Toward a Uniform Code of Police Justice

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I. INTRODUCTION

The recent (and seemingly consistent) news of police abuses has led to significant discussion on how best to curtail this conduct.¹ A common reaction is that we need to do a better job of making sure that officers are subject to appropriate criminal sanctions for their behavior.² While espousing a similar refrain, this Article takes a step back and wrestles with a more fundamental question. Why are police officers—given their unique responsibilities and powers—subject to the same criminal code as everyone else? I analogize to soldiers who have their own set of criminal laws under the Uniform Code of Military Justice (UCMJ). Given the similarities between soldiers and police officers—both carry guns, are part of a hierarchal structure, and most notably, are tasked to protect society through use of force and possibly deadly force—it stands to reason that both groups should be subject to unique laws specifically tailored to their respective duties and responsibilities. I argue that a uniform code of police justice would ultimately be more effective in regulating police behavior and deterring instances of abuse.

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The last few years have brought national attention to concerns of police misconduct. One only needs to read about the cases of Michael Brown, Sandra Bland, and Eric Garner to see the severity of the problem and the need for reform. In a recent civil suit relating to police use of deadly force, Justice Sotomayor lamented the culture of police brutality and violence. There have been a host of proposed reforms that seek to ameliorate the situation, including, for example, better training of police officers, broader use of civil remedies, greater involvement of community members in police oversight, and more stringent application of criminal law to police behavior.

This Article—while working within the criminal law reform framework—goes one step further and seeks to change the substantive criminal rules that apply to police officers when performing their duties. Currently, these individuals are subject to the same criminal laws as everyone else. The elements of relevant crimes such as assault and homicide make no distinction between officers and non-officers. I argue that current laws are not sufficiently tailored to regulate a police officer’s unique responsibilities and powers.

I use soldiers and the UCMJ as a counterpart. We, as a society, recognize that military personnel have a special role to play. They are tasked to defend the country through the use of force and, often, deadly force. While we honor their service, we recognize the need for special obligations commensurate with their duties. So goes the rationale for

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4 See infra notes 161-168 and accompanying text.

5 See infra notes 122-127 and accompanying text.

6 See Mullenix v. Luna, 136 S. Ct. 305, 316 (2015) ("But the [officer's glib] comment [after the shooting] seems to me revealing of the culture this Court's decision supports when it calls it reasonable—or even reasonably reasonable—to use deadly force for no discernible gain and over a supervisor's express order to 'stand by.' By sanctioning a 'shoot first, think later' approach to policing, the Court renders the protections of the Fourth Amendment hollow.") (Sotomayor, J., dissenting).


10 See supra note 2.

11 See infra Part II.B.

12 See infra Part II.A.
promulgating the UCMJ and its unique criminal provisions.\(^{13}\) This code includes crimes such as dereliction of duty and conduct unbecoming an officer—distinct liability rules that have no counterpart in the civilian criminal code.\(^{14}\)

Police officers, too, are uniquely positioned in our society. They also are tasked to defend communities against threats to safety and security. Carrying out these duties—which includes questioning or detaining suspects—similarly requires the power to use force, and even deadly force.\(^{15}\) While there are certainly differences between the roles of police officers and soldiers, their unique status and powers put these two groups in a separate category compared to all other professions and, in turn, point to the need for special criminal rules to regulate their respective duties.

It actually turns out that the current criminal code already treats police officers differently, although it does so in a partial and somewhat inconsistent way. Rather than impose any distinct affirmative liability, states have created separate rules for officers on the back end.\(^{16}\) Police officers get the benefit of special defenses not available to others such as the ability to use reasonable or justifiable force.\(^{17}\) Though these allowances make sense given an officer’s duties, we need affirmative criminal laws—similar to the UCMJ provision—that are equally tailored to an officer’s responsibilities.\(^{18}\)

It is important to note that the Article is focused less on the construction of a uniform police code and more on the conceptual framework that justifies its existence. However, we do not need to look that far for possible crimes that could be included. Police department policies or manuals provide a good starting point. They already contain specific provisions on the use of force and the role of ethical responsibilities.\(^{19}\) My proposal, crudely put, is to criminalize these provisions that currently only result in civil penalties such as demotion or termination. This could include specific provisions such as the prohibition of chokeholds when detaining individuals, an obligation to de-escalate an encounter, or a requirement of professionalism when interacting with citizens.\(^{20}\) These changes would make it easier for

\(^{13}\) See id.

\(^{14}\) See infra Part II.B.

\(^{15}\) See infra Part III.A.

\(^{16}\) Some states do impose affirmative liability in the form of “oppression statutes” but these rules are not designed to provide effective deterrence. See infra notes 107–112 and accompanying text.

\(^{17}\) See infra Part III.B.

\(^{18}\) See id.

\(^{19}\) See infra Part III.C.

\(^{20}\) See infra Parts III.C.1 and III.C.3.
prosecutors to bring charges and instill greater confidence in police accountability.\textsuperscript{21}

The Article proceeds in three parts. Part I provides a primer on military justice and a sampling of the unique crimes contained in the UCMJ. Part II makes the argument for a uniform police criminal code. It begins by detailing the similarity between police officers and soldiers and how this association supports a unique criminal code tailored to each group’s respective responsibilities and duties. It goes on to use police department policies as a starting point for the creation of distinct crimes for police officers. Part III focuses on the benefits of this kind of criminal code and tackles some practical considerations for its implementation.

II. MILITARY JUSTICE: CRIMINAL LIABILITY FOR SOLDIERS

A. The Rationale for a Separate System: Military Procedure vs. Military Specific Crimes

The United States has always treated soldiers differently from citizens when it comes to criminal justice.\textsuperscript{22} This takes the form of separate procedures as well as unique substantive criminal laws.\textsuperscript{23} Military process has a number of distinctive features: to name a few, soldiers are tried through non-judicial punishment or courts-martial;\textsuperscript{24} all the relevant players (lawyers, judges, and juries) are military personnel;\textsuperscript{25} and perhaps most significant, and contrary to the civilian system, military commanders rather than prosecutors wield decision-making authority over charges and pleas.\textsuperscript{26}

This process works side-by-side with a unique set of substantive criminal laws. Soldiers are subject to a separate set of criminal rules that arise directly from their role as a fighting force.\textsuperscript{27} The original

\textsuperscript{21} See infra Part IV.A.


\textsuperscript{25} See id. §§ 822–29 (describing who may participate in and convene courts-martial).

\textsuperscript{26} See id. §§ 822–24; Schlueter, supra note 23; Monu Bedi, Unraveling Unlawful Command Influence, 93 WASH. U. L. REV. (forthcoming 2016).

\textsuperscript{27} See Nicholson, supra note 22; Schlueter, supra note 23; GEORGE DAVIS, A TREATISE ON THE PRACTICE AND PROCEDURE OF COURTS-MARTIAL AND OTHER MILITARY TRIBUNALS 342–43 (J. Wiley & Sons, 3rd ed. 1915) (indicating that soldiers in the early Republic were governed by the Articles
military code—called the Articles of War—subjected soldiers to a wide assortment of crimes, including rape and murder as well as uniquely military crimes such as desertion, disobedience of orders, dereliction of duty, and conduct unbecoming an officer. The rationale for these military-oriented crimes seems somewhat obvious. Soldiers are tasked to defend this country, which often requires assaulting and killing individuals as part of the mission. So it is imperative to enforce good order and discipline by effectively regulating soldiers’ duties. This necessitates crafting criminal liability rules that are not applicable to civilian society. Obedience and readiness to fight, for instance, are essential qualities that must be enforced among soldiers On the other hand, these qualities would have no role to play in promoting law abiding civilians.

