and in a manner which was beyond legal reproach.

Whilst the legal framework within which military law should have operated has, therefore, been established, many fundamental questions remain about how this theoretical system operated in practice, and changed over the course of the period under

scrutiny. The next chapter will therefore examine how the army's most senior courts operated both on campaign, and at home in Britain, to determine the influences that both contemporaneous circumstances and individuals had on its operation. In the process, the army's prosecution priorities, and how it deployed its disciplinary powers, will be thrown into sharper focus. This has significant implications for our understanding of the extent to which use of the military courts was dictated by the pressures of campaign, and whether military justice served the needs of victims.

Chapter 3 The Conundrum of Command and Control: Normative expectations and Nuanced Approaches

3.1 Introduction

The implementation of military law was by no means as uniform and harmonious as the theoretical legal framework outlined in Chapter Two might imply. Military law not only had to fulfil the needs of the army, but was subjected to scrutiny during a time when, as Michel Foucault has argued, British society was transitioning away from capital and corporal punishment.[1] This chapter therefore seeks to establish the realities of the operation of the military justice system, by examining the view from 'above'. Drawing on the data from the top two tiers of court (the GCMs and GRCMs), it will establish the punishment and prosecution priorities of the army, to shed light on what the army was actually trying on a daily basis. This will be supplemented by the Duke of Wellington's letters and general orders to ascertain the perspective of the commander of one of Britain's largest and longest deployments of the period. This in turn will highlight how the pressures of command affected how commanders in the field sought to utilise this system in order to maintain discipline. However, it will also become apparent that there was by no means uniformity across the army's command structure on how best to implement military law. The correspondence of the Judge Advocate General (JAG), in addition to the stipulations of the army's Commander-in-Chief, the Duke of York, will be used to indicate how different sections of the army's command structure held diverging aims. Wellington's pre-occupation with maintaining discipline through swift trials and floggings stood in contrast to the desire of the King and Commander-in-Chief to limit the use of the lash. In the process, the role of pragmatism and discretion in applying military law will begin to emerge.

Throughout, the chapter will remain conscious of the value of considering the extent to which contemporary non-military law informed the practices of the courts. Close attention is therefore paid to the extent to which Douglas Hay's notion that law was a tool used to keep the lower classes in check is applicable to the military context. It will be argued

[1] Foucault, p. 231.

that this concept can only be applied in a limited manner, since the army as a whole was an institution based upon hierarchy, with analysis of trial data indicating that all ranks were held to account, regardless of class. Equally, in a foregrounding of the discussion that occurs in Chapter Four, the utilisation of discretionary powers by officers of all ranks will be highlighted, demonstrating ways in which the law could be applied in a manner that was bespoke to individual circumstances, rather than formulaic. Resonant with practices identified by John Beattie and Peter King in non-military courts, this further bolsters the thesis's wider argument that a pragmatic system of discretionary justice pervaded all levels of the army's command structure.

3.2 Keeping the lower orders in check?

In *Albion's Fatal Tree*, Douglas Hay argued that 'a fat and swelling sheaf of laws' were devised and mobilised by the propertied, ruling class both in order to protect their possessions and subject the lower classes to ever greater degrees of control.[2] Although Hay's comments related specifically to crime against property, particularly theft which was a major pre-occupation for legislators in the eighteenth and nineteenth centuries, it is tempting to generalise that the British army was characterised by a similar situation during the Napoleonic era.

However, as more recent scholarship has shown, systems of control based on the legal system were neither linear nor one-directional, whether in the contexts of the army or society more broadly. Ilya Berkovich has shown that the traditional perception of *Ancien Régime* armies where Privates and NCOs lived in fear of the brutal treatment by their officers is erroneous, and that instead troops were motivated by loyalty to their 'primary group' (comrades within their unit).[3] John Beattie, meanwhile, has argued that the victims of felonies were able to manipulate the legal process by influencing how, or indeed if, an offender was prosecuted.[4]

Examination of Wellington's general orders from the Peninsular War appear, at first glance, to suggest that military justice had a much greater alignment with Hay's thesis than

[2] Hay, p. 18.
[3] Berkvoich, pp. 229-230
[4] Beattie, *Crime and Courts*, pp. 38-39.

Berkovich's. The orders offer repeated instances of Wellington taking the opportunity to admonish his men, and threaten them with the full force of military law, usually with reference to plundering. There is also a clear transition in these orders, as Wellington seemingly resorted to ever harsher means to maintain order. Early orders in August 1809 reminded the men of his directions prohibiting plundering, directing that the rolls be called every two hours to detect those who had absented themselves from the camp for the purpose of plundering, and explaining how plundering was detrimental to the troops' interests since it antagonised the local civilians.[5] A month later Wellington declared his disgust with the troops continued plundering, announcing that he was 'determined, however difficult it may be, to put a stop to it', before seeking to instil fear in his troops by directing the provost to punish all those found disobeying his orders.[6]

This message re-appeared in varying forms throughout the war. By March 1810, with the message presumably still not having made an impression on the troops, Wellington stated: 'The Commander of the Forces repeats his determination to spare no trouble to procure and produce evidence against those who may be guilty of such outrages and to carry into execution invariably whatever may be the sentence of the court martial.'[7] This was a significant threat. As Commander of the Forces in the Iberian Peninsula, Wellington had the power to reduce sentences issued by GCMs, something which he was particularly inclined to do if the guilty soldier had a good 'character' (record of good behaviour prior to the crime), or if his unit had fought well in a recent action. By publicly declaring that, in cases of plundering, he would not feel inclined to exercise that privilege, he sent a clear signal that there would be no leniency when he confirmed sentences.

Wellington generally followed through on his threat and continued to remind his men of his determination to stop the plundering of civilians.[8] Occasionally, however, there were exceptions. In July 1811 he announced that:

> The Commander of the Forces is happy to have it in his power to pardon James Royston, Dennis O'Herron, and Patrick Heines (sentenced to be hanged on this date) not only because these men have made every restitution in their power to the

[5] WP91/2/1, General Orders, 2nd August 1809, 9th August 1809 and 16th August 1809.
[6] WP9/1/2/1, General Orders, 4th September 1809.
[7] WP9/1/2/2, General Orders, 25th March 1810.
[8] See, for example, WP9/1/2/3, General Orders, 4th June 1810.

> owners of the property stolen, but likewise because he has great satisfaction in stating that offences of this description are now rarely committed. The conduct of the 57th Regiment also in the Battle of Albuera on the 16th May has likewise rendered the Commander of the Forces anxious to be able to pardon these men in order that the regiment might avoid the disgrace of their public execution.[9]

Clearly Wellington felt that after the particularly bloody victory at Albuera, further loss of life would be detrimental to the morale of his troops. The remark on saving the regiment the disgrace of a public execution alludes to an important theme of honour that appears to have motivated the soldiers, and will be explored in greater depth in the next chapter. Yet the fact that Wellington was aware of this potential motivator for his men, and sought to exploit it, demonstrates that despite his unequivocal orders on plundering, he did occasionally take a more nuanced approached when he felt it was in the army's best interests.

Indeed, Wellington was apparently in a particularly merciful mood on the day of that order, as he went on to declare: 'The Commander of the Forces likewise pardons Drummer Walters, Richard Reynolds, Hugh Dunleary, John McNulty and Sergeant Egam, all of the 57th Regt concerned in other plunders at Elvas.'[10] What is noteworthy about this example is that, unlike Royston, O'Herron and Heines, who had been sentenced by a court martial, these men had not been tried, as there is no record of their trials in either the General Orders, or in the registers for GCMs.[11] Wellington was therefore intervening in an active case, assuming the guilt of the accused, and summarily pardoning them as part of a good will gesture towards the 57th.

The prudence of this approach is apparent when the exploits of the 57th at Albuera are considered. At a crucial phase of the battle, they and two other regiments held back the advance of the French 5th Corps, an achievement that Charles Oman described as 'the hardest and most splendid fighting done that day', and which gave rise to the regiment's nickname 'the Die-hards'.[12] Monthly returns show that the 57th's number of effectives plummeted from 613 in April 1811 to 202 in May, whilst the number of sick soared from

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[9] WP9/1/2/4, General Orders, 27th July 1811.
[10] WP9/1/2/4, General Orders, 27th July 1811.
[11] WP9/1/2/4; WO90/1; WO92/1.
[12] Charles Oman, *A History of the Peninsular War* (8 vols., Oxford: Clarendon Press, 1902-30), IV, p. 386.

206 (23.7% of those on the rolls) to 498 (64.2% of those on the rolls).[13] By the time of Wellington's order in July, the percentage of sick had fallen to 52.5%, but the fact remained that in the months of May and June the unit had experienced the second highest number of deaths of any in Wellington's army: 96 and 41 in those months respectively.[14]

Notwithstanding the example of the 57th, and that Wellington pardoned other crimes to thank units for their conduct on a multiple occasions, doing so for charges of plundering was unusual.[15] Nonetheless, this alludes to an important element of the military justice which will become increasingly apparent over this and the following chapter – the discretionary nature of the system's implementation, with individuals at all levels exercising their ability to manipulate the system to the army's circumstances and needs.

Returning to the question of plundering, Wellington was still repeating his determination to punish those found guilty of plundering in February 1813, when he also sought to undermine group complicity in plundering, by pointing out that 'one of the accomplices in the guilt never fails to give evidence against his accomplices. If this discovery is certain, the punishment is equally so'.[16] This was a shrewd comment by Wellington, that is also revealing about the actions of those who were caught. Wellington was attempting to 'divide and rule' his men, demonstrating that he was aware that plundering was often a group-based activity, as he sought to undermine the primary group bonds between plunderers by pointing out the reality of how quickly those bonds collapsed when faced with prosecution. His remarks also show the depth of the ordinary soldier's awareness of how military justice functioned. If Wellington's remarks are to be believed, the average soldier was well aware of the option of them turning 'king's evidence' in order to avoid prosecution, and were willing to resort to this measure.[17]

[13] Andrew Bamford, British Army Theatre returns, 1808-1815, <https://www.napoleon-series.org/military-info/organization/Britain/Strength/Bamford/c_BritishArmyStrengthStudyIntroduction.html> [Accessed 4th March 2019].
[14] *Ibid*.
[15] See for example WP9/1/2/4, General Orders, 23rd January 1811; WP9/1/2/4, General Orders, 30th August 1811.
[16] WP9/1/2/6, General Orders, 21st February 1813.
[17] Wellington had also made this point before. See, for example, WP9/1/2/3, General Orders, 4th April 1810.

Wellington's orders also unequivocally indicate that he considered the officers to be most to blame for the poor behaviour of the troops. In September 1809, in a particularly angry outburst in a General Order he declared:

> It is impossible these outrages can be committed daily and that the last outrage in particular, could have been permitted without the officers obtaining some knowledge of it. The officers with the army do not appear to be aware how much they suffer in the disgraceful and unmilitary practices of the soldiers, in marauding and plundering everything they can lay their hands upon.[18]

Wellington had already raised this theme in a long letter to Castlereagh on discipline generally in the army, written in June 1809.[19] As with other misdemeanours, Wellington found it necessary to repeat his disapprobation on a number of occasions:

> The troops on their passage through Coimbra to the army, have burnt the timber of the convent which was allotted for their accommodation. Experience has shown that when the non-commissioned officers, and particularly the officers of Regiments do their duty, these crimes cannot be committed. It is impossible that a soldier, or any number of soldiers can take down the large beams of the roof of a convent, or even a house, and burn them without the knowledge of the Non-Commissioned Officers of their companies and even of the officers if the latter do their duty, and attend to their men as they ought, not upon the parade only, but in their quarters, at various hours of the day, and night.[20]

Very similar comments were made when Wellington ordered the arrest of officers for failing to prevent the plundering of the Palace of the Retiro in Madrid in August 1812, and informing officers who failed to stop plundering when the army entered France in late 1813 that he would send them home in disgrace if they did not do their duty.[21] Clearly, therefore, Wellington found it necessary to draw heavily on the powers and opportunities

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[18] WP9/1/2/1, General Orders, 7th September 1809.

[19] John Gurwood (ed.), *The despatches of Field Marshal the Duke of Wellington, KG, during his various campaigns … from 1799 to 1818* (13 vols., new edition, London, 1837-9), IV, pp. 432-436. Sir Arthur Wellesley to Viscount Castlereagh, 17th June 1809. Subsequently *Despatches*.

[20] WP9/1/2/5, General Orders, 15th February 1812. Similar orders can be found in WP9/1/2/5 on 17th February 1812 and 15th August 1812, and in WP9/1/2/7 on 8th October 1813.

[21] WP9/1/2/5, General Orders, 15th August 1812; WP91/2/7, General Orders, 8th October 1813.

which were afforded by military law to apply pressure from multiple directions in order to ensure the Mutiny Act and Articles of War were adhered to.

Inherent in Wellington's furious accusations against his officers, and his need to remind his men repeatedly about the consequences of plundering, is an underlying conflict within the disciplinary system. As the system's effectiveness was dependent on its consistent and widespread application, which could only be facilitated by the junior officers and subalterns, only two conclusions about British officers can be drawn. The first is that they were utterly incompetent about their duties and ignorant about what their men were inclined to do. Given that incompetence could be tried as neglect of duty, and that regiments were regularly inspected, which would have resulted in incompetence being identified and remedied, this is highly improbable. The more logical answer, and one amply supported by memoir testimony, is that officers were, at the very least, willing to turn a blind eye to some plundering, if not actively complicit in it.[22] This is a notion that will be explored in greater depth in subsequent chapters, but it does point to conflicting pressures within the disciplinary system. Normative expectations, as outlined by Wellington, were undermined by a more pragmatic system, which in turn necessitated a more nuanced approach to the imposition of discipline by all ranks.

On one level therefore, Hay's theory resonates with the military context, at least when it is examined from Wellington's perspective. Compelling evidence can be found to suggest that Hay's notion of 'a fat and swelling sheaf of laws' being used to control the lower classes, especially in relation to property crime, was equally true of the army as it arguably was in the non-military courts. However, such a view is too simplistic. The fact that Wellington was blaming the officers for failing to prevent men from plundering, and was ordering the punishment of officers for that failure to fulfil their duty, points to the fact that military law did not solely exist to oppress the army's NCO and Privates, but also held the officers to account. Equally, just as Hay's thesis has since been questioned by the examination of civilian trial records, so a range of evidence from memoirs and court records point to a subtler approach to the imposition of military law.

[22] This notion will be explored in detail in Chapter 4.

3.3 Who was tried by the Courts Martial?

It must be recognised that Wellington's perspective as the commander of one of the British Army's largest and longest deployments of the Napoleonic Wars was not necessarily representative of the wider priorities of the British Army. When the distribution of trials across the principal ranks of the British Army is considered, it would seem that the army's primary focus was simply supressing the 'lower class' of the army. Table 3.1 shows the ranks of those tried at GCMs and GRCMs. It is immediately apparent that the weight of military law was exerted most heavily against the lowest ranks. However, the balance is not disproportionate, since in a battalion with a strength of 1000 men, 32 should have been officers, whilst 900 were Privates, with the remainder NCOs.[23] What is remarkable however, is the relatively small proportion of NCOs who were tried, comprising just 5% of GCM and GRCM cases. What makes this surprising is that Wellington suggested to Lord Liverpool in 1812, that NCOs were often as bad as the men, since their pay was so low that there was little incentive for them to be proactive in the execution of their duties.[24] Whether this reflects that NCOs were better able to evade justice due to their position or a greater awareness of how military law operated, or simply indicates that Wellington's view was erroneous, is impossible to determine.

[23] Richard Holmes, *Redcoat: The British Soldier in the Age of the Horse and Musket* (London: HarperCollins, 2001), pp. 112-24.
[24] WP1/347/73, Earl Wellington to Lord Liverpool, 10th June 1812.

Table 3.1: Distribution of GCM and GRCM trials across the main ranks of the whole of the British Army, 1808-1818.[25]

Rank	**GRCMs**	**GCMs confirmed at Home**	**GCMs confirmed abroad**	**Total**	**% of trials**
Private	1349	714	1772	3835	66.7
Lance Corporal/ Lance Sergeant	12	3	8	23	0.4
Corporal	36	8	71	115	2.0
Sergeant	36	21	75	132	2.3
Colour Sergeant	3	0	1	4	0.07
Staff Sergeant	0	1	1	2	0.03
Sergeant Major	0	1	5	6	0.1
Gunner	173	9	57	239	4.2
Bombardier	7	0	2	9	0.2
Driver	14	7	31	52	0.9
Drummer	17	9	18	44	0.77
Recruit	4	0	0	4	0.07
Sub total	1651	773	2041	4465	77.7
Ensign	-	83	51	134	2.3
Cornet	-	6	6	12	0.21
Lieutenant	-	312	213	525	9.1
Captain	-	143	92	235	4.1
Major	-	21	14	35	0.6
Lieutenant Colonel	-	22	14	36	0.6
Colonel	-	6	0	6	0.1
Generals	-	4	0	4	0.07
Surgeon	-	37	31	68	1.2
Commissaries	-	14	6	20	0.3
Sub Total	-	642	427	1069	18.6
Other[26]	27	92	95	214	3.7
Total	1678	1507	2563	5748	100.0

The contents of Table 3.1 should not cause us to jump to the conclusion that the NCOs and rankers were treated more leniently on the basis that trials of officers appeared to occur proportionately more frequently than those of the rank and file. It must be remembered that only the top two tiers of court are considered in this data, and that all those convicted by RCMs were ranked Sergeant or below, since officers could only be tried at GCMs. The overall numbers, and therefore proportion, of lower ranks who were tried is therefore higher. It is clear though that it was not only the 'lower orders' who were held to account for their actions.

The practicalities of who was tried by the Courts Martial therefore contradicts the notion that Hay's thesis is applicable to the military context, as military law did not solely exist to keep the rank and file in check, but was applied universally. This indicates significant parallels with the non-military legal system. Although Hay suggested that the principle of equality before the law was not a reflection of the reality in non-military courts, Clive Emsley has argued that they could, and did, 'protect the poor against the well-to-do'.[27] Emsley's notion is mirrored in the courts martial proceedings, with military law ensuring that officers did not exceed the limits of their authority, enjoy impunity before the law, or infringe on the rights of the Private soldier.[28]

3.4 The army's prosecution priorities

Wellington's preoccupation with plundering might appear to suggest a further parallel with the civilian legal system, given that the majority of civilian capital statutes introduced between 1688 and 1820 were for property offences.[29] However, the army's focus lay elsewhere. The full title of the 'Mutiny Act' (An Act for Punishing Mutiny and

[25] WO89/4, WO90/1, WO92/1
[26] This category includes camp followers, Hospital mates, Quartermasters, and individuals where no rank was specified.
[27] Hay, p. 33; Clive Emsley, *Crime and society in England, 1750-1900* (Harlow: Pearson, 1996), p. 15.
[28] See, for example, the case of Colonel James Orde, who was tried on 28th August 1812 in Nova Scotia, Halifax for defrauding the Quartermaster of the regiment, flogging several soldiers without trials, and other acts of oppression. He was found guilty of flogging soldiers without trials, and of oppression. He was sentenced to be cashiered, but due to a lack of specificity in the charges, the JAG advised that Orde's sentence be reduced to a severe reprimand from the Prince Regent. TNA, WO91/7.
[29] Hay, p. 18.

Desertion and for the better payment of the Army and their quarters) points to the army's greatest concerns: mutiny and desertion. These two crimes account for the majority of offences tried at GCMs and GRCMs. Between 1st January 1808 and 31st December 1818, 5,748 cases were tried in the top two tiers of military court. Of these, 4,070 were GCMs, and 1,507 those were placed before the King or Prince Regent for confirmation or revision. Table 3.2 outlines the top ten categories of charges that were tried by GCMs and GRCMs between 1808 and 1818, expressing the frequency that each type of charge appeared as a percentage. As it shows, 55% of all trials were for mutiny, desertion, or unapproved absence, which could be interpreted as desertion and was categorised as such in the Articles of War.[30]

Table 3.2: Ten most common categories of GCM and GRCM charges (1808-1818).[31]

Rank	Category of charge	% of cases
1	Desertion	41.91%
2	Property crime (including theft, stealing, burglary, robbery, and taking without consent)	13.52%
3	Conduct (ungentlemanly, unbecoming or 'unsoldierlike')	8.54%
4	Absence (including AWOL, absent from duty, and absent from quarters, and out of quarters)	7.28%
5	Mutiny (including exciting mutiny, mutinous conduct and mutinous language)	5.79%
6	Homicide (including murder, attempted murder, killing, shooting, stabbing, manslaughter and threatening the life of an individual)	4.44%
7	Disobedience of orders	4.23%
8	Drunkenness	4.05%
9	Neglect of duty	2.24%
10	Disrespect of a superior	2.04%

[30] Section VI of 1798 edition of the Articles of War was headed 'desertion', and contained 5 articles, the 4th of which declared that 'Any Non-Commissioned Officer or soldier, who shall, without Leave from his Commanding Officer, absent himself from his troop or company, or from any Detachment with which he shall be commanded, shall, upon being convicted thereof, be punished according to the Nature of his Offence, at the Discretion of a General or Regimental Court-Martial. Articles of War (1798), Section VI, Article IV, pp. 18-19. This wording remained unchanged in the 1809 and 1813 editions. Articles of War (1809), Section VI, Article IV, pp. 18-19. Articles of War (1813), Section VI, Article IV, p. 19.

[31] WO89/4, WO90/1, WO92/1. The percentage is calculated as a proportion of the total number individuals tried at GRCMs and GCMs during the period, of 5748.

It should be noted that although the combined percentage of cases in Table 3.2 only reaches 94.4%, this does not imply that the top ten categories of crime accounted for almost the entirety of the courts business. Since the accused could be arraigned on multiple charges within a single trial, it was not uncommon for a soldier to be tried on charges covering multiple categories of crime. In December 1810, for example, Corporal William Hammond, and Privates Arthur McCannah and Stephen Hudson, all of the 87th Foot, were tried simultaneously for having conspired together to break into the stores they were guarding in November 1809, proceeding to break open those stores, stealing from the same stores, for leaving their post guarding those stores, and getting drunk.[32] Each of these individuals constitutes a 'case' in the court martial database compiled for this study, as each man represents an entry in the court martial register. However, when breaking down the case, it is clearly applicable to four different categories of crime (breaking into a location, theft, absence from duty, and drunkenness). Similarly, on 9th April 1813, Ensign Kortright of the Coldstream Guards was tried and acquitted of 'Unofficerlike conduct on 8th December 1812, ordering British soldiers to fire without cause, thereby killing a Portuguese civilian'.[33] Aside from the multiple charges, Kortight's case provides one of many examples where the nature of the charge had been softened. Kortright's case could easily have been interpreted as one of manslaughter, but instead he was charged primarily with unofficerlike conduct.[34]

3.5 Desertion in the British Army

It is clear from Table 3.2 that nowhere were the army's priorities in criminal prosecution more clearly defined than in cases of desertion. Desertion rates varied widely across the British army, depending on the location of the regiment, the time of year, and the prevailing mood of the army.[35] Kevin Linch has shown that that the majority of desertions within British regiments occurred when those units were based in the British

[32] WO90/1
[33] TNA, WO90/1.
[34] This softening of charges is a theme which will also emerge in Chapter 4, pp. 128-140.
[35] Zack White, "Another Tarnish for British Valour': Responses to Success and Failure in Wellington's Peninsular Army', in *Life in the Redcoat: The British Soldier 1721-1815*, ed. By Andrew Bamford (Warwick: Helion & Co, 2020), pp. 153-176 (pp. 160-162).

Isles, and that the problem usually affected new recruits.[36] Meanwhile Joseph Cozens has made a convincing case that desertion was often not a random drunken mistake, but rather was a calculated move to fraudulently obtain bounty money, or escape the army entirely.[37] The motives of the individual deserter can be hard to ascertain, particularly since trial proceedings demonstrate a noticeable tendency for soldiers to employ drunkenness as a mitigating defence, which would result in a softening of the eventual punishment. In April 1814, for example, Thomas Lambert employed this defence when charged with 'Deserting from his post towards the enemy, when on picquet advanced from Prescott, on or about the night of the 2nd March 1814'.[38] Similarly, Privates James Smith, John Williams, and Joseph Widdows were tried in Quebec on 10th September 1816 at GRCM for desertion, and all three acknowledged their guilt, but claimed to have been drunk when they did so, and threw themselves on the mercy of the court.[39] These were interesting, calculated moves, as the defendants were acknowledging guilt to a further crime, of being drunk on duty, which itself was tried at GCMs and was given punishments of between 200 and 1,000 lashes.[40] The effectiveness of such a defence varied, as softer punishments were often in part due to a mixture of mitigating factors, including the character of the soldier. In Lambert's case he was found guilty of deserting his post, but not guilty of desertion towards the enemy.[41] He therefore escaped being shot, but only five of the 14 officers who judged the case felt that flogging was appropriate, and he was sentenced to transportation for life, a punishment which was confirmed by the Prince Regent.[42] In the case of Smith, Williams and Widdows, they all received 800 lashes, though three of the nine officers judging the case considered 999 or 1,000 lashes to be more appropriate. We can certainly question the veracity of Widdows's defence, however, as he was convicted of desertion again, seven months later.[43] Yet, the frequent employment of the drunkenness defence would suggest

[36] Kevin Linch, 'Desertion from the British Army during the Napoleonic Wars', *Journal of Social History*, 49, 4 (2016), 808-828 (820-821).
[37] Joseph Cozens, "The Blackest Perjury': Desertion, Military Justice, and Popular Politics in England, 1803–1805' *Labour History Review*, 79, 3 (2014), 255-280 (279).
[38] SCA, D/PM/20/29/a. Trial of Thomas Lambert, 11th April 1814.
[39] D/PM/20/30/1. Trial of James, Smith, John Williams and Joseph Widdows, 10th September 1816.
[40] TNA, WO90/1. See, for example, the trial of Private Bertrand, York Light Infantry Volunteers, on 6th February 1816, who was sentenced to 200 lashes for being drunk on guard, and the trial of Private Jonathan Hart, 8th Foot, on 28th November 1818, who was sentenced to 1,000 lashes for being drunk on his post.
[41] SCA, D/PM/20/29/a, Trial of Thomas Lambert, 11th April 1814, f. 5-6 .
[42] D/PM/20/29/a. Separate sheet containing details of how the court voted on the trial; WO92/1.
[43] WO89/4.

that it was common knowledge amongst the men. This points to an interesting undercurrent of awareness amongst the soldiers, of how to ameliorate a punishment if caught. The British soldier, then, was far from ignorant about the nature of military law, and how he could manipulate the system should he need to.

Whilst the factors motivating an individual to abandon his unit are therefore complex and difficult to determine, the army's motives in prosecuting them are far clearer. Registers of deserters, including their age, height, complexion and date of enlistment are contained in WO25/2907 and WO25/2908, and list over 13,000 individuals between 1811 and 1819. [44]

In the context of the Peninsular War desertion appears to have been a relatively benign issue. Rates of desertion fluctuated between regiments and according to the contemporaneous strategic situation. The Chasseurs Britanniques and 5th Battalion, 60th Regiment (5/60th) experienced easily the worst desertion rates of the regiments in Wellington's army: seeing 639 desertions over 41 months and 427 desertions over the 70 months they were deployed in the Peninsula.[45] Such high desertion rates may be attributable to the source of these units' recruits, as a significant number were foreign nationals or deserters from the French army who felt little affiliation with the regiment, the army's cause, or the British army or nation more generally. In the case of the 5/60th, the unit was also split across the divisions of Wellington's army, serving as small light infantry detachments, making cohesive, centralised control by the regiment's officers more challenging.[46] Perhaps more surprising and less easily explained in relation to primary group theory and existing theoretical models of motivation, is the case of the 95th Foot or 'Rifles' regiment. The Rifles have enjoyed the reputation of an elite unit, trained under the more 'humane' ideals of discipline advocated by Sir John Moore.[47] Their exploits are well documented in the wealth of memoirs from those who served in the unit, especially in the

[44] TNA, WO25/2907-2907, Registers of deserters for regular infantry and cavalry, 1811-1818. This figure is much lower than that calculated by Kevin Linch based on Parliamentary estimates, which he puts at 77,696. See, Linch, 'Desertion from the British Army during the Napoleonic Wars', p. 809.

[45] Bamford, British Army Theatre returns, 1808-1815, <https://www.napoleon-series.org/military-info/organization/Britain/Strength/Bamford/c_BritishArmyStrengthStudyIntroduction.html> [Accessed 4th March 2019].

[46] Oman, *Wellington's Army*, pp. 344-72.

[47] Arthur Bryant, *Jackets of Green: A Study of the History, Philosophy and Character of the Rifle Brigade* (London: The History Book Club, 1972), p. 15.

case of the 1st battalion. However, what has not previously been documented is the fact that all three battalions experienced some of the worst desertion rates of Wellington's troops. Table 3.3 outlines the number of desertions experienced by a selection of units in Wellington's army on a yearly basis.

Table 3.3: Desertions in Wellington's Army during the Peninsular War.[48]

Year	1/40th	1/43rd	1/45th	1/48th	1/52nd	1/88th	5/60th	1/95th
1808	0	0	2	-	3	-	49	2
1809	3	3	18	1	1	12	21	4
1810	1	5	0	1	14	5	32	5
1811	0	3	2	3	7	15	10	6
1812	2	11	40	2	7	7	61	37
1813	4	17	7	5	11	17	102	12
1814	3	8	12	6	2	17	160	8
Total	13	47	81	18	44	68	435	74
Average	**0.2**	**0.8**	**1.2**	**0.3**	**0.7**	**1.1**	**6.2**	**1.2**

The numbers of deserters outlined in the table are by no means excessively high, and are dwarfed by those of the Chasseurs Brittaniques and 5/60th, which averaged 15.3 and 6.2 desertions a month respectively.[49] However, when desertion rates for the 1/95th are compared to the army more broadly, the results are surprising. That units with less illustrious reputations experienced fewer desertions raises an interesting question of whether more humane punishment practices really had the desired effect on discipline. Addressing this is complex, and will be explored further in Chapters Four and Five, but it

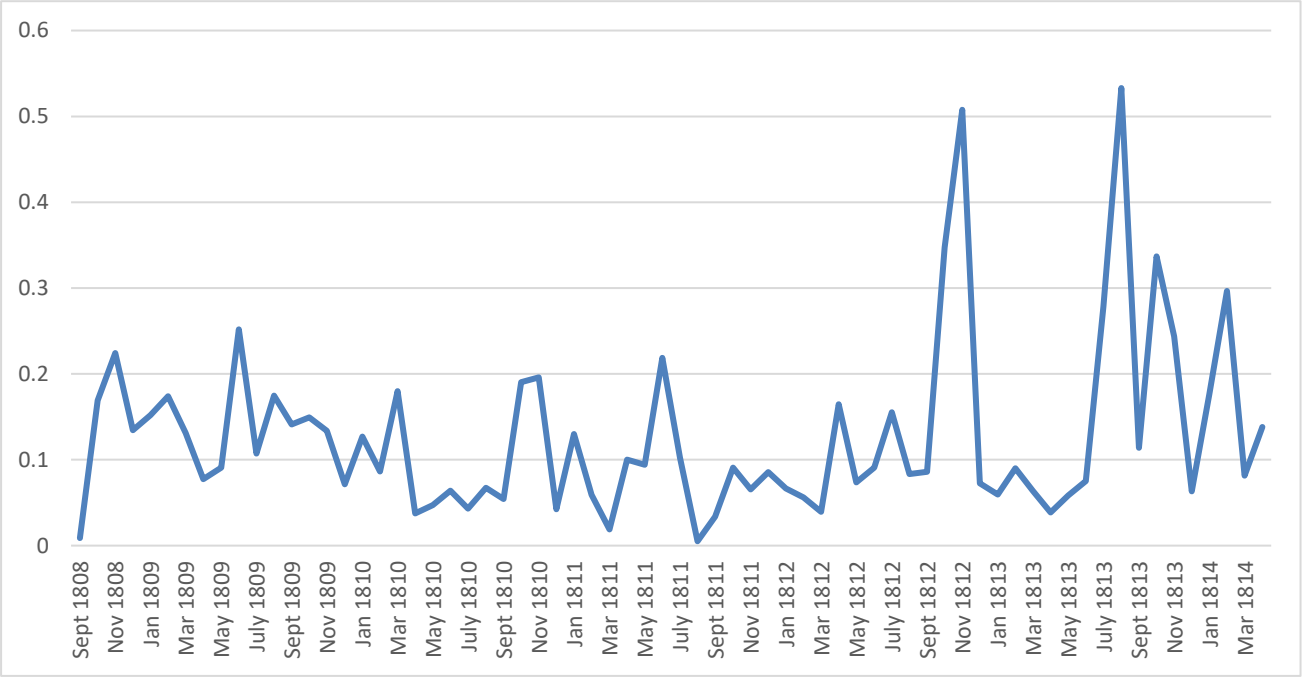
[48] Sourced from Bamford, British Army Theatre returns, 1808-1815, <https://www.napoleon-series.org/military-info/organization/Britain/Strength/Bamford/c_BritishArmyStrengthStudyIntroduction.html> [Accessed 4th March 2019]. This selection demonstrates a range of units which all saw long periods of service under Wellington in the Iberian Peninsula. 1/43rd, 1/52nd, 1/95th, were in Wellington's Light Division. 5/60th was split into companies and distributed across 1st, 2nd, 3rd, 4th and 6th Divisions. 1/45th served in the 3rd Division, and 1/40th served in the 4th Division. The averages have been calculated by dividing the total number of desertions in a given unit by the number of months that unit deployed in the Iberian Peninsula. 1/40th was deployed in Iberian Peninsula between September 1808 and January 1809, and between June 1809 and May 1814. 1/43rd was deployed in December 1808 and from July 1809 until June 1814. 1/45th was deployed continuously from September 1808 until June 1814. 1/48th was deployed between July 1809 and May 1814. 1/52nd was deployed between September and December 1808 and between July 1809 and May 1814. 1/88th was deployed between April 1809 and May 1814. 5/60th was deployed between September 1808 and June 1814. 1/95th deployed from September to December 1808 and from July 1809 until June 1814.

[49] Bamford, British Army Theatre returns, 1808-1815, <https://www.napoleon-series.org/military-info/organization/Britain/Strength/Bamford/c_BritishArmyStrengthStudyIntroduction.html> [Accessed 4th March 2019]

nonetheless demonstrates a further nuance to the discussion on the abolition of flogging within the army.

It is important to retain a sense of perspective when considering desertion data for Wellington's army. Figure 3.1 charts the fluctuations in desertion over the course of the Peninsular, but crucially expresses the number of desertions as a percentage of the British troops deployed in the force under Wellington's command.

Figure 3.1: The proportion of desertions from the British forces deployed throughout the Peninsular War, 1808-1814, calculated as a percentage of the total number of British troops in Wellington's Peninsula army.



It is clear that desertion rates throughout the Peninsular War were exceptionally low. At their worst, in August 1813, deserters comprised 0.53% (321 men out of 60,223), whilst at their best desertions affected a mere 0.03% (19 men out of 56,297). Nonetheless, the reasons behind some of those peaks are revealing in relation to the army's efforts to maintain discipline amongst its troops. The comparatively high numbers for August and October 1813 related to a proclamation issued by the Prince Regent declaring that soldiers would be expected to add up to another three years to their period of service, or until a

peace treaty was signed.[50] Such was the significant and sustained nature of the rise in desertion that Wellington was driven to remark on it in General Orders, reminding the troops of the punishments it entailed and dispelling myths spread by the French about how well they treated British deserters.[51] Such a response from the rank and file was not unprecedented. These soldiers had enlisted for a legally agreed period, and for the army to renege on that commitment therefore made soldiers question whether their loyalty was misplaced. As William Tatum has shown, it was not unusual for soldiers to express their discontent when ordered to embark for an unknown destination which would extend beyond their term of service.[52] Once again, therefore, the rank and files' awareness of the legal environment in which they lived and worked is apparent, pointing to a degree of agency amongst the men in embracing the opportunities that this offered.

The spike in desertions in late 1812 also points to a wealth of factors which could erode discipline. This increase coincided with the retreat from Burgos to Ciudad Rodrigo in late 1812, which saw the allies lose much of the ground they had gained over the course of that summer's campaign. This disappointment, which was felt keenly amongst all ranks, coincided with issues of supplies in the final days of the retreat, combining to create a spirit of despondency and disillusionment amongst the troops that motivated some to desert. As will be indicated when discussing plunder later in this chapter, keeping the men adequately supplied was a key factor in maintaining discipline.

The low rates both in the context of the Peninsular War, and the British Army more broadly, compare favourably to other *ancien régime* armies which averaged around 4%.[53] Despite the army's favourable desertion statistics though, the military courts took the matter extremely seriously. Analysis of all 5,748 cases tried in the top two tiers of court (GCMs and GRCMs) between 1808 and 1818 shows that 47% of trials (2,701) were for desertion, unexplained absence, or explicitly 'Absence without Leave' (AWOL).[54]

[50] WP9/1/2/7, General Orders, 13th August 1813.
[51] WP9/1/2/7, General Orders, 4th October 1813.
[52] Tatum, pp. 109-110.
[53] Berkovich, p. 58.
[54] 2384 cases outlined desertion as being at least part of the charge, absence was cited in a further 235 charges, and 'AWOL' in an additional 82.

As Table 3.4 indicates, proportionately the number of trials for desertion rose relatively consistently until 1812, where it plateaued at around 45%, with the exception of 1814 and 1815, which saw a significant drop and spike respectively. Desertion was therefore consistently the most prosecuted crime in the army, and its importance to prosecutors did not diminish with the arrival of peace in 1815. What is particularly noticeable from the study of desertion trials, however, is the significant numbers which were passing through the 'middle' tier of court, the GRCM. In fact, from their creation in 1812 to the end of the period of this study, desertion, absence and AWOL trials comprised 63.3% of GRCM business.[55]

Table 3.4: Total number of trials at GCM and GRCM where desertion formed part of the charge, 1808-1818.[56]

Year	GRCMs	GCMs at Home	GCMS abroad	GCMs Total	Grand Total	Grand Total as a percentage of all trials held
1808	-	53	23	76	76	26.2
1809	-	31	31	62	62	21.7
1810	-	55	53	108	108	30.1
1811	-	41	64	105	105	36.6
1812	144	43	111	154	298	46.1
1813	159	56	204	260	419	44
1814	86	27	150	177	263	38.9
1815	223	52	102	154	377	53.2
1816	113	69	93	162	275	45.8
1817	71	62	63	125	196	44.7
1818	177	21	30	51	228	45.1
Total	**973**	**510**	**924**	**1434**	**2407**	**41.9**

The Articles of War and Mutiny Act were unequivocal in their stipulations on how the military courts could punish deserters if those judging the case deemed it appropriate. Section 6, Article 1 of the Articles of War directed that all officers, Non-Commissioned Officers (NCOs) and soldiers who deserted could be sentenced to death by a General Court Martial.[57] By 1813, the Articles of War had gone even further, asserting that NCOs or soldiers who deserted could not escape punishment by re-enlisting, a move doubtlessly

[55] WO89/4, 1,063 of 1,678 GRCM trials.
[56] WO89/4, WO90/1, WO92/1. Note that this table only includes those cases where individuals were explicitly tried for desertion, and does not include those specifically tried solely for 'absence'. This accounts for the discrepancy between the total of 2407 individuals tried as listed in the table, compared to the figure of 2701 stated above.
[57] *Articles of War* (1798), Section VI, Article I, p. 16.

designed to address the phenomenon of soldiers deserting and re-enlisting in another regiment in order to claim the bounty money.[58] The trial of desertion in lower courts was facilitated by the wording of the Mutiny Act, which was more ambiguous since it failed to stipulate which tier of court was most appropriate for the offence. That such large numbers of these trials were passing through GRCMs, which did not have the power to execute deserters like the GCMs, is suggestive of a desire to both treat the issue seriously, whilst also suggesting a reluctance to prosecute to the full extent of the law.

What is also noticeable, is that whilst there is a distinct increase in the number of desertions prosecuted, these figures are miniscule in comparison to the numbers who are recorded as having deserted. 1808 alone saw the entire regular British Army lose 6611 men as deserters.[59] 1812, by way of further example, saw 5,918 desertions.[60] This means that in those respective years, the army tried 1.1% and 5.0% of deserters. Table 3.4 also clearly highlights the central role that the new GRCM tier of court played in trying desertion following its introduction in 1812. For our period, 58% of all GRCMs dealt with desertion in some form, whilst desertions comprised 35.2% of all GCM cases. Given that GRCMs were unable to sentence offenders to capital punishment, this would therefore suggest that a conflict existed between wishing to try more deserters, thereby making an example of cases in order to deter others from abandoning their regiments, whilst also being reluctant to implement the full extent of the law by shooting those found guilty. Once again, the pragmatism underpinning the imposition of military justice, and the influence of the discretion of those judging each case, is apparent.

These conflicting motives are also apparent from examining the punishments issued by GCMs and GRCMs for this crime. Tables 3.5 to 3.8 outline the distribution of punishments issued for desertion trials across each court and over the period under scrutiny.

[58] Articles of War (1813), Section VI, Article I, pp. 16-17.
[59] TNA WO25/3224, Return of the Number of casualties which have occurred in the Regular Army.
[60] TNA WO25/3225, Return of the Number of casualties which have occurred in the Regular Army for the Years 1811, 1812 and 1813.

Table 3.5: Punishments for desertion issued by GCMs confirmed at Home, 1808-1818.[61]

Year	Flogged	Executed	Transported	Confined	Service extended
1808	11	4	24	0	13
1809	4	5	12	0	15
1810	2	3	31	0	18
1811	4	0	14	0	26
1812	2	1	17	3	10
1813	5	0	36	1	19
1814	2	0	16	0	4
1815	0	1	24	0	27
1816	2	3	6	0	55
1817	3	4	14	0	40
1818	1	1	9	0	10
Total	**36**	**22**	**204**	**4**	**246**

Table 3.6: Punishments for desertion issued by GCMs confirmed Abroad, 1808-1818.[62]

Year	Flogged	Executed	Transported	Confined	Service extended
1808	14	4	2	0	3
1809	9	11	2	2	0
1810	19	30	0	0	4
1811	26	29	2	0	1
1812	32	63	0	2	11
1813	60	95	1	2	27
1814	58	57	1	2	22
1815	56	13	1	13	11
1816	68	5	9	5	6
1817	34	14	5	4	4
1818	11	8	5	6	0
Total	**386**	**329**	**28**	**36**	**89**

[61] WO92/1.
[62] WO90/1.

Table 3.7: Punishments for desertion issued by GRCMs, 1812-1818.[63]

Year	Flogged	Transported	Confined	Service extended
1812	92	0	24	28
1813	66	0	35	62
1814	38	1	2	44
1815	149	1	16	54
1816	83	0	7	24
1817	47	0	16	7
1818	103	0	16	55
Total	**578**	**2**	**116**	**274**

Table 3.8: Total distribution of punishments for desertion across GCMs and GRCMs, 1808-1818.

Year	Flogged	Executed	Transported	Confined	Service extended	Total
1808	25	8	26	0	16	75
1809	12	16	14	2	15	59
1810	21	33	31	0	22	107
1811	30	29	16	0	27	102
1812	126	64	17	29	74	310
1813	131	95	25	27	74	352
1814	126	57	18	37	104	342
1815	205	14	26	29	92	366
1816	153	8	15	12	85	273
1817	84	18	19	20	51	192
1818	115	9	14	22	65	225
Total	**1034**	**351**	**221**	**178**	**625**	**2409**[64]

The conflicting pictures are particularly apparent when confinement is considered. At GRCMs, the frequency of confinement as a punishment dropped. For GCMs confirmed abroad, confinement was used only occasionally, and for GCMs confirmed at home, confinement was almost never used. Taken as a whole, confinement was the least issued punishment for the army's most prosecuted crime. By contrast, flogging was the preferred method of dealing with deserters, however, there is an important caveat to that. As Table 3.6 demonstrates, executions exceeded floggings every year between 1809 and 1813

[63] WO89/4.

[64] The number of punishments exceeds the total number of desertion trials as multiple punishments could be issued in response to a single case.

amongst the GCMs confirmed abroad. This points to an important factor which influenced the implementation of military justice: its flexible application depending on the contemporaneous strategic situation. For officers in the field, the need to make a clear and public example of a deserter as a means of deterring others, combined with the logistical challenges of confining a prisoner for lengthy periods, resulted in a greater inclination to embrace capital punishment. Yet with the conclusion of the war, first in 1814, and then definitively after Napoleon's second abdication in 1815, the need to maintain such strict discipline abated with a corresponding fall in executions for desertion overseas.

The data relating to transportation is also revealing, with a far greater utilisation of this punishment amongst the registers of Courts Martial which were confirmed at home. The reasoning behind this will be explored further below, though it is worth highlighting that the role of the Prince Regent was key here, again pointing to the role of discretion and a more humanitarian outlook on the implementation of military justice.

The use of flogging to punish desertion increased dramatically over the period, thanks in large part to the creation of the GRCM tier of court. Whilst the opportunities that this new court offered were therefore embraced when it came to trying the more serious cases that would previously have been dealt with at RCM level, the focus was not on punishing better, but rather punishing more. This assessment would therefore appear to support both Buckley's notion of a military justice system based upon terror and torture, and the idea that Hay's assessment that law existed to keep the lower orders in check. However it is important to consider the primary function of military law: the maintenance of discipline to ensure that the army was capable of fighting effectively. That this was the pre-occupation of the military courts is demonstrated by the considerable proportion of trials devoted to trying desertion and absence. As a result, it is unsurprising that the court martial data shows stringent efforts were made to keep the lowest ranks in the army, and punishing those who left without permission. However, this in itself does not undermine the notion that accountability was fundamental to the imposition of military law, and, as will be demonstrated in Chapter Four, the techniques used to tackle desertion were often nuanced.

One further category of corporal punishment is not included in the tables above. Branding and marking was only used as a punishment in desertion cases, with those sentenced to the punishment marked with a letter D two inches below the left armpit, with

the letter being at least half an inch long, and marked on the skin 'with some ink or gunpowder, or other preparation, so as to be visible and conspicuous and not liable to be obliterated'.[65] Table 3.9 outlines the use of branding across the GCM and GRCM tiers, and indicates that brandings actually increased significantly over the period.

Table 3.9: Trials where branding was part of the punishment for desertion at GCMs and GRCMs, 1808-1818.[66]

Year	GRCMs	GRCMs %	GCMs at Home	GCMs at Home %	GCMs abroad	GCMs abroad %	Total	Total %	Total No. Desertion trials	% desertion trials with branding
1808	-	-	1	0.6	2	1.7	3	1	76	3.9
1809	-	-	1	0.7	0	N/A	1	0.3	62	1.6
1810	-	-	0	N/A	0	N/A	0	0	108	0%
1811	-	-	2	1.7	0	N/A	2	0.7	105	1.9
1812	28	14.5	3	1.4	5	2.1	36	5.6	298	12.1
1813	9	3.2	4	2.2	2	0.4	15	1.6	419	3.6
1814	6	2.9	1	0.9	4	1.1	11	1.6	263	4.2
1815	30	8.8	9	8.2	2	0.8	41	5.8	377	10.9
1816	30	13.2	29	26.1	22	8.4	81	13.5	275	29.5
1817	20	12.9	17	16.3	11	6.1	48	11	196	24.5
1818	68	25.1	6	8.7	5	3	79	15.6	228	34.6
Total	**191**	**11.4**	**73**	**4.8**	**53**	**1.3**	**317**	**5.5**	**2407**	**13.2**

The increase in the use of branding in the wake of the Napoleonic Wars is particularly striking from this data. It is difficult to determine the reasons behind the increase, although it is feasible that the fall in executions was transposed by the rise in branding. The use of the brand, which constituted a permanent badge of dishonour, offered a way of marking out the individual amongst their peers, making a visible example of them to their peers, without executing them.

It is clear, therefore, that the introduction of an intermediate tier of court martial, did not herald a reduction in the severity of punishments, but quite the reverse. Whilst the proportion of death sentences issued in desertion cases fell, it is important to remember that GRCMs did not have the power to sentence guilty men to execution. As GRCMs were tasked with trying RCM cases that merited more severe punishment, the fall in death

[65] 53 Geo. III. Cap 17, Mutiny Act, Clause VIII, p.15.
[66] WO89/4, WO92/1, WO90/1. The percentage columns calculate the number of trials issuing in that category issuing brandings, divided by the number of desertion trials in that tier for each given year.

sentences after the tier's creation represents a dilution of the punishment rather than a real terms fall in its use.

This use of a less senior tier of court to facilitate a more comprehensive approach to punishing desertion clearly contradicts the efforts that were made to the Mutiny Act to make transportation easier to facilitate.[67] Given that this move did not result in a notable shift in punishment practices, it is difficult to apply Foucault's notion that a transition occurred from punishment of the body to punishment of the mind to the military justice system.[68]

3.6 Prosecuting Mutiny

Given the centrality of mutiny to the very naming of the Mutiny Act, it is important to examine charges for the crime, which also included 'exciting mutiny', mutinous language and mutinous conduct. Table 3.10 outlines the number of trials involving mutiny (or equivalent) charges, broken down by tier of court and the year.

Table 3.10: Numbers of men tried for mutiny, mutinous language, or mutinous conduct, 1808-1818.[69]

Year	No. GRCM Trials	% of GRCMs that year	No. GCM at Home Trials	% of GCMs at home that year	No. GCMs abroad Trials	% of GCMs ab that year	Total	% of all trials that year
1808	-	-	5	2.92	12	10.08	17	5.86
1809	-	-	3	2.22	4	2.65	7	2.45
1810	-	-	5	2.76	29	11.24	25	6.96
1811	-	-	2	1.69	1	0.59	3	1.05
1812	2	1.03	30	14.15	18	7.44	50	7.73
1813	3	1.06	5	2.76	55	11.27	63	6.62
1814	3	1.43	8	6.96	22	6.27	33	4.88
1815	19	5.57	1	0.91	34	13.18	54	7.62
1816	7	3.08	3	2.70	20	7.63	30	5.00
1817	4	2.58	0	0.0	17	9.50	21	4.79
1818	1	0.37	2	2.90	25	15.15	28	5.54
Total	**39**	**2.32**	**66**	**4.38**	**228**	**8.90**	**333**	**5.79**

[67] 53 Geo. III, Cap 17, *Mutiny Act*, Clause IV, p. 11.
[68] Foucault, p. 231.
[69] WO89/4; WO90/1; WO92/1.

Prosecutions of mutiny associated charges fluctuated significantly, particularly within the GCMs, though there was a small overall increase between 1810 and 1815. This reflects mutiny being treated more harshly, as more troops were deployed in active theatres. It is also very clear that sentences issued for mutiny were not something that was considered to require approval from the Prince Regent and so were generally not sent home for confirmation. Rapidity of punishment was therefore seemingly considered key for mutiny, which would account for the reluctance to delay infliction of punishment by sending the trial proceedings home. It is also significant that the creation of the GRCM tier did not have a profound effect on the numbers of individuals tried for the crime. This suggests the trying of mutiny at GCM was an established practice, whereby it was consistently dealt with at the most senior tier of court to reflect the seriousness of the offence. As will be seen in Chapter Four, this stands in contrast to desertion, which was tried at a multitude of courts, and distinctions between offences were more nuanced.

It is worth reflecting on the fact that the number of mutiny-related trials represented at most 7.7% and at its least 1.1% of the business of the top two tiers of military court. This is significant when trying to assess where military law sat in relation to the idea of keeping the lower orders in check. Whilst punishing mutiny or mutinous conduct was certainly an important aspect of keeping all ranks, including officers, subservient to the orders of their commanders, the prosecution of mutiny charges pales in comparison to those of desertion. This therefore indicates the prosecutions were not excessive, but rather proportionate to necessity.

