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## Removing White Hoods from the Blue Line: A Legislative Solution to White Supremacy in Law Enforcement

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# Removing White Hoods from the Blue Line: A Legislative Solution to White Supremacy in Law Enforcement

Hope Elizabeth Barnes\*

## *Abstract*

*On May 25, 2020, George Floyd took his final breaths. His death at the hands of multiple Minneapolis police officers was recorded by witnesses and viewed by millions. The public response to Floyd's death was immediate and powerful. Americans were demanding change on a greater scale than ever before. The problem with policing is not Derek Chauvin, or the Minneapolis Police Department, but rather with the very institution. White supremacy is alive and well in American policing. This Note begins by examining the historic connection between white supremacist groups and law enforcement agencies. This Note then evaluates existing standards of conduct for federal law enforcement agents and judicial employees. This Note concludes by proposing a heightened standard of conduct for law enforcement employees and exploring various methods for implementation of the standard.*

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“The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”<sup>1</sup>

*I. Introduction*

For thirty-four years, Frank Nucera, Jr. served the Bordentown Township community as a law enforcement officer.<sup>2</sup> He swore an oath to “never betray [his] integrity, [his] character,

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1. See *McAuliffe v. Mayor of New Bedford*, 29 N.E.2d 517, 517 (1892).

2. See Lisa Rose, *This Is the First Police Officer Charged With a Federal Hate Crime in at Least 10 Years*, CNN (Dec. 21, 2018) (explaining that, in addition to being on the police force, Nucera was the town administrator) [[perma.cc/LPP7-HAGQ](https://perma.cc/LPP7-HAGQ)].

or the public trust”<sup>3</sup> and to “always maintain the highest ethical standards.”<sup>4</sup> He was given a badge of authority and eventually promoted to the position of Police Chief.<sup>5</sup> Unfortunately, Frank Nucera, Jr. was an unabashed racist who “frequently referred [to Black people] as ‘niggers,’”<sup>6</sup> “use[d] police dogs to intimidate [Black people],”<sup>7</sup> and stated that he was “gonna get to the point where [he] could shoot [a Black person].”<sup>8</sup> Nucera was charged with committing a hate crime<sup>9</sup> and depriving an individual of rights<sup>10</sup> after an incident in which he slammed a Black teenager’s head into a metal doorjamb before referring to said teenager as a “[f]ucking little, fucking nigger,” a comment which was caught on an audio recording.<sup>11</sup> A fellow officer began taping Nucera’s racist comments in 2015, a year before the aforementioned incident, and those recordings led the FBI to open an investigation.<sup>12</sup> Unfortunately, despite overwhelming evidence of Nucera’s antagonistic views against Black individuals, juries were unable to reach a unanimous decision and the charges were dropped.<sup>13</sup> While it is alarming to learn that a United States police chief in 2016 was openly spewing racist and derogatory statements, it is equally, if not more, alarming to know that he does not stand alone.

That members of law enforcement support, and are affiliated with, extremist groups and hate speech is not a new phenomenon.

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3. *Law Enforcement Oath of Honor*, INT’L ASS’N POLICE CHIEFS [perma.cc/KR2D-CS2X].

4. *Id.*

5. Rose, *supra* note 2.

6. Indictment at 2, United States v. Nucera, No. 17-532-RBK, 2017 WL 1158211 (D. N.J. Dec. 7, 2017).

7. *Id.*

8. *Id.* at 4.

9. 18 U.S.C. § 249 (2018).

10. 18 U.S.C. § 242 (2018).

11. See Indictment at 5, United States v. Nucera, No. 17-532-RBK, 2017 WL 1158211 (D. N.J. Dec. 7, 2017).

12. See Rose, *supra* note 2 (noting that the officer provided eighty-one audio recordings to FBI agents).

13. See Melanie Burney, *Former Bordentown Township Police Chief Will Not Face a Third Trial as Prosecutors Withdraw Charges*, PHILA. INQUIRER (Dec. 21, 2021) (detailing that, during his first trial, Nucera was convicted of lying to the FBI and received a twenty-eight-month prison sentence) [perma.cc/6AQ3-9HLY].

Organizations such as The Plain View Project,<sup>14</sup> Reveal News,<sup>15</sup> and the Anti-Defamation League Center on Extremism<sup>16</sup> have stepped in to monitor law enforcement officers and compile data to show the ties between extremism, hate groups, and American policing. In fact, one study by the Plain View Project reviewed about 3,500 officer social media accounts and found that 20% of current officers had made posts or comments which were biased, violent, dehumanizing, or mocked due process rights.<sup>17</sup> Since at least 2006, the FBI Counterterrorism Division has studied and gathered information relating to white supremacist infiltration of law enforcement agencies.<sup>18</sup> Recently, researchers were able to identify nearly 400 law enforcement officials whose Facebook profiles were associated with hate groups.<sup>19</sup>

Although law enforcement agencies are aware of these fundamental issues, they do not take effective action against these officers after information is uncovered.<sup>20</sup> In the few instances

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14. See *generally About the Project*, PLAIN VIEW PROJECT (explaining the origins of the project and the methodology for compiling bigoted statements made by law enforcement officers) [perma.cc/5KLU-3W6R].

15. See *generally To Protect and Slur*, REVEAL NEWS (listing investigative reports of police officers participating in extremist groups on Facebook) [perma.cc/FG2Z-89EF].

16. See *generally Center on Extremism*, ADL (describing the work done to monitor domestic extremism) [perma.cc/CN46-XFV9].

17. See Rashad Robinson, *We Can't Trust Police to Protect Us from Racist Violence. They Contribute to It*, GUARDIAN (Aug. 21, 2019, 8:29 AM) (noting that double the percentage of retired officers made these types of comments) [perma.cc/WR27-Q2P5].

18. See FBI Counterterrorism Division, *(U) White Supremacist Infiltration of Law Enforcement*, FBI INTEL. ASSESSMENT (Oct. 17, 2006) (stressing that infiltration can lead to intelligence breaches and jeopardize the safety of individuals) [perma.cc/FK6G-K43U].

19. See Will Carless & Michael Corey, *Inside Hate Groups on Facebook, Police Officers Trade Racist Memes, Conspiracy Theories and Islamophobia*, REVEAL NEWS (Jun. 14, 2019) [perma.cc/GV5R-C7TX].

20. See Will Carless, *Hundreds of Cops are in Extremist Facebook Groups. Why Haven't Their Departments Done Anything About It?*, REVEAL NEWS (Sept. 30, 2019) (highlighting that of over 150 police departments, only one had taken action against officers who were involved with extremist groups) [perma.cc/64J8-P7PL]; Michael German, *White Supremacist Links to Law Enforcement Are an Urgent Concern*, BRENNAN CTR. JUST. (Sept. 1, 2020) (emphasizing that the FBI

where termination, suspension, or other disciplinary action is taken, officers are often able to remain in their positions or they are re-hired by other law enforcement agencies.<sup>21</sup> The foundation of this problem lies in the history of American policing<sup>22</sup> because a system built on white supremacy will continue to uphold those same values.<sup>23</sup>

In recent years, federal legislators have shown interest in tracking and removing white supremacist ties to law enforcement. For example, the recently introduced White Supremacy in Law Enforcement Information Act<sup>24</sup> instructs the Attorney General, in collaboration with the FBI Director, to create intelligence assessments with information regarding white supremacist connections with law enforcement dating back to 2006.<sup>25</sup> Additionally, the House Subcommittee on Civil Rights and Civil Liberties held a hearing specifically to discuss the dangers of white supremacy and law enforcement.<sup>26</sup>

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has long known about law enforcement ties to white supremacist and militant groups) [perma.cc/CA5D-3AEW].

21. See Will Carless, *Exclusive: Cops Outed as Racists or Extremists Are Still on the Job or Were Rehired*, *ADL Says*, USA TODAY (Jun. 3, 2021, 11:04 AM) (last updated Jun. 3, 2021, 11:44 AM) (stating that, in the past ten years, 40% of officers were allowed to remain on duty after being found to have ties to various extremist and hate groups) [perma.cc/9TCF-98WZ].

22. See Ben Brucato, *Policing Race and Racing Police: The Origin of US Police in Slave Patrols*, 47 *SOC. JUST.* 115, 128 (2020) (describing how South Carolina's state militia and slave patrols merged in 1721 to maintain order throughout the state and essentially functioned as a police force).

23. See, e.g., Barbara Smith, Opinion, *The Problem is White Supremacy*, *BOS. GLOBE* (Jun. 29, 2020) (last updated Jun. 30, 2020, 4:01 PM) (explaining that institutionalized white supremacy is a system that depends on consistent practices to disadvantage certain groups while upholding privilege for white people) [perma.cc/5YXU-9GFK].

24. White Supremacy in Law Enforcement Information Act of 2021, H.R. 1031, 117th Cong. (2021).

25. *Id.*

26. See *Confronting Violent White Supremacy (Part IV): White Supremacy in Blue—The Infiltration of Local Police Departments: Hearing Before the Subcomm. on C.R. and C.L. of the H. Comm. on Oversight and Reform*, 116th Cong. 1–3 (2020) (discussing FBI findings on white supremacist infiltration of law enforcement and the threat it presents).

After Derek Chauvin murdered George Floyd, general police reform efforts began to gain traction.<sup>27</sup> Many of these endeavors have occurred at the local, state,<sup>28</sup> and federal levels, and various officials have proposed legislation in the hopes of broadly improving policing, but bipartisan support has been difficult to secure.<sup>29</sup> One such example is the George Floyd Justice in Policing Act of 2021 (“Justice in Policing Act”), a piece of federal legislation that was originally introduced in 2020, exactly two weeks after the murder of George Floyd, and aims to improve law enforcement accountability, transparency, and training.<sup>30</sup>

All of these proposals are alike in that they strive to improve policing and its effects on communities. These proposals, however, are only focused on eliminating white supremacy throughout police departments as a whole, but correcting individual officer behavior is equally as important. As the saying goes, “one bad apple spoils the whole barrel.” This Note proposes amending the Justice in Police Act to include a heightened conduct and speech standard for law enforcement officers. This Note also contemplates other methods for enforcing a heightened standard, such as changes to accreditation standards. A federal policy would provide a uniform strategy that is much needed in order to address the permeation of hate speech and hate organizations into law enforcement agencies around the country.

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27. See generally Ram Subramanian & Leily Arzy, *State Policing Reforms Since George Floyd’s Murder*, BRENNAN CTR. JUST. (May 21, 2021) (listing various reform measures that have been introduced across thirty states and in Washington, DC) [perma.cc/L4L4-6385]; Rashawn Ray, *One Year After George Floyd’s Murder, What is the Status of Police Reform in the United States?*, BROOKINGS (May 25, 2021) (discussing federal, state, and local reforms that were proposed within the year following George Floyd’s murder) [perma.cc/M854-AZ9J].

28. See Becky Sullivan, *With Slow Progress on Federal Level, Police Reform Remains Patchwork Across U.S.*, NPR (Apr. 27, 2021, 3:48 PM) (stating that over 2,000 police reform bills were introduced at the state or local level in 2020 but their success has been varied) [perma.cc/TY6N-MMBQ].

29. *Id.* (detailing the lack of bipartisan support for the federal police reform bill which Democrats introduced).