B. The Uniform Code of Military Justice and Substantive Military Crimes

The UCMJ passed by Congress shortly after World War II, was in many ways a watershed moment. While it continued the command-centric nature of military procedure, it finally gave defendants some of the same procedural rights that civilian defendants already enjoyed such as the prohibition against self-incrimination, double jeopardy protection, and extensive appellate review to name a few. Relevant
for my purposes, the statute also expanded upon the substantive criminal provisions of the Articles of War, including general as well as military specific crimes.\textsuperscript{37} I highlight two military crimes that are most relevant to my proposal for a uniform police code.\textsuperscript{38}

1. Dereliction of duty and the negligence standard.

The crime of dereliction of duty involves a soldier who fails to perform her required duties.\textsuperscript{39} The key elements are that the defendant had certain duties; that she knew or reasonably should of known of the duties; and that she either willfully or negligently failed in the performance of those duties.\textsuperscript{40} These duties can be imposed by a variety of sources, including by "treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service."\textsuperscript{41} It is no surprise that military courts have therefore prosecuted soldiers in a broad range of cases, including, for example, violating rules of engagement relating to use of military dogs on prisoners,\textsuperscript{42} general orders to report drug use by subordinates,\textsuperscript{43} and professional medical ethical standards in connection with patient care.\textsuperscript{44}

It is worth pointing out that military courts do not necessarily require a willful or intentional violation of duty, though this type of case carries the most severe punishment.\textsuperscript{45} Soldiers can still be prosecuted for mere negligence or, in other words, soldiers can still be prosecuted if a reasonable soldier under the same circumstances would have known about the duty and not engaged in the prohibited conduct.\textsuperscript{46} This standard is stricter than what is typically expected for a civilian prosecution, where simple negligence is not sufficient for a

\textsuperscript{36} See id. §§ 859–76 (outlining the rules of the appeals process).
\textsuperscript{37} See id. §§ 877–934 (enumerating the punitive articles of the UCMJ).
\textsuperscript{38} While the UCMJ built upon the crimes of dereliction of duty and conduct unbecoming an officer, these offenses were part of the original Articles of War. See supra note 28.
\textsuperscript{39} See UCMJ, 10 U.S.C. § 892(3) (outlining punishment for dereliction in the performance of duties). If the dereliction is based upon an order, it may be a lesser-included offense to a charge of disobedience of that order. See United States v. Bivins, 49 M.J. 328 (C.A.A.F. 1998) (defendant charged with violating lawful general order regarding underage drinking and found guilty of lesser included offense of dereliction of duty); UCMJ, 10 U.S.C. § 892(1)–(2) (outlining the elements of the crime of violation of lawful order).
\textsuperscript{40} See MCM at Part IV, ¶ 16b(3) and ¶ 16c(3c).
\textsuperscript{41} See id. at Part IV, ¶ 16c(3c).
\textsuperscript{42} See, e.g., United States v. Smith, 68 M.J. 316 (C.M.A. 2010).
\textsuperscript{44} See, e.g., United States v. Rust, 38 M.J. 726 (A.F.C.M.R. 1993).
\textsuperscript{45} See MCM, Part IV, ¶ 16e(3).
\textsuperscript{46} Id., ¶ 16c3(c) ("Negligently' means an act or omission of a person who is under a duty to use due care which exhibits a lack of that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances").
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criminal violation. United States v. Rust provides a good example of the more expansive military standard. A military obstetrician was convicted of dereliction of duty for failing to personally examine and provide proper medical care to a pregnant patient. There was no evidence that the doctor intentionally withheld treatment; rather, he was simply negligent in failing to meet the appropriate standard of care. This lack of reasonable care, however, was sufficient to make out a crime of dereliction of duty. In the civilian system, this kind of simple negligence by a doctor would only subject that doctor to potential tort or financial liability for medical malpractice, but no criminal sanctions.

2. Conduct unbecoming an officer.

Conduct unbecoming of an officer is a more general provision that applies only to officers. Officers are held to a higher standard and expected to inspire trust and the respect of their subordinates. The crime uses general language and prohibits any "action or behavior in an official capacity which, in dishonoring or disgracing the person as an officer, seriously compromises the officer's character as a gentleman, or action or behavior in an unofficial... capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person's...

47 Under the civilian standard, gross negligence not simple negligence is generally required before a defendant can be held criminally responsible. See MODEL PENAL CODE § 2.02 (Proposed Official Draft 1985 (defining gross negligence as minimum required culpability); Leslie Yalof Garfield, A More Principled Approach to Criminalizing Negligence: A Prescription for the Legislature, 65 TENN. L. REV. 875, 886, 904 (1998) ("Legislatures and courts generally disallow criminal punishment for careless conduct, absent proof of gross negligence"); United States v. Lawson, 36 M.J. 415. 421–22 (C.M.A. 1993) (noting that, contrary to the civilian standard, simple negligence, not gross negligence, is sufficient for the crime of dereliction of duty). Civilian courts, however, have permitted criminal punishment for simple negligence for environmental crimes involving widespread injury. See Garfield, supra note 47, at n.134, n.138 (citing cases and statutes).


49 See id. at 729.

50 See id. at 728.

51 See id.

52 See id. ("In our view, medical malpractice by an officer whose military duties require him to provide medical care may be punished as dereliction in duty.").


54 See MCM, Part IV, ¶ 59a.

55 See id. at ¶ 59c(2); Parker v. Levy, 417 U.S. 733, 744 (1974) ("We have also recognized that a military officer holds a particular position of responsibility and command in the Armed Forces."); United States v. Frazier, 34 M.J. 194, 198 (C.M.A. 1992) ("We note that one critically important responsibility of a military officer is to inspire the trust and respect of the enlisted soldiers who must obey his orders and follow his leadership.").
standing as an officer." The lack of specificity in this provision is intentional; the crime serves as a catch-all provision that sweeps in conduct that may not otherwise fall under an explicit UCMJ provision. Examples of conduct unbecoming of an officer can include acts of "dishonesty, unfair dealing, . . . lawlessness, injustice or cruelty." Military courts have prosecuted officers under this provision for a wide variety of behavior, including having an "unprofessional relationship" with a subordinate, charging fellow officers for tutoring lessons, and engaging in public drunkenness while in uniform.

C. Service Connected Crimes

Soldiers can be prosecuted for a crime even if it has no connection to their military service. Their status as active duty military personnel alone provides the relevant trigger to subject them to the UCMJ. This was not always the case. In the late 1960s, the Supreme Court briefly adopted a service connection requirement for court-martial jurisdiction. The Court came up with a multi-factor test to determine whether the putative crime was committed while in the performance of a soldier's military duty. For example, a soldier committing an offense outside the military base and after hours would not be subject to military jurisdiction. A later decision removed this service requirement altogether, finding it too difficult to administer.

56 MCM at Part IV, ¶ 59c(2).
57 See generally Elizabeth Hillman, Gentlemen Under Fire: The U.S. Military and "Conduct Unbecoming", 26 LAW & INEQ. 1, 6–8 (2008) (discussing the long history of the statute in American military life and its strategic vagueness); United States v. Bilby, 39 M.J. 467, 470 (C.M.A. 1994) ("It is not necessary, under [conduct unbecoming an officer], that the conduct of the officer, itself, otherwise be a crime."). Relying on the unique nature of military society, the Supreme Court has upheld the statute against claims of void for vagueness under due process. See Parker, 417 U.S. at 756–57.
58 MCM, Part IV, ¶ 59c(2).
59 See, e.g., United States v. Rogers, 54 M.J. 244 (C.M.A. 2000).
63 See, e.g., UCMJ, 10 U.S.C. § 802 (outlining which members of the military can be court-martialed).
64 See O'Callahan v. Parker, 395 U.S. 258 (1969) (holding that an off-duty soldier did not commit a service-related act that created court-martial jurisdiction when he allegedly broke into a hotel and assaulted someone).
65 See Relford v. Commandant, 401 U.S. 355, 365 (1971) (the Court used twelve factors, including, for instance, whether the crime was committed off base, whether the victim was a soldier, among other considerations).
66 See, e.g., United States v. Saulter, 5 M.J. 281 (C.M.A. 1978) (action was not service connected because soldier engaged in after hours, off base drug offense while in civilian clothes).
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and, moreover, concluding that its removal more faithfully adhered to Congress’ plenary authority over the military system.67

