Let's Talk about Sexual Assault in the United States Military: A Comparative Analysis of Non-Judicial Punishment and Response Training in Commanding Officers

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Abstract

The American public, by and large, remains unaware of the disciplinary processes exercised by the U.S. military, in spite of how the dramatic rendition of courtroom trials as depicted in blockbuster movies and literature. Non-judicial punishments under Article 15 of the UCMJ remain the predominant vehicle for the discipline of American troops: a process which is hardly transparent or procedural and seemingly permits the sexual assault of civilians and female servicemembers to proliferate. On the other hand, Article 15 is often heralded for its utility in quickly and efficiently settling matters without complicating processes unnecessarily. This report offers a nuanced take on the strengths and drawbacks of non-judicial punishment, including comparative analysis and specific policy recommendations.

The average viewer of modern American cinema has likely acquired a conception of military justice as if it were highly procedural. War movies have painted a picture of court trials that are lengthy, thorough, and sensational. When it comes to depositions and judicial procedures, these depictions aren't necessarily inaccurate. What most observers will not realize, however, is that such court proceedings are rare – indeed, most disciplinary issues in the military are settled with no judicial intervention whatsoever.

Certain military procedures of punishment and prosecution impose a different standard of conduct on servicemembers as opposed to the general population. Particularly, under Article 15 of the Uniform Code of Military Justice, servicemembers who commit war crimes or violate human rights are exempt from judgment under the court system and are instead punished solely at their commanding officer's discretion. This system has received praise for its ability to process a high volume of disciplinary issues at a low cost while remaining at a personal level.[1] Indeed, there are several reasons that Article 15 can be an effective method of discipline, which will later be reviewed at length. However, a host of systemic issues have ultimately crippled the Article 15 remedy, including the enabling language of the Article itself. Systemically, Article 15 has led to a certain degree of exemption from legal consequences for servicemembers, particularly repeat offenders, and has led to the proliferation of rape culture throughout the U.S. military, the deliberate concealment of disciplinary issues, and ultimately failed to mitigate offenses effectively. Before examining how non-judicial punishment under Article 15 has enabled systemic failure, however, it may be prudent to illustrate the gravitas of the problem itself.

[1] "...congressional actions and proposals to sharply modify the military criminal legal system to combat sexual assault and harassment [such as Article 15] provide both opportunity and necessity to reevaluate the fundamental need for and nature of the military criminal legal system." Fredric I. Lederer, "From Rome to the Military Justice Acts of 2016 and beyond: Continuing Civilianization of the Military Criminal Legal System" (2017). Faculty Publications. 1943. https://scholarship.law.wm.edu/facpubs/1943.

During the fiscal year of 2010, military services received reports of 2,617 instances of sexual assault.[2] However, the Department of Defense (DOD) estimates that no more than 14% of servicemembers who are victims of sexual assault file a report with military authorities.[3] As a result, U.S. authorities estimate that the true number of sexual assaults upon servicemembers in the 2010 fiscal year was closer to 19,000.[4] Is it fair to say, then, that the prevalence of rape culture is due not to procedures, but to a lack of reporting? No way! Rather, a study of servicewomen who experienced sexual assault revealed that the primary reasons victims chose not to report were: 1) a lack of confidentiality; 2) adverse treatment by peers; and 3) a belief that nothing would be done.[5] Of these three reasons, at least the first and third are inherently tied to procedural inadequacies. Therefore, in order to remedy the issues of reporting and proliferation, it becomes necessary to examine punitive procedures within the military, conduct a comparative analysis of the most common domestic procedures, and consider potential reforms in both law and culture.

Most commonly, military discipline takes the form of non-judicial punishment (NJP), a procedure which, in the United States, is authorized under Article 15 of the Uniform Code of Military Justice.[6] Effectively, the two terms are colloquially and legally synonymous. Under Article 15, non-judicial matters are settled solely between the commanding officer and the offender and involve no courtroom procedures. This principle in itself poses a systemic issue, as most

[2] Sexual Assault Prevention and Response Office (SAPRO), Department of Defense Annual Report on Sexual Assault in the Military, Fiscal Year 2011 (2012). http://www.sapr.mil/media/pdf/reports/; Complaint for Plaintiffs, 28.

[3] *Ibid,* 181.