30. George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. (2021).

Part II details the history of American policing from the country's beginnings through the recent past. It also examines why current policies, which are often jurisdictionally or departmentally specific and allow agencies to investigate and discipline their own officers, are inadequate to address such a pressing issue. Part III reviews The Hatch Act<sup>31</sup> and the Codes of Conduct for Judicial Employees<sup>32</sup> and for United States Judges,<sup>33</sup> both of which govern other actors within the criminal justice system. This section discusses these policies and their processes for removing unfit individuals from positions of authority after their bias and ability to exercise proper discretion has been placed into question. Part IV proposes a heightened standard, similar to those applicable to federal officers and judicial employees, and the means for bringing state and local law enforcement employees into conformity with said standard. State and federal legislatures can enforce these standards via an accreditation process, the federal Spending Clause, and even through congressional authority under the Thirteenth Amendment. Part IV also addresses a potential administrative solution that individual departments could implement immediately as well as some of the possible concerns regarding the effect of the proposed legislation on unions and sheriffs in policing. This Note concludes that higher speech and association standards are crucial in order to begin removing white supremacy from law enforcement agencies.

## *II. Background*

Before discussing the present-day relationship between white supremacy and American policing, it is important to understand the history of policing and its earliest ties to maintaining a racial hierarchy.

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31. 5 C.F.R. § 734 (2021).  
32. *See infra* Part III.  
33. *See infra* Part III.



*A. The Past – Origins of Policing in the United States*

While Africans were undoubtedly brought to the Americas during the sixteenth century, the first African enslaved people in the British colonies arrived in 1619<sup>34</sup> and the 1620 census confirms the presence of twenty African slaves in Jamestown.<sup>35</sup> Over time, enslaved populations began to outnumber white Americans and posed a threat to white supremacy, especially in Southern states.<sup>36</sup> In response, states began passing various slave codes in order to control their enslaved populations.<sup>37</sup> For example, in 1669, the Virginia General Assembly passed An Act About the Casual Killing of Slaves,<sup>38</sup> which ensured that slave owners would not be charged with a crime if they killed an enslaved person who was “resist[ing]” their authority.<sup>39</sup> This law was followed by An Act for the Apprehension and Suppression of Runawayes, Negroes, and Slaves in 1672,<sup>40</sup> a statute that expanded the previous law so that anyone, regardless of their relation to an enslaved person, could “endeavour to take” a runaway slave and had the right to kill them upon any resistance.<sup>41</sup> In 1690, South Carolina took a more extreme approach and mandated that everyone had a duty to “apprehend runawayes.”<sup>42</sup> The law was revised in 1696 to require the town watch to actively police enslaved individuals and allowed constables to jail enslaved people who were found in town on

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34. Brucato, *supra* note 22, at 122.

35. *Id.*

36. See Robert A. Brown, *Policing in American History*, 16 DU BOIS REV.: SOC. SCI. RSCH. RACE 189, 190 (2019) (detailing that threats to slavery and white supremacy were major regional concerns in the South).

37. See Brucato, *supra* note 22, at 126–27 (describing the problematic slave codes that were enacted by states).

38. *Study Aid: Slavery and the Law in Seventeenth-Century Virginia*, GILDER LEHRMAN INST. AM. HIST. [perma.cc/39KJ-4R8V].

39. *Id.*

40. General Assembly, “An Act for the Apprehension and Suppression of Runawayes, Negroes, and Slaves.” (1672), ENCYC. VA. (Dec. 7, 2020) [perma.cc/PNA3-2EYL].

41. *Id.*

42. SALLY E. HADDEN, *SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS* 17 (First Harv. Univ. Press ed., 2001).

Sundays.<sup>43</sup> In this way, the slave codes slowly became more formal and more powerful until finally, in 1704, South Carolina introduced the first official slave patrol.<sup>44</sup>

Initially, the slave patrol was focused on returning runaways<sup>45</sup> and deterring rebellions.<sup>46</sup> These duties were broadened in the 1730s when patrols were called on to maintain law and order for the entire Carolina population.<sup>47</sup> Similarly, in 1778, slave patrols in Savannah, Georgia, were granted the authority to take custody of white persons who were disorderly.<sup>48</sup> Virginia patrol duties mirrored South Carolina and Georgia, with patrollers receiving a fixed pay for their shifts.<sup>49</sup> Patrol captains were also required to write reports regarding patrol activity.<sup>50</sup>

Meanwhile, beginning in the mid-1600s, Northern cities and states established watches to preserve order in local communities.<sup>51</sup> Slave codes also rose to prominence in the North,<sup>52</sup> particularly as fear of rebellion grew.<sup>53</sup> By 1804, all Northern states had agreed to at least gradually abolish slavery,<sup>54</sup> but

43. *Id.* at 18.

44. Philip L. Reichel, *Southern Slave Patrols as a Transitional Police Type*, 7 AM. J. POLICE 51, 59 (1988).

45. *Id.*

46. See HADDEN, *supra* note 42, at 19–20 (emphasizing the slave patrol’s ties to the state militia).

47. See Brucato, *supra* note 22, at 128 (noting that the slave patrols “met most criteria typically used to identify police” by the late 1730s).

48. See Reichel, *supra* note 44, at 61 (writing that “patrols were obliged to ‘take up all white persons who [could not] give a satisfactory account of themselves”).

49. See HADDEN, *supra* note 42, at 31 (detailing that patrollers earned ten pounds of tobacco for every twenty-four hours on duty).

50. See *id.* (“[E]ach patrol captain was obligated to submit written reports of the patrol’s activities to the court.”).

51. See Jill Lepore, *The Invention of the Police*, NEW YORKER (Jul. 13, 2020) (stating that, among others, Boston’s watch was created in 1631 and New York City followed in 1658) [perma.cc/7VX5-QDB9].

52. See Edwin Olson, *The Slave Code in Colonial New York*, 29 J. NEGRO HIST. 147, 147 (1944) (discussing the Act for Regulating Slaves, the first of the New York slave codes which was passed in 1702).

53. *Id.* at 148.

54. Nicholas Boston & Jennifer Hallam, *The Slave Experience: Freedom & Emancipation*, THIRTEEN [perma.cc/WL6Q-KUDH].

concerns regarding abolitionists and potential uprisings lingered.<sup>55</sup> Boston became the first city authorized to hire police officers in 1838.<sup>56</sup> Shortly after, in 1844, New York City established a police department<sup>57</sup> and soon, other cities and states began to follow suit.<sup>58</sup>

While the numbers of police agencies were increasing around the country, the foundation of policing in white supremacy became stronger as incidents of law enforcement taking collective and organized action against people of color began to regularly occur. For instance, New Orleans created a police department in 1852<sup>59</sup> and in 1866, the city's police officers opened fire against hundreds of Black supporters of the constitutional convention,<sup>60</sup> thus beginning one of the worst race riots in Louisiana history. Witnesses claimed that many Black individuals approached the police "begging to be arrested" but that they were often "shot down in cold blood."<sup>61</sup> By the time the riot had ended, thirty-eight people were dead, thirty-four of whom were Black.<sup>62</sup> None of the involved police officers were punished and it was later discovered that the Chief of Police had assisted with organizing the riot.<sup>63</sup>

State-sanctioned violence against African Americans was not limited by time period or geography. Between 1865 and 1950, there

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55. See Lepore, *supra* note 51 (highlighting the publication of *An Appeal to the Coloured Citizens of the World* by Boston abolitionist David Walker and attacks against abolitionists that followed it).

56. See *id.* (noting that 1838 is often referred to as the beginning of "modern urban policing").

57. *Id.*

58. See *id.* (stating that New Orleans, Cincinnati, Philadelphia, Chicago, and Baltimore formed their own police departments between 1852 and 1860).

59. *Id.*

60. See generally Donald E. Reynolds, *The New Orleans Riot of 1866, Reconsidered*, 5 LA. HIST.: J. LA. HIST. ASS'N, 5, 11 (1964) (explaining that tensions had been building in the city ahead of the convention).

61. See *id.* at 13 (describing attempts by the unarmed, non-combatant Black individuals to surrender via arrest).

62. *Id.*

63. See *id.* at 16 (revealing findings of a special congressional committee's investigation of the riot).

were approximately 6,500 documented lynchings<sup>64</sup> and it was not uncommon for law enforcement officers to be involved.<sup>65</sup> This was unfortunately true in Omaha, Nebraska in 1891 when George Smith suffered a gruesome fate at the hands of an angry mob, thousands strong.<sup>66</sup> Smith had been arrested for assaulting a young girl and was forcibly taken from police custody.<sup>67</sup> The officers watched as he was dragged through the streets and hung from a telegraph pole.<sup>68</sup> Seven men were charged with Smith's murder, including police Captain John O'Donoghue,<sup>69</sup> but the charges were later dismissed<sup>70</sup> and no one was ever brought to justice.

Smith's devastating fate was the same one that awaited Thomas Finch, a man who was last seen leaving his family's home in Atlanta on September 12, 1936, with a group of men, one of whom was Officer Samuel Roper.<sup>71</sup> Somewhere between leaving

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64. See Alex Fox, *Nearly 2,000 Black Americans Were Lynched During Reconstruction*, SMITHSONIAN MAG. (Jun. 18, 2020) (citing an Equal Justice Initiative study which reported on roughly 2,000 lynchings during the Reconstruction Era and 4,400 more which occurred between 1877 and 1950) [perma.cc/BH7P-WDYZ].

65. See *Police and State Involvement with Lynching*, STATE SANCTIONED (quoting a letter from an anonymous resident to the Baptist Vanguard Newspaper in Little Rock which read, "officers of the law is a part of the mob") [perma.cc/BE9D-3RXX].

66. See *Lynching in America: Confronting the Legacy of Racial Terror*, EQUAL JUST. INITIATIVE (3d Ed., 2017) [hereinafter *Lynching in America*] (describing the crowd of white people who gathered outside the local jail where Smith was being held) [perma.cc/6EYW-CXRB].

67. See *The Lynching of George Smith*, N. OMAHA HIST. (Jan. 29, 2011) (detailing the accusation facing George of raping a five-year-old girl, which sparked public outrage which ultimately escalated to a mob attack on George) [perma.cc/Z8FT-EL9S].

68. See *id.* (explaining the mob's actions, including breaking into the jail and tying a rope around his neck).

69. See *Lynchers Under Arrest*, N.Y. TIMES (Oct. 10, 1891) (noting that another one of the men charged was a delegate for the Democratic County Convention) [perma.cc/V6WT-FAJY].

70. See *Lynching in America*, *supra* note 66 (noting that the coroner concluded that Smith had died from fright, not from the multiple physical injuries inflicted).

