

2018

A Reform to Police Department Hiring: Preventing the Tragedy of Police Misconduct

Owen Doherty

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A REFORM TO POLICE DEPARTMENT HIRING: PREVENTING THE TRAGEDY OF POLICE MISCONDUCT

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INTRODUCTION

On November 22, 2014, Officer Timothy Loehmann tragically shot and killed Tamir Rice, a twelve-year-old boy, in Cleveland, Ohio.¹ The

1. See Christine Mai-Duc, *Cleveland Officer Who Killed Tamir Rice Had Been Deemed Unfit for Duty*, L.A. TIMES (Dec. 3, 2014, 5:38 PM), <http://www.latimes.com/nation/nationnow/la-na-nn-cleveland-tamir-rice-timothy-loehmann-20141203-story.html> [<https://perma.cc/T5NU-KLU3>] (providing a brief description of the events surrounding Tamir Rice’s death and the employment history of Officer Loehmann); see also ROGER A. CLARK,

Cuyahoga County prosecutor declined to recommend charges against Loehmann for the shooting.² What was lost in the story surrounding this tragic death was not the fact that Officer Loehmann should have faced charges, but that he should not have been employed as a Cleveland police officer in the first place. When looking at his previous stint as a police officer, it becomes clear that he was not only unfit to serve and protect the community of Cleveland, but that he should have been prohibited from serving as a police officer anywhere.

In 2012, Loehmann served in the Independence Police Department, only thirteen miles south of Cleveland, for five months.³ During the first four months, he trained in the Cleveland Heights Police Academy.⁴ Personnel records from his time in Independence show that by December of 2012, the Independence Police Department began internal proceedings to fire Loehmann.⁵ According to the records, he had exhibited a pattern of emotional instability, immaturity, and an inability to follow basic instructions during firearms training at the Academy.⁶ Before the Independence Police Department fired him, however, Loehmann resigned citing personal reasons.⁷

EXPERT REPORTING ON THE SHOOTING DEATH OF TAMIR RICE (2015), <http://www.documentcloud.org/documents/2623274-roger-clark-expert-report.html> [<https://perma.cc/K4VP-CFNY>] (discussing, at length, Clark's reasoning behind his finding that "[Loehmann's] shooting of Tamir Rice was inconsistent with generally accepted standards and norms in police practices and that it was an unreasonable and unjustified use of deadly force.").

2. Timothy Williams and Mitch Smith, *Cleveland Officer Will Not Face Charges in Tamir Rice Shooting Death*, N.Y. TIMES (Dec. 28, 2015), <http://www.nytimes.com/2015/12/29/us/tamir-rice-police-shooting-cleveland.html> [<https://perma.cc/U9D5-D88W>].
3. Mai-Duc, *supra* note 1.
4. *Id.*
5. *Id.* Officer Loehmann's personnel files show that Loehmann displayed disregard for department regulations, insubordination, and a lack of commitment. City of Independence, Ohio Personnel File of Timothy Loehmann, at 56–59, available online at https://www.scribd.com/doc/252024886/Independence-PD-Timothy-Loehmann-Records#fullscreen&from_embed [<https://perma.cc/H84B-LXRR>] [hereinafter Loehmann Personnel File].
6. Mai-Duc, *supra* note 1; *see* Loehmann Personnel File, *supra* note 5, at 55 (“[D]uring a state [shooting] range qualification course, Ptl. Loehmann was distracted and weepy . . . could not follow simple directions . . . and his handgun performance was dismal.”).
7. Mai-Duc, *supra* note 1; *see* Loehmann Personnel File, *supra* note 5, at 58–59 (“I advised him of my intent and reasons [for firing him], and Ptl. Loehmann decided to resign instead for personal reasons. I accepted his written resignation.”).

When the Cleveland Police Department hired Loehmann, it did so without examining his personnel records from Independence as part of its background check.⁸ When the hiring officers called the Independence human resources department, the director did not disclose the issues that led to Loehmann's resignation.⁹ A cursory glance through Loehmann's personnel records, however, would have shown the hiring officers that he had displayed a disturbing lack of maturity.¹⁰ In fact, Loehmann's direct supervisor and Independence Deputy Chief of Police James Polak said, "I do not believe time, nor training, will be able to change or correct these deficiencies."¹¹ After resigning from Independence, Loehmann attempted to secure employment at four other police departments.¹² Each police department rejected Loehmann before Cleveland hired him.¹³ How, then, did these four police departments know not to hire him when Cleveland did not?

Tragically, this is an oft-repeated problem across the United States. In 2004, Sean Sullivan, a police officer in Oregon, was barred from a future career as a police officer as part of his sentence for kissing a ten-year-old girl on the mouth.¹⁴ Three months later, Cedar Vale, Kansas hired him as their police chief. He was later investigated for an alleged sexual relationship with an underage girl.¹⁵ Sullivan was eventually convicted of burglary and criminal conspiracy.¹⁶ Officer Eddie Boyd III resigned from the St. Louis Police Department after two incidents: he struck a twelve-year-old girl with his gun in 2006; and, after doing the

8. Mai-Duc, *supra* note 1.

9. *Id.*

10. Loehmann Personnel File, *supra* note 5, at 59.

11. *Id.* at 58. Loehmann listed James Polak as his direct supervisor. Cuyahoga County Application for Employment, Timothy Loehmann, at 3, *available online at* <http://www.documentcloud.org/documents/1391683-application-resume-01062015163324-redacted.html#document/> [<https://perma.cc/E9QU-F2SR>].

12. James Downie, *Tamir Rice Case Is a Perversely Fitting End to a Year of Police Controversies*, WASH. POST (Dec. 31, 2015), https://www.washingtonpost.com/opinions/when-a-12-year-old-boy-is-killed-by-police-and-no-one-is-accountable/2015/12/31/6970e528-afbd-11e5-b820-eea4d64be2a1_story.html?utm_term=.7995e4d54ed6 [<https://perma.cc/5C7R-9HL4>].

13. *Id.*

14. Timothy Williams, *Cast-Out Police Officers Are Often Hired in Other Cities*, N.Y. TIMES (Sept. 10, 2016), <http://www.nytimes.com/2016/09/11/us/whereabouts-of-cast-out-police-officers-other-cities-often-hire-them.html> [<https://perma.cc/45ME-U88B>].

15. *Id.*

16. *Id.*

same to a young boy in 2007, he falsified the subsequent police report.¹⁷ Officer Boyd, now with the Ferguson Police Department, is the subject of a lawsuit stemming from an incident in which he allegedly arrested a woman who asked for his name after a traffic accident.¹⁸

In the 1990s—at the height of the unrest following the Rodney King beating—the mayors of Los Angeles and New York City created commissions to investigate police department corruption and misconduct.¹⁹ The Christopher Commission of Los Angeles and the Mollen Commission of New York City discovered widespread issues of corruption, racial profiling, excessive use of force, and other forms of police misconduct.²⁰ They also discovered an appalling lack of intradepartmental accountability.²¹ In the nearly two decades since these commissions, much has been said about what must be done to prevent “bad apple” police officers from leaving one jurisdiction to serve in another. Unfortunately, little progress has been made in implementing effective responses to this most pressing of issues.

The middle part of the 1990s was marked by heightened public scrutiny of police-community relations, brought on by the Rodney King beating and the Christopher and Mollen Commissions. As a result, during the 104th Congress, Representative Harry Johnston and Senator Bob Graham, both of Florida, introduced bills that would have rendered this discussion moot. The Law Enforcement and Correctional Officers Employment Registration Act of 1996 would have amended the Omnibus Crime Control and Safe Streets Act of 1968 to create a

17. *Id.*

18. *Id.*

19. INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT, REPORT (1991) [hereinafter CHRISTOPHER COMMISSION REPORT]; THE CITY OF NEW YORK COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEPARTMENT, ANATOMY OF FAILURE: A PATH FOR SUCCESS (COMMISSION REPORT) (1994) [hereinafter MOLLEN COMMISSION REPORT].

20. See CHRISTOPHER COMMISSION REPORT, *supra* note 19, at vii–xxiii (providing a detailed summary of findings, including those on excessive use of force, racism and bias, and structural issues); MOLLEN COMMISSION REPORT, *supra* note 19, at 1–10 (providing a detailed summary of findings on police corruption issues within the NYPD).

21. For a discussion on the lack of accountability of individual officers who often face no repercussions for their actions, and of commanding officers who, through the structure of the LAPD and of Los Angeles city government, receive little oversight, see Chapters 9 and 10 of the CHRISTOPHER COMMISSION REPORT, *supra* note 19, at 151–221. For a closer look at how corruption permeated the NYPD’s internal investigation division, see Chapter 4 of the MOLLEN COMMISSION REPORT, *supra* note 19, at 70–89.

national clearinghouse for law enforcement employment data.²² The findings section of both versions of the act explained why a clearinghouse was needed: “[T]here have been numerous documented cases of officers who have obtained officer employment and certification in a State after revocation of officer certification or dishonorable discharge in another State.”²³

The clearinghouse, overseen by the Department of Justice, would have listed all previous employment in law enforcement agencies, for all law enforcement officers.²⁴ Under the Act, every applicant for a law enforcement position, including those positions within police departments—both elected and appointed—and state correctional facilities, would have been required to fill out an authorization for release of records during the application process.²⁵ The records would include the applicant’s name, date of birth, Social Security number, and other vital information, as well as whether the person’s state law enforcement certification had been revoked.²⁶ The Act also allowed for immunity from civil liability for disclosure by officers or departments that, in good faith, complied with the provisions of the bill.²⁷

Both bills never made it past committee.²⁸ During a hearing on the House version of the bill, then Representative Charles Schumer outlined many of the criticism that these bills faced. Along with many others, he thought that the database would be an invasion of officers’ privacy, and that it was an unnecessary solution to a non-existent problem.²⁹ He also criticized the broad overreach that the bill presented: “When we’re concerned only about so-called rogue officers, why not just list the few bad officers?”³⁰ Another criticism, from the National Troopers Coali-

22. S. 484, 104th Cong. (1995); H.R. 3263, 104th Cong. (1996).

23. S. 484 § 2; H.R. 3263 § 2.

24. S. 484 § 3; H.R. 3263 § 3.

25. *Id.*

26. *Id.*

27. *Id.*

28. *H.R. 3263 (104th): Law Enforcement and Correctional Officers Employment Registration Act of 1996*, GOVTRACK, <https://www.govtrack.us/congress/bills/104/hr3263> [<https://perma.cc/E4KS-TG3U>] (last visited Mar. 14, 2017); *S. 484 (104th): Law Enforcement and Correctional Officers Employment Registration Act of 1995*, GOVTRACK, <https://www.govtrack.us/congress/bills/104/s484> [<https://perma.cc/DQQ6-7KP6>] (last visited Feb. 14, 2017).

29. *Police Officers’ Rights and Benefits: Hearing on H.R. 218, H.R. 878, H.R. 1805, H.R. 2912 and H.R. 3263 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 104th Cong. 37 (1996) (statement of Rep. Schumer).

30. *Id.*

tion, was the uncertainty regarding the confidentiality of the information provided to the database.³¹ Further issues were raised about the procedural due process rights of police officers.³² This mainly took the form of concerns regarding whether an officer would have notice of what information would be reported and whether an officer would have the right to appeal the information that appears on his or her disciplinary record.³³

Not all police organizations opposed the bill, though. In fact, the International Association of Chiefs of Police (“IACP”) was the first to urge Representative Johnston to introduce the bill.³⁴ Though the IACP had reservations, particularly in ensuring that each state would provide due process to officers if their licenses were revoked, it supported the bill because of its benefit to smaller jurisdictions.³⁵ Sheriffs from police departments across the county also wrote or testified in favor of the bill. Their reason for supporting the bill mirrored that of the IACP: the relative lack of funding that smaller police departments have to carry out background checks.³⁶ Further, James T. Moore, the Commissioner of the Florida Department of Law Enforcement, specifically discussed the weakness of background checks in discovering officer misconduct committed in the employ of out-of-state police departments.³⁷ Unfortunately, this support was insufficient.

