

LESSONS FROM THE MILITARY ON REFORMING POLICE DISCIPLINE

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In recent years, there has been significant public debate concerning policing in the United States. Current events and recurring instances of police brutality have drawn attention to police misconduct and reinvigorated calls for systemic reforms to policing and police discipline. While there is a growing consensus in the United States among citizens, politicians, and even officers, that policing—and, in particular, police discipline procedure—requires reform, there is far less agreement as to what changes are necessary and feasible. In the U.S. military context, Congress enacted the Uniform Code of Military Justice (UCMJ), which created a separate military law system that imposes punishment for various administrative and criminal offenses. Some police reform advocates have proposed enacting a UCMJ equivalent—a Uniform Code of Police Justice (UCPJ)—for the nation’s police forces. This Note argues in favor of adopting a UCPJ and proposes a recommended Code structure, while acknowledging that a UCPJ would not be a cure-all for our nation’s policing troubles; further systemic reforms would still be required.

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INTRODUCTION

In recent years, there has been significant public debate concerning policing in the United States. Current events and recurring instances of police brutality against people of color¹ have drawn attention to police misconduct, underscored the racist nature of policing,² and reinvigorated calls for systemic reforms to policing and police discipline.³ Social and political movements have advocated for laws and

¹ See, e.g., *Atlanta Police Shooting: Rayshard Brooks Death Declared Homicide*, BBC NEWS (June 15, 2020, 7:11 PM), <https://www.bbc.com/news/world-us-canada-53047282>; Wil Gafney, *Jonathan Price's Shooting Was Not 'Reasonable.' Most Police Killings of Black People Aren't.*, NBC NEWS: THINK (Oct. 7, 2020, 7:11 PM), <https://www.nbcnews.com/think/opinion/jonathan-price-s-shooting-was-not-reasonable-most-police-killings-ncna1242463>; Evan Hill, Ainars Tienfenthaler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (Apr. 20, 2021), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html>; Richard A. Oppel Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Apr. 26, 2021), <https://www.nytimes.com/article/breonna-taylor-police.html>.

² See, e.g., Radley Balko, *There's Overwhelming Evidence that the Criminal Justice System Is Racist. Here's the Proof.*, WASH. POST (June 10, 2020), <https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system>; Zach Beauchamp, *What the Police Really Believe*, VOX (July 7, 2020, 8:10 AM), <https://www.vox.com/policy-and-politics/2020/7/7/21293259/police-racism-violence-ideology-george-floyd> ("America's epidemic of police violence is not limited to what's on the news. For every high-profile story . . . there are many, many allegations of police misconduct you don't hear about . . .").

³ See, e.g., Associated Press, *Only 5% of Americans Say Police Reform Is Unnecessary*, FORTUNE (June 23, 2020, 8:17 AM), <https://fortune.com/2020/06/23/american-support-police-reform-black-lives-matter> ("Americans overwhelmingly want clear standards on when police officers may use force and consequences for officers who do so excessively . . ."); Justin McFarlin, *Cops Need a 'Uniform Code of Police Justice' to Set*

policies that reenvision policing,⁴ or defund it altogether.⁵ However, while there is a growing consensus in the U.S. among citizens,⁶ politicians,⁷ and even officers⁸ that policing—and in particular, police discipline procedure⁹—requires reform, there is far less agreement as to what changes are necessary and feasible.¹⁰

Outside of the policing context and police discipline debate lies an existing military justice framework. Congress enacted the Uniform Code of Military Justice (UCMJ),¹¹ which created a separate military law system that imposes punishment for various administrative¹² and criminal offenses.¹³ These include charges that are unique to the mili-

Consistent Standards, TASK & PURPOSE (Sept. 23, 2016), <https://taskandpurpose.com/community/cops-need-uniform-code-police-justice-set-consistent-standards>.

⁴ Suggested reforms have included introducing body cameras, increasing sensitivity and antibias training, utilizing deescalation training, eliminating qualified immunity, disclosing police officers' discipline records, and much more. See, e.g., *Police Body-Worn Cameras: Let's Do It Right*, ACLU MASS., <https://www.aclum.org/en/police-body-worn-cameras-lets-do-it-right> (last visited June 2, 2021); Caroline Preston, *Police Education Is Broken. Can It Be Fixed?*, HECHINGER REP. (June 28, 2020), <https://hechingerreport.org/police-education-is-broken-can-it-be-fixed>; Colin Doyle, *Want to Reform the Police? Get Rid of Qualified Immunity*, WBUR (July 28, 2020), <https://www.wbur.org/cognoscenti/2020/07/28/protests-police-immunity-colin-doyle>; Marc Levy, *Lawmakers Urged to Make Police Discipline Records Public*, AP NEWS (June 19, 2020), <https://apnews.com/article/508f480d6950688cefb62469bac33b6>.

⁵ See Scottie Andrew, *There's a Growing Call to Defund the Police. Here's What It Means*, CNN (June 17, 2020, 10:32 AM), <https://www.cnn.com/2020/06/06/us/what-is-defund-police-trnd/index.html>.

⁶ See Associated Press, *supra* note 3.

⁷ See Heather Caygle & Sarah Ferris, *Congress Makes Last-Ditch Push on Police Reform*, POLITICO (Sept. 3, 2020, 4:30 AM), <https://www.politico.com/news/2020/09/03/congress-push-police-reform-407833> (stating that after the shooting of Jacob Blake, a Black man, “a bipartisan group of members” has engaged “in a last-ditch attempt to restart negotiations, which collapsed in late June amid partisan recriminations”).

⁸ See Harry Bruinius, *More and More, Push for Police Reform Starts with the Chief*, CHRISTIAN SCI. MONITOR (Oct. 18, 2016), <https://www.csmonitor.com/USA/Politics/2016/1018/More-and-more-push-for-police-reform-starts-with-the-chief> (“More and more, many within the top brass of American policing are doing what was once unthinkable: acknowledging that their departments have created many of the deep rifts that now beset minority communities and the men and women who police them.”).

⁹ See Darrel W. Stephens, *Police Discipline: A Case for Change*, NAT'L INST. JUST.: NEW PERSPS. IN POLICING 1, 10 (2011) (“It seems clear that police disciplinary processes are in need of revision, but what is not clear is *what* should be done or *how*.”).

¹⁰ See Charlotte Alter, *Black Lives Matter Activists Want to End Police Violence. But They Disagree on How to Do It*, TIME (June 5, 2020, 3:54 PM), <https://time.com/5848318/black-lives-matter-activists-tactics> (discussing “tactical differences” between activists whereby “[s]ome activists have adopted a reformist approach,” while others have “push[ed] for more aggressive strategies that weaken or eliminate police altogether”).

¹¹ Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 801–946.

¹² *Id.* § 815 (containing UCMJ Article 15, which discusses non-judicial punishment).

¹³ *Id.* §§ 877–934 (providing the “punitive articles” of the Code, which include specific offenses that can result in punishment by court-martial).

tary context, such as punishment for absence without leave,¹⁴ as well as wrongdoings that could be punished in the civilian civil or criminal justice systems, such as punishment for murder,¹⁵ manslaughter,¹⁶ and other crimes.¹⁷ Notwithstanding the UCMJ's shortcomings and the structural criticisms levied against the military justice system, discussed *infra*, the U.S. military's experience with monitoring and controlling servicemembers' behavior may be instructive in crafting solutions for the police discipline problems that plague our country's law enforcement divisions.

Some police reform advocates and scholars, including Monu Bedi, have proposed enacting a UCMJ equivalent—a Uniform Code of Police Justice (UCPJ)—for the nation's police forces.¹⁸ This reform proposal, while innovative, raises numerous questions which are discussed here. This Note brings a novel contribution to this nascent discussion by suggesting a unique formulation of a UCPJ. Building off of the work of other scholars—most importantly, Monu Bedi,¹⁹ whose scholarship underscores the need for a UCPJ and advises drafting a punitive code that is enforced through the existing civilian criminal justice system²⁰—this Note goes further than Bedi suggests by explicitly contemplating the personal and subject matter jurisdiction of the Code, and urging that the Code be enforced by a separate and independent set of investigators and prosecutors who could bring charges within the existing Article III civilian criminal justice system.

Part I contextualizes the UCPJ proposal by discussing the current internal and external approaches to police discipline across the country, identifying the prevalent flaws and inconsistencies with notions of justice and accountability, and reflecting on the differences

¹⁴ *Id.* § 886.

¹⁵ *Id.* § 918.

¹⁶ *Id.* § 919.

¹⁷ *See, e.g., id.* § 920 (rape and sexual assault); *id.* § 922 (robbery); *id.* § 928b (domestic violence); *id.* § 921 (larceny and wrongful appropriation).

¹⁸ *See, e.g.,* Monu Bedi, *Toward a Uniform Code of Police Justice*, 2016 U. CHI. LEGAL F. 13, 13 (2016) (arguing that a UCPJ “would ultimately be more effective in regulating police behavior and deterring instances of abuse”); Monu Bedi & Greg Everett, *It's Time for a Uniform Code of Police Justice*, NAT'L REV. (June 22, 2020, 6:30 AM), <https://www.nationalreview.com/2020/06/police-reform-model-after-uniform-code-military-justice> (arguing that Congress should adopt a UCPJ modeled after the UCMJ which would “recognize the unique role that police officers play in our society by holding them criminally accountable for misconduct in the same way that military personnel can be held criminally accountable [under the UCMJ]”); McFarlin, *supra* note 3 (“Congress should establish a national standard overseeing the conduct of all law enforcement personnel through nonbinding guidelines.”).

¹⁹ *See* Bedi, *supra* note 18, at 15 (“My proposal, crudely put, is to criminalize these provisions that currently only result in civil penalties such as demotion or termination.”).

²⁰ *See id.* at 40–41.

and similarities between law enforcement and servicemembers. Part II first outlines the military justice system and the implementation of the UCMJ. It then discusses the potential reach of the Code's subject matter and personal jurisdiction. Part II concludes by proposing a means of enforcing the Code through the establishment of a special unit of investigators and prosecutors who would bring charges against officers before Article III judges. Part III acknowledges the potential limitations of such a Code, many of which arise from the unique contextual differences between law enforcement and servicemembers. Ultimately, this Note argues that while adopting a UCPJ would not be a panacea, it is highly advisable, as it would create uniform standards, promote accountability, and enhance community trust in police forces. This Note contributes to the nascent discussion among scholars who initially suggested enacting a UCPJ by explicitly contemplating the personal and subject matter jurisdictions of the Code and urging that it be enforced by a separate, independent set of investigators and prosecutors within the Article III civilian criminal justice system.

I

CURRENT APPROACHES TO POLICE DISCIPLINE AND THEIR INCONGRUENCE WITH DISCIPLINARY GOALS AND NOTIONS OF JUSTICE

Given the disjointed nature of the U.S. federal system, there is no uniform approach to police discipline in our nation, and the procedures employed for such discipline vary *drastically* across the country.²¹ Nonetheless, a few generalizations can be made with regard to modern-day police discipline. Police officers may be subject to oversight and consequences through either non-judicial (mostly internal) police discipline or through external, judicially imposed punishment. Section I.A first discusses the contours of existing non-judicial internal department channels and non-judicial community channels (such as citizen review boards). Section I.B then examines existing external discipline, which is achieved through the imposition of civil and/or criminal liability under state or federal law. Both Sections highlight that these varied routes for reprimanding police misconduct have been ineffective in altering police behavior or deterring wrongdoing, have failed to achieve justice for victims of police violence, and have facilitated the continued deterioration of public

²¹ See Amelia Thomson-DeVeaux, Nathaniel Rakich & Likhitha Butchireddygar, *Why It's So Rare for Police Officers to Face Legal Consequences*, FIVETHIRTYEIGHT (Sept. 23, 2020, 4:53 PM), <https://fivethirtyeight.com/features/why-its-still-so-rare-for-police-officers-to-face-legal-consequences-for-misconduct> ("There is no national system for reporting police misconduct . . .").

trust in law enforcement. In light of these inadequacies, Section I.C reviews the emergence of the UCPJ proposal and its potential to achieve various police disciplinary reform objectives.

A. *Internal and Other Non-Judicial Police Discipline*

Generally, police officers may be subject to review and reprimand by internal or other non-judicial disciplinary sources, including superior officers, a police department's Internal Affairs Bureau (IAB), and/or a city's civilian complaint review board or independent police auditor.²² The degree to which residents participate in overseeing local law enforcement varies across the nation. Some oversight boards "investigate allegations of police misconduct and recommend actions to the chief or sheriff," while others review internal police investigation findings and merely recommend their approval or rejection.²³

Ordinarily, the internal or non-judicial disciplinary process commences when an incident occurs (such as use of force²⁴) or a complaint against an officer is filed (usually by community members, but at times, by peer officers or superiors). Typically, once these complaints are investigated by the department's IAB or the city's version of a civilian complaint review board, if the allegations are deemed meritorious, disciplinary action may be recommended. The sanctions that an officer may face include written warnings, loss of vacation days, suspension without pay, probation, termination, or transfer, amongst other punishments.²⁵ The severity of the consequences that an officer may face in any given instance depends on the particular department's disciplinary approach and is impacted by numerous factors, including the gravity of the offense, the officer's prior record, and

²² See PETER FINN, NAT'L INST. JUST., CITIZEN REVIEW OF POLICE: APPROACHES AND IMPLEMENTATION, at iii (2001), <https://www.ncjrs.gov/pdffiles1/nij/184430.pdf>; *Police Oversight by Jurisdiction (USA)*, NAT'L ASS'N FOR CIVILIAN OVERSIGHT L. ENF'T, https://www.nacole.org/police_oversight_by_jurisdiction_usa (last visited June 2, 2021) (providing a comprehensive database for accessing various U.S. jurisdictions' internal police discipline procedure guidelines and explanations).

²³ FINN, *supra* note 22, at iii.

²⁴ While "[t]here is no single, universally agreed-upon definition of use of force," this term has been described by the International Association of Chiefs of Police "as the 'amount of effort required by police to compel compliance [from] an unwilling subject.'" *Overview of Police Use of Force*, NAT'L INST. JUSTICE (Mar. 5, 2020), <https://nij.ojp.gov/topics/articles/overview-police-use-force> (citing INT'L ASS'N OF CHIEFS OF POLICE, POLICE USE OF FORCE IN AMERICA, 2001, at 1 (2001), <https://www.theiacp.org/sites/default/files/2018-08/2001useofforce.pdf>).