III. TOWARD A UNIFORM CODE OF POLICE JUSTICE

A. The Similar Roles of Police Officers and Soldiers

Police officers and soldiers have a lot in common. Both carry guns, wear uniforms, work in hierarchal organizations, and go through extensive training pipelines.68 It is no surprise that becoming a police officer is a common second career for veterans.69 More importantly, both groups are tasked to protect society and uniquely sanctioned to use physical force—including deadly force, if necessary—to carry out their duties.70 The recent “militarization” of many police departments—for better or worse—further underscores this association.71 Soldiers, however, typically deal with external threats and are deployed overseas, whereas police officers are tasked with dealing with internal

67 See Solorio, 483 U.S. at 436 (overruling O’Callahan, supra note 64).

68 See, e.g., Elizabeth Price Foley, The “War” Against Crime: Ferguson, Police Militarization, and the Third Amendment, 82 TENN. L. REV. 583, 593 (2015) (“The question for an originalist, therefore, would be whether the fact that police officers shared basic characteristics with military ‘soldiers’—carrying weapons, wearing uniforms, hierarchical organizational structure.”); Clayton Browne, Are Police Academies Like Military Boot Camp, DEMAND MEDIA, [https://perma.cc/MA6W-TF43] (discussing respective training pipelines, including the fact that both boot camp and police academies provide firearm training).


70 See, e.g., W. Hays Parks, Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect, 42 N.Y.U. J. INT’L L. & POL. 769, 820 (2010) (“Thus a soldier in an armed conflict or a law enforcement officer in a peacetime environment confronted with a threat will see what may be a threat, identify it as a threat, process that information, and respond according to his or her training, rules of engagement (in the case of the soldier) or rules for use of deadly force (in the case of the police officer.”); Samantha A. Lovin, Note, Everyone Forgets About the Third Amendment: Exploring the Implications on Third Amendment Case Law of Extending Its Prohibitions to Include Actions by State Police Officers, 23 WM. & MARY BILL RTS. J. 529, 545 (2014) (citing James P. Rogers, Third Amendment Protections in Domestic Disasters, 17 CORNELL J.L. & PUB. POL’Y 747, 749 (2008)) (“the drafters may not have necessarily anticipated the existence of the armed and uniformed peace-keeping corps that make up the law enforcement agencies of today”); Stephen Coleman, Possible Ethical Problems with Military Use of Non-Lethal Weapons, 47 CASE W. RES. J. INT’L L. 185, 198 (2015) (discussing that both soldiers and police officer are authorized to use deadly force though soldiers are expected to kill the enemy).

threats and are expected to keep communities safe. Still, the ability to use force in protecting society puts these two groups in a category distinct from other professions.

Add to this a key justification for criminal laws—namely the need to regulate citizen behavior and deter people from harming other citizens. This rationale should apply equally to soldiers and police officers. Given both groups' 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.

There are, of course, material differences between soldiers and police officers. For example, one difference is the sanctioned use of physical force. A soldier's duty is more straightforward and one-sided. As part of engaging the enemy, she is expected to kill. Use of force by a police officer is more complicated, on account of an officer's broader authority as a peace officer. This role often only includes questioning a suspect or otherwise interacting with a citizen, and only if necessary arresting or detaining someone. The use physical force—and obviously deadly force—may or may not be justified depending on the circumstances. This key difference, however, simply speaks to the specific contours of a unique criminal code—not to whether it should exist. Regulating police officer behavior, will likely require specific regulations on use of force that are not necessary for soldiers.

A similar analysis applies to a soldier's service obligation and the requirement to obey superior officers. Soldiers are legally required to serve for multiple year periods whereas police officers are free to resign


74 See, e.g., Joseph McNamara, The Police and Violent Crime, 51 WASH. & LEE L. REV. 491, 502 (1994) (quoting General Colin Powell for the propositions that "a soldier's duty is to kill the enemy" and "police officers are supposed to be peace officers").

75 See id.

76 See, e.g., Kealy, supra note 71, at 386–87 ("Whereas soldiers must attack and defeat an enemy, police officers are charged with not only protecting the community from lawbreakers, but also protecting the constitutional rights of those alleged lawbreakers that they arrest. Whereas soldiers are trained to inflict maximum damage in many situations, police officers have a duty to use minimum force, and only when reasonably justified, in accomplishing their mission.").

77 See, e.g., Michael Lewis, Ethics and Operational Realities of War on Terror, 50 S. TEX. L. REV. 837, 842 (2009) ("The difference in mindset between a soldier and a police officer can be summed up this way: A soldier's best friend is his rifle; a police officer's best friend is his radio. That does not mean soldiers do not use radios and police do not use guns, but it does indicate where they are trained to turn when things do not go as planned.").

78 See infra Part III.C.1.
from their job at any time.\textsuperscript{79} Additionally, obedience to superior officers and following orders play a much greater role in military life than in the police system.\textsuperscript{80} But again, these differences only go to what the relevant crimes should be, not to whether these groups should be subject to a separate criminal code. For example, it makes sense that desertion and disobedience of orders are part of the military code, but would not necessarily be essential components of a police code.\textsuperscript{81}

Soldiers also typically work alongside other soldiers and are generally segregated from the civilian population. They work on bases almost exclusively with other military personnel and can be deployed overseas with other military units.\textsuperscript{82} Police officers, on the other hand, routinely interact with members of the community in carrying out their duties.\textsuperscript{83} In fact, their job necessitates this interaction. Whether it is interviewing citizens, questioning suspects, conducting traffic stops, or making arrests, all of these actions by definition require interfacing with citizens.

This difference between soldier and police life—while presenting an interesting contrast—is not really pertinent to my specific proposal for a unique criminal code, or at least does not pose a challenge to it. We are talking about criminal liability for police officers in connection with their responsibilities, and commensurate powers, as keepers of the peace and protectors of the community. In this way, there is an undeniable nexus between the responsibilities of officers and soldiers. This does not mean that the varying level of interaction with the general population is not applicable to criminal justice. But perhaps it says more about how these crimes should be prosecuted and less about what crimes should be prosecuted. I will discuss this point in more detail below.\textsuperscript{84} For now, it is enough to say that the shared

\begin{itemize}
\item See UCMJ, 10 U.S.C. § 651 (defining service obligation of soldiers).
\item See id. at § 892 (criminalizing failure to obey lawful superior order); Monu Bedi, \textit{Entapped: A Reconceptualization of the Obedience to Orders Defense}, 98 MINN. L. REV. 2103, 2132 (discussing how implicit obedience is a necessary feature for an effective military force). It is still important for police to respect the chain of command. See, e.g., SEATTLE POLICE DEPT, \textit{MANUAL: CHAIN OF COMMAND} (2014), http://www.seattle.gov/police-manual/title-1—department-administration/1020—chain-of-command [https://perma.cc/HXL9-P2YF].
\item See supra note 80; UCMJ, 10 U.S.C. § 885 (describing the elements of desertion). Failure to follow orders within the police structure can still result in disciplinary actions. See, e.g., Longton v. Village of Corinth, 869 N.Y.S.2d 682 (A.D. 3d Dept. 2008) (police officer suspended for failing to obey direct order by chief of police).
\item See infra Part IV.C.
\end{itemize}
responsibilities of police officers and soldiers—most notably their sanctioned use of physical force—puts them in a separate category relative to all other professions and, in turn, points to the need for special criminal rules to regulate these duties.

B. Police Accommodations Within the Civilian Criminal Code

Police abuses were historically handled either through civil assault suits brought by citizens against police officers or, less often, criminal prosecutions brought by states under their general criminal code. In both scenarios, police officers—in defending their actions—had the ability to use self-defense provisions or the common law rule permitting reasonable force in effectuating a lawful arrest. The current civilian code has simply codified this state of affairs. As the discussion below will demonstrate, states continue to treat officers differently, although end up doing so in a partial and inconsistent way.

By and large, police officers and non-police officers are subject to the same criminal laws. The elements of relevant crimes such as assault and homicide are the same for both groups. These crimes typically require a specific *mens rea* together with some physical act resulting in injury. These elements make no distinction between conduct by police officers and non-police officers.