Once again, the highly volatile nature of police-community relations has placed this issue in the public spotlight. Two potential solutions have been proffered that would ameliorate this issue. The database legislation discussed above is one such solution.³⁸ The other posits to

31. *Id.* at 87–88 (statement of James A. Rhinebarger, Chairman, National Troopers Coalition).

32. *Id.* at 110–11 (responses of Gilbert G. Gallegos, National President of the Fraternal Order of Police, to questions from Rep. Sheila Jackson Lee of Texas).

33. *Id.* at 112 (statement of William J. Johnson, General Counsel, National Association of Police Organizations, Inc.).

34. *Id.* at 145 (statement of Roy C. Kime, Legislative Counsel, International Association of Chiefs of Police).

35. *Id.*

36. *Id.* at 118 (statement of Patrick Sullivan, Jr., Sheriff of Arapahoe County, Colorado).

37. *Id.* at 174 (prepared statement of James T. Moore, Comm’r of the Florida Department of Law Enforcement).

38. In 2009, the Department of Justice gave a \$200,000 grant to the International Association of Directors of Law Enforcement Standards and Training (“IADLEST”) to create a database for the purposes of tracking decertified officers. The Department of Justice no longer funds the initiative, and the

persuade states to enact a model decertification law. Much has been written on what that legislation would look like.³⁹ This Note proposes a different solution—one which is a combination of previous ideas, but which would take further steps to strengthen accountability. Rather than allowing the states to enact minimum standards for officers, Congress should enact legislation that requires the Department of Justice to promulgate minimum standards for police officers. The Department of Justice should have the power to persuade, but not coerce, states to enact these minimum standards. The federal government, through the Department of Justice, should also create a database, similar to the one discussed above, that would store the employment data, reported by the states, of officers who have had their certification revoked or suspended. This type of legislation would be constructed similarly to the Clean Air Act: state agencies would be responsible for enacting and enforcing these standards on state and local police departments. The Department of Justice would only be involved when a state or local police department declines to enact or properly enforce the standards.

This Note will delve into how this type of system will overcome any barriers to implementation and how the ideal system would operate.

director of the IADLEST complained that a lack of resources prevented IADLEST from keeping up with problem officers. Williams, *supra* note 14.

39. In the last three decades, Roger Goldman, of the St. Louis University School of Law, and Steven Puro, of the St. Louis University Department of Political Science, have written extensively on the use of decertification as a means of solving the police misconduct issue. See Roger L. Goldman & Steven Puro, *Revocation of Police Officer Certification: A Viable Remedy for Police Misconduct?*, 45 ST. LOUIS U. L.J. 541, 575, 577–78 (2001) [hereinafter *Revocation*] (discussing the Law Enforcement and Correctional Officers Employment Registration Act, and the alternative possibility of persuading states to adopt programs that would ensure state agencies share data to prevent law enforcement officers from crossing state lines for new employment); see also Roger L. Goldman, *A Model Decertification Law*, 32 ST. LOUIS U. PUB. L. REV. 147 (2012) [hereinafter *Model Law*] (providing an example of a model decertification law); Roger L. Goldman & Steven Puro, *Decertification of Police: An Alternative to Traditional Remedies for Police Misconduct*, 15 HASTINGS CONST. L.Q. 45, 52–64 (1987) [hereinafter *Alternative Remedies*] (examining the shortcomings of remedies such as the exclusionary rule, criminal prosecutions against law enforcement officers, and administrative complaints); Roger L. Goldman, *State Revocation of Law Enforcement Officers' Licenses and Federal Criminal Prosecution: An Opportunity for Cooperative Federalism*, 22 ST. LOUIS U. PUB. L. REV. 121 (2003) [hereinafter *Cooperative Federalism*] (urging federal prosecutors to explore state decertification, rather than litigation, as a means of punishing officers who have committed crimes); Steven Puro, Roger L. Goldman & William C. Smith, *Police Decertification: Changing Patterns Among the States, 1985–1995*, 20 POLICING: AN INT'L J. POLICE STRATEGIES & MGMT. 481 (1997) (depicting a research study on the evolution of police decertification in states).

Part I will explore the various types of misconduct that must be included in this system, including criminal convictions, firings due to misconduct, and resignations in the face of imminent discipline or investigation. It also will consider certain infractions by officers that should be included, but that have serious hurdles to effective tracking which militate against inclusion in the system. Part II will discuss the current lack of accountability in law enforcement hiring decisions. This discussion will include attention to the current challenges—legal, political, and cultural—that may, and often do, impede the implementation of this system. Part III will review what provisions would be appropriate for the legislation. It will examine what types of law enforcement officers should be included; the minimum standards of conduct that, if breached, would require law enforcement agencies to report the breach; the protections afforded law enforcement officers; and the incentives for state and local compliance.

I. POLICE MISCONDUCT DEFINED

Police misconduct and the attempts to remedy it have existed for decades. Identifying and preventing police misconduct through police department reform was one of the goals of the President's Commission on Law Enforcement and the Administration of Justice, formed by President Johnson in 1965.⁴⁰ While police misconduct has been a part of the public discourse in the past, it became and has remained, a larger part of the conversation in the aftermath of the Rodney King beating in Los Angeles. The Christopher Commission, created amid the resulting public outcry, raised a series of questions relating to police misconduct.⁴¹ The Commission paid particular attention to the culture within the Los Angeles Police Department, the failure to penalize officers with repeated instances of misconduct, and the failure to flag potentially violent applicants during the hiring process.⁴² Questions also were raised about the efficacy of background investigations conducted by an overburdened hiring department.⁴³ The Commission noted that, while some applicants were rejected due to previous instances of misconduct, background checks that indicated an applicant's history of violence were overlooked.⁴⁴

40. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* vi (1967) available online at, <https://www.ncjrs.gov/pdffiles1/nij/42.pdf> [<https://perma.cc/23MS-W2TN>].

41. CHRISTOPHER COMMISSION REPORT, *supra* note 19, at 17.

42. *Id.*

43. *Id.* at xvi.

44. *Id.* at xv–xvi.

Police misconduct, though, is often hard to define. It certainly encompasses criminal activity and corruption, but what of the police activity that may be wrong, but does not necessarily rise to a level that results in termination? While the optimal system would track all instances of police misconduct, regardless of level, the systems that this Note aims to create would, at the very least, track criminal convictions, firings due to misconduct, and resignations in the face of imminent discipline. Police misconduct, then, should be defined as criminal activity, corruption, and abuse of power. And though impractical to enforce or track, the ideal system would pay special attention to an officer's demonstrated instances of racial profiling, implicit bias, and selective enforcement of laws due to the color of one's skin, religion, sexual and gender identity, and mental capacity and illness.

A. Criminal Activity

Police officers, themselves tasked with investigating and preventing criminal activity, perpetrate crimes at a higher rate than one would think given their status as community protectors. Criminal activity of police officers encompasses a wide range of crimes motivated by varying factors. As the people tasked with protecting and serving communities, police officers must be law-abiding citizens and should be held to the same standards as other professionals, such as teachers and doctors, where certain convictions can preclude one from employment. Currently, there exists no nationwide reporting service for crimes committed by law enforcement officers and this presents a serious issue.

For the purposes of this Note, criminal activity is defined as actions that can lead to a criminal conviction. Sex-related, drug-and-alcohol-related, violence-related, and profit-related crimes are included in this category, as are forms of criminal corruption and perjury.⁴⁵ A recent study, funded and published by the Department of Justice and carried out by researchers at Bowling Green State University in Ohio, found alarming trends in the limited data that the researchers used.⁴⁶ By using an algorithm through the Google News search engine, the researchers were able to uncover 6,724 instances where police officers were arrested for various criminal activities between 2005 and 2011.⁴⁷ The researchers recognized that this data set is limited due to the lack of available reporting resources, and thus does not include all police officers who may have engaged in criminal activity nationwide.⁴⁸

45. PHILIP MATTHEW STINSON, SR. ET AL., *POLICE INTEGRITY LOST: A STUDY OF LAW ENFORCEMENT OFFICERS ARRESTED 15* (2016).

46. *Id.*

47. *Id.* at 20–21.

48. *Id.* at 19–21.

Sex-related crimes often involve an officer abusing his or her authority, and typically involve violent sexual misconduct perpetrated against young victims.⁴⁹ Sex-related crimes were the third-largest category, with 1,475 cases involving just 1,070 law enforcement officers.⁵⁰ This clearly depicts a grave issue of repeat offenders, such as Sean Sullivan, who had at least two instances of inappropriate sexual contact with a minor.⁵¹ In fact, minor victims, like Officer Sullivan's two victims, comprised almost half of the 1,475 cases in the study.⁵² Nearly one-third of cases involved some form of rape, either statutory or forcible.⁵³ Preventing applicants with a history of sex-related crimes is of the utmost importance for protecting the most vulnerable members of the population.

Alcohol-related crimes, particularly driving under the influence, are very common in police departments across the country.⁵⁴ Many of the DUI arrests, however, were only carried out in extreme instances: traffic accidents, injuries, and fatalities.⁵⁵ The researchers categorized these arrests as officers who had "lost their *exemption from law enforcement*."⁵⁶ When officers are stopped for simple DUI offenses, which do not involve injury, fatality, or property damage, they often are not arrested because of their status as a fellow law enforcement official.⁵⁷ According to the study, even if the officer was arrested for an alcohol-related offense, little more than one-third lost their jobs.⁵⁸ This speaks to the need for reporting of all instances of misconduct, regardless of whether the officer was disciplined.

Drug-related crimes are often entwined with profit-motivated crimes due to the nature of the drug trade.⁵⁹ More than half of drug-related arrests could be categorized as profit-motivated as well.⁶⁰ Thus,

49. *Id.* at 23.

50. *Id.* at 22.

51. Williams, *supra* note 14.

52. STINSON, ET AL., *supra* note 45, at 23.

53. *Id.*

54. *Id.*

55. *Id.* at 24.

56. *Id.* at 23.

57. *Id.*

58. *Id.* at 24. Only 270 of the 1,405 incidents resulted in the department firing the officer. Of the remainder, 263 cases involved an officer voluntarily resigning, 612 involved officer suspensions, and in 260 incidents the officer did not face punishment. *Id.* at 124.

59. *Id.* at 24.

60. *Id.*

drug-related crimes related to personal use were not as prevalent as those related to trafficking, enabling the drug trade, and shakedown of drug dealers.⁶¹ These crimes do have a slight overlap with corruption, most notably self-dealing and extortion. There is far less data on drug-related crimes and hiring, however. Mandatory reporting of all drug-related activity would open up police departments and give more information for background check purposes.

Violence-related crimes were far and away the most prevalent offenses found in the study.⁶² Violence-related crimes seem to go hand in hand with being a police officer, as the sheer number of excessive-use-of-force cases reported in the media show. But a significant amount of violence-related crimes are unrelated to use of force during an arrest. Nearly one-third of violence-related crime arrests during this period were for domestic violence.⁶³ And, as the report indicates, many of these domestic violence arrests and convictions did not result in firings.⁶⁴ The Gun Control Act of 1968⁶⁵ provides that persons convicted of domestic violence crimes face the prospect of losing the right to own a firearm.⁶⁶ Thus, the fact that officers can avoid criminal penalties for domestic violence crimes gives rise to questions regarding those officers' continued use of weapons.⁶⁷

Profit-motivated crime arrests, though presenting an overlap with various forms of corruption such as extortion, were the second-highest category in the study.⁶⁸ Excepting those forms of profit-motivated crimes that do overlap with corruption, serious questions are still raised by the varying crimes of theft from persons, robbery, or theft from buildings or businesses.⁶⁹ But profit-motivated crimes do not always

61. *Id.*

62. *Id.* at 22.

63. *Id.* at 24.

64. Only 210 of 961 incidents resulted in an officer losing his job as a result of a domestic violence arrest or conviction. Of the remainder, 150 voluntarily resigned, 453 were suspended, and 148 did not face any known adverse employment decisions. *Id.* at 152.