²⁵ See Christopher J. Harris & Robert E. Worden, *The Effect of Sanctions on Police Misconduct*, 60 CRIME & DELINQ. 1258, 1271 (2014).

the received or anticipated publicity of the incident, among others.²⁶ Moreover, even when officers are fired for misconduct, “a stunningly high percentage . . . are eventually rehired after a lengthy appeals process,” which often offers officers numerous routes to appellate review, including in front of third-party arbitrators.²⁷ In sum, police officers may be subject to a wide array of disciplinary measures, many of which do not preclude them from continued service.

1. *The Blue Shield: Walling Off Public Accountability*

Notably, not all states permit officers' conduct to be reviewed by citizens or other “outsiders,” instead authorizing solely fellow officers to engage in such oversight. The Law Enforcement Officers' Bill of Rights (LEOBOR) was born in the late 1960s and early 1970s in response to civil rights activists' efforts and “demand[s] [for] greater police accountability, including the advent of civilian review boards.”²⁸ However, LEOBORs' design protects law enforcement officers from investigation and/or disciplinary proceedings arising out of on-duty conduct by “codif[ying] workplace protections for police officers far beyond those afforded to other government employees.”²⁹ Amongst the protective measures that the LEOBOR provides officers under investigation are that it enables peer officer investigations to potentially preempt civilian review.³⁰ Today, a strong minority of states have statutorily codified a LEOBOR, and others have adopted such a bill of rights through police union contract provisions.³¹ Initially, LEOBORs were conceived of as a means for providing law enforcement officers additional due process protections—such as only

²⁶ See Stephens, *supra* note 9, at 5–10 (discussing various considerations in the current police disciplinary process).

²⁷ Christopher Ingraham, *Police Unions and Police Misconduct: What the Research Says About the Connection*, WASH. POST (June 10, 2020, 7:54 AM), <https://www.washingtonpost.com/business/2020/06/10/police-unions-violence-research-george-floyd/>; see also Stephen Rushin, *Police Disciplinary Appeals*, 167 U. PA. L. REV. 545, 545 (2019) (characterizing police disciplinary appeals as “an underappreciated barrier to officer accountability and organizational reform”); Stephens, *supra* note 9, at 1.

²⁸ Eli Hager, *Blue Shield*, MARSHALL PROJECT (Apr. 27, 2015), <https://www.themarshallproject.org/2015/04/27/blue-shield>.

²⁹ Rebecca Tan, *There's a Reason It's Hard to Discipline Police. It Starts with a Bill of Rights 47 Years Ago.*, WASH. POST (Aug. 29, 2020, 8:00 AM), https://www.washingtonpost.com/history/2020/08/29/police-bill-of-rights-officers-discipline-maryland.

³⁰ See *id.* (describing how both Baltimore and Montgomery county have civilian review boards, but “police accountability advocates call them toothless because they cannot interrogate officers or request disciplinary action”).

³¹ Hager, *supra* note 28. Currently, fourteen states—California, Delaware, Florida, Illinois, Kentucky, Louisiana, Maryland, Minnesota, Nevada, New Mexico, Rhode Island, Virginia, West Virginia, and Wisconsin—have statutorily enacted LEOBOR. *Id.* Some states have enacted similar Bills of Rights for correction officers. *Id.*

permitting officers to be questioned for “a reasonable length of time, at a reasonable hour, by only one or two investigators (who must be fellow policemen), and with plenty of breaks for food and water”³²—thus ensuring fairness and justice in investigations and prosecutions of officer misconduct. In modern practice, however, LEOBORs have come to serve as a nearly impenetrable “blue shield,” impeding efforts to promote accountability, punish misbehaving officers, and remove repeat offenders from the police force.³³

Notwithstanding the Supreme Court’s police-friendly rulings that provided the impetus for states drafting and adopting various versions of the LEOBOR,³⁴ the propriety of this blue shield remains hotly debated,³⁵ especially in the wake of repeated instances of police brutality and subsequent failures of police disciplinary procedures to achieve accountability for officers’ wrongdoing.³⁶ Union representatives contend “that what constitutes due process for civilians is not protection enough for enforcers of the law, who operate under the aggressive scrutiny of internal investigators and the public.”³⁷ On the flip side, critics and police reform advocates urge that law enforcement officials should not be held to a more lenient standard, nor should they be afforded additional procedural protections, for this creates the impression that they are somehow above the law.³⁸ Likewise, such blue shields do little to promote accountability;³⁹ by ham-

³² *Id.* For example, Maryland’s LEOBOR includes a “cooling-off period,” such that “officers cannot be forced to make any statements for 10 days after the incident, during which time they are presumed to be searching for a lawyer.” *Id.*

³³ *See id.*

³⁴ *See, e.g.,* Gardner v. Broderick, 392 U.S. 273, 278–79 (1968) (holding that “the New York City Charter [provision] pursuant to which petitioner was dismissed cannot stand” because the officer “was dismissed solely for his refusal to waive the immunity to which he is entitled if he is required to testify despite his constitutional privilege”); Garrity v. New Jersey, 385 U.S. 493, 497–98 (1967) (holding that threatening police officers with termination if they did not testify against themselves—even in an internal or administrative investigation—deprived the officers of their Fifth Amendment right against self-incrimination).

³⁵ *See* Hager, *supra* note 28 (detailing that originally these rights were not considered controversial, but, “the debate is mounting, now that Maryland’s 43-year-old LEOBOR seems to have prevented a swift accounting of how Freddie Gray was killed”).

³⁶ *See, e.g.,* Steve Lash, *Lawmakers Eye Changes to Police ‘Bill of Rights,’ Cite Need for Oversight*, DAILY REC. (Dec. 13, 2020), <https://thedailyrecord.com/2020/12/13/lawmakers-eye-changes-to-police-bill-of-rights-cite-need-for-oversight>; Matt Bittle, *Delaware Officers’ Bill of Rights Debated*, BAYTOBAY NEWS (Dec. 12, 2020, 8:30 PM), <https://baytobaynews.com/stories/delaware-officers-bill-of-rights-debated,39273?>

³⁷ Hager, *supra* note 28.

³⁸ *See id.* (questioning why police officers “want better treatment than other criminal defendants[]” since “[t]hey already have 95 percent of civil-rights law on their side, starting with qualified immunity”).

³⁹ *See* Steve Alhquist, *Is the Law Enforcement Officer’s Bill of Rights About Accountability?*, UPRISE RI (Nov. 19, 2020), <https://upriseri.com/2020-11-19-leobor>

pering transparency and stifling investigations and prosecutions, LEOBOR actually *undercuts* efforts to hold police officers responsible for their actions.⁴⁰ And, while LEOBOR's protections "apply only during the *internal* investigation of police officers," and officers "would not receive this special treatment during a criminal investigation by an outside agency such as the Department of Justice," such *external* investigations, as discussed below, are exceedingly rare.⁴¹

2. *The Debate over Internal and Non-Judicial Discipline's Efficacy*

Despite certain high-level overarching commonalities, the reality of U.S. internal and non-judicial police discipline is more aptly characterized as fragmented, inconsistent, and flawed.⁴² The status quo has consistently been critiqued from both sides of the aisle.⁴³ On the one hand, police critics and reform activists urge that the police discipline system is too lenient because its leaders are repeatedly reluctant to investigate and charge accused officers,⁴⁴ it lacks clear standards, it

(quoting the Rhode Island State Director of the International Brotherhood of Police Officers as stating "LEOBor [sic] has nothing to do with the accountability. LEOBOR comes into play after the fact – after a complaint's been made, and an officer has been charged").

⁴⁰ See Hager, *supra* note 28; Bittle, *supra* note 36 (quoting a former police officer as stating that the LEOBOR affords police "such broad power and authority and protections that it really does make it impossible to get rid of bad police, and not even get rid of them but even discipline them").

⁴¹ See Hager, *supra* note 28.

⁴² See Stephens, *supra* note 9, at 5–10; *see also* POLICE ACCOUNTABILITY TASK FORCE, RECOMMENDATIONS FOR REFORM: RESTORING TRUST BETWEEN THE CHICAGO POLICE AND THE COMMUNITIES THEY SERVE 43 (2016), https://igchicago.org/wp-content/uploads/2017/01/PATF_Final_Report_4_13_16-1.pdf (noting that reform efforts have similarly been fragmented and thus ineffective).

⁴³ See Stephens, *supra* note 9, at 1–2 ("[I]t is a frustrating experience that leaves everyone with a sense that it has fallen well short of the primary purpose of holding officers accountable for their actions and encouraging behavior that falls within departmental expectations and values.").

⁴⁴ See, e.g., Vera Bergengruen & Tessa Berenson, 'It Was a Tinderbox.' *How George Floyd's Killing Highlighted America's Police Reform Failures*, TIME (June 4, 2020, 1:22 PM), <https://time.com/5848368/george-floyd-police-reform-failures> (citing to a 2015 report which "found that only 21% of conduct complaints in the [Minneapolis Police Department] were ever even investigated, with almost half dismissed outright and the rest resulting in 'coaching,'" whereby officers could "receive a refresher on department policy instead of a suspension"); German Lopez, *Cops Are Almost Never Prosecuted and Convicted for Use of Force*, VOX (Nov. 14, 2018, 4:12 PM), <https://www.vox.com/identities/2016/8/13/17938234/police-shootings-killings-prosecutions-court>; Rachel Tecott & Sara Plana, *Maybe U.S. Police Aren't Militarized Enough. Here's What Police Can Learn from Soldiers*, WASH. POST (Aug. 16, 2016, 5:00 AM), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/08/16/maybe-u-s-police-arent-militarized-enough-soldiers-are-better-trained-to-deescalate/> ("The standards governing police use of force are weaker than the standards governing soldiers—and that could be a source of trouble.").

fails to ferret out repeat offenders,⁴⁵ it is incapable of reforming misbehaving officers' conduct,⁴⁶ and it is ill equipped to achieve justice.⁴⁷ Critics assert that the inconsistent, opaque, and highly discretionary approach to police discipline not only keeps dangerous officers on the job by excusing their misconduct and shielding them from responsibility,⁴⁸ but also results in a miscarriage of justice and a devaluation of police brutality victims' lives.⁴⁹ These arguments are bolstered by mounting evidence that civilian complaint review and oversight boards' findings of officers' misconduct and recommendations for punishment are often ignored, overruled, or dismissed by police department insiders.⁵⁰ While such review boards were initially conceived of and established to serve as independent bodies—intended to provide an avenue for public input, accountability for officers' wrongdoing, and bolster community trust in police—the reality of such review boards has been far different.⁵¹ Much data suggests that, in

⁴⁵ See, e.g., Rinku Sen, *Repeat Police Offenders Remain on Force and Hidden from Public*, HUFFPOST (June 27, 2010, 5:12 AM), https://www.huffpost.com/entry/repeat-police-offenders-r_b_552371.

⁴⁶ Shaila Dewan & Serge F. Kovalski, *Thousands of Complaints Do Little to Change Police Ways*, N.Y. TIMES (June 8, 2020), <https://www.nytimes.com/2020/05/30/us/derek-chauvin-george-floyd.html>.

⁴⁷ See, e.g., Simon Vozick-Levinson, *Black Lives Matter: 11 Racist Police Killings with No Justice Served*, ROLLING STONE (Dec. 4, 2014, 6:36 PM), <https://www.rollingstone.com/politics/politics-news/black-lives-matter-11-racist-police-killings-with-no-justice-served-40001>.

⁴⁸ See Ashley Southall, *323,911 Accusations of N.Y.P.D. Misconduct Are Released Online*, N.Y. TIMES (Aug. 20, 2020), <https://www.nytimes.com/2020/08/20/nyregion/nypd-ccrb-records-published.html> (discussing a study wherein less than three percent of the 323,911 surveyed complaints resulted in the officer being punished and only twelve officers were terminated, suggesting “that the Police Department, whose commissioner makes the final decision on disciplinary matters, ‘is unwilling to police itself’”); Mihir Zaveri, *A Pattern of Leniency Toward Officers Accused of Misconduct*, N.Y. TIMES (Nov. 16, 2020), <https://www.nytimes.com/2020/11/16/nyregion/nypd-discipline-ccrb.html> (citing to NYC Police Department data that found that “[s]ome officers had multiple findings against them but continued to rise in the department”).

⁴⁹ See, e.g., Katherine Hawkins, *Unqualified Impunity: When Government Officials Break the Law, They Often Get Away with It*, POGO (Oct. 22, 2020), <https://www.pogo.org/analysis/2020/10/unqualified-impunity-when-government-officials-break-the-law-they-often-get-away-with-it>.

⁵⁰ For an example of a police department ignoring the civilian complaint review and oversight board's findings and recommendations, see Ashley Southall, Ali Watkins & Blacki Migliozi, *A Watchdog Accused Officers of Serious Misconduct. Few Were Punished.*, N.Y. TIMES (Nov. 15, 2020), <https://www.nytimes.com/2020/11/15/nyregion/ccrb-nyc-police-misconduct.html> (identifying a “pattern of lenient punishment [that] holds true for about 71 percent of the 6,900 misconduct charges over the last two decades in which the agency, the Civilian Complaint Review Board, recommended the highest level of discipline”).

⁵¹ See *id.*; see also Zaveri, *supra* note 48 (“[D]ata shows that the review board brought misconduct charges against 3,188 police officers. Of those officers, 798 were put back onto

New York and elsewhere,⁵² these boards have been rendered nugatory and “toothless.”⁵³ Moreover, in many states, police disciplinary records are confidential, and the public is kept in the dark with regard to officers’ misconduct, thus rendering transparency an illusory element of the police disciplinary system.⁵⁴ Though transparency and disclosure do not necessarily in and of themselves modify conduct, “sunlight is said to be the best disinfectant[.]”⁵⁵ and is critical in the police disciplinary context for several reasons. Public availability of police disciplinary records could improve accountability, since the public would be more likely to pressure law enforcement’s leaders to investigate, charge, punish, or at least remove from service officers who have a proven track record of disobeying the rules. Furthermore, disclosure of such records would put police officers “on notice,” underscoring that they cannot hide their misdeeds in the shadows, and that if they choose to misbehave, they will need to answer for their actions.