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87 A simple assault (or battery in some jurisdictions) usually requires a person to intentionally or recklessly make offensive contact or injure a person. See, e.g., FLA. STAT. ANN. § 784.03(1)(a) (West 2007) (under Florida law, a battery occurs when a person intentionally strikes a person or causes bodily harm); 720 ILL. COMP. STAT. ANN. 5/12-3 (Lexis 2015) (under Illinois Law, a battery occurs when a person knowingly makes unwanted physical contact or causes bodily harm); N.Y. PENAL LAW § 120.10 (McKinney 2010) (under New York law, a person commits an assault if she intentionally or recklessly causes injury to another); MODEL PENAL CODE § 211.1(1)(a) (Proposed Official Draft 1985). Aggravating factors such as the nature of the injury (e.g. severe bodily injury) may justify a more severe charge such as aggravated assault. See, e.g., FLA. STAT. ANN. § 784.021; 720 ILL. COMP. STAT. ANN. 5/12-3.05; N.Y. PENAL LAW § 120.10; MODEL PENAL CODE § 211.1(2) (Proposed Official Draft 1985). Homicide charges require a specific state of mind (e.g. recklessness) along with the victim’s death. See generally MODEL PENAL CODE § 210.1(1) (Proposed Official Draft 1985). Here, too, depending on the level of intent, an actor may be subject to a more severe charge. See *id.* § 210.1(2). For example, negligently or recklessly causing the death of a person is generally considered manslaughter, whereas intentionally causing the death of a person can result in the greater charge of murder. See FLA. STAT. ANN. § 782.07(1) (defining manslaughter with negligence); FLA. STAT. ANN. § 782.04 (defining murder with intent); 720 ILL. COMP. STAT. ANN. 5/9-3 (defining involuntary manslaughter with recklessness); 720 ILL. COMP.
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State criminal codes, however, do make allowances for police officers when it comes to defenses to these crimes. Take the crime of assault. It is typically defined as intentionally causing injury to another person and, again, makes no reference to police officers. To accommodate police duties, state codes promulgate additional provisions that explicitly allow these individuals to use justified physical force in order to arrest or capture a suspect. These provisions require that the force be reasonable under the circumstances.

Similarly, when it comes to homicide charges, states have adopted broader self-defense rules for police officers than for other individuals. States typically require an imminent threat of serious bodily harm before allowing a citizen to use deadly force against her aggressor, and some states even require individuals to retreat if possible. Police have greater leeway. Officers have no duty to retreat and, in some jurisdictions, can kill even if there is no imminent threat of deadly harm.

On some level, the special defenses for police officers make sense. Part of a police officer’s job is to make arrests and keep the peace. These duties necessarily implicate the potential of assaulting citizens and, if necessary, killing them. But it is not clear why these defenses

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8 See supra note 87.
89 See supra note 87.
90 See, e.g., FLA. STAT. ANN. § 776.05 (explaining that police officer allowed to use reasonable force in effectuating arrest); 720 ILL. COMP. STAT. ANN. 5/7-5 (same); N.Y. PENAL LAW § 35.30 (same); MODEL PENAL CODE §§ 3.07 (police officer allowed to use force in effectuating arrest), 3.09 (requiring that police officer’s use of force not be negligent or reckless).
92 See, e.g., MODEL PENAL CODE § 3.04 (Proposed Official Draft 1962) (requiring that deadly force be “immediately necessary” and requiring retreat if possible); N.Y. PENAL LAW § 35.15 (requiring that aggressor is “using or about to use deadly physical force” before allowing use of deadly force in self-defense and requiring retreat if possible); FLA. STAT. ANN. § 776.012(1) (requiring “imminent threat of death or great bodily harm” before allowing use of deadly force but not requiring retreat); 720 ILL. COMP. STAT. ANN. 5/7-4 (requiring that there be an “imminent danger of death or great bodily harm” before allowing use of deadly force and requiring retreat if possible).
93 See, e.g., MODEL PENAL CODE § 3.07 (Proposed Official Draft 1962) (no requirement police officer retreat or threatened harm be imminent before using deadly force); 720 ILL. COMP. STAT. ANN. 5/7-5 (no requirement that police officer must retreat before using deadly force and no requirement that there be an imminent or immediate threat of serious bodily injury to officer or others); N.Y. PENAL LAW § 35.30 (no requirement that police must retreat before using deadly force); FLA. STAT. ANN. § 776.05 (no requirement that threat of serious bodily injury or death be immediate or imminent).
94 These unique defenses thus probably stand as analogous to the military defense of
are crafted in such an open-ended manner. Take an officer's justified use of physical force in making an arrest. State codes typically paint with a broad brush and use very general language to describe the contours of this justification.\textsuperscript{95} New York law, for example, states that a police officer can "use physical force when and to the extent he or she \textit{reasonably believes} such to be necessary to effect the arrest, or to prevent the escape from custody."\textsuperscript{96} There is no mention of specific acts that may or may not be prohibited in carrying out these duties.

Similarly, take an officer's use of deadly force even if there is no imminent harm. Here, too, state codes rely on very general language that defers to an officer's judgment.\textsuperscript{97} Illinois, for example, provides that an officer can use deadly force "when he \textit{reasonably believes} that such force is \textit{necessary} to prevent death or great bodily harm to himself or such other person."\textsuperscript{98} These provisions allow officers to use force, and potentially kill if it is reasonable, without much guidance on the specific circumstances under which either is acceptable.\textsuperscript{99} The vagueness of the statute, in turn, leaves prosecutors with significant discretion (perhaps too much) on whether to bring charges and gives juries significant latitude on whether to convict an officer.\textsuperscript{100}

The difference between the more developed general justification rules and the less developed police use-of-force defenses may not be surprising given the early American focus on private citizens playing an active role in reporting crimes and making arrests. As Professor Rachel Harmon explains, "In a world without professional police forces or frequent interactions between the police and suspects, there would have been much less opportunity and motive for police violence."\textsuperscript{101} By contrast, the more common occurrence of citizens playing law enforcement roles necessitated more developed common law rules for obedience to orders. This unique military defense allows military personal to engage in conduct that would otherwise be a criminal act if committed by a civilian. A soldier can argue that she committed the act because she was ordered to do them by a superior officer and at the time didn't realize they were unlawful. See MCM, \textit{supra} note 29, at R.C.M. 916(d). Given the importance of obedience in military life, it is imperative soldiers can make out such a defense. See Bedi, \textit{supra} note 80. A successful application of this defense also carries a reasonableness or objective requirement. See \textit{id}.

\textsuperscript{95} See \textit{supra} note 90.
\textsuperscript{96} See N.Y. PENAL LAW § 35.30(1) (emphasis added).
\textsuperscript{97} See \textit{supra} note 93.
\textsuperscript{98} See 720 ILL. COMP. STAT. ANN. 5/7-5 (emphasis added).
\textsuperscript{99} See, \textit{e.g.}, Toussaint Cummings, Note, \textit{I Thought He Had a Gun: Amending New York's Justification Statute to Prevent Police Officers from Mistakenly Shooting Unarmed Black Men}, 12 CARDOZO PUB. L. POLY & ETHICS J. 781 (2014) (arguing that current justification laws need to be changed to prevent unwarranted shootings).
\textsuperscript{100} See \textit{generally infra} Part III.C.
\textsuperscript{101} See Harmon, \textit{supra} note 85, at 1149.
self-defense. This state of affairs thus left little attention to the question of police force accountability in early American cases. The eventual rise of a professional police force, according to Harmon, did not bring commensurate attention to specific justification defenses for this group of individuals.

Moving beyond the merits of these defenses, it also seems somewhat inconsistent to provide for them but not employ distinct affirmative criminal liability. Why should police officers—on account of their unique duties—get the benefit of special defenses unavailable to non-officers but not the commensurate burden of additional criminal liability? To be sure, this asymmetry is not present in the military system—which opts for a distinct criminal code that applies across both crimes and their defenses—where soldiers, too, must kill and assault in their line of work.