3.7 Prosecuting theft and the failure to attend to the victim's needs

Given Hay's argument that non-military law was predominantly used by the propertied classes to protect their possessions, examining the handling of property crime by military courts contributes to understanding any commonality between the military and non-military systems. Property-based offences, which were variously described in charges as theft, burglaries, stealing, robbery or taking without consent, represented the second most common category of offence charged at GCM and GRCM.[70] Table 3.11 shows the number of trials for these at GCM and GRCM, alongside the commutation rates, with GCMs having

[70] See Table 3.2 above.

been split between those which were sent home for confirmation by the King or Prince Regent (GCMs @H), and those that took place abroad, but did not need to be confirmed at home (GCMs ab).

Table 3.11: Trials for theft and similar offences at GCMs and GRCMs 1808-1818.

Year	GRCMs		GCMs @H		GCMs ab		GCMs Total		Grand Total	
	Trials	Commuted	Trials	Commuted	Trials	Commuted	Trials	Commuted	Trials	Commuted
1808	-	-	10	6	22	2	32	8	32	8
1809	-	-	12	5	15	0	28	5	28	5
1810	-	-	15	5	29	1	44	6	44	6
1811	-	-	2	0	22	0	24	0	24	0
1812	16	2	33	8	20	2	53	10	69	12
1813	38	10	17	4	84	19	101	23	139	33
1814	33	1	27	10	40	3	67	13	100	14
1815	29	7	10	0	23	2	33	2	62	9
1816	28	4	28	4	32	0	60	4	88	8
1817	20	5	21	4	23	4	44	8	64	13
1818	34	10	56	12	39	2	95	14	129	24
Total	**198**	**39**	**231**	**58**	**349**	**35**	**580**	**93**	**778**	**132**

It is immediately clear that property offences were taken sufficiently seriously for the majority (74.6%) to be tried in the highest tier of court. It is also interesting that commutation rates were not especially high at 17%. It is difficult to ascertain precisely why this was the case, though it is logical that social attitudes towards this crime were likely to influence the manner in which it was tried. Wellington himself demonstrated this when describing thefts as 'outrages' in general orders.[71] The context of these comments is key, as 'outrage' could refer to an act of violence, or sexual assault.[72] However, Wellington used the term interchangeably, referring to the plunder of beehives, more general cases of theft, and theft involving violence. Fundamental to the way in which he expressed himself on these occasions was that such conduct was 'a disgraceful excess', and 'unmilitary'.[73] However, this argument should not be overstated, since tackling plundering of civilians by the troops was of vital strategic importance to Wellington in order to prevent the alienation of the local population. For commanders in the field, tackling plundering was therefore

[71] WP9/1/2/1, 7th September 1809; WP9/1/2/3, 25th March 1810, 4th April 1810; WP9/1/2/6, 21st February 1813; WP9/1/2/7, 8th October 1813.
[72] Oxford English dictionary, 'Outrage' <https://www.oed.com/view/Entry/133856?rskey=BIoAxi&result=1&isAdvanced=false#eid> [Accessed 8th June 2021]
[73] WP9/1/2/6, 21st February 1813; WP9/1/2/1, 7th September 1809.

largely a pragmatic concern that was essential to ensure harmonious relations with the local population. This is not to suggest that social attitudes did not play a role in how the crime was perceived, but rather that military courts were a tool through which to implement military necessity, rather than societal norms.

This emphasis is also apparent in the failure of the military courts to compensate victims of theft for the goods that they had lost, which may have, ironically, affected the army's ability to prosecute cases of theft. Wellington complained of the fact that civilians in the Iberian Peninsula were unwilling to come forward to testify, thereby hindering the legal process.[74] Language was not in itself a barrier to victims giving evidence, with the JAG, Manners Sutton, writing that in appropriate cases, requests for funds for interpreters should be forwarded to the Secretary at War.[75] Irrespective of this, the issue persisted throughout the conflict, as Wellington later wrote to British Ambassador to Portugal Charles Stuart about the same problem in 1813.[76] Wellington's concern was that the failure of these witnesses to appear to give testimony was resulting in soldiers receiving acquittals due to a lack of evidence.[77] As a result, the complaints made were not being addressed, which in turn resulted in Wellington being accused of awkwardness and insolence.[78]

One of the possible reasons why civilians did not always attend trials was the issue of remuneration. Manners Sutton was against the principle of compensating victims for their stolen goods. In a letter to the Deputy Judge Advocate General with Wellington's army Francis Larpent he remarked that 'it is clear the practice, if it ever existed, is wrong – nor can I think the practice a very long established or inveterate one, as the cases can only occur out of this country, in places where there are no civil courts or Judicature.'[79] Associations for the prosecution of felons within the British Isles encouraged their members to attempt to secure convictions by military, rather than civilian, courts in order to remove the costs associated with procuring witnesses.[80] However, there is no evidence of successful prosecutions resulting in the reimbursement of victims. If anything, it is

[74] WD IV, pp. 502-503. Sir A. Wellesley to J. C. Villiers, 9th July 1809.
[75] WO81/43, Charles Manners Sutton to Major Reynolds, 18th September 1810.
[76] WD X, pp. 131-132. Earl Wellington to Sir Charles Stuart, 22nd February 1813.
[77] *Ibid*., p. 131.
[78] *Ibid*., p. 131.
[79] WO81/47, Charles Manners Sutton to Francis Larpent, 19th February 1813.
[80] King, *Justice and Discretion*, p. 28.

apparent from both the court martial proceedings, and from the sentences issued, that the military courts had little interest in providing restitution to victims. Of the 778 cases of theft, stealing or burglary in the court martial database, just 44 (6%) resulted in sentences where the thief received stoppages of pay. The widespread failure to do this strongly suggests that compensation was never paid, and victims therefore gained nothing from a guilty verdict.

This curious lack of focus on compensating victims of soldiers' crime is equally apparent in trial proceedings. In January 1810, for example, Private James McGill was tried for stealing from a house and being absent from guard duty. The civilian victim of the theft testified in the trial, but the questions put to her showed no interest in establishing the value of the goods taken, simply focusing on determining how she knew that the accused was the person who had stolen from her house. McGill was found guilty, but his sentence did not involve any form of fine. He was initially sentenced to be hanged, but this was commuted to transportation for life to the British colony of New South Wales.[81]

However, this disinterest in reimbursing the victim was not limited to civilians. In March 1809, Private William Weston appeared before a GCM on a number of charges, including 'selling a watch not his own', which had been stolen from a fellow soldier. Although the first witness testified that the accused received 24 shillings when he sold the silver watch in question, this was the only point in the trial where money was mentioned. The victim of the theft also testified, but was not asked about the watch's true value. Weston was ultimately acquitted of the charge concerning the watch on the grounds of insufficient evidence, but the lack of focus on the watch's value stands in marked contrast to the importance that was placed on the value of the goods stolen in trials in civilian courts.[82] With no provision for this in the Mutiny Act, a resultant disinterest from the military courts in the value of goods stolen, and a related lack of reimbursement, ensured that military courts were not avenues of reimbursement for victims of theft.

This should not be taken as an indication that military law was ineffective, but rather as further evidence of its bespoke purpose. Military law did not attend to the needs of the victim for the simple reason that it was never conceived to do so. Instead, its *raison d'être*

[81] WO71/220, Trial of Private McGill, 22nd January 1810.
[82] Beattie, *Crime and Courts*, pp. 38-39.

was to punish the individual in such a way that deterred others from doing something similar. With the army's pay being months in arrears in the Iberian Peninsula, flogging was a much more effective and tangible punishment than the withholding of money which the troops were not receiving anyway. Furthermore, it is particularly clear that restitution in cases of property offences was not a priority of the military courts, further undermining the applicability of Hay's thesis to the operation of military law.

3.8 The prosecution, or otherwise, of sexual assault.

Whilst desertion, theft and mutiny were clearly high priorities for the army, it also interesting to note which categories of crime were not high on the army's agenda. Foremost amongst these were sexual violence and misconduct. Here again, the lack of attention paid by military courts to the needs of the victim are apparent.

The army prosecuted just 14 individuals for rape or attempted rape between 1808 and 1818. The incredibly small number of prosecutions is significant, as this by no means suggests that sexual assault was a relatively unknown crime within the army, as there was, and remains, a widespread problem across society of victims declining to report assaults.[83] Soldiers, and even officers, not only committed sexual assault, but were at times quite brazen in admitting to it. Notwithstanding a culture of sexual aggression which can be gleaned from some memoirs, Charles Esdaile has suggested that the majority of soldiers were 'held in check by the bounds of discipline'.[84] Esdaile's comments are particularly made in reference to the exceptions of the sackings of Ciudad Rodrigo and Badajoz in 1812, which he suggests points to a situational, rather than systemic problem within the British army in preventing sexual assault.

Nonetheless, as Gavin Daly has highlighted, soldiers considered sex to be 'one of the recognised pleasures of war', and Michael Hughes has shown that, within the context of the French army, martial cultures did partially revolve around sexual aggression.[85]

[83] Weiner, pp. 7-8.
[84] Charles Esdaile, *Women in the Peninsular War* (Norman: University of Oklahoma Press, 2014), p. 214.
[85] Gavin Daly, *The British Soldier in the Peninsular War: Encounters with Spain and Portugal, 1808-1814* (Basingstoke: Palgrave Macmillan, 2013), p. 188; Michael J. Hughes, *Forging Napoleon's Grande Armeé: Motivation, Military Culture, and Masculinity in the French Army, 1800-1808* (New York: New York University Press, 2012), p. 127-8.

Evidence from memoirs and letters of British soldiers, both officers and the rank and file, suggest that sexual assault was certainly more frequent than the 14 cases tried in the courts martial might suggest.

August Schaumann, an officer in the Commissariat department, recounts how he and a number of his colleagues, on coming across a Portuguese peasant woman and her beautiful daughter 'among other things, […] made her kiss us each in turn before taking our leave, and as the last one to be kissed always [circled] round to the tail of the line in order to be kissed again, the poor girl never came to an end with her kissing.'[86] This was by no means the only example that can be found in Schaumann's memoir. The casual objectification of women punctuates his writing, commenting on the appearance of the Spanish ladies in terms such as 'their calves were pretty, they had small kissable feet […] Their hips were well developed, and their arms and breasts full'.[87] Some of his remarks were altogether more sinister. After encountering 'a pretty girl' who had lost her family, and was distraught by the experience, he offered to look after her for time. However as the girl, Eufemia das Neves, 'did not cease wailing about the cold, I regarded it as a duty and obligation to warm her in the suitable way. […] although she resisted me at first, she soon became very happy'.[88]

The presumptuousness of some officers is demonstrated equally clearly by a letter from Cornet Kinchant, written in 1815:

> The women are very plain […] it is with great difficulty I can make them understand my wants […] I asked a girl one day if she would let me *manoeuvre* her, she answered 'Yaw, Yaw', little thinking from her reply but she understood & was willing, I proceeded to action; when lo! To my astonishment she kicked [up] such a row in Dutch that I never before heard, & ran away as fast as she could.[89]

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[86] A. F. L. Schaumann, *On the Road with Wellington: Diary of a War Commissary in the Peninsular Campaign* (Barnsley: Frontline Books, 2015), p. 29.
[87] *Ibid*., p. 207.
[88] *Ibid*., pp. 254-356.
[89] Gareth Glover, *The Waterloo Archive: Volume III* (Barnsley: Pen & Sword, 2011), p. 30. Subsequently Glover, *Waterloo Archive*. Cornet Francis Charlton Kinchant, 2nd Dragoons (Scots Greys), to Sir John Hall, Denderhoutem near Grammont, 21st May 1815. The italics appear in the original.

Whilst it is important not to inject modern attitudes of appropriate behaviour into an analysis of the past, both Schaumann and Kinchant unquestionably committed sexual harassment, and a strong case could be made that Schaumann's actions with Eufemia amounted to rape. The 'communication problem' caused by the language barrier in Kinchant's letter demonstrates how easily the inability to communicate due to language could lead to sexual assault, further demonstrating how important it is not to misinterpret the absence of such cases as evidence that they did not occur. Memoirs and letters are rarely as candid as the examples of Schaumann and Kinchant, something which Daly comments is unsurprising given their intended readers, and the moral codes of the time.[90] When these accounts are considered, it is less surprising that, in such an environment, such a small number of rape cases were tried by the military courts.

It must be acknowledged that these attitudes were by no means unique to this conflict. Gregory Urwin and Holly Mayer have both highlighted the large number of rapes British forces conducted in New Jersey in 1776, during the American War of Independence.[91] Karen Hagemann has expressed scepticism over the fact that no sexual assaults were reported in Leipzig when the city was taken in 1813, arguing that the subject was taboo, and 'discussed only in metaphorical terms as a threat to the honour of the nation or men'.[92]

This attitude which both normalised sexual violence, and refused to treat the crime with the seriousness it deserved, was not unique to the armed forces during this period. It is clear that rape was rarely tried in European society in the long-eighteenth century. George Vigarello has argued that prosecutions for rape were a rare occurrence due to the victims' reluctance to report crimes, and the difficulty of proving that a rape had taken place.[93] At the heart of this problem were contradictory contemporary attitudes towards

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[90] Daly, p. 192.

[91] Gregory Urwin, "To bring the American Army under strict Discipline': British Army Foraging Policy in the South, 1780-81', *War In History*, 26, 1 (2019), 4-26 (6-7); Holly A. Mayer, 'Bearing Arms, Bearing Burdens: Women Warriors, Camp Followers and Home-Front Heroines of the American Revolution', in *Gender, War and Politics: Transatlantic Perspectives*, ed. by K. Hagemann, G. Mettele and J. Rendall (Basingstoke: Palgrave Macmillan, 2010), pp. 169-187 (p. 182).

[92] Karen Hagemann, "Unimaginable Horror and Misery': The Battle of Leipzig in October 1813 in Civilian Experience and Perception' in *Soldiers, Citizens and Civilians: Experiences of the Revolutionary and Napoleonic Wars, 1790-1820*, ed. by A. Forrest, K. Hagemann and J. Rendall (Basingstoke: Palgrave Macmillan, 2009), p. 168

[93] George Vigarello, *A History of Rape: Sexual Violence in France from 16th to 20th Century,* trans by Jean Birrell (Cambridge: Polity Press, 2001), pp. 241-242.

women, which simultaneously considered them to be more vulnerable, and yet saw women who were unable to fight off their attackers as potentially promiscuous.[94] A failure to cry for help, for example, was considered to be a serious weakness in any sexual assault case.[95] Beattie points to the fact that those who came forward to report rapes and pursue prosecutions opened themselves up to 'publicity and to the embarrassment and pain of having to prove in court that an attack had taken place and that it was indeed a rape, that the accused had had carnal knowledge of her 'forcibly and against her will'.[96] Scholars have uncovered a multitude of demonstrations of the challenges of securing rape prosecutions. Beattie highlights that part of the challenge lay in proving 'that the rape had actually been accomplished, that there had been penetration'.[97] This was even challenging in child abuse cases. Vigarello has pointed to the example of a teacher who in 1818 was convicted of 'indecent assault', but not the rape for five small girls despite a doctor's report testifying to the victims' absence of hymen.[98]

In such an environment, it is debatable how far sexual assault was taken seriously by the military courts. The fact that only 14 individuals were brought to trial for the offence immediately speaks volumes about the fact that this was not a crime which was high on the military courts' list of priorities. It is worth noting, by way of comparison, that 22 individuals were tried for homosexuality (described in charges variously as 'sodomy', 'buggery' and 'an unnatural crime'). This number of individuals tried is extremely low, even given the attitudes of nineteenth-century society, and the challenges of bringing such cases to trial. Susan Barber and Charles Ritter have found that during the American Civil War almost 400 cases of the 80,000 tried were for rape.[99] Although only amounting to 0.5%, this is still substantially above the 0.15% of the 9,228 cases in the database underpinning this study. Notwithstanding this, all cases were tried at GCM or GRCM, theoretically showing that, in the rare instances when a case was brought to trial, it held a degree of gravitas, and was treated seriously.

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[94] *Ibid*., p. 126.
[95] Beattie, *Crime and Courts*, p. 126.
[96] *Ibid*., pp. 124-125.
[97] *Ibid*., p. 125.
[98] Vigarello, pp. 121-122.
[99] E. Susan Barber and Charles F. Ritter, "Unlawfully and Against Her Consent': Sexual Violence and the Military During the American Civil War', *Sexual Violence in Conflict Zones* ed. by Elizabeth D. Heineman, (Philadelphia: University of Pennsylvania Press, 2011), pp. 202-214 (p. 202).

Table 3.12 outlines the available details of rape trials during the period that can be gleaned from the Court Martial registers.[100] Examining the outcomes of these trials, it appears that the challenges of proving that a rape had been committed were just as common in military courts as they were in the rest of society, as five of the 14 (36%) were acquitted. Although one was hanged, the severity of the punishment was due to the fact that he had committed multiple offences, and a further two had their punishments reprieved. Five were sentenced to floggings of between 300 and 800 lashes. Averaging at 580 lashes, this is substantially below the floggings which were given by GCMs and GRCMs for desertion. The one officer tried, who was prosecuted for assault with intent to commit a rape, was simply reprimanded. However, these statistics are actually not as bad as those that have been uncovered in Britain's assize courts. Weiner has found that just 11% of the 203 Old Bailey rape cases between 1718 and 1800 resulted in convictions, whilst in the Surrey Assizes, the same proportion of rape cases (5 out of 42) saw guilty verdicts being issued.[101]

Careful examination of the places of the trials points to a further significant element of military thinking on rape cases. All of the cases tried took place outside of the British Isles. This is significant, as rape was not explicitly an offence under military law. Any cases that did appear before the military courts therefore did so under the provision outlined in Section XXIV, Article IV of the Articles of War, whereby cases that would normally be tried in non-military courts could appear before the courts martial provided that 'no Form of Our Civil Judicature in Force'.[102]

Table 3.12: All cases of rape tried by the British Army, 1808-1818.[103]

[100] It has been impossible to find any copies of rape trial proceedings amongst the surviving material in WO71. No proceedings for rape trials logged in the Court Martial database were found for the boxes covering 1808-1813. Exploration of later boxes in the series was prohibited by the coronavirus pandemic.
[101] Weiner, p. 81.
[102] *Articles of War* (1798), Section XXIV, Article IV, p. 75.
[103] Based on the court martial database compiled for this thesis, drawing Court Martial records contained in WO89/4, WO90/1, WO92/1, WO27/91-145.

Rank	Name	Type of Court	Regiment	Place of Trial	Date of Trial	Charge	Outcome
Private	G. Safson	GCM	Royal Staff Corps	Vizeu	25/1/1810	Entering a house, behaving in a disorderly manner, and attempting to commit a rape	Acquitted
Private	G. Altobello	GCM	Calabrese Corps	Messina	31/7/1810	Entering the house of an inhabitant, extorting money, committing a rape	Hanged
Private	G. Coriolano	GCM	Calabrese Corps	Messina	31/7/1810	Entering the house of an inhabitant, extorting money, committing a rape	Acquitted
Private	M. Martello	GCM	Calabrese Corps	Messina	31/7/1810	Entering the house of an inhabitant, extorting money, committing a rape	Respited
Ensign	W. Fsennel	GCM	8th West India Regiment	Guadaloupe	24/9/1810	Committing an assault with intent to commit a rape	Reprimanded
Gunner	G. Bond	GCM	Royal Artillery	Barbados	18/2/1813	Attempted rape	300 lashes (remitted)
Private	M. Higgins	GCM	51st Regiment	Eschalar	25/10/1813	Rape	Acquitted
Private	Jonathan Cunningham	GCM	75th Regiment	Messina	17/2/1814	Attempted rape	800 lashes
Private	A. Tullis	GCM	1st Dragoons	Toulouse	17/5/1814	Rape	500 lashes
Private	Mulchahey	GRCM	86th Regt	Masulipatam	26/12/1814	Attempting to commit a rape	500 lashes and 6 months solitary confinement
Private	Patrick McCabe	GRCM	54th Regiment	Nieuport	2/2/1815	Broke into a house and committed a rape	Acquitted of a rape, guilty of breaking into the House. 6 weeks solitary confinement
Private	James McGand	GCM	52nd Regiment	Lilliers	10/6/1816	Assault and attempted rape	Acquitted

Private	Peter McGowan	GRCM	1/23rd	Hamelincourt	3/1/1817	Attempting to commit a rape	800 lashes
Private	Christopher Shaw	GCM	29th Regiment	Chocques (France)	1/6/1818	Rape	4 months solitary confinement

As a result, any rapes committed by soldiers within the British Isles appear to have been dealt with by the non-military courts, and military courts therefore only dealt with cases as a last resort. Despite first appearances, this does not undermine the argument that military courts did not consider sexual assault a high priority. If the Peninsular War is considered in isolation, the records show that just four individuals were brought to trial over the course of the six-year conflict. This is despite Wellington's repeated efforts to ensure that troops behaved themselves in order to avoid alienating the local population. This disinterest from the military courts is particularly perplexing considering that Catriona Kennedy makes the point that notions of masculinity involved treating women well, and therefore represents a contradiction that the army and wider society were struggling to reconcile.[104]

Once again, therefore, it is clear that the military courts were not focused on providing justice for the victim, trying cases only when it was essential, and handing out punishments which were substantially lower than those issued for crimes such as theft or desertion. This in itself re-emphasises that the fundamental purpose of military courts was always to serve the army's priorities, and instil discipline, rather than to protect potential victims of soldiers' depredations.

3.9 Flogging at GCM and GRCM level

Fundamental to Buckley's 'terror and torture' thesis is the fact that the British army made extensive use of flogging as a means of punishing those who broke military law. This took place at a time when society more broadly was reappraising how it punished criminals, as outlined by Foucault, undergoing a shift in sentences inflicted by courts from punishment of the body towards confinement and punishment of the mind.[105] As Deidre Palk has argued, the period 1780 to 1830 was a time of intense debate about the nature of

[104] Kennedy, *Narratives*, pp. 103-104.
[105] Foucault, p. 231.

judicial punishment within society more broadly, as discussions centred on an abhorrence of the death penalty, and the way in which transportation might be used to ameliorate pressure on prisons.[106] This was true of both the non-military and military courts, as has been demonstrated with the alterations to the 1813 Mutiny Act in relation to desertion. Similarly, in 1811 Manners Sutton carried a clause amending the Mutiny Bill enabling imprisonment to be issued by the military courts as an alternative to flogging, where the judges deemed it appropriate.[107] The efforts to reform military law will be explored fully in Chapter Five of the thesis, but it is important to dwell on the discrepancy between the policies of the JAG, and those at the very top of the army's command structure, and those commanding forces 'on the ground'.

Pressure was unquestionably exerted from above to reduce the scale of flogging in the army to some degree. Military courts had the power to inflict large numbers of lashes. Whilst the Royal Navy's lash limit was 500, a GCM could order 1,500 lashes, though this was only issued in three cases, one for mutiny, one for mutinous conduct, and one for advising and conniving in desertion.[108] Conversely, there was no limit to the number of lashes that a GRCM could inflict.[109] In reality though, the highest lash punishment awarded was 1,000 lashes, which was issued 66 times.[110] As discussed in Chapter Two, the King had also minuted in 1807 that he considered 1000 lashes to be a sufficient corporal punishment in any circumstance, although this was ignored.[111] In 1812, meanwhile, the Duke of York ordered that RCMs could only issue 300 lashes, rather than the previous limit of 500. [112]

The efforts to reduce floggings both in Parliament and Horse Guards are consistent with Foucault's argument, yet analysis of the punishments handed down by the courts martial demonstrates inconsistency with the measures that were being imposed from above. If anything, the pressure from above had precisely the opposite effect, as those 'on the ground' utilised whatever measures they considered necessary to maintain control.

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[106] Deidre Palk, *Gender, Crime and Judicial Discretion, 1780-1830* (Woodbridge: Boydell & Brewer, 2006), p. 5.
[107] Hansard, Vol. XIX, 11th March 1811, 356.
[108] Thomas Malcomson, *Order and Disorder in the British Navy, 1793-1815: Control, Resistance, Flogging and Hanging* (Woodbridge: The Boydell Press, 2016), p. 207; WO90/1, Trial of Private O'Donnell, 13th July 1818, Trial of Private Vickerman, 20th October 1815, Trial of Gunner Evans, 10th July 1818.
[109] Hough, p. 396.
[110] WO89/4, WO90/1, WO92/1.
[111] Quoted in Glover, *Peninsular Preparation*, p. 180.
[112] Clode, I, p. 155.

Table 3.13 shows the number of death sentences that were issued by GCMs. It is immediately apparent that death sentences from GCMs which had to be confirmed by the King or Prince Regent (GCMs confirmed at home) were all commuted, usually for Transportation or General Service, often for life. Clearly, therefore those at the very top of the military command structure were keen to avoid capital punishment, perhaps not least because the image of a benevolent King exercising his power to reduce sentences was more likely to inspire loyalty amongst his troops.

Nonetheless, the fact remains that 15.4% of GCMs incurred the death penalty, the vast majority of which were issued in GCMs overseas (GCMs confirmed abroad). It is therefore apparent that commanders had few qualms about employing the death penalty when they considered it necessary and commutation rates for death sentences 'confirmed abroad', are noticeably low.

Table 3.13: Numbers of death sentences and commutations issued by all GCMs 1808-1818.[113]

Year	GCMs at Home Total	GCMs at Home Commuted	GCMs Abroad Total	GCMs Abroad Commuted	Grand Total	Grand Total Commuted	Death sentences as % of all GCMs that year	% of death sentences commuted
1808	9	9	21	4	30	13	10.3	43.3
1809	9	9	23	0	32	9	11.2	28.1
1810	6	6	75	0	81	6	22.6	7.4
1811	5	5	40	8	45	13	15.7	28.8
1812	1	1	85	13	86	14	18.9	16.3
1813	1	1	135	17	136	18	20.3	13.2
1814	6	6	76	29	82	35	17.6	42.7
1815	2	2	38	14	40	16	10.9	40
1816	8	8	25	6	33	14	8.8	42.4
1817	7	7	24	6	31	13	11	41.9
1818	11	11	21	0	32	11	13.7	34.3
Total	**65**	**65**	**563**	**97**	**628**	**162**	**15.4**	**25.8**

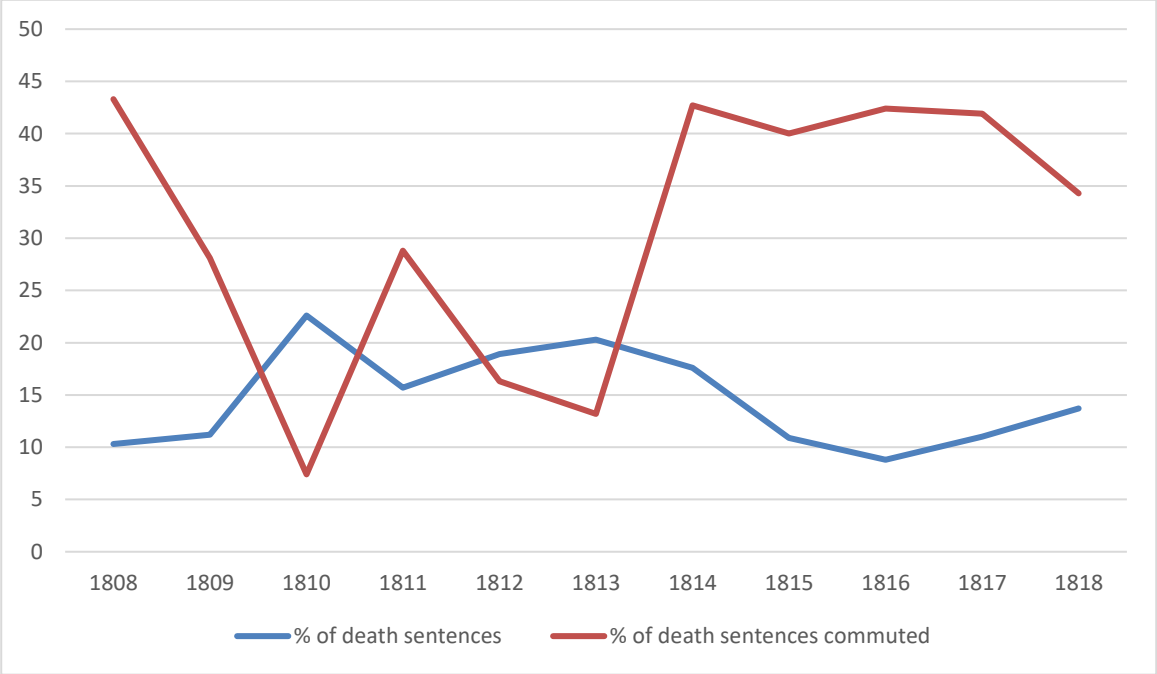
The data is particularly striking when the last two columns of Table 3.13 are plotted in graph form, as shown in Figure 3.2. Rates of commutation of death sentences dropped dramatically during the Peninsular War, before returning to their pre-Peninsular War levels at the conflict's conclusion. This indicates that leniency was not considered expedient by

[113] WO89/4; WO90/1; WO92/1.

commanders on active service. It should be emphasised that this data is not solely influenced by the deployment of troops to the Peninsula, since, between 1809 and 1814 the Peninsular War only witnessed 565 individuals tried by GCMs, that is 22.4% of all GCMs in those years.[114] The pressures betrayed by this data were therefore being felt universally across the many theatres of the British Army's operations.

It is equally noticeable that there is a corresponding, if less marked, growth in the proportion of GCMs which awarded death sentences, and that across the 11 years of this study, the percentage did not fall as might have been expected if Foucault's thesis were applicable to the military context.

Figure 3.2: Percentage of GCMs issuing death sentences and % of death sentences commuted across the British army, 1808-1818.[115]



However, nothing demonstrates more emphatically how the army resisted any transition from punishment of the body, than an analysis of the use of the lash. Between 1808 and 1818, GCMS and GRCMs issued a total of 1,441,053 lashes across 2128 cases (or

[114] 565 individuals from Britain's Peninsular Army are recorded in the General Orders as having been tried between 1809 and 1814. Between the same years there were 2521 individuals tried at GCMs.
[115] WO90/1; WO92/1.

37% of trials). Of those 173,820 lashes, or 12.1%, were commuted.[116] Appendix E contains details of lash totals and averages in each tier of court across the period. It is noticeable that, far from reducing, lash averages were broadly consistent with those discovered by Arthur Gilbert's analysis of GCMs in the eighteenth century.[117] However it should be noted, that when wartime periods in both centuries are compared, the Napoleonic Wars appear to have witnessed a slightly lower lash average than the American Revolution. Gilbert has found that lash average over the period ranged between 705 and 827 per sentence, but generally centred around 800 lashes.[118] By comparison GCMs confirmed abroad ranged between 656 and 920, centring around 750 lashes, and GRCMs ranged between 628 and 700 lashes, and centred around 650 lashes. Nonetheless, the numbers of trials have to be taken into consideration, since Gilbert's data was based on the 138 GCMs which occurred during the American Revolution.[119] During the Napoleonic Wars, however, the number of trials using the lash exploded, again, helped in large part by the introduction of the GRCM tier of court martial, a point readily apparent from Table 3.14 and Figure 3.3. Quite clearly, then, the British military courts used flogging as a punishment more than ever before, at a time when the King, Commander in Chief and JAG were trying to limit the size of lash punishments which could be issued, and to create options for alternative methods of punishment.

It is also noticeable from examining Appendix E and Figure 3.3 that from 1813 commanders stopped sending flogging punishments home for confirmation. This either indicates that a professionalisation of the military justice system was imbuing regional commanders with the greater confidence to confirm the flogging punishments themselves, or that they increasingly appreciated that sending a flogging punishment home would likely result in a royal pardon or a commutation of that punishment for service abroad. In 1812, 22 of the 35 floggings placed before the Prince Regent resulted in commutations, 9 of which were pardons, representing easily the highest commutation rate for GCMs and GRCMs during the period (63% of trials where flogging formed part of the sentence).

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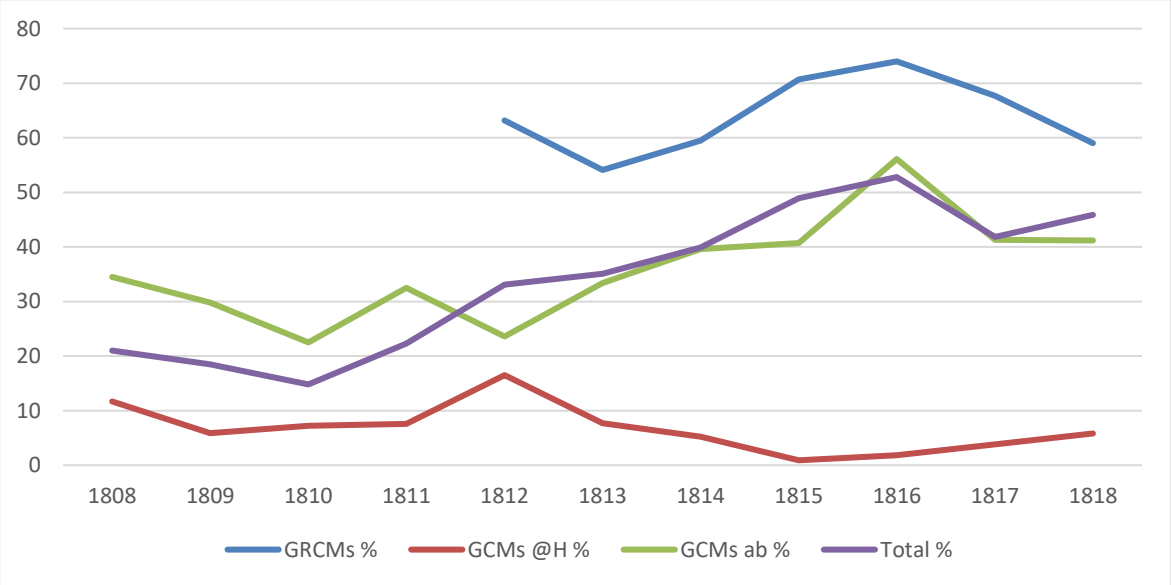
[116] For a detailed break-down of numbers of lashes inflicted, and commutation rates of lashes in each tier of court, see Appendix E.
[117] Arthur N. Gilbert, 'Military and Civilian Justice in Eighteenth Century England: An Assessment', *Journal of British Studies*, 17, 2 (1978), 41-65 (51).
[118] *Ibid*., p. 51.
[119] *Ibid*., p. 44.

Table 3.14: Distribution of lash punishments across the whole of the British army at GCMs and GRCMs, 1808-1818.[120]

Year	GRCMs	GRCMs %	GCMs @H	GCMs @H %	GCMS ab	GCMs ab %	Total	Total %
1808	-	-	20	11.7	41	34.5	61	21
1809	-	-	8	5.9	45	29.8	53	18.5
1810	-	-	13	7.2	40	22.5	53	14.8
1811	-	-	9	7.6	55	32.5	64	22.3
1812	122	63.2	35	16.5	57	23.6	214	33.1
1813	157	54.1	14	7.7	163	33.4	334	35.1
1814	125	59.5	6	5.2	139	39.6	270	39.9
1815	241	70.7	1	0.9	105	40.7	347	48.9
1816	168	74	2	1.8	147	56.1	317	52.8
1817	105	67.7	4	3.8	74	41.3	183	41.8
1818	160	59	4	5.8	68	41.2	232	45.9
Total	1078	64.2	116	7.7	934	36.4	2128	37.0

Figure 3.3: Percentage of GCMs and GRCMs across the British Army issuing flogging punishments, 1808-1818.[121]



3.10 Non-capital and Non-corporal methods of punishment

In relation to confinement and transportation the picture is more ambivalent. Table 3.15 shows the number and proportions of GCMs and GRCMs across the British army that

[120] WO89/4; WO90/1; WO92/1.
[121] WO89/4; WO90/1; WO92/1.

issued sentences containing confinements, between 1808 and 1818. Sentences issuing this punishment across GCMs and GRCMs rose from virtually non-existent levels in 1808 to almost 10% of cases in 1813. However, the percentage of convictions resulting in confinement dipped from between 1814 and 1816, falling to 6%, before resuming its climb in 1817 and 1818, reaching almost 15% in the latter year. However, it is clear that the rise in its usage was in part driven by the GRCMs embracing confinement in their sentences. This offers an important indication of how the military courts viewed the appropriate use of confinement as a sentence. As GRCMs tried cases that potentially merited harsher punishments than could be issued at RCM, but which did not merit a full GCM being convened, the fact that confinement was embraced more at GRCM than GCM highlights that it was not deemed an appropriate punishment for the most serious offences. The army therefore preferred to retain its ability to sentence men to capital and corporal punishments in cases where it was judged that to be necessary.

Table 3.15: GCMs and GRCMs across the British army issuing confinement as part of the punishment, 1808-1818.[122]

	GRCMs		**GCMs confirmed at Home**		**GCMs confirmed Abroad**			
Year	No. of Trials awarded	% of GRCMs	No. of Trials awarded	% of trials	No. of Trials awarded	% of trials	Total	% of all GRCMs and GCMs
1808	-	-	0	0	1	0.8	1	0.3
1809	-	-	0	0	2	1.3	2	0.7
1810	-	-	0	0	1	0.6	1	0.3
1811	-	-	2	1.7	4	2.4	6	2.1
1812	31	16	3	1.4	7	2.9	41	6.3
1813	72	25	3	1.7	15	3.1	90	9.5
1814	42	20	1	0.9	14	4	57	8.4
1815	30	8.8	1	0.9	27	10.5	58	8.2
1816	22	9.7	0	0	13	5	35	5.8
1817	28	18.1	0	0	26	14.5	54	12.3
1818	43	15.9	0	0	31	18.8	74	14.7

It is very clear that confinement was not a matter which was considered to require the approval of the King, as very few trials containing confinement as a punishment appear in the registers of GCMs confirmed at home. This in itself is indicative of the concerns that commanders had about approving certain types of sentences. Whilst trial proceedings that

[122] WO89/4; WO90/1; WO92/1.

awarded the death sentence might be sent back in order to prevent judicial murder, or in order to initiate a commutation process in cases of extenuating circumstances or a soldier receiving a good character, it is apparent that confinement did not produce the same reaction amongst commanders serving overseas. This was potentially because the result was less 'permanent' than a flogging or hanging in terms of physical damage to the individual, although the psychological damage was potentially substantial. The majority of sentences stipulated that the guilty soldier would be placed in solitary confinement, which could last as long as two years.[123] However, the extent to which this confinement was truly solitary is open to interpretation. The JAGs letters indicate that some soldiers sentenced to confinement within the British Isles were actually held in civilian gaols, with the rules on their release, and who had jurisdiction over the prisoner causing confusion in February 1813.[124] As Randall McGowen has shown, civilian gaols were complex institutions, at times holding both felons and debtors, with the latter sometimes choosing to bring their spouses and children into the prison.[125]

The alternative to imprisonment in civilian gaols was to confine men within what was termed the 'Black Hole', essentially a 'lock up house', within barracks.[126] Black Holes had a long history, with the term originating as a reference to the 'Black Hole of Calcutta', in which, following the fall of Fort William, Calcutta, in June 1756, 64 soldiers and civilians were confined overnight, with only 21 surviving the experience.[127] Yet despite this long heritage, there was also confusion about how to use solitary confinement, with the JAG's Deputy and First Clerk, John Oldham writing to Lieutenant Campbell of the 91st Regiment in Chatham to inform him for future reference that a soldier could not be sentenced to both corporal punishment and solitary confinement.[128] Equally, there was uncertainty about the effectiveness of the punishment. When giving evidence to a Parliamentary enquiry of military punishment in 1836, Wellington explained the challenges of maintaining

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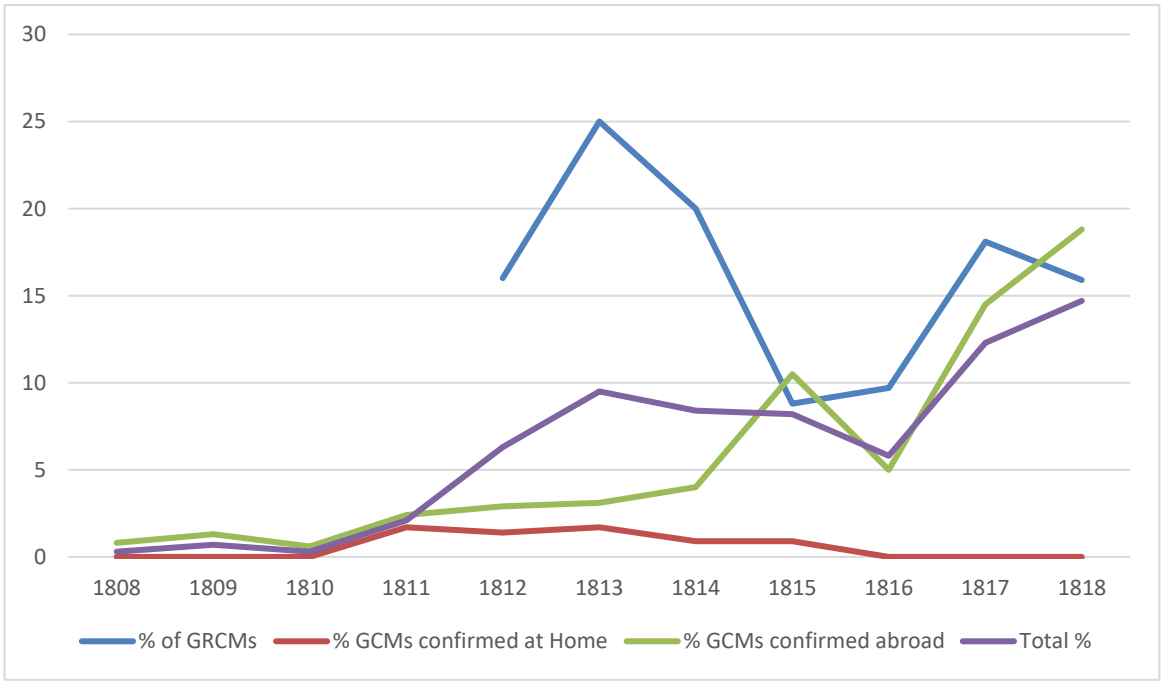
[123] WO90/1.
[124] WO81/47, C. B. Wollaston to Lieutenant Colonel Jackson, 23rd February 1813; C. B Wollaston to J. Beckett, 26th February 1813.
[125] Randall McGowen, 'The Well-Ordered Prison: England, 1780-1865', in *The Oxford History of the Prison: The Practice of Punishment in Western Society*, ed. by Norval Morris and David J. Rothman (Oxford: Oxford University Press, 1998), pp. 71-99 (p. 73).
[126] WO81/47, C. B Wollaston to J. Beckett, 26th February 1813.
[127] Oxford English Dictionary, 'Black Hole of Calcutta', <https://www.oed.com/view/Entry/19728?rskey=SCG2BW&result=1&isAdvanced=false#eid205880769> [Accessed 10th June 2021]
[128] WO91/46, J. A. Oldham to Lieutenant D. Campbell, 5th September 1812.

the isolation of men in solitary confinement: 'the men must be watched and guarded in those solitary cells by their comrades. […] The sentry does not do his duty; he gets into conversation with the man in the cell; the solitary part of the confinement is lost.'[129] Wellington also cast doubt on whether the private, rather than public, nature of confinement was counterproductive in a system where, in his view, the whole purpose of punishment was to serve as a visible deterrent to other soldiers.

> There is no punishment which makes an impression upon any body except corporal punishment. You send a man into solitary confinement; nobody sees him in solitary confinement, and nobody knows what he is suffering while he is in solitary confinement. […] that is not the intention of punishment. The real meaning of punishment, if it means anything, is example, - it is to prevent others, by the example of what they see the criminal suffer, from committing the same or a similar offence.[130]

Figure 3.4: Percentage of punishments including confinement, issues at GCM and GRCM across the British army, 1808-1818.[131]



This sets the information from Table 3.15 in context, showing that the adoption of solitary confinement was by no means a linear progress. This point becomes clear when

[129] *Reports from His Majesty's Commissioners for inquiring into the system of military punishments in the army*, 15 Vols (London: W. Clowes and sons, 1836), p. 325.
[130] *Ibid*., p. 324.
[131] WO89/4; WO90/1; WO92/1.

Table 3.15 is expressed as a graph (see Figure 3.4), with the growing use of confinement experiencing a drop between 1813 and 1816. Once again it remains difficult to argue that Foucault's progression from punishment of the body to punishment of the mind was applicable in the military context. Similarly, there is little to suggest that the efforts from the top of the army's command structure to encourage the adoption of non-corporal punishment methods were greeted with any enthusiasm, or adopted particularly widely, by those presiding over courts and confirming their punishments overseas.

The picture when examining the punishment of the rank and file is, therefore, an ambivalent one. In advocating the use of floggings on the grounds of setting a public example to other soldiers, it is clear that in one sense, in Wellington's mind at least, military law was based upon Buckley's 'terror and torture as public spectacle'. This is not altogether surprising given Wellington's perspective as someone who had to utilise the law in order to maintain order within his army with one eye on protecting the civilian population. Yet in examining military law it is important to be cognizant of the fact that its primary function was indeed to keep all ranks in check, adhering to provisions which were designed to ensure that the army functioned efficiently and that, in theory, protected civilians from soldiers' behaviour. In such an environment, it is only natural that clear evidence emerges of public punishment and efforts to keep lower ranks in check, yet it is important not to ignore the more subtle evidence that has emerged elsewhere in this chapter regarding a more discretionary attitude. These discretionary practices will become even more evident in Chapter Four, when the trial of the rank and file in Regimental Courts Martial is considered in depth.

3.11 The trial of officers

With the preceding analysis having focused on the punishments experienced by NCOs and rankers, it is important to examine the punishments issued to officers, and the types of charges they faced. In the process, this section explores the extent to which a two-tier system operated within the military justice system, whereby officers received preferential treatment to the rank and file. In the process a number of nuances will be exposed in the way in which military law operated, from ambiguous charges deliberately framed in broad language, to questions of honour impinging on prosecution practices and means of escaping prosecution being offered in some instances. To achieve this, the same

database is being consulted, based upon the registers of the courts martial. However, given that officers could only be tried at GCM, only data from WO90/1 and WO92/1 will be used. Trial proceedings from the National Archives WO71 will also be utilised. In the process, the pragmatism and discretion which underpinned the military justice system will become more apparent, providing a useful point of comparison for similar procedures which were applied to the rank and file at RCM level. Whilst there can be no question that officers were punished differently, in part due to a perceived necessity based on social norms of the period, analysis in Chapter Four will ultimately show that the approach was not inconsistent when the operation of military justice is viewed as a whole.

It is important to emphasise that military law was ambiguous on whether the rank and file had an inferior legal status to officers. All officers were subject to same legal stipulations as the rank and file, yet the way in which their breaches of military law was handled differed markedly. As outlined in Chapter Two, officers could only be tried at GCM, and the punishments that they received were very different. No officer was flogged or executed during the period of this study. Immediately therefore, it would seem that military law was a two-tier system, meting corporal punishment to the rank and file, whilst shielding officers from the same type of punishment. Yet this appears to have been a matter of implementation rather than explicit legal direction, as the Mutiny Act did not comment specifically on the punishment of officers. Section XXI of the Mutiny Act stipulated that 'it be lawful for any such General Court-martial, by their sentence or judgement to inflict corporal punishment, not extending to life or limb, on any soldier for immoralities, misbehaviour, or neglect of duty'.[132] Crucially, however, the clause was applicable to 'any Soldier', a classification which did not include officers, as other clauses explicitly referred to 'officers and soldiers', when its contents applied to both.[133]

[132] 49, Geo III, Cap 12, sect XXI, Mutiny Act, p. 27.

[133] See for example 49, Geo III, Cap 12, sect XXXIII, *Mutiny Act*, p. 42 which stipulated 'That if any officer of soldier shall, in any of His Majesty's Dominions beyond the Seas, or elsewhere beyond the Seas, commit any of the offences triable by Courts-martial, by virtue of this Act, and shall come or be brought into this Realm, or into *Jersey, Guernsey, Alderney, Sark*, or *Man*, or the islands thereto belonging, before he be tried by a Court-martial for such offence; such Officer or Soldier shall be tried and punished for the same, as if the said offence had been committed within this Realm.' The repeated reference to 'officer and solder' is a clear indication that when a clause was applicable to both categories of army employee, it had to be explicitly stated. The absence of reference to officers in Clause XXI therefore means that it only applied to the rank and file.

It was technically possible for officers to receive the same punishments as the rank and file for certain crimes. The opening clause of the Mutiny Act, which outlined crimes such as mutiny, desertion, striking a superior officer, leaving, or sleeping at, their post, and giving intelligence to the enemy, was clear that 'all and every such person or persons so offending […] shall suffer death, or such other Punishment as by a Court-martial shall be awarded'.[134] Legally, therefore, it was possible for officers to be executed, and under this clause, it should have been possible to flog officers. The fact that this never occurred was therefore a matter of how the law was applied by the court, and precedent, though there is no obvious indication of where that precedent came from. Writing in 1769 Adye acknowledged the distinction in treatment of officers and soldiers before the courts by remarking

> for crimes that officers and soldiers may be guilty of, which are not of so capital a nature as to deserve death, cashiering is prescribed for the former, and corporal punishment for the latter, and for misdemeanours of a still more inferior nature, custom has introduced suspension for a time for Officers and other slight punishments for soldiers.[135]

The fact that Adye makes reference to 'custom' is significant, suggesting that this was a matter of precedent, though as he makes no further comment on the practice, it cannot be traced back further. Other works of authority on the army's administration and military law, ranging from Clode's *Military Forces of the Crown* to *The Military Law of England* and Williamson's *Elements of Military Arrangement* all equally accept the separation of punishments without question.[136] All that can be gleaned from this, therefore is that the delineation of punishments reflected the system of subordination that existed within the army. Adye suggested that the army was not unusual in this, arguing that it existed 'among all sects of men; […] it may perhaps be more conspicuous in the Navy and Army, as the profession of Arms naturally require it.'[137] Essentially, therefore, officers were not flogged in order to ensure that they retained a status above the rank and file, rather than being reduced to the same level of degradation and shame as those they commanded by being

[134] 49, Geo III, Cap 12, sect II, *Mutiny Act*, pp. 9-10.
[135] Adye, p. 108.
[136] Clode, I, p. 155; Anon, *Military Laws of England*, pp. 134-135; Williamson, pp. 201-202.
[137] Adye, p. 16.

flogged. As a result, there is a clear parallel here with Hay's notions of the law existing to keep the lower orders in check, which must be acknowledged. Once again, however, the existence of this hierarchy within the army is unsurprising, and the significance of this finding lies in the punishments issued, which will be explored further below.