On the other hand, police officers, unions, and police executives generally also harbor frustrations with police discipline procedures, but for different reasons. They tend to characterize police discipline as unfair, inconsistent, untimely, unpredictable, and disproportionate.⁵⁶ Moreover, police representatives and unions urge that recently adopted reforms—such as certain states’ adoption of novel disclosure

the street by the department after receiving additional instructions, training or warnings, and 890 were not disciplined at all.”).

⁵² See, e.g., Catherine Rentz, *Baltimore Police Failed to Share Misconduct Complaints with Civilian Oversight Board; Promise to Do So Now*, BALT. SUN (Aug. 31, 2016, 9:11 PM), <https://www.baltimoresun.com/maryland/baltimore-city/bs-md-civilian-review-board-20160831-story.html> (noting the failures of the Baltimore Civilian Oversight Board to have a substantial impact on overseeing police misconduct because “Baltimore police did not forward to the board from 2013 to 2015 more than two-thirds of the police misconduct cases that are under its purview”).

⁵³ Southall et al., *supra* note 50; see also ROBERT A. PERRY, *MISSION FAILURE: CIVILIAN REVIEW OF POLICING IN NEW YORK CITY 1994–2006*, at 3 (2007), https://www.nyclu.org/sites/default/files/publications/nyclu_pub_mission_failure.pdf (suggesting that the CCRB has been ineffective and “has failed to win the confidence of the city’s residents”); Hector Soto, *The Failure of Civilian Oversight*, GOTHAM GAZETTE (Oct. 9, 2007), <https://www.gothamgazette.com/index.php/open-government/3683-the-failure-of-civilian-oversight>.

⁵⁴ See *Is Police Misconduct a Secret in Your State?*, PROJECT WNYC, <https://project.wnyc.org/disciplinary-records> (last visited June 2, 2021). However, some states, such as New York, have begun to repeal these laws, rendering police discipline records publicly available. See, e.g., Stephanie Wykstra, *The Fight for Transparency in Police Misconduct, Explained*, VOX (June 16, 2020, 7:30 AM), <https://www.vox.com/2020/6/16/21291595/new-york-section-50-a-police-misconduct>.

⁵⁵ U.S. Supreme Court Justice Louis D. Brandeis penned this phrase in *OTHER PEOPLE’S MONEY* 92 (1914).

⁵⁶ See Stephens, *supra* note 9, at 1.

laws that declassify police officers' misconduct and personnel records⁵⁷—are misguided, unjust, and threaten police officers' safety.⁵⁸ Notwithstanding which side of the police reform debate one is on, there is consensus that non-judicial and “internal discipline in police departments across the country” is “uneven, arbitrary, and entirely discretionary.”⁵⁹

B. *External Police Discipline: Civilian Civil and Criminal Law*

In addition to *internal* and/or other forms of *non-judicial* discipline, officers may also be subject to *external judicial* sanctions for their misconduct in the form of civil⁶⁰ and/or criminal liability⁶¹ under state or federal law. Yet, here too, critics assert that investigations of police misconduct are uninquisitive and police prosecutions are too infrequent,⁶² in part due to prosecutors' conflicting interests that may dissuade them from bringing charges against officers with whom they work.⁶³ And even when such prosecutions do occur, officers are rarely

⁵⁷ See Wykstra, *supra* note 54.

⁵⁸ See, e.g., Southall, *supra* note 48 (noting that in the aftermath of the public release of “323,000 accusations of misconduct against current and former New York City police officers,” police “unions vowed to continue fighting against . . . ‘the improper dumping of thousands of documents containing unproven, career-damaging, unsubstantiated allegations that put our members and their families at risk’”).

⁵⁹ Kate Levine, *Discipline and Policing*, 68 DUKE L.J. 839, 842 (2019); see also Stephens, *supra* note 9, at 1–10.

⁶⁰ See Hawkins, *supra* note 49 (“Another option for holding officials accountable is civil law. Rather than depending on a prosecution to hold an official accountable, the victim of the misconduct can sue, and if victorious, force the person who violated their rights to compensate them for the damage.”). This Note does not focus on the use of civil liability as a means to discipline police officers. However, it would be remiss not to mention that holding police officers civilly liable—for example, in a wrongful death suit—is far from an easy feat, especially on account of legal protections afforded to police officers through doctrines such as “qualified immunity,” which shields police officers from suits alleging that they violated a citizen’s rights unless the officer violated a “clearly established” statutory or constitutional right. Daniel Epps, *Abolishing Qualified Immunity Is Unlikely to Alter Police Behavior*, N.Y. TIMES (June 16, 2020), <https://www.nytimes.com/2020/06/16/opinion/police-qualified-immunity.html>; see also Pierson v. Ray, 386 U.S. 547, 557 (1967) (holding that qualified immunity applied to police officers charged under 42 U.S.C. § 1983).

⁶¹ See Bedi, *supra* note 18, at 24.

⁶² See Thomson-DeVaux et al., *supra* note 21 (noting that police officers rarely “face criminal legal consequences for using excessive force—or even fatal violence—against civilians”); Hawkins, *supra* note 49 (referencing an analysis of “8,300 credible police misconduct accusations against nearly 11,000 police officers” wherein “only 3,238 resulted in any legal charges”).

⁶³ See Alexandra Hodson, Note, *The American Injustice System: The Inherent Conflict of Interest in Police-Prosecutor Relationships & How Immunity Lets Them ‘Get Away with Murder,’* 54 IDAHO L. REV. 563, 582–89 (2018) (describing the historical relationship between prosecutors and police throughout the past forty years, highlighting the fact that,

convicted and/or imprisoned for their misconduct.⁶⁴ Efforts to prosecute police officers are further frustrated by state and federal laws' special allowances for officers, such as the provision of unique defenses for misconduct.⁶⁵ For example, the legal doctrine of "qualified immunity" grants an extraordinarily "broad shield for government officials[,] including police officers, by protecting them from "liability for damages—even if they have violated the Constitution—so long as they did not violate 'clearly established' law," which is discerned based on whether "a prior court has held that an officer violated the Constitution under virtually identical circumstances."⁶⁶ This doctrine erects a difficult and almost impenetrable standard to meet, rendering prosecuting officers even more of a challenge.⁶⁷ Thus, as with internal and non-judicial discipline, external judicial discipline is also seen as ineffective in controlling police behavior and punishing transgressors.

C. *Police Discipline Reform Objectives and the Emergence of the UCPJ Proposal*

In light of overwhelming dissatisfaction with the aforementioned non-judicial, internal, and external measures, there has been a rallying cry to reimagine the nation's approach to police discipline.⁶⁸ In this tumultuous context, proposals for a UCPJ began to emerge.⁶⁹ This

while once disjointed, the two groups now work together closely, which has led to "a drastic increase in misconduct due to the fraternal bond between the two agencies").

⁶⁴ See Dewan & Kovaleski, *supra* note 46 ("[I]t remains notoriously difficult in the United States to hold officers accountable, in part because of the political clout of police unions, the reluctance of investigators, prosecutors and juries to second-guess an officer's split-second decision and the wide latitude the law gives police officers to use force."); Thomson-DeVeaux et al., *supra* note 21 (noting that a review of police prosecutions data indicates that "it's uncommon for police officers to face any kind of legal consequences—let alone be convicted—for committing fatal violence against civilians").

⁶⁵ Bedi, *supra* note 18, at 25. For example, "when it comes to homicide charges, states have adopted broader self-defense rules for police officers than for other individuals." *Id.* In some states, "[o]fficers have no duty to retreat and, in some jurisdictions, can kill even if there is no imminent threat of deadly harm." *Id.* And "in most states, on-duty police officers cannot be considered aggressors even if their actions create or escalate a dangerous situation." Hawkins, *supra* note 49. Police officers are also afforded certain special procedural protections. *Id.* (noting the existence of "[u]nion contracts, local regulations and [LEOBORs]").

⁶⁶ Joanna C. Schwartz, *Suing Police for Abuse Is Nearly Impossible. The Supreme Court Can Fix That.*, WASH. POST (June 3, 2020, 2:17 PM), <https://www.washingtonpost.com/outlook/2020/06/03/police-abuse-misconduct-supreme-court-immunity>.

⁶⁷ See *id.*

⁶⁸ See *supra* notes 6–9 and accompanying text.

⁶⁹ See generally Bedi, *supra* note 18; McFarlin, *supra* note 3; Tecott & Plana, *supra* note 44 ("Deescalation training can only reduce unnecessary loss of life if it is paired with laws that hold individuals accountable when they break the rules. Even if a police code of

Section discusses some key police discipline reform goals and contextualizes the UCPJ proposal in light of these objectives.

Given the criticisms levied against the current police discipline system, it is evident that reform is necessary, and both law enforcement and its opponents agree on this point. The police disciplinary system ought to be uniform, consistent, and transparent. While some may contend that police departments in different states, cities, and towns operate in unique contexts and have distinct resource constraints, thus requiring diverse rules and standards in each department,⁷⁰ this argument falters in that this fragmented approach has a demonstrated, decades-long, failing track record.⁷¹ Context- or resource-specific approaches may be justified at times, and critics may note that a police department in a rural town, wherein all officers know the residents that they police and generally encounter lower-level crimes with less immediate response times,⁷² should not be subject to the same rules as a metropolitan department, wherein the officers encounter new civilians every day and face a wider range of threat levels under more urgent and imminent circumstances.⁷³ Yet, our nation's extensive history of police discipline failures demonstrates that there are country-wide systemic problems that need to be

conduct contains explicit deescalation instructions, which is uncommon, police are not legally bound to uphold these codes.”); Bedi & Everett, *supra* note 18.

⁷⁰ See *Four Crucial Law Enforcement Policies*, POWERDMS (Dec. 22, 2020), <https://www.powerdms.com/blog/crucial-law-enforcement-policies> (“Different communities have different needs, and your agency will need to adapt policies to meet the needs of the community you serve.”).

⁷¹ See generally Stephens, *supra* note 9.

⁷² See, e.g., RALPH A. WEISHEIT, DAVID N. FALCONE & L. EDWARD WELLS, NAT'L INST. JUSTICE, *RURAL CRIME AND RURAL POLICING* 1 (1994), <https://www.ojp.gov/pdffiles/rcrp.pdf> (noting the conventional wisdom surmised from a vast majority of research which “concludes that crime is less frequent in rural areas, and it is often speculated that greater informal controls in rural areas protect against high crime rates” and noting that “[t]he belief that crime is less frequent in rural areas is supported by recent Uniform Crime Reports (UCR) data that present crime by type and population group”); Lauren Weisner, H. Douglas Otto & Sharyn Adams, *Issues in Policing Rural Areas: A Review of the Literature*, ICJIA RES. HUB (Mar. 18, 2020), <https://icjia.illinois.gov/researchhub/articles/issues-in-policing-rural-areas-a-review-of-the-literature> (“Research indicates rural police departments often operate with fewer resources, lower staffing levels, and more inferior technology than their urban counterparts. Other research shows urban and rural officers experience different sources of job-related stress and its manifestations.”). See generally INT'L ASS'N OF CHIEFS OF POLICE, *PRACTICES IN MODERN POLICING: POLICING IN SMALL, RURAL, AND TRIBAL COMMUNITIES* (2018), https://www.theiacp.org/sites/default/files/2018-11/IACP_PMP_SmallTribal.pdf.

⁷³ See Weisner et al., *supra* note 72 (comparing the day-to-day patrol experiences of urban and rural officers, noting that “[r]esearch has found compared to urban officers, rural officers are more likely to encounter residents of their jurisdiction, handle more public service requests, and experience more administrative stress from their work”).

addressed.⁷⁴ As discussed *supra*, both police officers and their critics have taken issue with the unreliable and arbitrary nature of the existing disciplinary system. Moreover, not only is consistency—in terms of predictable judicial/legal treatment—sought by officers and reformists alike, but it is also a highly revered, core tenet in our legal system.⁷⁵ Given the national rebuke that the existing police discipline system is facing, and considering the country-wide systemic problems that police departments are plagued with, a uniform, national reform that sets a floor for police discipline could provide much-needed refuge.

Key similarities between police officers and military servicemembers provide a basis to infer that police discipline might benefit from a code much like the UCMJ. The proffered justification for subjecting police officers to a separate, specialized rulebook is generally rooted in notions that parallel the rationales underpinning the UCMJ; given both military personnel and police officers' "unique roles in society, it is only logical that we draft criminal rules specifically designed to make sure neither oversteps its bounds when executing these special responsibilities."⁷⁶ Law enforcement officers and military servicemembers' professional experiences are similar in several respects. Both police officers and servicemembers swore an oath to serve and protect their fellow citizens and share a sense of camaraderie with their peers.⁷⁷ Moreover, both professions involve navigating legal and ethical requirements, necessitate interacting with civilians, and "require tactical approaches that without command, control, coordination, and communication could result in death or discipline."⁷⁸

Yet, a monumental distinction between law enforcement and servicemembers is that police officers do not fit the stereotypical mold ascribed to soldiers; namely, they do not deploy to distant lands to

⁷⁴ See generally Stephens, *supra* note 9, at 1.

⁷⁵ See *Rule of Law*, AM. BAR ASS'N, https://www.americanbar.org/groups/public_education/resources/rule-of-law (last visited Feb. 23, 2021) (noting that "[t]he rule of law" includes the notion that "everyone is treated equally under the law, everyone is held accountable to the same laws, there are clear and fair processes for enforcing laws, there is an independent judiciary, and human rights are guaranteed for all").

⁷⁶ Bedi, *supra* note 18, at 22.

⁷⁷ See Ashleigh FOX, *Veterans Reflect on Similarities, Differences of Military, Law Enforcement*, SHERIDAN PRESS (Nov. 9, 2018), https://www.thesheridanpress.com/news/local/veterans-reflect-on-similarities-differences-of-military-law-enforcement/article_090f8488-6f23-56c4-b171-6dbdb7b20dbf.html.