[4] FY2010 spans October 1, 2009, through September 30, 2010. Sexual Assault Prevention and Response Office (SAPRO), Department of Defense Annual Report on Sexual Assault in the Military, Fiscal Year 2010 (2010). http://www.sapr.mil/index.php/annualreports.

[5] A. Burgess, K.B. Wolitzky-Taylor, D.G. Kilpatrick, R. Bachman, K. Houser, L.M. Rock, B.S. Fisher, et al. "Reporting Sexual Assault in the Military: Who Reports and Why Most Servicewomen Don't." American Journal of Preventive Medicine, May 19, 2014. https://doi.org/10.1016/j.amepre.2014.03.001.

[6] "What Is the Most Common Type of Military Discipline?" Joseph L. Jordan Military Defense Attorney at Law, March 15, 2022. https://www.jordanucmjlaw.com/2022/03/what-is-the-most-common-type-of-military-discipline/.

military officers do not appear to be properly equipped to address cases of sexual violence. In 2014, the Department of Defense found military officers have repeatedly encouraged victims to drop the issue (44% of cases) or declined to take action whatsoever (41% of cases).[7] Additionally, researchers have raised concerns that military officers may lack legal expertise, be biased towards or against the accused and/or the victim, or present the potential for abuses of power over those providing testimony.[8] These concerns are sufficient to raise doubts over whether leaving interpersonal disciplinary issues up to commanding officers is tenable, even on the conceptual level.

In addition to problems with commanding officers themselves, even the face of the text of Article 15's guidelines and procedures reveals striking inadequacies. For example, the maximum punishments set forth within the Article are ridiculously lax, providing no option for discharge or even a permanent injunction. Indeed, a guilty ruling via Article 15 lasts on an offender's record for no more than 2 years.[9] Beyond this, the maximum punishments for an offense are: 1) one demerit; 2) a fine of ⅔ of a month's basic pay; 3) 8 days confinement; 4) a verbal reprimand; 5) 7 day extra duty; 6) 7 day restriction.[10] These figures should be jarring to any reader who has experienced the effects of sexual assault. So inadequate are these maximum punishments that even if the social issues with dispassionate commanding officers were to be resolved, even the sheer limitation of maximum punishments are factors which alone would be enough to absolutely stymie the administration of justice for victims of sexual assault. Perhaps it may even be true that the

[7] Jill A. Rough, and David J. Armor. "Sexual Assault in the U.S. Military: Trends and Responses." *World Medical & Health Policy* 9, no. 2 (2017): 206–24. https://doi.org/10.1002/wmh3.228.
[8] Cassandra E. Dodge, Ráchael A. Powers, and Jacqueline Leon. "Reforming the Role of the Convening Authority in the Military Justice System." *Family & Intimate Partner Violence Quarterly* 15, no. 2 (2022): 79–90.
[9] "Article 15 Fact Sheet." Indiana National Guard. Accessed July 15, 2023. https://www.in.gov/indiana-national-guard/files/Article_15_Fact_Sheet.pdf.
[10] *Ibid.*

reluctance of commanding officers to engage in disciplinary procedures is due to their knowledge that the consequences available would be ultimately ineffective. Taken together, these two issues have led to an American military justice system that is undeniably broken.

The inadequacies of the military's response to sexual violence are more than just a social issue affecting the victims; they are a systemic failure which is representative of a larger fracture in commanding authority. Indeed, in the 2010 Annual Report of Sexual Assault in the Military, the DoD acknowledged that issues of rape and sexual assault are severe enough to impair the military's readiness and impede mission accomplishment.[11] It then becomes a national issue, not just for those directly affected by sexual assault, but for the entire U.S. population that the prevailing issues of rape culture in the military are resolved in pursuit of a more efficient and productive military.

