

ARMED NOT MILITARIZED: ACHIEVING REAL POLICE MILITARIZATION

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“Police Militarization” is a hot-button topic. The highly publicized events in Ferguson, after the tragic death of Michael Brown, and the grand jury choosing not to press charges against police officer Darren Wilson, nationally showcased a “militarized” police response to public protests. Media coverage showed Ferguson police in armored vehicles, dressed in camouflage and pointing M-16s at unarmed black civilians. These events spurred a nationwide dialogue about the wisdom of providing local law enforcement with military equipment.

The term “police militarization” is a pejorative one. However, the U.S. military is one of the country’s most highly respected government institutions. The military prides itself on civilian control, discipline, and accountability achieved through command responsibility and a unique military culture. Police, on the other hand, are highly unionized, create their own rules for accountability, limit the power of police chiefs to discipline officers, show disrespect towards civilian authorities and maintain a culture where police come first. Real police militarization could be achieved by police departments modeling institutional structures, regulations and laws after the U.S. military.

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DOI <http://dx.doi.org/10.15779/Z388P0C>

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I. INTRODUCTION

On August 9, 2014, in Ferguson, Missouri, police officer Darren Wilson shot and killed Michael Brown, an unarmed black eighteen-year old. Brown's dead body lay in the street for nearly four hours while police did their initial investigations, leaving Brown's body on full display for the entire community to see. Members of the underserved African-American Ferguson community took to the street in protest.¹ To quell tensions in the city, the Ferguson police force responded quickly and with force.

The Ferguson Special Weapons and Tactics (SWAT) team, was armed with short-barreled military Colt M4 carbine (5.56-mm) rifles, semi-automatic assault rifles with scopes that can hit a target up to 500 meters away.² The M4 carbine is a semi-automatic assault rifle that uses 5.56 mm ammunition and serves as the "United States Armed Forces' weapon of choice."³ Members of the SWAT team wore military camouflage similar to that of U.S. Marine Corps.⁴ Ferguson police patrolled the streets in a vehicle called a Bearcat, which is an armored

¹ Larry Buchanan et al., *Q & A What Happened in Ferguson?*, N.Y. TIMES (Aug 2, 2015), <http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html>.

² Paul Szoldra, *This is The Terrifying Result of the Militarization of the Police*, BUS. INSIDER (Aug. 12, 2014, 4:05 PM), <http://www.businessinsider.com/police-militarization-ferguson-2014-8>.

³ *Colt M4 Carbine Product Overview*, COLT, <http://www.colt.com/Catalog/Military/Products/ColtM4Carbine.aspx> (last visited Nov. 14, 2015).

⁴ Szoldra, *supra* note 2.

military vehicle with variants that are resistant to 50-caliber machine gun fire and used by military Explosive Ordnance Disposal units.⁵ One journalist captured a photo showing Ferguson police officers wearing military camouflage, outfitted in riot gear, and pointing their semi-automatic rifles at unarmed black civilians. These events quickly sparked a national conversation regarding police militarization, with widespread media coverage.⁶

However, the media failed to adequately cover the response of veterans, some of whom served in Iraq and Afghanistan, who were outraged by police conduct in Ferguson. Twitter follower @AtheronKD created a newsfeed that allowed military veterans to speak out against the police response in Ferguson.⁷ One Twitter user, @jeffclement⁸ tweeted, “A few people have pointed it out, but our [rules of engagement] regarding who we could point weapons at in Afghanistan was more restrictive than cops in MO.”⁹ Current Gawker contributor and USMC veteran Adam Weinstein, wrote an article called, “Don’t Call the Police ‘Militarized.’ The Military is Better Than This.” In this article, he criticized the public’s perception that America’s police have been “militarized” by stating, “Like most tropes, it holds a grain of truth, but it’s off-base in one critical respect: The U.S. armed forces exercise more discipline and compassion than these cops.”¹⁰ Some veterans, including me, who saw police playing “soldier” in Ferguson took offense to ascribing the police response in Ferguson to a problem of “police militarization.”¹¹ U.S. service members are highly trained, skilled, and professional. No properly trained servicemember would ever point a weapon at an unarmed civilian who obviously posed no

⁵ *Bearcat Variants*, Lenco ARMORED VEHICLES, <http://www.lencoarmor.com/law-enforcement/bearcat-variants> (last visited Nov. 8, 2015).

⁶ See Szoldra, *supra* note 2; Paul D. Shinkman, *Ferguson and the Militarization of Police*, U.S. NEWS (Aug. 14, 2014, 10:13 AM), <http://www.usnews.com/news/articles/2014/08/14/ferguson-and-the-shocking-nature-of-us-police-militarization>.

⁷ Kelsey D. Atherton, *Veterans on Ferguson*, STORIFY (Aug. 2014), <https://storify.com/AthertonKD/veterans-on-ferguson>.

⁸ Jeff Clement is former second lieutenant, United States Marine Corps, trained as a logistics officer and deployed to Afghanistan as a platoon commander. He is also the author of the book, *The Lieutenant Don’t Know. About The Author*, JEFF CLEMENT, http://clementjd.com/?page_id=2 (last visited Jan. 4, 2016).

⁹ *Id.*

¹⁰ Adam Weinstein, *Don’t Call the Police “Militarized.” The Military is Better Than This*, GAWKER (Aug. 14, 2014, 3:00 PM), <http://gawker.com/dont-call-the-police-militarized-the-military-is-bet-1621523647>.

¹¹ See Atherton, *supra* note 7.

immediate lethal threat.¹²

A USA Today/Pew Research Center poll, found that four out of ten respondents said they were not confident police could use military equipment and weapons appropriately.¹³ According to the report, nine of ten black citizens said the police “only do a fair or poor job when it comes to applying equal treatment and appropriate levels of force.”¹⁴

The concern about police “militarization” is perplexing when public opinion of the U.S. military remains high. “Militarizing” the police should be a popular idea if the U.S. public supports the U.S. military. The Pew Research Center found that, in 2013, 78% of adults polled said the armed services contribute “a lot” to society’s “well-being.”¹⁵ The number had fallen modestly from 84% in 2009.¹⁶ A Pew Social Trends poll found that nine of ten respondents expressed pride in the troops and that three-quarter of them admitted to personally thanking someone in the military.¹⁷

News media and authors define “police militarization” in terms of providing police with military equipment.¹⁸ However, the problem with “police militarization” is not that the police have been militarized. Police in the military have not been militarized, rather they have been

¹² See 800th Military Police Brigade Rules of Engagement for Operations in Iraq, <http://nsarchive.gwu.edu/NSAEBB/NSAEBB140/a93.pdf>. Boots-on-ground servicemembers in Iraq were allowed to use lethal force, but before using “deadly force” against a hostile actor, soldiers had to use an “escalation of force” procedure. The procedures were: (1) shout a verbal warning; (2) shove; (3) show your weapon and demonstrate intent to use it (i.e. point weapon at person); and (4) shoot “to remove the threat of death/serious bodily injury or to protect designated property. IF YOU MUST FIRE.”

¹³ Cherly K. Chumley, *Public trust in police low, criticism of militarization rises: poll*, WASH. TIMES (Aug. 26, 2014), <http://www.washingtontimes.com/news/2014/aug/26/public-trust-police-low-poll-finds>.

¹⁴ *Id.*

¹⁵ *Public Esteem for Military Still High*, PEW RESEARCH CENTER (July 11, 2013), <http://www.pewforum.org/2013/07/11/public-esteem-for-military-still-high>.

¹⁶ *Id.*

¹⁷ *War and Sacrifice in the Post-9/11 Era: The Military-Civilian Gap*, PEW RESEARCH CENTER (Oct. 5, 2011), <http://www.pewsocialtrends.org/2011/10/05/war-and-sacrifice-in-the-post-911-era>.

¹⁸ See Atherton, *supra* note 7; see also Daryl M. Meeks, *Police Militarization in Urban Areas: Obscure War Against the Underclass*, 35 THE BLACK SCHOLAR 4, 33-41, 36 (2006) (in section on “context” of police militarization, author refers to “paramilitary” units, i.e. SWAT); Peter B. Kraska & Victor E. Kappeler, *Militarizing American Police: The Rise and Normalization of Paramilitary Units*, 44 SOCIAL PROBLEMS 1, 1-17 (1997).

militarily-equipped. If local police forces were modeled after and operated like the U.S. Armed Forces, there would be higher standards of professionalism and accountability. Modeling U.S. police forces after the military would professionalize and discipline the police officers and create a sense of true police militarization.

In Part II of this article, I will provide a brief history of police militarization, which is commonly described as a means of providing police with military equipment. In Part III, I will discuss the problems with police unions and how and why the military bans unions. In Part IV, I will show that unlike the military, police forces lack respect for civilian authority. In Part V, I will show how the doctrine of command responsibility should be imputed to chiefs of police. Finally, in Part VI, I will compare police and military cultures.