65. 18 U.S.C. § 922 (2012).

66. 18 U.S.C. § 922(g)(9) (making it unlawful for persons convicted of domestic violence crimes to own a firearm).

67. STINSON ET AL., *supra* note 45, at 25. Originally, the Gun Control Act of 1968 contained an exception for law enforcement officers to use firearms while on the job. With the passage of the "Lautenberg Amendment," however, the exception was removed. *Revocation*, *supra* note 39, at 555–56.

68. STINSON ET AL., *supra* note 45, at 22.

69. *Id.* at 25.

result in job loss, just as the other forms of crimes do not.⁷⁰ The largest chance for job loss relating to profit-motivated crimes occurs when the crime is also drug-related.⁷¹ Just as above, profit-motivated crimes should be included in this system.

Police officers who commit crimes are acting conversely to the fundamental duties of law enforcement officials: the duties to protect and serve the community. Rather than upholding these duties, officers are taking advantage of their position and acting as if they are above the law. Therefore, the system this Note proposes needs to work with police departments to ensure that even officers who are privately sanctioned, as opposed to publicly disciplined through suspension or termination, are still reported to the database so that future police departments are made fully aware of an officer's disciplinary issues.

B. Corruption

Corruption, though still a crime, can be much less visible to the public than those crimes listed above. As such, corruption investigations are often kept within the department and are tracked at a much lower rate. Corruption is a dereliction of duty itself, as officers are sworn to uphold the law. But a culture of corruption also spawns misconduct in other forms; if a police officer is likely to lie on the stand or file a false police report, then what else is the officer likely to do? Corruption, for the purposes of this Note, is defined as perjury, falsification of documents, cover-ups, and extortion. Corruption in police departments is much harder to define and weed out than other criminal activity, and this system must require police departments to self-report.

Lying while under oath, or perjury, is common enough in police departments that a new word was coined for the practice: "testilying."⁷² Testilying has been uncovered in large cities all across the country, and its rampant occurrence has fractured public trust in the police.⁷³ A police officer's lie can have serious, lasting consequences.⁷⁴ It can lead to innocent persons being convicted of crimes they did not commit, and

70. Profit-motivated cases, however, do result in job loss more frequently than other crimes; of 1,592 cases, 577 resulted in involuntary termination, 503 resulted in voluntary resignation, 376 resulted in suspension, and 133 resulted in no adverse action. *Id.* at 167.

71. *Id.* at 25.

72. MOLLEN COMMISSION REPORT, *supra* note 19, at 36.

73. Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 234–37 (1998).

74. *Id.* at 237.

guilty persons freely walking away.⁷⁵ Police perjury can be motivated by malice, but it can also be motivated by a desire to admit evidence obtained in violation of a suspect's constitutional rights.⁷⁶ The "Blue Wall of Silence," the protective and secretive police code that prohibits disclosing a fellow officer's perjury, presents many challenges, and is another reason police officers will lie or refuse to testify.⁷⁷ Despite the difficulty in determining whether an officer has "testified"—in part due to the "Blue Wall of Silence"—society must ensure that these officers are not able to obtain new employment in a law enforcement capacity.

Falsification of documents related to an investigation is another serious problem within police departments. The Mollen Commission uncovered widespread falsification of police reports, often to protect the arresting officer, to cover up unlawful searches and seizures, or to frame an innocent civilian.⁷⁸ Like testifying, the falsification of documents related to an investigation hurts police-community relations. And, like testifying, the "Blue Wall of Silence" often makes the issue worse by covering up falsification.⁷⁹ This is especially so because investigators and prosecutors are unlikely to follow up on reports made by the community and, at times, ignore differing reports from the public, characterizing the witness as "involved."⁸⁰ While it is difficult to say what evidence would be necessary to decertify an officer for falsification of documents, it is clear that the issue must be addressed.

Cover-ups are closely tied to perjury and falsification of documents, as they are the main ways in which cover-ups occur. One solution to the "Blue Wall of Silence" could be the addition of a category in the system that tracks officers who do not break with the "Blue Wall of Silence" to report misconduct. While this might be a lower-level "offense" for the purposes of these systems, this could be a direct response to the culture of police departments and unions. It could present serious challenges as well. As it stands, police officers who do break the "Blue Wall

75. *Id.*

76. *Id.*

77. *Id.*

78. See MOLLEN COMMISSION REPORT, *supra* note 19, at 36–43 (discussing these forms of corruption within the NYPD).

79. Chin & Wells, *supra* note 73, at 237–41.

80. See CHRISTOPHER COMMISSION REPORT, *supra* note 19, at 162–64, for a discussion of the LAPD's classification system for witnesses to police misconduct. Often, internal investigators would cheat the system by labeling non-involved witnesses as "interested" solely because the witness made a complaint against the officer. *Id.* at 163.

of Silence” code often experience threats of violence, expulsion, and potential job loss.⁸¹

Extortion is another common form of police corruption.⁸² While it generally affects citizens engaged in criminal activity, such as drug dealing, illegal gambling, or prostitution,⁸³ it is just as important to track as the other forms of corruption. Extortion shows a propensity for criminal activity, and often targets more vulnerable segments of the population: people who might only be involved in these criminal activities as a last resort or because they are forced into the activities.⁸⁴ Police officers who engage in extortion present dangers to the public. Rather than protecting vulnerable citizens, officers often take money, sex, or drugs in exchange for not arresting citizens engaged in criminal activity. This has many serious consequences; it allows criminal activity to perpetuate, endangers the most vulnerable members of society, and leads to more danger for law-abiding citizens.

Corruption, though more private than the criminal activity discussed above, is no less important to track. Corruption breeds an environment that is relaxed on crime and enforcement, while being protective of those officers who do engage in misconduct. It takes the form of officers who do not arrest other officers for DUI and of officers who are willing to protect other officers at the expense of the citizens they are sworn to protect and serve. While the system will have to rely on a modicum of self-reporting, the release of documents related to internal investigations will be a powerful tool for either system.

C. Unconstitutional Activities

Over the past two decades, the Department of Justice has entered into consent decrees with police departments all across the country. Beginning with the Violent Crime Control and Law Enforcement Act of 1994, the Department of Justice was authorized to investigate any non-federal law enforcement agencies for suspected civil rights violations under 34 U.S.C. 12601.⁸⁵ Since then, consent decrees have been

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81. Chin & Wells, *supra* note 73, at 241–44. In one instance, New York City gave an armed detail to two officers who had testified against other officers because the city feared violent retaliation by police officers. *Id.* at 243–44.
 82. See MOLLEN COMMISSION REPORT, *supra* note 19, at ex. 6, 4–8 (finding that the corruption had evolved from simply accepting bribes to actively extorting criminals).
 83. *Id.*
 84. See *id.* at ex. 6, 4–5.
 85. *Conduct of Law Enforcement Agencies*, U.S. DEP’T OF JUST., <https://www.justice.gov/crt/conduct-law-enforcement-agencies> [<https://perma.cc/FC9L-E9PU>] (last visited Mar. 17, 2017); 34 U.S.C. 12601 (2017) (formerly 42 U.S.C. 14141).

entered into with police departments in Pittsburgh, Washington D.C., Los Angeles, New Jersey, Oakland, Detroit, New Orleans, Seattle, Ferguson, and Cleveland, with further oversight taking place in Cincinnati, New York, and Baltimore.⁸⁶ These investigations have turned up widespread constitutional violations within each police department. Violations include unconstitutional stop and frisks, searches and seizures, and excessive use of force.⁸⁷

The investigation of the Baltimore City Police Department is the most recent investigation that the Department of Justice has released to the public. The Department found that the Baltimore police officers were stopping law-abiding citizens at an alarming rate, often when the citizens were not participating in any criminal activity.⁸⁸ Officers frequently were using false pretenses, and not acting on any reasonable suspicion, to stop citizens in order to find evidence of criminal activity.⁸⁹ Similarly, the stop-and-frisk policy in New York City, which was similar to policies employed in other jurisdictions,⁹⁰ was ruled unconstitutional in part because of the unreasonable, racially motivated nature of the stops in the first place.⁹¹ Police officers who are caught engaging in, or upper-level command officers who are caught enacting policies that result in, a pattern of unreasonable stop and frisks,⁹² therefore, should be included in this system.

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86. *Police Reform and Accountability Accomplishments*, U.S. DEP'T OF JUST., <https://www.justice.gov/opa/file/925861/download> [https://perma.cc/DK9X-QAXY] (last visited Mar. 17, 2017); POLICE EXEC. RES. F., CIVIL RIGHTS INVESTIGATIONS OF LOCAL POLICE: LESSONS LEARNED 1–5 (2013), http://www.policeforum.org/assets/docs/Critical_Issues_Series/civil%20rights%20investigations%20of%20local%20police%20-%20lessons%20learned%202013.pdf [https://perma.cc/662A-V5QH].
87. *E.g.*, U.S. DEP'T OF JUST., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 3 (2016) [hereinafter BALTIMORE REPORT].
88. *See id.* at 24–34 (detailing the Baltimore police department's unconstitutional practices).
89. *Id.*
90. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 559–89 (S.D.N.Y. 2013). Judge Scheindlin found that officers conducted a substantial amount of stops on citizens of color, even in areas of the cities that were not heavily populated by people of color. This is very similar to what the Department of Justice found in Baltimore, Chicago, and Ferguson. *See, e.g.*, BALTIMORE REPORT, *supra* note 87, at 48–54; U.S. DEP'T OF JUST., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT 19, 143–45 (2016) [hereinafter CHICAGO REPORT]; U.S. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 64–67 (2015) [hereinafter FERGUSON REPORT].
91. *Floyd*, 959 F. Supp. 2d at 665–66.
92. While there exists little publicly available data on individual officers' use of unconstitutional and unreasonable stop-and-frisks, there exists some data on broad trends. *See* Becca James, *Stop and Frisk in 4 Cities: The Importance*

Searches and seizures of property are unconstitutional when law enforcement officials conduct them without a warrant or without probable cause in exigent circumstances.⁹³ There are significant social and legal interests in preventing police officers from conducting unconstitutional searches and seizures. Prosecutors do not want evidence that could convict a defendant when it results from an unconstitutional search that could subject the evidence to the exclusionary rule.⁹⁴ And privacy interests for the general public outweigh any benefit that an unconstitutional search and seizure might allow.⁹⁵ This is especially true because of the exclusionary rule. Thus, police officers who have a history of repeated unconstitutional searches of property should be held accountable by this system.

Under the Fourth Amendment, citizens have the right to be free from a law enforcement officer's use of excessive or deadly force without justification. As the Department of Justice investigations demonstrate, law enforcement officers violate this right in a widespread and rampant

of Police Data, SUNLIGHT FOUNDATION (Mar. 2, 2015, 9:00 AM), <https://sunlightfoundation.com/2015/03/02/stop-and-frisk-in-4-cities-the-importance-of-open-police-data-2/> [<https://perma.cc/4NQ6-UXPL>]. Many police departments—though some better than others—keep internal records of stop-and-frisks, including the names of those officers who employ the tactic. *Id.* The Sunlight Foundation is a non-profit entity dedicated to government accountability. *About Us*, SUNLIGHT FOUNDATION, <https://sunlightfoundation.com/about/> [<https://perma.cc/2XN2-VCFU>] (last visited Mar. 17, 2017).