It is worth noting, however, that some states do impose affirmative criminal liability on police officers in the form of “official oppression statutes.” These are broadly worded laws that make it a crime for a police officer or other official to abuse her power. A typical statute reads as follows: “A public servant ... commits official oppression if, with actual knowledge that his conduct is illegal, he ... [s]ubjects another to arrest, detention, search seizure, mistreatment....” At first blush, this may seem like an effective deterrent but upon closer analysis, these provisions are not specifically designed to successfully curtail bad behavior. For one thing, these are misdemeanor offenses and so would not have the same deterrent effect of an assault or homicide charge. Perhaps more significantly, it is hard to prove that an officer has violated this statute. The mens rea for this type of crime requires an officer to knowingly violate a lawful duty. This is not easy to show because it requires assessing the officer’s subjective mental state rather than an objective perspective.

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102 Id.
103 Id.
104 Id.
105 See supra Part II.A and supra note 94.
106 See, e.g., MODEL PENAL CODE § 243.1 (Proposed Official Draft 1985). It seems that roughly less than half of states have such statutes. See Matthew Hess, Comment, Good Cop-Bad Cop: Reassessing the Legal Remedies for Police Misconduct, 1993 UTAH L. REV. 149, n.213 (collecting statutes and noting that approximately 20 states have official oppression statutes).
109 See Hess, supra note 106, at n. 234 and accompanying text; supra note 107.
110 See Hess, supra note 106, at 183; supra note 107.
111 See, e.g., MODEL PENAL CODE § 2.02(5) (Proposed Official Draft 1985) (noting the hierarchy of culpability and that establishing knowledge automatically satisfies negligence standard);
This heightened standard is in sharp contrast to the simple negligence standard found in the dereliction of duty cases—the closest military analog to oppression statutes—which focuses on an objective assessment of the situation. These unique features may help explain why oppression charges are rarely brought against police officers.\(^{112}\)

C. A Starting Point: Promulgating Police Department Policies

The creation of a model uniform police code would no doubt require significant work and careful drafting of relevant crimes. The purpose of my Article is less about constructing one and more about justifying its existence in the first place. That said, one could look to internal police department policies as a useful starting point to any such enterprise. Police departments in most large metropolitan areas across the country have internal policies that govern an officer's conduct.\(^{113}\) While these internal policies are often too general to provide adequate guidance, a few city departments have promulgated more comprehensive rules and, perhaps more importantly, occasionally adopted stricter rules than their respective state criminal codes.\(^{114}\)

Just 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

\(^{112}\) Federal law also has a broad general criminal provision that subjects police officers to liability if they deprive a person their constitutional right, which can include physical harm. See 18 U.S.C. § 242 (2012). But these are hard cases to successfully prosecute since the officer must commit the violation willfully or with specific intent to cause harm. See 18 U.S.C § 242; Screws v. United States, 325 U.S. 91 (1945) (finding that the prosecution had not shown an officer intended to violate an individual's constitutional rights when he was killed during an arrest); United States v. Shafer, 384 F. Supp. 496, 499 (N.D. Ohio 1974) (affirming an acquittal of Ohio National Guardsmen involved in a shooting because the evidence was insufficient to find they had the specific intent of depriving persons of their constitutional rights); Hess, Good Cop-Bad Cop, supra note 106, at 186–88 (discussing the difficulty in prosecuting police officers under state oppression statutes and analogous federal law).

\(^{113}\) See generally Nirej S. Sekhon, Redistributive Policing, 101 J. CRIM. L. & CRIMINOLOGY 1171, 1177 n.26 (2011) (noting that such policies tend to focus on personnel issues rather than police protocol).

1. Excessive force provisions and prohibited conduct.

One of the biggest issues with police conduct seems to be the use of excessive force in effectuating arrests or otherwise detaining suspects. Internal police department policies provide a good starting point for how we can fashion affirmative criminal liability for an officer’s conduct in these situations.

New York City is a prime example of where internal police policies provide a stricter rule on use of force than the state's criminal code. As previously mentioned, the state has very general guidelines on an officer’s lawful use of force to arrest a suspect, subjecting it to a general reasonableness standard. New York City internal police rules, however, go a step further. For example, these policies explicitly ban officers from using chokeholds when arresting suspects. The relevant policy defines a chokehold as "any pressure to the throat or windpipe, which may prevent or hinder breathing or reduce intake of air." Currently, violation of this policy can only lead to disciplinary action such as demotion or termination. A potential uniform code of police justice could explicitly outlaw this kind of conduct such that an officer would be subject to a criminal assault charge if she engages in this practice.

This discussion of chokeholds as excessive force is not merely academic. A change in New York criminal law on this issue could have drastically altered the outcome of the Eric Garner case, which received significant media coverage and generated considerable outrage within the American public. In arresting Garner for illegally selling...
cigarettes on a sidewalk, a New York City police officer used a chokehold that ultimately caused his death.\textsuperscript{122}

A grand jury failed to indict the police officer on any criminal charges.\textsuperscript{123} Because grand jury proceedings are confidential, it is impossible to know how the grand jury reached this conclusion.\textsuperscript{124} One plausible explanation is the general nature of the relevant New York criminal statute on the use of excessive force.\textsuperscript{125} It may not be readily apparent why or why not this method of takedown is reasonable. It is not clear how the internal New York prohibition on chokeholds—assuming the jury received this policy—impacted their deliberation on whether the force used was excessive. Because chokeholds are not illegal \textit{per se}, the grand jury may have focused instead on the specific circumstances surrounding the incident. If the criminal code, however, had explicitly prohibited chokeholds, the grand jury may have found it easier to return an indictment and find probable cause that the officer’s conduct was excessive. It is not surprising in fact that as a result of this case, there have been efforts to change the criminal rules to prohibit such chokeholds.\textsuperscript{126}

My proposal in some ways is simply the logical extension of this sort of piecemeal reform. Working with these police manuals, we can craft statutes that specifically subject officers to criminal liability if they violate their duties in arresting and detaining suspects. These kinds of “excessive force” provisions could constitute an instance of assault, or alternatively, could work as a stand-alone charge.\textsuperscript{127} The form is of secondary importance. This kind of statute could include, as already discussed, a prohibition on the use of chokeholds by officers. Another potential excessive force provision could include the


\textsuperscript{126} See supra note 96 and accompanying text.

\textsuperscript{127} I am not necessarily arguing that we should get rid of the current assault or homicide statutes, but simply that we need to augment these provisions with additional and more narrowly tailored laws.
requirement to use a less lethal tool when arresting or detaining an individual before resorting to shooting a suspect. The Seattle police manual, for example, requires all officers to carry at least one less lethal tool such as a stun gun or Taser.128 States may also consider a more general requirement—patterned again on Seattle’s police manual—to deescalate a situation through various means such as warnings, calling extra officers, or moving to a safer position before using deadly force.129 The key takeaway here is that we 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.

These specific excessive force rules can, in some way, be analogized to rules of engagement in the military. The military promulgates instructions or rules that apply to soldiers who are deployed overseas and specify the circumstances and limitations under which soldiers may engage with other forces.130 They typically lay out when force and particularly deadly force is appropriate131 and their violation can be enforced through dereliction of duty criminal provisions.132 For example, during the United States engagement in Iraq, the military promulgated numerous rules on how and under what circumstances to engage a potential enemy target.133 In the context of a police uniform code, the aforementioned excessive force rules could be thought of as standing engagement rules for arresting or otherwise detaining citizens—an association that courts and scholars have already made.134

129 Id.
130 The United States Joint Chiefs of Staff have defined rules of engagement as “Directives issued by competent military authority that delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered.” U.S. DEP’T OF DEF., DICTIONARY OF MILITARY AND ASSOCIATED TERMS 154 (2010), http://www.dtic.mil/doctrine/new_pubs/jpl_02.pdf [https://perma.cc/XZ3D-KHW2] (as amended through June 15, 2015).
133 See, e.g., Karen Seifert, Interpreting the Law of War: Rewriting the Rules of Engagement to Police Iraq, 92 MINN. L. REV. 836, 838 (2008) (“The [Rules of Engagement] are more than instructions to soldiers; they are a legal interpretation of congressionally enacted law, made by members of the executive branch.”).
States could also pattern their culpability requirements on the military's dereliction of duty cases. A knowing violation of these proposed excessive force statutes would result in the highest penalty. Presumably, police officers like soldiers would be instructed on these rules as part of their training. But even if a police officer is not aware of the rule, she could still be prosecuted under a straightforward negligence theory the same way soldiers are held to a reasonable person standard.