II. BRIEF HISTORY OF POLICE MILITARIZATION

Current discussions, books, and articles cover police militarization in terms of the U.S. Government providing military-grade equipment to local police forces.¹⁹

After the United States gained its independence from Britain, no city had a “police force” as we currently understand the term today. Most of the population lived in small, rural towns where behavior was regulated by social mores and standards of community morality. According to Radley Balko, in *Rise of the Warrior Cop*, the U.S. police were governed by three distinctive policing policies based on region: Northeast, South, and Western Frontier.²⁰

Northeast cities grew rapidly compared to the rest of the country and had more incidents of crime. To combat this crime, cities created night watchmen, composed of ununiformed volunteer citizens. Police in the agrarian South were mostly used as slave patrols, where members wore uniforms and were armed. The main purpose of these patrols was to guard against rebellion and capture escaped slaves. The Western Frontier was neither very populated, like the Northeast, nor very agrarian, like the South, so it relied on vigilantes and private police to enforce order.²¹

The first modern police force began in New York City, with

¹⁹ See Atherton, *supra* note 7; Meeks, *supra* note 18; Kraska & Kappeler, *supra* note 18; RADLEY BALKO, *RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE* 30 (2014).

²⁰ See BALKO, *supra* note 19, at 27.

²¹ *Id.*

Boston and Philadelphia soon following suit.²² The early New York City Police Force was very democratic. Patrolmen lived in the area they patrolled and offered community services, such as soup kitchens.²³ Interestingly, NYC police wore no uniforms and patrolled wards unarmed.²⁴ Prohibition introduced an uneasy level of government corruption to U.S. cities, and this was even more so for the police.

In 1950, William Parker became Chief of the Los Angeles Police Department (LAPD) and quickly set out to update and professionalize the force. He created a highly-bureaucratic²⁵ and militaristic-style police force.

A LAPD shootout with Jack Ray Hoxsie helped move the LAPD to a more militarized-police force. A month after the Watts Riots, Jack Ray Hoxsie shot LAPD officer Ron Mueller as Mueller was knocking on Hoxsie's door in response to a domestic violence report. Hoxsie then shot another report police officer and a citizen who attempted to help medical personnel place Mueller on gurney. Eventually more than 50 police officers showed up, leading to an hours long shootout. Eventually, Hoxsie was shot in the chest by a police officer and arrested.²⁶

This incident caused then-LAPD inspector, and future LAPD police chief, Daryl Gates, to rethink how the LAPD would respond to barricaded criminals. He began having the U.S. military train the LAPD on strategies for handling snipers.²⁷ Gates created a quasi-militaristic police group called SWAT that trained secretly in the San Fernando Valley and received training from U.S. Marines stationed at Camp Pendleton.²⁸

Racial tensions during the 1960s and 1970s caused uneasy whites to support tougher policing policies. During the mid- to late-Civil Rights Movement of the 1960s, whites began to feel unease. Protests and race "riots" covered the newspapers and television screens. While blacks were understandably infuriated and fighting for their rights, whites began to show discomfort and disapproval of such methods. In 1969, *Newsweek* printed an essay titled, "The Troubled

²² *Id.* at 30 (2014).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 34.

²⁶ *Id.* at 60.

²⁷ *Id.*

²⁸ *Id.* at 62.

American: A Special Report on the White Majority.” The report showed that 85 percent of whites thought black militants were getting off too easily, 66% percent thought the police needed more power and more than half of recipients believed the country had regressed over the last ten years.²⁹

President Richard Nixon began arming American police forces in the 1970s. During the 1968 presidential election, candidate Nixon ran on a tough-on-crime, law and order platform, which he delivered.³⁰ After being elected, he quickly declared a war on drugs and described drug abuse as a national security threat.³¹ In 1971, Don Santarelli became head of the Law Enforcement Assistance Administration (LEAA), a White House agency tasked with providing police forces with military equipment. Under a 1970 federal crime bill, LEAA’s budget soared from \$75 million annually to \$500 million.³² According to Santarelli himself, local law enforcement did not “value education or training. They valued hardware.”³³ The city of Birmingham asked for armored personnel carriers and LAPD requested a submarine.³⁴ Other police chiefs requested military equipment and training so they could create SWAT teams modeled after the LAPD.

By 1975, *The New York Times* estimated that more than 500 cities had SWAT teams.³⁵ SWAT teams were intended to respond only to emergency situations that required specialized training. However, most SWAT teams in the U.S. were used to bully protesters, question minority activists,³⁶ and conduct drug raids.³⁷

President Reagan also rode the tough-on-crime, war-on-drugs bandwagon and expanded local law enforcement’s role in fighting drug use with the assistance of military equipment. In 1986, he signed

²⁹ *Id.* at 68.

³⁰ See IAN HANEY LOPEZ, DOG-WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS 35 (2014).

³¹ President Richard Nixon, Special Message to the Congress on Drug Abuse Prevention and Control (Jun. 17, 1971), available at <http://www.presidency.ucsb.edu/ws/?pid=3048> (“The magnitude and the severity of the present threat will no longer permit this piecemeal and bureaucratically-dispersed effort at drug control. If we cannot destroy the drug menace in America, then it will surely in time destroy us.”).

³² BALKO, *supra* note 19, at 96.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 132.

³⁶ *Id.*

³⁷ Kraska & Kappeler, *supra* note 18, at 7.

National Security Decision Directive 221, officially declaring drugs a threat to U.S. national security.³⁸ Reagan funneled money to local cities to create or expand their SWAT teams for the purpose of combating drug trafficking.³⁹ In 1987, Congress ordered the military branches to advise local police enforcement of any surplus military equipment that could be purchased, even setting up a toll-free hotline allowing police chiefs to call and inquire about buying for-sale equipment.⁴⁰ By the late 1980s, nearly every city with a population of over 100,000 had a SWAT team or was in the process of creating one.⁴¹

During the 1990s, President Bill Clinton ratcheted up the war on drugs and police militarization. In 1997, he signed into law the National Defense Authorization Act (NDAA), with a provision called the “1033 program.” The purpose of the program was to facilitate weapons and equipment transfers from the Department of Defense (DoD) to local police forces.⁴² Between 1997 and 1999, the DoD transferred \$727 million worth of equipment, including 253 aircraft, seven passenger airplanes, a UH-60 Blackhawk, 7,856 M-16 rifles, 181 grenade launchers, 8,131 bulletproof vests and 1,161 pairs of night-vision goggles.⁴³

President George W. Bush quickly made anti-drug efforts part of the culture war. As such, he continued and expanded President Clinton’s war on medical marijuana. The attacks of September 11, 2001, brought a national fear of terrorist attacks, even in the smallest of cities. The newly created Department of Homeland Security (DHS) provided its own grants to help city police departments arm themselves to prevent or respond to an act of terror. By the end of 2011, DHS had provided over \$34 billion in anti-terror grants.⁴⁴ DHS provided grants to cities that were very unlikely to be an Al Qaeda target, such as Fargo, North

³⁸ OFFICE OF THE PRESIDENT OF THE UNITED STATES, NATIONAL SECURITY DECISION DIRECTIVE NUMBER 221 (Apr. 8, 1986), *available at* <http://www.reagan.utexas.edu/archives/reference/Scanned%20NSDDs/NSDD221.pdf> (“The expanding scope of global narcotics trafficking has created a situation which today adds another significant dimension to the law enforcement and public health aspects of this international problem and threatens the national security of the United States.”).

³⁹ BALKO, *supra* note 19, at 62.

⁴⁰ *Id.* at 159.

⁴¹ *Id.* at 168.

⁴² *Id.* at 208.

⁴³ *Id.* at 210.

⁴⁴ *Id.* at 254.

Dakota.⁴⁵

President Obama increased the DHS grant program, as part of his economic recovery package.⁴⁶ More money has been funneled to small cities that have no need for such equipment. For example, Fargo, North Dakota has received \$8 million in total since the inception of the program.⁴⁷ With that money, city police have been able to purchase assault rifles, Kevlar helmets, and an armored truck.⁴⁸ In 2011, the 1033 program provided over half a billion dollars in equipment, including 800 Humvees.⁴⁹ According to California Watch, the LAPD by 2011 was accepting three to four million dollars worth of military gear annually, including , M16 rifles, helicopters, survival kits and bayonets.”⁵⁰

On May 18, 2015, President Obama announced the federal government would stop helping local law enforcement obtain military equipment. While this is a move in the right direction, the plan does not say what will happen with the more than \$ 4.3 billion worth of equipment currently on the streets.⁵¹

III. THE PROBLEM WITH POLICE UNIONS

A major difference between police departments and the military is that members of the military are prohibited from unionizing.

Under federal law, 10 U.S. Code § 976 prohibits members of the military from unionizing.⁵² The law prohibits members of the U.S. armed forces, whether active duty, reserve or National Guard, from engaging in, attempting to engage or enrolling in any “military labor organization.” The rationale of this law being that members of the U.S. Armed Forces must be ready to deploy at all times and must be prepared to die, if necessary. While this ban on unionization does violate service

⁴⁵ *Id.*

⁴⁶ *Id.* at 255.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 301.