93. *See* *Payton v. New York*, 445 U.S. 573, 590 (1980) (holding that “[a]bsent exigent circumstances, [the entrance of a household] may not reasonably be crossed without a warrant.”).
94. The exclusionary rule is a court-created remedy, couched in the Fourth Amendment, that grants protection to property owners who are subject to unconstitutional searches. Evidence obtained during an unconstitutional search can be suppressed later, thus significantly damaging a prosecutor’s ability to try a case. *See, e.g., Weeks v. United States*, 232 U.S. 383, 398 (1914) (establishing the exclusionary rule, but applying it only to the federal government); *Mapp v. Ohio*, 367 U.S. 643, 654–60 (1961) (holding that the exclusionary rule is incorporated against the states). Since then, the Supreme Court has carved out many exceptions to the exclusionary rule, and now, the exclusionary rule acts as a balancing test. *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 363 (1998) (“[B]ecause the [exclusionary] rule is prudential rather than constitutionally mandated, we have held it to be applicable only where its deterrence benefits outweigh its ‘substantial social costs.’”) (quoting *United States v. Leon*, 468 U.S. 897, 907 (1984)); *see also Hudson v. Michigan*, 547 U.S. 586, 591 (2006); *Utah v. Strieff*, 1036 S. Ct. 2056, 2061 (2016).
95. *See* William C. Heffernan, *The Fourth Amendment Exclusionary Rule as a Constitutional Remedy*, 88 GEO. L. J. 799, 832–40 (2000) (discussing privacy interests in the context of *Weeks* and beyond).

manner.⁹⁶ The victims are often people of color, occasionally those with mental illness, and these violations are a contributing cause to the fracturing of police-community relations.⁹⁷ Unfortunately, police departments and state governments do little to prevent these constitutional violations. Often, civilian complaints are ignored or filed incorrectly.⁹⁸ And even when an investigation moves forward against an officer, the protections that the officer gets through his or her union or through the “Blue Wall of Silence” mean that the officer rarely is disciplined.⁹⁹ The ideal minimum standards for this system would include some method of penalizing an officer’s career when that officer engages in repeated instances of use of excessive or deadly force without justification.

D. Racial Profiling and Bias

Racial profiling and bias should be included as a minimum standard for decertification or revocation. The difficulty in using racial profiling, however, is determining whether an officer actually uses racial profiling and bias when carrying out his or her duties. While the investigation in Ferguson revealed that officers had exchanged racially charged messages with each other,¹⁰⁰ not every case is so blatant. Unless an officer uses explicitly racial motives for effecting a stop or arrest, racial bias and profiling might only surface after extensive discovery of internal documents and policies. And as I will discuss later, the Supreme Court often sanctions police policies that have a disparate impact on people of color. While the ideal minimum standards would include some manner of decertification for racial profiling and bias, it is only included here as a potential future instrument for determining unfitness for duty.

Racial profiling, implicit and explicit bias, and selective enforcement of laws are damaging policies that sour police-community relations. These policies affect all people of color; many surveys have found that a majority of people of color disagree with the notion that they are

96. See, e.g., BALTIMORE REPORT, *supra* note 87, at 74–115 (examining the Baltimore City Police Department’s use of force tactics and policies); CHICAGO REPORT, *supra* note 90, at 22–46 (examining the same with the Chicago Police Department); FERGUSON REPORT, *supra* note 90, at 28–41 (examining the same with the Ferguson Police Department).

97. BALTIMORE REPORT, *supra* note 87, at 47, 80; FERGUSON REPORT, *supra* note 90, at 28.

98. See, e.g., BALTIMORE REPORT, *supra* note 87, at 139–48 (discussing the Baltimore police department’s obstruction of investigations and lack of oversight); CHICAGO REPORT, *supra* note 90, at 50–62 (discussing the Chicago police department’s obstruction of investigations into police misconduct); FERGUSON REPORT, *supra* note 90, at 82–86 (discussing the Ferguson police department’s inadequate complaints process).

99. See generally *infra* Section II.B.

100. FERGUSON REPORT, *supra* note 90, at 72.

treated as fairly as white citizens.¹⁰¹ African Americans and Latin Americans make up a disproportionate share of stops by law enforcement officers, such that the terms “driving-while-Black or -Brown” and “walking-while-Black or -Brown” have become ubiquitous as criticisms for police policies.¹⁰² In fact, studies have shown that African Americans, Latin Americans, and Asian Americans are stopped as much as “eight to ten times as often” as are white Americans.¹⁰³

The high number of stops is not indicative of a higher level of crime, though. Data from the Substance Abuse and Mental Health Services Administration shows that white Americans use drugs such as crack and powder cocaine at similar rates, and other drugs such as hallucinogens, heroin, and stimulants at higher rates than African Americans.¹⁰⁴ From the early 1990s through 2007, the proportion of African Americans arrested for drugs has never dropped below three times the proportion of white Americans arrested for drugs.¹⁰⁵ And the years between 1988 and 1993 saw rates of drug arrests for African Americans more than five times that of drug arrests for white Americans.¹⁰⁶ Race, then, seems to be the factor that explains this discrepancy the most.

The judicial system complicates this matter. The Supreme Court often strengthens privacy and personal protections for white citizens, while weakening them for citizens of color. *Illinois v. Wardlow*,¹⁰⁷ decided in 2000, allows officers to label drug-dealing areas, which predominantly appear in inner-city African American areas, as high-crime areas for purposes of stopping a citizen.¹⁰⁸ *Whren v. United*

101. See Floyd Weatherspoon, *Ending Racial Profiling of African-Americans in the Selective Enforcement of Laws: In Search of Viable Remedies*, 65 U. PITT. L. REV. 721, 722 nn. 1–2 (2004) (discussing multiple surveys conducted on the topic of selective enforcement of laws).

102. Kevin R. Johnson, *The Case for African American and Latina/o Cooperation in Challenging Racial Profiling in Law Enforcement*, 55 FLA. L. REV. 341, 343–44 (2003).

103. *Id.* at 344.

104. See *List of Available Quick Tables for the National Survey on Drug Use and Health, 2011*, NAT'L ADDICTION & HIV DATA ARCHIVE PROGRAM, http://www.icpsr.umich.edu/quicktables/quickconfig.do?34481-0001_all [<https://perma.cc/QBQ2-SQ3R>] (last visited Jan. 22, 2018).

105. Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL'Y REV. 257, 271–72 (2009).

106. See *id.* at 272 for a chart depicting drug arrests using data from the Federal Bureau of Investigation.

107. 528 U.S. 119 (2000).

108. *Id.* at 124; see also Andrew Guthrie Ferguson, *Crime Mapping and the Fourth Amendment: Redrawing “High-Crime Areas,”* 63 HASTINGS L. J.

States,¹⁰⁹ decided in 1996, allows officers to justify traffic stops for minor infractions, even if the stop is pretextual and based on race.¹¹⁰ The curtilage doctrine, which protects the area immediately surrounding a home,¹¹¹ does not protect the hallway of an apartment.¹¹² The doctrine means that courts often protect affluent communities, where houses are the typical dwellings, but do little to protect inner-city areas, low-income areas, and areas populated by people of color, where apartments are the more common dwellings.¹¹³

The difficulty in effectively tracking police officers in regard to racial profiling and bias comes from the lack of internal enforcement and investigation of these complaints. It is further complicated by judicial protections for officers, such as those seen in *Wardlow* and *Whren*. The ideal legislation would ensure reporting of police officers who employ racial profiling and biased tactics when making stops and arrests. Despite judicial protection, many of these policies still create unfair burdens on communities of color and harm police-community relations. This system should at least work to eradicate those instances of racial profiling that are explicitly unconstitutional. While a more robust system may require a changing of jurisprudence to eliminate a majority of racial profiling, this is ultimately beyond the scope of this Note.

II. THE CHALLENGES OF PREVENTING HIRING OFFICERS WITH POOR HISTORY

The status quo, which does little to prevent police departments from hiring demonstrably unqualified officers such as Timothy Loehmann, Sean Sullivan, or Eddie Boyd III, must be changed. That much is clear. Public support for police officers and the idea that police control and accountability in any form is anti-police make it difficult to broach these subjects without eliciting significant criticism. But police officers should be as qualified as current statutes and jurisprudence allow to serve and protect communities. Valiant efforts, such as the House and Senate bills from the 1990s, have been attempted, but few have brought about any significant change because of these steep barriers.

179, 217 (discussing the correlation between high crime areas and communities of color).

109. 517 U.S. 806 (1996).

110. *Id.* at 812–13.

111. *Oliver v. U.S.*, 466 U.S. 170, 180 (1984).

112. Carrie Leonetti, *Open Fields in the Inner City: Application of the Curtilage Doctrine to Urban and Suburban Areas*, 15 *GEO. MASON C. R. L.J.* 297, 310 (2005).

113. *Id.* at 310–12.

Some barriers fall under general issues in employment law, such as confidentiality agreements signed in the wake of termination or resignation and police unions, which often provide substantial support for bad police officers. Further, despite a majority of states having some form of decertification for officers, the decertification is not uniform and might not capture all of what this Note defines as police misconduct. Other barriers take the form of widespread cultural issues in police departments and the infamous “Blue Wall of Silence.” Still further barriers to systemic national change arise due to the issues inherent in federalism and the decentralization of police departments. Each of these delicate issues must be dealt with in order to enact programs that would give police departments the tools necessary to hire the best applicants.

A. Confidentiality Agreements

Confidentiality and non-disclosure agreements, either signed during termination or resignation proceedings or enacted by state and local law, provide ample protection for police officers. In many states, police officers enjoy broad protections for their personnel files, and both legislatures and the judicial system have broadened the definition of personnel files to include disciplinary matters. Any serious program designed to prevent the hiring of previously-disciplined officers or officers who have committed crimes or constitutional violations needs to be able to breach these confidential personnel files.

In California, for example, the penal code gives broad confidentiality protections to police officers personnel files.¹¹⁴ Personnel files consist of employment history, records of investigation or complaints regarding the officer that stem from the officer’s official duties, and departmental discipline.¹¹⁵ The only way to acquire the personnel record of a police officer in California is during litigation or if either the Attorney General, or a district attorney, commence an investigation into the officer’s actions.¹¹⁶ Theoretically, each of these types of information could demonstrate an officer’s unfitness for duty. But with relatively little means for acquiring the police officer’s personnel record, a lone police department would be unable to determine whether it wished to hire the officer.

Court decisions also affect whether personnel records are discoverable. In *Montgomery County v. Shropshire*,¹¹⁷ the Court of Appeals of Maryland ruled that internal investigations of two officers were con-

114. CAL. PENAL CODE § 832.7 (2004).

115. *Id.* § 832.8.

116. *Id.* § 832.7.

117. 23 A.3d 205 (Md. 2011).

sidered personnel records, rather than investigations.¹¹⁸ A complaint had been filed alleging that the officers had conducted themselves improperly during the investigation of a traffic accident.¹¹⁹ The internal investigation found that the officers had not committed any administrative violations.¹²⁰ In response, the Montgomery County Inspector General requested the records of the officers and of the internal affairs investigation.¹²¹ Labeling the internal investigations as personnel records exempted them from disclosure requirements under the Maryland Public Information Act.¹²² The court reasoned that there was a “significant public interest in preserving the confidentiality of internal police investigations both in promoting cooperation by civilian witnesses and police officers.”¹²³ This created an even more stringent regime than that of California; in Maryland, the court said that internal investigations do not have to be disclosed to county Inspectors General. If the investigating arm of the county government is unable to access records of internal investigations, then there is little hope of police departments acquiring them when screening applicants either.

There is a distinction between what California law and Maryland courts say and the issue discussed here. The legislation proposed would condition the release of this information on self-reporting, rather than any investigatory powers. The California statute and, more narrowly, *Shropshire* stand for preventing the release of this internal information to the public. The Department of Justice would be the only entity able to see all of the information contained in the database created by this legislation. Police departments would only have access insofar as they would be conducting background investigations on specific officers. The police departments would not have carte blanche to view all information in the database and thus the database should be outside any concerns raised in the California statute and in *Shropshire*.

B. Police Unions, Police Culture, and the “Blue Wall of Silence”

Police unions are politically powerful and highly influential in communities around the country. They work hard to protect officers who engage in police misconduct. Police unions often hold such enormous sway because of the importance of police to the community. Police unions, though, have gone far beyond the simple collective bargaining and employment protections offered by other unions. Instead, police unions

118. *Id.* at 218.

119. *Id.* at 207.

120. *Id.*

121. *Id.* at 208.

122. *Id.* at 207.