⁷⁸ *The Similarities and Differences Between Law Enforcement and the Military*, POLICING MATTERS PODCAST (Oct. 16, 2020), <https://www.police1.com/military/articles/the-similarities-and-differences-between-law-enforcement-and-the-military-47HIPFWvcdNamFOs>.

fight foreign enemies. Instead, police officers are members of the local communities that they serve, protect, and are empowered to police.⁷⁹ Thus, while in certain circumstances military personnel are required to earn the trust and respect of the communities to which they are deployed, their primary responsibility remains protecting the interests of their nation state and adhering to commanders' and military orders. Moreover, soldiers deployed on a mission often have clear orders as to whom they ought to engage in combat, whereas police officers often lack such direct orders and must assess suspects' risk profiles as they encounter them. Ultimately, in order to establish trust between officers and community residents, police officials must avoid falling into an us-versus-them mindset, wherein any suspect or authority-challenging figure with whom the officers come into contact is deemed a criminal who must be subdued at any cost.⁸⁰

The training that law enforcement and military personnel must go through before commencing their duties is also drastically different. As with police disciplinary procedure, police training is scattered and varies based on jurisdiction.⁸¹ In general, "police recruits must complete a police academy program" and "a period of field training," which is akin to "on-the-job training."⁸² Typically, recruits are required to complete over 700 hours or 19 weeks of training, but these numbers vary greatly based on the specific jurisdiction and academy.⁸³ Military personnel, in contrast, go through extensive and continuous training "over the course of their careers," wherein they "repeatedly train to employ techniques to deescalate stressful, unpredictable, and dangerous scenarios."⁸⁴ Through their extensive training, servicemembers obtain a better understanding of the "steps they must take before resorting to lethal force."⁸⁵ Moreover, even though police officers "usually receive ongoing training throughout their careers," this instruction is much less extensive and thorough than servicemembers' training.⁸⁶

⁷⁹ *See id.*

⁸⁰ *See* Eliav Lieblich & Adam Shinar, *The Case Against Police Militarization*, 23 MICH. J. RACE & L. 105, 143–44 (2018) (discussing the perils of the erection of a "friend/enemy distinction" between law enforcement officers and the community members whom they police).

⁸¹ U.S. DEP'T OF JUST., POLICING 101, <https://www.justice.gov/crs/file/836401/download> (last visited May 8, 2021) (providing a primer on jurisdictional variation of police training and hiring).

⁸² *Id.* at 4.

⁸³ *See id.*

⁸⁴ Tecott & Plana, *supra* note 44.

⁸⁵ *Id.*

⁸⁶ U.S. DEP'T OF JUST., *supra* note 81, at 4.

Yet another critical difference between police officers and military personnel arises from the wide range of circumstances and instances in which police officers are called upon to render their services. In the United States, police officers often serve (or jointly serve in) the role of first responders, drug crisis mediators, domestic dispute resolvers, arbitrators, guards in public settings, among other functions.⁸⁷ While military personnel are similarly relied upon for various purposes, the scope and range of contexts in which police officers must serve their communities are substantially more wide-ranging, and thus careful attention must be paid to the differing degrees of permissible conduct in each of these settings.

Notwithstanding these differences, the UCMJ and our nation's experience in implementing it may serve as a useful starting point for drafting a UCPJ. Specifically, a UCPJ could be drafted by drawing on lessons from the military, while bearing in mind the key differences between the operational contexts of servicemembers and police officers.

The UCPJ proposals proffered by scholars and reformists have varied in their extent, stringency, scope, and enforceability. For example, some advocates have pushed for a "National Law Enforcement Code of Conduct," wherein Congress would "establish a national standard overseeing the conduct of all law enforcement personnel through *nonbinding* guidelines."⁸⁸ Such an advisory code of conduct would provide key definitions of contested terms such as "excessive force" and would "clarify the constitutional boundaries of police conduct."⁸⁹ Other scholars suggest codifying a *binding* code, which would impose "affirmative duties" on law enforcement officers, thus remedying the mismatch prevalent in our current system "between the unique powers that society grants police officers and the regulations necessary to ensure the responsible exercise of those powers."⁹⁰ Scholars advocating for an obligatory code, rather than optional guidelines, urge that a binding UCPJ could promote accountability by "hold[ing] police officers criminally liable for violating

⁸⁷ See Amelia Cheatham & Lindsay Maizland, *How Police Compare in Different Democracies*, COUNCIL ON FOREIGN RELS. (Apr. 21, 2021, 1:04 PM), <https://www.cfr.org/backgrounder/how-police-compare-different-democracies> (noting that "[p]olice perform many duties," including "patrol[ing] communities, investigat[ing] crimes, mak[ing] arrests, and issu[ing] traffic citations, . . . [and] respond[ing] to mental health crises, domestic disputes, and noise complaints").

⁸⁸ McFarlin, *supra* note 3 (emphasis added).

⁸⁹ *Id.*

⁹⁰ Bedi & Everett, *supra* note 18.

police-department policies in the same way that soldiers are held criminally liable for violating military policies or regulations.”⁹¹

While UCPJ proposals have differed in their suggested design, they share a common objective: “fixing” police discipline—i.e., establishing a transparent and consistent disciplinary process, ensuring accountability for officers’ actions, changing officers’ behaviors prospectively by deterring misconduct, achieving justice for victims and their loved ones, and reestablishing community trust in police officers.⁹² With these goals in mind, one can envision a UCPJ that may address some of the critiques levied against the status quo and achieve the aforementioned goals of the police discipline reform movement.

II

THE PRACTICALITIES AND LOGISTICS OF CONSTRUCTING A UCPJ

A UCPJ could appeal to both police officers and their opponents, for it would create a uniform, consistent, and transparent disciplinary system. This Part presents the mechanics of putting the UCPJ into action, and illustrates how this proposed Code would work in practice via a discussion of a specific case of misconduct—Officer Adam Coy’s fatal shooting of Andre Maurice Hill, a 47-year-old unarmed Black man.⁹³ In this tragic incident, police responded to a nonemergency call and found Mr. Hill in the garage of a home in which he was temporarily staying.⁹⁴ Officer Coy shot Mr. Hill “within seconds of their encounter.”⁹⁵ In light of the public outcry in the wake of Mr. Hill’s murder, Officer Coy was fired and charged with felony murder.⁹⁶ While it remains to be seen whether our existing police discipline system will effectively carry out justice, this Part demonstrates how the proposed UCPJ could apply in a real-life incident of police misconduct. Section II.A argues that the UCMJ can serve as a guide for the UCPJ. Section II.B discusses the subject-matter and personal

⁹¹ *Id.*

⁹² *Cf.* Stephens, *supra* note 9, at 4–6 (discussing the goals of police discipline reform).

⁹³ *See* Rich McKay, *Ohio Police Officer Fired for Fatally Shooting Unarmed Black Man*, REUTERS (Dec. 28, 2020, 6:27 PM), <https://www.reuters.com/article/us-global-race-usa-ohio/ohio-police-officer-fired-for-fatally-shooting-unarmed-black-man-idUSKBN29221O>; David J. Lopez, Laurie Ure & Jennifer Henderson, *Body Cam Footage Shows Fatal Police Shooting of Unarmed Black Man in Columbus, Ohio*, CNN (Dec. 24, 2020, 4:28 PM), <https://www.cnn.com/2020/12/23/us/columbus-ohio-mayor-calls-for-firing-of-officer/index.html>.

⁹⁴ *See* McKay, *supra* note 93.

⁹⁵ Lopez et al., *supra* note 93.

⁹⁶ *See* Will Wright, *Former Columbus Police Officer Is Charged With Murder*, N.Y. TIMES (Feb. 3, 2021), <https://www.nytimes.com/2021/02/03/us/adam-coy-columbus-murder-andre-hill.html>.

jurisdiction of the Code and proposes drafting a UCPJ under which officers could be charged and prosecuted for misconduct committed in connection to their role as officers. Finally, Section II.C proposes a means of enforcing the Code, recommending that an independent, specialized unit of investigators and prosecutors be established to implement the UCPJ and to bring charges in civilian criminal courts before Article III judges who have judicial independence and could ensure the operation of cherished due process guarantees.

A. *The UCMJ as a UCPJ Template*

In drafting the UCPJ, lawmakers could rely on the UCMJ as a guiding template, drawing lessons from the military's experience with implementing the UCMJ.⁹⁷ This Section provides a brief introduction to the UCMJ and the separate military law system that it erected, which imposes punishment for various administrative⁹⁸ and criminal offenses.⁹⁹ These charges include crimes that are unique to the military context¹⁰⁰ as well as wrongdoings that could be punished in the civilian civil or criminal justice system.¹⁰¹ The UCMJ and its accompanying Manual for Courts-Martial (MCM)¹⁰² are implemented and administered through military court-martial proceedings.¹⁰³ There are three forms of court-martials—summary, special, and general—and the form in which a charge is tried largely depends on the severity of the alleged crime.¹⁰⁴ A court-martial conviction can result in jail time or a punitive discharge (including a dishonorable discharge), and/or fines and reduction in rank.¹⁰⁵

⁹⁷ Given our nation's federal structure, each state would likely need to adopt the UCPJ in order for it to apply to state police departments, and Congress would need to adopt the Code for it to apply to federal law enforcement officials (e.g., DEA, FBI, ICE). See Eugene R. Fidell, *Uniform Code of Police Justice?*, GLOB. MIL. JUST. REFORM (June 23, 2020, 7:08 AM), <https://globalmjreform.blogspot.com/2020/06/uniform-code-of-police-justice.html>; Bedi & Everett, *supra* note 18.

⁹⁸ UCMJ, 10 U.S.C. § 815 (providing UCMJ Article 15, which discusses non-judicial punishment).

⁹⁹ *Id.* §§ 877–934 (providing UCMJ Articles 77–134—the “punitive articles” of the Code—which include specific offenses that can result in punishment by court-martial).

¹⁰⁰ *Id.* § 886 (punishment for absence without leave).

¹⁰¹ *Id.* § 918 (murder); *id.* § 919 (manslaughter); *id.* § 920 (rape and sexual assault); *id.* § 922 (robbery); *id.* § 928b (domestic violence); *id.* § 921 (larceny and wrongful appropriation).

¹⁰² MANUAL FOR COURTS-MARTIAL, UNITED STATES (2019) [hereinafter MCM] (providing the rules and regulations that implement the military law of the UCMJ).

¹⁰³ See generally EUGENE R. FIDELL, MILITARY JUSTICE: A VERY SHORT INTRODUCTION 3 (2016).

¹⁰⁴ See *id.*

¹⁰⁵ Jim Absher, *The Uniform Code of Military Justice (UCMJ)*, MILITARY.COM (July 30, 2021), <https://www.military.com/join-armed-forces/the-uniform-code-of-military-justice-ucmj.html>.

Military court-martials are criminal trials, and, in some respects, operate like their civilian counterparts.¹⁰⁶ Court-martials are presided over by a legally trained judge and may have a jury-like group that decides guilt or innocence.¹⁰⁷ As in civilian criminal trials, the accused is generally represented by an attorney, “[w]itnesses testify under oath and are subject to cross-examination,” and certain rights of the accused, such as the right against self-incrimination, apply.¹⁰⁸ However, in other respects, the court-martial system is distinct from the civilian criminal justice model. For example, there is no right to indictment by grand jury or to bail.¹⁰⁹ Moreover, military judges are not life tenured, nor do they have lengthy, fixed terms;¹¹⁰ instead, they are uniformed officers¹¹¹ selected by the Judge Advocate General.¹¹² Similarly, when a court-martial includes a jury—referred to as a “panel” in the military justice system—the jurors (or, “panel members”) are fellow servicemembers.¹¹³ The military justice system also has its own specialized lawyers, referred to as “judge advocates,” who provide various legal services and serve as prosecutors and defense counsel.¹¹⁴ Since military judges, prosecutors, and jurors are products of the system which they are meant to police and share a bond with the servicemembers whom they are expected to impartially try, there is good reason to believe that the military justice system may lack the objec-

¹⁰⁶ See FIDELL, *supra* note 103, at 3.

¹⁰⁷ See *id.* (“A legally trained judge presides and a group similar to a jury decides guilt or innocence based on the evidence and applying instructions received from the judge.”).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 2 (“Both systems seek to punish crime, but military justice also aims to maintain order and discipline within its boundaries, including adherence to a host of requirements and prohibitions that have no counterpart in civilian society.”).

¹¹⁰ *Id.* at 5.

¹¹¹ *Id.* at 26.

¹¹² *Judges, TODAY’S MIL.*, <https://www.todaysmilitary.com/careers-benefits/careers/judges> (last visited Jan. 20, 2021).

¹¹³ *Jury Selection in the Military*, GARY MYERS, DANIEL CONWAY & ASSOCS., <https://www.mcmilitarylaw.com/resources/your-rights/jury-selection-in-the-military> (last visited Sept. 22, 2021) (detailing jury selection processes in the military justice system, as well as voting processes). An accused has the right to choose whether to be tried by a military judge alone or by a military judge and a panel of servicemembers in a general court in all circumstances, or in special court-martials when the case is subject to sections § 825(e)(3) and § 829. UCMJ, 10 U.S.C. § 816(b)–(c). To the extent possible, members junior to the accused in rank or grade should not be appointed to the panel. *Id.* § 825(e)(1); see also JENNIFER K. ELSEA & JONATHAN M. GAFFNEY, CONG. RSCH. SERV., MILITARY COURTS-MARTIAL UNDER THE MILITARY JUSTICE ACT OF 2016, at 1–7 (2020), <https://fas.org/sgp/crs/natsec/R46503.pdf> (“The Constitution specifically exempts military members accused of a crime from the Fifth Amendment right to a grand jury indictment. The Supreme Court has inferred from that absence that there is also no right to a civil jury in courts-martial.”).

¹¹⁴ *Judge Advocate General FAQs*, U. VA. SCH. L. (Mar. 17, 2021), <https://www.law.virginia.edu/public-service/judge-advocate-general-faqs>.

tivity that often attends our nation's notions of "justice."¹¹⁵ These lessons are important to bear in mind in crafting and enforcing the UCPJ.