When it came to the trial of officers, notions of honour had a significant impact on the way in which military courts operated. In 1809, Wellington expressed the opinion that RCMs were 'no longer a court of honour, at the hands of which a soldier was certain of receiving punishment if he deserved it; but it is a court of law, whose decisions are to be formed according to the evidence principally of those on whose actions it is constituted'.[138] The validity of this view is open to interpretation, though it is important here to highlight that Wellington was referring to RCMs, rather than GCMs which could try officers. Arthur Gilbert has argued that the courts martial were able to be both courts of honour and courts of law when it came to trying officers.[139] This dual emphasis on law and honour is visible in the phrasing of acquittals of officers. Officers were variously recorded as having been 'acquitted', 'honourably acquitted', and 'most fully and honourably acquitted'.[140] There is no evidence that, in law, there was any distinction between different types of acquittal, though honourable acquittals were never given to the rank and file. The distinction, therefore, related to the exoneration of an officer's honourable character, yet this does not mean that all acquittals were to intrinsically be regarded as honourable. Wellington made this point in relation to the trial of Lieutenant Perse of the 45th Regiment for 'most unofficerlike and ungentlemanlike conduct, in being concerned in an Affray which took place in the City of Lisbon on the night of the 3rd March last 1809'. Wellington felt obligated to write to the president of the court, Brigadier John Slade when, following the conclusion of the trial, the court honourably acquitted Perse of the crime.[141] Wellington confessed that 'it is difficult and needless to define in what cases an honourable acquittal by a Court Martial is peculiarly applicable', but argued that as the incident which had precipitated

[138] *Despatches*, IV, pp. 432-436. Sir Arthur Wellesley to Viscount Castlereagh, 17th June 1809.
[139] Arthur Gilbert, 'Law and Honour Amongst Eighteenth-Century British Army Officers' *The Historical Journal*, 19, 1 (1976), 75-87, p. 77. Subsequently Gilbert, Law and Honour.
[140] WO90/1; WO92/1. See for example, respectively, the trial of Lieutenant Bagot, 47th Foot, Bombay, 24th January 1814; the trial of Lieutenant Brackenberry, 61st Foot, Gibraltar, 6th April 1809: and the trial to Captain Balguy, 36th Regiment, Brighton, 25th August 1812.
[141] *Despatches*, V, pp. 221-222. Viscount Wellington to Brigadier General John Slade, Lisbon, 12th October 1809. Note: Perse's name and regiment are omitted from the published despatches, but can be found in Hartley Library, MS61, Wellington Papers 1/284/33.

Perse's trial had arisen from him visiting a brothel, it was his duty to 'anxiously recommend to the General Court Martial to omit the word *Honourably* in their sentence.' Honour therefore played a meaningful role in the courts martial, by influencing how others would judge the accused's character and reputation.

This focus upon honour had significant ramifications for whether some officers' crimes were ever taken to trial. Some officers opted to avoid the shame of a trial by agreeing to quietly sell their commissions. This approach was in the interest of both the accused and the regiment, as a trial would reflect badly on the regiment, and create embarrassment which would tarnish the unit's reputation which all ranks were encouraged to uphold.[142] In December 1813, Wellington made a point of announcing in General Orders that Lieutenant Gawler of the 52nd Regiment was to be released from his arrest after apologising for his conduct towards Acting Commissary General Stracham.[143] A similar dispute between Deputy Assistant Commissary Generals Watson and Miller was resolved in the same manner in January 1814.[144]

Although Wellington made a public display of those two examples, his method points to a practice that was widespread within the army, and forms part of the 'unofficial' means by which discipline was maintained, despite not being officially sanctioned by the Articles of War or Mutiny Act. Lieutenant Colonel Dickson, for example, resolved a dispute between Brevet Major H. Holcombe and Captain W. Powers of the Royal Artillery, having already 'refrained from further agitating the matter, as it might have been the means of depriving the existing service of one or both those Officers, neither of whom could be spared from the important operation [the siege of Badajoz]', agreed to brush the matter under the carpet 'taking into consideration the individuals, with whom he has lived in habits of friendship'. Dickson went to extraordinary lengths to offer both officers a get out clause, remarking that he could 'only attribute their late altercation as the effect of intoxication'. He concluded his private letter to both officers by giving a clear indication of how he expected them to resolve the matter:

[142] Bamford, *Sickness Suffering and the Sword*, p. 84.
[143] WP9/1/2/7, General Orders, 17th December 1813.
[144] WP9/1/2/7, General Orders, 27th January 1814.

> He feels anxious to settle the matter in some manner that could be satisfactory to the officers of the Corps and himself, as well as to the individuals both of whom must feel convinced they are in the wrong, and also to prevent such a circumstance becoming public which would cause so material a discredit to the Corps. It therefore appears to him as the best mode of affording this satisfaction that each party should address Lieutenant Col. Dickson expressing himself highly sensible of the impropriety of his conduct, declaring what he advanced in the heat of passion or intoxication.[145]

Both officers seized upon the opportunity to avoid a trial for 'conduct unbecoming', and wrote to Dickson with apologies, with Holcombe explicitly using intoxication as his excuse.[146]

Whilst there was no provision for such a course of action within Mutiny Act, the practice was seemingly considered permissible by military law's top administrators. In a sequence of letters in February 1811, Manners Sutton discussed the value of trying officers, and measures that could be taken to render such trials unnecessary. Writing to Major General Wynyard on 1st February in response to a request for his professional opinion on whether a trial was necessary to deal with the (unspecified) behaviour of Captain Tryon of the 99th Regiment, he argued that a trial was the only obvious option. However, he caveated this opinion with a comment that

> it must be for Sir David Dundas to determine, whether the inconvenience attending such a course of proceedings, in consequence of the present state of the Forces in and near Bermuda, counterbalances the necessity which seems very urgent of thoroughly investigating in the only legitimate mode, the conduct of Captain Tryon.[147]

In essence, therefore the JAG was acknowledging that a pragmatic decision had to be made about whether the inconveniences of calling a court martial comprising of 13 officers in the Caribbean outweighed the value of making an example of Tryon's behaviour. It is worth

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[145] C. Dickson (ed.), *The Dickson Manuscripts*, 6 Vols (Cambridge: Ken Trotman, 1990), IV, pp. 621-622. Copy of a 'Memorandum' MS. No. 75 of 1812 in Dickson's writing, regarding a dispute between Brevet Major H. F. Holcombe and 2nd Captain W. G. Power, Royal Artillery, Elvas, 16th April 1812.
[146] *Ibid*., p. 623. Major H. F. Holcombe to Lieutenant Colonel C. Dickson, Elvas, 16th April 1812.
[147] WO81/43, Charles Manners Sutton to Major General Wynyard, 1st February 1811.

noting that the court martial registers contain an entry for Captain George Tryon of the 99th Foot being tried in Halifax on 3rd August 1812 for having written a disrespectful letter, for which he was found guilty and publicly reprimanded.[148] It is impossible to be certain whether this was the crime which Manners Sutton was consulted over, although the 18 month gap suggests that Dundas declined to proceed with a trial. This pragmatic element may appear to represent an example of double standards, as it certainly permitted officers to get away with crimes in some instances. However, as will become apparent in Chapter Four, such discretion was not solely exercised in relation to the crimes of officers.

Possibly the most telling letter from Manners Sutton relating to allowing officers to escape trial, however, dates from 7th February 1811, in which he remarked 'Lieutenant Lynch's character and conduct has been such as to make it advisable that he should be detained at home with the offer of either giving in his resignation, or standing a Court Martial.'[149] Again, therefore, Manners Sutton was embracing a pragmatic approach to trying an officer: if the army was able to remove an individual who was having an adverse effect on the discipline of the force, then it was willing to spare them the potential damage to their reputation that could follow a trial.

Yet this attitude also worked in the opposite direction, with Manners Sutton acknowledging that an apology could, at times, be an appropriate means of negating the need for a trial. Once again, the officer's character, and the perceived impact upon their honourable reputation, had a role to play. Writing to an unspecified individual within Horse Guards, Assistant Deputy Judge Advocate General Wollaston related a conversation in which Manners Sutton:

> could not help feeling very desirous that an affair of so delicate a nature, which has been so long pending, and in which the characters of individuals are so materially implicated, should be finally set at rest. […] the Judge Advocate General seemed to hope that, should Captain Langton fulfil his expectations by transmitting such an apology in terms satisfactory to the Commander in Chief, His Royal Highness might

[148] WO90/1, Trial of Captain George Tryon, 99th Regiment, Halifax, 3rd August 1812.
[149] WO81/43, Charles Manners Sutton to Major General Wynyard, 7th February 1811.

> think that no further proceedings against him need take place, and that the service in general would not receive any detriment from the indulgence.[150]

Essentially therefore, if the Commander in Chief considered an apology to be sufficient, a trial could be avoided altogether, allowing the army's administrators to focus on other business. This willingness to embrace discretionary practices in the exercise of military justice points once again to the flexibility of the military justice system, which better enabled it to fulfil its primary function of maintaining discipline within the army. As alluded to above, similar practices will become apparent when examining the situation from below, and so its application to the cases of officers should not automatically lead us to conclude that this discretion was discriminatory on grounds of rank.

Nonetheless, fundamental differences remained in the manner in which the law was applied to officers, something which is particularly apparent when the charges brought against officers are considered. Table 3.16 outlines the most common types of charges which officers were tried for, between 1808 and 1818, ranking them in order of frequency. It is immediately apparent that the types of crimes which officers were tried for bears little similarity with those which the rank and file were prosecuted for. Whilst desertion and equivalent crimes of absence were the most tried offences for the GCMs and GRCMs as a whole, desertion (and associated crimes) accounted for just 76 or 7.1% of officer trials. In fact, deserting was only explicitly mentioned in three of those cases, with the remainder being classed as AWOL or absence.[151]

This raises a curious and important question of what constituted absence, to allow officers to be tried for what was a lesser offence. Manners Sutton confessed that 'it is very difficult in many cases to draw the line in substance, between absence without leave and desertion – it would be most unwise therefore to lay down a general rule applicable to each individual case'.[152] The failure to explicitly try officers for desertion therefore alludes to a culture within the army of choosing to try officers for absence rather than desertion. Whilst it is impossible to determine with any accuracy the reasons for this, it is important to

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[150] WO81/45, 18th September 1811, C. B. Wollaston to [Unspecified, but clearly someone in Horse Guards].
[151] WO90/1: WO92/1. These were the trial of Assistant Surgeon Kennedy, 15th Foot, Grenada, 19th July 1808, the trial of Lieutenant Rawlings, 4th Foot, Anglet (France), 4th May 1814, and the trial of Lieutenant Heath, 7th 60th, Halifax, 29th August 1816. All were found guilty, Kennedy and Rawlings were dismissed, but later pardoned, and Heath was cashiered.
[152] WO81/46, Charles Manners Sutton to Colonel Bastard, 27th August 1812.

remain mindful of the impact that a charge of desertion could have on an officer's honourable reputation, and as a result may provide a reason for the disparity between practices concerning officers and the rank and file. However, again as will become evident in Chapter Four, the inclination to embrace the dubious distinction between desertion and absence was by no means unique to trials of officers.

Table 3.16: Most common categories of charge which officers were tried for at General Court Martial, 1808-1818.[153]

Charge Type	Number Tried	Percentage of officer trials
Behaviour or conduct 'unbecoming of an officer' (or equivalent)	256	23.9
Disrespectful, insulting, or abusive language, or use of language inappropriate for an officer	192	18.0
Disobedience, mutiny, mutinous conduct	148	13.8
Failure to fulfil, or neglect of duty	128	12.0
Duelling, sending a challenge to duel, being a second in a duel (or equivalent charges related to duelling)	99	9.3
Making false or spurious allegations or assertions about another officer's actions or character	96	9.0
Drunkenness (on or off duty)	81	7.6
Desertion, absence from post, Absent without leave	76	7.1
Misapplying (money or stores), fraudulent actions, embezzlement	71	6.6
Murder, killing (or equivalent	26	2.3
Oppression (of those of a lower rank)	15	1.4
Theft (or equivalent)	5	0.5

Table 3.16 also clearly indicates that the almost a quarter (23.9%) of all officer trials related to their failure to act in a manner that reflected their status as officers. This focus on conduct 'unbecoming of an officer' is curious not only for the fact that it was the most frequent type of charge, but also for its seeming ambiguity. Unbecoming conduct was not a specific offence in military law, and, as Gilbert has highlighted, represented a 'classic

[153] WO90/1, WO92/1.

"honour" crime'.[154] The phenomenon is all the more remarkable for the fact that Manners Sutton was obligated to intervene on a number of ambiguous charges, since a vague charge was not answerable in law. In June 1811, Oldham wrote to Major General Wynyard to inform of Manners Sutton's view that 'the charge against Joseph Hunt is such as no man ought to be compelled to answer, being for unsoldierlike conduct simply without any specification of facts, time or place'.[155] A similar point was raised by Wollaston in February 1813, when he informed Edward Moore in Bermuda that Private Joseph Burke of the 98th Regiment 'ought not to have been put upon his trial, upon a charge so indefinite as "for Conduct disgraceful to a Soldier", which furnishes him with no notice whatever of the facts, for which it is intended to proceed against him'.[156]

Both of these examples clearly involved members of the rank and file, yet they are relevant here for two reasons. Firstly, they point to an important safeguard against tyrannical practices by indicating that such charges were not acceptable. In Hunt's case, the punishment was not, according to Oldham, to be inflicted, though in Burke's the fact that the proceedings had been sent from Bermuda meant that the punishment had already been inflicted before the JAG's office could object. This useful counterpoint highlights that soldiers were to some degree protected, something which is further highlighted by Table 3.16 indicating that officers could be brought to trial themselves for oppressive conduct.

The second significant factor in the matter of ambiguous charges is that these 'catch all' type of charges such as 'unofficerlike conduct' could only be used when detailed reference was made to the nature of the offence. Details of the precise nature of the offence officers were tried for in many cases does not survive in the trial registers, as restrictions on space precluded copying the full details of the charge. Once again, therefore, the notion of military law being arbitrary is not borne out by the evidence, as precision was vital to the legal process.

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[154] Gilbert, Law and Honour, p. 76.
[155] WO81/44, John Oldham to Major General Wynyard, 8th June 1811. No record can be found in the court martial registers for a Joseph Hunt being tried prior to June 1811 for unsoldierlike conduct.
[156] WO81/47, Charlton Wollaston to Edward Moore, 12th February 1813.

3.12 The punishment of officers

It is also important to examine the most common punishments which officers experienced. As mentioned above, a separate sequence of punishment options existed for officers: Reprimand, suspension of rank and pay for a specific period of time, dismissal and cashiering.

Reprimands could be public or private, and sometimes were categorised as 'severe' to indicate that the individual's conduct was wholly unsatisfactory. This was, of course, an honour-based punishment, with public reprimands potentially taking place at the head of the regiment, or even being issued in local general orders. Since this was part of the army's general orders, which were read to every regiment on the day they were issued, this meant that any such censure was the knowledge of every soldier in the army, a hugely embarrassing situation. However there was a disconnect in the fact that a summary of the proceedings of GCMs were published in the local general orders, meaning that all sentences and acquittals were effectively public knowledge.

Suspension of rank and/or, pay was a more severe punishment. A suspension of rank effectively set back an officer's promotion prospects, as it meant that they had the relevant period of time deducted from their length of service in their current rank. They continued to serve in their current rank, but the specified number of months did not count as part of their service record. Dismissal and cashiering were, of course, the most serious punishments. A cashiered officer was not permitted to sell his commission, resulting in significant financial loss. Whilst, in some cases, dismissed officers were informed that they could never 'serve His Majesty in any capacity' effectively banning them from any future role in the armed forces or government.

The distribution of the use of these types of punishments is also noteworthy. Table 3.17 outlines by year the number of officers who were reprimanded (either publicly or privately), suspended, dismissed and cashiered, between 1808 and 1818. It is particularly striking that almost exactly the same number of officers were cashiered as received reprimands, clearly highlighting that the military courts had no qualms in exercising the most severe punishment available to them in officers' trials.

The data in Table 3.17 therefore indicates that across the period 1808-1818, 25.8% of officers were reprimanded, 25.7% were cashiered, 19.1% were discharged, and 16.6% suspended. There is a noticeable drop in the number of officers prosecuted from 1815 onwards, reflecting the end of the Napoleonic Wars. The reduction is not especially surprising, and does not necessarily mean that a lower proportion of officers were tried, since the reduction in the size of the army at the end of the Napoleonic Wars created an opportunity for problematic officers, and those who neglected their duty to be quietly placed on half pay.

Table 3.17: Distribution of punishments issued to officers at GCM across the British army, 1808-1818.[157]

Year	Reprimand	Suspended	Discharged	Cashiered	Grand Total
1808	33	18	16	34	101
1809	31	19	23	33	106
1810	27	28	24	37	116
1811	27	21	15	25	88
1812	42	24	31	33	130
1813	40	38	34	35	98
1814	23	18	29	23	93
1815	23	6	15	25	69
1816	6	4	7	15	32
1817	13	1	7	12	33
1818	11	0	3	3	17
Total	**276**	**177**	**204**	**275**	**932**

It is noticeable, however, that the number of officers who were suspended dropped far faster than the other categories of punishment. This again may have been as a result of a greater inclination to eject convicted officers from the army once the war was over, as the army was not obliged to balance its manpower needs with its disciplinary procedures.

It is particularly interesting to examine how these punishments were broken down across the two GCM registers. Table 3.18 therefore separates out the punishments issued to officers which are listed in the 'Confirmed at Home' and 'Confirmed Abroad' registers, breaking them down by both year, and type of punishment.

[157] WO90/1; WO92/1.

It is immediately clear that regional commanders overseas generally did not consider themselves empowered to confirm discharges or cashier officers, with almost all of those categories of punishment being sent home for confirmation. Conversely, and perhaps unsurprisingly, they were far more confident in confirming the less severe punishments of suspension and reprimand. It must be acknowledged that 219 officers (20.5%) were acquitted, a figure which is well above that for the rank file of 8.6% at GCM. However, it is important to recognise that officer trials were often necessarily more complex. Given that a large proportion of rank and file trials were for crimes such as absence or desertion, proving the facts of an individual's absence was much simpler than a trial for 'unofficerlike conduct' in which the conduct and its unofficerlike nature both had to be established. Furthermore, officers on trial faced a very real risk of being removed from the army, with such a punishment being applied in 44.8% of all cases (or, at 479 of 932 instances of officers being found guilty, 51.2% of all guilty verdicts).

Table 3.18: Distribution of punishments issued to officers at GCM across the British army, 1808-1818, split by Confirmed at Home, and Confirmed Abroad registers.[158]

	GCMs confirmed at Home				**GCMs confirmed abroad**			
Year	Reprimand	Suspend	Discharge	Cashiered	Reprimand	Suspend	Discharge	Cashiered
1808	18	6	16	33	15	12	0	1
1809	13	8	22	33	18	11	1	0
1810	13	15	24	37	14	13	0	0
1811	8	4	13	22	19	17	2	3
1812	19	8	30	31	23	16	1	2
1813	15	7	32	33	25	31	2	2
1814	10	7	27	11	13	11	2	12
1815	6	1	14	23	17	5	1	2
1816	1	0	6	13	5	4	1	2
1817	5	0	5	12	8	1	2	0
1818	3	0	3	3	8	0	0	0
Total	111	56	192	251	165	121	12	24

It is therefore apparent that, whilst military law did indeed operate a two-tier punishment system, this process was not an arbitrary one. Although corporal and honour-based punishments by no means equated, officers who failed to meet the army's expectations of their conduct faced significant ramifications. For officers, conviction at

[158] WO90/1; WO92/1.

court martial could bring shame, humiliation, erosion of social status, loss of employment or loss of investment in their rank. Far from being used to simply keep the 'lower orders' in check, military law ensured that all ranks were held to account for their actions, albeit using punishment methods which were fundamentally different.

3.13 Conclusion

This chapter has shown that although some evidence does exist to support the notions of military law being 'capricious and arbitrary' and concerned with keeping the 'lower orders' in check, as Buckley and Hay respectively argued, such an interpretation does not reflect the full complexity of how the law was applied. There can be no question that military law was based upon deterrence, and therefore threatened large scale floggings for those of the rank and file who broke its stipulations, or humiliation and unemployment for officers. Nevertheless, prosecution practices were deliberately focused on the army's need to remain a cohesive fighting force, with the law being applied consistently in the pursuit of that goal. The pre-occupation with absence and desertion, and unofficerlike conduct revealed by analysis of the court martial registers, clearly shows that maintenance of discipline was considered paramount, with the result that military law did not serve the needs of the victim, but rather those of the army. Yet just like the civilian courts, the military justice system did present avenues and opportunities to 'escape' justice, or reduce the scale of their punishment.[159]

This resulted in a nuanced system, that embraced discretionary approaches, applying the law specifically to the army's needs in each case. Yet it also created challenges in implementing the law. The push by Wellington for more rapid means of punishing men reflects his concerns as a commander, yet these were fundamentally at odds with the priorities of the King and Commander in Chief, who wished to limit the scale of punishments for crimes. The military justice system therefore emerges as one facing divergent pressures, as those at the top of the army's command structure, and those tasked with maintaining discipline in forces overseas, sought to influence the system to address their own needs and concerns. Reforms such as the creation of the GRCM tier, effectively became a means of punishing more, as opposed to more effectively.

[159] King, *Justice and Discretion*, pp. 1-2.

Examination of the desertion records of units such as the 95th Rifles, where flogging was supposedly less prevalent, calls into question the notion that a reduction in flogging was always beneficial for unit discipline. Such units actually experienced higher desertion rates, thereby partially substantiating the notion of flogging as an effective deterrent.

The relatively low proportion of trials for theft, when considered alongside the endemic scale of the crime which emerges from soldiers' memoirs, reveals that the army's prosecution priorities were also not necessarily reflective of the actual scale of particular crimes. This highlights that struggles around the implementation of military law were not simply a binary process between those at the top of the army's command structure in Britain, and those tasked with overall command overseas. A third, equally divergent pressure exerted itself. The 'normative expectations' outlined in the Articles of War, and even in the orders of its most senior commanders, were trumped by the those in contact with the men on a daily basis, as they sought to maintain a fragile balance between maintaining control, without undermining morale. For those men, plunder was something which could be tolerated within certain parameters, a question which will be explored further in the next chapter. Meanwhile, the failure to prosecute sexual assault in significant numbers further highlights the fact that restitution to the victim was not a leading priority governing military law. Instead ensuring adherence to what amounted to a professional code of conduct in the form of the stipulations of the Mutiny Act, was paramount.

A pragmatic system of discretionary justice was therefore employed to meet the army's needs in each situation. This balanced the need to make examples of convicted soldiers through use of the lash and capital punishment with a system of 'live and let live', where some misdemeanours were allowed to slip through the net in order to preserve morale. Precisely how this pragmatic system worked, the motives which underpinned it, and its relevance for our appreciation of how the British Army functioned, form the basis of the next chapter.

Chapter 4 The Regimental Courts Martial and the view 'from below'

4.1 Introduction

The previous chapter alluded to the significant role that discretion played in the application of military law. Whilst this emerged particularly clearly in the handling of officers' trials, it was by no means limited to the commissioned ranks. Having examined military law from the perspective of those at the top of the army's command structure, and through the lens of the most powerful military courts (the GCMs and GRCMs), this chapter now examines the view from below. In the process it will determine the extent to which pragmatic and discretionary practices were also exercised when applying military law to the actions of the rank and file. Too heavy handed an approach could have disastrous implications for unit morale, leaving officers within regiments with their own conundrum of command and control. This chapter therefore seeks to determine how this manifested itself through what this thesis terms the 'pragmatic system of discretionary justice'.

To achieve this aim, it draws upon the records of the Regimental Courts Martial (RCMs), taken from the six-monthly inspection reports in WO27. It is important to emphasise that the 3,440 RCM cases examined do not represent all of the RCMs that took place within the British army during this period. In order to work with a manageable dataset, a sample of twenty-seven infantry battalions was used. These units were chosen because they all saw some service during the Peninsular War, and were all present on at least two of the most infamous occasions when discipline collapsed amongst Wellington's troops: the capture of Ciudad Rodrigo, the sacking of Badajoz, the looting of King Joseph's baggage train following the Battle of Vittoria, and the capture of San Sebastian.[1] This amounts to including all the units which served in the Third, Fourth, Fifth and Light Divisions of Wellington's army, and represents 26% of the 104 battalions which saw active service in

[1] This information has been derived from Appendix II of C. Oman, *Wellington's Army 1809-1814* (London: Edward Arnold, 1912), pp. 343 – 373, and C. Oman, *A History of the Peninsular War*, 7 vols (Oxford: OUP, 1901-1930), IV-VI. The battalions in question are: 3/1st, 1/4th, 2/5th, 1/7th, 1/9th, 1/23rd, 3/27th, 2/30th, 1/38th, 2/38th, 1/40th, 1/43rd, 2/44th, 1/45th, 2/47th, 1/48th, 1/52nd, 2/52nd, 5/60th, 74th, 77th, 2/83rd, 1/88th, 94th, 1/95th, 2/95th, 3/95th.

the Peninsular War. It must be acknowledged, as was emphasised in the introduction to this thesis, that RCM returns were only included sporadically in the 6-monthly inspection returns, creating an inconsistent data set. Returns were included with growing frequency from 1811 though, and the overall sample size of 3,440 trials provides a considerable and valuable data set for analysis.

The use of this data, and the consideration of memoirs, letters and diaries from officers, NCOs and Privates will reveal key facets of, and influences upon, the grassroots implementation of discretionary military justice. Examination of the data regarding trials for absence and desertion will highlight discretionary approaches employed in the re-categorisation of the potentially capital crime of desertion as simple absence. The implications of, and motivations for, this will be indicated by the language employed by officers on punishment parade, and in retrospect by observers. In the process it will point to the role that preserving the honourable reputation of regiments had on wilful misrepresentation of crimes. By extension, officers therefore preserved their own reputations by avoiding association with a unit beset by desertion issues.

Consideration of theft and plunder will also reveal marked self-interest on the part of both the rank and file and officers by uncovering evidence of complicit behaviour and an appreciation of the impossible situation troops faced in subsisting off irregular and inadequate supplies. In such an environment, turning a blind eye to crimes not only ensured a cut of stolen food, but preserved the unit's morale and fighting ability. Yet plunder for subsistence also posed huge problems for the officers tasked with maintaining discipline in their battalion or company, as punishing a soldier for stealing in order to stave off starvation, both for themselves and their colleagues, clearly had the potential to undermine morale. This points to a wider problem that lieutenant-colonels and lower ranked officers faced of balancing the need to implement the army's legal code, with the equally vital priority of maintaining morale by not over-punishing their men. Essentially this amounted to a distinction between command and control. Controlling the actions of the rank and file through what Stephen Westbrook has termed 'coercive power' (the threat 'or application of physical sanction') is only partially effective in the longer term.[2] Officers who were able to draw upon a multitude of methods to garner their men's willingness to co-

[2] Westbrook, p. 247.

operate by following orders generated compliance from their men, making the unit operationally more effective, and easier to command.[3] As Andrew Bamford has shown, those who failed to strike the correct balance, and were overly strict disciplinarians, ran the risk of ruining the combat capability of the unit by destroying morale.[4] These crucial yet contradictory concerns unquestionably manifested themselves in the RCM trial data.

Discussion of the army's response to disorder in the aftermath of sieges, such as those of Ciudad Rodrigo, Badajoz and San Sebastian will indicate how the employment of discretion for the more holistic needs of the army could have an insidious effect. Failure to prosecute could in turn create a perception that crime was permissible in certain circumstances, compounding the challenge of maintaining discipline. This further highlights the complex and imperfect balancing act which those at all levels of the military justice system were engaged in, and the manner in which the actions of some could have a counterproductive impact upon the needs of their colleagues elsewhere in the army.

Additionally, consideration of punishment practices will highlight further ways in which discretion resulted in manipulation of the military justice system for the benefit of morale and the better facilitation of command and control. The repeated exercise of what might be termed a 'humanitarian' outlook on the use of the lash, with officers remitting floggings, opens a number of questions. On one level these interventions allude to a culture of sympathy amongst the army's officer class. However the fact that they were also shrewd acts designed to forge stronger bonds of command and control by demonstrating leniency which clouds the 'humanitarian' argument, and will be explored further. This chapter will therefore offer a fresh lens through which to consider wider constructions of honour and masculinity at the start of the nineteenth century, by pointing to the self-interest of the actions of the officer corps, and the willingness of men of all ranks to overlook dishonest conduct.

4.2 Desertion, absence and the lesser charge phenomenon

Notwithstanding the fact that battalion and company commanders faced differing pressures and priorities, the prosecution data suggests that some concerns transcended

[3] *Ibid*., pp. 263-264.
[4] Bamford, p. 64.

the army's command structure. Desertion and absence were foremost amongst these. Just as at GRCM and GCM level, absence from the unit or from duty was the most prosecuted crime at RCM, accounting for 869 trials, or 25% of all cases tried. This is a substantially lower proportion than that of GCM and GRCM trials, where 41.9% of individuals were tried for desertion alone, but does indicate that desertion and absence from the unit remained the leading priority for all officers, irrespective of rank. When considered together, some 3,742 of the 9,228 cases considered in this study were for desertion, absence without leave, absence from the unit, or absence from duty. Given that this amounts to 40.6% of the data set, it is tempting, though erroneous, to conclude that absence was therefore the most difficult crime to 'get away with'. Delving more deeply into the nature of the charges brought against soldiers reveals that the trial of a soldier for absence or desertion was actually a far more nuanced process than the figures suggest. Officers demonstrated a willingness to only make examples of their men's behaviour when it proved absolutely essential, shielding them from harsher punishments on other occasions by classifying their desertion as a lesser crime of absence.

Understanding the motivation behind these officers' decisions is fundamental to appreciating the reality of how the theory of the British army's legal system was implemented in practice. Desertion was deeply damaging to the primary group dynamic (outlined in the thesis introduction), undermining the individual's bond with the primary group since the perpetrator implicitly demonstrated a greater concern over their own welfare than the welfare of the group. Disdain for deserters was unquestionably widespread across the British Army during the Napoleonic era, including the rank and file. One Private of the 42nd described a deserter from his regiment in the following way:

> I was glad he was gone […]. He was a good for nothing rascal; constantly shamming ill, and bothering the non-commissioned officers of the company. Your dirty, lazy, careless, lying, bullies, never do good to themselves, or their comrades. […] Such fellows ought never to come again among faithful, brave men. They are an eyesore to the good soldier.[5]

[5] Anon, *The Personal Narrative of a Private Soldier who served in the Forty-Second Highlanders* (London: Ken Trotman, 1996), pp. 230-231. Subsequently Anon, *Solider of the 42nd*.

Private William Wheeler, meanwhile, vividly recalled the eccentric Colonel Mainwaring's somewhat crude method of punishing and humiliating a deserter from his regiment:

> He was sentenced five hundred lashes. He only received 75. He was taken down, our ranks open, and […] was ordered to march between the ranks. At the same time Colonel M kept shouting 'soldiers spit on the cowardly poltroon, you should p--- over him if it were not too indecent.'[6]

Such an obvious and deliberate act of humiliation clearly played into the primary group dynamic through the 'othering' of the deserter, and bringing the other members of the unit together in an expression of disgust about his behaviour. There is also a noticeable commonality in the way in which discussion of deserters alluded to honour. Thomas Browne spoke of the contempt which *honourable* soldiers held for deserters over their 'unsoldierlike conduct'.[7] Wheeler recalled the punishment of another deserter where Mainwaring made the man strip and walk beneath the arched colours of the regiment, in order to literally wipe away the deserter's shame with the battalion's honour.[8] William Lawrence, meanwhile, described it as 'fortunate' that none of the deserters captured during the fall of Ciudad Rodrigo in 1812 were from his division.[9] Quite simply, his division's honour did not have to be besmirched by association with a deserter. It is important to acknowledge here that this is a martial construction of honour, associated with the unit's reputation, and the ability of an individual to undermine that reputation.[10] In this construction, honour was seemingly deemed transferable. Being a member of a unit

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[6] William Wheeler, *The Letters of Private Wheeler, 1809-1828*, ed. by B., H., Liddell Hart (London: Michael Joseph, 1951), p. 21

[7] Thomas Browne, *The Napoleonic War Journal of Captain Thomas Henry Browne, 1807-1816*, ed. by Roger Buckley (London: The Bodley Head, 1987), p. 245.

[8] Wheeler, p. 41.

[9] William Lawrence, *A Dorset Solider: The Autobiography of Sergeant William Lawrence*, ed. by Eileen Hathaway (Tunbridge Wells: Spellmount, 1993), p. 62.

[10] For more on the interplay between notions of honour and martial masculinity see Matthew McCormack, 'Stamford Standoff: Honour Status and Rivalry in the Georgian Military', in *Britain's Soldier: Rethinking War and Society 1715-1815*, ed by Kevin Linch and Matthew McCormack (Liverpool: Liverpool University Press, 2014), pp. 77-94 (pp. 88-92). Catriona Kennedy has particularly written on the manner in which personal and professional self interest was paramount in officers' constructions of honour. Catriona Kennedy, 'John Bull into Battle, Military Masculinity and the British Army Officer during the Napoleonic Wars', in *Gender, War and Politics: Transatlantic Perspectives, 1775-1830*, ed. by Karen Hagemann, Gisela Mettele and Jane Rendall (Basingstoke: Palgrave Macmillan, 2010), pp. 127-146 (pp. 134-135). Subsequently Kennedy, *Military Masculinity*.

conferred a certain status on the individuals within it, and it became the responsibility of all to act in a way which upheld that reputation. Those who failed meet these expectations diminished the reputation of both the unit and those within it by association.

Nonetheless, there were limits to the soldier's approbation. Whilst both Edward Costello and John Green were of the opinion that a flogging was a well merited punishment for desertion, the tone used to recall the execution of deserters was always a sombre one.[11] John Cooper, for example, simply considered the deserters who were found following the capture of Ciudad Rodrigo, to be 'foolish fellows'.[12] Costello went even further, speaking of the admiration which his regiment felt for the 'intrepid and cool manner' which a deserter displayed during his execution.[13] This points to an interaction between martial masculinities and martial constructions of honour. In many respects, this in unsurprising, given that Faramez Dabhiowala, writing in the civilian context, has argued that as far back as the late seventeenth century notions of honour and reputation were integral to 'how individuals […] conceived of the relationship between the personal and the public and between the projection and perception of one's character'.[14] By dying with honour, and demonstrating qualities that were valued on the battlefield, not least steadiness in the face of death, the individual was able to in part eclipse the distaste soldiers felt for what he had done in life.

Part of the reason for these conflicting attitudes that were at once understanding and condemnatory is, of course, that the men were able to at least understand the motivations for deserting. Costello, meanwhile, clearly bore little ill will towards deserters who, following the conclusion of the Peninsular War, 'bound by the charms of the senoritas, who had followed their fortunes throughout the war, took this opportunity to desert their country's cause, to take up that of their Dulcineas'.[15] The fact that the war was over meant that those abandoning their colleagues were not judged in the same way that they would

[11] Costello, pp. 118-119; John Green, *The Vicissitudes of a Soldier's Life* (Louth: J & J. Jackson, 1827), pp. 16-17. Subsequently Green, *Vicissitudes*.
[12] John Cooper, *Rough Notes of Seven Campaigns 1809-1815* (Staplehurst: Spellmount, 1996), p. 72.
[13] Costello, p. 88.
[14] Faramez Dabhoiwala, 'The Construction of Honour, Reputation and Status in Late Seventeenth- and Early Eighteenth-Century England', *Transactions of the Royal Historical Society*, 6 (1996), 201-213.
[15] Costello, p. 149.

have been in the midst of the conflict. Their absence no longer had any impact on the unit's cohesion and their comrades survival prospects, and so carried less stigma.

Memoirs show that large numbers of soldiers, at various times, had also been guilty of absence without leave, and, as is shown in this candid admission from the same Private of the 42nd who vocally expressed his disgust for deserters, making the step from AWOL to desertion was tempting:

> When the orders came for us to hold ourselves in readiness for England again […] I went away at night; […]. On leaving Edinburgh I was assailed by a thousand different notions, all urging me not to return to the regiment; and I really believe I would have been base enough to desert, could I have got my clothes changed.[16]

For officers, being presented with a recaptured deserter from their regiment placed them in a quandary which Costello vividly captured:

> After the proceedings of the court-martial were read […] Major Cameron […] addressed the prisoner as follows: 'Stratton, I ought to have had you tried by a general court-martial; in that case you would have been shot; but the high character the regiment has borne in the army prevents me from having it mentioned in general orders that a man of the Rifles could be guilty of the heinous crime of desertion to the enemy.[17]

Cameron had to punish the deserter, yet could not bear to have his regiment's honour besmirched by association with a deserter. Military law therefore took a back seat, and pragmatism came to the fore, with Stratton being spared a far more severe punishment in the process. Nowhere then, is the motivation behind the trial of deserters at RCM more clearly exemplified than in Costello's recollection.

However, there is also a clear message here relating to deterrence, which is further evidenced by the trial data. The desire to treat the crime seriously, without besmirching the regiment's honour is particularly apparent from acquittal rates for 'absence', or equivalent crimes, which, at 2.6% is well below the average acquittal rate of 5.8% (see Table

[16] Anon, *Soldier of the 42nd*, pp. 114-115
[17] Costello, pp. 118-119.

4.1, 4.2 and 4.3).[18] In fact, only charges of drunkenness and disobedience had lower acquittal rates. When considered together, this points to the priority that affected officers' mindset when it came to prosecuting breaches of military law. Crimes which were directly subversive to good order and operational capability (i.e. a refusal to carry out a duty, or inability to do so due to absence or intoxication), met with a measured punishment that made an example of the accused, thereby sending a clear message that such behaviour would not be tolerated. Trial of deserters at RCM allowed officers to simultaneously demonstrate their inclination to engage in discretionary practices, whilst also embracing the public nature of punishments to send a clear message of deterrence regarding appropriate conduct.

However, it is also important to consider whether there was an element of self interest in officers' minds when seeking to preserve their regiment's honourable reputations, due to system of purchasing commissions within the British army during this period. The notion of martial honour discussed above stands in stark contrast to that found by Catriona Kennedy amongst the officer class.[19] Instead of being orientated towards the regiment, Kennedy makes the convincing case that honour amongst officers was predominantly tied to the individual. The scope for the two to intertwine was substantial, particularly given that, as Robert Shoemaker has pointed out, all reputations were based on public behaviour.[20] In the context of the army, therefore, the public nature of a GCM or GRCM trial, details of which would appear in General Orders, meant that a battalion's reputation suffered if too many such trials occurred. This had the potential to affect the officers financially, as commissions in regiments with more glorious and fashionable reputation, such as the Guards, fetched substantially higher prices than those in other units.[21] A public demonstration of disciplinary issues within the regiment therefore eroded that reputation, not only bringing shame, but also financial implications for the officers. Whether for holistic or pecuniary purposes, this notion of preserving the honour of the

[18] Based on the total number acquitted of desertion, AWOL, and 'Absence' at RCM, divided by the total number of trials at RCM for those same categories of crime: 21/795

[19] Kennedy, *Military Masculinity*, pp. 134-5.

[20] Robert Shoemaker, 'Male Honour and the decline of public violence in eighteenth century London', *Social History*, 26, 2, 190-208, (207).

[21] Robert Burnham and Ron McGuigan, *Wellington's Footguards at Waterloo* (Barnsley: Pen and Sword, 2018), pp. 16-17. An Ensign's commission in the Foot Guards cost £900, more than double the £400 for one in a line infantry regiment, such was the prestige of the Guards.

regiment therefore transcended all ranks of the army, and bears marked resemblance to Bamford's notions of regimental identity being a motivator for the soldier.[22]

Table 4.1: Number of trials and punishments issued at RCM for Desertion, 1808-1818.[23]

Year	Tried	Acquitted	Flogged	Confined	Other
1808	3	0	3	0	0
1809	2	0	2	0	0
1810	2	0	2	0	0
1811	0	0	0	0	0
1812	1	0	0	1	0
1813	5	1	4	0	0
1814	4	0	0	0	4
1815	5	1	4	0	2
1816	2	0	2	0	0
1817	4	0	3	0	1
1818	5	0	5	0	0
Total	**33**	**2**	**25**	**1**	**7**

Table 4.2: Number of trials and punishments issued at RCM for Absence Without Leave, 1808-1818.[24]

Year	Tried	Acquitted	Flogged	Confined	Other
1808	3	0	3	0	0
1809	6	0	6	0	0
1810	0	0	0	0	0
1811	8	0	8	0	0
1812	62	9	50	5	3
1813	24	0	22	1	3
1814	12	0	12	0	0
1815	54	0	52	0	5
1816	57	0	53	3	5
1817	44	1	34	9	9
1818	37	0	28	9	5
Total	307	10	268	27	30

[22] Bamford, p. 287.
[23] Sourced from WO27/91-145
[24] Sourced from WO27/91-145

Table 4.3: Number of trials and punishments issued at RCM for being 'Absent', 1808-1818.[25]

Year	Tried	Acquitted	Flogged	Confined	Other
1808	1	0	0	0	1
1809	28	0	28	0	3
1810	4	0	4	0	0
1811	17	0	17	0	1
1812	41	0	36	3	7
1813	31	1	18	2	13
1814	42	1	25	7	10
1815	72	3	62	0	14
1816	77	2	67	4	14
1817	61	1	41	16	6
1818	81	1	44	33	4
Total	**455**	**9**	**342**	**65**	**73**

The severity with which desertion and absence was handled is also partially indicated by the flogging rate, determined from Tables 4.1, 4.2 and 4.3. 691 of the 869 cases of the crime tried at RCM (79.5%) resulted in floggings, whilst just 99 (11.3%) were punished with confinements, with the vast majority of those confinements being issued in 1817 and 1818. There are also some interesting examples which arise in the 'other' category. In the majority of cases this category applies to NCOs who, upon being found guilty, would automatically be demoted to the rank of Private as part of their punishment, resulting in both shame for the individual and a loss of pay. However this was not always the case. When Privates Caul and Berlaud of the 74th Regiment were tried for being AWOL in late 1818, both were sentenced to 300 lashes and being branded with the letter D (a punishment generally used by GCMs and GRCMs for deserters), and notably the brandings were carried out. This was not an isolated incident as in September 1814, Private William Crosby was sentenced to the same punishment, although his charge explicitly stated that he had deserted. Given that the letter D was obviously associated with desertion, this provides further compelling evidence that desertion trials were passed off as 'AWOL' or 'absence' in order to avoid sending the cases to more senior courts, bringing public shame on the regiment.

[25] Sourced from WO27/91-145. Note: These figures do not include AWOL. Crimes in this category were described as 'Absent', 'Breaking out of barracks', 'leaving', 'out of barracks', 'our of quarters' and 'quitting'. A further, 74 were tried between 1808 and 1818 as having been 'Absent from Guard', or 'Absent from Duty', but are not included in tables 4.1, 4.2 or 4.3.

Examining the court records of desertion and absence therefore indicates the complex reality of the implementation of military law, and the centrality of pragmatism and discretion in influencing the legal process. Soldiers would have been aware of how the system worked since all RCMs within their unit, and all GCMs that took place in the region, were read to them on parade. It would therefore be clear that desertion was considered a shameful act. This would have been impressed upon them by both their peers and their officers, all of whom showed little inclination to be associated with deserters. Furthermore, the sheer volume of guilty verdicts for this type of charge would have sent a clear message that acquittal for desertion or absence was highly unlikely. It would also have been clear that the majority of these trials took place at the most senior tiers of court (47% of cases being at GCM, 30% at GRCM), with the result that if they were tried, they stood a 77% chance of being tried at a court capable of issuing 1000 lashes or more as a punishment. Additionally, due to the public nature of floggings, it would have been equally clear that the prospect of a severe flogging was very high. In essence then, those who absconded were playing a dangerous game, yet equally they knew that there was a possibility they would not be prosecuted at all. Due to the discretionary practices of their officers and even senior NCOs, absent soldiers knew that they stood the chance of not being noticed, or simply being confined for brief periods of time without a trial. The fact that less than 4,000 were tried for desertion or absence between 1808 and 1818, when the desertion registers list over 30,000 men between 1808 and 1813, indicates that the prospect of escaping justice remained high.[26]

The manner in which these crimes were classified at RCM is particularly noteworthy. Over this period 33 individuals (or 1% of the RCM sample) were tried for desertion at RCM. Although such a small proportion may seem insignificant, its importance becomes more apparent when the stipulations of the Articles of War are examined closely: 'All officers, Non-Commissioned Officers, and soldiers in Our Service, who shall be convicted of having deserted the same, shall suffer death, or such other punishment as by a *General Court Martial* shall be awarded.'[27] In essence, this was a precise stipulation that desertion was a crime which should be tried at GCM. Other articles were equally explicit that a crime could

[26] WO25/2907-2908.
[27] *Articles of War* (1809), Section VI, Article I, p. 16. Emphasis is mine. The wording in the 1813 edition of the Articles remained unchanged. *Articles of War* (1813), Section VI, Article I, p. 16.

only be tried at RCM, or GCM, or that could be tried in either tier, with drunkenness and being Absent Without Leave carrying the latter stipulation in the Articles of War.[28]

As a result, trying those 33 soldiers for desertion at RCM was an explicit breach of the Articles of War. These men were deliberately being tried in a court which lacked the legal authority to punish them, and whose punishments would be capped, ensuring that they received a lesser punishment than the law deemed to be appropriate. In the process, therefore officers deliberately sought to exploit the same ambiguities that Manners Sutton had flagged over the dubious distinctions between absence and desertion, referenced in Chapter Three. These trials contain charges that were wilfully ambiguous, such as the case of Private Ellis Woods of the 1/45th who was tried at Sydney on 25th May 1818 for 'absenting himself from his regiment with the intention of deserting'. He was found guilty, sentenced to 300 lashes, but had 275 lashes remitted.

The fact that these trials appeared in registers which were inspected as part of the six-monthly reports is also a curious point, suggesting that such a course of action was condoned to some degree, a point which will be explored further below. In essence it represented part of a culture across the army of avoiding recourse to the most senior tiers of military courts except in the most serious cases. These 'work arounds' were by no means unprecedented. As was established in Chapter Two, similar phenomena can be observed in the non-military courts. In cases of theft, the impetus for this came from victims rather than those charged with upholding the law.[29] However, Beattie has shown that even in cases of murder, the choice of categorisation of a crime could be key, as proving a justification for the killing in question could result in the offence being charged as non-capital.[30] This was therefore an established legal practice, albeit one that, in the military courts, could be used as a means to subvert the justice process, in favour of a more discretionary approach. Here again, therefore, we have evidence of the operation of military justice being both informed by non-military legal practices, though only drawn upon in a manner which suited the army's needs. The motives here were, therefore, markedly different. Whilst there may have been a common element of humanity as a motivator for this practice across the military and non-military courts, in the military context that humanity was at least in part based

[28] *Articles of War* (1809), Section XIV, Article IX, p. 42; *Articles of War* (1809), Section XIV, Article V, p. 40.
[29] Beattie, *Crime and Courts*, p. 333.
[30] *Ibid*, pp. 79-80.

upon ulterior motives. As such, therefore it is questionable whether this can truly be described as humanity. This is a theme which will be developed throughout this chapter, although at this stage it is important to note the self-serving nature of this supposedly humanitarian endeavour, given that the emphasis on preserving regimental honour and maintaining morale that has been identified so far.

If some officers chose to deliberately try deserters in a lower court than their crime warranted in order to reduce their punishment, others went even further. As the charge was usually crafted by the officer carrying out the arrest of the individual, they had an opportunity to influence the scale of the punishment that the prisoner received based on how they chose to categorise the charge. This gave rise to some men being tried for 'absence' when their guilt of desertion was beyond doubt.

The registers of RCMs of the 1/7th, and 2/47th, for example, show that men who had been absent for weeks, only returning when brought back under armed guard, were simply charged with being Absent without Leave (AWOL), despite the sustained nature of their absence clearly indicating an intention to desert. Private Edward Wakefield of the 1/7th, for example, was tried in October 1817 for having been AWOL from 1st July until he was brought back by an escort on 6th October, whilst Private Eccles of the same unit was tried for being AWOL from April to October of the same year, and Private Thomas Meek, again of the 1/7th was tried for having been 'absent from guard until brought back by an escort three months later'.[31] All three were found guilty, and sentenced to 300 lashes, though Wakefield had 200 lashes remitted, Ecceles had his punishment commuted to three weeks solitary confinement on account of him having surrendered himself, and Meek's punishment was commuted to one month's solitary confinement. Meek's charge is particularly interesting for the ambiguity in the way it was worded. He had in effect deserted, and was clearly absent without leave, not least because all desertions were instances of the soldier being absent without permission, but by framing the charge as being 'absent from guard', albeit for a sustained period of time, it could be classified as an offence appropriate for trial at RCM, rather than a higher tier of court.

[31] The National Archives, War Office 27/142.

Perhaps the most blatant example of a lack of willingness to ensure that men were tried at the most appropriate courts can be found in the case of Private Phillip Smith of the 2/52nd. In March 1813, Smith was tried by a 'Detachment General Court Martial' for having deserted in March 1801 and not returning to his regiment until brought back by an escort in December 1812. The use of a Detachment General Court Martial might appear to fulfil the requirements of the Articles of War, however, the place of the trial is significant in appreciating the more duplicitous decision-making surrounding this trial. The reference to a Detachment General Court Martial is itself peculiar, as Detachment Courts Martial were actually a form of RCM which had the power to try warrant officers.[32] In essence, then, the concept of a Private being tried in a 'Detachment General Court Martial' would appear, from the surviving works of authority on military law, to be a misnomer, or potentially even a complete fabrication.

Although the trial took place at the battalion's depot, it must also be recognised that this was certainly not a situation brought about by necessity due to staff shortages. The Articles of War did allow for situations where there were insufficient officers available to try a soldier at GCM. However, these provisions only applied overseas, and 13 officers would still have been required in this instance, as desertion carried the death penalty. Irrespective of this, the notion that there were insufficient officers available to try Smith at GCM is erroneous. The very fact that the trial took place at the battalion's depot in Shorncliffe, meant that it was perfectly feasible that Smith's case could have been referred to a full GCM. WO92/1 contains an entire volume of registers for GCMs confirmed 'at home' (ie within the United Kingdom, rather than overseas), containing some 1,507 cases between 1808 and 1818. Whilst some of these cases had been tried overseas, and the proceedings had been sent home for confirmation, the majority of the volume contains trials which took place within the UK. There was therefore comparatively little challenge in gathering the minimum of thirteen officers required for a full GCM.

The fact that Smith was sentenced to 500 lashes is a further peculiarity. By 1813, when this trial took place, RCMs were limited to a maximum corporal punishment of 300 lashes. 500 lashes was more typical of a GRCM punishment for desertion, but is still on the low side for that tier of court. It is noticeable that Smith was not tried in a higher profile

[32] *Articles of War* (1813), Section XVI, Article XV, p. 61; Hough, pp. 406-7.

GRCM, however, but instead was quietly dealt with at a Detachment Court Martial. Even then, 457 lashes, or 91% of his punishment, was remitted, further indicating that, whilst Smith clearly had to be tried and punished, there was little desire to bring the full force of military law to bear on a blatant case of desertion.

As not all charges listed in the RCM registers explicitly provide dates of absence, it is impossible to speculate how many cases of 'absence' or 'AWOL' should actually have been classified as desertion. Nonetheless, this points to an undercurrent of discretion in the military justice system, which not only transcended the officer class, but led to them deliberately exploiting a loophole in the very system that they should have maintained.

4.3 Discretionary approaches to trying property offences at RCM

If the prosecution of deserters and absent soldiers reveals a complex conflict between honour, discretion, and a need to uphold military law, studying how property crimes were handled at RCM is equally revealing. Here, again, there is a noticeable commonality with the GCM and GRCM data examined in the previous chapter. As with the top two tiers of court, property crime (variously described as theft, robbing, stealing, extorting, swindling, taking or having in one's possession without being able to properly account for it) was the second most commonly prosecuted crime, accounting for 628 (18%) of the 3,480 RCMs cases in the sample.[33] This compares to 580 (14.3%) at GCM and 198 (11.8%) at GRCM. Of the entire court martial database, 1,406 or 15.2% of those tried faced property-related charges.