NJP within a Comparative Lens

Repeated failures under the system of non-judicial punishment have led some researchers to conclude that the United States should do away with Article 15 and the imposition of non-judicial punishment in more serious cases, instead favoring the more common international doctrine of command responsibility.[12] Such procedures may include imposing stricter reporting requirements upon officers, prevent the use of Article 15 in cases of sexual and aggravated assault, and the prosecution of officers who fail to report offenses.[13] Several of these procedures have been implemented within the systems of foreign militaries, and comparative analyses may offer a lens of how punitive processes might look in the United States under a more limited application of

[11] *Supra* Department of Defense Annual Report on Sexual Assault in the Military, Fiscal Year 2010. At C-1, C-3.
[12] Lindsay Hoyle, "Command Responsibility — A Legal Obligation to Deter Sexual Violence in the Military." *Boston College International & Comparative Law Review* 37 (2014): 353–88.
[13] *Ibid.*

Article 15. Though it can be difficult to find countries for which there is extant research on punitive military procedures (eg. there has been no reporting or research on sexual violence in the UK military), we are lucky to find a detailed, well-researched counterexample in Israel's military system. [14]

Much like the United States, Israel is a liberal democracy whose social values and international ties closely mirror that of the U.S. Nevertheless, the two nations' military structures are markedly different. Whereas the U.S. has been criticized for "eroding" the separation of powers between executive and judicial apparatus under its system of non-judicial punishment, Israel's policy on the separation of powers is much more clearly delineated. Instead of allowing military commanders to make punitive decisions autonomously, Israel imposes strict requirements on commanders to report all instances of sexual assault to the judicial body immediately and bars those commanders from having any influence on the outcome of the case.[15] This system effectively delivers over all disciplinary issues to an independent authority and seeks to prevent any conflicts of interest created by workplace politics or any other sorts of limited interests. Additionally, Israel's system is so popular among military reservists that thousands have indicated that their service is conditional upon the independent powers of the judiciary, threatening to resign if the system is overturned.[16]

To more closely emulate this system, it would not be difficult at all for the United States to curtail or remove the use of Article 15 in cases of sexual assault. Historically, the reason that

[14] Louise Morgan, "Understanding sexual offences in UK military and veteran populations: delineating the offences and setting research priorities." *BMJ Mil Health* 168 (2022): 146-149.
[15] Emily Hazen, "Restructuring U.S. Military Justice through a Comparative Analysis of Israel Defense Forces." Wisconsin Journal of Law, Gender, and Society 34, no. 2 (2019): 179–206. https://uwlaw-omeka.s3.us-east-2.amazonaws.com/original/cbcaf16446f4a359ec1991001e55d183e68d92bc.pdf.
[16] Doug Cunningham, "Israeli military reservists say they will stop serving if judiciary is weakened." UPI. July 21, 2023. https://www.upi.com/Top_News/World-News/2023/07/21/reservists-protest-judicial-overhaul/4461689943283/ (Accessed June 21, 2023).

Article 15 has been used in such a broad context is because the language the Article uses to define its scope is greatly ambiguous. The Article sets forth that it authorizes the use of non-judicial punishment in instances of "minor offenses," but does not detail what qualifies as a minor offense. If Congress were to explicitly define what constitutes a "serious offense," it would have the power to render it impossible for Article 15 to be used in cases of rape, murder, and aggravated assault.[17] Consider for a moment: is it likely that Congress, when it authorized Article 15, intended for the Article to be used in cases of rape and murder when it used the language "minor offense"? It may be worthwhile for Congress to revisit the issue and clarify its intent, and if it wishes, bar the use of military non-judicial punishment for some of these more egregious crimes.

But would shifting to a system which more closely mirrors Israel's separation of powers effectively curtail sexual harassment and other disciplinary issues? A report by Israel's State Comptroller indicates that systemic failure is still widespread in the state's military force. In 2021, 44% of complainants in sexual assault cases felt that the issue was not handled properly, and 26% reported that it was not handled at all.[18] Notably, the former figure (44%) is identical to the one cited by the United States DoD for mishandling of cases in 2014, indicating little to no decrease in systemic failures over the United States' system of non-judicial punishment. These figures would support the conclusion that merely increasing the use of judicial systems in cases of sexual assault, as well as imposing stricter reporting requirements upon commanding officers, are insufficient to remedy the failure of punitive systems.

[17] Lindsay Hoyle, "Command Responsibility — A Legal Obligation to Deter Sexual Violence in the Military."
[18] Josh Breiner, "A Third of Israeli Female Soldiers Were Sexually Harassed in 2021, Report Says." Haaretz.com, November 28, 2022. https://www.haaretz.com/israel-news/2022-11-28/ty-article/.premium/a-third-of-israeli-female-soldiers-were-sexually-harassed-in-2021-report-says/00000184-bee1-d136-affd-fff5ac590000 (Accessed July 20, 2023).