71. See Michael S. Rosenwald, *A Black Man Accused of Rape, a White Officer in the Klan, and a 1936 Lynching That Went Unpunished*, WASH. POST (Jul. 19,

his home and arriving at Grady Hospital, Finch was beaten and shot multiple times.<sup>72</sup> Samuel Roper was never punished for his role in the lynching and, in fact, he would later become the Director of the Georgia Bureau of Investigation.<sup>73</sup> Upon retiring from his position as Director, Roper became an Imperial Wizard of the Ku Klux Klan,<sup>74</sup> the highest-ranked position within the organization.<sup>75</sup>

Black people on the West Coast were also not safe from violence disguised as public safety. Berry Lawson was only twenty-eight years old when three Seattle police officers beat him to death.<sup>76</sup> It was March 25, 1938, and Lawson, a Black employee at the Mt. Fuji Hotel, had fallen asleep in the lobby after his shift.<sup>77</sup> The officers, all of whom were white, claimed that they arrested Lawson for loitering and that he had fallen down the stairs while handcuffed.<sup>78</sup> That story quickly proved to be fabricated after one witness revealed that the officers had paid him \$250 to say that he witnessed the fall,<sup>79</sup> while an actual eyewitness to the beating stated that the officers gave him \$135 and a train ticket to leave town.<sup>80</sup> Doctors also discovered that Lawson had defensive injuries<sup>81</sup> and suffered more brain damage than surface skin

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2020) (depicting the five white men who came to the Finch family) [perma.cc/T4TC-ZG57].

72. *Id.*

73. *See id.* (noting that the murder of Finch was never investigated by authorities, and no one was ever charged with the crime).

74. *See id.* (commenting that Roper's appointment to Imperial Wizard occurred 13 years after Finch's lynching).

75. *See* CONST. & LAWS OF KNIGHTS OF KU KLUX KLAN, art. I, § 3 (equating the Imperial Wizard to a Commander-in-Chief).

76. *See generally* Taylor Easley, *Berry Lawson's Death and African American Civil Rights in 1930s Seattle*, C.R. & LAB. HIST. CONSORTIUM, UNIV. WASH. (last revised 2020) [perma.cc/5CLU-K2LZ].

77. *Id.*

78. *Id.*

79. *See id.* (“[Officer] Whalen bribed [James Franey] with two hundred and fifty dollars to testify.”).

80. *See id.* (explaining that the officers sent Travis Downs an additional \$50 after initially bribing him with \$85 and a train ticket to Portland, which he accepted).

81. *See id.* (stating that the defensive injuries “could not have been received” if Lawson were in handcuffs).

damage,<sup>82</sup> both of which were entirely inconsistent with falling down stairs.<sup>83</sup> A jury deliberated for fourteen hours before finding all three officers guilty of manslaughter.<sup>84</sup> Unfortunately, the officers were granted pardons by then-Governor Clarence Martin before ever spending a day in jail for their crime.<sup>85</sup> Despite the lack of adverse consequences, Berry Lawson's death is one of the first instances in which white officers were convicted and sentenced for killing a Black individual.<sup>86</sup>

Outside of individual and mass lynchings, race riots continued throughout the country, often from law enforcement, be it direct or indirect. In the summer 1943, the Zoot Suit Riots, indicative of the style commonly worn by Mexican American youth at the time, erupted in Los Angeles between white and Latino residents.<sup>87</sup> Reporters noted that police officers did little to control the violence; some were even directly implicated in crimes.<sup>88</sup> One study, which examined race riots that occurred in Boston and San Francisco between 1967 and 1969, claimed that, of the fifteen events researched, officers had instigated or escalated eleven of them.<sup>89</sup>

Some aspects of policing have changed significantly over time, especially in the early 1900s as American police became more militarized following the election of August Vollmer to the position

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82. *See id.* (“[T]he doctor concluded that it would have been impossible for the injuries to occur by falling down stairs.”).

83. *Id.*

84. *See id.* (noting that the three police officers did not put up a defense during the trial).

85. *See id.* (explaining that two of the officers were released on bail pending appeal and received full pardons while the third officer's sentence was delayed due to health conditions before he was granted a conditional pardon).

86. *See* Javonte Anderson, *White Cops Have Been Convicted of Killing a Black Person Before, But It's Rare*, USA TODAY (Apr. 22, 2021) (discussing other major convictions from recent years) [perma.cc/N3W4-7UAZ].

87. *See generally* Don Thomas Sine, *Zoot Suit Riots in Los Angeles, 1943: A New Perspective*, CAL. STATE UNIV., LONG BEACH (Jun. 1976) (explaining that white servicemen would attack anyone wearing a zoot suit during this time).

88. *See id.* at 37–38 (noting that officers would also arrest victims rather than perpetrators as a form of anti-Mexican violence).

89. Anthony Daniel Perez, Kimberly M. Berg, & Daniel J. Myers, *Police and Riots, 1967–1969*, 34 J. BLACK STUD. 153, 159 (2003).

of Chief of the Berkeley Police Department.<sup>90</sup> Vollmer, an army veteran, claimed that American police were “conducting a war, a war against the enemies of society.”<sup>91</sup> As such, he ensured that police training and command structures mimicked that of the army.<sup>92</sup> Policing continued to change and become more organized after J. Edgar Hoover was appointed as the Director of the FBI<sup>93</sup> and appointed the Wickersham Commission in 1929 to report on police inefficiency and try to reform police.<sup>94</sup> Despite the adjustments over the years, many parts of policing and police culture have stayed true to their harmful roots.

*B. The Present – An Abundance of Discretion; An Absence of Accountability*

Once the origins of modern policing are more fully understood, the connections with its overtly racist past become obvious. Today, the phrase “resisting arrest” can often be heard by law enforcement officer’s attempting to justify their use of force.<sup>95</sup> Further, the

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90. See Katrina Schwartz, *How a Berkeley Police Chief Gave Rise to the Modern Force*, KQED (Nov. 19, 2020) (tracing modern policing back to Vollmer and the militarized reforms modeled in Berkeley which soon spread across the country) [perma.cc/4Z5T-9CXG].

91. *Id.*

92. See *id.* (detailing military tactics Vollmer used in the police force such as mobile units, wearing uniforms, being organized into ranks, and creating police academies).

93. See Frank Olito, *Photos Show How Policing Has Evolved in the US Since its Beginnings in the 1600s*, INSIDER (Apr. 26, 2021, 4:00 PM) (describing how officers stopped foot patrols and grew apart from the community) [perma.cc/586E-SC3Z].

94. See Gary Potter, *The History of Policing in the United States, Part 5*, ECU ONLINE (Jul. 23, 2013) (noting that the Wickersham and other commissions did little to reform policing) [perma.cc/Q7EE-J63E].

95. See generally Wesley Lowery, *‘I Can’t Breathe’: Five Years After Eric Garner Died in Struggle with New York Police, Resolution Still Elusive*, WASH. POST (Jun. 13, 2019) (stating that the police union attorney said Eric Garner’s “choice to resist arrest” was a factor in his death) [perma.cc/VC6P-H2V8]; Vanessa Romo, *Expert Testifies Chauvin’s Actions Were Justified and in Line with Policies*, NPR (Apr. 13, 2021) (reviewing an expert’s testimony that George Floyd was resisting arrest when he continued to move around while struggling to breathe) [perma.cc/5VLL-QYY3]; see also Christina Morales, *What We Know About the Shooting of Jacob Blake*, N.Y. TIMES (Nov. 16, 2021) (noting that the

Supreme Court has stated that, among other factors, one must consider “whether [an individual] is actively resisting arrest or attempting to evade arrest” in determining whether an officer’s use of force was reasonable.<sup>96</sup> Additionally, the parallel between lynchings and police violence is still apparent. The Economic Policy Institute compared location data for historical lynchings and officer-involved shootings of Black individuals and found a positive relationship between the two.<sup>97</sup> In other words, counties that saw more historical lynchings also see a higher percentage of officer-involved shootings of Black people.<sup>98</sup>

Officers have a significant amount of discretion, the abuse of which can have extremely harmful consequences.<sup>99</sup> Beginning in the late 1960s, courts began to expand police discretion, a trend that has continued.<sup>100</sup> In addition to broad discretion, legal rulings have served to grant greater police power.<sup>101</sup> For example, the modern qualified immunity doctrine was established in *Harlow v. Fitzgerald* when the Court held that government officials are immune from liability for actions that do not “violate clearly

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Kenosha police union argued Jacob Blake “resisted arrest” before being shot seven times by officers) [perma.cc/W2EK-24TA].

96. *Graham v. Connor*, 490 U.S. 386, 396 (1989).

97. Jhacova Williams & Carl Romer, *Black Deaths at the Hands of Law Enforcement Linked to Historical Lynchings*, ECON. POL’Y INST. (Jun. 5, 2020, 2:42 PM) [perma.cc/86DD-H3CH].

98. *See id.* (“[A] statistically significant relationship exists between historical lynchings and the difference in the share of officer-involved shooting of Blacks compared with whites.”).

99. *See* David Weisburd et al., *The Abuse of Police Authority, A National Study of Police Officers’ Attitudes* 12, 12 (2001) (“However, the potential abuse and actual abuse of [police discretionary authority] remain both a central problem for police agencies and a central public policy concern.”).

100. *See generally* Katherine Beckett, *The Uses and Abuses of Police Discretion: Toward Harm Reduction Policing*, 10 HARV. L. & POL’Y REV. 77, 78–79 (2016).

101. *See* Becky Sullivan, *The U.S. Supreme Court Rules in Favor of Officers Accused of Excessive Force*, NPR (Oct. 18, 2021, 4:47 PM) (summarizing two cases in which qualified immunity was used to relieve officers from liability for excessive force) [perma.cc/U3KN-2RAN]; *see also* Charles Lane, *Opinion: A 1989 Supreme Court Ruling is Unintentionally Providing Cover for Police Brutality*, WASH. POST (Jun. 8, 2020) (discussing the implications of *Graham v. Connor*, which established the objective reasonableness standard for reviewing claims of excessive force by law enforcement officers) [perma.cc/A2PL-953E].



established statutory or constitutional rights.”<sup>102</sup> Importantly, the *Harlow* decision meant that courts should not consider whether the officer acted in bad faith, but should instead determine the “objective reasonableness” of the officer’s actions.<sup>103</sup> Similarly, the decision in *Screws v. United States* hinged on the Court’s interpretation of the word ‘willfully’ and the majority agreed that “it was not sufficient that petitioners had a generally bad purpose.”<sup>104</sup> In that case, a sheriff beat Robert Hall to death and was charged with willfully violating Hall’s civil rights.<sup>105</sup> The Court stated that even if someone is “assaulted, injured, or even murdered by state officials,” that “does not necessarily mean that [they are] deprived of any [constitutionally or federally protected right].”<sup>106</sup>

Recently, in *Utah v. Strieff*, the Court reasoned that a defendant’s Fourth Amendment right to be free from unlawful searches and seizures was not violated by the admission of evidence discovered during an unlawful stop.<sup>107</sup> The Court stated that a pre-existing, though unknown, arrest warrant “sufficiently attenuated” the connection between the stop and the evidence that was seized.<sup>108</sup> In *Hiibel v. Sixth Judicial District Court of Nevada*, the Court evaluated a Nevada statute, which required detained individuals to identify themselves to officers.<sup>109</sup> Ultimately, that Court held that the statute did not violate the Fourth Amendment

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102. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

103. See Kathryn R. Urbonya, *Problematic Standards of Reasonableness: Qualified Immunity in Section 1983 Actions for a Police Officer’s Use of Excessive Force*, 62 TEMP. L. REV. 61, 65 (1989) (explaining that the Court believed the “objective reasonableness” standard would be better for balancing “the interests of aggrieved citizens against the interests of state officials and society”).