⁵⁰ G.W. Schulz and Andrew Becker, Free Military Surplus Gear a Boon to Local Calif. Law Enforcement, California Watch (Mar. 29, 2012), <http://californiawatch.org/public-safety/free-military-surplus-gear-boon-local-calif-law-enforcement-15493>.

⁵¹ Max Ehrenfreund, *The Biggest Question About Police Militarization Obama Hasn't Answered*, THE GUARDIAN (May 21, 2015), <http://www.washingtonpost.com/blogs/wonkblog/wp/2015/05/21/the-biggest-question-about-police-militarization-obama-hasnt-answered>.

⁵² Membership in military unions, organizing of military unions, and recognition of military unions prohibited, 10 U.S.C. § 976 (1997).

members' First Amendment right to associate, the U.S. Supreme Court in *Parker v. Levy* held that, "[T]he different character of the military community and of the military mission requires a different application of those [First Amendment] protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline may render permissible within the military that which would be constitutionally impermissible outside it."⁵³

Even in dissent, Justice Stewart conceded that "individual rights must necessarily be subordinated to the overriding military mission" and that "the military may constitutionally prohibit conduct that is quite permissible in civilian life."⁵⁴ The military is a unique institution that is given the responsibility of protecting national security. Discipline, order, cohesion, effectiveness and accountability must be maintained at all times.

One of the main problems with police misconduct and police militarization is that police are highly unionized. This unionization allows for an overtly political police organization that prioritizes job security. This creates a system where mayors, as commanders, are beholden to police unions, which may prevent them from speaking out against police misconduct.⁵⁵ This inhibits what the military prides itself on: civilian control. Additionally, police chiefs themselves are beholden to the unions. This is a problem for three reasons. First, police chiefs are not imbued with command responsibility that makes them accountable for their subordinates' actions. Second, police chiefs, as union members, are part of an entity whose purpose is to defend police action, instead of demanding professionalism and accountability from officers. Third, police unions have created a "brotherhood" and "protect the police at all cost" mentality that prevents any members from criticizing the actions of another police officer.

A. The Scale and Power of Police Unions

While most labor and trade unions have been in decline, police unions worldwide are expanding and gaining strength.⁵⁶ In September 2006, police unions from Europe, North America, South Africa and Australasia created the International Council of Police Representative

⁵³ *Parker v. Levy*, 417 U.S. 733, 758 (1974).

⁵⁴ *Id.* at 787 (J. Stewart, dissenting).

⁵⁵ See *infra* Section V.

⁵⁶ MONIQUE MARKS & DAVID SKLANSKY, POLICE REFORM FROM THE BOTTOM UP: OFFICERS AND THEIR UNIONS AS AGENTS OF CHANGE 7 (2012).

Associations (ICPRA).⁵⁷ ICPRA was established “to bring national police unions together to discuss union issues, to share information and to foster strong relationships between national associations.”⁵⁸ ICPRA is so powerful that in 2010, the United Nations Development Programme asked ICPRA to assist in creating a proposal to that would help newly developed democratizing countries to create robust police representative organizations.⁵⁹

Gauging the size and scale of police unions is difficult because “the nature and impact of police unions in the USA is a seriously neglected area of research in the field of police studies.”⁶⁰ In 2006, three-quarters of the 100 largest municipal police departments had unions with collective bargaining agreements.⁶¹ At that time, only one of the twenty-five largest police departments had no collective bargaining agreement, and half of the smallest had no contract.⁶² The International Union of Police Associations claims its membership has “grown tremendously since 1990” and represents police, sheriff’s departments, and correction officers in Puerto Rico and “officers from California to Massachusetts, Minnesota to Florida, and across the Mid-West.”⁶³

Police unions formatively shape police management. Academic neglect of studying police unions “has seriously impeded understanding of American policing, particularly with respect to basic police management, innovation and reform, police community relations and police accountability.”⁶⁴ Most troubling, police unions impact the ability of superiors to maintain discipline and obtain accountability.^{65 66}

⁵⁷ *Id.* at 8.

⁵⁸ *About Us*, INTERNATIONAL COUNCIL OF POLICE REPRESENTATIVES, <http://www.icpra.org/about-us> (last visited Nov. 14, 2015).

⁵⁹ MARKS & SKLANSKY, *supra* note 56, at 8.

⁶⁰ Samuel Walker, *The neglect of police unions: exploring one of the most important areas of American policing*, 9 POLICE PRACTICE AND RESEARCH 95 (May 2008).

⁶¹ *Id.* at 91.

⁶² *Id.*

⁶³ *Our History*, INTERNATIONAL UNION OF POLICE ASSOCIATIONS, AFL-CIO, <https://iupa.org/our-history> (last visited Nov. 14, 2015).

⁶⁴ Walker, *supra* note 60, at 95.

⁶⁵ “As late as the mid-1960s police chiefs had virtually unlimited power to run their departments Today police chiefs are severely constrained. Not only are many important issues subject to collective bargaining, but police unions exert enormous influence both within the department and community at large.” John M. Magenau & Raymond G. Hunt, *Police Unions and the Police Role*, 49 HUMAN RELATIONS 1315 (1996) (quoting *The Future of Policing*, WILLIAM O. DOUGLAS INSTITUTE (1984)).

⁶⁶ Conor Friedersdorf, *How Police Unions and Arbitrators Keep Abusive Cops on the*

In the political arena, police unions were able to achieve passage of the Peace Officers Bill of Rights in 14 states.⁶⁷ Many Republican Governors, while attacking public sector unions, exempt police unions from collective-bargaining reforms.⁶⁸ Ohio Governor John Kasich did not exempt police from collective-bargaining reforms and those reforms were successfully defeated.⁶⁹ Unions regularly endorse political candidates for office and oppose ordinances or referenda. In elections, police unions engage in the political system to preserve their benefits, wages, and oppose unfavorable bills.⁷⁰ Other officers become politicians. Former mayor of San Diego, Jerry Sanders previously served as San Diego's Chief of Police.

In 2014, the International Union of Police Officers (IUPA) sent a letter to Senator Patrick Leahy, Chairman of the Judiciary Committee, and to Senator Chuck Grassley, Ranking Member of the Judiciary Committee, opposing Mr. Debo Adegbile's appointment to the position of Assistant Attorney General for the Civil Rights Division at the Department of Justice.⁷¹ IUPA opposed Mr. Adegbile's nomination because, in 1981, he participated in the defense of Wesley Cook, later named Mumuia Abdul Jamal, who killed Philadelphia police officer Danny Faulkner. IUPA stated in their opposition letter: "Mr Adegbile's participation in the defense of this cop killer has tainted any notion of justice for all, and an even handedness which Mr. Adegbile would require, to have any credibility within the law enforcement community."⁷² Mr. Adegbile's "participation" consisted of him working for the NAACP's Legal Defense Fund and contributing to a filing of a 2009 brief arguing that Mr. Abu-Jamal faced a discriminatory jury.⁷³

Street, THE ATLANTIC (Dec. 2, 2014), <http://www.theatlantic.com/politics/archive/2014/12/how-police-unions-keep-abusive-cops-on-the-street/383258>.

⁶⁷ Walker, *supra* note 60, at 95.

⁶⁸ Ross Douthat, *Our Police Union Problem*, N.Y. TIMES (May 2, 2015), http://www.nytimes.com/2015/05/03/opinion/sunday/ross-douthat-our-police-union-problem.html?_r=0.

⁶⁹ *Id.*

⁷⁰ See RONALD DELORD ET AL., POLICE UNION POWER, POLITICS, AND CONFRONTATION IN THE 21ST CENTURY: NEW CHALLENGES, NEW ISSUES 95-107 (2008).

⁷¹ Letter from Sam A. Cabral, Int'l President, INTERNATIONAL UNION OF POLICE ASSOCIATIONS, AFL-CIO (Jan. 9, 2014), <https://iupa.org/wp-content/uploads/2013/02/Assistant-AG-for-the-Civil-Rights-Division-Letter.pdf>.

⁷² *Id.*

⁷³ Timothy M. Phelps, *Justice's Civil Rights nominee has resume that includes 'Sesame Street' and voting rights*, WASH. POST (Dec. 13, 2013), <https://www.washingtonpost.com/politics/justices-civil-rights-nominee-has-resume->

Both Senate Republicans and Democrats opposed Mr. Adegbile's nomination, citing his participation in Mr. Abu-Jamal's appeal.⁷⁴

IV. CIVILIAN CONTROL

The U.S. Constitution ensured that legally the military would be under strict civilian control. Article I, Section 8 of the Constitution provides Congress with the power to raise and support armies and to provide and maintain a Navy.⁷⁵ In this way, Congress by controlling the purse can regulate the size of the military in war and in peace. The Constitution also provides that Congress has the power to declare war⁷⁶ and to make rules for governing the military.⁷⁷ The President, under Article II, Section 2, is provided authority as the Commander in Chief of the U.S. military.⁷⁸ Military members take an oath to "support and defend the Constitution of the United States." They do not pledge an oath to a president, political party, or military commander. Instead, military women and men are taught to obey lawful orders, especially those of civilian higher authority. By limiting political activity, the U.S. military maintains civilian control.