As is distinguished in the military justice context, an important distinction must be made between UCPJ offenses and rules of engagement. Although existing rules of engagement for law enforcement certainly merit revision,¹¹⁶ which may in turn facilitate deescalation,¹¹⁷ these rules address the wholly distinct matter of defining circumstances in which officers are justified in engaging in violence. While rules of engagement—such as when use of force is authorized, when to advance on a suspect, when to call for backup, etc.—can continue to be spelled out in police manuals, the UCPJ, in contrast, should state barred misconduct for which officers would be penalized to varying predetermined degrees.¹¹⁸

B. Scope of the UCPJ: Establishing the Code's Jurisdiction

A central and thorny question concerns how far the UCPJ ought to reach, both in terms of subject-matter jurisdiction and personal jurisdiction. For example, what kinds of offenses should the Code regulate? Should the Code only reform *internal* and *non-judicial* police discipline, or should it also supplement *external*, *judicial* police discipline? Should an officer's off-duty conduct be subject to the Code? Should retired officers be subject to the Code?

1. Subject-Matter Jurisdiction: The Punitive Reach of the UCPJ

In delineating the kinds of offenses that would be subject to non-judicial or administrative sanction under the UCPJ, the drafters would

¹¹⁵ See FIDELL, *supra* note 103, at 68 (noting that in the U.S. military justice context, "judicial independence is even more vulnerable . . . because of the inherently insular nature of [the military justice system]").

¹¹⁶ See Ian Ayres & Daniel Markovits, *Ending Excessive Police Force Starts with New Rules of Engagement*, WASH. POST (Dec. 25, 2014), https://www.washingtonpost.com/opinions/ending-excessive-police-force-starts-with-new-rules-of-engagement/2014/12/25/7fa379c0-8a1e-11e4-a085-34e9b9f09a58_story.html ("The existing rules of engagement for police in the United States invite violence That's wrong. An arrest should not impose a burden greater than a conviction.").

¹¹⁷ Cf. Quil Lawrence & Martin Kaste, *Military-Trained Police May Be Less Hasty to Shoot, But That Got This Vet Fired*, NPR (Dec. 8, 2016, 3:41 AM), <https://www.npr.org/2016/12/08/504718239/military-trained-police-may-be-slower-to-shoot-but-that-got-this-vet-fired> (discussing the experience of a military-trained U.S. Marines veteran who subsequently joined the police force, and when faced with a Black suspect pointing a gun, did not immediately escalate or shoot the suspect—a show of restraint that actually led to the officer's termination from the police force).

¹¹⁸ See Bedi, *supra* note 18, at 31 ("[W]e need affirmative provisions that specifically subject officers to criminal liability should they deviate from their duties—something that the current criminal code does not provide.").

need to consider the kinds of lower-level misconduct that plague police forces across the nation and craft proscriptive rules to prohibit such behaviors. Examples of such misconduct include using police resources for personal affairs¹¹⁹ and seeking favoritism, leniency, or accommodation for oneself or their friends/family on account of one's status as a police officer.¹²⁰ Disobedience, failure to follow superiors' orders, lack of adherence to department policy, disrespecting one's peers and superiors, tardiness, and other similar behavioral offenses—all of which are prohibited under the UCMJ¹²¹—ought to also be subject to non-judicial punishment under the UCPJ.

The drafters would also need to determine whether the UCPJ would only impose administrative-grade punishment (such as reduction in rank, suspension, termination without severance or pension, etc.), or whether it would dole out punitive sanctions that entail confinement/imprisonment for certain serious violations.¹²² If the former option were selected, the UCPJ would essentially serve as a means to unify and centralize the *internal* and *non-judicial* disciplinary systems utilized across the nation's various police forces, but would leave higher-level violations—such as unjustified killings (murder) or excessive uses of force (assault)—to the existing, external civilian criminal justice system. This approach has some merit, for it could successfully address police officers' misconduct that consists of low-level or nonviolent violations,¹²³ which could likely be dealt with through an internal disciplinary process. Moreover, developing a robust

¹¹⁹ See *Police Sometimes Misuse Confidential Work Databases for Personal Gain*, CBS NEWS (Sept. 30, 2016, 8:59 AM), <https://www.cbsnews.com/news/police-sometimes-misuse-confidential-work-databases-for-personal-gain-ap>.

¹²⁰ See *'Get Out of Jail Free': Will This Card Get You Off a Speeding Ticket?*, BBC NEWS (Jan. 23, 2018), <https://www.bbc.com/news/world-us-canada-42780382>.

¹²¹ See, e.g., UCMJ, 10 U.S.C. § 895(a) (barring disrespect toward sentinel or lookout); *id.* § 885 (prohibiting absence without leave, including failure to arrive at an appointed place of duty in a timely manner); *id.* § 888 (“Any commissioned officer who uses contemptuous words against the President, the Vice President, [and various other government officials] . . . shall be punished as a court-martial may direct.”).

¹²² See Bedi, *supra* note 18, at 28–29 (proposing that “[j]ust as soldiers can be held criminally liable for violating military policies or regulations, state jurisdictions—in promulgating a uniform police code—could also hold officers criminally responsible for violating specific department policies”).

¹²³ Examples of such violations include certain abuses of power, such as providing unauthorized police escorts to friends, skipping shifts, using police resources for personal purposes, etc. See, e.g., Katie Way, *The Little Cards That Tell Police 'Let's Forget This Ever Happened'*, VICE (Sept. 2, 2020, 7:30 AM), <https://www.vice.com/en/article/v7gxa4/pba-card-police-courtesy-cards> (discussing the common practice wherein police officers give family members and close friends union-issued “courtesy cards,” which “help get them out of minor infractions” and “embody everything wrong with modern policing”); Associated Press, *Seattle Police Officer Charged With Theft for Allegedly Skipping 55 Days of Work*, SEATTLE TIMES (Oct. 24, 2017, 1:28 PM), <https://www.seattletimes.com/>

internal disciplinary system that could identify and weed out the “bad apples”¹²⁴ from the outset could serve a deterrent effect and could prevent future escalations or more heinous violations from ever transpiring.¹²⁵

Nevertheless, despite this aspirational idea, the reality is that many such internal reforms or administrative-level punishments have failed to substantially change police conduct.¹²⁶ Moreover, there has been a rise in more atrocious and violent instances of police misconduct, including unjustified police killings and excessive uses of force,¹²⁷ which have not been adequately addressed or stymied by the existing, external (civilian) disciplinary process¹²⁸ and have resulted in rapid deterioration of community trust and respect for police.¹²⁹ For example, if the Code provided only administrative-grade punishment and not a means for addressing criminal discipline more harshly, the UCPJ would not provide an avenue through which Officer Coy could face criminal murder charges for shooting Mr. Hill, an unarmed civilian. In order to address this kind of misconduct, the UCPJ must have a punitive section, much like the Punitive Articles of the

seattle-news/crime/seattle-police-officer-charged-with-theft-for-allegedly-skipping-55-days-of-work (providing an example of an officer who skipped dozens of assigned shifts).

¹²⁴ Notably, a substantial portion of police misconduct is attributable to a group of repeat offenders whose careers are filled with complaints and investigations, but who seldom face consequences for their actions. See John Kelly & Mark Nichols, *We Found 85,000 Cops Who’ve Been Investigated for Misconduct. Now You Can Read Their Records.*, USA TODAY (June 11, 2020, 9:48 AM), <https://www.usatoday.com/in-depth/news/investigations/2019/04/24/usa-today-revealing-misconduct-records-police-cops/3223984002> (“Less than 10% of officers in most police forces get investigated for misconduct. Yet some officers are consistently under investigation. Nearly 2,500 have been investigated on 10 or more charges. Twenty faced 100 or more allegations yet kept their badge for years.”).

¹²⁵ Studies have found that negative police department culture and fellow officers’ wrongdoings are key predictors of police misconduct. See Katherine J. Wu, *Study Finds Misconduct Spreads Among Police Officers Like Contagion*, PBS (May 27, 2019), <https://www.pbs.org/wgbh/nova/article/police-misconduct-peer-effects>; see also Redditt Hudson, *I’m a Black Ex-Cop, and This Is the Real Truth About Race and Policing*, Vox (July 7, 2016, 11:22 AM), <https://www.vox.com/2015/5/28/8661977/race-police-officer> (discussing the impact of police culture and the attitudes of officers’ peers on officers’ conduct, and noting that on any particular day, “70 percent [of officers’ behavior] could go either way depending on whom they are working with”).

¹²⁶ See Sam Levin, *‘It’s Not About Bad Apples’: How US Police Reforms Have Failed to Stop Brutality and Violence*, GUARDIAN (June 16, 2020, 6:00 AM), <https://www.theguardian.com/us-news/2020/jun/16/its-not-about-bad-apples-how-us-police-reforms-have-failed-to-stop-brutality-and-violence> (noting that “incremental reforms have not addressed systemic harms and . . . have not diminished bad behavior by police”); Bergengruen & Berenson, *supra* note 44 (noting that the same reforms were recommended over and over again to “increase accountability, curb use-of-force violations and build up community trust – with seemingly little implementation”).

¹²⁷ See *supra* notes 1–10 and accompanying text.

¹²⁸ See discussion *supra* Section I.B.

¹²⁹ See *supra* notes 44–49 and accompanying text.

UCMJ.¹³⁰ By encompassing crimes such as “murder,” the UCPJ could, potentially, toe the line craftily between what qualifies as licit and illicit conduct in police officers’ unique circumstances—for example, by taking into account factors such as whether the suspect was armed, advancing towards the officers despite warnings to stop, etc.—but without going as far as many state and federal criminal codes currently do in excusing police officers’ uses of force.¹³¹ In doing so, one of the criticisms of the current external disciplinary system—the abundance of loopholes under state and federal criminal law that enable officers to evade liability and escape accountability—could be addressed. Under this approach, Officer Coy could be prosecuted under the UCPJ for murder.

In addition to resolving whether the Code would impose punitive sanctions for more serious offenses, the UCPJ’s drafters would need to decide whether or not the Code would only proscribe police-specific conduct that lacks a civilian counterpart (such as excessive force used against a suspect in the course of an arrest), or whether it would also criminalize other misconduct that could be punished through existing, civilian criminal laws (such as rape,¹³² sexual assault, driving under the influence,¹³³ etc.). There is an argument to be made that, since such conduct is already penalized under the civilian criminal laws, it would be duplicative and unnecessary to create a separate crime under the UCPJ for officers who engage in such offenses. Yet, this approach fails to recognize both the wide-ranging loopholes that exist under state and federal laws enabling police officers to engage in

¹³⁰ UCMJ, 10 U.S.C. §§ 877–934 (providing UCMJ Articles 77–134, the “punitive articles” of the Code).

¹³¹ See, e.g., Bonnie Kristian, *How the Police Protect Themselves from Prosecution*, WEEK (Aug. 21, 2019), <https://theweek.com/articles/859853/how-police-protect-themselves-from-prosecution> (discussing the role of unions, LEOBORS, and qualified immunity, amongst other factors, that serve as bulwarks against police accountability).

¹³² See Elliott C. McLaughlin, *Police Officers in the US Were Charged with More than 500 Rapes over a 9-Year Period*, CNN (Oct. 19, 2018, 10:46 AM), <https://www.cnn.com/2018/10/19/us/police-sexual-assaults-maryland-scope/index.html> (“[P]olice officers in the US were charged with forcible rape 405 times between 2005 and 2013. That’s an average of 45 a year. Forcible fondling was more common, with 636 instances.”); Bob Kalinowski & James Halpin, *Cop Claims Highlight Abuses of Power*, AP NEWS (Jan. 27, 2019), <https://apnews.com/article/86a69e6a32a94666b721787e358c2eaa> (“In the span of a month, two Luzerne County police officers were charged with using their badges to pressure women into having sex.”).

¹³³ See Henry A. Wallace *Police Crime Database*, BGSU, <https://policecrime.bgsu.edu/Home/Crimes> (last visited Oct. 12, 2020) (providing “summary information on 11,932 criminal arrest cases from the years 2005–2015 involving 9,819 individual nonfederal sworn law enforcement officers,” and indicating that there were 1,771 officers charged with driving under the influence during the covered time period).

abhorrent conduct with impunity,¹³⁴ and it does not acknowledge the potential for abuses of power that accompany the unique position of power that police officers hold in our society.¹³⁵ Police officers are entrusted with tremendous authority, but with added influence and clout comes enhanced responsibility. While certain offenses may have a civilian criminal counterpart, such crimes, when committed by police officers—individuals who have been trained and empowered to *prevent* crime and *protect* our communities—may constitute a greater breach of public trust. Including offenses in the UCPJ that are already criminalized under existing civilian laws would underscore police officers' distinctive role in our society and could impose elevated sanctions for officers' contraventions of community faith and abuse of publicly entrusted authority.

In crafting offenses, the drafters could seek guidance from the UCMJ analogue. For example, the “[s]tates could also pattern their culpability requirements on the military’s dereliction-of-duty cases.”¹³⁶ If this approach were adopted, “[a] knowing violation of a statute governing use of force would result in the highest penalty.”¹³⁷ Though officers would need to be “instructed on these rules as part of their training,” even police officers who were unaware of a rule “could still be prosecuted under a straightforward negligence theory, in the same way soldiers are held to a reasonable personal standard.”¹³⁸ The drafters could also draft an equivalent to the UCMJ’s “conduct unbecoming an officer” provision.¹³⁹ In the UCMJ context, this provision serves as a catch-all, sweeping in “acts of ‘dishonesty, unfair

¹³⁴ For example, in many states, it is legal for police officers to have “consensual” sex with individuals in their custody. See Devon Link, *Fact Check: Sex Between Police Officers and Their Detainees Isn’t Illegal in Many States*, USA TODAY (July 9, 2020, 5:33 PM), <https://www.usatoday.com/story/news/factcheck/2020/07/09/fact-check-police-detainee-sex-not-illegal-many-states/5383769002>. However, “consent” is quite a slippery concept in the police officer-detainee context, a relationship that seems indisputably ripe for coercive power dynamics. See *id.*

¹³⁵ See, e.g., Larry Smith, *I Was a Cop for 18 Years. I Witnessed and Participated in Abuses of Power.*, GEN (Oct. 18, 2018), <https://gen.medium.com/i-was-a-cop-for-18-years-i-witnessed-and-participated-in-abuses-of-power-8d057c18f9ee> (“As a cop, I was pulled over, off-duty, at least a half-dozen times for speeding, and each time I flashed my badge and identification and was let go without so much as a warning. Cops refer to this as ‘professional courtesy.’ . . . [I]t can be extended to other situations”); Philip M. Stinson Sr., John Liederbach, Steven L. Brewer Jr. & Brooke E. Mathna, *Police Sexual Misconduct: A National Scale Study of Arrested Officers*, 26 CRIM. JUST. POL’Y REV. 665, 665 (2015) (noting that “[p]olice work is conducive to sexual misconduct”).