104. *Screws v. United States*, 325 U.S. 91, 107 (1945).

105. *Id.* at 92–94.

106. *Id.* at 108–09.

107. See *Utah v. Strieff*, 579 U.S. 232, 242 (2016) (discussing whether the short time between the illegal stop and the search outweighed two countervailing considerations, the presence of a valid arrest warrant and the absence of flagrant misconduct by the police officer).

108. *Id.*

109. See *Hiibel v. Sixth Jud. Dist. Ct. of Nevada*, 542 U.S. 177, 188–91 (2004) (considering NEV. REV. STAT. § 171.123 which defines the legal rights and duties of a police officer in the context of an investigative stop).

protection from unreasonable searches and seizures nor the Fifth Amendment right against self-incrimination.<sup>110</sup>

The Court in *Tennessee v. Garner* held that, “[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm. . . it is not constitutionally unreasonable to prevent escapes by using deadly force.”<sup>111</sup> In allowing deadly force to be used against fleeing dangerous suspects, the Court authorized officers to use their discretion to determine which fleeing suspects were seen as a threat and which were not.<sup>112</sup> However, granting greater discretion has not helped the large problem of racial profiling, which remains pervasive across the country.<sup>113</sup> The problem of racism is not only seen in how officers interact with the public, but also in how agencies interact with their employees.

There are many documented instances in which law enforcement officers have been disciplined for “political” or biased speech. For example, last year, a Springfield, Massachusetts police detective was terminated after re-posting a photo of Black Lives Matter protestors holding signs that read, “Who do we call when the murderer wears the badge?” and, “Shoot the fuck back.”<sup>114</sup> In Philadelphia, an officer alleged that he was fired as a means of retaliation for supporting Black Lives Matter.<sup>115</sup> Even when officers are not terminated by their department, they can be ousted

110. *Id.*

111. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

112. *See id.* at 1 (concluding deadly force may only be used as it is “necessary to prevent the escape” and if “the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others”).

113. *See* Erik Ortiz, *Inside 100 Million Police Traffic Stops: New Evidence of Racial Bias*, NBC NEWS (Mar. 13, 2019, 1:00 PM) (citing a Stanford study which found that drivers of color are pulled over at a higher rate during daylight hours and are searched twice as often as white drivers) [perma.cc/QT8D-LLL3].

114. *See* Bryan Pietsch, *Massachusetts Detective is Fired Over Black Lives Matter Post*, N.Y. TIMES (Jul. 5, 2020) (detailing the backlash that then-Detective Fuentes received for sharing the photo) [perma.cc/C8V8-UPKT].

115. *See* *Fired, Pro-Black Lives Matter Philly Officer Sues to Get Job Back*, WHYY (Sept. 18, 2020) (detailing the officer’s lawsuit alleging that he was fired and refused reinstatement because of his social media support for Black Lives Matter and local activists) [perma.cc/U9AR-3X4D].

as a result of their beliefs. One Chicago officer was suspended by her police union for six months after posting a photo of herself kneeling and holding a Black Lives Matter sign.<sup>116</sup>

On the other hand, there are even more cases of officers evading discipline, or being reinstated, following similar conduct. A recent arbitration hearing led to Officer Christian Fenico being reinstated with back pay after he was terminated for disparaging social media posts.<sup>117</sup> In the comments of one social media post about refugees refusing food which displayed a cross symbol, Officer Fenico stated, “Good, let them starve to death. I hate every last one of them.”<sup>118</sup> Similarly, a Colorado police lieutenant won an appeal to keep his job after calling a group of people “Alabama porch monkeys.”<sup>119</sup> The comment was captured on body-worn camera.<sup>120</sup> In Seattle, an officer managed to keep her job after saying, “Well, if I wasn’t racist before. . . I’m getting there now.”<sup>121</sup> When a group of almost twenty New York police officers were connected to Facebook comments which referred to West Indian people as “savages” and “animals” among other insults, the department handed down discipline in the form of reprimands and

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116. See Trone Dowd, *This Black Cop Got Kicked Out of Her Union for Supporting BLM*, VICE (Oct. 22, 2021, 11:18 AM) (documenting the officer’s actions and attempt to strike the suspension from her record) [perma.cc/SZ6Q-BG8U].

117. See *Philly Police Officer Fired Over Facebook Posts Reinstated, Given Back Pay*, NBC PHILA. (Jun. 2, 2021) (last updated Jun. 6, 2021, 12:40 PM) (summarizing Officer Fenico’s return to the police force after termination) [perma.cc/D24H-9X7L].

118. See *Complete Collection*, PLAIN VIEW PROJECT (including five posts and three comments from Officer Fenico all sharing similar viewpoints including one post that said “should have shot him” in response to a video about a thief) [perma.cc/PPF8-UXUS].

119. See Ryan Haarer, *Aurora Police Lieutenant Keeps Job After Getting Caught Using Racial Slur*, 9 NEWS (Jul. 10, 2018, 9:11 PM) (last updated Jul. 11, 2018, 9:41 AM) (“While discussing the next steps with an APD sergeant, DeShazer said, ‘We got the Alabama porch monkeys all contained.’”) [perma.cc/DMY8-7NL7].

120. See *id.* (adding that after DeShazer made the comment, the sergeant gasped and quickly turned the body camera off).

121. See Heidi Groover, *Investigation Finds Seattle Officer Violated Policy with ‘Joke’ About Being Racist; Other Claims Dismissed*, SEATTLE TIMES (Nov. 14, 2020, 1:20 PM) (describing the officer’s statement and providing additional context) [perma.cc/GUH8-R4LE].

short suspensions.<sup>122</sup> These types of varied outcomes on behalf of agencies are due, in part, to non-uniform agency policies regarding accountability and conduct.<sup>123</sup>

Occasionally, when officers hold very explicit racial biases, they do face consequences. In 2001, two members of the Williamson County Sheriff's Office were terminated for being Ku Klux Klan members.<sup>124</sup> Officer James Elkins of the Fruitland Park Police Department resigned in 2009 after an internal investigation revealed that he was an active Klan member.<sup>125</sup> Notably, a few years later, another Fruitland Park officer was fired and a deputy chief resigned after it came to light that they too had initiated into their local Klan chapter.<sup>126</sup> Recently, in 2019, a Michigan police officer was terminated for having several Confederate flag memorabilia items and a framed Ku Klux Klan application displayed openly in his home.<sup>127</sup> Importantly, though, these instances were particularly explicit regarding bias and they do not represent the majority of outcomes.

When some officers are harshly disciplined or terminated for supporting certain organizations and movements, but others are allowed to remain in their positions, it reinforces the notion that

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122. See Joseph Goldstein, *Police Workers Punished for Racist Web Posts on West Indian Parade*, N.Y. TIMES (Aug. 22, 2012) (explaining that four of the officers were still pending further investigation) [perma.cc/HG3L-F7A7].

123. See Leandra Bernstein, *America Has 18,000 Police Agencies, No National Standards; Experts Say That's a Problem*, ABC NEWS (Jun. 9, 2020) (explaining that jurisdictions have individual standards and federalism limits the federal government's power to enforce national policies) [perma.cc/CM39-4PYA].

124. See generally *Texas Officers Fired for Membership in KKK*, ABC NEWS (Jan. 7, 2006, 10:18 AM) ("[T]here was no evidence the two men . . . had committed any acts of discrimination or failed to perform their duties, but . . . membership in the notorious hate group was sufficient reason to dismiss them.") [perma.cc/7ACJ-5HKK].

125. See generally Helen Eckinger, *Fruitland Park Cop Linked to Klan Quits*, ORLANDO SENTINEL (Feb. 7, 2009) [perma.cc/VC9L-ZYXW].

126. See generally *Police Ties to Ku Klux Klan Shock Florida Town of Fruitland Park*, GUARDIAN (Jul. 21, 2014, 8:20 AM) [perma.cc/C8YX-7RPV].

127. See Muskegon Police Department, *IA 19-06, Muskegon Police Department Inquiry into Allegations of Potential Bias by Officer Charles Anderson*, 4, 4 (Sept. 1, 2019) (detailing that the items were found and reported by someone who was a potential buyer of Officer Anderson's home) [perma.cc/2V8J-Q5HK].

upholding white supremacy is the goal.<sup>128</sup> In fact, one study which researched NYPD involuntary separation rates by race found that officers of color were more likely to be terminated for misconduct than white officers.<sup>129</sup> Over time, the rate of misconduct termination for Hispanic and Asian officers decreased to match white officers, however, the rate for Black officers remained significantly higher than for other races.<sup>130</sup> It is clear that departments cannot be responsible for disciplining their own officers in matters related to bias and prejudice since the departments themselves are often biased and prejudiced in favor of upholding white supremacy. Further, the *Nucera* case demonstrates that the criminal justice system may not be able to provide recourse for these actions even when they cause tangible harm to individuals.<sup>131</sup> A new method of accountability is necessary to ensure uniformity and accountability as well as to limit these occurrences.

### *III. Heightened Standards for Other Government Actors*

While law enforcement officers are not federal employees, the following statutes provide uniform standards for the applicable employees. Additionally, federal law enforcement and judicial employees are given great authority and power that needs to be balanced with high standards. This level of authority and discretion is often mimicked within law enforcement agencies so similar standards of conduct should apply.

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128. See, e.g., Hubert Williams & Patrick V. Murphy, *The Evolving Strategy of Police: A Minority View*, PERSP. POLICING, Jan. 1990, at 2 (stating that police were bound to uphold a legal order which sustained discrimination and that one task of police is to keep minorities communities under control).

129. See James J. Fyfe & Robert Kane, *Bad Cops: A Study of Career-Ending Misconduct Among New York City Police Officers*, submitted to U.S. DEP'T. JUST., 1, 294 (Sept. 2006) (reporting that the racial disparity in involuntary separation for misconduct was significant in the early data).

130. See *id.* at 295. (expressing that the rate of separation for Black officers did decrease but stayed above the rest of the groups).

131. See generally *United States v. Nucera*, No. 17-532-RBK, 2017 WL 1158211 (D. N.J. Dec. 7, 2017).

*A. Federal Government Employees and the Hatch Act*

The Hatch Act, which regulates the political activity of government employees, was initially passed in 1939 as a way to maintain public trust in government officials<sup>132</sup> and keep partisan politics out of the federal workforce.<sup>133</sup> Portions of the Hatch Act apply to all federal employees and prohibit them from seeking office in a partisan election, soliciting donations for partisan groups or individuals, and engaging in political activity while on duty.<sup>134</sup> The statute, however, divides employees into “less restricted”<sup>135</sup> and “further restricted” categories.<sup>136</sup> In addition to the prior prohibitions, regardless of whether they are on or off-duty, “further restricted” employees are also forbidden from circulating nominating petitions, campaigning for candidates in partisan elections, making campaign speeches, distributing campaign literature, and volunteering for a partisan campaign.<sup>137</sup> Individuals employed by the following federal law enforcement agencies are considered “further restricted” employees for the purposes of the Hatch Act: Federal Bureau of Investigation (FBI), Secret Service, Internal Revenue Service (IRS) Criminal Investigation, Customs and Border Protection (CBP), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), and Department of Justice (DOJ) Criminal Division.<sup>138</sup> Notably, the Hatch Act also

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132. Whitney K. Novak, *The Hatch Act: A Primer* CONG. RSCH. SERV. 1 (Apr. 20, 2020) [perma.cc/B5A6-GMRS].