The Other Side of the Coin

Additionally, it would be misleading to suggest that systems of non-judicial punishment, such as Article 15, are not without their benefits. The prospect of removing the use of Article 15 has been criticized for its potential to prolong the period of time before a fair judgment can be reached, as well as increasing the burden of proof upon the victim. Indeed, certain researchers have maintained that Article 15 increases the effectiveness of the justice process, allows for cases to be more swiftly adjudicated, and allows for victims to pursue justice without having to meet the higher burden of proof that judicial systems typically impose.[19] Under a lower burden of proof, it becomes possible for victims to pursue justice without producing a prohibitive amount of evidence – often, under the judicial system, an impossible standard to meet in cases of sexual assault.[20] Additionally, certain ex-military researchers have reported that the lack of an effective response to sexual violence is not due to non-judicial punishment under Article 15, but rather the failure to utilize its procedures altogether. According to ex-military scholar Fredric Lederer:

> When I was an Army War College student, a survey that I conducted, concededly now quite dated, showed large numbers of commanders avoiding Article 15 in favor of other, quasi legal, informal procedures.[21]

[19] Jill A. Rough, and David J. Armor. "Sexual Assault in the U.S. Military: Trends and Responses."
[20] Heather Waltke, Gerald LaPorte, Danielle Weiss, Dawn Schwarting, Minh Nguyen, and Frances Scott. "Sexual Assault Cases: Exploring the Importance of Non-DNA Forensic Evidence." National Institute of Justice, November 9, 2017. https://nij.ojp.gov/topics/articles/sexual-assault-cases-exploring-importance-non-dna-forensic-evidence.
[21] Fredric I. Lederer, "From Rome to the Military Justice Acts of 2016 and beyond: Continuing Civilianization of the Military Criminal Legal System" (2017). Faculty Publications. 1943. https://scholarship.law.wm.edu/facpubs/1943.

The example provided above is, of course, an anecdotal one, but it reveals an observation which is strikingly central to the issue of resolving military reporting: if it is the case that commanding officers fail to make reports compliant with the terms of Article 15, then the Article itself is not responsible for the failure to remedy the U.S. military's rampant sexual assault problem. Rather, statistical indicators suggest that inadequate training on responses to sexual violence is one of the largest factors driving inappropriate behavior from commanding officers and perpetrators, as well as the crux of a crucial lapse in resources for victims.[22] According to independent research, exposure to comprehensive training across all military branches, ranks, and genders produced lower sexual assault incidence and superior knowledge (albeit at varying rates by demographic).[23] This conclusion runs contrary to the DoD's assertion that sexual assault training for active duty members is currently "effective," revealing the purportedly paradoxical nature of sexual assault occurrence despite the administration's "best efforts."[24]

Training alone, however, cannot be said to be the only necessary measure to remedy the widespread failure of sexual assault response systems. Effective, standard procedures must be in place to ensure that punitive responses meet a uniform standard and are not variable or inadequate at lower levels. Let us revisit the advantages as well as the flaws of Article 15 and further underscore that reform of non-judicial punishment is preferable, at least in cases of sexual violence, to judicial trial at court martial.

The inability of traditional judicial measures to deliver justice in cases of sexual assault is largely due to the aforementioned burden of proof, an evidentiary standard that is difficult to meet

[22] Kathryn Holland, Caridad Rabelo, Verónica, and Cortina, Lilia. "Sexual Assault Training in the Military: Evaluating Efforts to End the "Invisible War"." *American Journal of Community Psychology* 54(3-4): 289–303. doi:10.1007/s10464-014-9672-0.
[23] *Ibid.*
[24] *Supra* Department of Defense Annual Report on Sexual Assault in the Military, Fiscal Year 2010. At 104.

in a crime that involves no weapons, has no witnesses, and is often subject to conflicting testimony. An analysis of sexual assault cases on United States military bases in Japan revealed that in 2018, only 10% of sexual assault cases were successfully referred to face trial at court martial.[25] Literature reviews indicated insufficient evidence and low conviction rates as the reason behind reluctance to utilize traditional judicial systems, as well as the existence of informal and non-judicial punitive procedures.[26]

As Lederer indicated, however, informal and non-judicial procedures do not always include Article 15 punishments; commanding officers may opt to address the issue wholly under-the-table, or decline to take action whatsoever. Recall that 41% of sexual assault cases were found to have received no action whatsoever – not even a verbal reprimand properly filed under Article 15.[27] Indeed, it appears that the primary issue is not that Article 15 punishments (though ostensibly inadequate) are being implemented too broadly, rather that they are not being implemented at all.