123. *Id.* at 216.

have used their power to influence state and local politicians to enact laws that help to cover up evidence of police misconduct.

In early 2016, *The Guardian* combed extensively through hacked files belonging to the Fraternal Order of Police, the nation's largest police union.¹²⁴ The nearly 2.5 gigabytes of leaked files contained agreements between cities and local branches of the Fraternal Order of Police.¹²⁵ The hacks showed that cities all across the United States were inserting provisions into the agreements that protected police officers who engaged in misconduct.¹²⁶ In a large number of contracts, there were provisions that allowed for, or required, the destruction of "records of civilian complaints, departmental investigations, or disciplinary actions after a negotiated period of time."¹²⁷ In some instances, that period of time was as little as a few months.¹²⁸

The "Blue Wall of Silence" is heavily intertwined with police union policies. The police code of silence has been long observed in academia, news, and court opinions as a significant barrier to holding police officers accountable for their actions.¹²⁹ Officers often face serious and brutal consequences from other officers if they break the code.¹³⁰ In the past, cooperating officers have lost their careers, had their property destroyed, and have feared for their lives.¹³¹

There is further evidence that unions often explicitly condone the "Blue Wall of Silence" and implicitly condone the retaliation that cooperating officers receive. In the wake of the killing of Laquan McDonald in Chicago, Mayor Rahm Emanuel formed a police accountability task force.¹³² The task force concluded that "the police unions and the City

124. George Joseph, *Leaked Police Files Contain Guarantees Disciplinary Records Will Be Kept Secret*, GUARDIAN (Feb. 7, 2016, 7:00 PM), <https://www.theguardian.com/us-news/2016/feb/07/leaked-police-files-contain-guarantees-disciplinary-records-will-be-kept-secret> [https://perma.cc/88HS-AA2D].

125. *Id.*

126. *Id.* Protections include "slow[ing] down misconduct investigations, prevent[ing] public access to complaints and disciplinary records, and enabl[ing] the destruction of complaints and disciplinary records after a negotiated period of time. *Id.*

127. *Id.*

128. *Id.*

129. Chin & Wells, *supra* note 73, at 238–40 nn.16–22.

130. *See id.* at 256–61 (discussing officer retaliation in general and with specificity in the accompanying footnotes).

131. *Id.* at 242–43 n.25.

132. Clarence Page, *Cleaning Up a Police Culture of Cover-up*, CHI. TRIB. (Apr. 15, 2016, 12:21 PM), <http://www.chicagotribune.com/news/opinion/page/>

have essentially turned the code of silence into official policy.”¹³³ This is not limited to just Chicago. Jurisdictions around the country have made it easier for unions to protect officers behind the “Blue Wall of Silence.”¹³⁴ Often, collective bargaining agreements have provisions that allow for a grace period—an “interrogation buffer”—before interviews take place, which ostensibly gives police departments the ability to cooperate on responses to investigations.¹³⁵

Police department culture is also toxic, protecting officers from public scrutiny and liability. Mayor Emanuel created the above-mentioned Chicago police accountability taskforce after it came to light that the police department had worked to cover up any evidence of wrongdoing on the part of Officer Jason Van Dyke.¹³⁶ Officer Van Dyke told investigators that he feared for his life.¹³⁷ Officers who witnessed Van Dyke shoot and kill McDonald told investigators, under oath, that Officer Van Dyke acted in self-defense when he shot Laquan McDonald, because McDonald “had moved menacingly toward [Van Dyke] with a knife.”¹³⁸ Command-level officials in the police department also agreed that Officer Van Dyke acted reasonably.¹³⁹ Contrary to the police department’s public statements, video evidence shows that Laquan

ct-page-police-racism-laquan-emanuel-task-force-perspec-0417-jm-20160415-story.html [https://perma.cc/TQT2-XCPX].

133. POLICE ACCOUNTABILITY TASK FORCE, RECOMMENDATIONS FOR REFORM: RESTORING TRUST BETWEEN THE CHICAGO POLICE AND THE COMMUNITIES THEY SERVE 14 (2016).
134. See Kevin M. Keenan & Samuel Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers’ Bill of Rights*, 14 B.U. PUB. INT. L.J. 185, 207–08 (2005) (discussing a typical provision in Law Enforcement Officers’ Bill of Rights that “enshrine[s] in law the previously illegal blue wall of silence . . .”).
135. Aziz Z. Huq & Richard H. McAdams, *Litigating the Blue Wall of Silence: How to Challenge the Police Privilege to Delay Investigation*, 2016 U. CHI. LEGAL F. 213, 220 (2016).
136. Page, *supra* note 132; see also Mitch Smith & Richard A. Oppel, Jr., 7 *Chicago Officers Face Firing Over Laquan McDonald Cover-Up*, N.Y. TIMES (Aug. 18, 2016), <https://www.nytimes.com/2016/08/19/us/laquan-mcdonald-chicago-police.html> [https://perma.cc/4VFB-F7FC]; Jeremy Gorner, et al., *Top Police Brass Defended Laquan McDonald Shooting After Seeing Video, Records Show*, CHI. TRIB. (Dec. 23, 2016, 6:55 AM), <http://www.chicagotribune.com/news/laquanmcdonald/ct-laquan-mcdonald-shooting-inspector-general-report-met-20161222-story.html> [https://perma.cc/K57R-JQMA].
137. Gorner, *supra* note 136.
138. Smith & Oppel, *supra* note 136.
139. Gorner, *supra* note 136.

McDonald was stumbling away from officers when Van Dyke fired his gun sixteen times, killing the Chicago youth.¹⁴⁰

While police unions have worked tirelessly to institute police-friendly policies at the state and local level, they have worked just as tirelessly to prevent reforms that would have a positive effect on police-community relations. Many states have a system whereby officers who commit misconduct can be decertified or have their licenses revoked.¹⁴¹ In those states that do not have a certification system, it is largely due to the efforts of police unions blocking accountability reforms.¹⁴² Other common-sense reforms that police unions have blocked include the use of body cameras, nametags, and more thorough reports and documentation of racial profiling, bias, and excessive use of force.¹⁴³ Further, police unions consistently oppose the oversight power of civilian review boards.¹⁴⁴

In most other jobs, background investigations would uncover instances of law-breaking and misconduct allegations from supervisors and coworkers. But in the police department context, the “Blue Wall of Silence” effectively covers up evidence of misbehaving officers. These lax laws and policies concerning background investigation should not be applied to law enforcement officers sworn to protect and serve our communities. Thus, the legislation should enable the piercing of this thick veil of secrecy propagated by police unions and local governments.

C. Certification and Licensure

Many occupations—namely, doctors, airline pilots, and lawyers—have licenses or certifications. In the event of misconduct or malpractice, professionals in these occupations often face the risk of being decertified or stripped of their licenses. This is so the government or independent boards in charge of regulating those professions uphold the integrity and ensure that honest, ethical, and competent people are

140. Page, *supra* note 132.

141. See *infra* Section II.C.

142. *Revocation*, *supra* note 39, at 571.

143. James Surowiecki, *Why Are Police Unions Blocking Reform?*, NEW YORKER (Sept. 19, 2016), <http://www.newyorker.com/magazine/2016/09/19/why-are-police-unions-blocking-reform> [<https://perma.cc/A2DM-25K3>].

144. *Id.* In Cleveland, Steve Loomis, the president of the local police union, serves on the Cleveland Community Police Commission. Various organizations have called on Loomis to resign because of his impartiality and tendency to undermine the work of the Cleveland Community Police Commission in the media. Sam Allard, *Loomis Will Not Resign from Community Police Commission*, CLEVELAND SCENE (Jan. 28, 2016, 4:54 PM), <http://www.clevescene.com/scene-and-heard/archives/2016/10/18/vocal-demands-call-for-removal-of-steve-loomis-from-cleveland-police-commission> [<https://perma.cc/AT9L-5SXQ>].

employed in these fields. For law enforcement officers, a majority of states do offer certification or licensure. The problems lie in consistency, enforcement, the power of state decertification boards, and the lack of efficacy across state borders.

1. Consistency

Forty-three states have adopted some form of decertification as a penalty for committing various forms of misconduct or criminal activity.¹⁴⁵ Each state maintains a similar construction for its decertification regime. Peace Officer Standards and Training Commissions are state-created entities that are in charge of defining the criteria for serving as a law enforcement officer.¹⁴⁶ Each state also provides for sanctions short of decertification.¹⁴⁷ The similarities end there, however, as many states have different criteria for law enforcement officer certification.

Of the states that do have a decertification process, there is little consistency in the reasons that will lead to decertification. The states can be categorized into two different tiers. In the first tier are the states that decertify officers for felony and, in some states, misdemeanor convictions.¹⁴⁸ That is clearly a good first step; officers should not be allowed to serve after felony convictions. But the states in the first tier stop at felony and misdemeanor convictions instead of also including administrative adjudications and misconduct.¹⁴⁹ Further, decertification in those states that require a conviction provides a large amount of discretion to prosecutors, who may or may not pursue charges against an officer.¹⁵⁰

In the second tier are those states that further include administrative hearings and adjudications by administrative law judges as a basis for decertification.¹⁵¹ This is in addition to decertification as a result of criminal convictions.¹⁵² In this tier, there exists a broad spectrum of administrative charges and disciplinary infractions that lead to administrative decertification. In some states, decertification follows from general “conduct unbecoming a law enforcement officer” or “act[s]

145. *Revocation*, *supra* note 39, at 542.

146. *Id.* at 542–43.

147. *Id.* at 544.

148. *Model Law*, *supra* note 39, at 150–51.

149. *Id.* at 151.

150. *Id.*

151. *Id.*

152. *Id.*

committed . . . under color of law that involve[] moral turpitude.”¹⁵³ In others, decertification follows from more specific infractions, such as excessive use of force or perjury.¹⁵⁴

Intertwined in both of the tiers are those states that pursue decertification as a result of officer termination for good cause or resignation in lieu of termination for good cause.¹⁵⁵ This can provide ample protection against hiring unfit officers by catching those who have a pattern or history of misconduct that does not rise to the level of administrative adjudications. The weakness in this policy, though, is when an officer is decertified for a good-cause termination resulting from inability to get along with other officers.¹⁵⁶ In other words, an officer who is pretextually fired, possibly for breaching the “Blue Wall of Silence,” can be subject to decertification for acting contrary to the union or his or her commanding officer.

Resignation is also viewed differently by states that have decertification boards. In those states that have termination for good cause as a basis for decertification, some also include provisions allowing for decertification if an officer resigns in the face of imminent investigation into conduct that could lead to termination for good cause.¹⁵⁷ In Washington, a proposed law would have allowed the state Peace Officers Standards and Training Commission to decertify officers who resigned when conduct could have led to termination, whether the conduct had been discovered by supervisors or not.¹⁵⁸ It is especially important to include resignation in the face of imminent investigation or discipline because police departments oftentimes sign confidentiality agreements so that they do not have to engage in lengthy and expensive hearings and investigations.¹⁵⁹ This lack of consistency between the states necessitates finding a common, minimum standard for officer revocation.

2. Power of State Boards

The states that do have state organizations for decertification of officers also differ in the boards’ power to act unilaterally. In some states, the state board can act absent local departmental action to revoke or

153. *Id.* For examples of states that have this statutory language, see *id.* at 151 nn.12 & 14.

154. *Id.* at 152.

155. *Id.*

156. *Id.* at 152–53.

157. *Revocation*, *supra* note 39, at 560.

158. *Id.*

159. *Id.*

decertify an officer for misconduct.¹⁶⁰ In some states, the board must wait for the local department to terminate or begin termination proceedings before the board can revoke or decertify an officer.¹⁶¹ In a proposed statute, a separate state civil service board has the power to overturn a local department's decision.¹⁶² Thus, even if a police chief or sheriff would like to terminate an officer for good cause, the civil service board can have a hearing, and the officer, represented by union counsel, can be reinstated to his or her position. In those states, the state decertification board cannot take any action, even if the officer was justifiably terminated in the first place.¹⁶³ This can have the effect of a police chief deciding not to terminate an officer or even start disciplinary proceedings. The chief, hoping to save money, would rather allow the officer to resign, than spend the time and resources investigating, holding hearings, and litigating before the state board only to have to rehire the officer and give him or her back pay.¹⁶⁴ Thus, while this system should include protections for officers in the event of unjust termination, it should also make sure that the reasonable and correct final decisions of police departments are upheld.