In terms of punishments, it is striking that flogging was again overwhelmingly used to punish those caught stealing. What is more intriguing, however, is that very few were issued with fines to reimburse the owner. This is particularly hard to account for, given that victims of theft often complained with the hope of recovering their property, and research has shown that in the civil legal system complainants often lost interest in the process of prosecution once they had secured remuneration for their loss.[34] This data therefore indicates that if the army did ever seek to refund the costs of the stolen material to the

[33] Note: This does not include 'making away' with necessaries and other army equipment, or embezzling, both of which are considered separately below.
[34] Beattie, *Crime and Courts*, pp. 38-9.

victims, they certainly did not recover that expense from the perpetrator. As we shall see, this stands in contrast to the army's approach to recovering the costs of lost or damaged equipment when soldiers were found guilty of 'making away' with it, again calling into question the extent to which the military justice system provided settlement for victims.

Table 4.4: Number of trials and punishments issued at RCM for 'theft' or equivalent crimes, 1808-1818.[35]

Year	Tried	Acquitted	Flogged	Confined	Other
1808	1	0	1	0	0
1809	23	2	21	0	0
1810	2	0	2	0	0
1811	33	2	31	0	0
1812	156	25	121	1	16
1813	90	6	79	4	6
1814	31	2	25	0	5
1815	117	9	107	0	5
1816	84	10	72	2	9
1817	59	5	49	4	3
1818	32	6	19	5	2
Total	628	67	527	16	46

It is also noticeable that acquittal rates for thefts tried at RCM were higher than for any other category of crime prosecuted at this tier of court, with 10.7% of those tried being cleared of the charges. Accounting for this is difficult, given the scarcity of RCM proceedings, and it is therefore impossible to determine with any accuracy how soldiers sought to defend their actions. Yet by examining the culture that surrounded plunder and theft, it is possible to gain a clearer indication of officers attitudes on plunder. This in turn, would unquestionably have influenced their attitude towards trying soldiers for the crime.

In *All for the King's Shilling*, Ed Coss has made a distinction between theft for subsistence, and theft for profit. Not only, as Coss highlights, were troops' rations nutritionally inadequate, but issues with supply often meant that the troops only ate if they were able to 'forage' for their dinner.[36] The extent to which soldiers considered this to be permissible is demonstrated by the huge number of candid confessions to plunder for

[35] Crimes in the category were variously described as 'Theft', 'robbing', 'stealing', 'extorting', 'swindling', 'taking' or having in ones possession 'without being able to properly account for it'. Note: This does not include 'Making away with regimental necessaries, or other crimes relating to losing army equipment.
[36] Coss, p. 110-112.

subsistence.[37] It is interesting that the soldiers developed a number of euphemisms to describe this process, indicating the tendency to recognise that under normal circumstances their actions would not have been acceptable. An anonymous soldier of the 42nd described how: 'three of the mess I belonged to, volunteered to go on a private foraging party. I was always forward when there was anything to be done in this way'.[38] 'Forage' was a popular term for this activity. Although of course the soldiers rarely if ever paid for what they found, and the term 'appropriating' used by some was probably more accurate.[39]

James Anton provided this useful explanation of the distinctions that were made between the different ways of procuring food by theft:

> This manner of unwarrantably furnishing themselves by stealth, is justly termed *marauding* by our official authorities; if the act be attended by violence, it is called *rapine*; but, on purpose to divest it of either of these offensive appellations, the soldiers call it *reconnoitring*; thus softening it down to a more honourable undertaking, in the military phrase, so as to justify, in their own opinion, their nocturnal excursions for booty.[40]

It is beyond doubt that plenty of officers were aware of the light-fingered tendencies of their men and knew who the most common culprits were. It is clear that plenty were prepared to, at the very least turn, a blind eye when men were plundering for subsistence. This was partially a pragmatic recognition that, not withstanding Wellington's orders, the men needed to eat, and preventing them from doing so would only undermine the morale of the wider unit, given that any food discovered went into the communal mess pot. George Bell was therefore unconcerned when he remarked: 'Tom Tandy, who was a good forager, always left room in the sack for anything Providence might send on the way,

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[37] Green, *Vicissitudes*, pp. 115-116; Anon, *Memoirs of a Sergeant Late in the Forty-Third Light Infantry* (London: John Mason, 1835), p. 130; William Brown, *The Autobiography or Narrative of a Soldier: The Peninsular War Memoirs of William Brown of the 45th Foot* (Warwick, Helion & Co., 2017), p. 155. Subsequently Brown, *Autobiography*.

[38] Anon, *Soldier of the 42nd*, p. 58

[39] The term forage was also used by an anonymous soldier of the 71st, Anon, *A Soldier of the Seventy-First: The Journal of a Soldier of the Highland Light Infantry 1806-1815*, ed. by Christopher Hibbert (London: Leo Cooper, 1975) p. 59, and even officer George Bell. George Bell, *Soldier's Glory being 'Rough Notes of an Old Soldier'*, ed. by Brian Stuart (London: G. Bell & Sons Ltd, 1956), p. 11, p. 35. Anon, *Soldier of the 42nd*, p. 59.

[40] James Anton, *Retrospect of A Military Life during the most eventful periods of the last war* (Cambridge: Ken Trotman Ltd, 1991), pp. 80-81.

as he said, 'to help the rations'.'[41] Some officers went much further, condoning, or even actively ordering their men to ransack abandoned buildings or fields for food. William Wheeler recalled in a letter in June 1813 that his battalion commander Major Roberts actively encouraged his men to plunder for food during breaks on the march because, as Roberts' himself acknowledged, the commissariat could not supply the men.[42]

Other officers were actively complicit in this plundering by taking a cut in return for their relaxed stance, inhibiting the prosecution process when civilians complained. This therefore created a triple incentive for officers not to report those who plundered food. Their men would know of their acquiescence, and thereby be indebted to them, fostering a stronger bond of loyalty as they became more popular amongst the men, and therefore facilitating a greater degree of control in situations where it was needed. In addition, the men's morale would be higher, further making the task of command and control significantly easier, reducing the need to police the men, as they were in a better mood and therefore more likely to contentedly follow orders. Crucially however, the officers' own battle with hunger was solved by these 'foragers'. There were, therefore multiple reasons to disincentivise officers to report thieves, yet the idea of categorising the motives of the officers as evidence of humanitarianism is problematic, since self-interest was so prominent here. As Samuel Moyn has highlighted, during the Enlightenment humanity became more associated with the culture of sympathy and empathy (in other words feeling others' pain).[43] Certainly officers could empathise with their men when it came to plunder for subsistence, or in other words, they had an 'internalised understanding of, or identification with, such people's states, seeing things from their point of view'.[44] However, this was at least in part because they themselves were suffering, or had suffered, similar privations on campaign. The fact that these officers benefited personally from these acts of discretion therefore lacks a key element of humanity, as it lacked the selflessness required of a humanitarian who should seek to assist fellow being and alleviate suffering.[45]

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[41] Bell, p. 35.
[42] Wheeler, p. 115.
[43] Samuel Moyn, *The last Utopia: Human Rights in History* (London: Belknap Press, 2010), p. 19.
[44] Samuel Moyn, 'Review: Empathy, in History, Empathising with Humanity' *History and Theory*, 45, 3 (2006), 397-414 (399).
[45] Richard Ashby Wilson and Richard D. Brown, 'Introduction', in *Humanitarianism and Suffering: The Mobilisation of Empathy*, ed. by R. A. Wilson and R. D. Brown (Cambridge: Cambridge University Press, 2009), pp. 1-30 (pp. 11-12).

By permitting plunder for subsistence, officers made it much more difficult to establish where the line had to be drawn. As Private Jeremiah showed in his candid account of a 'foraging' expedition on the morning of the Battle of Waterloo, the search for food could easily lead to soldiers discovering other valuables which they were not inclined to ignore. After having discovered some wine and flour, Jeremiah observed a dog tied to a chair in an abandoned mansion and unchained it in order to prevent it from starving.[46] As he did so, he discovered that the straw that the animal had been lying on contained two bags of silver dollars, which he and his comrades shared between them.[47]

Furthermore, primary group dynamics were just as crucial in preventing soldiers reporting on one another when money was stolen. William Lawrence recalled the extreme lengths that the men went to in order to protect their collective share of some plunder found whilst encamped near the Lines of Torres Vedras. After discovering a jar containing thousands of dollars buried beneath the floor of their quarters, the money was split between the men who were billeted in the building. When the Portuguese owner of the property discovered that the money was missing, he reported it to the Colonel. Lawrence was sent for, as the Colonel did not speak Portuguese, but lied to his Commanding Officer, telling him that the civilian wanted some men to guard a pile of wood, whilst telling the victim that as he had no witness to the money having been buried under the floor, there was nothing the Colonel could do. When the civilian returned the following day, Lawrence was obliged to tell the Colonel the real reason for the man's complaint, though he first extracted a promise that the Colonel would forgive him for not being truthful. With the Colonel now being aware of the situation, the men made plans to hide the loot ahead of an inevitable search, supporting one another in finding hiding spaces for the money. In Lawrence's case, he and some friends carved out a hole in a pumpkin and concealed the money inside. When an inspection failed to find the money, the battalion's major interviewed the men individually, offering them five guineas if they told the truth. All refused, in part because their share of the Portuguese man's money was worth more, but equally, they would have been shunned by their comrades had they taken the money and informed on the rest of the unit. Ultimately they trusted one another to serve the collective

[46] Quoted in Glover, *Waterloo Archive*, IV, p. 186.
[47] Quoted in *Ibid*, pp. 186-7.

interest, and prevented the officers from prosecuting the men for the theft of a sum of money which the Portuguese civilian claimed to amount to $7000.[48]

Attitudes to plundering on campaign differed markedly from attitudes towards plundering the battlefield dead, representing an additional grey area that may have affected plunder and theft prosecution rates. Some officers were quite candid about their men picking up plunder, and showed little concern over it. When writing home after the Battle of Oporto, John Aitchison, for example, seemingly classed plunder as being no different from collecting prisoners: 'Several hundred prisoners [were taken] and two squadrons of [French] Dragoons lost their horses – a great quantity of plunder was likewise taken – several of our soldiers took to the value of £100.'[49]

Some of the rank and file had apprehensions over where the line lay, as Rifleman Harris related. Whilst one officer was very helpful, and offered him advice on where to find a dead French soldier's hidden plunder, he was more concerned when he returned to his unit and was questioned by his Major:

> I handed him the purse, expecting a reprimand for my pains. He, however, only laughed as he examined it, and, turning, showed it to his brother officers. "You did that well, Harris," he said, "and I am sorry the purse is not better filled. Fall in". In saying this, he handed me back the purse.[50]

Opportunistic plundering of the enemy was therefore deemed acceptable, something which may explain why, despite Wellington's obvious irritation at plundering at the Battle of Vittoria, no-one was tried. Other officers gave their men permission to plunder. During the Waterloo campaign General Adams specifically permitted his men to plunder three farmhouses as a reward for fighting hard all night. Second Lieutenant Richard Eyres Cocks remarked in a letter to his mother how, after a night of skirmishing with the French, his unit was recalled on the morning 18th June. 'As a reward for our nocturnal labours, we had leave from General Adam who commanded our (Light) Brigade to plunder three farm houses

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[48] Lawrence, pp. 45-48.

[49] John Aitchison, *An Ensign in the Peninsular War: The Letters of John Aitchison*, ed. by W. F. K. Thompson (London: Michael Joseph, 1981), p. 42. Aitchison, To Anon, Oporto, 25th May 1809.

[50] Benjamin Harris, *Recollections of Rifleman Harris*, ed. by H. Curling (London: Peter Davies Ltd, 1929), pp. 57-58.

which were near us!'[51] Plunder as reward was therefore clearly a recognised phenomenon, though plundering an ally was controversial, and certainly not approved of by Wellington.

As a result, it is clear that the 628 theft trials in the RCM sample, and the additional 198 tried at GRCM, and 580 tried at GCM, can only have represented a miniscule proportion of the offences that were actually perpetrated by soldiers during the period. Inconsistencies in the frequency and detail of the six-monthly inspection returns mean that it is difficult to make definitive judgements about the trends in trying the rank and file for theft over the course of each year. The six-monthly nature of the reports means that the inclusion of a particularly detailed return can particularly skew the results. Some returns also did not include the precise dates that the RCM trials took place. Nonetheless, when charting the distribution of the trials for the 505 RCM theft cases where precise dates are given, it is noticeable that the numbers of prosecutions were substantially larger in the months of November to May, than in June to September, something which Table 4.5 demonstrates.

Table 4.5: RCM theft trial distribution by month, 1808-1818.[52]

	1808	**1809**	**1810**	**1811**	**1812**	**1813**	**1814**	**1815**	**1816**	**1817**	**1818**	**Total**
Jan	0	0	0	0	11	17	0	5	12	4	2	**51**
Feb	0	2	0	0	5	27	1	5	6	4	1	**51**
March	0	0	0	0	7	10	0	2	8	11	2	**40**
April	0	4	1	0	3	15	1	6	5	6	5	**46**
May	0	2	1	1	28	2	2	2	5	2	7	**52**
June	0	0	0	0	2	4	2	3	10	5	1	**27**
July	0	0	0	4	6	0	2	3	5	2	0	**21**
Aug	0	2	0	1	6	1	0	5	11	0	1	**27**
Sept	0	0	0	0	4	1	6	5	11	1	0	**28**
Oct	0	0	0	7	9	0	5	8	3	4	0	**36**
Nov	1	0	0	6	7	0	5	25	2	1	0	**46**
Dec	0	0	0	15	44	1	3	6	5	6	0	**80**

It is immediately clear that, generally speaking, when the army was not on campaign, it saw a greater number of theft prosecutions. This in itself is not entirely surprising, since the army would have been in winter quarters. This would have aided detection of the theft, and the reporting of it by civilians, since the unit would remain in the same location for extended periods of time. This stands in contrast to the campaign

[51] Glover, *Waterloo Archive*, III, p. 115. Second Lieutenant Richard Cocks Eyre, 2nd Battalion 95th Foot, to his mother, Brussels 28th June 1815.
[52] Compiled from WO27, Six-monthly inspection returns.

season where a unit might bivouac in one village overnight, before moving on the following day, creating challenges for theft victims in finding an officer who could act upon their complaint. However, accounting for the more nuanced reasons behind the increase is challenging. Whilst it is possible that this increase was simply the result of the greater ease with which such crimes could be detected and reported, it is equally feasible that officers were more inclined to prosecute these trials when the regiment was not on campaign, since the troops were not suffering the same privations that they were exposed to on campaign. Higher numbers of trials could also be the result of officers having more time to be able to try cases when the unit was in winter quarters. Furthermore, officers may have been inclined to adopt a stricter approach to discipline when troops were not occupied with the business of campaigning, in order to prevent a surge in criminal activity caused by the men having more time to devote to theft than normal. With no RCM proceedings being available for scrutiny, no anecdotal evidence offering an insight into this phenomenon, and given the inconsistencies in the nature of the returns acknowledged above, it is important not to jump to conclusions about this curious phenomenon. Further research is required beyond the period covered by this thesis in order to ascertain the consistency of the trend identified here to confirm whether it is representative.

The fact remains, however, that generally speaking soldiers were not being caught in the act, officers choose not to ask questions, and the officers themselves plundered for subsistence and personal gain. As a result, both pragmatism and self-interest combined to make prosecution for theft extremely challenging, in spite of the stipulations of the Articles of War. Choosing pragmatism and discretion over the law inevitably led to a blurring of the distinctions over permissible and unacceptable behaviour, which simply served to exacerbate the challenge of maintaining discipline and adherence to the Mutiny Act.

4.4 Discretionary approaches to discipline following sackings

Possibly the most compelling case study for examining how the pragmatic system of discretionary justice manifested itself, its impact on the implementation of military law, and the damage that it could cause to wider discipline, can be found in the handling of the aftermaths of the Peninsular War sieges. There is a considerable volume of scholarship noting the murder, rapes and sackings which followed the sieges of Ciudad Rodrigo, Badajoz and San Sebastian. However, much of it has focused on explaining why they took

place. Saul David has pointed out that soldiers' wives energetically joined in the plundering, whilst Charles Esdaile has found that poorer inhabitants participated in the sacking of Ciudad Rodrigo.[53] The most common argument made though is that these sackings were inevitable, partly due to the impossibility of officers staying in contact with their men in the narrow streets, and partly due to the tradition that besieged towns which stood an assault could be sacked.[54]

All of these arguments are valid, yet they fail to address the paradox created by Wellington's well documented abhorrence of plunder. For Wellington, the looting, murder and rape which occurred in these towns must have created an intense internal conflict, as he sought to reconcile his unequivocal stance on plunder with an acceptance of the notion that these sackings were to be expected. Ciudad Rodrigo, Badajoz, and San Sebastian therefore represent curious cases of inconsistency from a commander who was usually uncompromising in his expectations.

Wellington's General Orders during the sacking of Badajoz were characteristic, declaring that 'it is full time that the plunder of Badajoz should cease', the Provost were ordered into the town to execute plunderers, and that the rolls were called hourly until order was restored.[55] Although eyewitness testimony proves that the Provost were ordered into the town, a gallows was erected and some were flogged, but there is no conclusive proof that any of the looters were hanged.[56]

Yet Badajoz was not the first time that British officers had lost control of their men in the wake of a siege. Ciudad Rodrigo, the siege of which involved the same units, had

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[53] Saul David, *All the King's Men: The British Redcoat in the era of Sword and Musket* (London: Penguin, 2013), p. 417; Charles Esdaile, *The Peninsular War: A New History* (London: Penguin, 2003) p. 380

[54] Frederick Myatt, *British Sieges of the Peninsular War* (Stroud: Spellmount, 2008), p. 15; David Chandler, 'Siege Warfare in the Peninsula, 1808-1814', in *The Peninsular War: Aspects of the Struggle in the Iberian Peninsula*, ed. by Fletcher, I. (Staplehurst: Spellmount, 1998), pp. 47-64 (pp. 59-60).

[55] WP9/1/2/5, General Orders, 7th April 1812.

[56] See, for example, George Bell, *Soldier's Glory*, ed. by Brian Stuart (London: G. Bell and Sons Ltd, 1956), p. 29. Thomas Browne, *The Napoleonic War Journal of Captain Thomas Henry Browne, 1807-1816*, p. 153. Browne is the only person to state that men were hung at Badajoz, and his journal more broadly provides a valuable insight into discipline in the British Army, but his account contains exaggerations: 'Division after division was sent in to check the plunder, who so far from doing so, joined in the work of havoc that was going on. Gallows were erected in several street, and soldiers were hung upon them, but all in vain.' Costello, p. 99: 'I am not aware that a single execution took place'. Costello later remarked that a fellow ranker, Johnny Castles, had actually had a noose placed around his neck at Badajoz, but had not been hung, and since decided 'to live forever', resulting in him becoming corpulent, something which Costello claimed made him a target when in the front line. Costello, p. 143.

been followed by plundering, though on a much smaller scale, raising the tantalising question of whether Ciudad Rodrigo, and the manner in which it was dealt with, set a precedent for events at Badajoz.

As order was restored in Ciudad Rodrigo in the morning after the assault, Wellington's General Orders had little reason to raise the issue, and he chose instead to thank and praise the troops for their labours and gallantry.[57] Nonetheless, the evidence of the troops' crimes was plain to see as they carried their plunder back to camp, creating plenty of grounds for the soldiers to be tried. Either the complaints of the civilians had to be investigated, or the officers would have been expected to investigate how their men had acquired their newfound wealth. However, there were no such trials at any level. Whilst some deserters found in Ciudad Rodrigo were tried at General Court Martial and executed, no GCMs dealt with plunder in the town. Across the thirteen regiments in the Third and Light Divisions only one Regimental Court Martial was held for 'suspicion of theft', which took place in the 2/5th, although for six of those regiments there are no returns of RCMs in the six-monthly inspection reports for the relevant time period.[58] Even in that isolated case of the 2/5th, the charge does not explicitly refer to Ciudad Rodrigo, with the trial occurring six days after the siege concluded.

With such a lax disciplinary response to blatant plundering, the troops could consider themselves to have 'got away with it' at Ciudad Rodrigo, or even assume that their actions were condoned. Wellington's orders prior to the assault on Badajoz gave them no reason to alter this perception, as there was remarkable ambiguity in his order that the troops stay together until the threat of the enemy had been overcome. As with Ciudad Rodrigo, the response of the military courts was muted. There were no GCMs in the Iberian Peninsula in the weeks following Badajoz. The registers of the newly created General-Regimental Courts Martial equally show nothing relevant, as trials did not take place until the 1st June 1812.[59]

RCM returns are missing for 12 of the 24 British regiments which stormed Badajoz. Of the remainder, nine returns show nothing that fits either the dates or relevant crimes.

[57] WP9/1/2/5, General Orders, 22nd January 1812.
[58] WO27/106-107, 111-112.
[59] WO89/4.

In the remaining three, the 2/5th tried one soldier on suspicion of theft more than a fortnight after the plunder of Badajoz ceased, the 2/95th tried a Corporal and 3 Privates for unsoldierlike conduct on the evening of 9th April.[60] However, what is more revealing is the return for from 1/40th from this period. The document only covers one month between mid-April and mid-May, and details 25 individuals over that period who were tried, which is not particularly remarkable. Before the 5th May, four in the 1/40th were tried for dirtiness, four for drunkenness, three for unsoldierlike conduct, and four for robbing an inhabitant. As those last four were tried on 5th May, nearly a month after Badajoz, it is highly unlikely that there is a connection. However, what is really intriguing is the note at the bottom of this return. In an apologetic tone, the battalion's new Commanding Officer explained that 'the above relative state of discipline of the Regiment after the Siege of Badajoz and the very great irregularities and drunkenness that prevailed, caused the above number of Courts Martial for example and to put a stop to such practice'.[61] In essence the commander of this regiment felt the need to justify why he called RCMs to discipline his own men in line with army regulations. Yet even here, the trials were not for plunder, rape or murder. As at Ciudad Rodrigo, few were brought to justice.

As indicated above, the reasons for this lay in pragmatism, which led to an unwillingness to inform upon offenders, or bring them to justice. Given the importance of camaraderie and solidarity amongst soldiers, the rank and file were unlikely to report on their friends, as it increased the risk of ostracization from that primary group. Subalterns, meanwhile, were faced with the need to strike a delicate balance between maintaining order and morale. The fact that the battalions had suffered hugely in storming the breaches meant that there was doubtless a feeling that the men had suffered enough.

The decision not to prosecute becomes more morally questionable in relation to the rapes and murders which were committed by the soldiers. Costello, who was wounded during the assault on Badajoz, made his way into the town in the midst of the sacking, and joined some soldiers who had occupied the house of an old man. The elderly Spaniard provided the soldiers with food, wine, and was forced to give up all the money he had in the house. As Costello recalled, events took a darker turn, however, when:

[60] WO27/111-112.
[61] WO27/107, Six-Monthly Inspection Return for 1st Battalion 40th Regiment, 18th April to 12th May 1812.

> Unhappily they discovered the two daughters of the old patrone, who had concealed themselves upstairs. They both were young and very pretty. The mother, too was shortly afterwards dragged from her hiding-place. Without dwelling on the frightful scene that followed, it may be sufficient to add, that our men, more infuriated by drink than before, again seized upon the old man, and insisted upon a fresh supply of liquor. And his protestations that he possessed no more were as vain as were all attempts to refrain them from ill-using him.[62]

Costello, of course, does not openly admit to standing by whilst these women were raped, limiting himself to the remark that the old man was 'ill-used', in this instance probably referring to him being beaten. That said, the allusion to the beauty of the man's daughters, the 'frightful scene that followed', and the use of the term 'ill-using', are highly suggestive that the women were raped. It is important to note, that Costello's choice of the words 'ill-use' take on a new significance when it is considered that the phrase is noticeably similar to 'ill-treat' which was sometimes used in GCM trials as an euphemism for sexual assault.

Costello, therefore, provides an example of an individual who chose not to report what he had seen or provide evidence despite being a witness to a crime which he himself admitted 'disturbed' him, and was a 'painful recollection'. As discussed in Chapter Three, the court martial database indicates that the army almost never sought to prosecute its men for rape, highlighting how Badajoz provides an example of wider issues within the military justice system. The failure to investigate the murder of civilians in the town during the sacking was equally problematic. There has been some discussion amongst historians over the number of inhabitants killed at Badajoz, with Saul David suggesting that the figure was 250, whilst Rory Muir has suggested that the number may be fewer than 100.[63] However, research by Fernando Ortiz has uncovered a detailed tally of the deaths and injuries.[64] Ortiz's sources, which originate from the diocese archives at Badajoz, reveal that a census by the French on the 17th March found 300 families in the town, or an estimated

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[62] Costello, p. 98.

[63] David, p. 417, Rory Muir, *Wellington: The Path to Victory, 1769-1814* (Yale: Yale University Press, 2013), p. 456.

[64] Fernando Ortiz, 'Civilian Casualties during the Sacking of Badajoz', <https://www.napoleon-series.org/military-info/battles/1812/Peninsula/Badajoz/CivilianCasualtiesBadajoz/c_civiliancasuatiessackofBadajoz.html> [Accessed 25/08/2021].

1,400 people.[65] A parish Priest provides the street, house number, and even names of the victims, totalling 102 dead, 23 mortally wounded, and 83 seriously injured. At the very least this gives us a civilian casualty rate of 16%. However, the absence of one of the parishes (that of Santo Domingo in the west of the town) from the sources, combined with the fact that a number of civilians seemingly left the city after the census, means the figure is likely to be 20-25%. Clearly then, whilst the numbers are not as high as has been assumed by some, the proportion was still significant. The fact that the military justice system did nothing to address such serious offences speaks volumes about the role of discretion in the operation of the courts martial. Under Section 9, Article 5 of the Articles of War:

> 'Every Officer [sic] commanding in Quarters, Garrisons, or on a March, shall keep good Order, and to the utmost of his Power redress all such Abuses or Disorders as may be committed by any Officer or Soldier under his Command. If […] Commanding Officer[s] shall refuse or omit to see Justice done on the Offender or Offenders, […] he shall, upon due Proof thereof before a General Court-martial be deemed culpable in the same Degree as if he himself had committed the Crimes or Disorders complained of.[66]

It was therefore not just the moral, but also the legal, duty of all officers from Wellington downwards to facilitate the prosecution of plunderers, murderers and rapists of Badajoz. Costello reasoned that 'men who besiege a town in the face of such dangers generally become desperate from their own privations and sufferings', and Thomas Graham later remarked that 'I am quite sure that if Dover were in the hands of the French, and were to be taken by a British army, the cellars and shops of the inhabitants would suffer'.[67] However, the evidence remains unequivocal. Military law was circumvented, and its

[65] This is far lower that Gavin Daly's recent estimate of 4,000-5,000 inhabitants at the time of the storm. Gavin Daly, "The sacking of a town is an abomination': siege, sack and violence to civilians in British officers' writings on the Peninsular War – the case of Badajoz' *Historical Research* (2018) 1-22 (9). The figure of 1,400 is an approximation based on 4-5 people making a family unit. Even if the multiplier is increased to 6-7, the approximate figure would be 2,100 people, still well short of Daly's estimate.

[66] *Articles of War* (1809), Section IX, Article V, pp. 28-29.

[67] Costello, p. 98; Arthur Wellesley, second Duke of Wellington (ed.), *Supplementary despatches and memoranda of Field Marshal Arthur Duke of Wellington KG* (15 vols., London, 1858- 72), VIII, pp. 301-2. Graham to Wellington, London, 9th October 1813. Muir suggests that the letter is misdated, as Graham was still in Spain on this date, and that the correct date is likely to be 9th November 1813. Muir, *Wellington: Path to Victory*, p. 670.

provisions ignored. The disorder at Badajoz was left unpunished, in order to achieve the more holistic goal of maintaining discipline and morale for future campaigns.

The case study of the sackings of Ciudad Rodrigo and Badajoz therefore point to the insidious effect that a discretionary approach to discipline could have, not only on the army's wider discipline, but also for potential victims of soldiers' depravity. In a seemingly rare exception to his usually unequivocal stance on plunder, Wellington did not press for the prosecution of those responsible for the sacking of Ciudad Rodrigo. This likely created a snowball effect which contributed to the scale of disorder at Badajoz. Wellington unquestionably faced a situation which was impossible to resolve in terms of how to deal with the disorder which followed these two sieges. Punishing all those responsible would have overwhelmed the military courts, yet his silence on the matter appeared to condone the troops' behaviour. The response to the sackings of Ciudad Rodrigo and Badajoz therefore serve as a useful counterpoint in assessing Wellington's approach to discipline, as even he embraced a discretionary approach when he felt necessity required it. This further reinforces the argument made throughout the thesis of the manner in which discretionary justice transcended the military justice system, serving the requirements of the army before it served the needs of victims.

4.5 Drunkenness and discretion

It is important to acknowledge, however, that absence and theft, although amongst the most common, and most frequently remarked upon crimes carried out by soldiers, were by no means the only offences which were committed. Trials for drunkenness constituted a significant proportion of RCM business. At 704 trials between 1808 and 1818, charges of being drunk on duty, drunk in quarters (i.e. without permission), or being 'in liquor' accounted for 20% of all RCMs during the period. Only absence was more commonly tried at this level, representing 25% of RCM trials. It is important to recognise that charges of drunkenness often appeared alongside additional charges. As a result, an individual might be tried for 'being out of quarters and drunk', or 'being drunk and riotous conduct', yet the frequency with which it appeared nonetheless speaks volumes about the scale of the problem which the army faced in trying to keep its soldiers sober. As with theft though, this almost certainly reflected a small proportion of the actual number of offences. Ilya Berkovich has shown that even within the confines of the British territory of Gibraltar,

authorities could not stop the soldiers from drinking excessively, or prevent the civilians from selling liquor to the men.[68]

Table 4.6: Trials for drunkenness at RCM, 1808-1818.

Year	Tried	Acquitted	Flogged	Confined	Other
1808	9	0	8	0	2
1809	72	0	69	0	12
1810	0	0	0	0	0
1811	21	0	20	0	4
1812	104	0	88	1	31
1813	67	2	42	5	29
1814	45	0	32	3	16
1815	151	2	119	5	33
1816	112	2	94	4	26
1817	56	1	38	10	10
1818	67	1	29	34	6
Total	704	8	539	62	169

It is perhaps unsurprising that, at 1.1%, acquittal rates were virtually non-existent in cases of drunkenness. As the evidence of this crime was observational, it would have been comparatively easy to secure a number of witnesses. However, since the individual who ordered the confinement for this crime would also write the charge, they were able to mould the charge, just as was seen in cases of absence and desertion. As a result, a small number of men (26 cases, or 4% of drunkenness trials) were charged with being 'in liquor', with those found guilty of this charge generally receiving smaller floggings or in the case of NCOs being sentenced to a reduction in rank, but no flogging. Officers also had the choice of whether or not to specify if an individual was drunk on duty, or on guard, which was a much more serious crime than simply being drunk without permission.

Table 4.6 also indicates that 24% of those tried for drunkenness received a punishment that has been categorised as 'other'. Of those, 133, or 79%, were NCOs receiving a reduction in rank. In all NCOs comprised 23% of those tried for drunkenness, a proportion which was almost double the average across all RCMs in the sample. The fact that so many were reduced to the ranks for their actions, and often were sentenced to a

[68] Ilya Berkovich, 'Discipline and Control in Eighteenth-Century Gibraltar', in *Britain's Soldiers: Rethinking War and Society, 1715-1815*, ed. by K. Linch and M. McCormack (Liverpool: Liverpool University Press, 2014), pp. 114-130 (p. 130).

flogging in addition to the demotion, demonstrates the seriousness with which the crime was regarded, and indicates that a clear example was being made of these men.

Nevertheless, discretion was also apparent in drunkenness prosecutions. The majority of the punishments for drunkenness (57%) were remitted in some form, meaning that whilst the court sent a clear message that drunkenness was an unacceptable crime, those on punishment parade were less severe in their response. In May 1812, for example, Private Noble Armstrong of 1st 40th was tried at RCM for being drunk on duty, an offence that was potentially more serious than simply being drunk on parade.[69] However, his punishment of 400 lashes was remitted, and he was given extra drill. Similarly, in August 1815, Private Hugh Dogherty of the 1st 43rd was tried for being drunk, rioting in camp and striking a corporal. He was only sentenced to 50 lashes, indicating that he was only partially guilty, yet even that was remitted.[70] Officers would have been acutely aware that alcohol was widely available to the troops, formed part of their daily rations, and was frequently a priority for men when they were foraging. Memoirs from the period contain almost as many anecdotes of drunken conduct as they do of plundering, with some taking an active role in covering for their colleagues. One NCO of the 42nd recalled that when he discovered one of his sentries drinking with the French piquet he let the French soldiers go, despite being concerned that they were deliberately getting the British sentries drunk in order to launch a surprise attack. He reasoned:

> I would have made them prisoners at the time, but what would the consequence have been to my own men? I then would have had to report them, and the crime was death. One of my sentries was so drunk, that I had enough to do to get him to the piquet guard: I then concealed him amongst the bushes.[71]

This NCO was therefore well aware of the stipulations of military law, yet considered his first priority to be safeguarding his men from punishment for a foolish mistake, despite the personal risks that this incurred if he was found out. Camaraderie therefore took priority over army regulations.

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[69] WO27/107, Six-Monthly Inspection Return for 1st Battalion 40th Regiment.
[70] WO27/134. Six-monthly inspection return for 1st Battalion 43rd Regiment.
[71] Anon, *Soldier of the 42nd*, pp. 207-208

Edmund Wheatley went to extraordinary lengths to protect his men from the risks of capital punishment by a Court Martial when he discovered that his men had become drunk on piquet.

> All the kicking possible could not revive them and I was obliged to stand Sentry myself till day break […] after a fatiguing search I found [another soldier who had disappeared] in a bush stripped naked and frozen to death. Not knowing how to conceal this unpleasant business from the Colonel (as death to them all is the result of sleeping upon Duty before the enemy and having once been guilty of the same myself) I determined to screen the poor fellows. So digging a deep hole we buried the man and I reported him as having deserted to the enemy. The other three would go to the Devil for me now.[72]

Wheatley's pragmatic approach and discretion had potentially saved his men from execution. Acutely aware of that fact, they were therefore completely loyal to him, knowing that they owed their lives to him. He had therefore forged a bond far stronger than anything that could have been created by him doing his duty, and reporting these men to his Colonel. In letting an instance of drunkenness go unpunished, Wheatley had acquired the respect and adoration of his men, and it is inconceivable that the story would not have been shared with others in the unit. There is also a curious point here relating to Wheatley himself acknowledging that he had done a similar thing himself in the past. This further points to the challenges facing officers who themselves were by no means infallible, and could understand how men could be moved to commit certain breaches of military law. This again highlights the significance of the discretionary approach in the field which was built upon first-hand knowledge of the challenges of campaigning.

Officers seemingly recognised that drunkenness represented a form of ameliorating circumstances which tempered the way in which they dealt with their men. George Bell recalled how one drunken soldier declared:

> 'I go no further: no service on this road.' I gave him a punch that floored him right into his little den, where he lay quiet as a turtle until I took away his gun, knapsack,

[72] Edmund Wheatley, *The Wheatley Diary*, ed. by C. Hibbert (London: Longmans, 1964), p. 35. Diary, 29th January 1814.

> and ammunition and locked him up a close prisoner till morning, when he turned out quite fresh and as penitent as priests, who'll never do it again until the next time!

Technically, Bell should not have punched this private, and should have brought him to trial. Both actions could potentially have resulted in his own prosecution at a GCM, yet Bell clearly believed that this approach was more profitable than seeing the man tried and flogged at RCM.

William Brown recalled how one officer sought to save his men from a flogging, by punishing them by unofficial means. He ordered several men who had been confined for drunkenness to fill their knapsacks with bricks and march carrying them for fourteen miles every day for the next seven days whilst being confined at night. When one man refused, he was given an opportunity to change his mind before being tried by a Drum-Head Court Martial, and sentenced to 150 lashes. He was given further opportunities to reconsider both before the flogging began and after the first 25 lashes, but refused, preferring to receive the full punishment. This soldier's objection lay with the method of punishment. '[He] told the Major he would be damned if he would carry bricks in his knapsack, for him, or any other man in the service'.[73] He considered the purposeless manual labour to be too demeaning, and therefore preferred a trial and swifter corporal punishment. Taken together, it is clear that, as with other crimes, a pragmatic approach, and the use of discretion over when and how to punish offenders, was fundamental to the handling of drunkenness.

4.6 Pragmatism and punishment practices

Since pragmatism and discretion are so readily apparent in the way in which military justice was implemented, it is logical and essential to explore the extent to which this also influenced punishment practices. Much of the scholarly discussion of military punishment during this period has focused on flogging and its brutal nature.[74] The heavy emphasis on the use of the lash in the army stands in contrast to discussion of the sentencing practices of civil courts, with the discussion being dominated by Foucault's work. Although Foucault

[73] Brown, *Autobiography*, pp. 179-180.
[74] Buckley, p. 229; Glover, *Peninsular Preparation*, 176-180.

believed he had identified a Europe-wide phenomenon, there was a noticeable antipathy towards the notion of abolishing corporal punishment amongst NCOs and Privates.

Although Cooper's remark that Wellington had to be severe with discipline as many soldiers were idle and drunken has often been referenced, other memoirists provide a more nuanced explanation of the sentiments of the rank and file.[75] Some were certainly opposed to the use of corporal punishment, though it is noticeable from surviving memoirs that those complainants were few in number. Brown is one example of this exception. In anecdotes relating to his service in 1813 and 1814, he wrote with bitter sarcasm that men were flogged for crimes that were 'enormous – perhaps taking a loaf of bread, when he was in danger of being starved to death for want of provisions'.[76] He reserved particular ire for the Provost:

> I had another proof of the mild discipline, and tender regard with which we were treated by our superiors. Having been busily employed during the night, we were by daylight very fatigued, when the Provost-Marshal chancing to pass, one of our men in a jocular manner, called to his comrades to cheer up, as they would soon have done, for the 'Whipper-in' was come. This was sported with the lion's paw, and was overheard by the man of stripes himself, who ordered the wit to be instantly seized and tied up to the next tree where for his joke he received four dozen ticklers.[77]

It is important to recognise that Brown's character completely changed when, in the wake of the Battle of Vittoria, he and the other men of his division were searched and relieved of the plunder that they had taken from the French baggage train. Having been deprived of what he considered to be a just reward, Brown went to great lengths to create mischief, committing multiple crimes often for the simple reason of causing trouble.[78] His disillusionment with the system of military discipline is therefore a clear influence on his remarks above, yet even here he did not decry the use of the lash itself, but rather the crimes it was used to punish.

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[75] Cooper, p. 14.
[76] Brown, *Autobiography* p. 155.
[77] *Ibid*., p. 157.
[78] See, *Ibid*., p. 128 and pp. 133-4.

This attitude that the lash had to be used in certain circumstances is a noticeable theme in soldiers' memoirs. Rifleman Harris remarked that 'the moment the severity of the discipline of our army is relaxed, in my opinion, farewell to its efficiency; but for our men to be tormented about trifles (as I have seen at times) is often very injurious to a whole corps'.[79] In essence Harris was suggesting that flogging in certain circumstances was necessary and even justified, but that it should not be used to excess, a sentiment which was echoed by privates, NCOs and officers.

Possibly the most surprising acceptance of the necessity of flogging came from an anonymous officer of the 1/23rd, who recalled that when his colonel died:

> Among several of the soldiers of his regiment, who were at the same farmhouse with him, mortally wounded, and inquiring anxiously after their colonel, there was one who supported a very bad character and he had been frequently punished. To this man I said, to learn his attachment, 'He is just dead; but why should you care? You cannot forget how of the cause your back to be bared?' 'Sir', replied he, his eyes assuming a momentary flash and his cheek a passing glow, 'I deserved the punishment, else he would never have punished me'. With these words, he turned his head a little from me, and burst into tears.[80]

Whilst it is important to retain a healthy scepticism to such anecdotes, even if this is fabricated, it is suggestive of a wider culture and thought processes surrounding punishment practices. This points to a remarkable degree of trust between officers and men that they would exercise their judgement (i.e. their discretion) when it came to punishment, and only punish in situations when it was appropriate. When considered alongside Harris's comments, there is a clear recognition that officers were not inclined to punish excessively in order to preserve a unit's morale, with the result that any floggings which were inflicted carried a greater significance and sent a stronger message about the unacceptability of the guilty man's actions.

A particularly telling example of the extent to which this attitude to flogging was widely held within the remarks can be found in the remainder of Costello's comments of

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[79] Harris, pp. 101-102.
[80] Glover, *Waterloo Archive*, IV, p. 175. Unknown Officer, 1st Battalion 23rd Foot.

how Major Cameron punished the deserter Stratton at RCM rather than GCM, discussed at the start of the chapter. Cameron ordered the prisoner to prepare for his flogging, but then appealed to the honour of the rank and file, saying: 'if the men of the battalion will be answerable for your future good conduct, I shall pardon you.' When nobody vouched for the deserter, he ordered the flogging to be given, and after 25 lashes asked if Stratton's company would vouch for him. When there was no reply, another 25 lashes were inflicted before Cameron asked if one man in the unit would vouch for him. Another 16 lashes were inflicted before someone stepped forward and vouched for Stratton. Cameron was deeply impressed by the unit's refusal to vouch for the deserter, remarking 'Your conduct in the field is well known by the British army; but […] your moral worth I have not known before; not a man would speak in that fellow's behalf, except the man who did, whom you know as well as I do'. Cameron was alluding to the fact that the person vouching for Stratton had a poor character. As Costello himself put it, 'This may serve to show that however soldiers dislike this mode of punishment they still like to see a rascal punished; and nothing tends to destroy all feeling of pity for his sufferings more than his having been guilty of an act of cowardice, or robbing his comrade'.[81] The rank and file may not have liked flogging, but they were willing to recognise that there were circumstances when, in their view, it was necessary.

In light of this, it is less surprising that Private James Anton offered an eloquent, yet scathing rebuke to the philanthropists who favoured the abolition of flogging, arguing that the lash was a necessary evil to protect the more honourable NCOs and privates from the depredations of their more troublesome colleagues:

> Philanthropists, who decry the lash, ought to consider in what manner the good men, - the deserving, exemplary soldiers, - are to be protected; if no coercive measures are to be resorted to on purpose to prevent ruthless ruffians from insulting with impunity the temperate, the well-inclined, and the orderly-disposed, the good must be left to the mercy of the worthless; and I am glad to say there are many good men in the ranks of the army. […] The good soldier thanks you not for

[81] Costello, pp. 118-119.

> such philanthropy; the incorrigible laughs at your humanity, despises your clemency, and meditates only how to gratify his naturally vicious propensities.[82]

For Anton, the concern was not so much keeping the incorrigible in check, as preserving the virtue of the respectable NCOs and privates.

The attitude of officers was more mixed. Wheatley's diary contains a lengthy comment on Francis Burdett's efforts to abolish flogging in the army, in which he suggested that other forms of punishment were inadequate:

> I am confident no other substitute could effectually check and restrain so many thousands of men from the commission of those crimes to be expected from such an heterogeneous mixture of depravity and ignorance as is to be met with in an army. Imprisonment would encourage the dilatory; stoppages of pay would increase the dishonest; reproofs are useless; disgraces would soon become common; transportation must thin the ranks; and death become dangerous when too commonly inflicted.[83]

Wheatley's views, which interestingly were also echoed by Anton, preceded a more scathing rebuke that without any military training, Burdett's 'opinion is merely supposition erected on a foundation of charity and humanity for his fellow creatures which undoubtedly is a dangerous one when [applied] to all'.[84] For Wheatley, Burdett's emphasis was entirely wrong, opining that the situation should 'not looked upon with the eye of a father of a family but maturely considered with the discernment of a ruler of a nation'.[85] In essence then, the army's focus had to be maintaining command and control, and flogging was necessary to facilitate that. This view was seemingly not universally held, as Bell advocated the use of more humane methods, claiming to have been deeply affected by the floggings that he witnessed during the Peninsular War, though it is difficult to determine the extent to which his view is affected by hindsight, and the shift away from flogging over the remainder of his long career.[86]

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[82] Anton, p. 11.
[83] Wheatley, pp. 11-12.
[84] Wheatley, pp. 11-12; Anton, p. 102.
[85] *Ibid*., pp. 11-12. For more on Burdett's comments in Parliament, see below Chapter 5, pp. 210-212.
[86] Bell, p. 97.

What is clear, however, is that soldiers seem to have been relatively content with the notion that flogging was an appropriate method of punishment. Given the dearth of material in memoirs, letters and diaries expressing any resentment over the two-tier punishment system, it also seems that NCOs and Privates were willing to accept that they were subjected to corporal punishment whilst officers predominantly received honour-based punishments.

Table 4.7: Proportion of Punishments issued by RCM, 1808-1818.[87]

Year	No. RCM Trials	Acquitted		Flogged		Confined		Demoted		Suspended		Stoppages		Punishment reduced	
		No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
1808	36	0	0	33	91.6	0	0	3	8.3	1	2.7	0	0	15	41.7
1809	257	15	5.8	227	88.3	1	0.4	28	10.9	2	0.8	4	1.6	157	61.1
1810	10	0	0	10	100	0	0	0	0	0	0	0	0	0	0
1811	134	6	4.5	121	90.3	0	0	13	9.7	0	0	1	0.7	110	82.1
1812	575	51	8.9	459	79.8	14	2.4	68	11.8	5	0.9	23	4	374	65
1813	396	19	4.8	307	77.5	17	4.3	68	17.2	3	0.8	14	3.5	224	56.6
1814	193	3	1.6	143	74.1	10	5.2	31	16.1	2	1	7	3.6	121	62.7
1815	631	38	6	534	84.6	11	1.7	68	10.8	0	0	21	3.3	391	62
1816	516	38	7.4	404	78.3	29	5.6	65	12.6	1	0.2	26	5	288	55.8
1817	386	16	4.1	261	67.6	80	28.7	37	9.6	2	0.5	18	4.7	174	45.1
1818	347	17	4.9	184	53	129	37.2	23	6.6	2	0.6	9	2.6	195	56.2
Total	**3481**	**203**	**5.8**	**2683**	**77.1**	**291**	**8.4**	**404**	**11.6**	**18**	**0.5**	**123**	**3.5**	**2049**	**58.9**

It will come as no surprise that the court martial data indicates that flogging was unquestionably the typical punishment for those found guilty at RCM. Table 4.7 details the proportion of different categories of punishment issued every year by RCMs between 1808 and 1818. The data clearly indicates that flogging sentences were issued in the vast majority (77.1%) of RCM cases. The next highest category of punishment, demotion, was used in 11.6% of cases, but clearly this could only ever be issued to NCOs. As a proportion of NCOs tried at RCM, demotion was issued in 89.0% of cases, clearly indicating that NCOs who abused the responsibility placed in them, by breaking military law, were usually not trusted to retain their position. As was noted in the previous chapter, officers were never demoted, in part because many had bought their commissions, and were therefore either reprimanded, or suspended for a period of months. The severe stance taken with NCOs is further proven by the exceptionally small number of suspensions of rank and pay issued

[87] WO27/91-145

during this period. Its use in 0.5% of RCM cases stands in stark contrast to its use in officer trials at GCM, where 16.6% of officers tried were suspended, something which further reinforces the degree to which the two-tier punishment system was regarded as acceptable in the British army.

The table also provides an insight into changing punishment trends over the period. Acquittal rates were broadly consistent across the years under scrutiny, despite showing fluctuations in individual years. The use of stoppages, meanwhile, which were only sparsely included in RCM sentences, jumped from virtually never being issued prior to 1812, to generally being implemented in between 3.5% to 4% of cases over the remainder of the timeframe. Confinement was scarcely used prior to 1817, before dramatically rising, a trend that will be explored further below. Flogging, by contrast was consistently the most issued sentence, being issued at least 74% of cases every year until 1817, when the proportion began to fall markedly.

Table 4.8: Lash sentences issued by RCMs, 1808-1818.

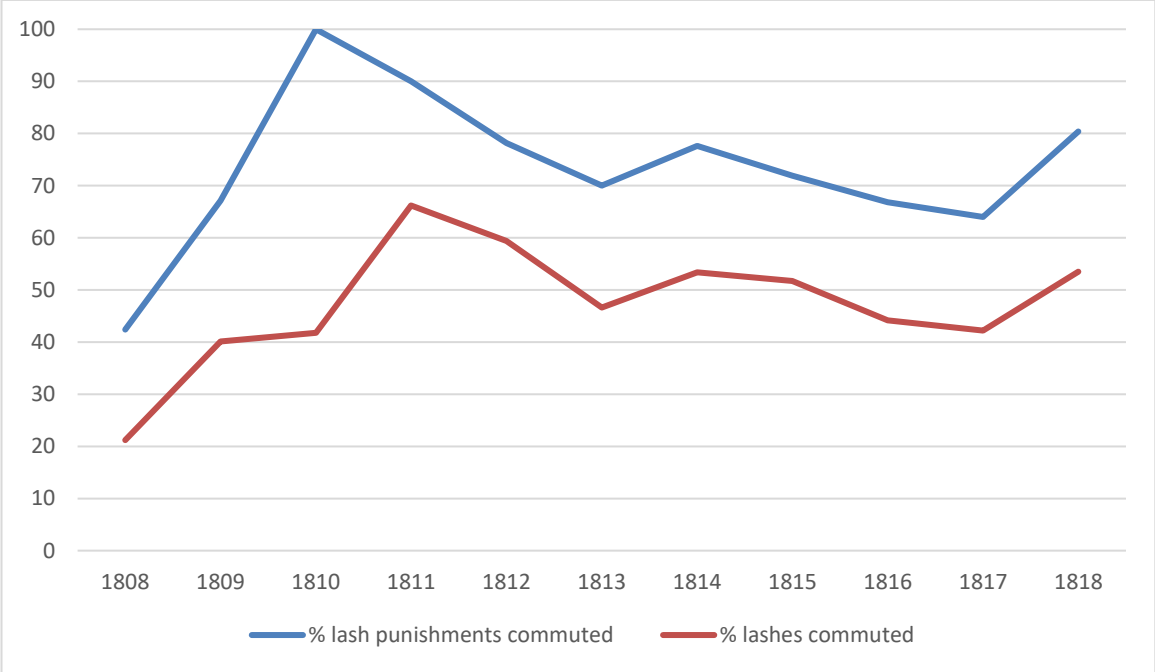
Year	Total Lashes	No. trials awarded	Total commuted	No. trials commuted	% lash punishments commuted	% lashes commuted	Average Lashes	Average No. Commuted
1808	10350	33	2195	14	42.4	21.2	314	157
1809	60080	227	24105	152	67.1	40.1	265	159
1810	5198	10	2175	10	100	41.8	519	217.5
1811	36700	121	24313	110	90	66.2	303	221
1812	118573	459	70466	359	78.2	59.4	258	196
1813	65300	307	30444	215	70	46.6	213	142
1814	30309	143	16199	111	77.6	53.4	212	146
1815	120075	534	62063	384	71.9	51.7	225	162
1816	91400	404	40373	270	66.8	44.2	226	150
1817	62190	261	26262	167	64	42.2	238	157
1818	46450	184	24869	148	80.4	53.5	252	168
Total	**646625**	**2683**	**323464**	**1940**	**72.3**	**50**	**241**	**167**

Table 4.8 provides a detailed breakdown of the data concerning flogging sentences issued by RCMs in any given year, including the total number of lashes ordered, the average number of lashes that sentences contained, and the proportion of those lash punishments that were remitted. In all, RCMs in the sample issued 646,625 lashes in the period under scrutiny, across 2,683 cases. However, through close examination of this data, it is possible to once again identify the complex way in which humanitarian concerns and discretionary practices influenced the implementation of military justice. The table indicates that efforts

to reduce the severity of floggings through the Commander-in-Chief's imposition of a 300 lash limit did appear to have the desired effect. After this order's implementation in 1812, the average number of lashes that a convicted soldier was sentenced to dropped markedly to the low 210s, before slowly climbing towards the 250s between 1815 and 1818.