Members of the military are encouraged to vote and can participate in protests and organizations. However, Department of Defense directive 1325.06 prohibits members of the military from participating in "off-post demonstrations" when (1) on duty, (2) in a foreign country, (3) the activities constitute a breach of law and order, (4) violence is likely to occur, and, most importantly, (5) they are in uniform.⁷⁹

Commissioned officers, who receive their appointments via presidential authority, are prohibited under Article 88 of the Uniform Code of Military Justice (UCMJ) from using contemptuous language against the "President, the Vice President, Congress, the Secretary of

that-includes-sesame-street-and-voting-rights/2013/12/31/7e321eee-7236-11e3-8def-a33011492df2_story.html.

⁷⁴ Wesley Lower & Ed O'Keefe, *Senate rejects Obama appointment of Debo Adegbile to top civil rights post*, WASH. POST (Mar. 5, 2014), <https://www.washingtonpost.com/news/post-politics/wp/2014/03/05/senate-rejects-obama-appointment-of-debo-adegbile-to-top-civil-rights-post>.

⁷⁵ U.S. CONST. art. I, § 8, cls. 12-13.

⁷⁶ U.S. CONST. art. I, § 8, cl. 11.

⁷⁷ U.S. CONST. art. I, § 8, cl. 14.

⁷⁸ U.S. CONST. art. II, § 2.

⁷⁹ U.S. Dep't of Def. Instr. 1325.06, *Handling Dissident and Protest Activities Among Members of the Armed Forces* (Nov. 27, 2009).

Defense, the Secretary of a military department, the Secretary of Homeland Security, or the Governor or legislature of any State, Territory, Commonwealth, or possession in which he is on duty or present.”⁸⁰ This military law is applicable whether the contemptuous statement was made in an “official or private capacity.”⁸¹ Further, a commissioned officer making such a statement in the “presence of military subordinates, aggravates the offense.”⁸²

Some police officers today, as opposed to servicemembers, are actively political, in uniform, and blatantly show disapproval of their civilian leaders. The New York City Police Department’s blatant disrespect towards Mayor Bill De Blasio is a case in point. In December 2014, NYPD officers Rafael Ramos and Wenjian Liu were assassinated as they sat in their patrol car. Hundreds of uniformed police officers in attendance at both funerals turned their backs on Mayor De Blasio as he was speaking. Some uniformed police officers attending the funeral from out of town joined the NYPD in turning their backs on the newly elected mayor.⁸³ The police union and officers accused the mayor of fueling anti-police sentiment by criticizing the department’s stop and frisk policy, investigating the death of Eric Garner by NYPD officers and being too friendly with Al Sharpton.⁸⁴ Speaking on Meet the Press, New York Police Commissioner Bill Bratton echoed the police department’s anti-President Obama sentiment in saying that officers “feel that they are under attack from the federal government at the highest level.”⁸⁵

Surprisingly, instead of ordering and prohibiting such a political statement, Commissioner Bratton requested that officers not repeat the “act of disrespect” at Officer Wenjian Liu’s funeral.⁸⁶ Commissioner

⁸⁰ UCMJ art. 88.

⁸¹ *Id.*

⁸² *Id.*

⁸³ Wesley Lowery and Kimberly Kindy, *2nd NYPD officer honored at funeral; many again turn back on de Blasio*, WASH. POST (Jan. 4, 2015), http://www.washingtonpost.com/politics/2015/01/04/9b11964a-92c7-11e4-a900-9960214d4cd7_story.html?tid=pm_pop.

⁸⁴ *Id.*; Mark Berman and Karen Tumulty, *De Blasio-police rift shows signs of closing*, WASH. POST (Dec. 29, 2014), http://www.washingtonpost.com/politics/de-blasio-police-rift-shows-few-signs-of-closing/2014/12/29/a261507e-8f80-11e4-ba53-a477d66580ed_story.html.

⁸⁵ Lowery & Kindy, *supra* note 83.

⁸⁶ Ashley Southall, *No Turned Backs at Officer Liu’s Funeral*, N.Y. TIMES (Jan 2, 2015), http://www.nytimes.com/2015/01/03/nyregion/no-turned-backs-at-officer-lius-funeral-bratton-asks.html?partner=socialflow&smid=tw-nytmetro&_r=0.

Bratton wrote: “[W]hen you don the uniform of this department, you are bound by the tradition, honor and decency that go with it.”⁸⁷ This request by Commissioner Bratton highlights perfectly a difference between the police and the military. Military personnel are ordered not to engage in political speech and not to disrespect civilian leaders, while police officers are requested, via memo, not to engage in such insubordination. Commissioner Bratton’s memorandum contained no threats or mandates. None of the officers who turned their back on the mayor were disciplined.

Interestingly, both Mayor De Blasio and Commissioner Bratton characterized the officer’s political statement as a show of “disrespect” not toward Mayor De Blasio, but rather as a show of disrespect towards the murdered officers and their families. Mayor De Blasio said the officers were “disrespectful to the families who had lost their loved ones. I can’t understand why anyone would do such a thing in the context like that.”⁸⁸ Commissioner Bratton described the gesture as “an act of disrespect” that “stole the valor, honor, and attention that rightfully belonged to the memory of Detective Rafael Ramos’ life and sacrifice.”⁸⁹ Neither the mayor nor police commissioner made any statements describing the contemptuous gesture as disrespect towards police civilian leadership.

Juxtapose the behavior and consequences of the NYPD with the relief of command retirement of General Stanley McChrystal in 2010. In 2009, U.S. Army General Stanley McChrystal was appointed the Commander of the International Security Assistance Force and the U.S. Forces Afghanistan. In 2010, he was relieved of command by President Obama for contemptuous remarks made during a *Rolling Stone* magazine interview. In the article *The Runaway General*, General McChrystal made disparaging remarks and allowed his military aides to make disparaging remarks about members of the executive cabinet and Congress. Joking among his staff about upcoming questioning by Vice President Biden, McChrystal joked, “Are you asking about Vice President Biden? Who’s that?” To which another adviser responded, “Biden? Did you say: Bite Me?”⁹⁰ Another advisor called then National

⁸⁷ *Id.*

⁸⁸ Mark Berman, *De Blasio calls funeral protests ‘disrespectful’*, WASH. POST (Jan. 5, 2015), <http://www.washingtonpost.com/news/post-nation/wp/2015/01/05/de-blasio-calls-funeral-protests-disrespectful>.

⁸⁹ Southall, *supra* note 86.

⁹⁰ Michael Hastings, *The Runaway General*, ROLLING STONE (June 22, 2010),

Security Advisor James Jones “a clown.”⁹¹ In referring to Senators John McCain and John Kerry another aide said the two senators play politics in that they “turn up, have a meeting with Karzai, criticize him at the airport press conference, then get back for the Sunday talk shows. Frankly it’s not very helpful.”⁹²

In referring to his commander-in chief, General McChrystal said the President looked “uncomfortable and intimidated” at his first meeting with top military leaders at the Pentagon.⁹³ In describing General McChrystal’s first one-on-one meeting with President Obama before he was appointed the top commander in Afghanistan, a top aide said the meeting was a “10-minute photo op” and that “Obama clearly didn’t know anything about [General McChrystal], who he was. Here’s the guy who’s going to run his fucking war, but he didn’t seem very engaged. The Boss was pretty disappointed.”⁹⁴

After the *Rolling Stone* article was published, General McChrystal was quickly and tentatively relieved of command and resigned.⁹⁵ In accepting his resignation, President Obama stated that he did not accept the resignation out of “personal insult,” but rather:

The conduct represented in the recently published articles does not meet the standard that should be set by a commanding general. It undermines the civilian control of the military that is at the core of our democratic system. And it erodes the trust that’s necessary for our team to work together to achieve our objectives in Afghanistan . . . It is also true that our democracy depends upon institutions that are stronger than individuals. That includes strict adherence to the military chain of command, and respect for civilian control over the chain of command. And that’s why, as Commander-in-Chief, I believe this decision is necessary to hold ourselves accountable to standards that are at the core of our democracy.⁹⁶

<http://www.rollingstone.com/politics/news/the-runaway-general-20100622>.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Scott Wilson & Michael D. Shear, *Gen. McChrystal is dismissed as top U.S. commander in Afghanistan*, WASH. POST (June 24, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/23/AR2010062300689.html>.

⁹⁶ Jesse Lee, *President Obama on Afghanistan, General McChrystal and General Petraeus*, WHITE HOUSE BLOG (June 23, 2010, 3:19 PM), <https://www.whitehouse.gov/blog/2010/06/23/president-obama-afghanistan-general-mcchrystal-general-petraeus>.