3. Enforcement

Issues also arise in enforcement of decertification. Even when a state has provisions in place to decertify law enforcement officers who commit misconduct, officers may not be decertified for their misconduct. In *Carney v. White*,¹⁶⁵ an officer had been fired from a Wisconsin police department for trading, and offering to trade, leniency in traffic tickets for sexual favors.¹⁶⁶ After the first police department fired him, he ac-

160. *Id.* at 558.

161. *Id.*

162. *Id.* at 558-59.

163. *Id.* Civil service boards are often criticized as pro-police and pro-union. One example of an officer reinstated after justifiable termination occurred in Braintree, Massachusetts. Officer James Kelleher was fired from his position as a police officer after he and his girlfriend assaulted his then-wife. After the police department went through the lengthy process of terminating him, the civil service commission overturned that decision and reinstated him with back pay. See David Armstrong, *Second Chance for Bad Cops: Chiefs Say Civil Service Thwarts Discipline*, BOS. GLOBE (May 21, 2000), http://cache.boston.com/globe/metro/packages/civil_service/part1.htm [<https://perma.cc/FT7K-KCBK>] (discussing James Kelleher and the problem with the civil service commissions in Massachusetts).

164. *Revocation*, *supra* note 39, at 599.

165. 843 F. Supp. 462 (E.D. Wis. 1992).

166. *Id.* at 478.

quired employment with another Wisconsin police department.¹⁶⁷ The second police department later fired him, and his victims sued the city when he committed the same form of misconduct.¹⁶⁸ While misconduct did lead to decertification in this instance, the state board was not required to decertify in the case of termination; instead, the state board allowed local police departments discretion in deciding whether to conduct background investigations or whether to hire an officer.¹⁶⁹

Similarly, in *Doe v. Wright*,¹⁷⁰ a police officer resigned after attempting to exchange leniency in traffic citations for sexual favors.¹⁷¹ His original police department followed statutory requirements when it reported his resignation to the state board.¹⁷² But because Arkansas law at the time did not require police departments to include information as to why the officer resigned, he was not decertified.¹⁷³ When he subsequently secured employment at a new police department, he was caught engaging in the same misconduct and fired.¹⁷⁴ Arkansas later amended its laws to require the disclosure of information as to why an officer resigned.¹⁷⁵

The cases of *White* and *Wright* are not anomalous. Rather, they are compounded by the fact that, as discussed previously, prosecutors have substantial discretion in determining whether to pursue charges against a police officer. In that sense, a decertification program that relies solely on convictions would let officers who engage in other forms of misconduct, or in criminal activity that a prosecutor does not pursue, slip through the cracks. As discussed above, police unions and the “Blue Wall of Silence” provide ample protections for officers accused of misconduct. This often leads to situations like that of Officer Van Dyke, where nearly a year passed before the prosecutor formally charged him with a crime.¹⁷⁶ In that time, he had not been under any significant investigation by the Chicago Police Department which would have risen to the level of decertification.¹⁷⁷ An officer in Van Dyke’s position, then,

167. *Id.*

168. *Id.* at 478–79, 465.

169. *Revocation*, *supra* note 39, at 561.

170. 82 F.3d 265 (8th Cir. 1996).

171. *Id.* at 267.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Revocation*, *supra* note 39, at 561.

176. *Gorner*, *supra* note 136.

177. In Illinois, the board may not certify any officer who has been convicted of a felony. 50 ILL. COMP. STAT. § 705/6.1(a) (2013). Officer Van Dyke was

could have resigned and taken a position as a police officer in another jurisdiction.

4. Lack of Efficacy Across Borders

Finally, state governments control certifications of law enforcement officers within their borders. Each state controls the requirements for officer certification and controls the bases for decertification. This has the effect of creating vastly different systems from one state to the next. Decertifying conduct in one state may not rise to the level of decertification in another state. Thus, an officer like Sean Sullivan, who is fired and who would lose his certification in most states, is able to cross state borders to work as a police chief. While the cases of *Wright* and *White* above illustrate this situation in the context of intrastate police departments, police departments that wish to hire applicants who previously worked out of state have little means to discover previous misconduct.

The case that led James T. Moore, Commissioner of the Florida Department of Law Enforcement, to testify in support of the Law Enforcement and Correctional Officers Employment Registration Act of 1996 involved an officer doing exactly this. In West Palm Beach County, Florida, two police officers engaged in the use of deadly force, killing Robert Jewett.¹⁷⁸ One of the officers came from Tennessee after resigning from a police department for former misconduct.¹⁷⁹ In the investigation into Jewett's death, it came to light that the officer from Tennessee had explicitly asked the Chattanooga police department not to report that he was forced to resign.¹⁸⁰ Under Tennessee law at the time, a suspension or termination was enough for the state board to decertify an officer.¹⁸¹ But because he resigned and pledged to move to Florida to continue his law enforcement career, his new police department was unaware of his past misconduct.¹⁸² In his testimony, Commissioner Moore said of Jewett's death: "I am confident that had [his] record[] been known when [he] applied for [his] police job[], [he] would have never been hired. Had this happened, Mr. Jewett might be alive

not indicted until over a year after the shooting. Steve Schmadeke, *Chicago Cop Indicted on 6 Murder Counts in Laquan McDonald Slaying*, CHI. TRIB. (Dec. 16, 2015, 8:32 PM), <http://www.chicagotribune.com/news/local/breaking/ct-jason-van-dyke-indicted-laquan-mcdonald-met-20151216-story.html> [<https://perma.cc/SFS5-VN96>].

178. *Revocation*, *supra* note 39, at 561.

179. *Id.* at 562.

180. *Id.*

181. *Id.*

182. *Id.*

today.”¹⁸³ A system that works both interstate and intrastate is desperately needed to prevent tragic events like the killing of Robert Jewett.

D. Federalism and the Decentralization of Police Departments

The federal government does not have general police powers. Many Supreme Court cases speak to the exclusive power of state governments to regulate police departments.¹⁸⁴ Police power is almost exclusively in the hands of state governments under the Tenth Amendment. Some states take this a step further; they have decentralized their police functions to the point that local police departments often set their own internal hiring and qualification policies.¹⁸⁵ This presents genuine challenges with regard to implementing effective policies to prevent the hiring of problem officers.

But police power and criminal activity, as well as police accountability, have been increasingly subject to dual enforcement from the federal government. And in the past, the Supreme Court has indicated a willingness to uphold federal police accountability laws if enacted through the proper channels.¹⁸⁶ Federal courts oversee and ensure enforcement with the federal government reforms when the Department of Justice negotiates consent decrees with local police departments found to be engaging in unconstitutional practices under 34 U.S.C. § 12601.¹⁸⁷ Other federal crime bills, including the Omnibus Crime

183. *Police Officers' Rights and Benefits*, *supra* note 29, at 175 (prepared statement of James T. Moore, Comm'r, Fla. Dep't of Law Enforcement).

184. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598, 617–18 (2000) (“The Constitution requires a distinction between what is truly national and what is truly local . . . Indeed, [there is] no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.”); *United States v. Lopez*, 514 U.S. 549, 564 (1995) (noting that the states “historically have been sovereign” in the field of law enforcement).

185. As discussed above, see *supra* Section II.C.3., some states have similar systems to Wisconsin. In Wisconsin, despite having a Peace Officer Standards and Training Commission, the law allows for local police departments to decide whether to hire an officer or whether to conduct a background investigation. Such decentralization causes issues such as those seen in *Carney v. White*. *See supra* notes 165–168 and accompanying text; *Revocation*, *supra* note 39, at 561.

186. In *United States v. Morrison*, the Supreme Court invalidated only the civil remedy included in the Violence Against Women Act, but indicated a willingness to uphold the rest of the act. 529 U.S. at 627. And, in *United States v. Lopez*, the Court explicitly stated that federal criminal laws could be upheld under the Commerce Clause as long as they fall into one of three categories. 514 U.S. at 558.

187. *See supra* Section I.C.

Control and Safe Streets Act of 1968,¹⁸⁸ the Violent Crime Control and Law Enforcement Act of 1994,¹⁸⁹ and the Gun-Free Schools Act of 1994,¹⁹⁰ are still good law despite states being the main arbiters of police power and criminal laws.

E. Law Enforcement Officers' Bill of Rights

Many of the policies supported by local police unions and promulgated by local governments can be traced to a single, highly effective barrier to police accountability. Fourteen states currently have enacted a Law Enforcement Officers' Bill of Rights ("LEOBoR") to protect the due process of officers during internal investigations.¹⁹¹ Still more states and localities have adopted, as part of collective bargaining agreements, similar protections afforded by the LEOBoRs in those fourteen states.¹⁹² Protections include longer waiting periods for the commencement of an investigation, interviews conducted only by fellow law enforcement officers, and notice of investigation provided to both the law enforcement officer and his or her union representative.¹⁹³ In all cases, officers are afforded more rights than the suspects that they interrogate and investigate on a daily basis.¹⁹⁴ These provisions directly shield officers from accountability by providing them with substantial leniency during investigations. While LEOBoRs generally only apply in those instances where an officer is under internal investigation, in most cases an internal investigation is the only one an officer will face for alleged misconduct.¹⁹⁵ While not necessarily a direct impediment to decertification—LEOBoRs do not include provisions denying states the ability to decertify officers—the LEOBoRs are impediments to the investigatory

188. Pub. L. No. 90-351, 82 Stat. 197 (current version at 34 U.S.C. § 10101 et seq. (2017)).

189. Pub. L. No. 103-322, 108 Stat. 1796 (current version at 42 U.S.C. § 12101 et seq. (2017)).

190. 20 U.S.C. § 7961 (2015).

191. Eli Hager, *Blue Shield: Did You Know Police Have Their Own Bill of Rights?*, MARSHALL PROJECT (Apr. 27, 2015), <https://www.themarshallproject.org/2015/04/27/blue-shield#.0Qyqq9ce6> [<https://perma.cc/3BD9-4XXR>]. The fourteen states are California, Delaware, Florida, Illinois, Kentucky, Louisiana, Maryland, Minnesota, Nevada, New Mexico, Rhode Island, Virginia, West Virginia, and Wisconsin. *Id.*

192. Keenan & Walker, *supra* note 134, at 185–86.

193. *Id.* at 203–41 (discussing typical provisions of LEOBoRs).

194. Other provisions not afforded to suspects include limits on duration of interviews, protections against harassing or threatening during interrogation, and limits on the number of interrogators present during an interview. *Id.*

195. *Id.* at 207–10 (discussing LEOBoR provisions dealing with formal investigations, as opposed to informal inquiries).

powers of police departments. Thus, police departments are more likely to allow the officer to resign than to spend the time and resources that comes with these investigations. And this can have the effect of shielding the officer from decertification.

F. The Inadequacy of Alternative Remedies

There are several remedies currently available for deterring police officers from committing misconduct. These other remedies, however, are entirely inadequate at dealing with problem officers acquiring new positions. The exclusionary rule is now subject to a balancing test, meaning that even if officers do commit unconstitutional searches and seizures, the evidence may still be admitted at trial.¹⁹⁶ Consent decrees established under 34 U.S.C. § 12601 have had modest successes in changing institutional policies, but do not deter individual officers from unconstitutional conduct.¹⁹⁷ Section 1983 actions may provide some deterrence, but jury bias in favor of the officers and the Supreme Court's expansion of qualified immunity has made it increasingly difficult to hold officers accountable.¹⁹⁸ Criminal prosecutions of law enforcement officers also do not provide much deterrence. Prosecutors, who can only effectively carry out their duties with the help of police officers, are reluctant to bring criminal charges.¹⁹⁹ And, as in 1983 actions, jury bias favors officers, making it very difficult to prosecute officers successfully.²⁰⁰ Internal investigations also rarely hold officers accountable for their actions.²⁰¹ Thus, a new remedy is required that will effectively deter officers from committing crimes and misconduct.