133. See U.S. Office of Special Counsel, *A Guide to the Hatch Act for Federal Employees* (Sept. 2014) [hereinafter *Hatch Act Guide*] (“The purpose of the Act is to maintain a federal workforce that is free from partisan political influence or coercion.”) [perma.cc/5PWW-7DAL].

134. See *id.* (outlining how the Hatch Act applies to employees working in the executive branch of the federal government).

135. See Novak, *supra* note 132, at 2 (stating that while off-duty, less restricted employees are permitted to engage in political activity, such as campaigning for candidates).

136. See *id.* (explaining that while further restricted employees may contribute to political groups and attend events, they cannot actively participate in political campaigns).

137. *Hatch Act Guide*, *supra* note 133.

138. See 5 C.F.R. § 734.401 (2021) (listing the agencies in which employees may be impacted differently by the Hatch Act).

covers state and local government employees whose salaries are at least partially funded by the federal government,<sup>139</sup> meaning law enforcement officers are, to a limited extent, bound by the Hatch Act provisions.<sup>140</sup>

The Office of Special Counsel (OSC) investigates alleged Hatch Act violations and establishes whether a federal employee has violated the Hatch Act based on if they have used their official authority or influence “for the purpose of interfering with or affecting the result of an election.”<sup>141</sup> OSC also utilizes certain factors to establish whether an employee’s personal social media account is being used for official purposes.<sup>142</sup> Among those factors are whether the account contains minimal personal content, identifies the person as a federal employee, and frequently references, retweets, likes, comments, or shares information related to official activities.<sup>143</sup>

The potential discipline for Hatch Act violations varies widely, depending on the flagrancy of the violation.<sup>144</sup> For example, when a Veterans Affairs (VA) employee used their official title and endorsed a partisan campaign, they received a 7-day unpaid suspension.<sup>145</sup> In contrast, another VA employee and a

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139. *See id.* (clarifying that covered state and local employees still may not coerce donations or interfere with elections but the political participation restrictions do not apply).

140. *See id.* (implying law enforcement officers are bound).

141. *See* U.S. OFF. OF SPEC. COUNS., REP. OF PROHIBITED POL. ACTIVITY UNDER HATCH ACT 1, 4 (May 30, 2019) (applying the analysis to Kellyanne Conway’s Twitter activity, prompting OCS’s recommendation for her removal) [perma.cc/8MNG-ZFFC].

142. *See id.* at 5 (“The Hatch Act prohibits (1) federal employees (2) from using their official authority or influence (3) for the purpose of interfering with or affecting the result of an election.”).

143. *See id.* (listing the other factors as extensively using photographs of the employees’ official activities and linking the account to an agency website or other official page).

144. *See Hatch Act Guide, supra* note 133 (stating that discipline can range from removal or debarment from federal service to suspension, written reprimands, or civil penalties).

145. *See OSC Announces Discipline for Federal Employees Who Violated the Hatch Act*, U.S. OFF. SPECIAL COUNS. (Feb. 22, 2021) (“A VA employee used his official title when endorsing the campaign of a Hawaii state representative

Department of Agriculture (USDA) employee were suspended for 25 and 30 days after making partisan political social media posts while on duty.<sup>146</sup> Employees who continue to breach provisions in the Hatch Act after earlier violations are subject to greater disciplinary penalties. Such was the case with a Defense Logistics Agency (DLA) employee who made political social media posts and sent partisan emails while on duty in several instances.<sup>147</sup> Although the employee had previously received counseling regarding their duties under the statute, they continued to engage in these violations and were eventually suspended for 90 days.<sup>148</sup> OSC imposed harsher discipline in the form of a 30-month debarment and \$1,000 civil penalty on an immigration judge who promoted Hillary Clinton during a deportation hearing.<sup>149</sup> Additionally, OCS handed down the longest possible debarment of five years to a Customs Enforcement (ICE) employee who made over 100 social media posts while on duty in support of Hillary Clinton.<sup>150</sup>

As previously noted, many local and state law enforcement officers fall under the “less restricted” employee category since

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running for partisan political office. The employee agreed to serve a 7-day unpaid suspension.”) [perma.cc/D4PW-3CA5].

146. *See id.* (noting both employees shared social media posts relating to political candidates, had prior knowledge of the Hatch Act and received unpaid suspensions).

147. *See OSC Announces Significant Discipline Imposed on Two Federal Employees for Hatch Act Violations*, U.S. OFF. SPECIAL COUNS. (Oct. 18, 2019) (explaining the employee violated the act on numerous occasions and “used Facebook to solicit political contributions nearly two dozen times” despite being aware of the Hatch Act and prior warnings) [perma.cc/8F7T-SF48].

148. *See id.* (“In a settlement agreement, the employee agreed to a 90-day suspension without pay.”).

149. *See Immigration Judge Who Violated the Hatch Act Fined \$1K with 30-Month Debarment from Federal Service*, U.S. OFF. SPECIAL COUNS. (Sept. 17, 2019) (noting this was the maximum civil penalty, defended by the argument “[i]f a judge can say it from the bench, what stops other employees from making these statements in the office?”) [perma.cc/5CDG-6XHX].

150. *See ICE Employee Resigns with 5-Year Debarment for Flagrant Hatch Act Violations*, U.S. OFF. SPECIAL COUNS. (Aug. 7, 2018) (reporting the employee also told coworkers to vote for Hillary Clinton and invited them to attend a campaign rally for Clinton) [perma.cc/QVM2-XWCC].



they often receive federal funding.<sup>151</sup> Recently, a New York sheriff was found to have violated the Hatch Act when he displayed a “Make America Great Again” flag on a patrol boat during a flotilla.<sup>152</sup> No disciplinary action was taken,<sup>153</sup> however, he later released a statement, as the county sheriff, in which he took responsibility for the violation while vowing to speak up “about the unjust and hypercritical criticism of police by anti-democracy groups and certain politicians who pander to them.”<sup>154</sup> He concluded with a commitment to continue “impartially enforc[ing] the law.”<sup>155</sup> Disciplinary action was similarly not taken with regard to several law enforcement officers who appeared in uniform as part of a campaign endorsement for a partisan sheriff’s election.<sup>156</sup>

Although local and state law enforcement employees are considered “less restricted,” federal law enforcement employees fall into the “further restricted” category.<sup>157</sup> Federal and local officers, however, will often work on and investigate cases together since their jurisdictions can overlap,<sup>158</sup> but their off-duty conduct standards do not seem to reflect the similar nature of their work.<sup>159</sup>

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151. See Novak, *supra* note 132 (outlining the prohibitions on federal employees and noting most employees are “less restricted”).

152. See generally Meryl Kornfield, *Sheriff Who Flew Trump Flag on Patrol Boat Violated Ban on Partisan Political Activity, Officials Say*, WASH. POST (Mar. 14, 2021, 10:27 PM) [perma.cc/EW25-TXG2].

153. See *id.* (noting that he was also not punished by the county legislature).

154. Don Hilton, *Hilton: I Will Be ‘Even More Vocal About the Unjust and Hypercritical Criticism of Police’*, OSWEGO CNTY. NEWS (Aug. 14, 2020) (last updated Aug. 14, 2020) [perma.cc/A9VF-GQX9].

155. See *id.* (“I remain dedicated to continuing to impartially enforce the law, keep our communities safe. That will never change.”).

156. See Steven Collins & Heather Barr, *Local Police Break Federal Election Law, Receive Warning*, CIRCLEVILLE HERALD (Jun. 22, 2018) (last updated Jun. 22, 2018) (stating that the investigation concluded three police chiefs were in violation of the statute) [perma.cc/GQD5-G27U].

157. See Novak, *supra* note 132, at 2 (delineating federal law enforcement and local and state law enforcement officers under the Hatch Act).

158. See *Do FBI Agents Work with State, Local, or Other Law Enforcement Officers on “Task Forces”?*, FBI FREQ. ASKED QUESTIONS (explaining concurrent jurisdictions and the importance of combined task forces) [perma.cc/C8EJ-RXYD].

159. Compare Novak, *supra* note 132, at 1 (defining prohibitions for “less restricted” employees), with Novak, *supra* note 132, at 2 (stating that state and local employees are not barred from participating in political activities).

Determining the line between federal and state or local jurisdiction has become a “daunting” task.<sup>160</sup> As responsibilities and jurisdiction have such a high tendency to overlap, it seems obvious that state and local law enforcement should be held to the same political speech standards as their federal counterparts.

*B. Code of Conduct for Judicial Employees and United States Judges*

The United States Courts Guide to Judiciary Policy includes an ethical code for judicial employees<sup>161</sup> and for United States judges,<sup>162</sup> both of which direct federal judicial employees and federal judges to refrain from engaging in inappropriate political activity<sup>163</sup> and to avoid activities that “detract from the dignity of the judge’s office”<sup>164</sup> or the court.<sup>165</sup> Similarly, the Code states that employees shall not act in a way “that would put into question the propriety of the judicial employee’s conduct in carrying out the duties of the office” and they are expected to avoid personal conflicts of interest.<sup>166</sup> Separate, but comparable, codes for state and local judges and judicial employees exist at the state and local

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160. See Daniel C. Richman, *The Changing Boundaries Between Federal and Local Law Enforcement*, 2 CRIM. JUST. 81, 82 (2000) (“If there is a boundary clearly separating Federal from State and local criminal enforcement . . . it is one not amenable to any categorical description.”).

161. 2A CHAPTER 3: CODE OF CONDUCT FOR JUDICIAL EMPLOYEES (2019) [hereinafter CHAPTER 3].

162. 2A CHAPTER 2: CODE OF CONDUCT FOR U.S. JUDGES (2019) [hereinafter CHAPTER 2].

163. See CHAPTER 3, *supra* note 161, at 13–14 (inappropriate political activity includes publicly endorsing or contributing to partisan political candidates); see also CHAPTER 2, *supra* note 162, at 18–19 (instructing judges to refrain from holding office in political organizations or attending events sponsored by political organizations).

164. CHAPTER 2, *supra* note 162, at 12.

165. CHAPTER 3, *supra* note 161, at 10.

166. See GUIDE TO JUDICIARY POL’Y, vol. 2, pt. A, ch. 3, Canon 2 (U.S. CTS. 2022) (explaining the propriety requirement and that “a judicial employee should not allow” personal motivations “to influence official conduct or judgement”).

level.<sup>167</sup> States also have their own judicial conduct organizations to investigate complaints and enforce sanctions against judicial employees.<sup>168</sup>

Complaints alleging violations of the federal judicial codes are initially reviewed by chief judges<sup>169</sup> who then dismiss them or refer them to a judicial council,<sup>170</sup> which in turn has the option to dismiss the complaint or refer it to the Judicial Conference.<sup>171</sup> Among other potential disciplinary actions, the judicial council is explicitly authorized to privately or publicly censor judges or to stop assigning cases to a judge involved in a complaint.<sup>172</sup> If the judicial council believes that a judge's conduct is grounds for impeachment or a higher form of discipline, the complaint is referred to the Judicial Conference.<sup>173</sup> Importantly, complaints which are "directly related to the merits of a decision or procedural ruling" are to be dismissed by the chief judge.<sup>174</sup>

In recent years, there have been multiple instances of judicial misconduct related to racial bias. For example, in late 2021, former Alabama Probate Judge John Randall Jinks was removed from his position after allegations of racism and sexual harassment were

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167. *Cf.*, FLA. STATS. ANN., CODE OF JUD. CONDUCT, Canon 2 (West 2023) (mandating the avoidance of even the appearance of impropriety), *and* TEX. GOV'T CODE ANN., tit. 2, sub. G, app. C, CODE OF JUD. CONDUCT, Canon 2 (West 2023) (stating that a judge should protect and promote "public confidence in the integrity and impartiality of the judiciary" and avoid even the appearance of conflicts of interest).