President Obama understood the importance of maintaining civilian control of and demanding respect for civilian control by the military, including top generals. In some ways, General McChrystal's remarks seem tame compared to hundreds of NYPD officers turning their backs on Mayor De Blasio. None of them suffered any punishment. General McChrystal, on the other hand, was a decorated war hero and four-star general, who had served as the Commander of Joint Operations Command, Director, Joint Staff, and at the time of his resignation was the top commanding general in Afghanistan.⁹⁷ His conduct, and the conduct he allowed, made him subject to swift and harsh consequences.

McChrystal resigned from his post and eventually retired. Although the consequences may seem harsh to civilian minds, McChrystal took full responsibility for his conduct and the conduct of his aides. He stated: "Regardless of how I judged the story for fairness or accuracy, responsibility was mine. And its ultimate effect was immediately clear to me."⁹⁸

V. COMMAND RESPONSIBILITY

The concept of command responsibility must be imputed to a chief of police in order to achieve true police militarization. According to the U.S. Navy Standard Organization and Regulations Manual (SORM), the "commanding officer is charged with absolute responsibility for the safety, well-being, and efficiency of the ship and crew."⁹⁹ Navy commanders, like other military commanders, must be held responsible and accountable for not only their actions, but the actions of subordinates.

For example, a U.S. Navy ship commander can be relieved of command for a collision caused by his subordinates' human error. In 2013, Navy submarine commanding officer Commander Thomas Winter was relieved of command from the Los Angeles attack submarine USS Montpelier after the submarine collided with the guided-missile cruiser

⁹⁷ *Biography of General Stanley McChrystal*, COUNCIL ON FOREIGN RELATIONS (2010), <http://www.cfr.org/afghanistan/biography-general-stanley-mcchrystal/p19396> (last visited Nov. 14, 2015).

⁹⁸ David Wood, *Stanley McChrystal Memoir: The Afghanistan War Commander Wouldn't Play Politics*, HUFFINGTON POST (Jan. 5, 2013, 10:17 PM), http://www.huffingtonpost.com/2013/01/05/stanley-mcchrystal-memoir_n_2412437.html.

⁹⁹ *Standard Organization and Regulations Manual (SORM)*, DEP'T OF THE NAVY (July 12, 2012), <http://doni.daps.dla.mil/Directives/03000%20Naval%20Operations%20and%20Readiness/03-100%20Naval%20Operations%20Support/3120.32D.pdf>.

USS Jacinto. An investigation showed that the principal cause of the collision was human error, poor teamwork by the watch team, and the commanding officer's failure to follow procedures for submarines operated at periscope depth (most likely attributed to the actions of the watch team).¹⁰⁰¹⁰¹

The military doctrine of command responsibility traces back to the Charles VII's Ordinances of Arms, which declared a commander is responsible for the abuses and offenses committed by a subordinate and that failure to bring the offender to justice would result in the commander being held responsible for the offense as if he had committed the offense himself.¹⁰² Yet, the doctrine was not fully formulated or given teeth after World War II.

In 1946, the U.S. Supreme Court issued its opinion in *In re Yamashita*, which outlined the modern doctrine of command responsibility.¹⁰³ General Tomoyuki Yamashita was the commander of the Imperial Forces in the Philippines during World War II. After Japan's surrender, General Yamashita was charged as being responsible for the death of more than 25,000 Filipino citizens.¹⁰⁴ Most had occurred during the battle for Manila, where Japanese troops engaged in guerrilla war and directed violence at the civilian population. In his defense, General Yamashita argued that he could not be held vicariously responsible for the actions of his subordinates, and he further claimed that he was unaware of his subordinates' actions as they were occurring.¹⁰⁵

In finding General Yamashita vicariously liable for his subordinates' actions and simultaneously formulating the doctrine of command responsibility, the Court found that the laws of war, primarily protecting civilian populations and prisoners of war from brutality,

¹⁰⁰ *USS Montpelier Commanding Officer Relieved of Duty*, DEP'T OF THE NAVY (Jan. 4, 2013, 3:56 PM), http://www.navy.mil/submit/display.asp?story_id=71334.

¹⁰¹ Periscope depth is the depth at which the submarine's periscope will just break the surface of the water.

¹⁰² *Command Responsibility: Its Elements, Principles, and Existing Philippine Laws*, LEGISLATIVE RESEARCH SERVICE, HOUSE OF REPRESENTATIVES, REPUBLIC OF THE PHILIPPINES (May 16, 2003), http://www.congress.gov.ph/download/researches/rrb_0307_3.PDF.

¹⁰³ *In re Yamashita*, 327 U.S. 1 (1946).

¹⁰⁴ *Id.* at 14.

¹⁰⁵ *Id.* at 28 (Murphy, J., dissenting) (“[Yamashita] was not charged with personally participating in the acts of atrocity or with ordering or condoning their commission. Not even knowledge of these crimes was attributed to him.”).

“would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for the their protection.”¹⁰⁶ Further, the Court held that “the law of war presupposes that its violation is to be avoided through the control of the operations of way by commanders who are to some extent responsible for their subordinates.”¹⁰⁷ While the Court claimed it was not making laws of war, it found that existing international law governing war imposed an “affirmative duty” on commanders to “take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population.”¹⁰⁸

The doctrine of command responsibility in *In re Yamashita* creates a burden of proof that a commander could be responsible for subordinate misconduct if he should have known of the misconduct.¹⁰⁹ This is a very low standard of accountability that means a commander can be held responsible if he refuses to maintain and to demand professionalism and as a result a subordinate breaks a law or military regulation. This means “commanders have a powerful incentive to ensure that subordinates are well trained and committed to compliance with the law. The commander is also compelled to ensure that indications of a breakdown in the culture of compliance produce a prompt and effective command response.”¹¹⁰ More than making a commander accountable for a subordinate’s action, it imputes liability for the actual insubordinate misconduct.

In contrast, police chiefs in the United States are not held legally responsible for their subordinates’ misconduct. Rather, police chiefs may remain silent or act in ways to protect their police officers. When current New York City Police Chief William Bratton became LAPD chief in 2002, he told his officers “the game of ‘gotcha’ in this department is coming to an end.”¹¹¹ In 2005, complaints against the LAPD rose, but suspensions and firings fell by 46 percent from the

¹⁰⁶ *Id.* at 15.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 16.

¹⁰⁹ See footnote 106.

¹¹⁰ Geoffrey S. Corn & Adam M. Gershowitz, *Imputed Liability for Supervising Prosecutors: Applying the Military Doctrine of Command Responsibility to Reduce Prosecutorial Misconduct*, 14 BERKELEY J. CRIM. L. 395, 425 (2010).

¹¹¹ Justine Peters, *They Couldn’t Breathe Either*, SLATE (Jan. 19, 2015, 11:45 PM), http://www.slate.com/articles/news_and_politics/crime/2015/01/_i_can_t_breathe_eric_gamer_wasn_t_the_only_victim_of_excessive_force_by.2.html.

previous year.¹¹² In 2008 Bratton asked for a change to the department's disciplinary rules that allowed him to discipline officers without formal disciplinary review.¹¹³ Put in context with subsequent changes, Bratton's statements can easily be understood as meaning that, as police chief, he would defend his officers' actions, regardless of the blatant misconduct.

While in Michael Brown's case, it is true that a grand jury found officer Darren Wilson could not be indicted for any crimes, a later report by the Department of Justice showed that the Ferguson Police Department routinely violated its citizens' constitutional rights.¹¹⁴ More than that, the police disproportionately targeted blacks. In the two years prior to the report release, blacks accounted for 85% of traffic stops, 90% of tickets and 93% of arrests.¹¹⁵ A black driver was twice as likely to be pulled over and searched as a white motorist, even though a search of a white motorist was more likely to turn up contraband.¹¹⁶ The report also indicated that the city's citation system ran like a money making scheme to help fund the municipal government¹¹⁷, a system the Ferguson police chief was undoubtedly part of.

If a report were released indicating such egregious behavior by soldiers under an armed services commander's watch, that Army commander would be relieved of command, investigated, and subject to court-martial. Navy commanders are relieved for less egregious conduct. Recently relieved Navy commanders were forced to step down for reasons ranging from low unit morale, loss of confidence in ability to lead, or suspected misconduct.¹¹⁸

General Yamashita was held responsible for the actions of soldiers under his command, even though he was unaware of their conduct. Nonetheless, under the doctrine of command responsibility, he was found fully responsible for the murders of thousands of Filipino

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Investigation of the Ferguson Police Department*, CIVIL RIGHTS DIVISION, U.S. DEP'T OF JUSTICE (Mar. 4, 2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

¹¹⁵ Matt Apuzzo, *Ferguson Police Routinely Violate Rights of Blacks*, *Justice Dept. Finds*, N.Y. TIMES (Mar. 3, 2015), <http://www.nytimes.com/2015/03/04/us/justice-department-finds-pattern-of-police-bias-and-excessive-force-in-ferguson.html>.