III. A COOPERATIVE FEDERALISM SOLUTION

Cooperative federalism is a regulatory regime in which the federal government enacts a law, and then “invite[s] state agencies to super-

196. *See supra* note 94.

197. *See* Adeshina Emmanuel, *How Union Contracts Shield Police Departments from DOJ Reforms*, IN THESE TIMES (June 21, 2016), <http://inthesetimes.com/features/police-killings-union-contracts.html> [<https://perma.cc/8XAU-FU9F>] (discussing the modest successes, but also the failings of consent decrees); Kami Chavis Simmons, *Cooperative Federalism and Police Reform: Using Congressional Spending Power to Promote Police Accountability*, 62 ALA. L. REV. 351, 376 (2011) (pointing out the lack of a “mechanism to guarantee that the reforms implemented under the [consent decree] will continue”).

198. *Alternative Remedies, supra* note 39, at 56–59.

199. *Id.* at 59–60.

200. *Id.*

201. *Id.* at 60–64.

intend [the] federal law.”²⁰² It is commonly characterized as the federal government enacting federal minimum standards, which are then implemented by state agencies.²⁰³ Generally, the law allows for wide discretion; states can enact the minimum standards, can create more stringent standards, or, in some cases, can receive federal exemption from the minimum standards.²⁰⁴ Cooperative federalism allows states to tailor the minimum standards to local conditions within the state.²⁰⁵ Cooperative federalism reflects the federal government’s understanding that not all states are the same, and thus it allows each state latitude to determine which policy works best for that state.

One of the most well-known cooperative federalism regimes is the Environmental Protection Agency’s (“EPA”) enforcement of air quality standards under the Clean Air Act. Passed using the Commerce Clause, the Clean Air Act requires the EPA to promulgate minimum standards for ambient air quality of different environmental air pollutants.²⁰⁶ Once those standards are created, the states must submit for EPA approval implementation plans that meet, but may exceed, the minimum standards.²⁰⁷ A state may opt out and allow the EPA to create and implement a federal plan for the state.²⁰⁸ If a state fails to submit a plan for approval, or if a state fails to come into compliance with its EPA-approved plan, then the EPA can sanction the state in a number of ways.²⁰⁹ The EPA can also sanction certain parts of states, rather than the entire state, if the parts are designated as “non-attainment areas.”²¹⁰ Thus, the Clean Air Act implements many of the hallmarks of a cooperative federalism regime: the federal government promulgates minimum standards; the state chooses to adopt or modify the minimum standards subject to approval by the federal government; and, the federal government does not coerce, but merely persuades states to adopt and enforce the regime.

Clearly, the problem of police departments hiring officers who have committed crimes, have been fired for misconduct, or have resigned in

202. Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1695 (2001).

203. *Id.* at 1696.

204. *Id.*

205. *Id.* at 1698.

206. 42 U.S.C. § 7409(a).

207. *Id.* §§ 7410, 7416.

208. *Id.* § 7410(c).

209. The federal government may withhold certain amounts of transportation funding. *Id.* §§ 7506(c)(1), (c)(2). The EPA can also compel states by withholding permits for new sources of air pollutants. *Id.* § 7503(a)(4). For other sanctions under the Clean Air Act, see *id.* § 7509.

210. *See id.* § 7509.

the face of imminent discipline has little to do with the environment. But the structure of the cooperative federalism regime implemented under the Clean Air Act provides a blueprint for implementing necessary reforms in police department hiring processes. One could envision a law, passed using Congressional Spending Power rather than the Commerce Clause, in which Congress gives power to the Department of Justice to promulgate minimum standards for law enforcement officer certification and decertification. The Department of Justice would also be responsible for creating a database—and persuading the state and local police departments to self-report—that tracks only those officers who have been decertified. The Department of Justice could then implement these standards in a manner similar to how the EPA implements the Clean Air Act. Under the legislation, states would be required to submit plans to the Department of Justice for approval. Once approved, the Department of Justice would give states a certain period of time to implement and begin enforcing the plans. If certain states or areas decline to implement the minimum standards, the Department of Justice would have the power to implement a federal plan. If certain states or areas refuse or shirk their responsibilities under the Department of Justice approved plans, then the Department of Justice would be authorized to sanction the states.

In constructing a cooperative federalism regime, the Department of Justice should enact fairly strict minimum standards for certification and decertification. The Department of Justice would also be tasked with creating a database to track officers who have been decertified pursuant to the minimum standards. It should allow a state, through its agencies, to implement the standards in a way that most benefits the state. The legislation would also include incentives and sanctions that would persuade state governments to comply with the law. Congress would give protections to officers so that it might be more palatable to officer unions and would assuage due process concerns. The legislation would also need to include a description of the relevant constitutional powers that Congress relies on to implement the law. Part III of this Note aims to create legislation and minimum standards that would satisfy all of these requirements.

A. Constitutional Powers and Challenges

Under the Clean Air Act, Congress presented its findings in a way that spoke to the Clean Air Act's constitutionality under the Commerce Clause. Pollution, Congress said, contributes to problems with transportation, crops, public health, and welfare. This has allowed the EPA's enforcement regime under the Clean Air Act to survive

constitutional scrutiny under the Commerce Clause in federal court.²¹¹ Additionally, the Clean Air Act has survived a non-delegation doctrine challenge²¹² and a Tenth Amendment challenge.²¹³ Here, Congress could enact this legislation pursuant to the Spending Power. The main challenges to the legislation would come in the forms of overreach under the Spending Power, the non-delegation doctrine, and the anti-commandeering doctrine.

1. The Spending Power

Congressional spending power is based in the first clause of Article I, Section 8 of the Constitution. This clause gives Congress the “Power To lay and collect Taxes . . . and provide for the common Defence and general Welfare of the United States.”²¹⁴ In *South Dakota v. Dole*,²¹⁵ the Supreme Court said that, implicit in the reading of this clause, is the power to “attach conditions on the receipt of federal funds.”²¹⁶ The Court went on to place explicit limits on the spending power: (1) “the exercise of the spending power must be in pursuit of the general welfare”; (2) the condition must be unambiguous, “enabl[ing] the States to exercise their choice knowingly”; (3) the condition must be related “to the federal interest in particular national projects or programs”; and, (4) the condition must be otherwise constitutional.²¹⁷ The Court stated that the condition must not be unduly coercive.²¹⁸ Additionally, in *National Federation of Independent Business v. Sebelius*,²¹⁹ the Court reaffirmed the necessity of Congress to make clear the conditions on funding and held that the conditions must affect future funding.²²⁰ In other words, Congress cannot use the spending power to take away funding that a state was given previously.²²¹

211. *Hodel v. Va. Surface Mining & Reclamation Ass’n Inc.*, 452 U.S. 264, 282 (1981).

212. *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457 (2001).

213. *Beame v. Friends of the Earth*, 434 U.S. 1310, 1314–15 (1977).

214. U.S. CONST. art. 1, § 8, cl. 1.

215. 483 U.S. 203 (1987).

216. *Id.* at 206.

217. *Id.* at 207–08 (internal citations and quotations omitted).

218. *Id.* at 211.

219. 132 S. Ct. 2566 (2012).

220. *Id.* at 2606–07 (“What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding.”)

221. *Id.*

Under the Clean Air Act, the EPA is authorized to order other agencies to withhold certain funding if an area is designated a non-attainment area.²²² This funding is limited to nonessential funding only; if the funding is needed for safety, public transit, or other explicitly listed reasons, the Department of Transportation must (for safety) or may (for the other reasons) approve grants or projects.²²³ Every year, Congress appropriates substantial amounts of grant funds for state and local police departments. Under this legislation, Congress would be able to authorize the Department of Justice to withhold certain amounts of grant funding through its Office of Justice Programs.²²⁴ Like the Clean Air Act, essential funding would not be withheld.²²⁵

Grant funding for state and local law enforcement reached over \$2.5 billion during fiscal year 2016.²²⁶ One source of “funding” that the Department of Justice could order to be withheld is the distribution of arms and other technology that the Department of Defense is authorized to give to state and local police departments under the 1033 Program, which has distributed military equipment to 8,000 police departments in all fifty states as well as Washington, D.C., Guam, Puerto Rico, and the Virgin Islands since its inception in 1997.²²⁷ Another could be grants through the Community Oriented Policing Services (“COPS”) Program, which aims to advance community policing in local

222. *See supra* Part III.

223. 42 U.S.C. § 7509(b).

224. For a list of funding and grant projects for fiscal years 2015, 2016, and 2017, see U.S. DEP’T OF JUSTICE, FY 2017 DOJ PROGRAM PLAN, <https://www.grantsnet.justice.gov/programplan/html/Solicitations.htm> [<https://perma.cc/4VUH-A5BS>] (last visited Mar. 21, 2017).

225. While essential funding is not easily defined in this context, it could look similar to the Clean Air Act, where funding is not withheld for explicitly listed reasons, such as safety and public transportation. Here, essential funding could, likewise, be safety spending that reaches a certain level defined by the courts or Congress. One could imagine a scenario where funding for armored vehicles could be withheld while funding for bullet proof vests might be exempt from conditions.

226. *Police Grants: What’s Being Federally Funded in 2016*, POLICEONE.COM (Feb. 1, 2016), <https://www.policeone.com/police-grants/articles/71130006-police-grants-whats-being-federally-funded-in-2016/> [<https://perma.cc/GD5H-935P>].

227. *Excess Federal Property*, JUST. TECH. INFO. CTR., <https://justnet.org/resources/Excess-Federal-Property.html> [<https://perma.cc/PGU9-MP8A>] (last visited Mar. 21, 2017); *Law Enforcement Support Office*, DEF. LOGISTICS AGENCY <http://www.dla.mil/DispositionServices/Offers/Reutilization/LawEnforcement.aspx> [<https://perma.cc/7GQX-FAH6>] (last visited Mar. 21, 2017).

and state law enforcement.²²⁸ The COPS Program has given state and local police departments more than \$14 billion since the program was created in 1994, and each department that wishes to receive funding must apply for the grant.²²⁹ Further, the Office of Justice Programs and various other federal offices and departments provide more grant funding to state and local law enforcement.

As the federal government gives many state and local police departments grants and funding which are appropriated year after year—and applied for by those departments each year—conditioning the grants on the implementation of these standards would not run afoul of *South Dakota v. Dole* or *NFIB v. Sebelius*.²³⁰ The funding is tied to the general welfare; the COPS Program is designed to enhance community policing,²³¹ the 1033 Program is designed to provide equipment officers in the field,²³² and many of the other grants and funding are directly linked to general public safety measures.²³³ It would be simple enough to articulate explicitly what a state must do in order to comply with the legislation, thus complying with the unambiguity requirement. Additionally, the funding is related “to the federal interest in particular national projects or programs”; Congress does have an interest in ensuring that the officers that are hired through the COPS Program and the officers that use the arms and technology through the 1033 Program act in a constitutional manner. Congress also has an interest in ensuring that the money that goes toward improving police-community relations is given to those departments that have hired offices which put the departments in the best possible position to implement much needed reforms. Thus, this legislation would have a strong argument for constitutionality under Congress’s Spending Power.

228. Office of Community Oriented Policing Services, *About*, U.S. DEP’T OF JUSTICE, <https://cops.usdoj.gov/about> [<https://perma.cc/2JT4-VXSF>] (last visited Mar. 21, 2017).

229. *Id.*

230. The type of grants and the exact amount conditioned on implementation of this system would need to be calculated to avoid the Supreme Court labeling the conditions “unduly coercive.” In *South Dakota v. Dole*, because South Dakota would only lose 5 percent of funding due to non-compliance, the Supreme Court found that the requirement was not coercive. 483 U.S. 203, 211–12 (1987). Here, the calculation would involve more, as it would have to take into account direct funding of state and local police departments by the federal government, as well as funding given to the state governments earmarked for general law enforcement funding.