Curiously, there is an equally telling trend in the percentage of lashes commuted or remitted. The proportion of floggings which saw the punishment reduced in some way was not only high, but was consistently high between 1810 and 1815, dropping away in 1816 and 1817, before jumping back up in 1818, as demonstrated by Figure 4.1.

Figure 4.1: Percentage of flogging punishment and lashes commuted at RCM, 1808-1818.



Although perhaps unsurprising, Figure 4.1 also indicates that the fluctuations in the percent of lashes commuted within each punishment almost exactly matched the percentage of punishments which were commuted. In essence, then, this provides a very clear indication of the prevailing attitudes towards corporal punishment in the army in any given year. As the proportion of floggings which were fully or partially pardoned rose or fell, so the proportion of each of those punishments also rose and fell in step with that. In years when officers were less inclined to pardon, they were also allowing floggings to last for longer, with more lashes being inflicted, with the result that the percentage of lashes commuted fell.

When considered alongside the fluctuation in the average number of lashes awarded by RCMs, a clear trend emerges. As the King and Commander-in-Chief sought to make flogging a more humane practice by exerting pressure from above, officers on the front line of the Peninsular War were taking matters into their own hands by reducing the size of the punishments which were actually inflicted. As an average of 50% of lashes were not inflicted, officers were clearly exercising their discretion over what was appropriate for each soldier and in each case. Whilst on active service in the Iberian Peninsula (and it is important to remember that all regiments in the sample served in Spain and Portugal), officers, who oversaw the infliction of RCM sentences on their own men, chose to reduce the size of floggings.

The data for 1816 to 1818 is particularly revealing about changing priorities following the close of the Napoleonic Wars. It suggests that pardoning floggers was less of a priority after the conclusion of the conflict, until 1818. There are a number of elements which are likely to have influenced this shift. The first is that, with the conclusion of the war, troops were likely to be relatively well supplied, as the lack of movement and confusion necessitated by campaigning would have led to more stable supply lines. As a result, there was less of a need to steal, particularly for subsistence, whilst there was also a need to foster better relations with the local inhabitants, therefore increasing the pressure to demonstrate an uncompromising response to misbehaviour. A strong response which made an example of those who were guilty had the potential to dissuade soldiers from repeating the crime themselves. Furthermore, the conclusion of the war removed the preoccupation of needing to preserve the health of the men. When on campaign, units clearly needed as many men as possible to be able to fight, with the result that large floggings were counterproductive from the perspective of the unit's fighting capability. When deployed on garrison duty, however, troops were not needed for active duty beyond guard duty, drill and field exercises, with the result that allowing more of a flogging to be carried out did not pose such a risk to the battalion's cohesion. 1818 clearly saw a change in emphasis, which, when considered alongside the data for solitary confinement outlined below, suggests that a change in JAG in 1817 was beginning to affect punishment practices.

Nonetheless, the complex question of the extent to which officers were motivated by 'humanity', discussed earlier in this chapter, is also apparent when considering the actions of many officers when it came to floggings. Lieutenant George Simmons of the 95th

Rifles recalled that when he was asked to oversee a flogging when the unit's surgeon was indisposed, he decided that he would intervene after 100 lashes, regardless of the soldier's health, and say that the man should not, in his medical opinion, be flogged further. Simmons remarked:

> I gave pleasure to every man present, for they knew well that if the surgeon had been there, he would not have dared to do so. Some short time after, the colonel said "George Simmons you are a good fellow, you did exactly what I wished you to do. I was very sorry to be compelled to punish that man, but for the force of example and landing in a foreign country, I had no other alternative".[88]

This remark clearly reemphasises the conflicting pressures that officers faced of needing to punish men in order to make an example to dissuade others from committing the same crime, whilst also disliking excessive reliance upon flogging. Once again, the self-serving nature of this 'humanity' is apparent, with officers balancing the needs of command and control with their own beliefs on the extent to which flogging should be used, and the benefits of demonstrating an inclination to limit those floggings.

This philosophy appears to have been widely held across the army, as six-monthly inspection reports show that battalion commanders who excessively resorted to flogging in order to maintain control were remarked upon disapprovingly by inspectors. Since those conducting the inspections were Major-Generals, it is clear that this pragmatic attitude pervaded the highest levels of the army's command structure, and their comments were remarkably frank in how to avoid excessive flogging. One report on the 54th Regiment in June 1812, for example, found that:

> Courts martial were much too frequent during Captain Kirby's command, and considerable irregularity took place in the proceedings and over severity in the execution of the sentences, which were not proportionate to the crimes. Frequent desertions having been the consequence of such irregularities and punishments.[89]

[88] George Simmons, *A British Rilfeman* ed. by Lt-Col Willoughby Verner (London: Greenhill Books, 1986), pp. 204-205.
[89] WO27/107, Return of 54th Regiment, June 1812.

In a letter from April 1812, General Browne chastised Captain Ryan of the 100th Foot for putting a sentence of 500 lashes from a Garrison Court Martial into execution, as

> I am of the opinion, it was excessive, all circumstances considered. Discipline unquestionably must be supported and maintained, but heavy punishments are not necessary to the attainment of this desirable purpose. Three hundred lashes in my judgement would have been more than enough for the crime committed; had these men been absent for months together five hundred lashes would have been a severe punishment; how magnified then must this punishment appear, when it is recollected that the time they were absent from their quarters and the place they were taken at; could scarcely justify the opinion that they had actually committed the crime of desertion. I am disposed to admit, that they intended to desert, but the severity of the punishment outstrips anything of the kind.[90]

This letter is all the more remarkable for that fact that the general believed that the men had probably intended to desert, yet still believed that the flogging was excessive, pointing to the discretion with which the size of a flogging was considered.

Some men viewed the issue of floggings through the lenses of masculinity and honour. Private Thomas Jeremiah, for example, remarked with disapproval on how a fellow Welshman's refusal to remain quiet whilst being flogged made him fear ridicule from his English and Irish colleagues.[91] He went on to recall that a soldier who had just received a full flogging punishment stepped forward to offer to receive the vocal soldier's punishment 'so he should not disgrace the hardy Welsh by cringing from the lash'. This was an interesting, and probably calculated, move, as the 'good and kind colonel wisely observing the effect this fellows conduct had on all the young Welsh lads, caused him to be taken down and took him by the ear and gave him such a kick as became a coward who could not stand his punishment without disgracing his country'.[92] It is interesting that here the notions of masculinity and willingness to tolerate a punishment were intertwined with a construction of what it meant to be 'Welsh'. The failure to endure a flogging was deemed detrimental to the reputation of a 'Welshman', a point which serves to reinforce the notion

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[90] WO27/107, Letter from General G. Browne to Captain Ryan, 100th Foot, 5th April 1812.
[91] For more on constructions of national pride and its influence on notions of martial conduct see Linda Colley, *Britons: Forging the Nation 1707-1837*, 3rd edn (London: Vintage, 1996), p. 387 and White, p. 162.
[92] Glover, *Waterloo Archive*, IV, p. 182. Private Thomas Jeremiah, 1st Battalion 23rd Foot.

that wartime experiences were key to the development of embryonic notions of national identity.[93] Jeremiah's comments also allude to a system of negotiation between the officers and rank and file, over the implementation of their punishments.

Anton's explanation of this phenomenon indicates the extent to which NCOs and privates were well aware of the pressures that the officers faced in balancing the need to punish with the need to maintain the unit's morale, cohesion and fighting strength:

> The presence of a formidable enemy, in front of our lines, tended to mitigate punishments, that under other circumstances might have been awarded, and allowed offenders to get off with very slight correctives, in order to prevent our ranks being thinned by avoidable casualties.[94]

A laxly disciplined force, which was indebted to its officers for their clemency was, quite logically, deemed preferable to a one which was kept in check through extensive corporal punishment, yet saw large numbers of men hospitalised as they recovered from floggings, thereby reducing fighting capability.

Discretion also manifested itself in a further, quite startling manner. Men were able to appeal for clemency, showing an astonishing ability to negotiate their punishment. Costello considered 'the most memorable punishment scene' he had 'ever witnessed' to be the case of a popular Rifleman (Tom) who was generally a respectable officer, but who became so drunk that he threatened to kill an officer. After being tried at RCM, not GCM, itself a sign of discretion, he was found guilty, and the Colonel 'in a voice husky with emotion' ordered the flogging to begin. Costello recalled: 'Tom only once attempting to catch the eye of his colonel with an imploring glance, while he exclaimed in broken accents – 'Colonel, you won't, will you? You won't – you cannot mean to flog *me*!"[95] Beckwith stopped the flogging after just 35 lashes chastising Tom: 'You see, Sir, now, how very easy it is to commit a blackguard's crime, but how difficult it is to take his punishment'. Tom's plea had clearly not fallen on deaf ears however, and his request for mercy had a much greater effect thanks to his good reputation as a reliable, and usually honourable, soldier.

[93] Colley, p. 387.
[94] Anton, p. 65.
[95] Costello, pp. 12-14.

Costello also remarked on a similar situation, this time involving a punishment of a corporal by General Craufurd before the whole Light Division. The corporal, initially begged for mercy, but Craufurd uncompromisingly replied 'No, Sir, your crime is too great'. The corporal then reminded Craufurd of a time when they were both prisoners during the campaign in Buenos Aires, and he had given Craufurd the last of his biscuit. Costello recalled that: 'These words were spoken by the corporal in a mild and respectful accent, which not only affected the General, but the whole square'. Craufurd stopped the punishment, overcome with emotion, and the man was pardoned with a reprimand.[96]

Again, therefore, agency comes to the fore here. These men were drawing on their good conduct in order to make final pleas for leniency, even after the RCM had taken their character into account when passing sentence. Their good character gave them a bargaining chip, which enabled them to negotiate a smaller punishment than the court had stipulated, rather than waiting for the doctor to stop the flogging on medical grounds, or rely on an officer's sense of humanity or pragmatism to compel them to intervene. This remarkable degree of agency highlights how the accused soldier was an active participant, rather than a passive passenger, within the military justice system. It also has interesting implications for discussions of negotiated authority, as this process was clearly widely known, recognised and utilised by men across the army. Jackson used a similar method to evade punishment when he was discovered to have been absent overnight, by appealing to his Lieutenant who vouched for his good character, and interceded on his behalf.[97] However Jackson was even more frank about how the men manipulated the humanity of some of their officers to their advantage, admitting that '[Lord Lewisham] could never witness flogging without being much affected; and if he happened to have the command, and the culprit cried for mercy, he would be sure to obtain it'.[98] This therefore indicates that soldiers had far greater power to negotiate the extent of their punishment than is apparent in the Articles of War. This scenario served the purposes of both the officers and the men, as fewer men were hospitalised, whilst the morale of the unit was boosted, and the bond of respect between officer and ranker strengthened, by the fact that their officers

[96] Costello, pp. 83-85.
[97] Jackson, pp. 27-28.
[98] *Ibid*., p. 32.

showed humanity to their men. Yet the benefit that could be gained by officers demonstrating that humanity raises questions about how altruistic it was.

This ability to negotiate their punishment probably explains why so many men were willing to accept the use of the lash. By knowing that their officers operated discretion in choosing when to punish soldiers, they recognised that they would only be punished when such a punishment was perceived to be deserved. Even then, however, they had the ability to reduce their punishment, appealing directly to the humanity and pragmatism of their officers, calling for further discretion by asking for clemency. In such scenarios, officers were able to in effect reward those with a good character, shielding them from a serious flogging, but also allowing them to send a clear statement about unacceptable conduct. This therefore incentivised the rank and file to stay broadly within the confines of expected behaviour, and gave them leverage with their officers, which was not available to their less well-behaved colleagues.

It is important to acknowledge that some more positive methods were, at least in theory, available to officers to instil greater discipline amongst the men. Evidence of the implementation of such methods is generally scarce, indicating the extent to which, officially at least, the military justice system made far more use of the proverbial stick rather than the carrot. Although the notion of medals as a means of reward within the army is well established in modern armed forces, it is important to recognise that the creation of the Waterloo medal was the first to be issued to all combatants, rather than to officers.[99] The only evidence of medals being issued found by this research is a provision in the Standing Orders of the 85th regiment, stipulating that two orders of medal could be issued for honourable conduct by men in the field. The awarding of these medals was considered by a board of five officers, and five NCOs and Privates, and were given for 'voluntary acts of generosity towards either an enemy or those who are in an enemy's country'.[100] The brass version was issued when a soldier 'discharged such duty with peculiar ability and courage', whilst the silver one was issued when he was not ordered to carry out an action, yet nonetheless did so, which 'tended to the benefit of either the Regiment, or army in

[99] P. J. Kerry, 'The Copper Pattern Waterloo Medal, 1815: A rare prototype survivor linked to Private John Martin, 6th or Inniskilling Dragoons', *Journal of the Society for Army Historical Research*, 98 (2020), 113-117, 113.
[100] Standing Orders of the 85th Light Infantry, p. 131

which he serves, or to the peculiar private happiness of some individual suffering under the calamity of a campaign'.[101] The award of the medal not only represented a badge of honour, which in turn was designed to instil more honourable conduct in the remainder of the rank and file, but presented the added benefit of exempting the wearer from fatigue duty in the regiment.[102] This was consistent with a comment made earlier in the same document suggesting that indulgence from duty could also be used as a reward.[103]

Medals were seemingly coveted items, making their use as motivators of the men a viable prospect. A veteran of the Peninsular War and Waterloo campaigns remarked with obvious sarcasm 'how 'pleasant' then must it be to the old Peninsulars, whose battles fought and won outnumber perhaps the men of their company, to see whole squads of Waterloos strutting about with medals dangling on jacks which, as their first and last, had scarcely been on long enough to collect the dust of a 'donkey's trot".[104] Costello goes on to recall how one soldier, Wheatley, was so put out at having missed the Waterloo campaign due to convalescence, and therefore the prospect of receiving a medal despite his Peninsular War service, that he would tear off other men's medals. According to Costello, he was eventually tried for the this, and sentenced to solitary confinement, and was later discharged. No record can be found of Wheatley's trial to confirm these details, though gaps in the surviving returns mean that this does not necessarily contradict Costello's account.

Notwithstanding Costello's remarks, very little reference to medals survives amongst the recollections of those who served during the period, making it difficult to draw any conclusions on their effectiveness as a means of instilling discipline. Nonetheless, there are important points to note, not least the effort to imbue the rank and file with a set of 'martial' values, which bore a closer resemblance to the honourable conduct expected of officers. Equally important, however, is the limited nature of this initiative, which, until the creation of the Waterloo medal, was based at regimental level. This further indicates how much of the practical work of implementing discipline took place at a grass roots level, and

[101] *Ibid*., p. 132
[102] *Ibid*., p. 132-3.
[103] *Ibid*., p. 128.
[104] Costello, p. 133-134.

was reliant on inventive methods employed by those tasked with fostering more positive relationships with their troops than the Articles of War imply.

Promotion was another logical way of rewarding the rank and file for good conduct, although there was a degree of ambivalence over whether the additional responsibility was deemed to be worth the extra pay. According to figures for 1800, a corporal received an additional 2¼d per day in pay, whilst a sergeant received an additional 6¼d per day.[105] One soldier remarked on how he actually refused the promotion from Private to Corporal because he did not feel that the extra duty was worth the increase in wages.[106] Wellington shared a similar reservation, writing to Earl Liverpool that 'the old proportions [of pay] have not been preserved; and the non-commissioned officers of the army not only feel no inclination to preserve a distinction between them and the private soldiers, but they feel no desire to incur the responsibility'.[107]

Informal methods of punishment were a leading way of both reducing the severity of punishments, and the number of trials officially held by the regiment, whilst also ensuring that more minor breaches of military law were also dealt with. The information on these methods is scarce, yet a clear indication of the motives behind its use is provided in the Standing Orders of the 85th Regiment. These stipulated that as 'the public shame of the soldier and the public disgrace of the corps' were to be avoided, 'it is therefore directed for punishment of crimes which do not come under a positive Article of War, or are not of a very serious regimental nature, private company Court-Martial are to be held.[108] Essentially this provided the perfect solution for the maintenance of discipline. Since this court was staffed by NCOs and privates, this tier of court allowed the men to be judged by their peers, with the result, that sanction by the court effectively represented a form of reprimand from the primary group. These courts reduced the scale of serious corporal punishment, facilitating a more humanitarian approach to discipline as punishments were limited to 'extra duties, confinement to barracks, turned coats, fines for the benefit of the Mess, and cobbing'.[109] However, perhaps most crucially from the perspective of the

[105] Philip Haythornthwaite, *The Armies of Wellington* (London: Arms & Armour, 1994), p. 269.
[106] Anon, *Soldier of the 42nd,* pp. 42-43.
[107] *Despatches*, IX, p. 226, Earl Wellington to the Earl of Liverpool, Fuente Guinaldo, 10th June 1812.
[108] Standing Orders of the 85th Light Infantry, pp. 134-135.
[109] *Ibid*., p. 135.

officers, the use of company Courts-Martial served to boost the honourable reputation of the regiment. By indicating that they could try any offence which was not explicitly stated in the Articles of War, large numbers of misdemeanours could be kept out of the RCMs. This therefore meant that, during inspections, it appeared as though fewer trials were taking place, reducing the shame of holding large numbers of trials, whilst also appearing to indicate that relatively few trials were actually needed to maintain control. The two combined clearly served to enhance the regiment's reputation.

This phenomenon was not just an inventive concept crafted by the 85th. Thomas Browne of the 23rd Regiment, shed light on how the punishment of cobbing, handed out by Company Courts Martial worked. When a cook burnt his comrades food, and was sentenced to a cobbing by the court

> the Soldiers forming two ranks facing inwards, making the Cook pass between them, and cobbing him well about the head with their foraging caps; he is not allowed to run through them, but to march in slow time, and if he attempts to hurry his pace he is made to being again.[110]

It is worth recognising that Browne's anecdote pre-dates the start of the Peninsular War, indicating the extent to which this concept was entrenched in the army at the start of the nineteenth century.

Spike Mays, meanwhile, recalled that if a soldier failed to keep himself clean 'we took him to account in the cleaning water of a horse-trough; there to scrub his nakedness – good and hard'.[111] The fact that Browne was willing to talk candidly about this, and that the Standing Orders were so blatant in their directions to side-step the officially sanctioned legal system indicates that there was little fear of reprimand for those caught using these unofficial methods.

Some of the six-monthly inspection reports go even further, pointing to officers as senior as generals disapproving of excessive punishment, and favouring the use of informal means of reducing punishment. In an 1813 report into the 2/66th, the inspector remarked

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[110] Browne, p. 48.
[111] Quoted in Richard Holmes, *Soldiers: Army life and loyalties from Redcoats to Dusty Warriors* (London: Harper Press, 2011), pp. 546-7.

'Twenty one men have been tried since last inspection. The proceedings appear regular and the sentences justly awarded. I think some of the crimes might have been punished without a reference to a court martial'.[112] Costello meanwhile offered a detailed explanation of his commanding officer's philosophy:

> [He] was considered as one of the most human of the whole army, was an excellent man, and well deserving of his fame; he seldom had recourse to the 'cats' thinking, perhaps, with a great deal of truth, that it was necessary only in extreme cases. The plan of punishment, generally adopted by him, was to put the offender on extra drill with all his accoutrements on. When, however, the men became incorrigible, he would order a six-pound shot to be affixed to the leg, with a long chain attached to it, and so oblige them to trail it about with them.[113]

Even when using unofficial methods, therefore, discretion was exercised. This agenda from senior officers of trying to facilitate informal punishment techniques, inevitably calls into question the practice identified in the previous chapter of those same officers appearing to favour extensive use of corporal punishment. The crucial difference lies in the supposed severity of the crime, and the differing motivations of regimental officers, and generals. For those at the top of the army's command structure, it was essential to set a clear example to the entire army, and as a result, those tried at GCM had to be punished severely for the crimes that they had committed. For regimental officers, it was important to have as few men as possible tried at GCM, as this affected the regiment's reputation. This in turn meant that they sought to try manipulate the system to see their men tried at RCM under a lesser charge, rather than refer them to a GCM. When it came to the maintenance of the good order of a regiment, however, all ranks appreciated that excessive flogging was bad for morale, which in turn reduced the fighting capability of the army as a whole. As a result, punishment without use of the lash was preferable, yet a swift form of punishment which did not test the army's infrastructure was essential for a force that was on campaign, and needed to be able to mobilise its full strength swiftly. In such an environment Company Courts Martial, additional drill, and other informal punishments designed to inconvenience the men were the ideal solution, and were therefore widely embraced by the army.

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[112] WO27/125, Half Yearly inspection reports, second half 1813, 2nd Battalion, 66th Foot.
[113] Costello, p. 7.

This inevitably calls into question whether punishment trends in the army were actually influenced by self-interest, or humanity. Almost all officers naturally had a degree of humanity. In an era where punishment practices for criminals in society more widely was shifting from corporal punishment to confinement, it is inconceivable that officers were not aware of these discussions, and engaged with the growing inclination to develop punishments along more enlightened lines. As they were present on punishment parades, officers were also just as acutely aware as the men of the horrors of a large flogging, and the damage that it inflicted on the body, with the result that it was entirely feasible for officers to empathise with those found sentenced to be flogged. However, this argument should not be overstated, as it was also mixed with a knowledge that the first duty of the officers was to maintain control over their men. This need to maintain social order predominated, with officers most commonly expressing the view that flogging was a necessary evil in order to ensure that their men remained compliant when necessary. Above all, therefore, pragmatism was the overriding principle. Officers recognised that the most effective way of maintaining order was to exercise their discretion, using the lash when necessary, and ensuring that the threat of its use remained, whilst securing the respect and even devotion of their men by using it sparingly. By utilising a pragmatic system of discretionary justice, officers were able to manipulate military law to serve their needs, acting upon the most serious breaches of the Articles of War, whilst also giving their men the slack that they needed to ensure that a seemingly rigid system was able to adapt to the realities and challenges of life on campaign.

Whilst humanity does not appear to have been a clear factor in discussions within the army about punishment, it is clear that there were some methods of punishment which were deemed unacceptable. Despite the practice of 'cobbing' being a common sentence of a Company Court Martial, striking a soldier was something which was not considered permissible. Wheatley offered the opinion that 'The German soldiery do not respect much their officers because they remember many of their comrades on sentry and have frequently beaten the Sentinels' Tattoo with them. The officers, besides, do not hesitate to accompany a reproof with a blow'.[114] The extent to which this view was widespread is open to interpretation, especially considering Jeremiah's comment that his colonel was willing

[114] Wheatley, p. 9. Diary, 29th October 1813.

to make use of a 'good kick' in the case of the Welshman who would not quietly accept his punishment.[115] Nonetheless, striking a member of the rank and file was not considered appropriate conduct for an officer, with Wellington having to instruct officers of the Brunswick Light Infantry to discontinue the practice in September 1813.[116]

4.7 The use of Solitary Confinement

One area where a more humane attitude towards punishment was unquestionably on display was, however, in the use of solitary confinement. As was discussed in the previous chapter, Wellington had extreme reservations about the effectiveness of solitary confinement. However, examining the available data on the use of solitary confinement by RCMs also sheds interesting light on the ongoing struggle to find effective methods of punishment within the army.

Table 4.9: Confinement sentences issued at RCM, 1808-1818.

Year	Total Days	No. trials awarded	Total Commuted	No trials commuted	Percentage of confinement punishments commuted	Percentage of days commuted	Average No. days awarded	Average No. days commuted
1808	0	0	0	0	0	0	0	0
1809	90	1	0	0	0	0	90	0
1810	0	0	0	0	0	0	0	0
1811	0	0	0	0	0	0	0	0
1812	296	15	121	8	53.3	40.9	20	15
1813	702	18	63	2	11.1	9	39	32
1814	207	10	140	6	60	67.6	21	23
1815	200	11	14	1	9.1	7	18	14
1816	846	29	133	7	24.1	15.7	29	19
1817	1742	81	90	4	4.9	5.2	21	23
1818	4080	129	1362	16	12.4	33.4	32	85
Total	**8163**	**294**	**1923**	**44**	**15**	**23.6**	**28**	**44**

It is clear from the data in Table 4.9 that the use of confinement as a punishment went through three distinct phases during this period. In the first phase, between 1808 and 1811, confinement was only used in one instance. This reflects the long history of solitary

[115] Glover, *Waterloo Archive*, IV, p. 182. Private Thomas Jeremiah, 1st Battalion 23rd Foot.
[116] WP1/2/7, General Orders, 7th September 1813.

confinement. The punishment was colloquially referred to as 'the black hole', a term which can, according to the Oxford English dictionary be traced as far back as 1727, but was generally used in reference to the 'Black Hole of Calcutta'.[117] Occasional references can be found to the term in court martial registers, yet it was not used as an official punishment. This was due to the fact that there was no legal provision to do so under the Articles of War until a change was made to the law, which will be discussed in detail in Chapter Five.[118]

The second definite phase relating to solitary confinement spanned 1812 to 1816, and saw a small rise in its usage, reflecting the above-mentioned change to the Mutiny Act, passed in 1811, to make it easier for Courts-Martial to issue confinement as a punishment. However, the limited take up of this method of punishment arguably reflects a degree of uncertainty amongst the courts over which crimes it was appropriate to award confinement for, and the length of confinement that should be awarded, or lack of inclination to embrace the method. It is noticeable that many early sentences of solitary confinement included a flogging, showing that the courts' initial reaction was not to use confinement as an alternative to flogging, but as a supplement to punish further.

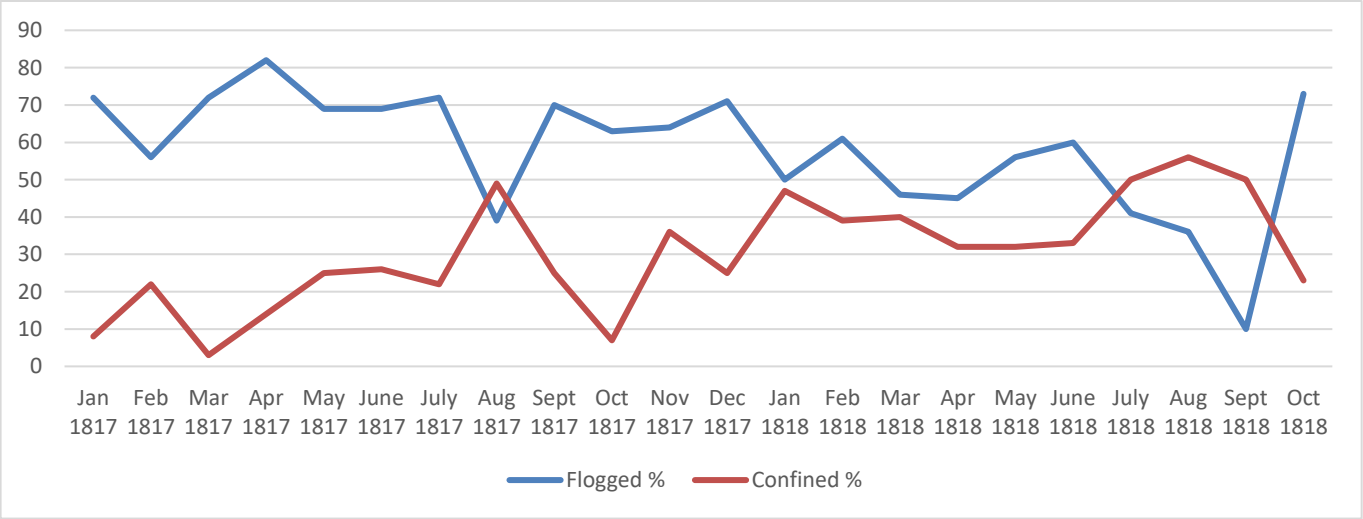
Nonetheless, this does not mean that solitary confinement was not being used, but rather that courts were not comfortable with the notion of awarding it as a sentence. The extent to which confinement was actually used as an unofficial means of punishment, yet is not obviously visible to us from the surviving source material, is demonstrated by a Field Return for the 104th Regiment from June 1812. When commenting on the state of discipline of the unit, the examiner remarked: 'Courts Martial are very frequent chiefly from crimes arising from drunkenness which is a prevalent evil in this country, owing to the cheapness of spirits. The sentences are severe but seldom fully inflicted. The Commanding officer has tried to keep the men in order by solitary confinement & c.'[119]

The final distinct phase relating to the use of solitary confinement emerged in 1817 and 1818. During that period, its usage saw a 1000% increase on 1816 levels.[120] This exceptional rise can be traced directly to the change of Judge Advocate General in 1817. On 2nd June 1817, Charles Manners Sutton resigned upon being elected Speaker of the

[117] For more details on the etymology, see Chapter 3, p. 109.
[118] Hansard, Vol. XIX, 12th March 1811, 361.
[119] WO27/108, Field Return of 104th, June 1812.
[120] 294 punishments awarded at RCM in 1818, compared to 29 in 1816.

House of Commons, with his successor, the Right Honourable Sir John Beckett being appointed on 25th June. By tracing the number of confinements issued by RCMs on a monthly basis immediately before and after Beckett's appointment (see Figure 4.2), a notable and consistent rise can be discerned in the frequency with which RCMs awarded solitary confinement. Following Beckett's appointment, floggings began to consistently drop, with this decline being matched by a corresponding rise in confinements. This therefore raises questions over the role of the individual in the way that military justice operated, a theme which will be explored in detail in the next chapter.

Figure 4.2: Proportion of RCM and flogging punishments issued each month between January 1817 and October 1818.



Nevertheless, it is apparent that at a regimental level there was a much greater inclination to embrace the opportunities offered by confinement than the perspective offered by Wellington might initially suggest. This has interesting implications for the discussion of the extent to which officers were motivated by a sense of humanity when deciding upon punishments. The available data clearly indicates that take up of solitary confinement was initially slow upon it being legally sanctioned, suggesting that there was no overwhelming impulse amongst the officer corps to utilise the method. That in turn implies that humanity was not an overwhelming motivator, but rather that the more pragmatic need to punish in a way which was considered to be tried and tested was deemed paramount.

4.8 Conclusion

Discipline and punishment of soldiers at all levels of the British army was therefore not a linear, one-directional process, but a multi-faceted, negotiated one. NCOs and regimental officers sought to intervene at every level of the disciplinary system in an effort to reduce the scale of punishments inflicted on soldiers, albeit sometimes due to differing motives. In instances of plunder for subsistence NCOs and many officers were willing to turn a blind eye. In the case of NCOs, this was generally motivated by a desire to preserve their place in the primary group, especially since they benefitted from any additions that a successful foraging expedition made to the communal mess pot. Officers meanwhile, often either recognised that the men had to eat, or expected a cut in exchange for their silence.

Stealing non-consumables fell into more ambiguous territory, and was harder to police precisely because of the accommodating stance that was taken over the stealing of food. It is clear that a culture pervaded a not insignificant body of the officer corps of 'making', and with officers being actively complicit in stealing items from the local inhabitants, it is impossible to conceive that this did not have an impact on the energy with which they pursued the complaints of civilians who had their property stolen.

Yet the influence of those in authority on the military justice system was by no means limited to simply ignoring instances of poor discipline. It is clear that where possible efforts were made to prevent cases from going to court martial, through unofficial, non-corporal punishment, or even by using courts which were not legally sanctioned by the Mutiny Act. That this practice was condoned by the army's senior officers indicates how ubiquitous pragmatism was in the imposition of military law.

Through the crafting of ambiguously worded charges, such as using 'absence' instead of desertion, or 'in liquor' rather than 'drunk', officers were able to instantly limit the size of the punishment that a soldier would receive if found guilty by a court martial. Whilst this may have been predominantly motivated by preserving the honourable reputation of a regiment, the fact remains that discretion inadvertently resulted in a more humanitarian punishment system.

Discretion also played a vital role in the court proceedings, as officers who were summoned to give evidence chose whether to give a good character reference for the

accused. Yet punishment practices reveal the extent to which conflicting priorities impacted on the implementation of military law. Driven by a duty to uphold the military justice system, courts martial made extensive use of the lash. However, since officers oversaw the punishment of their own men, particularly at RCM, they could, and did intervene. By reducing the size of floggings, pardoning their men, or exercising their own judgement on when the convicted soldier had received all the punishment they could bear, officers built a bond with, and secured the gratitude of, their men by showing mercy and empathy. The fact that this seeming humanity was tinged with self-interest, predicated on the importance of maintaining command and control, means that it does not closely resemble the patterns of humanitarian intervention and activism which have traditionally been associated with the term during this period.[121] Nonetheless, aware of the fact that officers were driven by this agenda due to a need to maintain the unit's morale and preserve its fighting strength, NCOs and privates were able to appeal directly to their officers for clemency. By observing the practices of their officers, British soldiers knew that well behaved men, who acted within the confines of the unspoken code of acceptable behaviour, could expect to be rewarded for their good conduct if they ever faced the lash.

The rank and file knew that the officers of their regiments operated a pragmatic system of discretionary justice. They were therefore content to accept its parameters, whilst acknowledging that, if they were caught by the wrong person, or their actions went too far, they would be judged according to the Articles of War which were otherwise so widely circumvented. Discipline in the British army was, therefore, far from being a rigid system that was strictly and viciously imposed. Instead it was far more fluid, more discrete, and more pragmatic than even its most senior administrators realised.

It has also become apparent throughout this thesis that, in addition to being flexible, the military justice system, and the methods used to instil discipline, were changing substantially during this period. Appreciating the motives for these changes, and the way in which those reforms were implemented, has the potential to answer fundamental questions on what military law was, how it was implemented, and the way in which wider society was engaging with notions of legal reform. These questions therefore form the focus of the examination of the reform of military, in this thesis's final chapter.

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[121] Green, *Humanitarianism* p. 1158.

Chapter 5 The Judge Advocate General, the nature of military law, and the reform of the military justice system

5.1 Introduction

Having explored the realities of how military law was implemented, this chapter returns to the concept that military law was not constant during the period under scrutiny, but underwent changes designed to improve the dissemination of justice, and punishment practices. A central figure within this process of reform was the Judge Advocate General, Charles Manners Sutton, the head of the JAG's department based in Downing Street. Upon his resignation as JAG in June 1817, Manners Sutton thanked his colleagues for their support in fulfilling what had been a 'not infrequently most painful duty'.[1] The exasperated tone of the comment reflected the frustrations that Manners Sutton had experienced in trying to instil a degree of uniformity of practice, and professional knowledge, into the administration of military justice over eight years in office. Manners Sutton had facilitated reforms to the financing and administration of the JAG's office, overseen a shift in the types of individuals chosen to officiate in trials, striven to expand the legal knowledge of Judge Advocates, and sought to reduce the use of corporal punishment in the army. These were wide ranging and sorely needed reforms which represented a significant shift away from methods of administering military justice witnessed in the eighteenth century. In order to better understand that process of reform, and the motivations behind it, this chapter will explore Manners Sutton's efforts, alongside those of others with an interest in reforming military law. The reason for much of this chapter's focus upon Manners Sutton is two-fold. Firstly, as the individual who held the position of JAG from 1809-1817, his influence was key to the administration of military law within government during the period scrutinised by this study. Yet it is also significant that Manners Sutton's role as a reformer of the department stands in marked contrast to his predecessor. Richard Ryder, who had held the position from 1807-1809 suffered throughout his life from ill health, including 'a

[1] WO81/54, Circular Letter, Charles Manners Sutton to Deputy Judge Advocates, 9th June 1817.

debilitating nervous headache', which hampered his career and affected his ability to effectively carry his duties in various government offices.[2] Manners Sutton's input therefore helped to give the department the leadership that it had lacked under Ryder, and as such his input merits detailed consideration.

Nonetheless Manners Sutton was by no means the only individual seeking to reform military justice during this period. Alterations to the military justice system were less the result of a co-ordinated long-term plan for reform and more due to piecemeal responses of individuals to the ongoing challenges. This chapter therefore examines the complex process of the reform of military law, both within and outside Parliament. In the Parliamentary context, the efforts to instigate reform particularly demonstrate the continuation of what Philip Salmon has described as 'an eighteenth century free-for-all open to all Parliamentarians'.[3] As with the implementation of military law within the army discussed in previous chapters, it will also become clear that many of the individuals who instigated measures of reform were working independently of one another. In turn, it will be argued that this lack of consultation between key reformers such as the Commander in Chief, Wellington, Manners Sutton and MPs, led to reforms that at times were at cross-purposes with one another.

The chapter will begin by exploring the primary issues facing the administration of military justice, before examining the input of individuals in attempting to redress those issues. In the process, it will offer insight into the priorities of those administrating and overseeing military justice, and how they construed the system. It is particularly noticeable that the pragmatic approach, which has formed such a central part of this thesis, was also evident in the JAG's approaches to the administration of military justice and its dissemination. Analysis of documents relating to the deputization of the Judge Advocates will show how Manners Sutton made a deliberate, strategic decision, when seeking to professionalise the groups of individuals officiating in trials, to militarise the Judge Advocates. Through the employment of officers in a role that had been frequented by lawyers, familiarity with the army's challenges, practices and needs was prioritised as the

[2] David R. Fisher, 'Ryder, hon. Richard (1776-1832)' in *The History of Parliament: The House of Commons, 1790-1820* <https://www.historyofparliamentonline.org/volume/1790-1820/member/ryder-hon-richard-1766-1832> [para 5 of 37] [Accessed 2/9/2020].

[3] Philip Salmon, 'Parliament', in *The Oxford Handbook of Modern British Political History, 1800-2000*, ed. by David Brown, Gordon Penland & Robert Crowcost (Oxford: Oxford University Press, 2018), pp. 83-102 (p. 85).

main form of knowledge amongst those advising the military courts. This in turn engendered further discretion by allowing those with the greatest appreciation of the pressures that the army faced to advise the military courts on appropriate ways of proceeding. Meanwhile, examination of the JAG's correspondence will show that Manners Sutton himself acknowledged that discretionary practices were at times necessary, with him actively advising that prosecution in some instances was not in the army's best instances.

A significant proportion of this chapter will focus upon discussions surrounding the question of flogging. This is not to say that the most radical changes of the period were in the reduction of lash limits, but instead is a reflection of the scale of the debate, particularly within Parliament on the issue. These debates, contained in Hansard, highlight the ongoing, contested nature of the conversation on the appropriateness of corporal punishment in the army. It will be argued that a lack of a consistent agenda amongst reformers resulted in tensions in the reforms that were implemented. Whilst Wellington was able to secure the reforms that he considered essential to facilitate a swifter route to punishment by holding trials with fewer officers, this undermined efforts to utilise more humane methods of punishment which were not implemented on campaign. Taken as a whole, the chapter will argue that discretionary approaches to the application of military law transcended those tasked with the law's administration, further highlighting the nuanced manner in which the law was applied to the army's requirements. The sporadic and largely unsuccessful attempts to limit the use of the lash, meanwhile, will be used to argue that humanitarian principles seemingly had little impact in the debate to abolish corporal punishment within the army.

5.2 The challenges facing the military justice system

5.2.1 Competency amongst the Judge Advocates

The fact that military law was distinct from its civilian, or non-military, counterpart created a series of challenges when it came to administration. Expertise as a legal professional was a pre-requisite for those holding the position of JAG, however this was not the case for the Deputy Judge Advocates. The position of JAG was held by three individuals in this period: Richard Ryder (November 1807 – November 1809), Charles Manners Sutton (November

1809 – June 1817) and John Beckett (June 1817 – May 1827).[4] Ryder was admitted to the bar in November 1791, having completed a MA at St John's College, Cambridge in 1787 and been admitted to Lincoln's Inn law school in February 1788.[5] Manners Sutton had also been educated at Cambridge (Trinity College), and Lincoln's Inn, before being called to the bar in May 1806 and practising on the western circuit.[6] Manners Sutton unquestionably viewed himself as a legal professional at heart, making a condition of his appointment the fact that he could return to the bar upon leaving office.[7] Beckett also graduated from Cambridge, but went to the Inner and Middle Temple before being called to the bar in 1803. However, Beckett was a civil servant prior to appointment, rather than a career politician like Ryder and Manners Sutton, serving as Under-Secretary at the Home Office from 1806, until becoming JAG in 1817.

All of those who held the position of JAG during this period therefore appreciated how non-military law worked, and were able to apply this, where necessary, to their role as JAG. However, a clear divide existed amongst those who officiated as Judge Advocates. On the one hand were those who had legal training, but no experience of serving in the army or appreciation of how military law operated. On the other were officers who were well acquainted with the Mutiny Act and Articles of War as a result of their services, but who seemingly lacked legal expertise.

The impact of this lack of professional legal knowledge on the orderly dispensation of military justice is apparent from some of the letter books of the JAG's department. The correspondence, particularly during Ryder's tenure, and in the early part of Manners Sutton's time in office, frequently dealt with basic points of military law and court martial procedure, which had been overlooked by those officiating in trials. In July 1808, for example, Ryder was consulted by the Secretary at War on the legality of inflicting a sentence from a Regimental Court Martial (RCM) when the proceedings themselves had

[4] Beckett held the position again, between February 1828 – December 1830 and December 1834 – April 1835.
[5] W. R. Williams, 'Ryder, Richard (1766-1832)' in *ODNB* <https://doi.org/10.1093/ref:odnb/24402> Para 1 of 4 [Accessed 02/09/2020].
[6] Gash, Norman, 'Charles Manners-Sutton, First Viscount Canterbury, 1780-1845' in *ODNB* <https://www.oxforddnb.com/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-17965?rskey=V57VNk&result=3> Para 1 of 8 [Accessed 02/09/2020]
[7] M. H. Port and R. G. Thorne, 'Manners Sutton, Charles (1780-1845)' in *The History of Parliament: The House of Commons* <https://www.historyofparliamentonline.org/volume/1790-1820/member/manners-sutton-charles-1780-1845> para 5 of 23 [Accessed 02/09/2020].

been lost by the battalion officers. Ryder opined that provided the President of the Court and the battalion's commander could perfectly recall the sentence, then the sentence could be carried out.[8] However some queries dealt with far more basic issues than the need to take care of court martial proceedings as a legal record of the judicial process. In 1808, the proceedings of Surgeon George Baker's General Court Martial in Gibraltar had to be returned after the court completely failed to pass judgement on two of the four charges. The fact that the Deputy Judge Advocate (DJA), had failed in his duty to advise the court that they had to pass judgement on all the charged laid before them, can only have been attributed to a lack of awareness of legal process.[9]

These examples were by no means isolated instances. When Manners Sutton took over as JAG, confusion over basic court operating procedures persisted. In 1811, a failure by DJA Major Handasyde to administer the correct oaths in the trial of James Clarke, East York Militia, led to the trial having to be rerun in its entirety.[10] However, these failings were not purely the responsibility of inexperienced officers. A Mr Daniel Sutton Esq, who served as Judge Advocate for the Eastern District of England from at least 1806 until July 1811, became a source of considerable frustration for the JAG.[11] Sutton, who does not appear to have been a relation of Manners Sutton, certainly seemed to benefit financially from his deputation as a DJA. In the list of payments for Judge Advocates, in the financial year 1808-9 (the first year recorded) Mr Sutton was paid £305 0*s*. 2*d*. for officiating on an unspecified number of trials. This amounted to some 25% of the JAG department's expenditure in that financial year.[12] Over the following three years, Sutton was paid a further £205 13*s* for his services, but this was not an indication that he was fulfilling his duties effectively. In December 1809, within two months of taking office, Manners Sutton wrote to Lieutenant-General Loftus, acknowledging Daniel Sutton's neglect of duty as DJA, and assuring the General that he would write to him.[13] Manners Sutton duly did this four days later, though on this occasion he took pains to assure Sutton that he was not being formally reprimanded. In February 1810, however, Sutton again came to the JAG's attention for

[8] WO81/39, J. A. Oldham to Francis Moore, 14th July 1808.
[9] WO81/39, Richard Ryder to Richard Mountney Jephson, 9th August 1808.
[10] WO81/44, J. A. Oldham to Major Handasyde, 27th February 1811.
[11] TNA War Office 85/4, Judge Advocate General's Office, Deputation Books, March 1806 to May 1817.
[12] WO93/9, ff. 70-71.
[13] WO 81/41, Charles Manners Sutton to Lieutenant-General Loftus, 19th December 1809.

grossly overcharging for expenses whilst acting as DJA, something which may explain the extraordinary sum that was paid to him in 1808.[14] By March 1811, however, Sutton was again failing to meet expectations, with John Oldham (Deputy Judge Advocate General and First Clerk of the JAG department) sending a curt letter on behalf of the JAG demanding detailed explanations for delays and failings in court procedures, whilst reproaching him for failing to pay attention to his earlier warnings on fulfilling his duties.[15] In June, Oldham had to write again, seeking an explanation as to why the revisions of the proceedings that had been directed by Commander in Chief for the courts to carry out had not been adhered to, and demanding to know what 'you thought it your duty to suggest to the Court as to the course which they were called upon to pursue on this occasion'.[16] After Sutton was paid for his services in those trials, he never again appears to have officiated as DJA.[17] It is important to acknowledge that Sutton's case was particularly egregious from a financial perspective, and may have partially been a result of fraud. Nonetheless, the fact that he continued to be hired until 1811 indicates that he must have been a suitably qualified legal professional, albeit one who lacked an appreciation of how to administer military law effectively. Furthermore, this example was not an isolated one when it came to awareness of the stipulations of the military law. The legality of sentences was a persistent problem, especially early in the period. In July 1808, for example, Ryder had to advise a civilian DJA that transportation could only be legally used as a sentence for desertion.[18] This was a point which Manners Sutton had to re-emphasise as late as 1816, albeit to an officer acting as DJA.[19] Meanwhile, Oldham had to confirm that it was not acceptable for the DJA to be a witness in the trial, as it created a conflict of interest in their position as both prosecutor and advisor to the defendant. The individual who failed to grasp this point, Mr A. W. Cochran Esq. in Quebec, was therefore instructed that another individual would have to officiate as DJA for that trial.[20]

Clearly then, failures to comprehend the nature of the military justice system were not solely attributable to officers lacking legal training. Rather, they were a reflection of a

[14] WO81/41, J. A. Oldham to D. Sutton, 15th February 1809.
[15] WO81/44, J. A. Oldham to D. Sutton, 1st March 1811.
[16] WO81/44, J. A. Oldham to D. Sutton, 18th June 1811.
[17] WO93/9. There is no further record of Sutton being paid for his services.
[18] WO81/39, Richard Ryder to James Christie Esten, 6th July 1808.
[19] WO81/53, J. A. Oldham to Captain Knight, 33rd Regiment, 4th December 1816.
[20] WO81/52, J. A. Oldham to A. W. Cochran, 4th April 1816.

lack of understanding of the nature of military law, and how military justice was to be disseminated. The fact that legal professionals were in some cases perplexed by military law further highlights its bespoke and distinctly separate nature from its non-military counterpart. This confusion, as the dates of some of these examples suggest, was an ongoing problem, which was never entirely resolved, although, as will become apparent below, a deliberate decision was made to prioritise military knowledge over legal training.

5.2.2 Expansion of responsibility and workload

One of the most immediate pressures felt within the JAG department over the course of this period was a growth in the business that the department handled, particularly in the latter stages of the Napoleonic Wars. In 1808, there were 275 GCMs, all of which had to be recorded by the JAG's office, regardless of whether the sentences were confirmed at home or overseas.[21] By 1813, the introduction of the GRCM tier, along with the growth in the number of GCMs conducted, meant that the JAG's office handled 948 cases, a 344% increase.[22] Even after the conclusion of the war, JAG business did not drop below 1808 levels. In 1818, the department was, at 506 cases, still handling almost double the amount of business it dealt with at the start of the period of this study.[23]

This increase in workload also resulted in increased expense, especially in postage fees, something which Manners Sutton challenged shortly after coming to office. His objections and efforts to secure changes, covered below, led to a fractious exchange with the Secretary to the Post Office Francis Freeling. Money was also a factor in terms of staff workload, with Manners Sutton having to apply for additional funds to give his clerks pay rises, though he only did this after being petitioned by his workforce.[24] Whilst no details of the specifics of that petition have been found, the clear implication is that the additional pressures were affecting staff morale.

[21] WO90/1, WO92/1. These figures are based on calculations from the database compiled by transcribing the registers in full.
[22] WO90/1, WO92/1, WO89/4. These figures are based on calculations from the database compiled by transcribing the registers in full.
[23] WO90/1, WO92/1, WO89/4. These figures are based on calculations from the database compiled by transcribing the registers in full.
[24] WO93/9, Charles Manners Sutton to the Earl of Liverpool, 31st October 1812.

5.2.3 Ongoing calls for reform

The JAG's office also found itself in the midst of ongoing pressures to reform the military justice system, both to resolve some of the issues outlined above, but also in response to perceived failings in the system.

One key source of pressure for reform was Parliament, where the radical MP Sir Francis Burdett, repeatedly questioned the appropriateness of the army's punishment system. On occasion Burdett called MPs' attention to specific instances where the threat of punishment had led to the suicide of the accused. In June 1811 he brought to the attention of the Commons a case where a soldier had allegedly cut his own throat for fear of being flogged. Manners Sutton investigated, and confirmed a few days later that Burdett was completely misinformed. The individual had deserted upon receiving his bounty money, and had committed suicide before the sentence of the court martial 'had been promulgated'.[25]

In 1817, Burdett raised a seemingly similar instance, where he believed threat of flogging had resulted in a sentenced soldier committing suicide. The case which Burdett referred to had apparently been printed in the *Carlisle Journal*, something which might appear to suggest that there was a degree of public knowledge and discussion of courts martial in the newspapers.[26] In reality, examination of the newspapers from this period shows that whilst the newspapers periodically printed the summaries of GCMs, especially those of officers, any discussion of the legitimacy of the sentences being issued was muted or non-existent.[27] Incidentally, the lack of discussion in the press on the question of flogging was also mirrored by scant coverage being given to debates on the matter within Parliament.[28] In the case that Burdett raised in 1817, Manners Sutton swiftly investigated and informed the Commons a few days later that Burdett was again misinformed, and had confirmed from the regional commander, Sir John Byng, that the remainder of the sentence had been remitted before the prisoner committed suicide and the individual, who was a

[25] Hansard, Vol. XX, 20th July 1811, 776-7.
[26] Hansard, Vol. XXXVI, 8th May 1817, 272-273.
[27] See for example Bury and Norwich Post, 6th January 1808; *Caledonian Mercury*, 4th January 1813;
[28] See for example *Aberdeen Journal*, 22nd March 1809.

bigamist, had, in Byng's opinion, killed himself in despair 'at finding himself married to a worthless and abandoned' character in the form of his new wife.[29]

As will be explored below, Burdett made repeated attempts to abolish flogging in the army. The JAG's responsibility to speak for the government on behalf of such issues, and therefore correct misconceptions and misrepresentations, on one occasion provoked an irritable response from Manners Sutton. In June 1811, Burdett sought to garner support across the house for the abolition of flogging, exaggerating the scale of punishment in the army, estimating that 'five millions of lashes might be annually inflicted', and seeking to make the argument that the use of a cat of nine tails whip meant that every stroke was in fact nine lashes in itself.[30] Manners Sutton picked Burdett up on this and other points, and remarked that:

> The practice which had been lately adopted, of bringing military subjects before the House in all cases, was mischievous. Much mischief must be done by its growing into a custom. If parliament made itself a court of military appeal, it would soon find that it had taken upon it an excessive burthen [sic].[31]

It is therefore clear that the JAG found himself fending off challenges designed to question the legitimacy of the military justice system's methods of punishment, which formed part of Burdett's wider agenda to abolish flogging in the army. Whilst Burdett's efforts were ultimately unsuccessful, they nonetheless posed an additional challenge for a minister who was already facing the need to resolve pressing practical problems to enable the military justice system to operate at all.