¹¹⁶ *Id.*

¹¹⁷ See *Investigation of the Ferguson Police Department*, supra note 115, at 42-61.

¹¹⁸ *2015 firings, Commanding officer, XO, and senior enlisted*, NAVY TIMES (Oct. 7, 2015), <http://www.navytimes.com/story/military/2015/09/15/2015-firings-commanding-officer-xo-senior-enlisted-co-cmc-csc/71885254>.

citizens. Command responsibility imposes an affirmative duty to ensure that subordinates are well-trained, disciplined, and follow the laws of war.

Unlike their military equivalents, United States police chiefs face no consequences, even when they are responsible for creating environments where misconduct is unchecked. Police chiefs do not ensure officers under their command are disciplined and respect civilian authority. Rather, police chiefs are shielding their subordinates from any criminal liability, or even any type of discipline. If Chief Jackson were Commander Jackson, he would have been relieved of command and immediately investigated for his role in using the police force as a revenue-generator for Ferguson. Depending on the charges and conviction, he could have been discharged with no benefits. Chief Jackson, instead, was allowed to resign and received a severance payment of \$ 96,000.¹¹⁹

A. Police Unions, Police Chiefs, and Accountability

Despite police chiefs' behavior, an ineffective system is more to blame than the individual officers. Regulations created by the police unions prevent police chiefs from exercising anything close to command responsibility. Instead, police chiefs and other managers must follow cumbersome union disciplinary guidelines, stripping police chiefs of command authority.

Aligned with the problem of impotent police chiefs is the role of unions in creating a "police subculture" that causes police to blindly support one another, even when a cop is accused of misconduct. Police unions helped create this mentality and sustain it through: "(1) negotiating a contract that inhibits thorough investigations of misconduct and (2) providing moral support for accused officers through organized group solidarity."¹²⁰ Other agreements include specific procedures for investigating misconduct, such as the "time, place, and manner of interviews or interrogations."¹²¹

Some unions have been able to obtain contract rules that mandate an officer 48-hour cool down period before they can be questioned, they also have access to the names and testimony of their

¹¹⁹ John Elignon, *Ferguson Police Chief, Thomas Jackson, Steps Down Amid Criticism*, N.Y. TIMES (Mar. 11, 2015), http://www.nytimes.com/2015/03/12/us/ferguson-police-chief-thomas-jackson-steps-down-michael-brown.html?_r=0.

¹²⁰ Walker, *supra* note 60, at 95.

¹²¹ *Id.*

accusers, they can be questioned by only one person at a time, and they can't be threatened with disciplinary action during questioning.¹²²

Unions have also fought against the creation of citizen oversight boards. And even in places where citizen oversight boards do investigate police misconduct, union rules weaken their ability to do so. For example, the Maryland Police Bill of Rights prohibits questioning of an officer by investigators who are not sworn officers,¹²³ a move intended to prevent investigation by citizen review boards.

B. Military Commanders' Use of Nonjudicial Punishment to Ensure Discipline

Under the Manual for Courts-Martial (UCMJ), military commanders are also authorized to discipline service members for misconduct outside of a military court through a process called nonjudicial punishment (NJP). Article 15 of the UCMJ authorizes commanding officers to impose punishment for minor offenses such as, but not limited to: restriction to specified limits (likely a base or naval vessel); forfeiture of one-half month's pay for two months; three days bread and water or diminished rations if stationed onboard a naval vessel; reduction in rank and/or extra duty for 14 days.¹²⁴ Part V of the UCMJ describes the purpose of NJP as follows: "Nonjudicial punishment provides commanders with an essential and prompt means of maintaining good order and discipline and also promotes behavior changes in servicemembers without the stigma of a court-martial conviction."¹²⁵ The section also describes the policy rationale behind NJP, which explains a "commander's responsibility":

Commanders are responsible for good order and discipline in their commands. Generally, discipline can be maintained through effective leadership including, when necessary, administrative corrective measures. Nonjudicial punishment is ordinarily appropriate when administrative corrective measures are inadequate due to the nature of the minor offense or the record of the servicemember, unless it is clear that only trial by court-martial will meet the needs of justice and discipline.¹²⁶

¹²² David Brooks, *The Union Future*, N.Y. TIMES (Dec. 18, 2014), <http://www.nytimes.com/2014/12/19/opinion/david-brooks-the-union-future.html>.

¹²³ Walker, *supra* note 60, at 95.

¹²⁴ Commanding officer's non-judicial punishment, 10 U.S.C.A. § 815 (2010).

¹²⁵ JOINT SERVICE COMM. ON MILITARY JUSTICE, U.S. MANUAL FOR COURT-MARTIAL Part V-1 (2012).

¹²⁶ *Id.*

While television shows like *NCIS* and *JAG* and movies like *A Few Good Men* have highlighted, popularized and dramatized the military court-martial system, most military members are punished through NJP. Providing military commanders with authority to use NJP has allowed commanders to maintain good order and discipline.

NJP is an internal system, with few checks-and-balances. A servicemember maintains the right to request a court-martial and has the right to appeal. NJP is not an adjudicative process and avoids the stigma of a criminal conviction. Because the purpose of NJP is to maintain good order and discipline, commanders will use it only when necessary and only to correct insubordinate behavior. A military commander cannot punish a subordinate for any misbehavior, but is limited to infractions outlined in the UMCJ, such as Article 86-Absence without Leave, Article 87-Missing movement or Article 92-Failure to obey order or regulation.¹²⁷

C. Command Responsibility Will Allow Police Chiefs to Exercise Nonjudicial Punishment

If police chiefs had the same power as military commanders, command responsibility would make them legally responsible for the good order and discipline of police under their command. If a police chief had NJP authority similar to UCMJ Article 15, each police chief could mete out punishment for minor offenses (offenses not required to go to court-martial) as determined by applicable regulation.

For example, police chiefs would have authority to punish police for misconduct that is related to civilian complaints against police officers. Under the current system, police chiefs have little incentive and are discouraged, by unions, from punishing police. Under a military NJP model, like UCMJ Article 15, police chiefs could delegate authority to investigate civilian complaints and conduct NJP proceedings to punish police officers when needed.

Police chiefs could also have authority to punish police for Fourth Amendment violations. Under the current system, a citizen's only remedy against a Fourth Amendment violation is suppression of the evidence.¹²⁸ The current system provides little incentive to abide by the

¹²⁷ Commanding officer's non-judicial punishment, 10 U.S.C.A. § 815 (2010).

¹²⁸ *Mapp v. Ohio*, 367 U.S. 643, 680 (1961) ("[I]t is entirely clear that the Weeks exclusionary rule is but a remedy which, by penalizing past official misconduct, is aimed at deterring such conduct in the future.").

Supreme Court's Fourth Amendment jurisprudence.¹²⁹ An officer who illegally obtains evidence will suffer no repercussions other than exclusion of evidence by the Court.¹³⁰ An NJP police model could allow police chiefs to track how often police violate citizens' Fourth Amendment rights, to determine the egregiousness of the conduct, and to punish accordingly. Punishments could be modeled after those of the military, such as forfeiture of pay, restriction, extra duty, or imposing extra training.

However, the police do not have the same discipline as the military. Military members are subject to the UCMJ, court-martial, and a commanding officer's nonjudicial punishment. A commander also has the legal responsibility of maintaining good discipline and order. If the police were truly militarized, police chiefs would have the same commander authority to punish, nonjudicially, subordinate officers.

VI. COMPARISON OF MILITARY CULTURE AND POLICE CULTURE

A major difference between the military and police is the respective cultures each institutional members hold. Painting a broad picture of police culture is difficult because culture is "[u]sed to paint a brush over broad social patterns, rather than to illuminate the individual practices of individuals as they go about deriving meaning from, and ascribing meaning to situations in which they find themselves everyday."¹³¹ David Sklansky describes such broad generalizations as the "Police Subculture Schema" which he says "makes it hard to see differences between officers, new complexities of police identity, and dynamic processes within the police workforce."¹³²

It is difficult to assess police culture because there is little

¹²⁹ Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J. L. & PUB. POL'Y 111, 114 (2003) ("[c]urrently, absent the exclusionary rule, there are almost no incentives for the police to be good actors").

¹³⁰ An officer can be held liable for civil damages under 42 U.S.C.A. § 1983. However, a court can find that a police officer has "qualified immunity" if his or her actions are considered "objective[ly] reasonable. . . in light of the legal rules that were 'clearly established' at the time the actions were taken." *O'Brien v. City of Grand Rapids*, 23 F.3d 990, 999 (6th Cir. 1994).

¹³¹ Jennifer Wood et al., *Building the capacity of police agents: The nexus policing project*, 18 POLICING & SOCIETY 72, 73 (2008).