¹³⁶ Bedi, *supra* note 18, at 32.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 20.

dealing, . . . lawlessness, injustice or cruelty.’”¹⁴⁰ Translated into the UCPJ, this provision could encompass issues such as “the improper use of a firearm, failure to report a fellow officer for abuse, and engaging in public drunkenness.”¹⁴¹

Additionally, in demarcating the scope of offenses under the UCPJ, the level of specificity required in the punitive articles would need to be determined. To achieve the stated goals of transparency and consistency, the Code’s phrasing must be as precise as possible, leaving little to the imagination. Though specific phrasing may be under- or overinclusive in some outlier instances, it will provide transparency, consistency, and ensure the fairest outcomes by clearly disclosing the rules of the road to officers. Moreover, it would be useful to draft a manual, akin to the MCM developed in conjunction with the UCMJ,¹⁴² wherein offenses and defenses could be described in detail and examples could be provided to offer guidance to officers and prosecutors.

2. *Personal Jurisdiction*

Another essential question concerns *to whom* the Code ought to apply. At first blush, one might respond “police officers,” but more nuanced questions surface when we consider *which* police officers should be subject to the Code’s regulations. For example, are off-duty officers subject to the Code? What about retired officers? And, should the Code apply uniformly to different law enforcement divisions, despite their unique contexts (such as the FBI or ICE)?

If, as suggested *supra* in Section II.A, the Code applies to both police-specific and general crimes that do have a civilian counterpart, it is important to cabin the personal jurisdiction of the UCPJ. In the military justice context, U.S. military courts-martial possess expansive subject-matter jurisdiction *and* wide personal jurisdiction. Yet, this has led courts-martial to prosecute peculiar cases that have little to do with a servicemember’s position in the army.¹⁴³ Thus, the UCPJ ought to impose a “service connection” requirement—as was previously

¹⁴⁰ *Id.* (quoting MCM, *supra* note 102, at Part IV, ¶ 59(c)(2)).

¹⁴¹ Bedi & Everett, *supra* note 18.

¹⁴² MCM, *supra* note 102.

¹⁴³ *See, e.g.,* Solorio v. United States, 483 U.S. 435 (1987) (prosecuting a Coast Guard servicemember who assaulted two women, wherein the only attenuated link between the service and the assaults was the fact that the victims were dependents of two other servicemembers, and where Solorio’s association to the military and/or other servicemembers did not facilitate his crimes).

used in the U.S. military justice jurisprudence¹⁴⁴—to render only offenses that are related to an officer’s duties or involve an officer’s use or evocation of their official capacity subject to punishment under the Code.

Deploying a “service connection” test would likely answer many of the previously raised jurisdictional questions. For example, if an off-duty officer were driving while under the influence, this offense, in and of itself, should not be prosecuted under the UCPJ because the officer was acting in a civilian capacity and the crime had no “service connection”—i.e., no relation to his job. But, if the officer were driving a police vehicle, then a “service connection” would be established, and they could be charged under the UCPJ. Similarly, if that same officer flashed their badge when they were pulled over in an attempt to resolve the matter, then they ought to face charges under the Code—both for driving under the influence and for attempting to abuse their power or exert undue influence.¹⁴⁵ Retired police officers’ conduct likely should not be subject to the Code,¹⁴⁶ unless, again, as in the prior example, they attempt to exploit their membership status in the police force in order to mitigate the consequences of their transgressions and/or they implicate their connection to the police force by some means through their improper conduct. If the “service connection” approach were adopted, Officer Coy could also easily be prosecuted under the UCPJ, for he fatally shot Mr. Hill while on duty. The underlying rationale for this approach is simple; if a connection can be drawn or perceived between the officers’ actions and their relationship to the police force, then it is in the public interest—and in the institutional interest of the police department—to punish that conduct under the UCPJ. In doing so, the government can demonstrate the elevated standard of conduct that police officers are expected to adhere to, especially when they are acting in (or purporting to act in) their official capacities. Furthermore, this will demonstrate that police

¹⁴⁴ See *O’Callahan v. Parker*, 395 U.S. 258, 272 (1969) (holding that crimes by officers must be “service connected” to fall within military jurisdiction), *overruled by Solorio v. United States*, 483 U.S. 435 (1987).

¹⁴⁵ For an example of such an occurrence, see Wilson Wong, *Video Shows Arizona Deputy Use Racial Slur, Beg for Release After DUI Stop*, NBC NEWS (Apr. 20, 2021, 2:48 PM), <https://www.nbcnews.com/news/us-news/video-shows-arizona-deputy-use-racial-slur-beg-release-after-n1264614> (noting that, after being pulled over, the inebriated deputy “flashed the officer his badge,” and pleaded for his release, stating “[d]on’t put my f----- career at risk”).

¹⁴⁶ As of a recently decided case under the UCMJ, personal jurisdiction over retired military officers was held unconstitutional. *Larrabee v. Braithwaite*, No. CV 19-654 (RJL), 2020 WL 6822706, at *1 (D.D.C. Nov. 20, 2020) (concluding “that Congress’s expansion of court-martial jurisdiction over retirees who are members of the Fleet Marine Corps Reserve is unconstitutional”).

officers are not above the law and are accountable for their actions, which will in turn advance the UCPJ's goal of reestablishing community trust in police.

C. *Implementing and Enforcing the Code*

If a UCPJ is adopted, a channel for receiving and adjudicating complaints and alleged violations would need to be established. Grievances ought to be reportable by various sources, including citizens, peer officers, and superiors.¹⁴⁷ But to whom should these individuals report their allegations? Who ought to be empowered to investigate and bring charges against an accused officer? And what administrative or judicial body ought to enforce the Code? In answering these questions and in creating a novel system for police discipline, we ought not only to capitalize on the successes of the military justice system but also learn from its shortcomings.

In the military context, the UCMJ empowers commanders to serve as convening authorities.¹⁴⁸ Once an instance of potential misconduct is brought to a commander's attention, he/she assesses the circumstances and wields enormous discretion in deciding whether to bring charges against the accused by convening a court-martial.¹⁴⁹ Yet, this system has garnered substantial criticism from the military defense bar,¹⁵⁰ who believe that military justice is second tier to civilian justice, for commanders are able to exert undue influence throughout the process,¹⁵¹ and by victims' rights advocates, who do not think that the military justice system is robust or stringent enough to deter rampant instances of sexual assault or other violent misconduct.¹⁵² Given this experience, it would be remiss to empower supe-

¹⁴⁷ See U.N. OFF. ON DRUGS & CRIME, HANDBOOK ON POLICE ACCOUNTABILITY, OVERSIGHT AND INTEGRITY 33–34 (2011), https://www.unodc.org/pdf/criminal_justice/Handbook_on_police_Accountability_Oversight_and_Integrity.pdf (discussing the importance of enabling citizens to file complaints).

¹⁴⁸ 10 U.S.C. § 822 (stating that “[g]eneral courts-martial may be convened by” commanding officers).

¹⁴⁹ See FIDELL, *supra* note 103, at 9–10.

¹⁵⁰ See Rachel E. VanLandingham, *Military Due Process: Less Military & More Process*, 94 TUL. L. REV. 1, 7 (2019) (characterizing the military justice system as subject to “structural vulnerability” due to “outcome-driven manipulation, a defect in which personal and political preferences can easily trump impartial, fact-focused procedures because of the coerciveness inherent in all things military”).

¹⁵¹ See *id.* at 7–8 (discussing “unlawful command influence” and suggesting that military personnel’s “inculcated obedience to orders is a dangerous dynamic in relation to a criminal justice system owned and operated by those giving the orders”).

¹⁵² See Ella Torres, *Military Sexual Assault Victims Say the System Is Broken*, ABC NEWS (Aug. 28, 2020, 5:06 AM), <https://abcnews.go.com/US/military-sexual-assault-victims-system-broken/story?id=72499053> (discussing discipline deficiencies after a victim reported sexual assault).

rior officers or police commanders to bring charges against fellow officers. By comparison, in the current police justice system, for conduct that warrants administrative sanctions, the fragmented and inconsistent internal or non-judicial disciplinary systems discussed above govern. For conduct that warrants judicial punishment, prosecutors wield the kind of discretion that commanders hold in the military justice system, for they are the ones who decide whether to bring charges and what charges ought to be brought. Nonetheless, in our current police disciplinary system, prosecutors' ability to effectively and impartially bring charges against police officers with whom they must work has been brought into question.¹⁵³

Thus, rather than relying on police commanders (who are police officers themselves) or regular prosecutors (who work with police officers on a daily basis and are therefore likely to face tense, conflicting loyalties)¹⁵⁴ to make charging decisions, there should be a separate department of specialized investigators and prosecutors whose sole role is to investigate and prosecute law enforcement officials ("Independent Special Investigators" or "ISIs" and "Independent Special Prosecutors" or "ISPs").¹⁵⁵ Unlike current Internal Affairs departments, ISIs and ISPs would operate outside of the law enforcement orbit, rather than functioning as a division of the police department. After all, one of the lessons that can be gleaned from the military justice system¹⁵⁶ and the current police discipline system¹⁵⁷ is that it is not always best to allow the fox to guard the henhouse. Such arrangements frequently result in claims of failure to impartially

¹⁵³ See Hodson, *supra* note 63, at 582–89 (discussing problems posed by the close relationship between police and prosecutors).

¹⁵⁴ See *id.*

¹⁵⁵ Cf. U.N. OFF. ON DRUGS & CRIME, *supra* note 147, at 34 (discussing the importance of ensuring a means for members of the public to be able to file complaints both directly with the police and with a body that is independent of the police or prosecutor's office, for "[t]his will protect those making complaints from being intimidated by the police").

¹⁵⁶ See, e.g., Chris Carroll, *Hagel: Change UCMJ to Deny Commanders Ability to Overturn Verdicts*, STARS & STRIPES (Apr. 8, 2013), <https://www.stripes.com/hagel-change-ucmj-to-deny-commanders-ability-to-overturn-verdicts-1.215629> (discussing the push to amend UCMJ Article 60 to prevent commanders from being able to overturn court-martial verdicts in the aftermath of a commander's use of the power to overturn a sexual assault conviction).

¹⁵⁷ See, e.g., Matt Rocheleau, *Dozens of State Police Troopers Remain on the Force Despite Past Illegal Conduct*, BOS. GLOBE (Oct. 17, 2020, 3:09 PM), <https://www.bostonglobe.com/2020/10/17/metro/dozens-state-police-troopers-remain-force-despite-past-illegal-conduct> ("When it comes to policing its own, the agency rarely sustains complaints against troopers."); E. Hinton, *These Five Systems Often Protect Cops from Criminal Accountability*, NBC WASH. (June 3, 2020, 5:54 PM), <https://www.nbcwashington.com/lx/these-five-systems-often-protect-cops-from-criminal-accountability/2321855> ("There's an internal system of police policing cops that runs the gamut from deciding if the officers actually violated policy to recommending punishment, if any.").

administer justice.¹⁵⁸ To combat such criticism, charging authority in police disciplinary cases ought to be entrusted to special, independent prosecutors, for this would advance the UCPJ proposal's goals of impartiality, consistency, and fairness.¹⁵⁹ ISPs would, as most prosecutors do, wield enormous discretion. However, unlike our current system, in which prosecutors' independence and impartiality in police discipline cases is often under attack,¹⁶⁰ ISPs would be better equipped to remain independent and would not be subject to the same degree of capture by police departments, since they would focus solely on police disciplinary prosecutions and would not need to collaborate with police officers to prosecute other cases on their dockets. For example, an ISP could be assigned to prosecute Officer Coy for Mr. Hill's murder, and this prosecutor would not be subject to the same kinds of pressures that he/she would typically face in our current system. Namely, the ISP would not need to work and cooperate with other Columbus police department officers when prosecuting cases, since the ISP's sole role would be to bring charges against officers, not other civilian defendants.

For lower-level, administrative violations under the UCPJ, ISPs could work out arrangements and appropriate punishments for the accused based on the Code's guidance and with reference to typically relied-upon factors such as severity of the misconduct and the officer's prior record.¹⁶¹ For wrongdoings that warrant prosecution in a judicial setting, ISPs could bring charges in an Article III court under the UCPJ.

While this Note proposes establishing a new division of independent investigators and prosecutors, it is important to underscore that this would *not* require an insurmountable siphoning of resources, nor would it amount to the creation of a new branch of law enforcement. In contrast, the ISIs and ISPs contemplated in this proposal would be much like the existing investigators and prosecutors serving in subject-

¹⁵⁸ For example, critics have argued that allowing the military to handle sexual assault allegations has resulted in a miscarriage of justice and a failure to hold culpable offenders responsible. See, e.g., Amy Davidson Sorkin, *Military Sexual Assault: Shame Isn't Enough*, NEW YORKER (May 8, 2013), <https://www.newyorker.com/news/amy-davidson/military-sexual-assault-shame-isnt-enough>. In the police context, there has similarly been criticism that internal and external police discipline is too lax. See *supra* note 157 and accompanying text.

¹⁵⁹ Cf. Rushin, *supra* note 27, at 553 (suggesting that "to the extent that communities want to promote democratic oversight of police behavior, policymakers could replace arbitrators with democratically accountable actors").

¹⁶⁰ See *supra* note 153 and accompanying text.

¹⁶¹ See Stephens, *supra* note 9, at 15–17 (outlining factors in police discipline used by the Charlotte-Mecklenburg Police Department).

matter-dedicated units (e.g., narcotics,¹⁶² sexual violence,¹⁶³ white collar crime¹⁶⁴). ISI and ISP units could vary in size in a manner that correlates to the jurisdiction's police department size. These divisions of investigators and prosecutors would be independent, for they would not be located within the law enforcement apparatus and would not work with officers on a daily basis (thus decreasing incentives to remain in officers' good graces). This impartiality and objectivity would enable these investigators to pursue meritorious allegations and prosecute misbehaving officers, thus ensuring that justice is served and trust in our nation's police is, at least partially, restored.