168. *See* Cynthia Gray, *Judicial Conduct Commissions: How Judicial Conduct Commissions Work*, 28 JUST. SYSTEM J. 405, 405–06 (2007) (adding that some states apportion greater punishment for willful or prejudicial misconduct).

169. *See* 28 U.S.C. § 352 (detailing that the chief judge can dismiss a complaint which lacks "sufficient evidence to raise an inference that misconduct has occurred" or has allegations that cannot be conclusively determined after an investigation).

170. *See* § 354 (explaining that judicial councils may, if necessary, conduct additional investigation, dismiss the complaint, or refer the complaint to the Judicial Conference).

171. *See* § 355 (noting that the Judicial Conference votes on appropriate disciplinary action after considering the prior proceedings).

172. § 354(a)(2)(A).

173. § 354(b)(2).

174. § 352(b)(1)(A)(ii).

brought forward.<sup>175</sup> Staff members reported that Jinks had mouthed racial slurs, frequently sexually harassed women employees by commenting on their breasts and bodies, and referred to George Floyd as “just another thug” who “pretty much got what he deserved.”<sup>176</sup> Meanwhile, in New Jersey, former Municipal Court Judge Hector Rodriguez was publicly reprimanded<sup>177</sup> when a defendant at a bail hearing asked him if she owed him anything and he responded, “Not that you can do in front of all these people, no.”<sup>178</sup> Another judge even resigned and agreed to a permanent judicial disbarment after an investigation uncovered anti-LGBT and anti-Muslim social media posts.<sup>179</sup>

Even when judges are not formally disciplined for violating ethics rules, the majority of states elect judges,<sup>180</sup> either via partisan or non-partisan elections, meaning voters have some authority in removing them from their positions. One highly publicized example of this is former Judge Aaron Persky, a California judge who was removed by a recall election after being extremely lenient and giving a six-month sentence to a defendant, Brock Turner, who eyewitnesses caught sexually assaulting a woman.<sup>181</sup>

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175. *In the Matter of John “Randy” Jinks*, No. 57, 2021 WL 5218543, at \*5 (Ala. Jud. Inquiry Comm’n Oct. 29, 2021) [hereinafter *In re Jinks*] (finding that Jinks violated various provisions within Canons 1, 2, and 3 of the Alabama Canons of Judicial Ethics).

176. *See generally* Complaint at 10–27, *In re Jinks*, No. 57, 2021 WL 969550, at \*3–\*10 (Ala. Jud. Inquiry Comm’n Mar. 3, 2021).

177. *In re Rodriguez*, 260 A.3d 848 (N.J. 2021) (mem.).

178. Formal Complaint at 2, *In re Rodriguez*, 260 A.3d 848 (N.J. 2021) (mem.).

179. *See* Stipulation at 1–2, *In re Knutsen*, 2021 WL 2550263, at \*1 (N.Y. Comm’n. Jud. Conduct May 26, 2021) (“A review of the Facebook page revealed numerous other posts containing: partisan political content; expressions of bias in favor of law enforcement and against criminal defendants; expressions of anti-Muslim bias; and prohibited commentary on pending cases, including the murder trial of former Minneapolis Police Officer Derek Chauvin.”).

180. *Judicial Selection: Significant Figures*, BRENNAN CTR. JUST. (last updated Oct. 4, 2021) [perma.cc/NUZ9-Q3X6].

181. *See* Maggie Astor, *California Voters Remove Judge Aaron Persky, Who Gave a 6-Month Sentence for Sexual Assault*, N.Y. TIMES (Jun. 6, 2018) (noting that the state of California had not recalled a judge for 80 years prior to this event) [perma.cc/QB3G-QW9C].

Despite the various ways for judges to be sanctioned for their conduct, often, judges are not disciplined at all.<sup>182</sup> Approximately 90% of judges return to the bench after receiving misconduct sanctions,<sup>183</sup> reminiscent of the 46% of police officers who keep their jobs after arrests for criminal offenses.<sup>184</sup> There is also a trend of allowing judges to retire instead of facing discipline,<sup>185</sup> a tendency that is also often followed by law enforcement agencies.<sup>186</sup> Judges are also similar to law enforcement officers in that they are expected to remain impartial in a position that grants them significant discretion.<sup>187</sup> Specifically, the ABA notes that judicial codes are intended to ensure that the judiciary remains

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182. See Erik Ortiz, *Robed in Secrecy: How Judges Accused of Misconduct Dodge Public Scrutiny*, NBC NEWS (Dec. 26, 2021, 4:30 AM) (last updated Dec. 26, 2021, 8:27 PM) (concluding that thousands of complaints are filed annually but only 1% of them result in public discipline) [perma.cc/M6JN-4GQP]; Kimberly Strawbridge Robinson, *Judges Policing Judges: True Disciplinary Actions Are Rare (I)*, BLOOMBERG L. (Sept. 26, 2019, 4:50 AM) (last updated Sept. 26, 2019, 1:21 PM) (stating that, between 2010 and 2018, only 33 of 11,000 complaints against federal judges resulted in disciplinary action) [perma.cc/ZZN3-TK8P].

183. Michael Berens & John Shiffman, *Thousands of U.S. Judge Who Broke Laws or Oaths Remained on the Bench*, REUTERS (Jun. 30, 2020, 12:00 PM) [perma.cc/BGW9-AE7N].

184. PHILIP MATTHEW STINSON ET AL., *POLICE INTEGRITY LOST: A STUDY OF LAW ENFORCEMENT OFFICERS ARRESTED 22* (2016) (detailing that the severity of the charged offense and the years of law enforcement service are important factors to consider).

185. See Robinson, *supra* note 182 (explaining that on 121 occasions, judges were allowed to retire rather than face sanctions and that this is “a feature of the system”).

186. See Rob Low, *Aurora Police Lieutenant Retires After Suspicious Crash, But Chief Won't Take Questions*, FOX 31 (Jan. 4, 2022, 9:22 PM) (last updated Jan. 4, 2022, 9:45 PM) (describing how the employee admitted to drinking before the crash but maintained that he was simply distracted and not impaired) [perma.cc/5WJJ-MLLL]; Colin Warren-Hicks, *SRSO Internal Affairs Investigation Prompts Deputy to Retire in Lieu of Termination*, PENSACOLA NEWS J. (Sept. 3, 2021, 10:49 AM) (last updated Sept. 3, 2021, 2:14 PM) (revealing that, in addition to the open investigation which alleges manipulation of an elderly woman for financial gain, the deputy was demoted in 2020 for sexually harassing a subordinate employee and showing her a sex toy) [perma.cc/M3XP-NZSU]; *Seattle Police Lieutenant Retires Rather Than Face Firing*, AP NEWS (Apr. 19, 2021) (explaining that the lieutenant lied about directing a city contractor to remove trash from her home) [perma.cc/4DTP-YE9B].

187. See Wilfrid J. Waluchow, *Strong Discretion*, 33 PHIL. Q. 321, 321 (1983) (“[J]udicial discretion is an unavoidable feature of legal systems.”).

“independent, fair and impartial.”<sup>188</sup> The importance of these values is not lost on law enforcement agencies; the Law Enforcement Code of Ethics demands that officers not let “personal feelings, prejudices, political beliefs” or other animosities influence their decision-making.<sup>189</sup> Both professions confer significant discretionary authority and, as such, employees in both fields should be held to the same heightened standards of conduct.

#### *IV. A Proposed Solution*

This Part explores various methods that could be utilized to impose a heightened standard on law enforcement employees and agencies. This standard should incorporate: (1) the Hatch Act’s rules for “further restricted employees” regarding political speech; (2) the limitations on partisanship found in the judicial codes of conduct; and (3) an element that encompasses actions and speech that “reflect adversely on the dignity or impartiality” of law enforcement employees and agencies. Part IV also considers the potential implementation barriers posed by police unions and partisan, elected sheriffs.

##### *A. Amending Federal Legislation*

The Justice in Policing Act intends to improve transparency and accountability in policing by lowering the criminal intent standard, limiting qualified immunity, creating a national police misconduct registry, and prohibiting certain dangerous practices.<sup>190</sup> The bill, which is awaiting a Senate vote, was passed by the House of Representatives on March 3, 2021.<sup>191</sup> Adding a heightened standard provision to this Act is one method to address expressed racism by law enforcement officers. A new provision

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188. MODEL CODE OF JUDICIAL CONDUCT 1 (AM. BAR ASS’N 2020).

189. *Law Enforcement Code of Ethics*, INT’L. ASS’N CHIEFS OF POLICE [perma.cc/ZT83-UZLQ].

190. See George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. (2021) (“To hold law enforcement accountable for misconduct in court, improve transparency through data collection, and reform police training and policies.”).

191. *Id.*

would establish a blanket standard for all law enforcement agencies in the country, the enforcement of which could be accomplished through the existing accreditation or grant funding provisions.<sup>192</sup> Importantly, this provision would be optional, meaning that agencies are not required to hold their officers to this standard. Agencies that opt out, however, would lose federal funding.<sup>193</sup>

In addition to incorporating a heightened standard, the provision should include a section that specifically outlines prohibited organizational affiliations. These prohibited affiliations would mirror those applied to judicial employees<sup>194</sup> as well as to “further restricted” employees covered by the Hatch Act.<sup>195</sup> Examples of prohibited organizations include the Ku Klux Klan, Aryan Nations, Keystone United, and National Alliance.<sup>196</sup> While this amendment would significantly limit law enforcement employees’ ability to freely associate, it is necessary to begin the journey toward a reformed police state. Some scholars have argued that law enforcement officers have “arguably. . . the greatest opportunity to exercise discretionary judgment.”<sup>197</sup> It is imperative that this level of discretion be balanced with checks to ensure that it is not abused, and prohibited association with biased and harmful organizations would be an important step to this end.

As detailed above, judicial employees are expected to refrain from any activity which may “reflect adversely on the dignity or impartiality” of their office.<sup>198</sup> Indeed, something as innocuous as a political bumper sticker can be a violation of ethics codes.<sup>199</sup> Yet,

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192. See *infra* Part IV.C.

193. See *infra* Part IV.C.

194. See generally CHAPTER 3, *supra* note 161.

195. See generally 5 C.F.R. § 734.401–412 (2021); 5 U.S.C. §§ 7321–7326.

196. See *Extremist Files: Groups*, S. POVERTY L. CTR. (listing designated hate groups in the United States) [perma.cc/TEH5-VB8N].