Opportunities for Reform

The push to reform, rather than negate, non-judicial punishment under Article 15 has been headed by several veteran researchers, who argue that non-judicial punishment is the best available option to simultaneously support administrative flexibility and fairness to all parties. Recommended reforms include decreasing, rather than increasing, reporting requirements upon commanding officers, increasing the maximum punishments available under Article 15, more properly defining the scope under which Article 15 may be utilized, and limiting the number of times that an individual can receive non-judicial punishment before deferral to court-martial.

[25] Carloyn Warne, Mia Armstrong, "The Role of Military Law and Systemic Issues in the Military's Handling of Sexual Assault Cases." *Law and Society Review* 54(1): 265–300. doi:10.1111/lasr.12461.
[26] *Ibid.*
[27] Figures per the Department of Defense. Jill A. Rough, and David J. Armor. "Sexual Assault in the U.S. Military: Trends and Responses."

Research indicates that the failure of military commanders to satisfy reporting requirements under Article 15 is in large part due to the tremendous effort and amount of paperwork required to satisfy the provision.[28] We have seen that under Israel's military justice system, increasing reporting requirements and scrutiny upon commanding officers has done nothing to increase the overall effectiveness of sexual assault response relative to the United States, although it has marginally improved the amount of cases filed.[29] Further, extensive documentation has been performed in the U.S. military, which proves that removing discretionary authority from commanding officers disrupts the chain of military authority and leads commanders to exercise improper influence upon case decisions, damaging the independence of convening authorities. The result of a progressively less discretionary approach to sexual assault in the United States has been the opposite of the effect intended by Israeli provisions, such that the independence and transparency of administrative associations are demonstrably weakened rather than strengthened.[30] Together, these three sources support the hypothesis that increasing the amount of filings and reporting processes necessary to deliver punitive justice in no way facilitates the effectiveness of non-judicial punishment as a vehicle for responsiveness to sexual assault in the military. Rather, the solution suggested by both Lederer and Murphy, those with personal experience in the system, indicates that disciplinary issues are more effectively resolved when the influence of commanding authority is transparently acknowledged and filing requirements are made less complex.

[28] Francis A. Gilligan, Fredric I. Lederer. "Court Martial Procedure § 8–21.20" (2015). 4th ed. ISBN 978-0327049203.

[29] Josh Breiner, "A Third of Israeli Female Soldiers Were Sexually Harassed in 2021, Report Says."

[30] Major Elizabeth Murphy presents an in-depth discussion on how removing discretionary authority from commanders and increasing social pressures leads to increased corruption within the military, including the improper exercise of control over filings, trial proceedings, decision-making, and the implementation of punishment. *See* Elizabeth Murphy, "The Military Justice Divide: Why Only Crimes and Lawyers Belong in the Court-Martial Process" (2014). *Military Law Review* (220):129–190. https://whitecollarblog.mmwr.com/wp-content/uploads/sites/4/2014/07/major-murphy-article.pdf.

In return for the elimination of prohibitive filing requirements, increasing maximum punishments under Article 15 may elevate the level of available justice to one that more closely reflects the international standard. While detention or confinement is limited to a maximum of eight (8) days under Article 15, punishments in the United Kingdom are provided for up to 28 days with an extension to 90 days if approved by a higher authority.[31] Other possible increases include heftier fines, longer periods of extra duty, and longer restrictions. Coupled with increased sensitivity training and procedural awareness for commanding officers, these punishments stand to be implemented more effectively at the discretion of officers who are experienced with their subordinates and the reality of the situation.