With regard to adjudication and enforcement, in the military, the UCMJ is administered through a special court apparatus (courts-martial), wherein military judges, rather than Article III judges, preside.¹⁶⁵ Yet, this aspect of the military justice system has also been subject to scrutiny by critics who argue that military courts are littered with due process violations and that military judges, as members of the army, are insufficiently impartial.¹⁶⁶ Moreover, police officers operate in a different context than soldiers do: “[P]olice officers carry out their duties within communities, whereas soldiers carry out their work apart from civilians, often while deployed overseas.”¹⁶⁷ In light of these structural criticisms and institutional differences, rather than erecting a specialized court system for carrying out police discipline and staffing it with non-judicial-branch judges, UCPJ offenses ought to be adjudicated by courts housed in the independent, judicial

¹⁶² See OFF. OF THE SPECIAL NARCOTICS PROSECUTOR FOR THE CITY OF N.Y., <https://www.snpnyc.org> (last visited May 30, 2021).

¹⁶³ See *Sexual Violence*, MANHATTAN DIST. ATT'Y'S OFF., <https://www.manhattanda.org/our-work/sexual-violence> (last visited May 30, 2021).

¹⁶⁴ See *White Collar Crime*, MANHATTAN DIST. ATT'Y'S OFF., <https://www.manhattanda.org/our-work/white-collar-crime> (last visited May 30, 2021).

¹⁶⁵ 10 U.S.C. § 826(a) (noting that “[a] military magistrate shall be a commissioned officer of the armed forces who . . . is a member of the bar” and who “is certified to be qualified . . . for duty as a military magistrate by the Judge Advocate General of the armed force of which the officer is a member”).

¹⁶⁶ See Frederic I. Lederer & Barbara S. Hundley, *Needed: An Independent Military Judiciary—A Proposal to Amend the Uniform Code of Military Justice*, 3 WM. & MARY BILL RTS. J. 629 (1994) (presenting these concerns); *What Is 'Unlawful Command Influence' in the Military Justice System?*, NPR (July 19, 2019, 4:09 PM), <https://www.npr.org/2019/07/19/743599276/what-is-unlawful-command-influence-in-the-military-justice-system> (highlighting that one difference between the military justice system and civilian courts is that “the entire military justice system is comprised of men and women in uniform” who lack the independence of civilian judges).

¹⁶⁷ Bedi & Everett, *supra* note 18 (noting that this difference between military and police contexts is one reason that implementing a UCPJ “would not require the creation of a unique criminal-justice system as in the military context”).

branch.¹⁶⁸ Thus, Officer Coy would be tried for Mr. Hill's murder in an Article III court, just like any other civilian criminal defendant. While this will, to some extent, promote notions of both impartiality in the administration of police discipline and public confidence in the administration of justice,¹⁶⁹ this will not be a bulletproof solution, since issues associated with juries' unwillingness to indict and/or convict officers may persist.

In the aftermath of an investigation and prosecution, both the civilian criminal justice system and military justice system offer accused and convicted persons opportunities for higher court appellate review. Although the military justice system provides a significantly curtailed line of access for judicial review by appeals courts¹⁷⁰ and the U.S. Supreme Court,¹⁷¹ the UCPJ's approach, in this respect, should hew toward the guideposts for judicial review provided for in the civilian criminal justice system. Therefore, if convicted under the UCPJ, Officer Coy would have the same opportunities to appeal and contest his conviction as any other civilian criminal defendant. This feature of the UCPJ system would ensure that law enforcement officers did not feel singled out for suboptimal treatment in the justice system and would safeguard against the inequity of providing diminished due process protections to police officers as compared to their civilian peers. Although officers are surely not above the law, the law should equally protect them, as it does other civilians, when they are accused of misconduct.

¹⁶⁸ Federal Article III judges and many state court judges are considered more impartial and independent on account of their tenure protections and separation from the legislative and executive branches. While not all state court judges are afforded tenure protections (as federal judges are), the risk for bias or influence may be lessened if the judge and court do not themselves sit within the institution that they are meant to be policing (as is the case with military courts-martial and military judges).

¹⁶⁹ See EUGENE R. FIDELL, ELIZABETH L. HILLMAN & DWIGHT H. SULLIVAN, *MILITARY JUSTICE: CASES AND MATERIALS* 515 (3d ed. 2020) (“[J]udicial independence is one of the key factors that contributes to (or, if compromised, detracts from) public confidence in the administration of justice . . .”).

¹⁷⁰ See ANNA C. HENNING, CONG. RSCH SERV., *SUPREME COURT APPELLATE JURISDICTION OVER MILITARY COURT CASES 3* (2009), <https://fas.org/sgp/crs/misc/RL34697.pdf> (noting that the United States Court of Appeals for the Armed Forces (CAAF)—“an Article I court, housed within the Department of Defense”—is the military court system’s body for appellate review, with “discretion to grant or deny petitions for appeals” but limited authority).

¹⁷¹ See Eugene R. Fidell & Stephen I. Vladeck, *Second-Class Justice in the Military*, N.Y. TIMES (Mar. 20, 2019), <https://www.nytimes.com/2019/03/20/opinion/military-justice-congress.html> (“Every defendant before an American criminal court today has a right to ask the highest court in the land to review his case—except members of the military.”).

Moreover, in both the civilian criminal justice system¹⁷² and military justice system,¹⁷³ accused and convicted persons may be granted clemency at various points throughout the process. Although clemency and the President's constitutional pardon power remain controversial,¹⁷⁴ especially in the military context,¹⁷⁵ if these features are to live on in the civilian justice system, they should equally apply when law enforcement officers are prosecuted under the UCPJ.¹⁷⁶ Officers convicted under the Code ought to be granted commensurate opportunities for clemency as are provided in the civilian criminal justice system, for this ensures fairness and equality, and demonstrates that police officers are members of the civilian populace that they serve. In this respect, officers would be constrained by the law's outer bounds—just as the citizens that they patrol are—but officers would also be entitled to the same protections and benefits that other citizens have available, including opportunities for reprieve.

III

LIMITATIONS OF THE UCPJ

Given the parallels between the UCMJ and the proposed UCPJ, many lessons can be learned from the military's experience. Moreover, the potential pitfalls of a UCPJ can also be identified. From these limitations, it is apparent that a UCPJ, while useful, is not a cure

¹⁷² See U.S. CONST. art. II, § 2, cl. 1 (establishing the presidential pardon power).

¹⁷³ See 10 U.S.C. § 860(a) (providing limitations on convening authorities' ability to act on sentences in specified post-trial circumstances and barring the convening authority from reducing, commuting, or suspending a sentence of confinement in certain instances while allowing them to do so in other circumstances); see also NAVAL JUST. SCH., USN/USMC COMMANDER'S QUICK REFERENCE LEGAL HANDBOOK 27 (Mar. 2021), <https://www.jag.navy.mil/documents/NJS/Quickman.pdf> ("The accused must be given the opportunity to seek clemency from the [convening authority]."); FIDELL ET AL., *supra* note 169, at 748–49.

¹⁷⁴ See Kristine Frazao, *Understanding the Controversial Nature of Presidential Pardons*, WJLA (Feb. 19, 2020), <https://wjla.com/news/nation-world/the-controversial-nature-of-presidential-pardons> ("Pardons are closest to the act of a king that the president has." (quoting Paul Schiff Berman) (internal quotation marks omitted)).

¹⁷⁵ See, e.g., Leo Shane III, *Clemency for War Criminals an 'Insult' to the Military, Lawmaker Argues*, MIL. TIMES (Nov. 22, 2019), <https://www.militarytimes.com/news/pentagon-congress/2019/11/22/clemency-for-war-criminals-an-insult-to-the-military-lawmaker-argues> (quoting Senator Jack Reed as saying that President Trump's "decision to grant clemency to three service members accused of war crimes amounts to 'an insult to our entire system of military justice' and military order").

¹⁷⁶ One thorny question is whether permitting clemency could undercut the advances made by the UCPJ. This Note, however, does not delve into the complex question of whether clemency and the pardon power undermine the criminal justice system's efforts in achieving justice. Rather, this Note posits that, so long as clemency and the pardon power persist in the civilian criminal justice system, these forms of relief ought to be available to accused and convicted officers on an equal basis as other civilian defendants.

all; while it may help ameliorate certain issues inherent in the current policing system, it will not solve all of the problems that critics, activists, and community members have identified.

A. *The Uncertainty of Behavioral Changes*

While the UCPJ and the proposal detailed in this Note may be effective in promoting accountability by ensuring that officers are held responsible for their misconduct, it may not actually *change* officers' behavior. While some scholars optimistically note that “[o]fficers perceiving their agency to engage in fair managing practices are expected to have engaged in less misconduct,”¹⁷⁷ the persistence of misconduct in police forces across the nation—even in the face of public scrutiny, backlash, and stricter policies¹⁷⁸—suggests that police departments' problems are more deeply rooted than any single reform can ameliorate. Similarly, in the military context, sexual assault has been considered pervasive, underreported, and under-prosecuted.¹⁷⁹ Despite the UCMJ's proscription of such offenses,¹⁸⁰ and top officials' and leaders' outspoken rebukes of such behavior,¹⁸¹ sexual misconduct persists.¹⁸² One explanation may be that a Code—whether it be the UCMJ or the UCPJ—may be insufficient to change servicemembers' or police officers' behavior. Perhaps conduct is more so a function of culture than it is a product of the rules used to regulate behavior.¹⁸³

¹⁷⁷ See Scott E. Wolfe & Alex R. Piquero, *Organizational Justice and Police Misconduct*, 38 CRIM. JUST. & BEHAV. 332, 339 (2011) (discussing the role of “organizational justice”).

¹⁷⁸ See Baynard Woods & Brandon Soderberg, *Police ‘Reform’ Doesn’t Work. Baltimore Proves It.*, EAGLE (June 18, 2020), https://theeagle.com/opinion/columnists/police-reform-doesnt-work-baltimore-proves-it/article_ea969f0d-9bd2-5728-b166-9a0f6f4adf99.html (noting that when new policies adopted by the Baltimore Police Department “required officers to wear body cameras and follow several other Obama-era proposals,” and when “[t]he department embraced the ideas behind community policing, and[] . . . was put under a consent decree, where the federal government assigned a monitor to insure reform[,]” the police officers responded negatively and “undermined every new policy in an open revolt”).

¹⁷⁹ See, e.g., Torres, *supra* note 152 (discussing problems with the incidence and sanctioning of sexual assault in the military); Sorkin, *supra* note 158 (discussing the same).

¹⁸⁰ See 10 U.S.C. § 920 (proscribing rape and sexual assault).

¹⁸¹ See Craig Whitlock, *Obama Delivers Blunt Message on Sexual Assaults in Military*, WASH. POST (May 7, 2013), https://www.washingtonpost.com/world/national-security/possible-military-sexual-assaults-up-by-33-percent-in-last-2-years/2013/05/07/8e33be68-b72b-11e2-bd07-b6e0e6152528_story.html; Rebecca Kheel, *Gillibrand Tears into Army Nominee Over Military Sexual Assault: ‘You’re Failing Us.’*, THE HILL (May 2, 2019, 1:45 PM), <https://thehill.com/policy/defense/441840-gillibrand-tears-into-army-nominee-over-military-sexual-assault>.

¹⁸² See *supra* note 179 and accompanying text (noting the high incidence of sexual assault in the military).

¹⁸³ See DAVID WEISBURD, ROSANN GREENSPAN, EDWIN E. HAMILTON, KELLIE A. BRYANT & HUBERT WILLIAMS, POLICE FOUND., *THE ABUSE OF POLICE AUTHORITY: A*

Thus, irrespective of the adoption of the UCPJ, the environment, training, protocol, and ethos of police departments will also need to be reformed. Nevertheless, the adoption of the UCPJ could, in and of itself, serve as an impetus for cultural and systemic reform across police departments.¹⁸⁴

B. *The Role of Culture and the “Blue Wall of Silence”*

A further cautionary note that ought to append this UCPJ proposal is that a Code itself will not eliminate police officers’ propensity to shield their peers from scrutiny or disciplinary action.¹⁸⁵ In the military context, while some have argued that, due to the UCMJ’s emphasis on accountability for one’s actions, no such equivalent “code of silence” exists,¹⁸⁶ others have challenged this assertion, noting that military culture leads servicemembers to “band together” and not report fellow servicemembers’ misconduct.¹⁸⁷ Thus, the military’s experience suggests that the UCPJ cannot eradicate the “blue wall of silence”—i.e., police officers’ tendency to close rank and protect their own when a fellow officer faces allegations of wrongdoing.¹⁸⁸ The “blue wall of silence” has not only resulted in fewer instances of misconduct being reported, substantiated, investigated, and punished but

NATIONAL STUDY OF POLICE OFFICERS’ ATTITUDES 9 (2001) (“The key moral problem for police departments is . . . how can you create a culture that will induce members to strike the right balance between achieving an organizational goal and observing fundamental principles of decency and fairness?”).

¹⁸⁴ See Rushin, *supra* note 27, at 554–55 (“[I]n order to address police misconduct effectively, the law must not only punish ‘bad apples,’ but also incentivize the nation’s roughly 18,000 state and local police departments to implement rigorous internal oversight and disciplinary procedures.” (internal citations omitted)).

¹⁸⁵ *But see* Wolfe & Piquero, *supra* note 177, at 339 (positing that “[i]t is expected that officers who perceive their organization to be more just and fair will have weaker adherence to the code of silence and be less likely to believe that corruption of the noble cause is justified”).

¹⁸⁶ Dwight Stirling, *Analysis: Why the U.S. Military Usually Punishes Misconduct but Police Often Close Ranks*, GOV. EXEC. (Dec. 6, 2019), <https://www.govexec.com/defense/2019/12/analysis-why-us-military-usually-punishes-misconduct-police-often-close-ranks/161723>.

¹⁸⁷ Jim Wilhelm, *Pentagon Tries to Challenge Unwritten Code of Silence Among Troops*, TRIB LIVE (May 5, 2014, 10:57 PM), <https://archive.triblive.com/news/pentagon-tries-to-challenge-unwritten-code-of-silence-among-troops>. See generally DEF. LEGAL POL’Y BD., REPORT OF THE SUBCOMMITTEE ON MILITARY JUSTICE IN COMBAT ZONES (2013), <https://civiliansinconflict.org/wp-content/uploads/2017/09/20130531-Subcommittee-Report-REPORT-OF-THE-SUBCOMMITTEE-ON-MILITARY-JUSTICE-IN-COMBAT-ZONES-31-May-13-2.pdf> (noting that a high percentage of servicemembers were unwilling to report war crimes committed by fellow servicemembers).