231. *About*, *supra* note 228.

232. *Excess Federal Property*, *supra* note 227.

233. U.S. DEP’T OF JUSTICE, *supra* note 224.

2. Challenges

Besides a challenge to this system under congressional spending power, the potential legislation could also face challenges under the non-delegation and anti-commandeering doctrines. Under Article I, Section 1 of the Constitution, “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.”²³⁴ The Supreme Court has read this to mean that Congress may not delegate legislative duties to other branches of government.²³⁵ In *J.W. Hampton, Jr., & Co. v. United States*,²³⁶ the Supreme Court held that Congress may delegate powers to the executive branch if Congress “shall lay down by legislative act an intelligible principle to which the person or body authorized . . . [act] is directed to conform.”²³⁷

In *Whitman v. American Trucking Association*,²³⁸ the Supreme Court applied the intelligible principle requirements to the Clean Air Act. At issue in that case was whether the Clean Air Act was a constitutional delegation of powers by Congress to the EPA.²³⁹ The Court held that, as long as the legislation contained an “intelligible principle” that directed the agency, it was not an unconstitutional delegation of power.²⁴⁰ In that case, the Clean Air Act included an intelligible principle because it requires the “EPA to set air quality standards at the ‘requisite’ level, that is, not lower or higher than is necessary,” and does not need to specify exact levels.²⁴¹ Here, the proposed legislation could include a provision that requires the Department of Justice to set minimum qualifications for decertification that are not higher or lower than necessary to prevent police departments from hiring officers who have committed the police misconduct defined in Part I above.

Another major challenge to this legislation could come in the form of an anti-commandeering challenge. Under the Tenth Amendment to the Constitution, Congress may not enact legislation that “commandeers” a state’s legislative or executive branch to carry out federal regulation.²⁴² In *New York v. United States*, the seminal case on the

234. U.S. CONST. art. I, § 1.

235. *Whitman v. Am. Trucking Ass’n, Inc.*, 531 U.S. 457, 473 (2001).

236. 276 U.S. 394 (1928).

237. *Id.* at 409; *Whitman*, 531 U.S. at 472.

238. 531 U.S. 457 (2001).

239. *Id.* at 472–73.

240. *Id.* at 473–76.

241. *Id.* at 475–76.

242. *New York v. United States*, 505 U.S. 144, 161 (1992) (“As an initial matter, Congress may not simply ‘commandee[r]’ the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory

anti-commandeering doctrine, the Supreme Court took issue with a federal law which compelled state governments to establish ownership of radioactive waste produced within that state's borders.²⁴³ In *Printz v. United States*,²⁴⁴ the Supreme Court ruled invalid a provision in the Brady Handgun Violence Prevention Act which required state law enforcement officers to conduct background checks on potential gun buyers because it compelled state officials to participate in a federal regulatory scheme.²⁴⁵

In *New York v. United States*, however, the Court made clear that Congress still had the power to encourage state governments to enact federal regulatory programs.²⁴⁶ Congress, the Court said, has two means by which it can do so in a constitutional manner. First, Congress can use the spending power to persuade state governments to enact federal programs.²⁴⁷ Second, Congress can “offer States the choice of regulating that activity according to federal standards or having state law preempted by federal regulation.”²⁴⁸ As discussed in Part III.A.1, this legislation could be tailored so as to be constitutional under the Spending Power. And the legislation would be constructed like the Clean Air Act, with federal enforcement in those areas where states cannot, or will not, enact the minimum standards.

The intelligible principle seems to be a fairly lenient standard; in *Whitman*, the Court could only point to two cases in which the Court held invalid delegation legislation.²⁴⁹ While Justice Thomas has since criticized the leniency of the “intelligible principle” standard, it remains good law today.²⁵⁰ The legislation here simply needs to include the manner in which the Department of Justice must act, set out in precise and unambiguous terms. In that way, the legislation would likely survive a challenge under the non-delegation doctrine. Further, because the legislation will be designed to persuade, and not compel state and local

program.” (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981)).

243. See *id.* at 177–80 (discussing the unconstitutionality of the “take title” provision).

244. 521 U.S. 898 (1997).

245. *Id.* at 933–34.

246. *New York*, 505 U.S. at 167–68 (discussing Congress's power to encourage state governments to enact federal regulations).

247. *Id.* at 167.

248. *Id.*

249. See *Whitman*, 531 U.S. at 474–75 (compiling cases in which the Supreme Court has undertaken an “intelligible principle” analysis).

250. See *Dep't of Transp. v. Ass'n of Am. R.R.s*, 135 S. Ct. 1225, 1245–55 (2015) (Thomas, J., concurring).

law enforcement departments to participate, it will not run afoul of the anti-commandeering doctrine.

B. The Legislation

Like the Clean Air Act, this legislation must be thorough. In its nearly half century of existence, the Clean Air Act has been the subject of many constitutional challenges. Today, it still stands as a cooperative federalism regime that, not without criticism, has overseen many important reforms to United States environmental policy. Like the EPA and the environment, the Department of Justice is an agency that is acutely aware of the challenges facing police departments. As such, the Department of Justice is in the best position to create, and persuade compliance with, minimum standards for police officer certification and decertification. Fortunately, state mechanisms for enforcement are already in place; forty-three states have some form of Peace Officer Standards and Training Commission that could be the state liaison for the federal regulatory scheme.²⁵¹ When creating the legislation, Congress would have to include provisions that give the Department of Justice power to promulgate and persuade compliance with the standards, to create and persuade compliance with the database, and to give the states the leniency needed to survive constitutional challenge.

When Congress gave the EPA the power to promulgate minimum air quality standards under the Clean Air Act, it did so by including an “intelligible principle” to survive a non-delegation doctrine challenge. Congress instructed the EPA to promulgate these standards after a notice and comment period,²⁵² subject to review by an independent scientific committee,²⁵³ and with the mandate that the standards must be related to protecting public health.²⁵⁴ In crafting the legislation which would authorize the Department of Justice to promulgate minimum standards and create the database, Congress would need to include an “intelligible principle.” Congress could do so by mandating that the Department of Justice hold a notice and comment period for the proposed minimum standards. Congress could also require that the minimum standards be subject to review by an independent committee consisting of law enforcement professionals, academics, and other independent, qualified citizens. And Congress would need to include a provision requiring the minimum standards to be directly related to preventing police departments from hiring problem police officers.

251. *See supra* Section II.C.1.

252. 42 U.S.C. § 7409(a).

253. *Id.* § 7409(d).

254. *Id.* § 7409(b).

As for the database, Congress could create the legislation in the mold of the proposed Law Enforcement and Correctional Officers Employment Registration Act of 1996. This time, however, Congress could respond to many of the criticisms that prevented the bill from making it out of committee.²⁵⁵ This version of the database should track only those officers who have been decertified pursuant to the minimum standards, rather than the employment history of all law enforcement officers in the United States.²⁵⁶ It should include confidentiality provisions so that only the Department of Justice may access the database and so that police departments can only have access after securing a signed release of information from the police department applicant. As discussed above, the problem of officers moving to a different jurisdiction is not confined to anecdotal accounts anymore; rather, the problem has become well known in the media as a widespread issue.²⁵⁷ Officers could be given notice of what information a police department is sending to the database, and Congress could include an appeal provision for officers to contest the publishing of employment history in the database.

Like the sanctions that allow the EPA both to withhold transportation funding and to order other departments to withhold funding, this legislation could include sanctions, promulgated under the Spending Power, both for the adoption of the minimum standards and for reporting to the database. Congress could give the Department of Justice the authority to withhold certain funding and grants given to state and local police departments as part of the Office of Justice Programs.²⁵⁸ This exercise of the Spending Power would be constitutional because: (1) it aims to improve public safety and confidence in police departments; (2) it would be enunciated in a clear and unambiguous manner, allowing states the opportunity to weigh the costs and benefits of the regulatory scheme; and (3) Congress has a particular interest in ensuring that its grant funding is used by police departments and officers who have a demonstrated ability to operate constitutionally. Further, the sanctions must not be coercive, and Congress is in the best position to determine whether the amount of funding that the Department of Justice can withhold would rise to that level. Finally, the sanctions and conditions would be forward looking because state and local police departments apply for the grants each year, rather than receiving them over time.

255. See *supra* Introduction (discussing criticisms of the Law Enforcement and Correctional Officers Employment Registration Act of 1996).

256. See *infra* Section III.C.

257. See *supra* Introduction (discussing Timothy Loehmann, Sean Sullivan, Eddie Boyd III, Jason Van Dyke, Officer White, and Officer Wright); see also *supra* Section II.C.4. (discussing the killing of Robert Jewett).

258. See U.S. DEP'T OF JUSTICE, *supra* note 224.

Congress could include incentives as well, such as funding appropriated for the legislation that will assist states in adopting this cooperative federalism regime. As for incentives for reporting to the database, Congress should include a qualified immunity defense against defamation claims for police departments that, in good faith, report an officer's employment changes to the state created agency. This qualified immunity should also extend to the state agencies that report the final determination of an officer's status to the database.²⁵⁹ Finally, Congress should not force states to adopt this regulatory regime in order to comply with the anti-commandeering doctrine. In those states and areas where police departments do not comply with the minimum standards or with the database, the Department of Justice should be authorized to implement a federal program.

C. The Minimum Standards

In the ideal system, the federal minimum standards would cover the requirements for both certification and decertification of police officers. The main focus of this Note, however, is attempting to prevent police departments from hiring problematic applicants who have already served as police officers. As such, the minimum standards this Note discusses will only cover the standards for decertifying an officer. In a program such as this, the federal minimum standards would have to be extensive, yet flexible, so that states can enact more stringent standards. The main focus of Department of Justice should be on creating the minimum standards by which police departments will know when they should not hire a police officer.

To start, the Department of Justice should require the inclusion of police officers in the minimum standards and database. Police officers should include traditional state and local police, but also campus police officers, elected law enforcement officials such as sheriffs, and transit police.²⁶⁰ States should be free to include any other forms of law enforcement officers they desire, including correctional officers, investigators for state bureaus of investigations, court appointed bailiffs, or state border protections officers.²⁶¹ The standard for when a law enforcement officer should be decertified should, at a minimum, include when the officer commits felonies or certain misdemeanors, such as domestic abuse or other violent misdemeanors, burglary, perjury, property theft, or unlawful possession of a weapon. It should also include firings with good cause or resignations in the face of imminent discipline or investigation, but only when resulting from misconduct as it relates to the public. Thus, an officer who is fired with good cause because of simple chemistry issues or who is pretextually fired for violating the

259. See *Model Law*, *supra* note 39, at 154 (discussing qualified immunity).

260. *Id.* at 150 (discussing law enforcement officers).

261. *Id.*

“Blue Wall of Silence” should not be included in either the decertification regime or database. Rather, the firing or resignation must come after instances of police brutality, perjury or corruption, or other unconstitutional activities as determined by adjudications or investigations carried out internally or by independent review boards.

CONCLUSION

Officers such as Timothy Loehmann, Sean Sullivan, and Eddie Boyd III should never have been in positions to commit the misconduct for which they have become known. Instead, these officers should have been subject to decertification because of their clear unfitness to work as law enforcement officers protecting and serving a community. Their former employers should have reported the reasons for their change in employment status to a state body. As a result, their new departments should have been able to see their employment history and should have been able to make the decision not to hire them. The system this Note describes does not purport to be exhaustive. Yet, such a system would provide a valuable starting point for enacting much needed reforms that will ensure that police departments and officers afford people equal protection of the law.

Owen Doherty[†]

[†] J.D. 2018, Case Western Reserve University School of Law. I would like to thank my wonderful parents, Dennis and Carol, as well as my brothers, Patrick and Michael, who have always supported me in my endeavors. Without their love and encouragement, I would not be the man I am today. I would also like to thank Case Western Reserve University, the Law Review Journal, and Professor Jonathan Entin for giving me the opportunity to have my work published.