Yet the JAG did not simply have to face calls for changes to the military justice system at home. One of the most vocal proponents of reform, and the individual demanding the most fundamental changes to the military justice system, was Wellington. As was outlined in Chapter Three, Wellington engaged in a relentless battle to improve the discipline of his men. However, he not only sought to deal with the matter on a practical level through his powers as regional commander of the forces, but also sought to secure reform at home, which would give him greater power to act. That Wellington had a clearly

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[29] Hansard, Vol XXXVI, 15th May 1817, 574-575.
[30] Hansard, Vol. XX, 18th June 1811, 703.
[31] Hansard, Vol. XX, 18th June 1811, 706-707.

formed notion of how to improve military discipline, at least from his perspective, and to address the challenges that he faced in the Iberian Peninsula, is demonstrated by a lengthy letter to Castlereagh in June 1809. The letter is so significant that it is quoted in full in Appendix F. In it, he proposed three key areas of reform: a court martial to be constituted of one, two or three officers, with the power to inflict immediate punishment, and to report to the Commander of the Forces in the theatre; to significantly expand the role of the provost, and formalise its position in military law, as it currently operated by convention; and that Wellington be given the power to promote officers based on their service record.[32] Wellington was therefore proposing a multi-directional approach to what he considered to be an endemic problem across the British army, and he was persistent in pursuing those changes. Wellington's desired reforms were slow to materialise, and it appears that he sought to lobby other government ministers in order to realise his aims. Particularly significant is a now lost letter to the JAG, from 13th November 1811. We can only gain a rough sense of what this letter entailed, as the original copy was amongst a number of documents which were lost when the boat transporting Wellington's archive back to England sank in the Tagus. What is evident from Manners Sutton's reply, however, is that Wellington's proposals were detailed, and that he had attempted something of a charm offensive, as Manners Sutton remarked 'I am extremely thankful for any communications by which your Lordship conceives I can in any way promote the welfare and discipline of the army, and beg to assure you every attention shall be paid on my part to your Lordship's suggestion.'[33] Even more frustratingly, we do not have any evidence of what Manners Sutton thought of Wellington's proposals, as he went on to say that 'I am persuaded your Lordship will see that the importance of the subject, added to the various difficulties of dealing with it in such times as these, will excuse me for not being better prepared with a decisive opinion at this moment.'[34] Manners Sutton therefore clearly intended to write back to the Wellington, but since the JAG's out letter books for the period 6th February to 8th August 1812 have been lost, we have no clear indication of what was discussed. Nonetheless, we can still glean some sense of the contents of both letters. In the registers for the Wellington Papers, there is a brief entry for Wellington's original letter to Manners Sutton which states 'Irregularities of the army. Necessity of altering the military law. Begs

[32] *Despatches*, IV, pp. 432-436.
[33] WO81/45, Charles Manners Sutton to Viscount Wellington, 10th December 1812.
[34] WO81/45, Charles Manners Sutton to Viscount Wellington, 10th December 1812.

him to send out three or four regular deputy judge advocates'.[35] One thing that is abundantly clear, therefore, is that Wellington's army was struggling to cope with the scale of the task of administering military justice. Wellington's proposals must also have been considerable, wide ranging and potentially have involved alterations to the Mutiny Act, or the administration of military law, which would explain why Manners Sutton felt the need to take time over his response. It is probable that Wellington reprised a number of the points that he had made to Castlereagh almost two and half years earlier. It also likely that the fact that Larpent was sent out to the Iberian Peninsula in 1812 was at least partly due to Wellington's request, showing that the JAG department was receptive to some of his suggestions.

Nonetheless, there can be no doubt that the eventual results of this discussion with the JAG disappointed Wellington. In a lengthy letter to Lord Liverpool, Wellington lamented the challenges that the army faced in producing evidence and correctly framing the charges against individuals, and remarked that in his letter to Manners Sutton he had 'proposed remedies for this evil which have not been entirely adopted'.[36] It is impossible to determine, therefore, whether the creation of the GRCM was meant to be a means of resolving the challenges that Wellington faced by allowing small courts to assemble to try offences. However, it is clear that whilst the JAG faced pressure within Parliament to reduce flogging, he also faced unrelenting pressure from one of the army's most prolific commanders in the field to make punishment easier. Wellington's frustration with the necessity of evidence, which will be discussed further below, represented an attack on the fabric of how military law operated, highlighting the extent to which the divergent priorities across both the army and society served to confuse any attempts to form a cohesive strategy for reform. This theme will become further apparent when those efforts to reform are discussed in full below.

5.3 The militarisation of the administration of military law.

1812 was a year of significant changes in the administration of military law, not least given the creation of the General-Regimental tier of Court Martial (GRCMs) in the Mutiny

[35] MS61 WP6/1/11, Index of letters from the Duke of Wellington, January 1811 – December 1811.
[36] *Despatches*, IX, p. 227. Viscount Wellington to Earl Liverpool, 10th June 1812.

Act of that year.[37] Manners Sutton seized this opportunity to try and inject a degree of professionalism into the military justice system. In a letter in August 1812, he wrote to Major Robinson of the Royal Glamorgan Militia, remarking 'It is quite impossible for me in the scope of a letter to detail all the duties of a Deputy Judge Advocate, and I must therefore excuse myself from complying with your request on that point, and indeed it is for this reason, that I am anxious to obtain the recommendation of Commanding Officers, in favour of persons qualified to discharge those duties'.[38] Manners Sutton seemingly wrote to commanders of all regiments, asking for them to suggest somebody within their regiment who would be able to carry out the duties of DJA for GRCMs. The results were telling. Of the 82 warrants deputising DJAs to officiate in GRCMs in 1812, 71 were officers, all ranked between Ensign and Captain, and the remaining 11 were paymasters. In the special deputations that were issued for specific General Courts Martial, there was also a telling shift. Special deputations are a significant indicator to a change in the JAG's thinking: they were issued for individual trials, appointing an individual to officiate on that particular case. This stood in contrast to the standing deputations which gave the holder blanket authority to officiate as DJA within a prescribed region. As a result, changes to who was selected to officiate as shown by the type of individuals issued with special warrants provide a more immediate indication of who the JAG trusted than trends in the standing deputations, which were ongoing over period of months or years once confirmed by the JAG.

In 1811, 23 of the 28 special deputation warrants issued by the JAG's office were given to officers, meaning that 19% were issued to civilians. In 1812, however, 32 of the 37 special deputation warrants named officers, with civilians receiving 14%. Of those, 2 of the special warrants were given to Charlton Byam Wollaston, who had been trained at Inner Temple and was Assistant Deputy Judge Advocate General from December 1808.[39] Wollaston was therefore well versed in the implementation of military law, and considered

[37] Frustratingly, the correspondence for the crucial period surrounding the debate and implementation of that Act is missing, as there is a gap in the JAG's out letter books for 6th February to 8th August 1812 – the period covering the implementation of this change.
[38] WO81/46, 11th August 1812, Charles Manners Sutton to Major Robinson, Royal Glamorgan Militia.
[39] WO85/4, f. 122.

a safe civilian pair of hands to officiate in GCMs. Of the remaining civilian deputations, a further two were issued to a Magnus Henderson, and the fifth was given to a paymaster.[40]

Appointing an officer to officiate as DJA was not a guarantor against confusion over how the law should be applied. Manners Sutton was by no means ignorant of the fact that many officers had limited knowledge of legal procedure, having had to explain to a Colonel in 1810 about the need for military courts to ask the prisoner to plead guilty or not guilty.[41] Furthermore, significant mistakes still occurred throughout the period. In 1816, Lieutenant Miller of the Wiltshire Regiment made the fundamental error of using the wrong year's Mutiny Act as the basis of the advice that he gave the court, citing the 1812 version.[42] As was seen above, these issues could arise just as easily with civilian DJAs.[43] This lack of knowledge was not solely a problem limited to junior officers: Lieutenant General Maitland had to be informed by John Beckett in March 1818 that, notwithstanding staff shortages, it was not possible for the prosecutor and witness on a trial to also be a judge in that same trial.[44]

That these relatively simple mistakes were made indicates that there was not a perfect answer to the issue that Manners Sutton had sought to resolve. By employing officers as DJAs, legal knowledge was sacrificed in preference for an appreciation of the fundamentals of military discipline. What is equally noticeable, however, is that Manners Sutton seems to emerge from these examples as a man inclined to follow the law to the letter. The extent to which the JAG advocated a strict adherence to military law is a vitally important question which will be explored further below, although it is worth noting that in reality Manners Sutton's view was often more nuanced than these extracts imply.

In relation to the militarisation of the administration of military justice however, it is important not to take the argument too far. Until 1812, the administration of military justice in Britain's most active theatre of operations, the Iberian Peninsula, was indeed conducted by officers, with much of the work falling to Captain Goodman who from at least September 1809 was attached to the Adjutant General's officer was DJA.[45] In 1812,

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[40] WO85/4, f. 122.
[41] WO81/42, C. Manners Sutton Colonel Cornewall, Hereford Militia, 9th March 1810.
[42] WO81/52, C. Manners Sutton to Lieutenant Miller, 4th March 1816.
[43] See above, Chapter 5, pp. 184-187.
[44] WO81/54, Sir J. Beckett to Lieutenant General Maitland, 17th March 1818.
[45] WP9/1/2/1, General Orders, 7th September 1809.

however, a Deputy Judge Advocate General (DJAG) was appointed to oversee military justice in the theatre seemingly at Wellington's direct request. Although Goodman appears to have been competent in his duties (by 1816 he had reached Lieutenant Colonel and was still working for as a DJA), Wellington was overwhelmed with the number of trials that were needed to maintain discipline.[46]

As a result, in 1812, Francis Seymour Larpent was appointed as a DJAG. Born in 1776, Larpent was a civilian lawyer who, like Ryder, had graduated from St John's College, Cambridge, before attending Lincoln's Inn, and being called to the bar in 1803.[47] It is a mark of how successful Larpent was that, after the conclusion of the Peninsular War, he was appointed DJA at Gibraltar, before becoming Admiralty judge there. Manners Sutton appears to have played a key role in this appointment, lobbying the Secretary of State for War and the Colonies, Earl Bathurst, on Larpent's behalf.[48]

However, Larpent himself still required clarification on some of the finer points of interpretation of the Mutiny Act. In March 1813, Wollaston wrote to Larpent on the JAG's behalf, confirming that DJAs were required to officiate on GRCMs, and that sentences which contained both flogging and transportation were not legal.[49] The previous month meanwhile, Manners Sutton had expressed his surprise that Larpent did not consider one witness for the prosecution to be sufficient to convict a prisoner, remarking that 'in every military case there can be no doubt of its full sufficiency, except where more than one are required by the express words in the Mutiny Act'.[50]

That Larpent wrote with these queries does not mean that he was out of his depth. It is very clear from the language used that Larpent based his enquiries around what he considered to be legal precedent, and had provided his legal reasoning for his thoughts. In both Wollaston's and Manners Sutton's responses, they made reference to the reasoning that Larpent had used in his letter, emphasising specific sections of the Mutiny Act which

[46] WO81/52, J. A Oldham to Lieutenant Colonel Goodman, 7th May 1816; *Despatches*, V, pp. 448-9. Viscount Wellington to Earl Liverpool, 24th January 1810.
[47] Archbold, para 1 of 4 [Accessed 10th October 2020].
[48] WO81/50, Charles Manners Sutton to Earl Bathurst, 2nd October 1814.
[49] WO81/47, Charlton Wollaston to Francis Larpent, 30th March 1813.
[50] WO81/47, Charles Manners Sutton to Francis Larpent, 19th February 1813.

were more applicable to the predicaments raised.[51] Larpent was therefore engaged in a detailed and nuanced discussion with the JAG's department, which serves to further indicate how bespoke military law's nature was. As an experienced and competent legal specialist, taking a professional approach to the implementation of military law based on his training, Larpent still found it difficult to determine precisely what the correct practice was, even on fairly simple matters such as sentencing and use of evidence. Far from being something that anyone with legal training could apply themselves to, implementing military law required considerable familiarity with the Mutiny Act's specific provisions, and the conventions of military practice. As was discussed in Chapter Three, officers were able to acquire this by reading the handful of texts on military law upon obtaining a commission, and through their obligatory attendance at RCM trials within their unit upon appointment.[52] However there is no evidence of bespoke training for DJAs. Instead the only manner in which such queries could be resolved was by liaising with the JAG's office, something which further increased the department's workload. This indicates that whilst treatises on military law did explain the basic principles, there was no body of work which established a system of legal precedents that could be consulted and adhered to.

Once again Manners Sutton emerges from these exchanges as a proponent of following military law to its precise letter. The fact that the JAG, Wollaston and Larpent all made reference to specific clauses of the Mutiny Act is in many respects unsurprising. As the Mutiny Act was the legal basis upon which these courts operated, close adherence to its provisions was not only good professional practice, but also a legal requirement.

Notwithstanding the example of Larpent, however, it is clear that a more careful approach was being exercised over who administered military justice. Manners Sutton's transition towards a preference for army officers acting as DJAs indicates the unique nature of military law. Far from legal expertise being the main priority, an appreciation of how army discipline worked was seen as the key qualification for a competent DJA. The fact that experienced legal professionals were called upon with increasing scarcity shows that military law was not analogous with civilian law, but operated within its own distinct

[51] WO81/47, Charles Manners Sutton to Francis Larpent, 19th February 1813; Charlton Wollaston to Francis Larpent, 30th March 1813.
[52] See above, Chapter 2, p. 38.

framework, a point which is further supported by other features of the JAG's correspondence which will be explored below.

This emerging preference for DJAs to be officers also has significant implications on the pragmatic system of discretionary justice which has been identified in previous chapters. The experience of serving with their unit afforded officers who were subsequently appointed DJAs a useful perspective on the conflicting pressures of upholding military law, whilst also maintaining an effective fighting force. As a result, their advice to the court on legal matters had the potential to reconcile this dichotomy, or at least to be informed by it. This is not to say that officers who officiated as DJAs deliberately subverted the Mutiny Act and Articles of War in favour of a pragmatic approach. Any attempt to do so at GCM or GRCM would have been addressed when the JAG reviewed the court martial proceedings. Nonetheless, they provided a way of ensuring that whilst military justice operated within the limitations of the law, the army was not unduly confined by an inflexible interpretation that purely adhered to the law's exact letter.

5.4 Military precedent and the role of discretion

The question of discretion, its application, and the challenges of establishing military precedents within a system where there was no formal legal training, represented an ongoing area of discussion for the JAG. The use of established precedents was commonplace within the civilian legal system, particularly in relation to the role of defence counsel in civilian trials.[53] In the military context, discussion of precedent seems to have focused on punishment practices. In March 1814, the JAG had to intervene on the way in which the forfeiting of an officer's arrears had been outlined in a particular sentence, as it was 'neither sustained by the written law, or the practice of the Army'.[54] As a result, the punishment was illegal and had to be revised. Implicit within that remark is the recognition by Manners Sutton that bowing to established precedent was sometimes necessary, as if a precedent had existed, he would have been satisfied with the court's sentence.

This further serves to emphasise that the military legal system was unique in nature, making the growing reliance on officers as DJAs, rather than civilian legal experts, all the

[53] Beattie, *Crime and Courts*, pp. 362-3.
[54] WO81/49, Charles Manners Sutton to Lieutenant Colonel Forster, 3rd March 1814.

less surprising. Just as prosecuting civilian law required specific knowledge, and an awareness of precedents, so too did its military counterpart. As officers were likely to be better acquainted with the army's practices than a civilian, this acceptance of the importance of military precedent highlights the wisdom of Manners Sutton's increasing militarisation of the administration of military law.

By advocating adherence to precedent, Manners Sutton was embracing the spirit of discretion which pervaded military justice, by allowing the army to manipulate the more ambiguous areas of the law in a way which was consistent with historic military practices. However, the JAG did not simply bow to established military precedent where it existed. In 1810, he commented to Lieutenant Colonel Torrens that when it came to the matter of officers 'peremptory supersession' should 'never be resorted to', despite some entertaining the notion that it was acceptable in certain circumstances.[55]

Manners Sutton's acceptance of discretionary practices went much further than simply supporting precedents which were not written into military law, and the occasional bending of the rules on grounds of practicality. From as early as June 1810, he was exchanging letters with senior officers on the significance of exercising discretion when sentencing.[56] When writing to Brigadier General Hodgson to explain a number of points of military law, he remarked that it 'not only is the practice but equally the duty of every Court Martial where the punishment is left *discretionary* with them to measure the degree of offence by the motives which led to it'.[57] Put simply, Manners Sutton was recognising that aspects of military law were deliberately written in Mutiny Act and Articles of War in such a way as to allow flexibility when it came to sentencing guilty soldiers, allowing them to take extenuating circumstances into consideration.

The way in which this practice worked in reality was outlined by the JAG in a number of letters written later in the period. In July 1817, Wollaston wrote to DJA to the Army of Occupation Harris, on behalf of newly appointed JAG John Beckett, regarding the specifics surrounding sentencing.[58] Wollaston explained that a sentence of transportation for burning down a building used as a barracks was not legal as transportation could only be

[55] WO81/41, Charles Manners Sutton to Lieutenant Colonel Torrens, 15th January 1810.
[56] WO81/42, Charles Manners Sutton to Brigadier General Hodgson (Bermuda), 16th June 1810.
[57] WO81/42, Charles Manners Sutton to Brigadier General Hodgson (Bermuda), 16th June 1810.
[58] WO81/54, Charlton Wollaston to J. G. Harris, 14th July 1817.

used in cases of desertion. In the process, however, Wollaston also explained that courts martial had been given the power to treat civil offences as military ones, and therefore to apply military punishments (such as corporal punishment, solitary confinement or execution). Courts were therefore being trusted with greater powers in order to punish offenders in whatever way was most productive to the maintenance of discipline. As a result, Courts Martial could, if they wished, make public examples of soldiers committing civil crimes as a means of deterrence, by applying military punishments that would be conducted before their comrades.

This offers a clear indication of the full extent to which discretionary practices pervaded every layer of the military justice system. For the JAG to both acknowledge and advocate that courts should exercise their own discretion in the severity of the punishments issued provides emphatic proof that military law was far from capricious in nature.[59] Inevitably this method could lead to a lack of consistency in the sentences handed down for particular crimes. It might be expected that those charged with the same crime received roughly similar sentences. In reality, the evidence from the court martial records shows that even within the same court, this was not the case. In January 1813, for example, Privates Thomas Byrne and James Morgan of the 1/45th were both tried for having stolen a sheep from a Portuguese inhabitant. These two men were tried for the same crime, on the same date, by the same officers, yet Byrne was sentenced to 200 lashes, whilst Morgan was sentenced to 300.[60] This is one of countless examples, and might appear to indicate that empowering the court could lead to inconsistency. A similar situation occurred in April 1813 when Privates Neilson and Peterson from the 3rd Battalion, King's German Legion were tried at General Court Martial for desertion. Whilst Peterson was sentenced to service for life, Neilson was shot.[61] Of course, there also were plenty of situations where soldiers tried contemporaneously for the same crime did receive the same punishment. Yet this complex picture simply shows that officers were perfectly cognisant of their ability to take extenuating circumstances, such as a peripheral role in a crime, intoxication whilst committing a crime, or good character, into consideration. By emphasising the legal basis for such a mode of practice by advising that military law was not formulaic in structure

[59] Buckley, pp. 244-5.
[60] WO27/117, Six-monthly Inspection report for the 1/45th.
[61] WO90/1.

when it came to punishment practices, the JAGs effectively further empowered and encouraged officers to exercise discretionary justice in the court room.

Manners Sutton was equally prepared to advocate a degree of discretion in bringing, or indeed not bringing, cases to trial. In 1810, when asked to comment on the challenges of trying an officer due to be deployed overseas, the JAG remarked: 'Lieutenant Lynch's character and conduct has been such as to make it advisable that he should be detained at home with the offer of either giving in his resignation or standing a Court Martial upon the return of the Regiment'.[62] Manners Sutton was in effect endorsing that practice of allowing officers to escape trial by resigning their commission, despite it undermining military law in the process.

Yet this exercise of discretion under certain circumstances was not something solely left to the JAG. In December 1810, Manners Sutton was again asked to review the particulars of an allegation and felt that whilst there was a case that was worth investigating, he nonetheless left 'it entirely to Lord Wellington's discretion, as to whether the interests of the service require such notice to be taken of Lieutenant Steitz's misconduct.'[63] This was a point which was echoed a few months later when the JAG confirmed that there was a clear case for trying Captain Fryon 'for making false oaths to the monthly abstracts and pay lists of the regiment'.[64] Nonetheless, discretion was abundantly in evidence in his remark that:

> it must be for Sir David Dundas to determine whether the inconvenience attending such a course of proceedings, in the consequence of the present state of the forces in and near Bermuda, counterbalances the necessity which seems very urgent of thoroughly investigating in the only legitimate mode, the conduct of Captain Fryon.[65]

It is worth dwelling on this astonishing admission from Manners Sutton. The JAG was effectively saying that whilst there was a clear case to answer, this was a secondary concern to the challenges of assembling a General Court Martial of 13 officers in the Caribbean.

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[62] WO81/43, Charles Manners Sutton to Major General Wynyard, 7th February 1811.
[63] WO81/43, Charles Manners Sutton to Lieutenant Colonel Torrens, 1st December 1810.
[64] WO81/43, Charles Manners Sutton to Lieutenant General Wynyard, 1st February 1811; WO92/1.
[65] WO81/43, Charles Manners Sutton to Lieutenant General Wynyard, 1st February 1811.

Whilst Fryon was eventually tried and publicly reprimanded, the fact remains that the head of the military justice system was prepared to accept that the reality on the ground sometimes made prosecuting crimes impractical.[66]

Manners Sutton's actions should be seen within the wider context of the pragmatic system of discretionary justice identified in this thesis, as it is clear that ignoring an officer's conduct was not unprecedented. In September 1810, the JAG wrote to an unspecified recipient, presumably at Horse Guards, remarking that 'if the Commander in Chief's intention of overlooking Ensign Ferguson's conduct has not been notified to this officer', then he should face trial. Equally, however, if Ferguson had already been informed of the C-in-C's intentions to ignore Ferguson's actions, then Manners Sutton could not recommend trying him.[67]

Similarly Manners Sutton advised discretion in the case of Dr Bancroft, who was arrested in 1809 for 'Disobedience of the Commander in Chief's order to repair to Deal, for the purpose of embarking with the expedition under the commander of the Earl of Chatham'.[68] According to the Court Martial registers, the case was 'referred to the twelve judges on a point of law stated by Dr B that H[is] M[ajesty] had no right to place him on full pay without his own consent'. The reality was more complex, however. Manners Sutton was of the view that there was 'no weight in the legal objection suggested by Dr Bancroft'.[69] However, 'at the same time, it is impossible not to feel for the inconvenience by which Dr Bancroft is subjected by so long a delay in the progress of the trial'. [70] Whilst the JAG acknowledged that officially Bancroft was a prisoner under the warrant that had been issued for his arrest, and therefore could not go abroad as he wished, 'it would best meet the justice of the Case and satisfy his convenience if the Commander in Chief could *unofficially* apprize him [Bancroft], that his half pay should not be interfered with'. In other words, the case was quietly dropped, and no verdict or punishment was ever recorded for Bancroft's case.[71] Similarly in September 1811, Manners Sutton was consulted on a

[66] WO92/1.
[67] WO81/43, Charles Manners Sutton to unspecified recipient, 10th September 1810.
[68] WO92/1.
[69] WO81/43, Charles Manners Sutton to Lieutenant Colonel Torrens, 1st December 1810.
[70] WO81/43, Charles Manners Sutton to Lieutenant Colonel Torrens, 1st December 1810.
[71] WO92/1.

situation regarding Captain Langton, of the 61st Regiment, and Major Northey.[72] Manners Sutton felt that since the affair was so delicate (no specifics were provided in the response), and Langton was 'sufficiently impressed with a sense of the impropriety of his conduct' that prosecution was not advisable.[73] Nonetheless, the JAG did insist on a proviso that Langton must apologise 'in terms satisfactory to the Commander in Chief' before any proceedings were dropped.[74] Once again, the JAG emerges as an advocate of prosecution only in situations where the army would materially benefit.

However, Manners Sutton's advocacy of discretion also embraced an economic argument. In September 1811, he queried whether the expense of transporting a foreign soldier enrolled in the British service was actually worthwhile, despite it being 'not unfrequent [sic]'.[75] What is all the more remarkable is that the JAG was writing directly to the Commander in Chief of the Army, the Duke of York to advocate waiving the law in favour of saving the army money. Even more astonishing, however, is how the Duke of York responded. Just the following day, Oldham wrote to the DJA in Messina informing him that the JAG 'has had it in command from His Royal Highness The Prince Regent, strongly to recommend to General Officers commanding abroad, to check as much as possible the frequency of sentencing deserters to transportation, and to impress on the minds of the Court Martial, the great inconvenience and expense that is felt both by the Army and the Public by adopting unnecessarily that course.'[76] This actually appears to have had a negligible effect. Analysis of the courts martial database reveals that 31 deserters were transported in 1810, 16 in 1811, 17 in 1812, 25 in 1813.[77] However, since the Duke of York's opinion was only gleaned in September 1811, it is difficult to attribute the drop in transportations for that year to the Commander in Chief's orders. By stymieing efforts to transport convicted deserters overseas, however, Manners Sutton was in effect facilitating greater use of confinement, extension of service, flogging or execution.

These examples of discretion are significant on two levels. Firstly, the examples relating to officers indicate a willingness by Manners Sutton to sustain a two-tier system

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[72] WO81/45, Charlton Wollaston to Lieutenant Colonel Torren, 18th September 1811.
[73] *Ibid*.
[74] *Ibid*.
[75] WO81/45, Charles Manners Sutton to Duke of York, 18th September 1811.
[76] WO81/45, J. Oldham to Captain Newland, 19th September 1811.
[77] WO89/4, WO90/1, WO92/1.

for dealing with breaches of military law, affording officers a means of escaping trial which was denied to the rank and file. Equally, however, is it clear that the JAG did not take a one-dimensional view towards discretionary practices. For the JAG to not only be acquiescent, but to actively advise not bringing officers to trial shows clear support for some of the more underhand practices which were not provided for by military law. It would therefore seem that even the JAG felt that, in some circumstances, military law was sometimes best maintained when it was not upheld at all. If nothing else, therefore, it seems that military justice was a flexible and nuanced system, something which even the most senior adviser on military law agreed with.

A further way in which the JAG had the potential to influence the military justice system was much more subtle and even arguably subliminal, rather than intentional. As the JAG was responsible for providing clarity on the finer points and ambiguities of the law, there was ample scope for his personal convictions to influence his judgement on how military law should be interpreted. This is by no means to suggest that Manners Sutton was duplicitous or unprofessional in how he sought to advise officers on their queries. Emphatic evidence to the contrary can be found in the JAG's correspondence from January 1810. Oldham wrote to Major Campbell, DJA at the Cape of Good Hope, on Manners Sutton's behalf, informing him that solitary confinement was not, at the moment in time, a legally enforceable sentence, as there was no provision for it in the Mutiny Act.[78] What was particularly significant here was that Manners Sutton's advice ran contrary to his own, seemingly strong, feelings on the matters. In 1811 he was instrumental in changing the Mutiny Act by introducing a clause to allow courts to award confinement as an alternative to flogging.[79] There can be little doubt, therefore, that Manners Sutton did not consciously allow his distaste of flogging to interfere with his reading of the law.

Nonetheless, the complex position that Manners Sutton adopted, inevitably raises the question of the extent to which the JAG actively pursued a reformist agenda. The degree to which the JAG department generally did not take an active part in pursuing a reformist agenda is demonstrated by a number of instances where the JAG went to pains to state that his comments represented his 'confidential opinion'.[80] This attitude was

[78] WO81/41, J. Oldham to Major Campbell, 72nd Regiment, 11th January 1811.
[79] Hansard, Vol. XIX, 11th March 1811, 356. This is discussed further below.
[80] See, for example, WO89/39, J. A. Oldham to F. Moore Esq., 6th July 1808

wholly consistent with the JAG's professional outlook, and disinclination to involve himself in matters which were outside of the remit for his office. In January 1811, for example, Manners Sutton had made it clear that he had no legal knowledge of RCMs as they were not part of the duties of his office, and therefore he could not offer an opinion.[81] He then added that it would be 'inconsistent with the practice and duties of this office for the Judge Advocate General in any way to interfere with military matters until they come officially before him'.[82]

It is therefore clear that the advocacy for a pragmatic and discretionary approach to the application of military law transcended to the very highest levels of its administration. The fact that the JAG encouraged discretionary practices further serves to demonstrate the extent to which military law was applied in a manner that was bespoke to the army's needs, both legal and financial. The lack of clearly established precedents certainly created significant confusion and additional workload for the JAG, but this did not mean that military law did not embrace precedent. Instead it highlights that, just like non-military law, the Mutiny Act and Articles of War were applied in nuanced ways , rather than arbitrary ones.

5.5 Tensions between the law, honour, and specificity

The complex balancing act between legal stipulations and discretion, visible even in the JAG's own correspondence, raises important questions about how precise military law was. In some respects, Manners Sutton emerges from an examination of his correspondence as an individual of contradictions. Despite the clear advocacy of discretionary approaches, he also supported a strict adherence to the precise stipulations of military law, though this predominantly, but not exclusively, applied to a couple of key areas of legal practice.

One area where this particularly emerged was in relation to the wording of charges. For logical reasons, the JAG was very particular about ensuring that the charges were framed in such a way that they directly correlated to the Mutiny Act and Articles of War, thereby making it easier to determine whether the defendant had broken military law. A

[81] WO81/43, Charles Manners Sutton to Lieutenant Colonel Maxwell, 2nd January 1811.
[82] WO81/43, Charles Manners Sutton to Lieutenant Colonel Maxwell, 2nd January 1811.

failure to include a date of an alleged desertion led to the court, in the case of Private J. Joinson, of the Cheshire Militia, in March 1810, uncovering evidence of an additional desertion which it did not have the power to try, as it was 'beyond the time of limitation' for which an individual could be tried.[83] Specificity of when the crime occurred was deemed of vital importance for securing a conviction, as Manners Sutton explained to Major General Wynyard in 1810. Without such specificity it became difficult for both the prosecution and the defence to produce documentation to support their position.[84]

There was in fact a disconnect between what the JAG felt was essential from a legal perspective, and what Wellington, as a commander on the ground, considered to be beneficial. In 1809 he had lamented the fact that securing prosecutions at RCM was extremely difficult as

> officers who are sworn "well and truly to try and determine, *according to the evidence*, the matter before them", have too much regard to the strict letter of that administered to them. [… The RCM] is no longer a court of honour, at the hands of which a soldier was certain of receiving punishment if he deserved it; but it is a court of law.[85]

That Wellington should have objected to Regimental Courts Martial operating as courts of law shows the extent to which army officers operated under a very different set of principles and assumptions to legal professionals. Yet it also highlights the divide between what commanders on the ground considered to be necessary, and what those in London considered to be desirable.

Wellington's remark offers an intriguing insight into how he construed military conduct as a manifestation of honour. It is feasible, that his perception was influenced by his perspective as an officer. The two-tier approach to punishment meant that for officers, the courts were often regarded as courts of honour, which had the potential to exonerate them for their conduct. Wellington's attitude alludes to eighteenth century notions of honour with a focus upon status and public perception. Given Wellington's need to

[83] WO81/41, 26th March 1810, Charles Manners Sutton to Brevet Major Newton.
[84] WO81/41, 27th March 1810, Charles Manners Sutton to Major General Wynyard.
[85] *Despatches*, IV, p. 433. Sir Arthur Wellesley to Viscount Castlereagh, 17th June 1809. Emphasis is Wellesley's. A full transcript of this letter is provided in Appendix F.

maintain a positive relationship with the local population, this need to maintain an honourable reputation for the army appears at times to have influenced his thinking. There is a curious contradiction here with the fact that Wellington did nothing to punish those responsible for the sackings of Ciudad Rodrigo and Badajoz, which can only be explained by the notion that military law was fundamentally always subservient to the army's needs.

Yet there are further undertones to Wellington's comment. The first is that of change. For Wellington to lament that RCMs were 'no longer a court of honour' points to an ongoing transformation of military law, which highlights a closer alignment with the principles of trials being decided by the presentation of evidence that already governed the non-military courts.[86] This serves as a useful reminder of the fact that whilst military law was distinct, it did draw upon the practices of its non-civilian counterpart when necessary. Wellington's phrase 'receiving a punishment if he deserved it' also speaks to the need that he had for military law, and how he regarded it as a tool for the facilitation of discipline. Wellington's perspective was essentially, perhaps unsurprisingly, functional, rather than legal. As a result, anything which allowed soldiers to 'escape' punishment was simply an obstacle to the maintenance of order within the force.

The divide between Wellington's stance and Manners Sutton's is possibly best demonstrated in the latter's objection to an individual being charged simply with 'Unsoldierlike conduct'. In June 1811, Oldham therefore wrote to Major General Wynyard that 'the charge against Joseph Hunt is such as no man ought to be compelled to answer, being […] without any specification of facts, times or place'.[87] As a result, Wynyard was advised that the sentence was far too harsh to be carried into effect. This points to a further disconnect within the administration of justice. As was noted in Chapter Four, the use of 'catch all' euphemistic charges was a commonly used technique in order to facilitate a greater degree of discretion in the military justice. However it is significant that Manners Sutton was not objecting to the notion of a soldier being tried for 'unsoldierlike conduct', which was legally admissible, but rather that the crime which was deemed to be 'unsoldierlike' had not been specified. Manners Sutton's position therefore sought to achieve the best of both worlds, allowing a degree of discretion within the operation of the

[86] Beattie, *Crime and Courts*, p. 348.
[87] WO81/44, J. A. Oldham to Major General Wynyard, 8th June 1811.

law, whilst also being rooted in the legal stipulations of the Mutiny Act. Manners Sutton's motivation was to equip defendants with the means of providing evidence of their innocence, ensuring that punishments that were issued were more appropriate to the facts of their case, a point which Woolaston made to the DJA in Bermuda in 1813.[88]

This friction between the use of broader charges, and Manners Sutton's push for specificity, at times hampered the swift administration of justice. In March 1813, the JAG wrote to Wynyard, remarking that whilst he was 'very sorry' to 'obstruct or even delay, the course of justice, when a speedy and effectual example may be required', since the prisoner had been charged with 'mutinous conduct', and not 'beginning, exciting or joining a Mutiny', he could not be executed.[89] He explained that the purpose of the 'mutinous conduct' charge was that it 'has a milder construction, and has never been considered as making the party charged with it liable to the punishment of death'.[90] The law therefore took a priority over the army's immediate needs. Military law was therefore certainly discretionary, but never to the point of losing sight of its legal origins. Any tendencies towards tyrannical or illegal practices, accidental or intentional, were held in check by the oversight of the JAG.

5.6 Efforts to reform military law in Parliament

As was apparent from the discussion of Parliamentary pressures to reform military law earlier in this chapter, the question of the appropriateness of flogging dominated deliberations on reforming punishment practices in the House of Commons. It was in this field which Manners Sutton instigated potentially the most important reform he was responsible for. In 1811, in the clearest indication of his stance on the army's punishment practices, the JAG was responsible for inserting a clause into the Mutiny Bill which permitted the use of solitary confinement as an alternative to flogging.[91] This was a significant move from an individual whose primary role in Parliament at the time was to speak on the government's behalf on matters relating to military discipline. By proposing his own amendment to government legislation in the midst of a debate in the House of

[88] WO81/47, C. B. Wollaston to Edward Moore, 12th February 1813.
[89] WO81/47, C. Manners Sutton to Lieutenant General Wynyard, 15th March 1813.
[90] WO81/47, C. Manners Sutton to Lieutenant General Wynyard, 15th March 1813.
[91] Hansard, Vol. XIX, 11th March 1811, 356.

Commons, Manners Sutton was implicitly criticising the government's stance on the use of corporal punishment to discipline soldiers. His proposal was defeated by 13 votes to 46.[92] However, the following day, the issue was raised again by William Smith, MP for Norwich, who although a member of the opposition expressed 'his entire satisfaction at the clause' which Manners Sutton had proposed.[93] After a brief query regarding technicalities of how men would be imprisoned, in which Manners Sutton remarked that 'there were barracks and garrisons enough in the country where there could be no difficulty of setting apart a room for that purpose', the clause, and indeed the whole Bill, were passed.[94]

These events are significant for many reasons. Firstly, the measure, and therefore efforts to reform military law, lacked co-ordination. Courtenay Ilbert opined that 'administrative measures introduced by a minister of the Crown may presumably have been drawn by some members of his official staff'.[95] However, the fact that Manners Sutton's proposal was initially defeated suggests that the government had not been consulted. Had it had the backing of the government, enough MPs would have been present to ensure that it was passed, or, if the government had been consulted but disapproved of the initiative, then measures would have been taken to dissuade the JAG from presenting it, or to ensure its defeat. In keeping with much reform in the late eighteenth and early nineteenth century, Manners Sutton was using a private amendment to facilitate change based on his convictions rather than resorting to a more holistic government agenda.[96]

A further point of significance lies in the JAG's motivations and his conduct. It is clear that Manners Sutton had harboured a dislike of flogging, and was keen for the army to embrace a shift towards imprisonment which was already well advanced within the civilian legal system. This therefore makes his insistence that solitary confinement was not a legal sentence for Courts Martial prior to 1811, identified above, all the more emphatic as a demonstration of the degree to which Manners Sutton sought to prevent his personal convictions influencing his interpretation of military law.

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[92] Hansard, Vol. XIX, 11th March 1811, 356.
[93] Hansard, Vol. XIX, 12th March 1811, 361.
[94] Hansard, Vol. XIX, 12th March 1811, 361.
[95] Courtenay Ilbert, *Legislative Methods and Forms* (Oxford: Clarendon Press, 1901), p. 80.
[96] Salmon, p. 89.

As with the officers who stepped in to commute floggings, discussed in Chapter Four, the question arises of whether the JAG was motivated by a sense of humanitarianism. Manners Sutton's motives were clearly very different from the officers, as there was nothing for him to gain on a personal level from this intervention. Self-interest, or concerns about command and control were therefore not feasible motives for the JAG. This in turn suggests that Manners Sutton's motives embodied a much closer alignment with Abigail Green's construction of humanitarianism, namely an 'identification with the suffering of distant others […] and the mobilisation of this empathy'.[97] Nonetheless, the extent of Manners Sutton's empathy is difficult to determine, as his intervention should not be misinterpreted as a zeal to eradicate use of the lash entirely. When the question of the abolition of flogging was raised again in the following year's debate of the Mutiny Bill, he again spoke in the Commons, opining that total abolition of flogging was 'impractical' and that:

> what had been already done by the clause introduced into the Mutiny Act last year, had succeeded considerably in making it less general – of which he would give to the House a conclusive proof. From January 1811, to December 1811, […] there had been but eight sentences for flogging by general courts martial, and what was still more remarkable, of those eight, but one had occurred since March, the time at which the clause passed.[98]

An examination of the court martial records, however, demonstrates that Manners Sutton was being inventive, or at the very least selective, with the truth. The registers for GCMs confirmed at Home reveal nine, not eight, individuals who were flogged that year. However, two of them were punished before the March 1811 alterations to the Mutiny Act, and seven afterwards.[99] Yet Manners Sutton, as a consummate professional who had spent two and a half years in the post of JAG, would have been fully aware that the returns for General Courts Martial during this period were split into two volumes: those confirmed at Home by the King (or Prince Regent during this period), and those confirmed abroad by the regional Commanders of the Forces. Crucially, the GCMs confirmed abroad tell a

[97] Green, *Humanitarianism*, 1160.
[98] Hansard, Vol. XXI, 6th March 1812, 1205.
[99] WO92/1.

different story: of the 169 individuals listed in that register as having been tried in 1811, 55 were flogged, 34 of which were tried after the changes in March.[100]

The question therefore inevitably arises as to why Manners Sutton should have misled the House, and overstated the impact of the clause which he had introduced to the Bill in the previous year. There is no documentary evidence to explain the JAG's motivation. However, having moved to implement a change to the Bill in 1811 which he had confidently asserted would have a significant impact, Manners Sutton may have felt that his political reputation and credibility were tied to the perceived success of that clause. By selectively employing the data from the GCMs at home, and ignoring those abroad, Manners Sutton may have been suggesting that his intervention had been enough to secure a material change to military punishment practices. It is important to recognise an alternative possibility however, which has equally intriguing implications for our understanding of how military law and discipline was viewed by civilians. Manners Sutton may have deliberately referenced the GCMs confirmed as Home because he felt that MPs were predominantly interested in altering how punishments were inflicted at home. If this was indeed the case, then it would suggest less interest in what was happening overseas, whether on campaign, or in garrisons across the British Empire.

In fact, the question of whether it was practical for armies in the field to implement some of the proposed changes, such as greater use of imprisonment, was never discussed. This in turn suggests that such considerations were not something that MPs were cognizant of, and further indicates how reform to military justice was subject to divergent aims and conflicting priorities, just like its implementation.

Ironically, Manners Sutton's intervention to make confinement easier in 1811 created a whole host of additional problems, as, despite his confident assertion, there was not sufficient space in barracks to confine convicted soldiers. The extent to which this change of policy was not the result of a consultation between the JAG and key officials is demonstrated by a letter to the Adjutant General on 20th March 1811. In it Manners Sutton sought:

[100] WO90/1.

> to submit to the consideration of the Commander in Chief, whether it may not be advisable without loss of time to communicate with the Commanders of the several Districts as to the conveniences which may at present be at hand for such confinement if awarded, or as to the steps which ought to be immediately taken to furnish them with the means of enforcing such punishments.[101]

As a result, is it clear that the army had neither been consulted over the feasibility of finding places to confine convicted soldiers, nor had any plans for the implementation of the JAG's measure. Soldiers therefore in some cases began to be confined in civilian jails, leading to confusions over jurisdiction on who had the authority to release imprisoned soldiers.[102] This points to a somewhat piecemeal approach to reforming military justice, which is further exemplified by other instances of reform outside of Parliament.

Manners Sutton's exchanges and actions in the House of Commons, were part of a wider discussion within Parliament on reforms to military law, and in particular on the wisdom, or otherwise, of abolishing flogging. Within Parliament, a protracted discussion unfolded during the period often, but not exclusively focusing on flogging. Sir Francis Burdett was unquestionably the most dogged advocate for the reduction or abolition of flogging, something which is unsurprising given his reputation as a radical who championed the oppressed and pushed for prison reform.[103] In 1808 he made a number of efforts to intervene in court martial practices, including an attempt to facilitate an enquiry into punishment practices in the army by trying to gather 'regimental returns of all Corporal Punishments sentenced and inflicted during the last ten years'.[104] Flogging in the army was something which he had first raised as an issue in 1798, though his efforts were unsuccessful.[105] His motion on regimental returns was defeated by 4 votes to 77.[106]

Burdett's desire to reduce flogging was broadly consistent with his reformist attitude, particularly in relation to prison reform, and his arguments were expressed in

[101] WO81/44, Charles Manners Sutton to the Adjutant General, 20th March 1811
[102] WO81/47, Charlton Wollaston to John Becket, 26th February 1813.
[103] Marc Baer, 'Burdett, Sir Francis, fifth baronet', *ODNB*, <https://www.oxforddnb.com/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-3962?rskey=S1R2D1&result=2> [Accessed 28th October 2020] paras 6 and 7 of 21.
[104] Hansard, Vol. XI, 30th June 1808, 1116.
[105] Baer, para 8 of 21.
[106] Hansard, Vol. XI, 30th June 1808, 1122.

humanitarian terms. Whilst raising the issue in 1811, he drew a link with the movement to abolish slavery, remarking that 'the House had lately expressed its sympathy for the sufferings of West India slaves, but there was nothing in the West Indies which could, be at all compared for cruelty, with the manner in which English soldiers were flogged'.[107] Burdett was not the only individual in this period to, completely independently, make an argument in such terms. Private James Aytoun, who served in the West Indies, made remarks along similar lines in his memoir, suggesting that slaves actually had greater liberties, and were better treated, than soldiers.[108] Irrespective of the disconnect between the reality and perception of slaves' experiences, the fact that Burdett sought, unsuccessfully to galvanise the same humanitarian sentiment which had contributed to the abolition of the slave trade shows that humanitarian interest in abolishing flogging was not widespread. The meagre support that his propositions received in Parliament indicates that this was not an issue high on MPs' agenda, and that the humanitarian appeal had limited effect.

Although Burdett's 1811 motion to abolish flogging was defeated by 10 votes to 94, Burdett continued to raise individual cases in Parliament.[109] He once again drew comparisons with the slave trade during the third reading of the Mutiny Bill in 1812. However, the comparison did little to recommend his arguments to the Commons, as William Smith remarked that:

> Though the Slave Trade was abolished, who was there that would venture to say that it was practicable to emancipate the slaves? He was afraid that there was something in the character of slavery which rendered it dangerous to give immediate freedom to the slave. As long as there existed a mass of baseness and profligacy in some of the soldiery, he was afraid that flogging must exist.[110]

What makes Smith's remarks all the more significant is that he was the one who had been instrumental in bringing Manners Sutton's reform on solitary confinement back to the house the previous year, and had also voted in favour of Burdett's motion the previous

[107] Hansard, Vol. XX, 18th June 1811, 704.
[108] James Aytoun, *Redcoats in the Caribbean* (Darwen: Blackburn Recreation Services, 1984), p. 29.
[109] Hansard, Vol. XX, 18th June 1811, 710.
[110] Hansard, Vol. XXI, 13th March 1812, 1283.

year.[111] If anything, Burdett's repeated interventions produced, as Palmerston highlighted, a consensus 'on all sides of the House, with scarcely any exceptions, that the abolition of the species of punishment under consideration was quite impracticable'.[112] Even William Wilberforce remarked that 'he should be afraid of adopting suddenly so material a change in what was deemed to be so essential to its discipline'.[113] When the motion was voted on, it was defeated by 6 votes to 79. The humanitarian argument therefore gained limited traction with Burdett's colleagues, and whilst there may have been sympathy for soldiers, even the majority of MPs did not consider the abolition of flogging pragmatic.

Burdett's convictions on military flogging, expressed throughout this period, therefore clearly represented a minority view within Parliament, though he did also take an interest in reforming other aspects of military law. In March 1808 he tried to change the Mutiny Act so that Courts Martial could be used as a way of exonerating officers' honour.[114] The cause of preserving officers' honour was also taken up by William Lyttleton, the MP for Worcestershire who had a close association with the Parliamentary opposition.[115] In June 1808 Lyttleton attempted to change the confirmation process on courts martial aiming to expedite it in order to prevent lasting damage to officers' reputations. His concern was that it took too long for the King to confirm the sentences of courts, but withdrew the motion when he was informed that his measures infringed on royal prerogative.[116] Although he promised to bring the measures back at a future date, he never did so.

Other passing attempts were made to see that the government was held to account. When Henry Bennett queried whether the use of solitary confinement was being abused within the army, Whig and MP for Arundel, Sir Samuel Romilly, sought to make it illegal for officers to permit the remainder of a flogging to be inflicted after a soldier had been taken down to recover.[117] Romilly, who was a key figure in the reform of criminal law during this

[111] Hansard, Vol. XIX, 12th March 1811, 361; Hansard, Vol. XX, 18th June 1811, 710.
[112] Hansard, Vol. XXI, 13th March 1812, 1282.
[113] Hansard, Vol. XXI, 13th March 1812, 1287.
[114] Hansard, Vol X, 14th March 1808, 1080-1082.
[115] M. J. Williams, 'William Henry Lyttleton', <https://www.historyofparliamentonline.org/volume/1790-1820/member/lyttelton-hon-william-henry-1782-1837> [Accessed 28th October 2020].
[116] Hansard, Vol. XI, 3rd June 1808, 811-815.
[117] M. H. Port, 'Sir Samuel Romilly', <https://www.historyofparliamentonline.org/volume/1790-1820/member/romilly-sir-samuel-1757-1818> [Accessed 28th October 2020]; Hansard, Vol. XXVII, 29th November 1813, 215-218.

period, pushed to rescind the death penalty for some crimes.[118] Romilly's efforts on this occasion prompted Manners Sutton to remark that 'he had no hesitation in declaring his opinion of the impropriety, injustice, and even illegality of inflicting the second part of a sentence after the first had really produced all the suffering that was intended'.[119] Romilly's efforts ultimately came to nothing, though this did not dissuade him, in 1815, from attempting to limit all floggings to 100 lashes. Manners Sutton again stepped in, saying that the efforts of the Commander in Chief, the Duke of York, effectively made the clause unnecessary.[120] This is another interesting remark from Manners Sutton which reflects his nuanced position, as York's reform had only reduced RCM floggings to 300 lashes. Whilst Manners Sutton may therefore have disliked excessive use of the lash, and excessive cruelty, he did not support sweeping reform, and was seemingly content to argue against it in Parliament.

Efforts to reform military law in Parliament were therefore sporadic, uncoordinated, and predominantly focused on the issue of flogging. Humanitarian arguments had limited impact, those who spoke against the army's existing legal system were almost exclusively members of the opposition, and it was widely considered to be unpragmatic to dispense with flogging altogether. Whilst a select few individuals may have been sufficiently motivated to continue to raise the issue, Parliament was clearly not a vehicle for substantial reforms to military law.

5.7 Other influences on the reform of military law

The JAG and Parliament were not the only ways through which change could be achieved. A considerable number of people sought to influence and alter the implementation of military justice with varying degrees of success, and variously for ideological, humanitarian or practical reasons.

The Duke of York took a leading role in attempts to restrict the use of corporal punishment, at least at RCM level. The significance of his 1812 order that RCM floggings be limited to 300 lashes, down 40% from the previous maximum punishment of 500 lashes, is

[118] *Ibid*.
[119] Hansard, Vol. XXVII, 29th November 1813, 215-218.
[120] Hansard, Vol. XXX, 8th March 1815, 84.

difficult to overstate. Coming five years after George III's more subtle, relatively unsuccessful attempt in 1807 to reduce the scale of individual floggings at GCM by 33% from 1500 lashes down to 1000, York's measure was one of the most important reforms to military discipline during the period.[121] As a direct order, it compelled officers to comply, in contrast to the King's efforts which were an expression of preference.