¹⁸⁸ See CARL B. KLOCKARS, SANJA KUTNJAK IVKOVICH, WILLIAM E. HARVER & MARIA R. HABERFELD, U.S. DEP’T OF JUST., NAT’L INST. OF JUST., THE MEASUREMENT OF POLICE INTEGRITY 1–2 (2000), <https://www.ncjrs.gov/pdffiles1/nij/181465.pdf> (providing coterminous phrases for “blue wall of silence” and discussing the phenomena).

has also “widen[ed] [the] divide between the world as seen by law enforcement and the world experienced by the citizens whom officers are sworn to protect.”¹⁸⁹ Here, too, further training and deep-rooted organizational and cultural reforms will be necessary.

C. *Recognizing the Impact of Differences Between the Military and Police Departments*

While the proponents of various UCPJ proposals are eager to draw numerous parallels between the military and law enforcement that would warrant the imposition of a similar code of conduct and oversight on both entities, it is imperative that, in developing, adopting, and implementing such a Code, its drafters, the public, and—most importantly—police officers themselves, do not lose sight of the *differences* between servicemembers and police officers and the distinct institutions in which they serve. While the divergent contexts in which officers and servicemembers operate are discussed *supra*, this Section discusses another exceptional characteristic of law enforcement—its unionized status—and the need to ensure that the adoption of a UCPJ does not lead to the conflation of police officers with servicemembers in a manner that would exacerbate the militarization of our law enforcement.

1. *The Unique Role of Police Unions*

One critical distinction between police officers and military personnel is that the former are unionized, whereas the latter are not.¹⁹⁰ Although historically police officers had not been unionized,¹⁹¹ today, police unionization is ubiquitous and highly consequential in both the contexts of police discipline¹⁹² and police reform.¹⁹³ Police unioniza-

¹⁸⁹ Philip Hayden, *Why an Ex-FBI Agent Decided to Break Through the Blue Wall of Silence*, USA TODAY (Jan. 31, 2019, 8:26 PM), <https://www.usatoday.com/story/opinion/policing/2019/01/31/blue-wall-of-silence-policing-the-usa-cops-community/2604929002>.

¹⁹⁰ See generally Jennifer Mittelstadt, “*The Army Is a Service, Not a Job*”: Unionization, Employment, and the Meaning of Military Service in the Late-Twentieth Century United States, 80 INT’L LAB. & WORKING-CLASS HIST. 29 (2011) (discussing the unsuccessful attempt to unionize the United States armed forces in the 1970s and noting proffered reasons against servicemember unionization).

¹⁹¹ Rushin, *supra* note 27, at 557–58.

¹⁹² *Id.* at 559–60 (arguing that “the collective bargaining process may contribute to internal policies and procedures that thwart police accountability efforts” and stating that “union contracts may establish particularly cumbersome disciplinary appeals procedures that seem to unfairly advantage officers facing suspensions or terminations”).

¹⁹³ See Noam Scheiber, Farah Stockman & J. David Goodman, *How Police Unions Became Such Powerful Opponents to Reform Efforts*, N.Y. TIMES (Apr. 2, 2021), <https://www.nytimes.com/2020/06/06/us/police-unions-minneapolis-kroll.html>; Rushin, *supra* note 27, at 560 (noting that police unions’ political clout and collective bargaining power may

tion poses unique challenges to drafting, passing, and enforcing a UCPJ nationwide, and since police unions have no parallel in the military context, there are no lessons that can be extrapolated or guidance that can be surmised from this analogous system. A first-order issue is that police unions constitute an additional stakeholder that will need to be represented in the UCPJ drafting process. However, even if unions are given a seat at the table, there is little assurance that union representatives will be open to the concept of a UCPJ. In fact, it is fair to assume that unions will respond with resistance to a Code that imposes heightened obligations on law enforcement personnel in light of their privileged position and on account of the authority that they wield.¹⁹⁴ Though the existence of unions and their associated opposition to reform efforts should not discourage legislators from drafting and adopting a UCPJ, it is important to recognize the impediment that unions pose in the police disciplinary reform movement and to acknowledge the implications of union involvement in the UCPJ drafting process. For example, the presence of unions in the UCPJ formulation process may result in rank-and-file officers having significantly greater bargaining power and influence in designing this novel police disciplinary system than servicemembers had in structuring the military justice system. While this may ensure that officers' interests are represented and protected, it should not be permitted to dilute the efficacy of the UCPJ as a tool for constraining officers' behavior.

2. *Avoiding Militarization*

While a UCPJ presents many potential benefits, this Note emphatically cautions against deploying the UCPJ as a means to further militarize the police. In contrast to the U.S. law enforcement apparatus, several other democracies—including France,¹⁹⁵ Italy,¹⁹⁶

“contribut[e] to regulatory capture, whereby police unions are able to obtain unreasonably generous protections from disciplinary oversight”).

¹⁹⁴ This conclusion is warranted, given police unions' resistance to other police reforms that have been suggested in recent years. *E.g.*, William Finnegan, *How Police Unions Fight Reform*, *NEW YORKER* (July 27, 2020), <https://www.newyorker.com/magazine/2020/08/03/how-police-unions-fight-reform>; Jill McCorkel, *Police Unions Are One of the Biggest Obstacles to Transforming Policing*, *CIV. BEAT* (July 30, 2020), <https://www.civilbeat.org/2020/07/police-unions-are-one-of-the-biggest-obstacles-to-transforming-policing>.

¹⁹⁵ See *French National Gendarmerie*, FIEP: INT'L ASS'N GENDARMERIES & POLICE FORCES WITH MIL. STATUS, <http://www.fiep.org/%20member-forces/french-national-gendarmerie> (last visited May 30, 2021).

¹⁹⁶ See *Italian Carabinieri*, FIEP: INT'L ASS'N GENDARMERIES & POLICE FORCES WITH MIL. STATUS, <http://www.fiep.org/member-forces/italian-carabinieri> (last visited May 30, 2021); see also Dany Mitman, *It's 200 Years Old, but What Is Italy's Carabinieri?*, *BBC NEWS* (July 13, 2014), <https://www.bbc.com/news/magazine-28254297> (noting the militarized status of the Italian Carabinieri).

and Spain¹⁹⁷—have fully militarized or “hybrid” militarized police forces.¹⁹⁸ Although further research ought to be conducted to discern valuable cross-national lessons from these countries’ experiences, a cursory glimpse at such systems reveals that this approach may exacerbate, rather than alleviate, problems of police brutality.¹⁹⁹ Moreover, our nation’s tumultuous history of police violence and public distrust of law enforcement cautions against adopting such an approach in America.²⁰⁰

Rather than facilitating the militarization of U.S. police, the UCPJ ought to be used to promote accountability, consistency, and impartiality in the administration of police discipline. Critics have noted that “[i]n recent years, law enforcement agencies across the country have increasingly adopted tactics, equipment, and a culture that is more akin to those seen in the branches of our military,” positing that this “trend has resulted in a clear decrease in legitimacy and trust between communities and law enforcement.”²⁰¹ The militarization of police units has reached far beyond their uniforms, weapons, and tactics, and can be traced back to the “paramilitary police training” that police recruits endure, wherein many of the unbecoming elements of military training and service are also present.²⁰² For example, when “police recruits are belittled by their instructors and ordered to refrain from responses other than ‘Yes,

¹⁹⁷ See *About Us*, GUARDIA CIVIL, <https://www.guardiacivil.es/en/institucional/Conocenos/index.html> (last visited Aug. 20, 2021) (describing Spain’s Civil Guard as a militarized public security corps).

¹⁹⁸ Lieblich & Shinar, *supra* note 80, at 147.

¹⁹⁹ See Hayes Brown, *Four Countries That Show the Danger of Militarized Police Forces*, THINKPROGRESS (Aug. 14, 2014, 8:32 PM), <https://archive.thinkprogress.org/four-countries-that-show-the-danger-of-militarized-police-forces-432bf7e66831> (“[M]any of the countries with a gendarmerie—a hybrid of the military and police—or national police force have in their history systemic abuse and violations of human rights.”); Pascale Bonnefoy, *Mounting Evidence of Abuse by Chile’s Police Leads to Calls for Reform*, N.Y. TIMES (Dec. 13, 2019), <https://www.nytimes.com/2019/12/13/world/americas/chile-police-protests.html> (discussing brutality perpetrated by the Carabineros, Chile’s militarized police force).

²⁰⁰ See Lieblich & Shinar, *supra* note 80, at 143–44 (discussing how militarization of the police erects a “friend/enemy distinction . . . whereby the policed community is excluded from the political collective” and noting that “the exclusionary result of the friend/enemy distinction is amplified when aimed at historically marginalized communities, as it could reify already prevailing notions of exclusion and alienation”).

²⁰¹ *Militarization of Police*, CHARLES KOCH INST. (July 17, 2018), <https://www.charleskochinstitute.org/issue-areas/criminal-justice-policing-reform/militarization-of-police>.

²⁰² Rosa Brooks, *Stop Training Police Like They’re Joining the Military*, ATLANTIC (Aug. 12, 2020, 9:56 AM), <https://www.theatlantic.com/ideas/archive/2020/06/police-academies-paramilitary/612859> (detailing that most police academies are “loosely modeled on military bootcamps”).

Sir!,’ they may learn stoicism—but they may also learn that mocking and bellowing orders at those with less power are acceptable actions.”²⁰³ These kinds of “paramilitary traditions extend well beyond the academy” in many police departments, since “[s]enior police officials commonly refer to patrol officers as ‘troops[]’” and “chain of command is rigidly enforced.”²⁰⁴ Such paramilitary tactics have led police officers to become segregated from the communities that they serve, furthering an “us versus them” mindset, rather than reinforcing a collective vision.²⁰⁵ Notably, though, this increased militarization does not mean that law enforcement officers are as extensively trained as servicemembers.²⁰⁶

It is imperative that the adoption of the UCPJ does not further segregate police officers from the communities that they serve. Military servicemembers often view their military enlistment as much more than a mere job, and this phenomenon is present among police officers as well.²⁰⁷ While it is important for police officers to have a strong sense of community and trust among one another, since they do sometimes encounter dangerous circumstances and must be able to rely on one another under such conditions, it is equally important that the UCPJ not further the narrative that police officers’ uniforms transform them into unique human beings, somehow distinct from the community members that they serve and police. For example, the concept of “blue lives” has been challenged by critics who argue that police officers can take off their uniforms at the end of their shift.²⁰⁸ Critics also warn against the dangers of perpetuating a narrative wherein being a police officer is considered an inherent part of one’s identity.²⁰⁹ While this is an important concern to keep in mind in the

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ See *id.* (discussing antagonistic police programs and actions); Julian Go, *The Imperial Origins of American Policing: Militarization and Imperial Feedback in the Early 20th Century*, 125 *AM. J. SOC.* 1193, 1194 (2020) (noting that “the use of militarized equipment, forms, and tactics increases police aggression and police killings while decreasing the public legitimacy of policing institutions”).

²⁰⁶ See *supra* Section I.C. (discussing how law enforcement personnel’s training is inferior to servicemembers’ training).

²⁰⁷ See *The Similarities and Differences Between Law Enforcement and the Military*, *supra* note 78, at 26:00 (discussing police officers’ heightened sense of responsibility in protecting their friends and family).

²⁰⁸ See Alexandra Tsuneta, *Blue ‘Lives’ Don’t Matter Because Blue ‘Lives’ Don’t Exist*, MEDIUM (June 26, 2020), <https://medium.com/fearless-she-wrote/blue-lives-don-t-matter-because-blue-lives-don-t-exist-ec44762a5299> (“Cops willingly choose their profession and when they finish their shift they can clock out, go home, take their uniform off, and continue with their lives. . . . [B]eing a policeman/police woman is a job, it is not a race.”).

²⁰⁹ See Matthew Guariglia, *‘Blue Lives’ Do Matter—That’s the Problem*, WASH. POST (Nov. 30, 2017, 6:00 AM), <https://www.washingtonpost.com/news/made-by-history/wp/>

process of drafting and implementing the UCPJ, such a Code does not necessarily have to be contrary to the notion that police officers are civilians and members of the community. In fact, by limiting the subject-matter and personal jurisdiction of the Code, and in part by imposing a service-connection requirement for prosecution under the Code, law enforcement personnel would be reminded that their status as police officers is not an omnipresent force in their lives.

CONCLUSION

Ultimately, while adopting a UCPJ is advisable—for it would create uniform standards, promote accountability, and enhance community trust in police forces—such a Code would not be a panacea; additional, systemic reforms would be required to attain the goals of the police reform movement and to ensure the fair administration of justice in police discipline matters. Yet, despite the UCPJ's shortcomings and its inability to resolve all of the pervasive ills inherent in policing and police discipline, such a Code would serve as a monumental step towards achieving the goals of the police discipline reform movement.

Although the Code may encounter initial resistance amongst law enforcement officials, it may actually benefit officers by “providing officers with a clearer sense of what is expected of them,” in turn cultivating “an atmosphere of compliance, which would go a long way toward fostering a higher degree of goodwill between police and the people they’re tasked with protecting.”²¹⁰ By providing a uniform system for police oversight and regulation, the UCPJ would address both due process and miscarriage of justice concerns ascribed to the existing systems of internal and external police discipline. Moreover, by outlining clear and consistent rules for law enforcement officials, the Code would underscore that police officers are not above the law and will be held accountable for their actions. And, if the Code is implemented and enforced, the actual and apparent imposition of responsibility and accountability will potentially reestablish some community trust in law enforcement. For example, in the case of Mr. Hill’s unjustified murder, Officer Coy, the responsible culprit, could be held accountable under the UCPJ, thus ensuring that justice is served and signaling to other officers that they are not above the law and that police brutality will not go unpunished.

2017/11/30/why-blue-lives-matter (identifying one of the problems with perceiving officers as having “blue lives” is that, “at least for white officers, this strong sense of identity and camaraderie—of police-hood—often supersedes an ability to empathize with civilians of color”).

²¹⁰ Bedi & Everett, *supra* note 18.