We discussed earlier the issues of scope inherent within Article 15, such as the failure to define what constitutes a "minor offense." Because statutory provisions cannot be unilaterally defined by anyone but Congress, military administration is left powerless to reduce the ambiguity of this term.[32] Nevertheless, with or without legislative action, it is important to ascertain under what circumstances Article 15 is best used in order to exercise effective control over punitive issues, allow for fairness to victims, and increase the effectiveness of military operations. We have determined that, due to the prohibitive evidentiary standard, it is not desirable to refer all cases of sexual violence to trial at court-martial. However, it seems misleading to continue to classify violent crimes such as sexual and aggravated assault under the umbrella of "minor offenses" as provided in the Article's text. To be more linguistically precise without forcing disciplinary issues

[31] Frederic I. Lederer (2017). At 538. *Citing* Military Jurisdiction, Courts and Tribunals Judiciary, https://www.judiciary.gov.uk/ about-the-judiciary/the-justice-system/jurisdictions/military-jurisdiction/ (Accessed May 22, 2017). Fredric I. Lederer, "From Rome to the Military Justice Acts of 2016 and beyond: Continuing Civilianization of the Military Criminal Legal System."

[32] Article 15 is a constituent policy of the Uniform Code of Military Justice (UCMJ), a Congress-enacted and codified legal system. Congress retains the sole authority to modify statutory and codified U.S. law. *See* Rebecca Kheel, "Congress Faces Decision on Military Justice Overhaul." October 23, 2021. Military.com. https:// www.military.com/daily-news/2021/10/23/congress-faces-decision-military-justice-overhaul.html (Accessed July 21, 2023).

into traditional judicial contexts, it may be prudent to expand Article 15 to separately cover "serious offenses," define which disciplinary issues are covered by each term, and respectively implement graduated maximum punishments. Preferably, this change would be implemented by Congress in order to preserve legal consistency, but the benefits of implementing distinct customs and procedures would still logically stand to be realized via informal military policy and proper, uniform response training.

Finally, the use of non-judicial punishment must be limited as an alternative to traditional justice, such that it cannot be used as a subterfuge to prevent issues from reaching trial that should otherwise be heard.[33] At times, criminal cases in the military may be more appropriately referred to court-martial if the matter requires substantive investigation, exceptional procedural awareness, or public transparency.[34] Thereby, systematic issues arise if judicial punishment is eschewed as a whole in favor of the abuse of a situationally inappropriate policy. It then becomes necessary to ensure that the implementation of judicial punishment does not altogether fall away due to the expansion of non-judicial measures. If prior suggestions to decrease reporting requirements upon commanding officers, alongside statistically-vetted increases in response training, are followed and the expected increase in reporting is observed, non-judicial punishment could even serve as an effective apparatus for documenting misconduct, which can then be compelled to discovery at trial by court-martial. In other words, an increase in paper trails left by discretionary non-judicial punishments could help provide evidence of prior misconduct to satisfy burden-of-proof requirements that traditional justice systems levy upon the prosecution.

[33] Fredric I. Lederer, "From Rome to the Military Justice Acts of 2016 and beyond: Continuing Civilianization of the Military Criminal Legal System." At 538.
[34] Elizabeth Murphy, "The Military Justice Divide: Why Only Crimes and Lawyers Belong in the Court-Martial Process," 129-190.

It then becomes obvious how, through reform, non-judicial punishment is best used in conjunction with traditional court systems, rather either being wholly eliminated or used as the sole basis for punitive justice.

Conclusion

As it stands, the problem with sexual violence in the U.S. military remains rampant and is in no way effectively addressed by measures of non-judicial punishment, while simultaneously ignored almost entirely by judicial trial systems. Nevertheless, the solution to resolving punitive issues, while counterintuitive, is logically quite simple and corroborated by experienced military researchers. Rather than mirroring ineffective comparative systems, which increase the density of proceedings and put increased pressure upon commanding officers, statistics show that gently increasing the prevalence of awareness and response training is most effective in changing the behavior of military authorities in a constructive manner. Additionally, while non-judicial punishment is currently poorly defined under Article 15, effective implementation of victim-friendly procedures can be achieved either by legislative amendment or the gentle cultural overhaul of informal military procedures. Addressing the jarringly low amount of justice available under Article 15, however, as in the issue of inadequate maximum punishments, is an issue that will have to be taken up by legislative authority and reviewed for better application. Overall, while non-judicial punishment in the military is in dire need of reform, it is a necessary measure to provide efficient, tailored justice in issues of internal discipline and has the potential to increase access to justice for victims in a manner that courts, which levy upon the victim unattainable burdens of proof, never will.