York's reforming influence on the army during the Napoleonic Wars has long been acknowledged, and received extensive scrutiny in Richard Glover's *Peninsular Preparation*. However, as with much work on York's life and career, the work predominantly focuses on the period 1795-1809, the time of his first period as Commander-in-Chief. As York was forced to resign in the wake of the Mary Ann Clarke scandal, in which he was considered to have been complicit in his mistress, Clarke's, selling commissions to officers, the reforms that he instituted upon his return to the post in 1811 have not been set in context. As Alfred Burne argued, however, when the Duke of York returned to his position as Commander-in-Chief in 1811, 'the army was in much the same state' as when he had left in 1809, having 'run on its own momentum'.[122] Derek Winterbottom suggests that the reason for this is that Dundas, who had been York's deputy at Horse Guards, 'understood perfectly well that his role was to mount a holding operation […] until it was time for the duke to return'.[123]

York's 1812 order on flogging should in fact be seen as part of his wider efforts to reform and professionalise the army.[124] The continuity between his earlier reforms to professionalise the officer corps and his efforts relating to military discipline become much clearer when his 1811 measures relating to Courts Martial are also considered. In a set of *General Regulations and Orders*, issued in August 1811, a number of measures were explicitly outlined to facilitate a greater degree of scrutiny of soldiers' behaviour, and more closely monitor the crimes tried and punishments issued by RCMs. Particularly significant was a stipulation that it was officers' duty to notice 'any negligence or impropriety of

[121] Glover, *Peninsular Preparation*, p. 180.
[122] Alfred Burne, *The Noble Duke of York: The Military Life of Frederick Duke of York and Albany* (London: Staple Press, 1949), p. 324.
[123] Derek Winterbottom, *The Grand Old Duke of York: A Life of Prince Frederick, Duke of York and Albany, 1763-1827* (Barnsley: Pen and Sword, 2016), p. 129
[124] Order quoted in Henry Marshall, *Military Miscellany: A History of the Recruiting of the Army, Military Punishments, & c* (London: John Murray, 1846), pp. 184-185. Sir Harry Calvert to officers commanding regiments [Circular Letter], Horse Guards, 25th March 1812. A transcript of the order is provided below.

conduct' amongst NCOs and privates, regardless of whether they belonged to their own unit, and whether or not the officer was on duty.[125] It went on to stipulate, however, that:

> a Registry is to be kept in each Regiment of the Names of such Men as are guilty of Misconduct, in which the Nature of their Offence is to be detailed, and the Consequences (whether Forgiveness or Punishment) are to be entered: a Reference to this Document will give the Commanding Officer an Insight into that part of his Regiment which most requires his Superintendence, and by time timely Reproof and salutary Restrictions, he will often avoid having recourse to severe Corporal Punishments, which should be reserved for Crimes of an aggravated and heinous Nature.[126]

In essence, the Commander in Chief of the Army was actively ordering not only a close monitoring of soldier's behaviour, but a reservation of Courts Martial for the most serious offences. In practice this meant that York was telling officers to employ both pragmatism and discretion, in determining whether it was beneficial to the regiment for a misbehaving soldier to be flogged, or dealt with by some other means.

The point was reinforced in the new stipulation that half-yearly inspection should contain details of the RCMs which had taken place since the last inspection. The Commander-in-Chief requested that the reports comment on, amongst other things 'Whether the Necessity of frequent Punishments has been superseded by the Zeal and Assiduity of all Officers', and if the sentences RCMs were issuing in any given regiment were proportionate to the crimes tried.[127] It should be recognised that these reforms took time to take effect, with RCM returns not appearing with any regularity until 1812, and with many reports barely making more than a formulaic confirmation that sentences were proportionate. Nonetheless, the fact remains that within months of his return to Horse Guards, the Commander-in-Chief was making a concerted effort to better understand how crimes and troop misbehaviour were being dealt with in a level of military court which had previously received much less scrutiny.

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[125] Adjutant General's Office, *General Regulations and Orders*, (London: W. Cowles, 1811), p. 99.
[126] *Ibid*., p. 99.
[127] *Ibid*., p. 284.

It is difficult to determine whether York was motivated by humanitarian principles, or saw his efforts as a logical extension of his existing efforts to professionalise the officer corps. Like commanders on the ground, he was unequivocal on the fact plundering was 'a crime 'of such enormity, as to admit of no remission of the awful Punishment, which the Military Law awards against offences of this nature.'[128] York fully appreciated the complex situation that faced commanders in the field, having himself struggled with those issues whilst commanding in Flanders in 1793-5.

Glover hypothesises that since the King and York were close, the Duke's attitudes on flogging were likely to be derived from the King's own humanitarian motivations.[129] His suggestion is a logical one, although no documentary evidence survives to corroborate the notion either way.[130] Irrespective of the truth, there can be little question that York was at least in part motivated by a desire to complete his agenda of professionalising the officer corps. His order limiting RCM floggings is revealing in showing how closely inter-connected the Commander-in-Chief considered a professional officer corps and good discipline amongst the rank and file to be, and is worth quoting at length:

> The Commander-in-Chief judges it expedient to transmit to you, with the enclosed documents, a few observations on the salutary effects with which it is reasonable to hope than an occasional recurrence to the powers with which you are hereby vested will be attended, amongst which the most obvious advantage is that of limiting the operation of regimental courts-martial strictly to the purposes for which they are designed by the Legislature, viz., for enquiring into such disputes and criminal matters as may come before them, and for inflicting corporal or other punishments for *small offences*, and in order to prevent the possibility of any misunderstanding on this important point, it is His Royal Highness's command, that on no pretence whatever shall the award of the regimental court-martial hereafter exceed 300 *lashes*. The Commander-in-Chief has commanded me [i.e. the Adjutant General] to take this opportunity of stating, that there is no point on which His Royal Highness is more decided in his opinion, than that when officers are earnest and zealous in the discharge of their duty, and competent to their respective stations, a

[128] *Ibid*., p. 123.
[129] Glover, *Peninsular Preparation*, p. 179.
[130] Burne, p. 336.

> frequent recurrence to punishment will not be necessary. The Commander-in-Chief is confident the officers of the army are universally actuated by a spirit of justice, and impressed with those sentiments of kindness and regard towards their men which they have on so many occasions proved themselves to deserve; but His Royal Highness has reason to apprehend, that in many instances sufficient attention has not been paid to the *prevention of crime*. The timely interference of the officer, his personal intercourse and acquaintance with his men (which are sure to be repaid by the soldiers' confidence and attachment,) and, above all, his personal example, are the only efficacious means of preventing military offences; and the Commander-in-Chief has no hesitation in declaring, that the maintenance of strict discipline, without severity of punishment, and the support and encouragement of an ardent military spirit in a corps, without licentiousness, are the criterion by which His Royal Highness will be very much guided in forming his opinion of the talents, abilities, and merit of the officers to whom the command of the different regiments and corps of the army are confided.[131]

York's language is strikingly similar to Wellington's repeated laments, both in letters and General Orders highlighted throughout this thesis, that soldiers would be incapable of committing crimes if officers fulfilled their duties properly.[132] The overlap here is significant, and clearly demonstrates that the factors which hindered the effective implementation of discipline were well understood, and were agreed upon, amongst senior commanders. Nonetheless, common understanding did not lead to unity on how to resolve issues of discipline, as Wellington's pursuit of his own agenda demonstrates.

A further indicator of the lack of co-ordination between senior commanders and with the JAG's department on to military law reform, can be found in the JAG department's responses to changes. The JAG's office appears to have been caught unawares by the changes to the 1812 Mutiny Act, particularly the creation of the GRCM tier of court. It is, of course, difficult to be certain of this given the disappearance of the JAG letters for February to August 1812, but the circumstantial evidence is nonetheless suggestive. The fact that it took three months from the passing of the Bill before the first GRCMs were held, certainly

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[131] Quoted in Marshall, pp. 184-185. Sir Harry Calvert to officers commanding regiments [Circular Letter], Horse Guards, 25th March 1812.
[132] See, for example, WP9/1/2/5, General Orders, 15th February 1812.

indicates that the department were not ready for administrative burden that establishing this court created.[133] Equally, the requests made to the Treasury later that year for the clerks to receive a pay rise points to the fact that no-one had considered the additional burden that managing this tier of court would place on the JAG's department. This would therefore suggest that the JAG's office therefore had little, if any, input in the proposed changes for 1812.

York's measures were by no means universally well received. Whilst there is no evidence of discontent within the army or Parliament at the reduction in the use of the lash, there is evidence that some within government felt that more should be done. One surprising source of dissatisfaction was the Secretary at War, Lord Palmerston. David Brown has shown that Palmerston was a passionate bureaucratic reformer, though much of that reform focused on the financial management of the War Office, rather than military discipline.[134] However, Palmerston was seemingly conflicted about the position that he found himself in, when it came to debating the issue of flogging in the army when it was raised in Parliament. As Secretary at War, it was his responsibility to introduce the Mutiny Bill, and he was therefore expected to offer a robust defence of the Bill, including its stipulations on flogging. However, as Michael Partridge has argued, Palmerton's 1826 defence of the lash was a weak one, demonstrating that he was finding it difficult to defend the practice.[135]

Palmerston sought to reform flogging in 1823, when he wrote to the Duke of York's secretary, Sir Herbert Taylor, requesting that he would submit for York's consideration the proposal that he had already outlined to Taylor of reducing floggings from 300 to 200 lashes.[136] In 1816, meanwhile, he had tried to persuade the Duke and Home Secretary Viscount Sidmouth, to abolish the practice of drafting convicts into the army. This was a significant effort with implications for military discipline considering that the need to keep the convicted criminals employed by the army in check was a common argument against

[133] WO89/4.
[134] David Brown, *Palmerston: A Biography* (Yale: Yale University Press, 2010), p. 69. Subsequently Brown, *Palmerston*.
[135] Michael Partridge, 'Palmerston and the War Office', in *Palmerston Studies II*, ed. by David Brown (Southampton: Hartley Institute, 2007), pp. 1-23 (p. 11).
[136] Palmerston Papers British Library, Add Ms 48419, f. 90. Palmerston to Sir H. Taylor, 2 Feb 1813. I am grateful to David Brown for his kind assistance with the contents of Palmerston's Papers on matters relating to military discipline.

the abolition of flogging.[137] Both of Palmerston's efforts were ultimately in vain. It is difficult to determine the extent to which the failure of these plans can be attributed to the fractious nature of York and Palmerston's relationship.[138] What is striking however, is the lack of a cohesive strategy, with the JAG, the Secretary at War, and the Commander-in-Chief all making individual and uncoordinated attempts to reduce the incidence of flogging in the army.

As was highlighted above, Wellington was a particularly vociferous proponent of reform to the military justice system, albeit one who advocated reforms which in some respects ran contrary to the humanitarian approach of the JAG and Commander-in-Chief. His persistence ultimately yielded results, however, given the passing of 'An act for the more speedy and effectual trial of offences committed by soldiers detached in places beyond the seas out of His Majesty's Dominions'. Passed in July 1813, this Act allowed courts of three officers to try offences, without a warrant. The degree of Wellington's involvement in this process is exemplified by the formulation of these courts. Clearly it did not quite go as far as to allow a court to be convened with a single officer present, as Wellington had initially suggested. Nonetheless, the fact that these courts could meet 'notwithstanding such General or other Officer shall not have received […] any Warrant or Warrants empowering' them to convene the court, represented a significant break from established legal procedure.[139] As discussed in Chapter Two, warrants were an important element of the legal basis upon which the Courts Martial operated, as they represented the legal authority by which a trial was held. So significant was this legal authority, that in March 1810 Oldham wrote to the DJA at Plymouth, Major Newton, informing him of the implications of bringing additional soldiers to trial via the GCM that was currently sitting. Newton's concerns related to the fact that his warrant was issued under the terms of the Mutiny Act which had expired earlier that month, and that the sentence of the court would not be legally enforceable if he proceeded with a trial which was operating under an old warrant.[140] Departing from such a careful attention to the legal premise of the Courts

[137] PP, BL, Add Ms 48418, f. 60. Palmerston to Sidmouth, 8th Feb 1816.
[138] Brown, *Palmerston*, pp. 66-68.
[139] 53 Geo. III. Cap XCIX, c. 17, *The Statues of the United Kingdom of Great Britain and Ireland, 53 George III, 1813* (London: Statute and Law Printers, 1813), p. 372. For the full text of this Act see Appendix C.
[140] WO81/42, J. Oldham to Major Newton, 24th March 1810.

Martial was a radical move by law makers, which serves to demonstrate the power of Wellington's influence by this point in the conflict.

However, Wellington's involvement went much further than persuading the government to create an Act of Parliament specifically to attend to his needs on discipline. When Bathurst wrote to Wellington in June 1813, he remarked that the legislation had been 'altered according to your suggestions'.[141] Wellington was therefore not only lobbying for concessions on how military law operated overseas, he was actively rewriting some of that legislation to tailor it explicitly to his requirements.

The example of Wellington therefore further emphasises the piecemeal nature of reform, and the extent to which differing motivations of one individual could conflict with the efforts of other reformers. What is noticeably absent from Wellington's efforts is any inclination to reduce the size of flogging punishments. Wellington's emphatic stance on the abolition of flogging, thought apparent throughout his career, was best articulated by his testimony to the Commission into Military Punishments of 1835-1836. He argued that 'there is no punishment which makes an impression upon anybody except corporal punishment', and that alternatives to flogging did not work, though he did remark that he tried to diminish the use of corporal punishment as much as possible.[142] Given Wellington's evident concern in his 10th June 1812 letter to Liverpool that an inability to source evidence meant that 'the Guard rooms are therefore crowded with prisoners', it is clear that greater use of solitary confinement was not high on Wellington's agenda.

There were also seemingly abortive attempts to lobby for reform from individuals. Evidence for this is scant, but it is important to recognise that discussions on military law did not solely take place amongst a select group of MPs and significant figures within the army and military justice system. Whilst discussion of military law was muted in the press, occasionally voices of malcontent did emerge. In November 1812, *The Military Panorma* printed a letter from 'A British Officer' dated Abrantes 22nd August 1812. In it the writer claimed that there was gross inconsistency in how military courts operated in the Iberian

[141] WP1/371, Earl Bathurst to Earl Wellington, 9th June 1813.
[142] 'Report of the Commission of Military Punishments' *Parliamentary Papers*, 1836, vol. 22, pp. 322-32, esp. p. 323.
<https://parlipapers.proquest.com/parlipapers/result/pqpdocumentview?accountid=13963&groupid=97356&pgId=fe964261-13d3-43cb-a310-4bad12e26a52&rsId=174DA340E00> [Accessed 29th October 2020]

Peninsula, compared to Britain, claiming that defendants were not allowed to read statements, were prohibited from cross examining witnesses, and that trial proceedings were rushed.[143] The author of the letter therefore appealed directly to Manners Sutton to standardise the practice of courts martial and to address the fact that courts met 'every day from ten o'clock till three, for months', 'making the duty of a General Court-Martial more severe than any other'. The fixation with the timing of the courts is curious, especially since, as was explained in Chapter Two, the court met at these times each day to ensure that officers did not become overly tired by sitting constantly, and heard the evidence at a time in the day when they were most likely to be alert. The anonymous correspondent himself acknowledged he was 'not much acquainted with the law', and his appeal fell on deaf ears. Larpent was concerned enough to bring the piece to Manners Sutton's attention, perhaps understandably given the implied criticism of how courts martial were being conducted in the area where he had taken over responsibility of military legal administration. Manners Sutton, however, was not aware of the letter until Larpent raised it, thereby indicating that it had limited impact, and then opined that 'it is so ignorant, and in many parts so unintelligible, and in all so innocently imbecile, that in my opinion it is perfectly unworthy of notice.'[144] Quite clearly, therefore, individual complaints might be examined, but did not have any leverage, especially when based on flawed opinions.

5.8 Conclusion

Efforts to reform the military law and discipline were therefore as uncoordinated, and at times conflicting, as the different strategies that were employed over their implementation. Humanitarian principles are much more easily discernible in the reform efforts of the King, Commander-in-Chief, certain members of Parliament, Manners Sutton and Palmerston, yet pragmatism still pervaded the steps that were taken. Whilst each individual had their own opinions on how wise it was to reform the use of corporal punishment, there was certainly no broad consensus on how this could be achieved, and how far reforms should go. Where consensus does appear to have existed, is on the notion

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[143] *The Military Panorama or Officers Companion* (No date, no publisher), I, pp. 160-162. <https://babel.hathitrust.org/cgi/pt?id=hvd.32044089395602&view=1up&seq=176&q1=Sutton> [Accessed 29th October 2020].

[144] WO81/47, Charles Manners Sutton to Francis Larpent, 19th February 1813.

that the retention of the lash in some form was necessary, even if its use was to be discouraged where possible.

It is important to recognise, however, that efforts to reform covered a much wider range than the question of corporal punishment. For both Manners Sutton, and the Duke of York, professionalisation was a major area of focus, albeit in slightly different forms. The JAG embarked on a programme to militarise the administration of military law, significantly expanding the number of officers who acted as DJA. In the process, legal specialism was sacrificed in exchange for a familiarity with the way in which the army operated. This in turn made it easier to facilitate a more pragmatic approach to military justice, something which Manners Sutton was not only aware of, but actively encouraged. From the perspective of the JAG's office, the professionalisation of the military justice system took the form of employing those who understood how the army worked.

This vision of professionalisation had significant parallels with the Duke of York's ongoing efforts to improve the army's officer corps, by imbuing it with professional values, ensuring that officers were held to account, and combatting the abuse of commission purchases. The Duke's 1811 regulations provided unprecedented levels of scrutiny of Regimental Courts Martial, whilst also actively encouraging a pragmatic approach to discipline that limited the use of the Courts Martial to the most serious offences. Writing in terms that bore a marked similarity to Wellington, his 1812 order limiting RCM floggings to 300 lashes represented the first important step in reducing corporal punishment, whilst highlighting to officers that by attending to their duties properly, they should rarely need to flog.

Such efforts ran contrary to the desire of Wellington, who had far less concern for legal strictures, and was motivated by a need to punish rapidly as a means of deterring further breaches of the law. His position, and the securing of legislation to try soldiers without warrants, in some respects undermined the efforts of York and Manners Sutton. For Wellington as a commander in the field, use of the lash was essential in order to facilitate swift justice, whilst the law's requirements for large numbers of officers to be present for trials, and a focus on legal evidence were an inconvenience. By sidestepping some of those legal necessities by lobbying for an unique arrangement of the courts martial overseas, he was able to adapt military law to his own needs, though his approach ran contrary to the efforts of other reformers.

With pragmatism and discretion being advocated by those at the highest levels of the army's command structure, the extent to which military law truly served justice for its victims remains an important question. Equally, it would be erroneous to assume that military law operated in a vacuum. Authorities on civilian law had passed comment on the Mutiny Act and Courts Martial, with sometimes damaging consequences, and when uncertainty arose over appropriate legal practices, the military courts and DJAs were inclined to mirror civilian courts in the manner in which they proceeded.

Chapter 6 Conclusion: Military law as a pragmatic, discretionary & bespoke system

At the heart of this thesis is the fundamental question of 'what exactly was military law and justice?' The complex reality revealed by this study is that the answer to that question often varied depending on the individual, and their position within the military justice system. For privates, military law was a set of rules that were read to them on a regular basis, and which they were expected to obey. It was also a system of punishments which would be employed if they failed to adhere to its strictures, but, crucially, those punishments served a purpose. They were partly a means of keeping the worst excesses of their colleagues in check, but they were by no means a military equivalent to the Bloody Code, or 'terror and torture as public spectacle' as has previously been suggested by scholars. Instead, privates lived in the knowledge that their officers could, and often did, exercise discretion, either by ignoring certain crimes entirely, giving informal punishments, or by offering clemency through stopping floggings before the full sentence had been inflicted.

It is a peculiarity of military law that NCOs and officers, despite being treated differently by its clauses, had very similar responsibilities when it came to navigating its provisions. Although, for officers, military law threatened a series of honour-based punishments and financial penalties for disobedience, rather than the corporal punishment and demotion that NCOs faced, both found themselves in a complex balancing act of discretionary justice. On a daily basis, they had to make judgements on the extent to which they should fulfil their duty to uphold military law (knowing that failure to do so adequately could lead to their own prosecution and punishment), whilst also recognising the often-difficult situations that the privates under their command found themselves in. Too strict an obedience of the law could undermine unit morale, and even health, as break downs in supplies and nutritionally inadequate rations compelled men to plunder, or face starvation. Excessive use of flogging, and punishment of every minor breach of discipline could erode trust between officers, NCOs, and privates, creating discontent which could explode into the far more serious offence of mutiny, or see men hospitalised due to the need to recover from their punishments, undermining the unit's fighting ability. This supports the notion of Gilbert that the *Articles of War* and notions of honour were incompatible, albeit in a

manner previously unrecognised by scholars, since doing the honourable thing of apprehending a criminal was not always in an officer's best interests.[1] The extent to which constructions of honour in this period impeded officers in fulfilling their duties therefore merits further study. Nonetheless, it must be acknowledged that the law offered officers and NCOs an important means of keeping their men in check, offering vital legal reinforcement to their authority and a means of making examples of the worst offenders, in order to send a powerful message about the penalties of overstepping the laxer boundaries that they maintained.

For senior commanders, such as Wellington, the nuances of how best to apply military law were equally complex. Here, pragmatic considerations manifested themselves differently, and led to a separate set of priorities. A need to maintain good relations with the local population meant that justice had to be served when excessive plundering or other 'outrages' were committed, or complaints were received. It was also a source of unrelenting frustration, due to its provisions restricting his ability to punish as swiftly as he needed in order to send an emphatic message to his troops, and move the army on both physically and mentally. Nonetheless, it was a system in which Wellington also could, and did, exercise discretion, rewarding the good behaviour of particular units by pardoning convicted men, and notably turning a blind eye to his troops sacking of Ciudad Rodrigo and Badajoz.

Parliament, meanwhile, had yet another, equally unique, take on what military law was, with the answer to this question being much more closely aligned to the individual MP's political and philanthropic views. For Manners Sutton particularly, as both JAG and MP, military law was a system that needed to be maintained, reformed to a degree, but most importantly had to be made to function effectively. The result was a need for Manners Sutton to achieve his own pragmatic balance between ensuring that the law fulfilled its function of keeping the army in check, and addressing a personal preference for reducing flogging. In the pursuit of the former, he increasingly employed army officers, rather than experienced civilian legal professionals, to officiate on courts martial. The latter was achieved through the insertion of his clause permitting confinement as an alternative to flogging in the 1811 Mutiny Act.

[1] Gilbert, Law and Honour, p. 76.

Diverging priorities, arising from the multitude of perspectives and challenges faced by different actors within the military justice system, also influenced pressures to reform military law. There was limited resistance to the concept of making alterations to the administration of military law, and its stipulations. However, this was predominantly attributable to the fact that the Mutiny Bill legally had to be reviewed annually in Parliament. Reforms were undermined by a lack of consensus on the alterations that needed to made in order to better facilitate discipline. The result was an uncoordinated approach to reform, with some of the measures introduced conflicting with one another. Wellington eventually succeeded in facilitating a swifter route to punishment by holding trials with fewer officers, and creating the Staff Corps of Cavalry, a predecessor to the Royal Military Police. Whilst his efforts sought a faster system of military justice with improved detection and increased prospect of punishment, this clashed with efforts to utilise more humane methods of punishment. The King, the Judge Advocate General, and the Commander-in-Chief all made individual efforts to reduce the scale of flogging, with limited degrees of success. Flogging was endemic in the army, with some 2,087,678 lashes being issued across 9,227 trials in 11 years. The unsuccessful Parliamentary efforts to abolish the lash indicate how fundamental a disciplinary tool the lash was within the force. Yet the army's growing use of solitary confinement towards the end of the period under scrutiny points to a willingness to, belatedly, embrace wider changes in punishment practices across society. This is significant on two levels. Firstly, the fact that the army was slow to relinquish punishment of the body suggests that the Foucauldian shift cannot be applied convincingly to the military context, and points to the value of a wider reappraisal and assessment of how much of society embraced the shift Foucault identified.[2] Secondly, the muted response within Parliament, the army, and the press to calls to abolish flogging, offers a lens through which to consider nascent notions of humanitarianism during the period. The lack of enthusiasm for such measures highlights that humanitarian arguments were truly embryonic at the start of the nineteenth century and gained limited traction.

It has become apparent that all legal commentators accepted that the civilian legal system was legally superior to its military counterpart. Nonetheless, military law was

[2] Foucault, p. 231.

equally complex, and bespoke in nature. Although it was partially informed by developments and practices in the wider civilian (non-military) legal system, military law always operated in a way which attended to the army's specific needs. Where overlap existed, it was because the army's officials considered a mirroring of the non-military legal process to be in the army's interests. The courts themselves were willing to consider the established practices and conventions of non-military systems when determining how to proceed in moments of uncertainty, a finding which reinforces the value of McCormack and Linch's call for a consideration of the exchange of ideas between the army and wider society.[3] Irrespective of this, the paths chosen by the military courts were always designed to ensure that the army's disciplinary process operated smoothly and in a manner which was beyond legal reproach.

This attitude of mobilising the law to serve the army's needs above all else, was applied more widely, influencing what was tried, how it was punished, and which cases were ignored. It was for this reason that, for civilians who were victims of soldiers' actions, speaking of military justice is something of a misnomer, depending on the crime that had been committed. It is clear that victims of sexual assault faced little prospect of justice, and the courts offered little to those who were victims of soldiers' thievery. Those civilians who were willing to testify in court could, with sufficient evidence, secure convictions against those who had stolen from or mistreated them. Yet a tension lay at the heart of the practices of courts martial, whereby their testimony represented a vital element of the prosecution's case, and yet they received little benefit from testifying. Military courts were not primarily concerned with providing satisfaction to victims, but with maintaining discipline. As a result, the benefits to civilian victims of engaging with the military legal system must have seemed nebulous, with them being reduced to the status of mere court room witnesses. With discretionary justice being tacitly, and sometimes even explicitly, accepted across the army, and with the punishments issued by the courts focusing upon corporal and capital punishment rather than financial reimbursement, victims received no settlement from the sentences that were issued.

[3] Kevin Linch and Matthew McCormack, 'Defining Soldiers: Britain's Military, c. 1740-1815', *War in History*, 20, 2, (2013), 144-159 (159).

At the same time, with the army employing discretionary practices to their fullest extent, and thereby turning a blind eye to crimes, civilians in effect became victims twice: firstly being wronged by the soldier, and then by the officers who failed to take the incident seriously. Civilians were largely ignored by the very system which should, in theory, have resolved their grievances. Britain's military law did not serve or protect the interests of the very citizens that the British army, in theory, were supposed to defend. It simply served the army's interests, holding all ranks to account in accordance with the army's norms of behaviour, and making examples of those who failed to adhere to those norms. The Courts Martial were not courts of restitution, but rather courts that safeguarded control over the troops, providing visual demonstrations of the punishments that awaited those who committed the most serious violations of the army's expectations. Military law was, above all else, a nuanced system of public punishment for the preservation of discipline.

Appendix A Crimes According to the Articles of War

This table outlines the crimes specified in the Articles of War, highlighting the relevant Section and Article which detailed each crime, the level of court that it should be tried in, and the harshest punishment which a court could award for that crime.[1]

Please Note: Officers could only be tried in highest tier of military court, the General Courts Martial (GCMs). This was in contrast to NCOs and soldiers who could be tried in all three tiers: GCMs, General-Regimental Courts Martial (GRCMs), and Regimental Courts Martial (RCMs). This information is taken from the Articles of War which were issued in 1798, and therefore pre-date the creation of the GRCM as a tier of court.

Section	Article	Crime	Punishment	Court
1	1	Officer absent from divine service without good reason	Public Reprimand by president of Court Martial	GCM
1	1	NCO or soldier absent from divine service without good reason	First Offence: Fined 12 pence Subsequent Offences: Fined 12 pence and placed in irons for 12 hours	RCM
1	2	Use of any unlawful oath or execration	Same as Section 1, Article 1	RCM
1	3	Speaking against the Christian faith	Passed to the Civil Magistrate for prosecution	Civil
1	4	Profane a place of worship, or threaten a Chaplain with violence	Any punishment merited	GCM
1	5	No chaplain to be absent from unit without good reason (illness) or permission	Any punishment merited	Not Specified
1	6	Chaplain drunk or conducting scandalous or vicious behaviour	Discharged	Not Specified
2	1	Officer using traitorous or disrespectful language about a royal	Cashiered	GCM
2	1	NCO or solider using traitorous or disrespectful language about a royal	Any punishment merited	GCM or RCM
2	2	Disrespect or contempt towards a General or Commander in Chief, or	Any punishment merited	GCM

[1] *Rules and Articles for the better Government of His Majesty's Forces* (London: Eyre and Strahan, 1798).

Section	Article	Crime	Punishment	Court
		speaking 'words tending to his Hurt and Dishonour'		
2	3	Exciting, causing or joining mutiny or sedition	Death (or another appropriate punishment)	GCM
2	4	Failure to act to suppress mutiny, or not passing information about a planned mutiny to CO (can apply to officer, NCO or soldier)	Death (or another appropriate punishment)	GCM
2	5	Striking a superior, lifting a weapon to a superior, offering violence, or disobeying a lawful command (can apply to officer, NCO or soldier)	Death (or another appropriate punishment)	GCM
4	2	Officer signing a false certificate of absence for any officer, NCO or soldier	Cashiered	GCM
4	3	Officer making a false muster of men or horses, or signing a false muster	Cashiered and other penalties that they are liable to (provided it can be proved by two witnesses)	GCM
4	4	Any Commissary or Muster Master taking money on a muster	Removed from office	GCM
4	5	Mustering someone as a soldier who is at other times accustomed to wear a Livery	Presumed to have creating a false muster, and therefore cashiered	GCM
5	1	Officer making false returns	Cashiered	GCM
5	2	CO failing to submit returns	An appropriate punishment	GCM
6	1	Desertion (whether an officer, NCO or soldier)	Death (or another appropriate punishment)	GCM
6	2	Enlisting in a regiment without having been discharged from their previous unit	Treated as a deserter, and punished according to Section 6, Article 1	GCM
6	2	Officers knowingly keeping men in their unit who have enlisted without having been discharged from their previous unit	Cashiered	GCM
6	4	NCO or soldier absent without leave	An appropriate punishment	GCM or RCM
6	5	Officer, NCO or soldier trying to persuade an officer to desert	An appropriate punishment	GCM

Section	Article	Crime	Punishment	Court
7	1	Officer, NCO or soldier using reproachful, or provocative language or gestures	Officer: arrested NCO or soldier: imprisoned Both forced to apologise to the offended party	N/A
7	2	Officer, NCO or soldier challenging another officer, NCO or soldier to a duel	Officer: cashiered NCO or soldier: corporal punishment	Not Specified
7	3	Officers or NCOs commanding guards, letting participants pass to fight a duel, or anyone acting as seconds, or carriers of challenges	'Deemed as principals and punished accordingly'	Not Specified
7	4	Resisting arrest by an officer preventing a fray (even if they are junior)	An appropriate punishment	GCM
7	5	Upbraiding an officer, NCO or soldier for refusing a challenge	To be punished as a challenger	Not Specified
8	1	Suttlers selling liquor or victuals after nine at night, or before the beating of the Reveilles, and on Sunday during divine service	Dismissed	Not Specified
8	4	Officers or Governors allowing or exacting exorbitant prices for stalls let out to suttlers	Dismissed, and subject to additional punishments under civil law	GCM
9	1	Officer or NCO demanding billets for more than the number of men under his command, or quartering wives, children and servants in houses assigned to officers or soldiers without the consent of the owner, taking money to exempt a house from quartering officers or soldiers	Officer: Cashiered NCO: Reduced to Private and corporal punishment	GCM or RCM
9	2	Officers refusing to settle accounts for themselves and their men with the Landlord (provided it is just)	Cashiered	GCM
9	5	Officers failing to see justice done to anyone mistreated by soldiers, and making reparations where appropriate	Treated as if he had committed the disorder complained about	GCM
10	1	Officers allowing the misuse of carts, ill-treating waggoners, allowing their	Cashiered, or another appropriate punishment	GCM

Section	Article	Crime	Punishment	Court
		men to illtreat waggoners, or failing to pay waggoners		
11	1	Officer failing to assist the civil magistrates in trying to apprehend an officer, NCO or soldier who has committed a capital crime or a crime against a subject or their property	Cashiered	GCM
11	2	Officer protecting someone against a creditor on the pretence that they are a solider, unless they are actually a soldier	Cashiered	GCM
12	2	Any officer, NCO or soldier making an ungrounded claim against an officer, and persisting with it past the RCM review stage to GCM	Punished at the discretion of the GCM	GCM
13	1	Officers, storekeepers or commissary selling (without an order), embezzling or through neglect of duty allowing military stores, provision, etc to be spoiled or damaged	Dismissed, and make good the value of the damaged articles, plus subject to other penalties under the Mutiny Act	GCM
13	2	NCO or soldier wasting ammunition, or selling it	NCOs: reduced to Private, and corporal punishment Soldier: Corporal punishment	GCM or RCM
13	3	NCO or soldier selling, losing or deliberately (or through neglect) spoiling his horse, arms, clothes or accoutrements	Stoppages of pay (not exceeding half pay), plus imprisonment, or other corporal punishment	GCM or RCM
13	4	Officer embezzling or misapplying for money for the soldiers pay (or other purpose related to the regiment)	Dismissed, forfeit arrears of pay to make good the loss of money	GCM
13	5	NCO doing the crime of Section 13 Article 4	Reduced to Private, stoppages of pay, corporal punishment	GCM or RCM
14	1	Damaging the property of the subjects without orders from the Commander of the Forces	Face civil prosecution AND an appropriate punishment by a military court	GCM or RCM
14	2	NCO or soldier being a mile or more from camp without written permission from their CO	An appropriate punishment	GCM or RCM
14	3	Officer, NCO or soldier lying outside of his quarters, garrison or camp	An appropriate punishment	GCM or RCM

Section	Article	Crime	Punishment	Court
		without permission from a superior officer		
14	4	NCO or soldier not retiring to quarters at the beating of the Retreat	An appropriate punishment (but it does not specify that a court martial was needed)	Not specified
14	5	Officer, NCO, or soldier failing to turn up for parade	An appropriate punishment	GCM or RCM
14	6	Soldiers hiring another to do their duty for them	An appropriate punishment	RCM
14	7	NCOs and officers allowing soldiers to hire others to do their duty	An appropriate punishment	GCM
14	8	Officer, NCO or soldier quitting his unit without permission	An appropriate punishment	GCM or RCM
14	9	Officer drunk on duty	Cashiered	GCM
14	9	NCO or soldier drunk on duty	Corporal punishment	GCM or RCM
14	10	Sentinel asleep at his post, or leaving it without permission	Death, or another appropriate punishment	GCM
14	11	Officer, NCO or soldier being violent towards someone bringing provisions and other items to camps, garrisons etc overseas	Death	GCM
14	12	Anyone who forces a safeguard	Death	GCM
14	13	Anyone serving overseas giving the watchword to someone who is not entitled to it, or giving parole to someone who does not know the watchword	Death, or another appropriate punishment	GCM
14	13	Doing the above in the British Isles	An appropriate punishment	GCM
14	14	Anyone serving overseas causing a false alarm	Death, or another appropriate punishment	GCM
14	14	Doing the above in the British Isles	An appropriate punishment	GCM
14	15	Corresponding with or giving intelligence to the enemy	Death, or another appropriate punishment	GCM
14	16	Giving an enemy money, victuals, or ammunition, or knowingly harbouring an enemy	Death, or another appropriate punishment	GCM
14	18	Plunder	Death, or another appropriate punishment	GCM

Section	Article	Crime	Punishment	Court
14	19	Throwing away arms or ammunition	Death, or another appropriate punishment	GCM
14	19	Doing the above in the British Isles	An appropriate punishment	GCM
14	20	'Misbehaving' before the enemy, or abandoning or delivering a fortress etc	Death, or another appropriate punishment	GCM
14	21	Forcing the governor to surrender	Death, or another appropriate punishment	GCM
16	15	Use of menacing words, signs of gestures before a court martial, or disturbing the courts proceedings	An appropriate punishment	RCM or GCM
16	19	Officer releasing any prisoner without authority, or allowing a prisoner to escape	An appropriate punishment	GCM
16	20	Failure of an officer to report, within 24 hours, on the name of the prisoner, charge and names of officers who had the prisoner confined	An appropriate punishment	GCM
16	21	Officer under arrest leaving his confinement without permission	Cashiered	GCM
16	22	Officer acting in a scandalous or infamous manner (including conduct unbecoming)	Discharged	GCM

Appendix B Transcript of the Articles of War (1798)

George R

Rules and Articles

For the better Government of all Our Forces

Section I

Divine Worship

Article I

All Officers and Soldiers not having just impediment, shall diligently frequent Divine Service and Sermon, in the Places appointed for the assembling of the Regiment, Troop, or Company, to which they belong; such as wilfully absent themselves, or, being, present, behave indecently or irreverently, shall, if Commissioned Officers, be brought before a Court-martial, there to be publickly [sic.] and severely reprimanded by the President; if Non-commissioned Officers, or Soldiers, every Person so offending shall, for his First Offence, forfeit Twelve pence, to be deducted out of his next Pay; for the Second Offence, he shall not only forfeit Twelve Pence, but be laid in Irons for Twelve Hours; and for every like Offence, shall suffer and pay in like Manner: Which Money, so forfeited, shall be applied to the Use of the sick Soldiers of the Troop or Company to which the Offender belongs.

Article II

Whatsoever Officer, Non-commissioned Officer, or Soldier, shall use any unlawful Oath or Execration, shall incur the Penalties expressed in the First Article.

Article III

Whatsoever Officer, Non-commissioned Officer, or Soldier, shall presume to speak against any known Article of the Christian Faith, shall be delivered over to the Civil Magistrate, to be proceeded against according to Law.

Article IV

Whatsoever Officer, Non-commissioned Officer, or Soldier, shall profane any Place dedicated to Divine Worship, or shall offer Violence to a Chaplain of the Army, or to any other Minister of God's Word, shall be liable to such Punishment as by a General Court-Martial shall be awarded.

Article V

No Chaplain, who is commissioned to a Regiment, Company, Troop, or Garrison, shall absent himself from the said Regiment, Company, Troop, or Garrison, (excepting in case of Sickness, or Leave of Absence), upon Pain of being brought to a Court-Martial, and punished as their Judgement, and the Circumstances of his Offence, may require.

Article VI

Whatsoever Chaplain to a Regiment, Troop, or Garrison, shall be guilty of Drunkenness, or of other scandalous or vicious Behaviour, derogating from the Sacred Character with which he is invested, shall, upon due Proof before a Court-martial, be discharged from his Office.

Section II

Mutiny

Article I

Whatsoever Officer, Non-commissioned Officer, or Soldier, shall presume to use traitorous or disrespectful Words against our Royal Person, or any of Our Royal Family, if a Commissioned Officer, shall, upon Conviction thereof before a General Court-martial be Cashiered; if a Non-commissioned Officer or Soldier, he shall suffer such Punishment as by the Sentence of a General or Regimental Court-martial shall be awarded.

Article II

Any Officer, Non-commissioned Officer, or Soldier, who shall behave himself with Contempt or Disrespect towards the General, or other Commander in Chief of Our Forces, or shall speak Words tending to his Hurt or Dishonour, shall be punished according to the Nature of his Offence, by the Judgement of a General Court-martial.

Article III

Any Officer, Non-commissioned Officer, or Soldier, who shall begin, excite, cause, or join in, any Mutiny or Sedition, in the Regiment, Troop, or Company, to which he belongs, or in any other Regiment, Troop or Company, either of Our Land or Marine Forces, or in any Party, Post, Detachment, or Guard, on any Pretence whatsoever, shall suffer Death, or such other Punishment as by a General Court-martial shall be awarded.

Article IV

Any Officer, Non-commissioned Officer, or Soldier, who being present at any Mutiny or Sedition, shall not use his utmost Endeavour to supress the same, or coming to the Knowledge of any Mutiny, shall not without Delay give Information thereof to his Commanding Officer, shall suffer Death, or such other Punishment as by a General Court-martial shall be awarded.

Article V

Any Officer, Non-commissioned Officer, or Soldier, who shall strike his superior Officer, or shall draw, or offer to draw, or lift up any Weapon, or offer any Violence against him, being in the Execution of his Office, on any Pretence whatsoever, or shall disobey any lawful Command of his superior Officer, shall suffer Death, or such other Punishment as by a General Court-martial shall be awarded.

Section III

Of Inlisting [sic.] Soldiers

Article I

Every Non-commissioned Officer and Solider, who shall be inlisted [sic.] in Our Service, shall, at the Time of Inlisting, [sic.] or with Four Days afterwards, have the Second and Sixth Sections of these Articles, which respect Mutiny and Desertion, read to him, and shall, by the Officer who inslited [sic.] him, or by the Commanding Officer of the Troop or Company into which he was inlisted, [sic.] be taken, within Four Days, but not sooner than Twenty Four Hours after such Inlisting, [sic.] before the next Justice of the Peace, or Chief Magistrate of any City or Town Corporate, (not being an Officer of the Army), or in Foreign Parts, where Recourse cannot be had to the Civil Magistrate, before the Judge Advocate, and, in his Presence take the following Oath:

I SWEAR to be true to our Sovereign Lord King GEORGE and to serve him honestly and faithfully, in Defence of His Person, Crown, and Dignity, against all His Enemies or Opposers whatsoever: And to observe and obey His Majesty's Orders, and the Orders of the Generals and Officers set over me by His Majesty.

Which Justice or Magistrate is to give the Officer a Certificate, signifying that the Man inlisted did take the said Oath, and that the Second and Sixth Sections of the Articles of War were read to him as prescribed by the Act of Punishment for punishing Mutiny and Desertion.

Article II

Non-commissioned Officers and Soldier, having been duly inlisted, [sic.] and sworn, shall not be dismissed Our Service without a Discharge in Writing signed by a Field Officer or the Corps to which they belong; or if no Field Officer be with the Officer be with the Corps, by the Commanding Officer thereof; or in respect to Regiments serving abroad, the Colonels of which are absent from *Great Britain*, by the Adjutant General of Our Forces or by the Commandant of Our Forces in *Chatham* Barracks.

Section IV

Musters

Article I

Musters shall be taken of Our Regiments of Life Guards, Horse Guards, and Foot Guards, Twice at the least in every Year, at such Times as shall have been or may be appointed, and agreeably to the Forms heretofore used therein, until Our further Pleasure be declared.

The Musters of every Regiment, Troop or Company in Our Service, other than Our Corps of Life Guards, Horse Guards, and Foot Guards, shall be taken at such Times and in such Manner as We have been pleased to direct, by Our late Regulations touching Regimental and District Paymasters, and the Mode of Mustering, paying or settling the Accompts of Our Army; or according to such Regulations as We may further think fit to establish in relation thereto: And all Commanding Officers, and others concerned in the Mustering as well of Our Regiments of Life Guards Horse Guards, and Foot Guards, as of Our other Forces, are hereby required to give the utmost Care and Attention to the making up of the

Muster Rolls with strict Exactness and Accuracy; as they shall be answerable to Us for their Neglect.

Article II

Every Officer who shall be convicted before a General Court-martial of having signed a false Certificate, relating to the Absence of either Officer, or private Soldier, shall be cashiered.

Article III

Every Officer who shall knowingly make a false Muster of Man or Horse, and every Officer and Commissary or Muster Master who shall wittingly sign, direct or allow the signing of the Muster rolls, wherein such false Muster is contained, shall, upon Proof made thereof by Two Witnesses before a General Court-martial, be cashiered, and suffer such other Penalty as he is liable to by the Act for punishing Mutiny and Desertion.

Article IV

Any Commissary or Muster Master who shall be convicted before a General Court-martial of having taken Money by way of Gratification on the mustering any Regiment, Troop, or Company, or on the signing the Muster-rolls, shall be displaced from his Office, and suffer such other Penalty as he is liable to by the said Act.

Article V

Any Officer who shall presume to muster any Person as a Soldier, who is at other Times accustomed to wear a Livery, or who does not actually do his Duty as a Soldier, shall be deemed guilty of having made a false Muster, and shall suffer accordingly.

Article VI

Every Colonel or other Field Officer commanding a Regiment, Troop, or Company, and actually residing with it, may give Furloughs to Non-commissioned Officers and Soldiers, in such Numbers, and for so long a Time as he shall judge to be most consistent with the Good of Our Service; but no Non-Commissioned Officer or Soldier shall, by Leave of his Captain or inferior Officer, commanding the Troop of Company, (his Field Office not being Present), be absent above Twenty Days in Six Months; nor shall more than Two Private Men be absent at the same Time from their Troop or Company, unless some extraordinary

Occasion shall require it, of which Occasion the Field Officer present with and commanding the Regiment is to be the Judge.

Section V

Returns

Article I

Every Officer shall knowingly make false Return to Us, to the Commander in Chief of our Forces, or to any his superior Officer authorised to call for such Returns, of the State of the Regiment, Troop, or Company, or Garrison, under his Command, or of Arms, Ammunition, Clothing, or other Stores thereunto belonging, shall, upon being convicted thereof, before a General Court-martial, be cashiered.

Article II

The Commanding Officer of every Regiment, Troop, or Independent Company, or Garrison, in *South Britain*, shall in the Beginning of every Month, transmit to the Commander in Chief of our Forces, and to Our Secretary at War, an exact Return of the State of the Regiment, Troop, Independent Company or Garrison, under his Command, specifying the Names of the Officers not hen residing at their Posts, and the Reason for and Time of, their Absence: Whoever shall be convicted of having, designedly or through Neglect, omitted the sending such Returns, shall be punished according to the Nature of his Offence by the Judgement of a General Court-martial.

Article III

Returns shall be made in like Manner of the State of our Forces in our Kingdom of Ireland to the Chief Governor or Governors thereof, as likewise of Our Forces in *North Britain* to the Officer there commanding in Chief; which Returns shall, from Time to Time be transmitted to Us, as it shall be best for Our Service.

Article IV

It is Our Pleasure, That exact Returns of the State of Our Garrison at *Gibraltar*, and of our Regiments, Garrisons, and Independent Companies, stationed abroad, be, by their

respective Governor Commanders there residing, by all convenient Opportunities, transmitted to Our Secretary at War, for their being laid before Us.

Section VI

Desertion

Article I

All Officers, Non-commissioned Officers, and Soldiers, in Our Service, who shall be convicted of having deserted the same, shall suffer Death, or such other Punishment as by a General Court-martial shall be awarded.

Article II

No Non-commissioned Officer or Soldier, shall inlist [sic.] himself in any other Regiment, Troop or Company, in which he last served, on the Penalty of being reputed a Deserter, and suffering accordingly: An in case any Officer shall knowingly receive and entertain such Non-commissioned Officer or Solider, or shall not, after his being discovered to be a Deserter, immediately confine him, and give Notice thereof to the Corps in which he last served, he the said Officer so offending shall, on being convicted thereof before a General Court-martial, be cashiered.

Article III

Non-commissioned Officers and Soldier, who shall desert any Regiment, Troop, or Company, in which they shall have inlisted [sic.] or received Pay, although of Right belonging to and liable to be claimed by another Corps in which they may have before inlisted [sic.] or received Pay, or who shall, whilst serving in such Regiment, Troop, or Company, commit any Offence against the Rules of Military Discipline, may be tried by a Court-martial and punished for such Desertion, or other Offence, in like Manner as if they had originally and rightfully inlisted [sic.] in such Regiment, Troop, or Company; Or, if any such Non-Commissioned Officer or Solider shall be claimed by the Corps in which he first inlisted, [sic.] and be proceeded against as a Deserter therefrom, his subsequent Desertion from any one or more Corps, in which he shall unwarrantably have inlisted, [sic.] may (unless he shall already have been tried for the same be given in Evidence, as an

Aggravation of his Crime, previous Notice being always given to such Non-commissioned Officer or Soldier of the Fact or Facts intended to be produced in Evidence against him.

Article IV

Any Non-Commissioned Officer or Soldier, who shall, without Leave from his Commanding Officer, absent himself from his Troop or Company, or from any Detachment with which he shall be commanded, shall, upon being convicted thereof, be punished according to the Nature of his Offence, at the Discretion of a General or Regimental Court-martial.

Article V

Whatsoever Officer, Non-commissioned Officer, or Soldier, shall be convicted of having advised or persuaded any other Officer or Soldier to desert Our Service, shall suffer such Punishment as by the Sentence of a General Court-martial shall be awarded.

Section VII

Quarrels and sending Challenges

Article I

No Officer, Non-commissioned Officer or Soldier, shall use any reproachful or provoking Speeches or Gestures to another, upon Pain, if an Officer of being put in Arrest, (or if a Non-commissioned Officer or a Soldier imprisoned), and of asking Pardon of the Party offended in the Presence of his Commanding Officer

Article II

No Officer, Non-commissioned Officer or Soldier, shall presume to give or send a Challenge to any other Officer, Non-commissioned Officer, or Soldier, to fight a Duel, upon Pain, if a Commissioned Officer, of being cashiered; if a Non-commissioned Officer or Soldier, of suffering corporal Punishment, at the Discretion of a Court-martial.

Article III

If any Commissioned or Non-commissioned Officer commanding a Guard shall knowingly and willingly suffer any Person whatsoever to go forth to fight a Duel, he shall be punished

as a Challenger: And likewise all Seconds, Promoters, and Carriers of Challenges, in order to Duels, shall be deemed as Principals, and be punished accordingly.

Article IV

All Officers of what Condition soever, have Power to quell all Quarrels, Frays, and Disorders, though the Persons concerned should belong to another Regiment Troop, or Company, and either to order Officers into Arrest, or Non-commissioned Officers, or Soldiers to Prison, until their proper superior Officers shall be acquainted therewith; and whoever shall refuse to obey such Officer, (though of an inferior), or shall draw his Sword upon him, shall be punished at the Discretion of a General Court-martial.

Article V

Whatsoever Officer, Non-commissioned Officer, or Solider, shall upbraid another for refusing a Challenge, shall himself be punished as a Challenger; and we hereby acquit and discharge all Officers and Soldiers of any Disgrace, or Opinion of Disadvantage, which might arise from having refused to accept of Challenges, as they will only have acted in Obedience of Our Orders, and done their Duty as good Soldiers, who subject themselves to Discipline.

Section VIII

Suttling [sic.]

Article I

No Suttler [sic.] be permitted to sell any Kind of Liquors or Victuals, or to keep their Houses or Shops open, for the Entertainment of Soldiers, after Nine at Night, or before the Beating of the Reveilles, or upon *Sundays* during Divine Service or Sermon, on the Penalty of being dismissed from all future Suttling [sic.].

Article II

All Officers, Non-commissioned Officers, Soldiers, and Suttlers, [sic.] shall have full Liberty to bring into any of Our Forts or Garrisons, any Quantity of Species of Provisions, eatable or drinkable, except where any Contract or Contracts are or shall be entered into by Us, or by Our Order, for furnishing such Provisions, and with respect only to the Species of Provisions so contracted for.

Article III

All Governors, Lieutenant Governors, and Officers commanding in Our Forts, Barracks, or Garrisons, are hereby required to see that the Person permitted to suttle [sic.] supply the Soldiers with good and wholesome Provisions, at the Market Price, as they shall be answerable to Us for their Neglect.

Article IV

No Governors, or Officers commanding in any of Our Garrisons, Forts, or Barracks, shall either themselves exact exorbitant Prices for Houses or Stalls let out to Suttlers, [sic.] or shall connive at the like exactions in others; nor by their own Authority, and for their private Advantage, shall they lay any Duty of Imposition upon, or be interested in the Sale of any Victuals, Liquors, or other Necessaries of Life, or Merchanidzes, [sic.] brought into the Garrison, Fort, or Barracks, under their Command, for the Use of the Soldiers, on Pain (upon Conviction thereof by a General Court-Martial), of being dismissed from Our Service; and suffering, besides, such Penalty as they may be liable by Law.

Article V

And if any Governor, or Officer commanding in any of Our Garrisons, Forts, or Barracks, shall connive at any other Officer or Person selling such Vicutals, [sic.] Liquors, or other Necessaries of Life or Merchandizes, to the Soldiers, under his Command, at exorbitant Rates; he shall, on Convictions thereof by a General Court Martial, be cashiered, and shall besides suffer such Penalty as he may be liable by Law.