¹³² DAVID ALAN SKLANSKY, *Seeing Blue: Police Reform, Occupational Culture, and Cognitive Burn-In*, in POLICE OCCUPATIONAL CULTURE: NEW DEBATES AND DIRECTIONS 21 (Megan O'Neill & Monique Marks eds., 2007).

research on the concept.¹³³ However, criminologist Samuel Walker has created three tentative hypotheses regarding how police unions shape police culture: (1) Police subculture is a multi-dimensional phenomenon, of which the police union is one influence, (2) there are differences in the informal cultures among police departments, and (3) local police subcultures have differences in all aspects of policing, including overall management, accountability, discipline and interactions with citizens.¹³⁴

Walker suggests “the impact of unions on the police subculture ‘code of silence’ is an issue of special concern.”¹³⁵ According to Walker, “Numerous reports, as opposed to social science research, label the code of silence as the major obstacle to accountability, because officers refuse to testify against officers who are accused of misconduct.”¹³⁶

The Mollen Commission Report found that police corruption was prevalent in the NYPD because of a police culture that placed loyalty to partners over honesty and professional responsibility.¹³⁷ The LAPD Board of Inquiry that investigated the Rampart Scandal discovered that the “Rampart Area had established its own unique culture.”¹³⁸ According to this report, the culture “certainly perpetuated a feeling of cultural elitism and was a significant contributing factor in this corruption incident.”¹³⁹ This mentality also led the Rampart division to believe, as they were investigating gangs, that they were in a life and death struggle and created an “Us versus Them” way of thinking.¹⁴⁰

While the Christopher Commission Report and Mollen Commission Report did not investigate a universal police culture, recent police officer and police union responses to police misconduct convey a

¹³³ Walker, *supra* note 60, at 95.

¹³⁴ *Id.*

¹³⁵ *Id.* at 97.

¹³⁶ *Id.*

¹³⁷ CITY OF NEW YORK, COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEPARTMENT: COMMISSION REPORT 51 (July 7, 1994) (“Scores of officers of every rank told the Commission that the code of silence pervades the Department and influences the vast majority of honest and corrupt officers alike. Although police officers who look the other way while colleagues steal property, sell drugs, or abuse citizens’ civil rights may not be directly involved in corruption, they nonetheless support and perpetuate it by abandoning their professional obligations.”).

¹³⁸ Los Angeles Police Department, Board of Inquiry Into The Rampart Area Corruption Incident Public Report 62 (2000), available at http://lapdonline.org/assets/pdf/boi_pub.pdf.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 63.

culture that maintains an “always support the police” mentality.

A. Police Unions’ Responses to Ferguson

After Michael Brown was shot and killed by Officer Darren Wilson, his body lay out in the streets for four hours. The community was angered, not only by the killing of an unarmed member of their community, but also by Michael Brown’s lifeless body lying in the streets on display.¹⁴¹ This revitalized the Black Lives Matter movement #BlackLivesMatter hashtag on Twitter. As understandably upset members of the community protested in the streets, cops and police unions immediately went on the defensive.

Jeff Roorda, the business manager of the St. Louis Police Officers Association, in an interview on *Fox & Friends* stated, “Dead cops, that’s what they want. Let’s not pretend like they wanted Tom Jackson’s resignation or they’re mad because Mayor Knowles is still there. They want dead cops. That was their goal all along and that was their goal last night.”¹⁴² Then, in November, the St. Louis Rams marched out on the field holding up their hands to show solidarity with Michael Brown and Ferguson. After the game, the St. Louis Police Officers Association quickly issued a condemnatory message stating:

The St. Louis Police Officers Association is profoundly disappointed with the members of the St. Louis Rams football team who chose to ignore the mountains of evidence released from the St. Louis County Grand Jury this week and engage in a display that police officers around the nation found tasteless, offensive and inflammatory.¹⁴³

Local police officials were not forthright when they released information regarding the shooting. The morning after the shooting, St. Louis County Police Chief Jon Belmar refused to release the name of the shooting officer, yet told the public an unverified story that Michael

¹⁴¹ Julie Bosman & Joseph Goldstein, *Timeline for a Body: 4 Hours in the Middle of a Ferguson Street*, N.Y. TIMES (Aug. 23, 2014), <http://www.nytimes.com/2014/08/24/us/michael-brown-a-bodys-timeline-4-hours-on-a-ferguson-street.html>.

¹⁴² Justin Baragona, *Police Union Rep Doubles Down on Comment That Ferguson Protestors “Want Dead Cops,”* POLITICS USA (Mar. 13, 2014, 12:48 PM), <http://www.politicususa.com/2015/03/13/police-union-rep-doubles-comment-ferguson-protesters-want-dead-cops.html>.

¹⁴³ Mike Florio, *St. Louis Police Officers Association condemns Rams’ Ferguson gesture*, NBC SPORTS (Nov. 30, 2014, 11:02 PM), <http://profootballtalk.nbcsports.com/2014/11/30/st-louis-police-officers-association-condemns-rams-ferguson-gesture>.

Brown had instigated a physical confrontation with an officer and reached for his gun.¹⁴⁴ When asked how many times Brown was shot, Belmar responded, “It was more than just a couple, but I don’t think it was more than that.”¹⁴⁵

Almost a week later, Ferguson police officially released information that Darren Wilson was the shooter, along with surveillance footage showing Michael Brown as a robbery suspect. The police later admitted, and knew at the time they released the footage, that Wilson was unaware of the robbery and did not encounter Brown because of the robbery.¹⁴⁶

The response by police unions and the Ferguson police shows a culture of obscuring issues to protect their own. Instead of discussing legitimate issues, such as police use of deadly force, potential racial profiling, or the insensitivity towards the Brown family and community for the treatment of Michael Brown’s body, the police and unions transitioned into defense mode. Legitimate criticism was quickly characterized as a desire for dead cops. The actions of the police chiefs showed a quick desire to protect the identity of Darren Wilson, while at the same time engaging in a scheme to blame the victim.

Unions did not distance themselves from Officer Wilson or explain how the situation might have been handled better. Rather, the unions responded quickly to protect Wilson’s actions and to attack people who were critical of them.

B. Responses to Eric Garner’s Death

In July 2014, Eric Garner was approached by police for allegedly selling untaxed cigarettes. Garner told the police to leave him alone and declared, “It stops today!”¹⁴⁷ Officer Daniel Pantaleo escalated the situation by trying to arrest Garner and placing him in what appeared to be a chokehold. Pantaleo and other officers wrestled Garner to the ground, and Garner repeatedly cried, “I can’t breathe.”¹⁴⁸ Garner

¹⁴⁴ Josh Vorhees, *Everything That’s Going Wrong in Ferguson*, SLATE (Nov. 25, 2014, 2:48 PM), http://www.slate.com/articles/news_and_politics/politics/2014/08/ferguson_police_timeline_a_comprehensive_chronological_accounting_of_the.2.html.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Ford Fessenden, *New Perspective on Eric Garner’s Death*, N.Y. TIMES (June 13, 2015), <http://www.nytimes.com/interactive/2014/12/03/us/2014-12-03-garner-video.html>.

¹⁴⁸ Gene Demby, *What We See in the Eric Garner Video, And What We Don’t*, NAT’L PUBLIC RADIO (Aug. 22, 2014), <http://www.npr.org/sections/codeswitch/>

subsequently died of compressions of the neck and chest, along with his position on the ground as police restrained him.¹⁴⁹ A bystander recorded the encounter. A grand jury cleared Officer Pantaleo of any charges. The Twitter hashtag #Icantbreathe became commonly used.

After the grand jury's decision, New York Police Department Union President Patrick Lynch blamed Garner for his own death. His reaction disregarded the potential excessive force resulting in the death of Garner and focused on the need for citizens to comply with police officers. He said, "We have to teach our children our sons and our daughters, no matter what they look like, to respect New York City police officers, teach them to comply with New York City police officers even if they think it's unjust."¹⁵⁰ Patrick Lynch, in response to the Garner protests, said, "Police officers feel like they are being thrown under the bus."¹⁵¹ Lynch further lambasted Mayor De Blasio for saying that the NYPD needed to improve relations with blacks and Hispanics by saying, "What we did not hear is this: You cannot go out and break the law. What we did not hear is that you cannot resist arrest. That's a crime."¹⁵² According to CBS News, "In private and Internet chat rooms, officers say they feel demoralized, misunderstood and 'all alone.'"¹⁵³ The union also claimed that the city's medical examiner's autopsy report labeling Garner's death a homicide was "political."¹⁵⁴ Lynch further stated that "[t]here's an attitude on our city's streets today that it is acceptable to resist arrest. That attitude is a direct result of the lack of respect for law enforcement, resulting from the slanderous, insulting, and unjust manner in which police officers are being portrayed."¹⁵⁵

2014/07/29/335847224/what-we-see-in-the-eric-garner-video-and-what-we-don't.

¹⁴⁹ *Medical Examiner Rules Eric Garner's Death a Homicide, Says He Was Killed By Chokehold*, WNBC (Aug. 1, 2014), <http://www.nbcnewyork.com/news/local/Eric-Garner-Chokehold-Police-Custody-Cause-of-Death-Staten-Island-Medical-Examiner-269396151.html>.