2. Tailoring police use of deadly force.

Another potential area where internal police manual policies may be useful relates to the special defenses currently afforded to officers when using deadly force. As previously mentioned, many states currently do not impose an imminent threat of serious harm requirement before allowing officers to use deadly force. They opt instead for a general reasonableness standard where an officer can use this level of force as long as she thinks it is necessary. However, some internal police policies provide stricter guidelines that require imminent harm very similar to general self-defense statutes. Compare again New York City police policies with its criminal statute on deadly force. The internal police provision on deadly force, unlike the criminal code, explicitly says that officers cannot use such force "unless they have probable cause to believe that they must protect themselves or another person from imminent death or serious physical injury." A proposed uniform code could thus narrow the use of deadly force along these lines. And given that this feature is already part of a police handbook, it stands to reason that this change would not adversely impact a police officer's ability to carry out her duties.

Incorporating this kind of revision can potentially alter how cases of deadly force are handled. A good example would be the fatal shooting

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135 See supra Part II.B.1.
136 See id.
137 See supra Part III.B.
138 See supra notes 97–99 and accompanying text.
140 POLICE USE OF FORCE IN NEW YORK CITY, supra note 139, at 8. (emphasis added)
141 Scholars have similarly suggested aligning police justification defenses with general justification defenses. See, e.g., Harmon, supra note 85, at 1166–82 (evaluating the imminence, necessity, and proportionality standards).
of Darrien Hunt in Utah.\textsuperscript{142} Hunt, who had a history of emotional problems, was carrying a samurai sword down a busy street in Saratoga Springs.\textsuperscript{143} He apparently carried this sword as part of costume and under Utah law he had a right to carry it.\textsuperscript{144} After receiving a 911 call, officers approached Hunt and repeatedly asked him to put down the sword.\textsuperscript{145} While the facts are in dispute, the officers claimed that Hunt took a swipe at one of the officers or otherwise threatened them.\textsuperscript{146} After the officers shot at him, Hunt started running away and one officer shot him fatally in the back. One of the officers explained to investigators that “there was no way around it. I couldn’t keep letting him run around with a frickin’ sword . . . [as] he might hack the first person he saw.”\textsuperscript{147} The prosecutor declined to bring charges in this case, finding that the officers acted reasonably.\textsuperscript{148} Utah’s law—like many states—has a general reasonableness requirement for use of deadly force without an explicit imminence of serious harm requirement.\textsuperscript{149}

If this state had an imminent threat requirement like the one contained in the New York City police manual, the prosecutor would have been more likely to bring charges.\textsuperscript{150} Of course, much of this analysis depends on how one defines “imminent” in this situation. Because Hunt was shot in the back, there would not seem to be any immediate threat to officers. However, he was running in a populated area with a sword. Was he an imminent or immediate threat to others? It depends. Perhaps yes, if there were others citizens nearby. But if there was nobody in the vicinity, this may be a harder case. I am not suggesting a definitive answer here, particularly as the facts are in dispute. My point is simply that the inclusion of the term imminent would have made it more likely that charges would have been brought in this case. In the end, the aim is to narrow the special defenses currently afforded to officers while maintaining their ability to perform their duties.

\textsuperscript{143} See id.
\textsuperscript{144} See id.
\textsuperscript{145} See id.
\textsuperscript{146} See id.
\textsuperscript{147} See id.
\textsuperscript{148} See id.
\textsuperscript{149} See UTAH CODE ANN. § 76-2-404 (LexisNexis 2012) (discussing an officer’s ability to use deadly force if it is reasonably necessary without reference to imminent harm).
\textsuperscript{150} A requirement to deescalate the situation or use a less lethal tool could also have resulted in charges being brought. \textit{See supra} notes 128–129 and accompanying text.
3. Conduct unbecoming a police officer.

The prior sections have focused on crafting excessive use-of-force statutes for officers—either through specific affirmative prohibitions (e.g. banning chokeholds by police officers) or narrowing current defenses (e.g. adding an imminence requirement for deadly force by police). This focus shouldn’t be surprising given the current problems with use of excessive force by police. However, states could go further and potentially regulate other behavior as necessary through a uniform police code. For instance, they could promulgate laws relating to stop and frisk, racial profiling, and interrogation procedures, etc. The UCMJ itself has over fifty punitive articles—though it seems that the police code need not be so comprehensive. The UCMJ includes crimes that one would expect to find in a civilian code such as burglary, rape, and murder. The inclusion of these common law crimes stems from the commander’s need to maintain order and discipline within the ranks. This rationale applies with even greater force when considering soldiers are deployed overseas and the government needs a mechanism to punish them. But these considerations are not present with police officers. As such, the current state laws in place for such crimes as burglary and rape would be sufficient to regulate police officer behavior. This is good news. It simply means that any uniform police code could be achieved without overhauling all criminal rules. States would only need to reform a small group of statutes that explicitly relate to a police officer’s duties to arrest and detain.

One useful additional provision—patterned after the UCMJ—would be the inclusion of a catch-all “conduct unbecoming of a police officer” statute. This type of crime—similar to its justification in the military context—would cover numerous situations that may neither fall under the explicit excessive force legislation proposed above nor similar statutes. However, the crime would, nonetheless, regulate concerns of professionalism and ethical responsibilities.

There is precedent for this type of statute in the police context. Numerous police departments already promulgate policies that prohibit a variety of conduct that falls under the general rubric of “conducting unbecoming of a police officer” and target conduct that is immoral or

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151 See UCMJ at §§ 880–934 (outlining punitive provisions).
152 See id. at §§ 918–22 (outlining the elements of each offense).
154 As previously mentioned, the notion of obedience and following orders is not as critical with police officers and, secondly, police officers carry out their duties exclusively within the United States. See supra notes 80–83 and accompanying text.
155 See supra Part II.B.2; MCM, Part IV, ¶ 59a.
otherwise brings discredit to the force.\textsuperscript{156} This list includes, for example, improperly using a firearm,\textsuperscript{157} failing to report a fellow officer for abuse,\textsuperscript{158} engaging in public drunkenness.\textsuperscript{159} Violation of these statutes currently carries no criminal sanctions, although officers can be subject to dismissal or termination.\textsuperscript{160}

The traffic stop involving Sandra Bland in Texas provides a good test case for applying this kind of general professionalism crime.\textsuperscript{161} In that case, a police officer stopped Bland for failing to use a turn signal.\textsuperscript{162} The routine traffic stop escalated after the officer asked Bland to put out her cigarette and she refused.\textsuperscript{163} The officer then ordered her to exit the vehicle and a verbal altercation ensued after which the officer forced Bland out of the car.\textsuperscript{164} She was ultimately arrested for resisting arrest.\textsuperscript{165} While the officer’s action of removing Bland from the

\textsuperscript{156} See, e.g., Monroe v. Board of Public Safety of City of Glenn Falls, 423 N.Y.S.2d 963, 964 (N.Y. App. Div. 1980) (noting that local New York county department provides that “[p]olice officers] shall not conduct themselves in an immoral, indecent, lewd, or disorderly manner or in a manner that might be construed by an observer as immoral, indecent, lewd or disorderly and [a]ny member who in his own personal conduct is guilty of behavior or reflecting discredit on the department or tending to bring the department to disrepute shall be subject to dismissal or such other action as may be deemed appropriate by the Board of Public Safety”); IND. CODE ANN., § 36-8-3-4 (West 2004) (“a member of the police or fire department holds office or grade until the member is dismissed or demoted by the safety board ... [A] member may be disciplined by demotion, dismissal, reprimand, forfeiture, or suspension upon ... conduct unbecoming an officer); Town of Georgetown v. Essex County Retirement Bd., 560 N.E.2d 127, 128 (Mass. App. Ct. 1990) (officer discharged for “violation of police department regulations proscribing conduct unbecoming an officer and mandating that her conduct should ’be above reproach in all matters both within and outside the [d]epartment’ and that she should be truthful ’in all reports as well as when [she] appears before any judicial ... proceeding’”; City of Mobile v. Trott, 596 So.2d 921, 923 (Ala. Civ. App. 1991) (finding sufficient evidence for conduct unbecoming of police officer in violation of police department policy).