Section IX

Quarters

Article I

No Officer, or Non-commissioned Officer, shall demand billets for Quartering more than his effective Men; nor shall he quarter any Wives, Children, Men or Maid Servants, in the Houses assigned for the Quartering of Officers or Solider, without the Consent of the Owners; nor shall he take Money for the freeing of Landlords from the Quartering of Officers or Soldiers, upon Pain, if a Commissioned Officer, of being a Commissioned Officer;

if a Non-commissioned Officer, of being reduced to a Private sentinel, and suffering such Corporal Punishment as by the sentence of a General or Regimental Court martial shall be awarded.

Article II

Every Officer commanding a Regiment, Troop, Company, or Detachment, whether in settled Quarters, or upon a March, shall take Care that his own Quarters, as also the Quarters of every Officer and Solider under his Command, be regularly cleared at the End of every Week; but in case any such Regiment, Troop, Company, or Party, be ordered to march before Money may be come to the Hands of the Commanding Officer aforesaid, he is hereby required to see that the Accounts with all Persons who shall have Money due to them, the Quartering of Officers and Soldiers be exactly stated and he is to sign a Certificate for each Landlord, specifying what Sum is then justly due to him, as likewise the Regiment, Troop, or Company, to which the Officers and Soldiers so indebted to him along and is, by the first Opportunity, to transmit, to transmit Duplicates of the said Certificates to Our Paymaster General: Any commanding Officer who shall refuse to neglect to make up such Accounts, and to certify the same, as is above directed, shall, upon being convicted therefore before a General Court martial, be cashiered.

Article III

The Commanding Officer of every Regiment, Troop, Company or Detachment, shall, upon their first coming to any City, Town, or Village, where they are to remain in Quarters, cause public Proclamation be made signifying, That if the Landlords or other Inhabitants suffer the Non-commissioned Officers, or Soldiers, to contract Debts beyond what their daily Subsistence will answer, such Debts will not be discharged; the said Commanding Officer refusing or neglecting so to do, shall be suspended for Three Months; during which Time his whole Pay shall be applied to the discharging of such Debts as shall have been contracted by the Non-commissioned Officers or Soldiers under his Command, beyond the Amount of their daily subsistence: If there be any Overplus remaining, it may be returned to him.

Article IV

If, after publick [sic.] Proclamation made as above directed, the Inhabitants shall notwithstanding suffer the Non-commissioned Officers and Soldiers to contract Debts beyond what the money issued out, or to be issued out, for their daily Subsistence will answer, it will be at their own Peril, the Officers no being obliged to discharge the said Debts.

Article V

Every Officer, commanding in Quarters, Garrisons, or on a March shall keep good Order, and to the utmost of his Power redress all such Abuses or Disorders as may be committed by any Officer or Soldier under his Command: If upon Complaint made to him of Officers, Non-commissioned Officers, or Soldiers, beating or otherwise ill-treating their Landlords, or extorting more from them than they are obliged to furnish by Law; or disturbing Fairs or Markets, or committing any Kind of Riots, to the disquieting of Our People, such Commanding Officer shall refuse or omit to see Justice done on the Offender, or Offenders, and Reparation made to the Party or Parties injured, as far as Part of the Offender's Pay (no exceeding the Half thereof) shall enable him to make such Reparation; he shall, upon due Proof thereof before a General Court martial, be deemed culpable in the same Degree as if he himself had committed the Crimes or Disorders complained of and shall be punished accordingly, at the Discretion of such Court martial.

Section X

Carriages

The Commanding Officer of every Regiment, Troop, Company, or Detachment, which shall be ordered to march, is to apply to the proper Magistrates for the necessary Carriages, and is to pay for them as is directed by the Mutiny Act; taking Care not himself to beat or abuse, nor to suffer any Person under his Command to beat or abuse, the Waggoners, or other Persons attending such Carriages; nor to suffer more than Thirty Hundred Weight to be loaded on any Wain or Waggon so furnished, or in proportion on Carts or Cars; nor to permit Soldiers (except such as are sick or lame); or Women, to ride upon the said Carriages: Whatsoever Officer shall offend herein, or, in case of Failure of Money, shall refuse to grant Certificates, specifying the Sums due for the Use of such Carriages, and the Name of the Regiment, Troop or Company, in whose Service they were employed, shall be

cashiered, or be otherwise punished according to the Degree of his Offence by a General Court martial.

Section XI

Of Crimes punishable by Law

Article I

Whenever any Officer, Non-commissioned Officer, or Soldier, shall be accused of a Capital Crime, or of having used Violence, or committed any Offence against the Person or Property of Our Subjects, such as is punishable by the known Laws of the land, the Commanding Officer and Officers of every Regiment, Troop, Company or Detachment, to which the Person or Persons so accused shall belong, are hereby required, upon Application duly made by or in Behalf of the Party of Parties injured, to use his and their utmost Endeavours to deliver over such accused Person or Persons to the Civil Magistrate; and likewise to be aiding and assisting to the Officers of Justice in apprehending and securing the Person or Persons so accused, in order that he or they may be brough to Trial. If any Commanding Officer or Officers shall wilfully neglect or shall refuse, upon the Application aforesaid, to deliver over such accused Person or Persons to the Civil Magistrates, or to be aiding and assisting to the Officers of Justice in apprehending such Person or Persons, the Officer or Officer so offending shall, upon being convicted therefore before a General Court martial, be cashiered.

Article II

No Officer shall protect any Person from his Creditors on the Pretence of his being a Soldier, nor any Non-commissioned Officer or Soldier who does not actually do all Duties as such, and no farther than is allowed by the Act of Parliament for punishing Mutiny and Desertion, and according to the true Intent and Meaning of the said Act: Any Officer offending herein, being convicted thereof before a General Court martial, shall be cashiered.

Section XII

Of Redressing Wrongs

Article I

If any Officer shall think himself to be wrong by his Colonel, or the Commanding Officer of the Regiment, and shall, upon due Application made to him, be refused to be redressed, he may complain to the General commanding in Chief Our Forces, in order to obtain justice; who is hereby required to examine into such Complaint; and either by himself, or by Our Secretary at War, to make his Report to Us thereupon, in order to received Our further Directions.

Article II

If any inferior Officer, Non-commissioned Officer, or Soldier, shall think himself wronged by his Captain, or other Officer commanding the Troop or Company to which he belongs, he is to complain thereof to the Commanding Officer of the Regiment, who is hereby required to summon a Regimental Court martial, for the doing Justice to the Complaint; from which Regimental either Party may, if he thinks himself still aggrieved, appeal to a General Court martial: But if, upon a Second Hearing, the Appeal shall appear to be vexatious and groundless, the Person so appealing shall be punished at the Discretion of the said General Court-martial.

Section XIII

Of Stores, Ammunition, &c.

Article I

Whatsoever Commissioned Officer, Storekeeper, or Commissary, shall be convicted at a General Court martial of having sold, (without a proper Order for that Purpose), embezzled, misapplied, or wilfully, or through Neglect, suffered any of Our Provision, Forage, Arms, Clothing, Ammunition, or other Military Stores, to be spoiled or damaged, shall, at his own Charge, make good the Loss or Damage, and be dismissed from our Service, and shall also suffer such other Penalty as he is liable to by the Mutiny Act.

Article II

Whatsoever Non-commissioned Officer or Soldier shall be convicted at a General or Regimental Court martial or having sold, or designedly, or through Neglect, wasted the Ammunition delivered out to him to be employed in Our Service, shall suffer corporal

Punishment, at the Discretion of such Court martial: A Non-commissioned Officer so offending, shall also be reduced to a private Centinel. [sic.]

Article III

Every Non-commissioned Officer or Solider, who shall be convicted at a General or Regimental Court martial of having sold, lost, or designedly or through Neglect spoiled, his Horse, Arms, Clothes, or Accoutrements, shall undergo such Weekly Stoppages (not exceeding that Half of his Pay) as such Court martial shall judge sufficient for repairing the Loss or Damage; and shall besides suffer Imprisonment, or other corporal Punishment, at the Discretion of the said Court-martial.

Article IV

If any Commissioned Officer shall embezzle or misapply any Monies with which he may have been entrusted for the Payment of the Soldiers under his Command, or for inlisting Men into Our Service, or for any Regimental Purpose, and shall be thereof convicted by a General Court martial, he shall be dismissed Our Service, and shall forfeit the Arrears due to him upon Account of his Pay, or so much thereof as may be sufficient to make good the Deficiency occasioned by such Embezzlement or Misapplication.

Article V

Every Non-commissioned Officer who shall be convicted at a General or Regimental Court martial, of having embezzled or misapplied any Money with which he may have been instrusted [sic.] for the Payment of Men under his Command, or for inlisting [sic.] Men into Our Service, or any Regimental Purpose, shall be reduced to serve in the Ranks as a private Soldier, be put under Stoppages until the Money be made good, and suffer such corporal Punishment as the Court martial shall think fit.

Article VI

Every Captain of a Troop or Company is charged with the Arms, Accoutrements, Ammunition, Clothing, or other warlike Stores, belonging to the Troop or Company under his Command, for which he is to be accountable to his Colonel, in case of their being lost, spoiled, or damaged, not by unavoidable Accident, or on actual Service.

Section XIV

Of Duties in Quarters, in Garrison, or in the Field

Article I

All Officers, Non-commissioned Officers and Soldiers, are to behave themselves orderly in Quarters, an on their March; and whoever shall commit any Waste or Spoil, either in Walks of Tress, Parks, Warrens, Fishponds, Houses, or Gardens, Cornfields, Inclosures, [sic.] or Meadows, or shall maliciously destroy any Property whatsoever belonging to any of Our Subjects, unless by Order of the then Commander in Chief of Our Forces to annoy Rebels, or other Enemies in Arms against Us, he or they shall be found guilty of offending herein, shall (beside such Penalties as they are liable to by Law) be punished according to the Nature and Degree of the Offence, by the Judgement of a General or Regimental Court martial

Article II

All Non-commissioned Officers and Soldiers, who shall be found One Mile from the Camp, without Leave, in Writing, from their Commanding Officer, shall suffer such Punishment as by the Sentence of a General or Regimental Court-martial shall be awarded.

Article III

No Officer, Non-commissioned, or Soldier, shall lie out of his Quarters, Garrison, or Camp, without Leave from his superior Officer, upon Pain of being punished, according to the Circumstances and Degree of his Offence, by the Sentence of a General or Regimental Court martial

Article IV

Every Non-commissioned Officer and Solider shall retire to his Quarters or Tent at the Beating of the retreat; in Default of which he shall in like Manner be punished according to the Circumstances and Degree of his Offence.

Article V

No Officer, Non-commissioned Officer, or Soldier, shall fail to repair, at the Time fixed, to the Place of Parade of Exercise, or other Rendezvous appointed by the Commanding

Officer, if not prevented by Sickness, or some other evident Necessity; or shall go form the said Place of Rendezvous, or from his Guard, without Leave from his Commanding Officer, before he shall be regularly dismissed or relieved, on the Penalty of being punished, according to the Circumstances and Degree of his Offence, by the Judgement of a General or Regimental Court martial.

Article VI

No Soldier belonging to any of Our Regiments of Life Guards, or Foot Guards, or to any other Regiment of Horse, Foot, or Dragoons, in Our Service, shall hire another to do his Duty, but in case of Sickness, Disability or Leave of Absence; and every such Soldier found guilty of hiring his Duty, as also the Party s hiring to do another's Duty, shall be punished at the Discretion of a Regimental Court martial.

Article VII

And every Non-commissioned Officer conniving at such Hiring of Duty, as aforesaid, shall be reduced for it; and every Commissioned Officer, knowing and allowing of such ill Practices in Our service, shall be punished by the Judgement of a General Court martial.

Article VIII

Any Officer, Non-commissioned Officer, or Solider, who shall, without urgent Necessity, or without Leave of his superior Office, quite his Platoon or Division, shall be punished according to the Circumstance and Degree of his Offence by the Judgement of a General or Regimental Court martial.

Article IX

Whatsoever Commissioned Officer shall be found drunk on his Guard, Party, or other Duty, under Arms, shall, upon being convicted thereof before a General Court martial, be cashiered for it, any Non-commissioned Officer or Solider, so offending shall suffer such corporal Punishment as by a General or Regimental Court martial shall be awarded.

Article X

Whatever Centinel [sic.] shall be found sleeping upon his Post, or shall be regularly relieved, shall suffer Death, or such other Punishment as by a General Court martial shall be awarded.

Article XI

Whatsoever Officer, Non-commissioned Officer, or Solider, shall do Violence to any Person who brings Provisions, or other Necessaries, to the Camp, Garrison, or Quarters, of Our Forces employed in Foreign Parts, and shall be convicted thereof by a General Court martial, shall suffer death.

Article XII

Whosoever of Our Forces employed in Foreign Parts shall force a Safeguard, and shall be convicted thereof by a General Court martial, shall suffer Death.

Article XIII

Any person belonging to Our Forces employed in Foreign Parts, who shall make known the Watchword to any Person who is not intitled to receive it according to the Rules and Discipline of War, or shall presume to give a Parole or Watchword different from what he received, shall suffer Death, or such other Punishment as by a General Court martial shall be awarded:

And whosoever shall be found guilty of such Offence in *Great Britain, Ireland, Jersey, Guernsey, Alderney, Sark, or Man,* shall be punished at the Discretion of a General Court martial.

Article XIV

Any Person belonging to Our Forces employed in any of Our Dominions beyond the Seas, or in Foreign Parts, who, by discharging Fire Arms, drawing of Swords, beating of Drums, or by any other Means whatever shall occasion false Alarms, in Camp, Garrison, or Quarters, shall suffer Death, or such other Punishment as by a General Court martial shall be awarded:

And whosoever shall be found guilty of such Offence in *Great Britain, Ireland, Jersey, Guernsey, Alderney, Sark, or Man,* shall be punished at the Discretion of a General Court martial.

Article XV

Whosoever shall be convicted of holding Correspondence with, or giving Intelligence to, the Enemy, either directly or indirectly, shall suffer Death, or such other Punishment as by a General Court martial shall be awarded.

Article XVI

Whosoever shall relieve the Enemy with Money, Victuals, or Ammunition, or shall knowingly harbour or protect an Enemy, shall suffer Death, or such other Punishment as by a General Court martial shall be awarded.

Article XVII

All Publick [sic.] Stores taken in the Enemy's Camp, Towns, Forts, or Magazines, whether of Artillery, Ammunition, Clothing, Forage, or Provisions, shall be secured for Our Service; for the Neglect of which Our Commanders in Chief art to be answerable.

Article XVII

If any Officer, Non-commissioned Officer, or Soldier, shall leave his Commanding Officer, or his Post or Colours, to go in Search of Plunder, he shall, upon being convicted thereof, suffer Death, or such other Punishment as by a General Court martial shall be awarded.

Article XIX

Any Person belonging to Our Forces employed in Foreign Parts, who shall cast away his Arms or Ammunition, shall suffer Death, or such other Punishment as by a General Court martial shall be awarded:

And whosoever shall be found guilty of such Offence in *Great Britain, Ireland, Jersey, Guernsey, Alderney, Sark, or Man,* shall be punished at the Discretion of a General Court martial.

Article XX

Whatsoever Officer, Non-commissioned Officer, or Soldier, shall misbehave himself before the enemy, or shall shamefully abandon or deliver up any Garrison, Fortress, Post, or Guard,

committed to his Charge, or which he shall be commanded to defend; shall suffer Death, or such other Punishment as by a General Court martial shall be awarded.

Article XXI

Whatsoever Officer, Non-commissioned Officer, or Soldier, shall compel the Governor, or Commanding Officer of any Garrison, Fortress, Post or Guard, to deliver up to the Enemy or to abandon the same, or shall speak Words, or use any other Means to induce such Governor, Commanding Officer, or others, to misbehave before the Enemy, or shamefully to abandon or deliver up any Garrison, Fortress, Post, or Guard, committed to their respective Charges, or which he or they shall be commanded to defend; shall suffer Death, or such other Punishment as by a General Court martial shall be awarded.

Section XV

Rank

Article I

Officers having Brevets, or Commissions of a prior Date to those of the Regiment in which they now serve, may take place in Courts martial, and on Detachments, when composed of different Corps, according to the Rank given them in their Brevets, or Dates of their former Commissions; but in the Regiment, Troop, or Company, to which such Brevet Officers, and those who have Commissions of a prior Date, do belong, they shall do Duty, and take Rank, both on Courts martial, and on Detachments which shall be composed only of their own Corps, according to the Commissions by which they are mustered in the said Corps.

Article II

If upon Marches, Guards, or in Quarters, any of Our Regiments of Life Guards, shall happen to join or do Duty together, the eldest Officer by Commission there, on Duty or in Quarters, shall command the Whole, and give our Orders for what is needful to Our Service; Regard being always had to respective Ranks of those Corps, and the Posts they usually occupy.

Article III

And in like Manner also, if any Regiments, Troops, or Detachments of Our Life Guards, Hose Guards, or Foot Guards, shall happen to march with or be encamped or quartered with any Bodies or Detachments of Our other Troops, the eldest Officer, without respect to Corps,

shall take upon him the Command of the Whole, and give the necessary Orders to Our Service.

Article IV

Whenever Our Regiments of Life Guards, or Detachments from the same, shall do Duty together, unmixed with other Corps, they are to be considered as one Corps, and the Officers are to take Rank and do Duty according to the Commission by which they shall be mustered.

Article V

And when our Regiments of Foot Guards, or Detachments form Our said Regiments, shall do Duty together, unmixed with other Corps, they shall be considered as One Corps, and the Officers shall take Rank and do Duty according to the Commissions by which they are mustered.

Section XVI

Administration of Justice

Article I

A General Court martial in Our Kingdoms of *Great Britain* or *Ireland*, shall not consist of less than Thirteen Commissioned Officers; and the President of such Court martial shall not be the Commander in Chief or Governor of the Garrison, where the Offender shall be tried, nor be under the Degree of Field Officer

Article II

A General Court martial held in our Garrison of *Gibraltar*, or in any other Place beyond the Seas, shall not consist of less than Thirteen Commissioned Officers, except the same shall be holden in *Africa*, or in *New South Wales*, in which Places a General Court martial may consist of any Number of Commissioned Officers not less than Five; and the President shall not be under the Degree of Field Officer, unless where a Field Officer cannot be had; nor shall in any Case whatever be the Commander in Chief, or Governor of the Garrison, where the Offender shall be tried, nor under the Degree of a Captain.

Article III

Whereas these Our Rules and Articles are to be observed by, and do in all Respects regard Our Regiments of Life Guards, Horse Guards, and Foot Guards, as well as Our other Forces: Now for preventing Disputes which may arise between Officers of Our Life Guards and Horse Guards, and also between Officers of Our Life or Horse Guards, and Officers of Our Foot Guards, in relation to their holding of Courts martial, and upon other Points of Duty; it is hereby declared to be Our Will and Pleasure, That when any Officer of Soldier belonging to Our said Regiments of Life Guards or Regiment of Horse Guards, shall happen to be brought before a General Court martial for Differences arising purely among themselves, or for Crimes relating to Discipline, or Breach of Orders, such Courts martial shall be composed of Officers serving in any or all of those Corps of Life Guards and Horse Guards (as they may then happen to lie for their being most conveniently assembled) where the Officers are to take post according to the Dates and Degrees of Rank granted them in their respective Commissions, without Regard to the Seniority of Corps, or other formerly pretended privileges.

Article IV

In like Manner also the Officers of Our Three Regiments of Foot Guards, for Differences arising purely among themselves, or for Crimes relating to Discipline or Breach of Orders, shall of themselves compose Courts martial, and take Rank according to their Commissions; but for all Disputes or Differences which may happen between Officers or Soldiers belonging to Our said Corps of Life Guards or Horse Guards, and Officers or Soldiers belonging to Our Regiments of Foot Guards, or between any Officers and Soldiers belonging to either of those Corps of Life Guards, and Officers or Soldiers of any other of Our Forces or among Officers or Soldiers of Our other Troops, but belonging to different Corps, the Courts martial to be appointed in such Cases shall be equally composed of Officers belonging to the Corps in which the Parties complaining and complained of do then serve, and the President shall be taken by Turns as nearly as Our Service will, with Convenience, admit, beginning first by an Officer of One of Our Regiments of Life Guards; and so on the Course out of the other Corps, according to the Seniority in Rank of such Corps respectively.

Article V

The Members both of General and Regimental Courts martial shall, when belonging to different Corps, take the same Rank which they hold in the Army; but when Courts martial shall be composed of Officers of one Corps, they shall take their Ranks according to the Dates of the Commissions by which they are mustered in the said Corps.

Article VI

The Judge-advocate General, or some person deputed by him shall prosecute in Our Name; and in all Trial of Offenders by General Courts martial, administer to each Member the following Oaths:

You shall well and truly try and determine, according to your Evidence, the Matter now before you. So help you God.

I A.B. do swear, That I will duly administer Justice, according to the Rules and Articles for the better Government of His Majesty's Forces, and according to an Act of Parliament now in Force for the Punishment of Mutiny and Desertion, and of other Crimes therein mentioned, without Partiality, Favour, or Affection; and if any Doubt shall arise, which is not explained by the said Articles or Act of Parliament, according to my Conscience, the best of my Understanding, and the Custom of War in like Cases. And I do further swear, That I will not divulge the Sentence of the Court, until it shall be approved by His Majesty, or by some Person duly authorised by Him; neither will I, upon any Account, at any Time whatsoever, disclose or discover the Vote or Opinion of any particular Member of the Court martial, unless required to give Evidence thereof, as a Witness, by a Court of Justice, in a due Course of Law. So help me God.

And so soon as the said Oath shall have been administered to the respective Members, the President of the Court shall administer to the Judge-advocate, or Person officiating as such, an Oath, in the following Words:

I A.B. do swear, That I will not upon any Account, at any Time whatsoever, disclose, or discover the Vote or Opinion of any particular Member of the Court martial, unless required to give Evidence thereof, as a Witness, but a Court of Justice, in a dues Course of Law. So help me God.

Article VII

All the Members of the Court martial are to behave with Decency; and in giving of their Votes are to begin with the youngest.

Article VIII

All Persons who give Evidence before a General Court martial are to be examined upon Oath; and no sentence of Death shall be given against any Offender by any General Court martial, (except the same shall be holden in *Africa*, or in *New South Wales*), unless Nine Officers present shall concur therein; nor shall such Sentence be given in any Case where a Court martial shall consist of more Officers than Thirteen, nor in *Africa* or *New South Wales*, when a Court martial shall consist of lesser Number of Officers without the Concurrence of Two Thirds at the least of the Officers present.

Article IX

No Field Officer shall be tried by any Person under the Degree of Captain; not shall any Proceedings or Trials be carried on excepting between the Hours of Eight in the Morning and Three in the Afternoon, except in Cases which require an immediate Example.

Article X

No Sentence of a General Court Martial shall be put in Execution till after a Report shall have been made of the whole Proceedings to Us, or to the Officer commanding in Chief, or some other Person duly authorised by Us under Our Sign Manual to confirm the same, and Our or his Directions shall have been signified thereupon; excepting in *Ireland*, where the Report is to be made to the Lord Lieutenant, or to Our Chief governor or governors of that Kingdom, and his or their Directions are to be received thereupon.

Article XI

The Commissioned Officers of every Regiment may, but the Appointment of their Colonel or Commanding Officer, hold Regimental Courts martial for the enquiring into such Disputes or Criminal Matters, as may come before them, and for the inflicting corporal Punishments for small Offences, and shall give Judgement by the Majority of Voices; but

no Sentence shall be executed until the Commanding Officer (not being a Member of the Court martial), or the Governor of the Garrison, shall have confirmed the same.

Article XII

No Regimental Court martial shall consist of less than Five Officers, excepting in Cases where that Number cannot be conveniently assembled, when Three may be sufficient; who are likewise to determine upon the Sentence is to be confirmed by the Commanding Officer, not being a Member of the Court martial, before it be carried into Execution.

Article XIII

Every Governor or Commander of a Garrison, when he shall judge it to be most conducive to the Good of Our Service; and every Officer commanding any of Our Forts, Castles, or Barracks, where the Corps under his Command shall consist of Detachments from different Regiments, or Independent Companies, and where the Number of Officers of the same Corps is not sufficient to form a Regimental Court martial, may assemble Courts martial composed of Officers of distinct Corps, and such Courts martial shall have the like Powers, and proceed in the like Manner as Regimental Courts martial, and their Sentence shall not be executed until it shall be confirmed by such Governor or Commanding Officer.

Article XIV

No Commissioned Officer shall be cashiered or dismissed form Our Service, excepting by an Order from Us, or by the Sentence of a General Court martial, approved by Us, or by some Person having Authority from Us, under Our Sign Manual; but Non-commissioned Officers may be discharged as private Soldiers, and, by the Order of the Colonel of the Regiment, or by the Sentence of a Regimental Court martial, be reduced to private Centinels [sic.].

Article XV

No Person whatsoever shall use menacing Words, Signs, or Gestures, in the Presence of a Court martial then sitting, or shall cause any Disorder or Riot, so as to disturb their Proceedings, on the Penalty of being punished at the Discretion of the said Court martial.

Article XVI

To the End that Offenders may be brought to Justice, We hereby direct, That whenever any Officer or Solider shall commit a Crime deserving Punishment, he shall, by his Commanding Officer, if an Officer, be put in Arrest; if a Non-commissioned Officer or Soldier, be imprisoned until he shall be either tried by a Court martial, or shall be lawfully discharged by a proper Authority.

Article XVII

No Officer or Solider, who shall be put in Arrest or Imprisonment, shall continue in his Confinement more than Eight Days, or until such Time as a Court martial can be conveniently assembled.

Article XVIII

No Officer commanding a Guard, or Provost-martial, shall refuse to receive, or keep, any Prisoner committed to his Charge by any Officer belonging to Our Forces; which Officer shall, at the same Time, deliver an Account in Writing, signed by himself, of the Crimes with which the said Prisoner is charged.

Article XIX

No Officer commanding a Guard, or Provost-martial, shall presume to release any Prisoner committed to his Charge, without proper Authority for so doing; nor shall he suffer any Prisoner to escape, on the Penalty of being punished for it by the Sentence of a Court martial.

Article XX

Every Officer or Provost-martial to whose Charge Prisoners shall be committed, is hereby required, within Twenty-four Hours after such Confinement, or as soon as he shall be relieved from his Guard, to give in Writing to the Colonel or Commanding Officer of the Regiment to which the Prisoner belongs, (where the Prisoner is confined upon the Guard belonging to the said Regiment, and that his offence only relates to the Neglect of Duty in his own Corps), or to the Commander in Chief, their Names, their Crimes, and the Names of the Officers who committed them, on Penalty of being punished for his Disobedience or Neglect at the Discretion of a Court martial.

Article XXI

And if any Officer under Arrest shall leave his Confinement before he is at Liberty by the Officer who confined him, or by a superior Power, he shall, upon being convicted thereof before a General Court martial, be cashiered.

Article XXII

Whatsoever Commissioned Officer shall be convicted before a General Court martial of behaving in a scandalous infamous Manner, such as is unbecoming the Character of an Officer and a Gentleman, shall be discharged from Our Service. Provided, however, that in every Charge preferred against an Officer for such scandalous or unbecoming Behaviour, the Facts or Fact whereon the same is ground, shall be clearly specified.

Section XVII

Accounts

The Accounts of all Regiments, Troops, or Companies in Our Service, other than Our Corps of Life Guards, Horse Guards, and Foot Guards, shall be made up and transmitted at such Times and in such Manner as We have been pleased to direct by Our late Regulations touching Regiment and District. Pay Masters, and the Mode of mustering, paying and settling the Accounts of Our Army, or according to such Regulations as We may think fit to establish in relation thereto.

Section XVIII

Entry of Commissions, and Leaves of Absence

All Commissions and Leaves of Absence granted by Us or by any of Our Generals having Authority from Us, shall be entered in the Books of Our Secretary at War, and Commissary-general, otherwise they will not be allowed of at the Musters.

Section XIX

Effects of the Dead

Article I

When any Commissioned Office shall happen to die, or be killed in Our Service, the Major of the Regiment, or the Officer doing the Major's Duty in his Absence, shall immediately secure all his Effects or Equipage then in Camp or Quarters; and shall before the next Regimental Court martial make an Inventory thereof, and forthwith transmit the same to the Officer of Our Secretary at War, to the End that the Executors of such Officer may, after Payment of his Regimental Debts and Quarters, and Interment, receive the Overplus, if any be, to his or their Use.

Article II

When any Non-commissioned Officer or private Soldier shall happen to be, or be killed in Our Service, the then commanding Officer of the Troop or Company shall, in the presence of Two other Commissioned Officers, take an Account of whatever Effects he dies possessed of, above his Regimental Clothing, Arms, and Accoutrements, and transmit the same to the Office of Our Secretary at War; which said Effects are to be accounted for, and paid to the Representative of such deceased Non-commissioned Officer or Solider: And in café any of the Officers, so authorised to take Care of the Effects of dead Officers and Soldiers, should, before they have accounts to their Representatives for the same, have Occasion to leave the Regiment, by Preferment, or otherwise, they shall, before the be permitted to quit the same, deposit in the Hand of the Commanding Officer or of the Agent of the Regiment, all the Effects of such deceased Non-commissioned Officers and Soldiers, in order that the same may be secured for, and paid to, their respective Representatives.

Section XX

Artillery

Article I

All Officers, Conductors, Gunners, Matrosses, Drivers, or any other Persons whatsoever receiving Pay or Hire in the Service of Our Artillery, shall be governed by these Our Rules and Articles, and shall be subject to be tried by Courts martial in like manner with the Officers and Soldiers of Our Other Troops.

Article II

For Differences arising amongst themselves, or in Matters relating solely to their own Corps, the Courts martial may be composed of their own Officers, but where a Number sufficient of such Officers cannot be assembled, or in Matters wherein other Corps are interest, the Officers of Artillery shall sit in Courts martial with the Officers of Our other Corps, taking rank according to the Dates of their respective Commissions, and not otherwise.

Article III

In like Manner also all Officer serving in the Corps of Royal Engineers, and all Officers and Persons serving in the Corps of Royal Military Artificers and Labourers, and all Master Gunners and Gunners under the Ordnance are to be governed by these Our Rules ad Articles; and equally subject to Trial by Courts martial, as Officers and Soldiers of Our other Troops.

Section XXI

American Troops

Article I

The Officers, Non-commissioned Officers and Soldiers of any Troops which are or shall be raised in America, being mustered and in Pay, shall at all Times, and in all Places, when joined, or acting in Conjunction with our *British* Forces, be governed by these Rules or Articles of War, and shall be subject to be tried by Courts martial in like Manner with the Officers and Soldiers of Our *British* Troops.

Article II

Whereas, notwithstanding, the Regulations which We were pleased to make for settling the Rank of Provincial General and Field Officers in *North America*, Difficulties have arisen with regard to the Rank of the said Officers when acting in Conjunction with Our Regular Forces; and We being willing to give due Encouragement to Officers serving in Our Provincial Troops, it is Our Will and Pleasure, that for the future, all General Officers and Colonels serving by Commission from any of the Governors, Lieutenant or Deputy Governors, or Presidents of the Council for the Time being, or Our Provinces and Colonies in *North America*, shall, on all Detachments, Courts martial, or other Duty, wherein they

may be employed in Conjunction with Our Regular Forces, take Rank next after all Colonels serving by Commissions signed by Us, or by Our General commanding in Chief in *North America*, though the Commissions signed by Us, or by Our General commanding in Chief in *North America*, though the Commissions of such Provincial Generals and Colonels should be of elder Date: And, in like Manner, that Lieutenant Colonels, Majors, Captains, and other inferior Officers, serving by Commission from the Governors, Lieutenant or Deputy Governors, or Presidents of the Council for the Time being of Our said Provinces and Colonies in *North America*, shall, on all Detachments Courts martial, or other Duty, wherein they may be employed in Conjunction with Our Regular Forces, have Rank next after all Officers of the Like Rank serving by Commissions signed by Us, or by Our General commanding in Chief in *North America*, though the Commissions of such Lieutenant Colonels, Majors, Captains, and other inferior Officers, should be of elder Date to those of the like Rank, signed by Us, or by Our said General.

Section XXII

Troops in the East Indies

Article I

Whenever any of Our Forces shall be employed in the *East Indies*, the Officers of Our Forces so employed may, as often as it shall be judged necessary, be associated with Officers in the Service of the United Company of Merchants trading to the *East Indies*, to fit in Conjunctions at Courts martial, and may proceed to the Trial of any Officer, Non-commissioned Officer, or Soldier, in the Like Manner as if such Courts martial were composed of Officers of Our Forces, or of Officers in the Service of the said United Company only: With this Distinction; that upon the Trial of any Officer or Soldier of Our Forces, regard shall be had to Regulations and Provisions contained in the Act for Punishing Mutiny and Desertion, and the Oaths administered to the several Members of the Court martial shall be in the Terms therein prescribed: And upon the Trial of any Officer or Soldier in the Service of the said United Company, regard shall be had to the Regulations and Provisions made by or in pursuance of an Act passed in the Twenty-seventh Year of the Regin of Our late Royal Grandfather, intituled, *An Act for punishing Mutiny and Desertion of Officers and Soldiers in the Service of the United Company of Merchants trading to the* East Indies*, and for the Punishment of Offences committed in the* East Indies*, or at the Island of* Saint Helena;

and the Oaths administered to the several Members of the Court martial shall be in the Terms prescribed by the same Act.

Article II

Whenever any of Our Forces shall be employed in the *East Indies*, the Officers of Our Forces so employed are, upon all Detachments, at Courts martial, and upon any other Duty, wherein they may be joined with Officers in the Service of the United Company of Merchants trading to the East Indies, to command and have Precedence of Officers of equally Rank in the Service of the said United Company, although the Commissions of the said United Company's Officers should be of elder Date.

Section XXIII

Troops on board Ships of War

Whenever any of Our Forces shall be embarked on Board Our Ships of War, or any other Ships which may have been regularly commissioned by Us, and which may be employed in the Transportation of Our Troops: Our Will and Pleasure is, that the Officers and Soldiers of such Forces, from the Time of Embarkation on Board any Ship as above described, shall strictly conform themselves to the Laws and Regulations established for the Government and Discipline of the said Ship, and shall consider themselves for these necessary Purposes, as under the Command of the Senior Officer of the particular Ship, as well as of the Superior Office of the Fleet (if any), to which such Ship belongs.

Section XXIV

Relating to the foregoing Articles

Article I

No Officer, Non-commissioned Officer, or Soldier, shall be adjudged to suffer any Punishment extending any Punishment extending to Life or Limb by virtue of these Our Rules, and Articles, within Our Kingdoms of *Great Britain, or Ireland, Jersey, Guernsey, Alderney, Sark,* and *Man*, and the Islands thereunto belonging, except for such Crimes as are herein expressly declared to be so punishable within the same:

Article II

But all Crimes not capital, and all Disorders and Neglects, which Officers and Soldiers may be guilty of to the Prejudice of good Order and Military Discipline, though not specified in the said Rules and Articles, are to be taken in Cognizance of by a General Court martial, according to the nature and Degree of the Offence, and to be punished at their Discretion.

Article III

All Suttlers [sic.] and Retainers to a Camp, and all Persons whatsoever serving with Our Armies in the Field, though no inlisted [sic.] Soldiers are to be subject to Orders, according to the Rules and Discipline of War.

Article IV

Notwithstanding its being directed in the Eleventh Section of these Our Rules and Articles, that every Commanding Officer shall deliver up to the Civil Magistrate all Persons who shall be accused of any Crimes which are punishable by the known Laws of the Land; yet in Our Garrison of *Gibraltar*, or in any other Place beyond the Seas, where Our Forces now are may be employed, and where there is no Form of Our Civil Judicature in Force, the General, Governor, or other Officer commanding in Chief from the Time being, is to appoint General Courts martial as Occasion may require, for the Trial of any such Persons under his Command accused of Murder, Theft, Robbery, Rape, Coining, or Clipping the Coin of *Great Britain*, or any Foreign Coin current in the Garrison or Place under his Command, or of having used Violence or committed any Offence against the Persons so accused, if found guilty, shall suffer Death, or such other Punishment, according to the Nature and Degree of their respective Offences, as by the Sentence of any such General Court martial shall be awarded.

Article V

All these Our Rules and Articles are to be read and published Once in every Two Months, at the Head of every Regiment, Troop or Company, Mustered, or to be mustered, in Our Service; and are to be duly observed and exactly obeyed by all Officers and Soldiers who are or shall be in Our Service; excepting in what related to the Payment of Soldiers Quarters, and to Carriages; which is, in Our Kingdom of Ireland, to be regulated by the Lord Lieutenant or Chief Governor, or Governors thereof, and in Our Islands, Provinces, and

Garrisons beyond the Seas, by the respective Governors of the same according as the different Circumstances of the said Kingdom, Islands, Provinces or Garrisons, may require.

G. R.

Appendix C An Act for the more speedy and effectual Trial and Punishment of Offences

An Act for the more speedy and effectual Trial and Punishment of Offences committed by Soldiers, detached in Places beyond the Seas, out of His Majesty's Dominions. [7th July 1813]

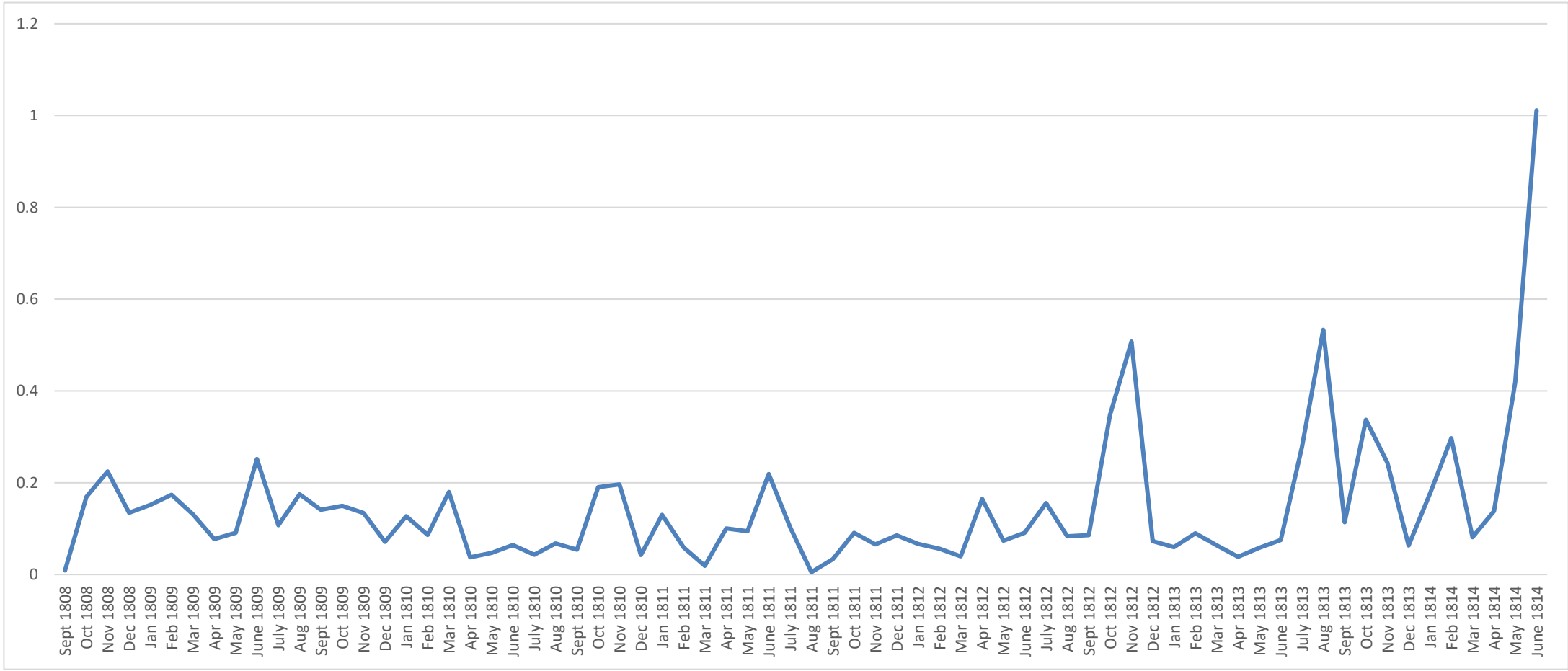
53 Geo III, Cap XCIX, c. 17, *The Statues of the United Kingdom of Great Britain and Ireland, 53 George III, 1813* (London: Statute and Law Printers, 1813), pp. 372-373.

Whereas by an Act passed in the present Session of Parliament intituled [sic] *An Act for punishing Mutiny and Desertion; and for the better Payment of the Army and their Quarters*, it is enacted that General Courts Martial to be held in Places beyond the Seas out of His Majesty's Dominions, may consist of a Number not less that Seven: And whereas it is expedient to amen the said Act, and to provide that such General Courts Martial may consist of a less Number than Seven, in cases hereinafter specified; Be it therefore enacted by the King's Most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, and by the Authority of the same, That it shall be lawful for any General or other Officer commanding any Station or commanding any Division, Brigade, Detachment or distinct Party, belonging to any Army of His Majesty, which may at any time be serving in any Place beyond the Seas out of His Majesty's Dominions, upon Complaint made to him of any Crime or Crimes, Offence or Offences, done or committed against the Property or Person of any Inhabitant or Resident in any such Countries, with or belonging to His Majesty's Armies in the Field, being under the immediate Command of any such General or other Officer, to summon and cause to assemble a Court Martial, which shall consist of not less than Three Officers at least, for the Purpose of trying any such Person or Persons accused or suspected of having committed any such Crime or Crimes, Offence or Offences as aforesaid, notwithstanding such General or other Officer shall not have received from His Majesty, or from any Person having His Majesty's Authority in that Behalf, any Warrant or Warrants empowering such General or other Officer to summon or assemble Courts Martial.

II. And be it further enacted, That every Court Martial so assembled under the Authority of this Act shall have Power to try and adjudge any such Person or Persons to suffer any such Punishment, as by any Act for the Punishment of Mutiny and Desertion which may be in force at the time such Crime of crimes, Offence or Offences, shall have been committed, or by any Article or Articles of War issued by His Majesty under the Authority of any such Act, shall be prescribed for any Crime or Crimes, Offence of Offences, with which any such Person or Persons shall be charged before such Court Martial: Provided always, that no Sentence of such Court Martial assembled under the Authority of this Act, shall be executed, until the General commanding in Chief any Army, of which the Division, Brigade, Detachment or Party, to which any Person so tried, convicted and adjudged to suffer Punishment shall belong, shall have approved and confirmed the same.

III. Provided always, and be it further enacted, That every Court Martial assembled under the Authority of this Act shall have such and the same Powers for summoning and examining Witnesses and Witnesses guilty of Perjury on Examination before them shall be subject and liable to the same Penalties and Punishments, as by any Law or Useage belonging to any Court Martial authorized by law; and the Sentence of such Court Martial acting under the Authority of this Act shall, after such Approval and Confirmation as aforesaid, be equally valid and effectual to all Intents and Purposes as if the same had been pronounced by any Court Martial summoned, assembled and acting under any Act or Acts of Parliament heretofore made or now in force respecting Courts Martial.

Appendix D Desertions from the British army in Spain and Portugal, 1808-1814



Appendix E Breakdown of lashes and commutation rates issued at GCMs and GRCMs by year, 1808-1818

Table E.1: Number of lashes awarded and commuted by General Courts Martial confirmed abroad

Year	Total Lashes	No trails awarded	Total Commuted	No. trials commuted	Percentage of lash punishments commuted	Percentage of all lashes commuted	Average number of lashes (to nearest lash)	Average number of lashes commuted
1808	37700	41	4700	7	17.1	12.5	920	671
1809	29500	45	1000	4	8.9	3.4	656	250
1810	31200	40	2000	2	5	6.4	780	1000
1811	38300	55	1500	2	3.6	3.9	696	750
1812	40100	57	4000	5	8.8	10	704	800
1813	123925	163	16300	24	14.7	13.2	765	679
1814	94415	139	10673	21	15.1	11.3	679	508
1815	79450	105	8000	11	10.5	10.1	757	727
1816	100082	147	3050	9	6.1	10.1	681	339
1817	53050	74	2050	3	4.1	3.7	717	683
1818	48869	68	0	0	0	0	752	0
Total	**676591**	**934**	**53273**	**88**	**8.3**	**7.7**	**737**	**582**

Table E.2: Number of lashes awarded and commuted by General Courts Martial confirmed at home

Year	Total Lashes	No trails awarded	Total commuted	No. trials commuted	Percentage of punishments where lashes commuted	% of all lashes commuted	Average number of lashes (to the nearest lash)	Average number commuted
1808	13600	20	900	3	15	6.6	680	300
1809	6650	8	0	0	0	0	831	0
1810	8700	13	1000	1	7.7	11.5	669	1000
1811	4000	9	650	3	33	16.3	444	217
1812	18400	35	9900	22	62.9	53.8	526	450
1813	7100	14	1500	3	21.4	21.1	507	500
1814	3500	6	500	1	16.7	14.3	583	500
1815	400	1	400	1	100	100	400	400
1816	0	0	0	0	0	0	0	0
1817	0	0	0	0	0	0	0	0
1818	0	0	0	0	0	0	0	0
Total	**62350**	**106**	**14850**	**34**	**32.1**	**28**	**580**	**421**

Table E.3: Number of lashes awarded and commuted by General-Regimental Courts Martial, 1808-1818

Year	Total Lashes	No trails awarded	Total Commuted	No. trials commuted	% lashes commuted	Average no. lashes (to the nearest whole no.)	Average no. commuted
1812	78400	122	3775	14	11.5	643	270
1813	98550	157	10946	26	16.6	628	421
1814	79140	125	11054	28	22.4	633	395
1815	156580	241	26626	69	28.6	650	386
1816	111191	168	17326	52	31	662	333

Year	Total Lashes	No trails awarded	Total Commuted	No. trials commuted	% lashes commuted	Average no. lashes (to the nearest whole no.)	Average no. commuted
1817	73463	105	9690	28	26.7	700	346
1818	104788	160	26280	61	38.1	655	430
Total	**702112**	**1078**	**105697**	**278**	**25**	**653**	**369**

Appendix F Transcript of a letter on discipline from Sir Arthur Wellesley to Viscount Castlereagh, Abrantes, 17th June 1809[1]

My dear Lord,

I cannot with propriety, omit to draw our attention again to the state of discipline of the army, which is a subject of serious concern to me, and well deserves the consideration of His Majesty's ministers.

It is impossible to describe to you the irregularities and outrages committed by the troops. They are never out of sight of their officers. I may almost say never out of the sight of the Commanding officers of their regiments, and the General officers of the army, that outrages are not committed; and notwithstanding the pains which I take, of which there will be ample evidence in my orderly books, not a post or a courier comes in, not an officer arrives from the rear of the army, that does not bring me accounts of outrages committed by the soldiers who have been left behind on the march, having been sick, or having straggled from their regiments, or who have been left in hospitals.

We have a Provost marshal, and no less than 4 assistants. I never allow a man to march with the baggage. I never leave an hospital without a number of officers and non-commissioned officers proportionable to the number of soldiers; and never allow a detachment to march, unless under the command of an officer; and yet there is not an outrage of any description which has not been committed on a people who have uniformly received us as friends, but soldiers who never yet, for one moment, suffered the slightest want, or the smallest privation. In the first place, I am convinced that the law is not strong enough to maintain discipline in any army upon service. It is most difficult to convict any prisoner before a regimental Court Martial, for I am sorry to say that the soldiers have little regard to the oath administered to them; and the officer who are sworn 'well and truly to

[1] The original version of this letter is WP1/266/4, Sir Arthur Wellesley to Viscount Castlereagh, Abrantes, 17th June 1809.

try and determine, *according to the evidence*, the matter before them', have too much regard to the struct letter of that administered to them. This oath, to the members of a regimental Court Martial, has altered the principle of the proceedings of that tribunal. It is no longer a court of honour, at the hands of which a soldier was certain of receiving punishment if he deserved it; but it is a court of law, whose decisions are to be formed according to the evidence principally of those on whose actions it is constituted, to be a control upon the soldiers equally efficient with that which existed under the old constitution of a Court Martial, which my experience tells me it is not, I should wish to know whether any British army (this army in particular, which is composed of 2nd battalions, and therefore but ill provided with officers) can afford to leave with every hospital, or with every detachment, 2 captains and 4 subalterns, in order to be enabled to hold a detachment court martial. The law in this respect ought to be amended; and when the army is on service in a foreign country, any one, 2 or 3 officers ought to have the power of trying criminals, and punishing them instanter; taking down all proceedings in writing, and reporting them for the information of the Commander in Chief on their joining the army. Besides this improvement of the law, there ought to be in the British army a regular provost establishment, of which a proportion should be attached to every army sente abroad. All the foreign armies have such an establishment: the French *gendarmerie nationale*, to the amount of 30 or 40 with each of their corps; the Spaniards their *policia militar*, to a still large amount while we, who require such an aid more, I am sorry to say, than any other nations of Europe, have nothing of the king excepting a few sergeants, who are taken from the Line for the occasion, and who are probably not very fit for the duties which they are to perform.

The authority and duties of the Provost ought, in some manner, to be recognised by the law. By the custom of British armies, the Provost has been int eh habit of punishing on the spot (even with death, under the orders of the Commander in Chief) soldiers found in the act of disobedience or orders, of plunder, or of outrage. There is no authority for this practice excepting custom, which I conceive would hardly warrant it; and yet I declare that I do not know in what manner the army is to be commanded at all, unless the practice is not only continued, but an additional number of Provosts appointed.

There is another branch of this subject which deserves serious consideration. We all know that the discipline and regularity of all armies must depend upon the diligence of the

regimental officers, particularly the subalterns. I may order what I please; but if they do not execute what I order, or if they execute it with negligence, I cannot expect that British soldiers will be orderly or regular.

There are two incitements to men of this description to do their duty as they ought, the fear of punishment, and the hope of reward. As for the first, it cannot be given individually; for I believe I should find it very difficult to convict any officer of doing this description of duty with negligence, more particularly as he is to be tried by others probably guilty of the same offence. But these evils of which I complain are committed by whole corps; and the only way in which they can be punished is by disgracing them, by sending them into garrison and reporting them to His Majesty. I may and shall do this by one or two battalions, but I cannot venture to do it by more; and then there is an end to the fear of this punishment, even if those who received it were considered in England as disgraced persons rather than martyrs.

As for the other incitement to officers to do their duty zealously, there is no such thing. We who command the armies of the country, and who are expected to make exertions greater than those made by the French armies, to march, to fight, and to keep our troops in health and in discipline, have not the power of rewarding, or promising reward for a single officer of the army; and we deceive ourselves, and those who are placed under us, if we imagine we have that power, or if we hold out to them that they shall derive any advantage from the exertion of it in their favour.

You will say, probably, in answer to all this, that British armies have been in the field before, and that these complaints, at least to the same extent have not existed; to which I answer 1st that the armies are no larger, their operations more extended, and the exertion required greater than they were in former periods; and that the mode of carrying on war is different from what it was; 2ndly, that our law, instead of being strong in proportion to the temptations and means of indiscipline and irregularity, has been weakened, and that we have not adopted the additional means of restrain and punishment practised by other nations, and our enemies, although we have imitated them in those particulars which have increased and aggravated our irregularities. And finally, that it is only within late years that the Commanders in Chief abroad have been deprived of all patronage, and, of course, of all power of incitement to the officers under their command.

[…] I have thought it proper to draw your attention to these subjects, which I assure you deserve the serious consideration of the King's ministers. We are an excellent army on parade, and an excellent one to fight; but we are worse than an enemy in a country; and take my word for it, that either defeat or success would dissolve us.

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