197. Richard K. Wortley, *Measuring Police Attitudes Toward Discretion*, 30 CRIM. JUST. & BEHAV. 538, 538 (2003).

198. CHAPTER 3, *supra* note 161, at 14.

199. See *Maintaining the Public Trust: Ethics for Federal Judicial Law Clerks*, FED. JUD. CTR. 1, 15 (4th ed. 2019) (explaining that law clerks “should not even take passive actions that might link [them] with a political issue, such as displaying a political sign or bumper sticker”).

law enforcement employees, whose discretionary judgment is arguably exercised more frequently day-to-day, are able to publicly endorse candidates, and even run for office, while employed by their respective agencies.<sup>200</sup> More worryingly, law enforcement officers can—and do—affiliate themselves with white supremacist groups, but manage to avoid consequences because they retain significant First Amendment protections, both on- and off-duty.<sup>201</sup> Explicit alignment with white supremacist and other hate groups is an intentional decision that, by its very nature, implies the belief that certain groups of people are less than others. This belief is inherently dangerous when held by those entrusted to protect individual rights.

Amending the Justice in Policing Act would give the United States Attorney General the power to oversee and enforce a heightened standard of conduct through revocation or withholding of federal funding.<sup>202</sup> The concept of conditional federal funding is not new and has been utilized by Congress on many occasions in place of direct legislation.<sup>203</sup> Senator Bernie Sanders recently asserted that these measures should be used to curb police abuse of crowd control tactics during the protest following George Floyd’s murder.<sup>204</sup> Specifically, Senator Sanders tweeted, “Every police department violating people’s civil rights must be stripped of

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200. See U.S. OFF. OF SPECIAL COUNS., POLITICAL ACTIVITY AND THE STATE AND LOCAL EMPLOYEE 4 (2005) (stating that state and local employees may be candidates in non-partisan election, campaign for candidates in partisan and nonpartisan elections, and contribute money to political organizations and attend fundraising events); See generally Wortley, *supra* note 197.

201. See German, *supra* note 20 (quoting FBI Counterterrorism Chief Michael McGarrity saying that while “he would be ‘suspect’ of white supremacist police officers . . . their ideology [is] a First Amendment—protected right”).

202. George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. § 113 (2021).

203. See *United States v. Am. Library Ass’n*, 539 U.S. 194, 203 (2003) (“Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives.”).

204. See Bernie Sanders (@SenSanders), TWITTER (Jun. 4, 2020, 10:34 AM) (demanding that police departments that violate civil rights must be defunded) [perma.cc/5RAP-25Y7]; See generally Kim Barker, Mike Baker, & Ali Watkins, *In City After City, Police Mishandled Black Lives Matter Protests*, N.Y. TIMES (updated Jun. 28, 2021) [perma.cc/AYQ9-FWNG].



federal funding.”<sup>205</sup> The threat of a significant financial impact should push more departments to adopt and comply with the new policies and provisions.

### *B. The Power of the Purse – Enforcement Mechanisms*

The most powerful enforcement mechanism for this heightened standard will likely be tied to federal funding. This Part will explore accreditation and the Spending Clause as methods of enforcement for the heightened standard.

#### *1. Agency Accreditation*

The heightened conduct standard could be implemented by requiring adoption as a requirement for law enforcement accreditation. Law enforcement agencies are currently accredited through national credentialing authorities, such as the Commission on Accreditation for Law Enforcement Agencies (CALEA),<sup>206</sup> or through states agencies, like the Virginia Law Enforcement Professional Standards Commission (VLEPSC).<sup>207</sup>

The Justice in Policing Act instructs the Attorney General to develop uniform accreditation standards for law enforcement agencies to encourage greater accountability.<sup>208</sup> Additionally, under the Act, the Attorney General has authority to withhold DOJ-grant funding from agencies that do not maintain accreditation from certified organizations.<sup>209</sup> At this time, some of the proposed uniform standards involve recruitment, hiring, and training policies.<sup>210</sup> Nonetheless, additional uniform standards—including the standards detailed above—could be required to

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205. Sanders, *supra* note 204.

206. See generally *Law Enforcement*, COMM’N ON ACCREDITATION. L. ENF’T AGENCIES [perma.cc/Y2Y6-ZQFM].

207. See generally VA. L. ENF’T PRO. STANDARDS COMM’N, VIRGINIA LAW ENFORCEMENT ACCREDITATION PROGRAM MANUAL (7th ed. 2022).

208. H.R. 1280 § 113.

209. *Id.*

210. *Id.*

receive accreditation. The proposed heightened standard can be included as one of the uniform accreditation standards. This process would automatically attach agency implementation of the standard to potential withholding of federal funds through the Act. Further, tying accreditation to funding would ideally result in safer and more accountable law enforcement agencies and employees. A study on law enforcement agencies in Georgia found that complaints against employees at accredited agencies were significantly more likely to be unfounded than those against non-accredited agencies.<sup>211</sup>

Accreditation is a viable alternative to altering legislation that has already reached the Senate floor. Beyond accreditation, Congress can also utilize Spending Clause powers to condition federal funding on decreasing the appearance of white supremacy in law enforcement agencies.

## 2. *The Spending Clause – Withholding Grant Funding*

Law enforcement agencies require significant funding to operate, and many departments rely on the federal government to subsidize their needs.<sup>212</sup> Local and state law enforcement agencies often receive federal assistance in the form of grants and surplus equipment programs.<sup>213</sup> There are approximately 18,000 law enforcement agencies in the United States<sup>214</sup> and, of those, over 13,000 have received a combined \$14 billion in federal grant

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211. See Robert Ellis Rodriguez, *The Impact of Agency Accreditation or Certification on Police Misconduct* 52–53 (Nov. 2020) (Ph.D. Dissertation, Walden University) (Walden Dissertations and Doctoral Studies Collection) (“The data indicated that nationally accredited agencies unfounded 38.75% of the complaints . . . where agencies that did not hold accreditation or certification only unfounded 6% of the complaints reported.”).

212. See Brian Naylor, *How Federal Dollars Fund Local Police*, NPR (Jun. 9, 2020, 5:10 AM) (explaining that “[f]unding for local law enforcement now increasingly comes from the federal government” and explaining how federal grant money is accordingly allocated) [perma.cc/4TPQ-CFBJ].

213. See *id.* (demonstrating that many federal departments, including the Department of Agriculture, have grant programs for state and local police).

214. DUREN BANKS ET AL., U.S. DEP’T OF JUST., NAT’L SOURCES OF L. ENF’T EMP. DATA 1 (rev. Oct. 4, 2016).

funding through the Department of Justice Community Oriented Policing Services (COPS).<sup>215</sup> Along with direct funding, the federal government assists local departments through the 1033 Program, which allows state and local law enforcement agencies to receive surplus military equipment free of charge.<sup>216</sup> Since the program began in 1997,<sup>217</sup> more than \$7.4 billion in equipment has been distributed to over 11,500 agencies.<sup>218</sup>

The Justice in Policing Act provides the Attorney General with substantial power over federal funding to law enforcement agencies.<sup>219</sup> Section 114 of the Act, for example, allows the Attorney General to give grants to community organizations that study training and oversight standards or realize inventive and effective public safety solutions.<sup>220</sup> Multiple provisions in the legislation authorize the Attorney General to revoke or suspend grant funding when agencies fall out of compliance with the required standards.<sup>221</sup> While federalism generally prevents Congress from regulating state and local governments, Congress

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215. *Justice Department Announces \$139 Million for Law Enforcement Hiring to Advance Community Policing*, U.S. DEPT. JUST. (Nov. 18, 2021) [perma.cc/7B7L-AYK6].

216. *See 1033 Program FAQs*, DEF. LOGISTICS AGENCY (“DLA . . . [disposes] of obsolete/unneeded excess property turned in by U.S. military units . . . , from military-specific equipment and vehicles to generic office furniture, computers, medical items and shop equipment . . . Congress [has] authorized the transfer of [this property] to . . . law enforcement agencies.”) [perma.cc/W2NG-5CL7].

217. *See id.*

In the National Defense Authorization Act for fiscal years 1990 and 1991, Congress authorized the transfer of excess DoD property to federal, state and local law enforcement agencies. Congress later passed the NDAA for fiscal year 1997, [allowing these] agencies to acquire property for bona fide law enforcement purposes.

218. Nathaniel Lee, *How Police Militarization Became an Over \$5 Billion Business Coveted by the Defense Industry*, CNBC (Jul. 9, 2020, 11:53 AM) (updated Jul. 10, 2020, 4:46 PM) [perma.cc/9T5J-A923].

219. *See generally* George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. (2021).

220. *See* George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. § 114(b) (2021).

221. H.R. 1280 § 114(i); § 118(e).

can, and frequently does, attach conditions to federal funding.<sup>222</sup> It is precisely these conditions that allow the Hatch Act, discussed above, to apply to state and local officials.<sup>223</sup>

Federal resources are crucial to the survival of local and state law enforcement agencies. Thousands of agencies across the country depend on federal funding and assistance, so conditioning funding on adoption of a heightened standard is a viable way to pursue incorporation. Because agencies have grown reliant on federal assistance, cutting funding is an effective avenue for enforcement. Change at the federal level, while ideal, can be an untimely process so more local solutions should also be considered.

### *C. Local and Administrative Alternatives*

In the event that federal implementation is not feasible, the same methods discussed above can be employed by individual states and localities. Agency accreditation is often completed through state accreditation agencies, so states could pursue enactment of a heightened standard through existing accreditation requirements.<sup>224</sup> States can also employ conditional funding tactics to push departments to follow a heightened standard. State-by-state enactment would not result in a uniform standard, but it would be a significant improvement over the broad speech and association standards that law enforcement employees frequently enjoy. Should states decide to enact their own legislation, it is important that current departmental policies, which typically allow for an internal unit to review violations and determine appropriate discipline, are not followed. Instead, the provisions of

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222. See Victoria L. Killion, *Funding Conditions: Constitutional Limits on Congress's Spending Power* CONG. RSCH. SERV. 1, 3–4 (Jul. 1, 2021) (providing examples of spending conditions that have previously been imposed by Congress).

223. See *id.* at 4. (“Congress has required state and local officials working on federally funded

activities to comply with the Hatch Act’s limitations on government officials’ participation in political campaign activities.”).

224. See Amy Vracar, *Accreditation 101: The Benefits of State and National Police Accreditation*, BENCHMARK ANALYTICS (citing that while federal programs are generally more rigorous and time-intensive, the state standards can vary from state to state and could have stringent requirements) [perma.cc/QKN4-U582].

this proposal must be enforced by an authority outside of the law enforcement department to limit prejudice and favoritism. A local, administrative change is an option that could likely be implemented quickly and could guide enforcement of the heightened standard.

The Pickering Connick balancing test is used to determine whether public employers have violated a public employee's right to free speech and expression.<sup>225</sup> The test was created as a result of two Supreme Court cases: *Pickering v. Board of Education*<sup>226</sup> and *Connick v. Myers*.<sup>227</sup> In *Pickering*, the Court held that, in reviewing free speech matters, the employee's right to free speech must be balanced with the employer's interest in promoting the efficiency of the public services it performs.<sup>228</sup> In *Connick*, the Court added that this balancing test applies when the employee speaks on a matter of public concern.<sup>229</sup> Notably, the *Connick* court did not recognize a need "for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships [was] manifest before taking action."<sup>230</sup> As such, employers are not required to show a tangible disruption related to the employee's speech or actions,<sup>231</sup> only that the employee's conduct created a "reasonable prediction of

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225. See David L. Hudson Jr., *Pickering Connick Test*, FIRST AMEND. ENCYC. (2019) (defining the case history and the parts of the test) [perma.cc/S62H-Y82A].