\textsuperscript{160} See supra notes 156–159. Courts have found that these statutes are not unconstitutionally vague, and so criminalizing them shouldn’t pose constitutional difficulty. See, e.g., Flanagan v. Munger, 890 F.2d 1557, 1569–70 (10th Cir. 1989); McIsaac v. Civil Serv. Com’n, 648 N.E.2d 1312, 1313–14 (Mass. App. Ct. 1995); see supra note 57.


\textsuperscript{163} Id.

\textsuperscript{164} Id.

\textsuperscript{165} Id.
car and subsequent arrest may have been lawful,\(^\text{166}\) there is a question of whether the officer could have handled the situation better or otherwise acted more professionally.\(^\text{167}\) One Texas state representative said that the officer "lost his composure and, as a result of that, his professionalism and what he was taught as it relates to interacting with citizens."\(^\text{168}\)

A conduct unbecoming statute could effectively deter this kind of behavior. What would otherwise potentially be lawful—e.g., not falling under my proposed excessive force statutes—could nonetheless be criminal if an officer fails to perform at the highest professional or ethical level. The officer in the Bland arrest may have breached this standard. It would obviously be up to a prosecutor and ultimately a jury whether the officer's conduct actually fell below this standard. But at least this statute could provide a mechanism to hold this officer responsible for his actions.\(^\text{169}\)

Another effective use of a conduct unbecoming statute would be in cases where police officers fail to disclose unlawful conduct committed by fellow officers. The "police code of silence" phenomenon refers to "the refusal of a police officer to 'rat' on fellow officers, even if the officer has knowledge of wrongdoing or misconduct."\(^\text{170}\) A conduct unbecoming statute would work well in this kind of situation. It would promote good behavior from officers and encourage them to disclose wrongdoings by their colleagues or suffer potential criminal sanction.

These professionalism statutes ultimately would work side-by-side with the more specific excessive force statutes described above. The

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\(^{166}\) See Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977) (police have constitutional authority to order person out of car during routine traffic stop); TEX. CODE CRIM. PROC. § 38.03 (West 2015) (person can be arrested for resisting arrest regardless of whether underlying arrest was lawful); Cevallos, supra note 162 (noting that the Court has not directly addressed ordering of putting out a cigarette, but the procedure is probably constitutional because of safety for the officer during the traffic stop). It is not clear if my proposed excessive force statutes would change this result assuming the police officer did not otherwise exceed the physical force needed to take Bland out of the car.

\(^{167}\) See Seth Stoughton, Cop Expert: Why Sandra Bland's Arrest Was Legal but Not Good Policing, TALKING POINTS MEMO (July 24, 2015), http://talkingpointsmemo.com/cafe/sandra-bland-video-legal-but-not-good-policing [https://perma.cc/V8LD-EQ84] ("An officer's actions can be entirely lawful, and yet fail to meet the high standards that we should expect from our law enforcement professionals, our community guardians.").

\(^{168}\) Phillip, supra note 161. My analysis, of course, does not include her subsequent death or the circumstances surrounding it.

\(^{169}\) However, it is worth noting that the officer was recently indicted on perjury charges relating to the arrest. See David Montgomery, Texas Trooper Who Arrested Sandra Bland Is Charged with Perjury, N.Y. TIMES (Jan. 6, 2016), http://www.nytimes.com/2016/01/07/us/texas-grand-jury-sandra-bland.html?

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point here is to construct a code that, like the UCMJ, employs a variety of criminal provisions, including tailored crimes, specifically defined defenses, and a general catch-all provision so that all facets of police behavior are covered.

IV. IMPLEMENTATION AND PRACTICAL CONSIDERATIONS

A. Tackling Police Brutality: An Optimistic Road

Promulgating a uniform code is only half the battle. Prosecutors must still bring these charges against officers.\(^{171}\) Because prosecutors work closely with officers on a daily basis, they may not be as motivated to prosecute these individuals.\(^{172}\) My proposal for a uniform code would not completely extinguish this potential concern. Given the nature of their relationship, prosecutors will always deal with institutional or other pressure not to bring charges against officers\(^{173}\) Nevertheless, my proposal could help incentivize prosecutors to bring appropriate charges.

As it stands, prosecutors are expected to make decisions on criminal rules that are general in nature. The current police-oriented defenses make references to reasonable use of force without specifying what that actually means. This leaves prosecutors with wide discretion on whether to bring a charge of assault or homicide.\(^{174}\) A uniform code and its more specific provisions could be beneficial here.\(^{175}\) Prosecutors may find it easier to bring charges against officers if the language explicitly prohibits the conduct (e.g. use of chokeholds constitutes assault) compared with the more general language in current use. Or at

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\(^{171}\) For example, there has been concern that the military has not done a good enough job in bringing sexual assault charges even though these violations are part of the UCMJ. See, e.g., Bedi, supra note 26; Eric Carpenter, The Military's Sexual Assault Blind Spot, 21 WASH. & LEE J. CIV. RTS. & SOC. JUST. 383 (2015); Helene Cooper, Pentagon Study Finds 50% Increase in Reports of Military Sexual Assaults, N.Y. TIMES (May 1, 2014), http://www.nytimes.com/2014/05/02/us/military-sex-assault-report.html?r=0 [https://perma.cc/RSE3-5GW4].

\(^{172}\) See, e.g., Joanna Schwartz, Who Can Police the Police?, 2016 U. CHI. LEGAL F. 437, 443 (discussing how prosecutors, while having the resources and leverage to bring cases against officers, may not have sufficient motivation given their close working relationship); David Rudovsky, Police Abuse: Can the Violence Be Contained?, 27 HARV. C.R.-C.L. L. REV. 465, 499 (1992) ("prosecutors do not like prosecuting fellow law enforcement officers (with whom they work on a day-to-day basis)"); Hess, Good Cop-Bad Cop, supra note 106, at 184 ("the criminal justice system requires prosecutors and police to work closely together. Because of the need for trust and openness in that working relationship, prosecutors are naturally averse to bringing criminal charges against police. There is understandable reluctance to prosecute a member of the team").

\(^{173}\) See supra note 172.

\(^{174}\) See supra notes 123–126 and accompanying text.

\(^{175}\) More specific provisions would also make it easier for grand juries to indict compared with the general provisions currently in place. See id.
the very least, they will have a harder time justifying not bringing charges when the officer has more clearly committed a violation.

A general conduct unbecoming statute could also potentially promote prosecutions that would otherwise not take place. While it is true this provision is also general in nature, like the reasonableness-based special defenses currently in place, its overall function of representing a higher ethical standard for police officers may, nonetheless, motivate prosecutors to bring charges more readily than simply a more neutral, reasonableness provision.