¹⁵⁰ *Eric Garner Fallout: "Cops feel "thrown under the bus," union says*, ASSOCIATED PRESS (Dec. 4, 2014), <http://www.cbsnews.com/news/eric-garner-case-reaction-from-new-york-city-mayor-riles-police-union>.

¹⁵¹ *NYPD chokehold victim Eric Garner complicit in own death, union says*, ASSOCIATED PRESS (Dec. 5, 2014, 7:21 PM), <http://www.cbsnews.com/news/nypd-chokehold-victim-eric-garner-complicit-in-own-death-union-says>.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Alice Spери, *A Chokehold Didn't Kill Eric Garner, Your Disrespect for the NYPD Did*, VICE NEWS (Aug. 6, 2014, 3:20 PM), <https://news.vice.com/article/a-chokehold-didnt-kill-eric-garner-your-disrespect-for-the-nypd-did>.

¹⁵⁵ *Id.*

Ed Mullins, president of the Sergeants Benevolent Association, also defended the NYPD by stating, “No one talks about the time delay where the officers waited for assistance. There was a greater time delay of assistance, and time for Eric Garner to surrender, then there was any actual scuffle itself. He chose not to.”¹⁵⁶ Mullins further added, “We want justice for everyone except police officers.”¹⁵⁷

Compound the police unions’ statements with the NYPD officers turning their backs on Mayor De Blasio and one can see a police culture that does not tolerate any criticism from the public or civilian authority. Just as in Ferguson, the police unions went quickly into defense mode and sought to blame the victim. The unions did not respond to any legitimate criticism of police tactics: why police sought to arrest Garner for such a victimless, nonviolent offense, why the officer escalated the situation, why the police team tackled Garner to the ground, why the officers were toppled on top of Garner, or why none of the officers administered emergency aid while Garner was unresponsive. Rather, the police unions that represent the majority of NYPD officers took the protests and questions surrounding Garner’s death as disrespectful and breeding a culture of police hate. Again, this is evidence of a “police culture” that wants to defend police action by any means necessary.

C. Military Culture

A recent report by the Center for Strategic Studies entitled, “American Military Culture in the Twenty-First Century,” sought to understand the military’s successful ability to create a military culture and how the military could best preserve such a culture.¹⁵⁸ The study states that U.S. armed forces have a “culture rich in the traditions of self-sacrifice, discipline, courage, physical rigor, and loyalty to comrades and country.”¹⁵⁹

According to the study, part of military culture requires that members’ rights and lifestyles differ significantly from civilian culture “[b]ecause the driving imperative behind U.S. military culture is the unique responsibility to fight and win the nation’s wars, basic individual

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ AMERICAN MILITARY CULTURE IN THE TWENTY-FIRST CENTURY, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES 5 (2000), http://csis.org/files/publication/121022_Collins_AmericanMilCulture_Web.pdf.

¹⁵⁹ *Id.*

freedoms in the military are often curtailed for the sake of good order and discipline.”¹⁶⁰ Members of the U.S. armed forces are taught to place the integrity of the institution and the mission above themselves.

The study names four “essential elements of military culture”: discipline, professional ethos, ceremony and etiquette and esprit de corps.¹⁶¹ The study cites discipline as the “widely regarded . . . essential factor that differentiates the armed forces from an armed mob. The U.S. military insists on high standards of discipline . . . although it is backed by threat of punishment . . . modern military discipline emanates from unit cohesion and the examples of inspiring leaders.”¹⁶²

Professional ethos requires a military value to “engage an armed opponent and sacrifice self, if necessary, to accomplish the mission.”¹⁶³ This requires selfless service to not only country, but to your unit and fellow soldiers. Members of the military are taught that soldier/airman/sailor/marine safety does not come first.

Ceremony and etiquette, in the form of salutes, ceremonies, proper uniforms, and other traditions peculiar to the individual branch, are also part of a valued tradition that stems from pride in the institution and respect for lawful authority and tradition.

Cohesion and esprit de corps are cited as the “fourth foundation of U.S. military culture.”¹⁶⁴ Cohesion creates a sense of shared sacrifice and identity that binds service members. Esprit de corps is pride in the larger unit, branch, and U.S. government.

Along with a highly structured and hierarchical chain of command, the military is able to fully socialize its members and transform them into sailors, soldiers, airmen or marines. Through the process, members of the U.S. armed forces are taught to put the mission first and to always be cognizant of how one’s actions could affect the unit and the reputation of the U.S. military.

D. Military Responses to Misconduct

Service members, as opposed to police officers, are prohibited from unionizing and seek to maintain the integrity of their branch. The integrity of the unit, branch, and the military are held as a high value. Members of the U.S. Armed Forces are prohibited from making political

¹⁶⁰ *Id.* at 7.

¹⁶¹ *Id.* at 8

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 9.

statements, or public statements on behalf of the U.S. government or military branch. Therefore, discerning the definition of military culture is just as difficult as discerning the definition of police culture. This problem is further exacerbated as each respective branch, Army, Navy, Marine Corps and Air Force, maintain their own traditions and are marked by their own unique culture. However, a glimpse of actual stories will reveal how quick members of the military are to ostracize and rid the service of bad apples.

The Tailhook Scandal is one example. In 1991, two hundred Navy and Marine Aviators attended the 1991 Tailhook Association Convention and stayed at the Las Vegas Hilton. On the third-floor of the Hilton, drunken officers sexually assaulted at least 83 women during a three-day conference.¹⁶⁵ Officers also engaged in lewd conduct.¹⁶⁶ In response, the Navy Inspector General and Naval Criminal Investigate Service conducted an investigation into this egregious officer misconduct. In all, three hundred naval aviators' careers were ruined, Secretary of the Navy H. Lawrence Garrett II, resigned, and Chief of Naval Operations Admiral Frank Kelso retired. Both men were present at the 1991 Tailhook Convention.¹⁶⁷

This episode demonstrates that the military will quickly act to disassociate the armed forces from the misconduct of some members. This is partly due to a military culture that values placing the mission first and ensuring that the name of the branch or even the entire service is never tainted. People who engage in misconduct are disciplined, and, in some cases, removed from command, the armed services, or forced to retire. Military members did not come to the defense of the officers who participated in the Tailhook Scandal. The military made public statements condemning their actions.

VII. CONCLUSION

Calling U.S. police forces “militarized” is an insult to the accountability and training of those who have served in the U.S. Armed Forces. To members of the military, serving requires more than carrying

¹⁶⁵ Norman Kempster, *What Really Happened at Tailhook Convention: Scandal: The Pentagon report graphically describes how fraternity-style hi-jinks turned into hall of horrors*, L.A. TIMES (Apr. 24, 1993), http://articles.latimes.com/1993-04-24/news/mn-26672_1_tailhook-convention.

¹⁶⁶ *Id.*

¹⁶⁷ *Frontline: Post Tailhook Punishment*, PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/navy/tailhook/disc.html> (last visited Nov. 14, 2015).

a weapon and riding in a military vehicle. Rather, it requires selfless service and placing the mission, unit, and institution before oneself. You will never hear a U.S. Army Soldier use the words “soldier safety” as a way of saying that soldier safety should always come before the mission or rules of war. The U.S. military is highly controlled by both civilians and military officers. Protecting the national security requires that members of the military sacrifice. This sacrifice takes form not only in the sacrifice of life, but in the sacrifice of liberty. Members of the Armed Forces give up many of their constitutional rights, such as their right to free speech and freedom of association. Although this seems harsh, members of the U.S. Armed Forces understand the necessity of maintaining such strict rules and abide by them honorably.

There is a trend of police officers putting themselves first. The fact that police are so concerned with “officer safety” shows that what they are most concerned about is never placing themselves in danger. By contrast, members of the military are taught from boot camp that they will be placed in danger and will give their lives if necessary, which is why military service is so respected. Yes, police safety is and should be a major concern for the U.S. public. Police are responsible for protecting the community and place their lives in danger on a daily basis. However, police should be ingrained with the idea that public service requires that one be a servant to the public. The interests of the public must come before the interests of the police. This means that at times a cop may have to assume some risk to ensure that a citizen’s constitutional rights are not violated.

Police forces can learn much from the U.S. military. They can learn that public service is a privilege, not a right. That no one needs to or must respect you for your service. Many veterans despise or feel uncomfortable when civilians thank them for their service. Public service should not be only a privilege, it should also be an honor. Police should assume the risk of their occupation and understand that the rule of law and the constitutional rights of citizens trump all. Officer safety should not come first, the officers themselves should not come first, and the unions should be dissolved. The Department of Defense is so restrictive because national security should always come first. There should be many of the same restrictions on police because protecting the community and protecting constitutional rights should always come first.

There is more to being a member of the military than carrying a gun. The military requires discipline, accountability and a high-degree

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of professionalism because the military must be ready to respond to war. I would argue that the police, because they interact regularly with local communities and are responsible for protecting those communities, should be more disciplined than the military that interacts with foreign communities.