Overall, this type of uniform police code will in turn help restore confidence in police accountability. Promulgation and enforcement of a police uniform code signals to the community that with a police officer's powers comes commensurate special obligations and restrictions that go beyond a general citizen's code of conduct. 176

B. State Statutory Change and Service Connection

The foregoing analysis assumes that states will take the lead on crafting a uniform code for their respective jurisdictions. State regulation is necessary because the federal criminal code would be restricted by federalism concerns and thus not be as comprehensive as a state code. 177 I recognize that my justification for such a criminal code, nonetheless, draws on the UCMJ, which is a federal statute. 178 This key difference is not problematic for my overall argument. For one thing, federal law as a first step toward ultimate state action is not entirely impossible. Congress could pass a “Uniform Federal Law Enforcement Code” to govern the conduct of federal law enforcement agencies (FBI, ATF, DEA, etc.). This could provide a model for state to replicate—an intermediate step in adopting the principles of the UCMJ in the policing context. In fact, this is what states have already done in the military context. Many individual states have promulgated their

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176 Cf. Paul H. Robinson & John M. Darley, The Utility of Desert, 91 Nw. U. L. REV. 453, 476 (1997) (“Criminal law rules can contribute to normative forces; they can shape, alter, and guide those forces, but only if the community accepts the law as a legitimate source of moral authority.”).

177 Only a constitutional violation would garner federal jurisdiction, which necessarily would not include all police actions or harms. See, e.g., Screws v. United States, 325 U.S. 91, 108–09 (1945) (finding that federal criminal liability is naturally restricted to “respect the proper balance between the States and the federal government in law enforcement” and thus “[t]he fact that a [defendant] is assaulted, injured, or even murdered by state officials does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States”); United States v. Delerme, 457 F.2d 156, 161 (3d Cir. 1972) (“we do not so intimate that every assault by a police officer or official of a state or territory ipso facto transfers a state offense to an offense of constitutional dimensions under 18 U.S.C. § 242”); David Dante Troutt, Screws, Koon, and Routine Aberrations: The Use of Fictional Narratives in Federal Police Brutality Prosecutions, 74 N.Y.U. L. REV. 18, 60–64 (1999) (discussing the mens rea analysis in Screws).

178 See supra note 24.
own military code patterned after the UCMJ that applies to soldiers when they are acting as part of their state militia. But federal law is not necessary to effectuate my proposed code. Similar to the Model Penal Code developed by the American Law Institute, a system of judges, lawyers, academics, and other related professionals such as police officers could work together on a proposed uniform police code that could serve as a model for states to implement.

Another issue is when police officers would be subject to these new criminal provisions. Here, I think it would be necessary to impose some service connection requirement. Police officers will be subject to these rules only when they are performing their authorized duties. Unlike the erstwhile service connection in the military context, it will not be difficult to determine whether a police officer is serving in her official capacity. To be sure, we already do this under the current system and there does not appear to be any issues.

C. The Question of Procedural Change

So far my Article has focused on substantive crimes and the need to change the laws. But if the analogy to military justice holds, there is still the question of whether the civilian system must also make procedural changes when prosecuting police officers. As previously mentioned, the military—in addition to having a unique set of crimes—also employs a separate set of military procedures: most notably, military personnel perform the functions of judges, lawyers, and juries, and commanders, not prosecutors, decide what charges, if any, should be brought. The rationale for these unique features centers on the nature of the military and its singular mission as a fighting force. It makes sense that commanders, who are responsible for maintaining good order and discipline, should decide what charges should be


\footnotesize{181} See, e.g., N.Y. Penal Law § 35.30 (restricting use of justified force to instances where police officer is effectuating an arrest or preventing a suspect from escaping); see cf. 18 U.S.C. § 242 (2012).


\footnotesize{183} See, e.g., Parker v. Levy, 417 U.S. 733, 743–44 (1974) ("This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society."); United States ex rel. Toth v. Quarles, 350 U.S. 11, 17 (1955) ("Unlike courts, it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.").}
brought against a subordinate within their command.\textsuperscript{184} As a deployable force, it also stands to reason that the participants of the system should be other soldiers to ensure the system can be easily administered.\textsuperscript{185} Furthermore, a criminal justice system made up of soldiers for soldiers seems to assure fairness in the administration of justice as soldiers can relate to the duties of defendants.\textsuperscript{186} They may have a better sense than civilians as to what constitutes dereliction of duty.

Before reaching the question of a separate system for police officers, one must recognize that even in the military context—and as a counterpart to the above line of reasoning—procedure and substance are not a package deal. Some countries, for instance, retain a separate criminal code for soldiers but employ the same procedural system used for civilians.\textsuperscript{187} Scholars, in fact, have suggested that there is no reason why the United States cannot administer substantive military crimes through the general civilian federal trial process, at least for crimes committed in the United States.\textsuperscript{188} They also specifically argue that civilian prosecutors—not military commanders—should decide what charges should be brought.\textsuperscript{189} Others, however, argue that it is important to retain distinct military procedures and command-centric discretion so that we have a flexible system capable of use in times of peace or conflict abroad.\textsuperscript{190}

Regardless of where one comes out on the issue of separate military procedures, the creation of a unique criminal justice system for police officers is not as compelling. This may sound inconsistent given my analogy between police officer and soldiers. Much of this paper has argued that police officers have extraordinary responsibilities and powers comparable to military soldiers. If the nature of police work is so extraordinary as to warrant criminal laws targeting this one type of employment, why is it so obvious that citizens who have never been in


\textsuperscript{185} See id. at 214–20 (discussing the involvement of various servicemen in the court-martial process).


\textsuperscript{187} See Edward Sherman, Military Justice Without Military Control, 82 YALE L.J. 1398 (1973) (noting that countries like Germany and Sweden try soldiers by the civilian process).


\textsuperscript{189} See Spak & Tomes, supra note 188, at 512–19.

\textsuperscript{190} See, e.g., Kenneth Hodson, Military Justice: Abolish or Change?, 22 U. KAN. L. Rev. 31, 35–40 (1973); Schlueter, supra note 183, at 209–11; Moorman, supra note 30, at 190–91.
these positions should sit in judgment of those who have? The reason against changing the current procedure relates back to context in which police officers carry out their duties. As previously discussed, police officers—unlike soldiers—carry out their duties within communities. The purpose of police action is to protect and regulate citizen behavior. The recent concerns over police abuses, in fact, deal with crimes against citizens, not fellow officers. Accordingly, the current criminal procedural system should remain intact. Police officers should be prosecuted and tried by civilians because their duties—and thus any resultant criminal liability from them—are inexorably intertwined with civilian interaction. Soldiers, on the other hand, carry out their work apart from civilians, often being deployed overseas. Their duties thus are not bound up with the general civilian population nor are they responsible for regulating citizen behavior.

My proposal for adding specific affirmative crimes to regulate police behavior does not change this analysis. Prosecutors and jurors, who may not have any experience as a police officer, already make decisions based on the current general provisions regarding the reasonableness of police conduct. What constitutes justified force? Was use of deadly force reasonable? These are all questions prosecutors and juries have to make before charging or convicting police officers. The insertion of more specific statutes along the lines I suggest (e.g. prohibition of chokeholds and de-escalation of force) only seems to make their jobs easier not harder.
V. CONCLUSION

My focus has been on the conceptual justification and general applicability of a uniform code of police justice. Admittedly, there remains the question of implementation by state legislatures. Laws will have to be changed for such sweeping reform. I recognize that this kind of enterprise takes political capital and will naturally confront challenges.

But despite long odds of such a code being implemented, now may be the opportune time to introduce this type of innovative statutory scheme given the groundswell of support and discussion regarding police reform. A tailored made criminal law scheme—analogous to the UCMJ—would seem to cure many of the problems identified with the current criminal statutes we rely on to regulate office behavior. Certain interest groups—police officers and their unions most notably—may naturally be opposed to such changes. But my proposal would benefit police officers as much as citizens. A more narrowly tailored set of criminal laws would give officers a clearer sense of what is expected of them. This would help foster an atmosphere of compliance that would increase the positive perception of police behavior.

All this being said, there is still value to discussing this kind of reform, even if it has no realistic chance of being implementing any time soon. For one thing, we should reflect—even if only in the abstract—on systematic changes that can help curtail police abuses. Moreover, this discussion can still serve some practical import in the near term. For example, it may help with the piecemeal reform measure currently taking place in New York regarding criminalizing chokeholds. Invoking the UCMJ and the similarity between soldiers and police officers can help bolster the arguments for activists in New York and potentially other states. This type small-scale reform is a step in the right direction and may ultimately lead to more sweeping changes along the lines articulated in this Article.