226. See *Pickering v. Bd. of Ed.*, 391 U.S. 563, 574 (1968) ("[A] teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.").

227. See *Connick v. Myers*, 461 U.S. 138, 154 (1983) (finding in favor of the government after applying the *Pickering* test).

228. See *Pickering*, 391 U.S. at 568 ("The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.").

229. See *Connick*, 461 U.S. at 146 ("*Pickering*, its antecedents and progeny, lead us to conclude that if Myers' questionnaire cannot be fairly characterized as constitution speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge.").

230. *Id.* at 152.

231. See *Tindle v. Caudell*, 56 F.3d 966, 972 (8th Cir. 1995) ("A showing of actual disruption is not always required.").

disruption.”<sup>232</sup> Because there is no actual disruption standard for the second prong of the balancing test, it has been inconsistently applied by lower courts.<sup>233</sup> However, an actual disruption standard will likely not help to remove officers with connections to hate groups. Instead, the *Pickering* Connick test should be applied to law enforcement officers that cause disruptions and decrease employer efficiency through their speech and conduct. The test would function in the place of the heightened speech standard and be used to review employee conduct to determine whether a disruption has been caused.

Justice Marshall examined several factors in reaching the *Pickering* conclusion.<sup>234</sup> First, it should be taken into account whether the speech was “directed towards any person with whom appellant would normally be in contact” during a typical workday.<sup>235</sup> Similarly, the Court reviewed whether the speech would pose an issue for supervisors tasked with maintaining discipline or would interfere with harmony among coworkers.<sup>236</sup> Another factor is whether the employment relationship between the employee and the person the speech is directed toward is “the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning.”<sup>237</sup> The reviewer should consider whether the speech was based on publicly accessible information or was a result of the employee’s greater access to facts.<sup>238</sup> Additionally, it must be determined whether the conduct or speech negatively affected the employee’s ability to perform their daily duties.<sup>239</sup> Since public employees are likely to have “informed and definite

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232. See *id.* (explaining that a reasonable prediction of disruption is entitled to substantial weight in the balancing process under *Pickering*).

233. See Lindsay A. Hitz, *Protecting Blogging: The Need for an Actual Disruption Standard in Pickering*, 67 WASH & LEE L. REV. 1151, 1154 (2010) (explaining that lower courts regularly apply the balancing test inconsistently).

234. See generally *Pickering v. Bd. of Ed.*, 391 U.S. 563 (1968).

235. *Id.* at 569–70.

236. *Id.* at 570.

237. *Id.*

238. *Id.* at 572.

239. See *id.* at 572, 573–473 (recognizing the importance of allowing teachers to speak out freely on certain topics without fear of retaliatory dismissal).

opinions,” the court stated that it was imperative they be allowed to speak without facing retaliation or termination.<sup>240</sup> Finally, the court considered whether there is evidence that the employee’s conduct or speech damaged the employer’s reputation or if they were merely “per se detrimental.”<sup>241</sup>

In arguing their case, employers need only show that they “reasonably believed” the employee’s conduct would disrupt their efficiency.<sup>242</sup> Many scholars have argued that the Pickering Connick test should be expanded to include an actual disruption standard.<sup>243</sup> However, the negative effects, or “disruption,” of white supremacy on policing are already visible. Since 2015, law enforcement officers have fatally shot over 6,000 people and over 1,500 of those individuals were Black.<sup>244</sup> Black men are approximately 2.5 times more likely to be killed by police than white men;<sup>245</sup> nearly 1 in 1,000 Black men will be killed by police over a lifetime.<sup>246</sup> Between the ages of 25 and 29, Black men are killed by police at triple the rate of white men.<sup>247</sup> Even when lethal force is not being used, Black individuals are over 21% more likely to have force used against them during police interactions.<sup>248</sup> This

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240. See *id.* at 572 (noting that public interest in having free and unhindered debate on matters of public importance is so great that it has been held that a State cannot authorize the recovery of damages by a public official for defamatory statements except for certain circumstances).

241. *Id.* at 570–71.

242. See *Connick v. Myers*, 461 U.S. 138, 154 (1983) (explaining that the decision to terminate Myers did not “offend the First Amendment”).

243. See generally Emily McNee, *Disrupting the Pickering Balance: First Amendment Protections for Teachers in the Digital Age*, 97 MINN. L. REV. 1818 (2013); Hitz, *supra* note 233.

244. See *Fatal Force*, WASH. POST (last updated Oct. 22, 2021) (stating that while Black people make up less than 13% of the US population, they account for roughly a quarter of individuals fatally shot by law enforcement officers) [perma.cc/3L5X-69WP].

245. Frank Edwards, Hedwig Lee, & Michael Esposito, *Risk of Being Killed by Police Use of Force in the United State by Age, Race-Ethnicity, and Sex*, 116 PNAS 16793, 16794 (Aug. 20, 2019).

246. *Id.*

247. *Id.* at 16795.

248. See Roland G. Fryer, Jr., *An Empirical Analysis of Racial Differences in Police Use of Force*, 127 J. POL. ECON. 1210 (forthcoming) (“[E]ven when we take perfectly compliant individuals and control for civilian, officer, encounter, and

is especially true in Minneapolis where 20% of the population is Black but 60% of the officer uses of force are against a Black individual.<sup>249</sup>

As previously stated, the Pickering Connick balancing test is a judicial standard used to review cases alleging a violation of the First Amendment rights of public employees.<sup>250</sup> However, the test is not currently used by local law enforcement agencies to judge employee conduct. Additionally, the policies that law enforcement employees are held to vary by jurisdiction.<sup>251</sup> If agencies used the *Pickering* factors and analysis when reviewing actions taken by their employees, they could have a similar effect to the proposed standard without a need for legislation. While this test may not be as effective as a clear heightened standard, it will likely have a greater impact than current policies. The problem remains that actual consequences and accountability are absent, so federal provisions, conditional funding opportunities, and new administrative standards can all serve to move the needle in the right direction.

#### *D. Implementation Barriers – Sheriffs and Police Unions*

One of the largest practical barriers to adopting a heightened conduct standard lies in the role of partisan sheriffs and police unions. In many localities, sheriffs are elected to partisan offices, and police unions are frequently involved in politics. The nature of

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location variables, black civilians are 21.2 percent more likely to have force used against them in an interaction compared to white civilians with the same reported compliance behavior.”).

249. See Richard A. Opper Jr. & Lazaro Gamio, *Minneapolis Police Use Force Against Black People at 7 Times the Rate of Whites*, N.Y. TIMES (Jun. 3, 2020) (citing that, since 2015, there have been 11,500 documented uses of force by Minneapolis police officers but only twelve of those instances resulted in disciplinary action being taken against the involved officer(s)) [perma.cc/T7US-3J7G].

250. See generally Hudson, *supra* note 225.

251. See *Policing 101*, U.S. DEPT. JUST. CMTY. RELS. SERVS. 1 (“[Local police] departments are subject to different state, county, and city laws and codes, and they have different policies, practices, and officer training programs.”).



these roles is inherently opposed to a heightened standard as individuals in these positions would be bound to ignore politics.

While sheriffs and unions could be areas of exception regarding this proposed standard, this Note proposes advocacy without additional politics. Police unions regularly donate to political candidates and lobbying organizations. In just over three decades, “[p]olice unions and associations have collectively contributed over \$121 million to state political candidates.”<sup>252</sup> Police union spending to endorse political candidates and campaigns is also increasing.<sup>253</sup> A heightened standard, however, does not necessarily point to the death of unions, but rather a decline in their political power. Unions would still be free to advocate for and against measures having a direct impact on law enforcement employment, such as budgetary decisions. Police unions in particular have an enormous amount of political sway that should be more heavily scrutinized. Abolishing police unions may seem extreme,<sup>254</sup> but the alternative is organizations so powerful, they are able to successfully block measures that would hold their members accountable.<sup>255</sup> Unions do serve to protect their employees but police unions in particular have a tendency to

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252. Srijita Datta, *Police Unions Spend Millions Lobbying to Retain Their Sway Over Big US Cities and State Governments*, OPEN SECRETS (Jun. 16, 2022, 3:41 PM) [perma.cc/Z37N-ETUA].

253. See Tom Perkins, *Revealed: Police Unions Spend Millions to Influence Policy in Biggest US Cities*, GUARDIAN (Jun. 23, 2020, 6:15 AM) (stressing that police union spending on contributions and lobbying has increased significantly in the last decade) [perma.cc/9L45-FG3B].

254. See Kim Kelly, *No More Cop Unions*, NEW REPUBLIC (May 29, 2020) (discussing collective bargaining agreements and provisions that insulate police from being held accountable, and recommendations to abolish the police as part of broader fight to defund, demilitarize, and dismantle the U.S. police force) [perma.cc/66JQ-EVAS].

255. See Daniel DiSalvo, *The Trouble with Police Unions*, NAT’L AFFAIRS (Fall 2020) (“Police unions have also shaped policies regarding citizen oversight of the police. . . [they] successfully blocked efforts to repeal [state law] that shielded police-misconduct records from the public [and] have also challenged the legitimacy of transparency measures such as civilian review boards and police auditors[.]”) [perma.cc/UVX4-DF2T].

protect their employees to a fault,<sup>256</sup> and that fault can have devastating consequences in communities.

In addition to police unions, changes would be necessary for elected sheriff positions. For instance, jurisdictions with partisan sheriff elections could move to nonpartisan elections or elections for sheriff positions could be replaced by appointments. As it stands, most police chiefs being appointed to their positions, but states and counties can decide how and when to elect sheriffs.<sup>257</sup> Sheriff elections are overwhelmingly partisan and very few counties place term limits on the position.<sup>258</sup> Some critics have pointed out that sheriff elections should be nonpartisan<sup>259</sup> while others believe sheriffs should simply not be elected at all.<sup>260</sup> Politics in law enforcement leadership contribute to mistrust and concern that bias is involved in law enforcement decisions. Not only is white supremacy prevalent in policing, it is also wound into the fabric of American politics.<sup>261</sup> Heightened standards for political speech from all law enforcement officers, including those in elected positions, is necessary to properly address the greater problem of police bias which permeates all levels of policing.

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256. *Id.* (“[T]he small body of scholarly literature on police unions is nearly unanimous in finding negative effects.”).

257. See Alan Neuhauser, *Running for a Badge: Why Does the U.S. Still Elect Sheriffs?*, U.S. NEWS & WORLD REP. (Nov. 4, 2016) (“All but four states either mandate or allow for the election of sheriffs. . . .”) [perma.cc/G8S4-M5LW].

258. See generally *Office of Sheriff State-By-State Elections Information*, NAT’L SHERIFFS ASS’N (updated Aug. 13, 2015) [perma.cc/YBC7-NMY8].

259. See Jon Webb, *Wedding’s Speech Proves We Shouldn’t Assign Political Parties to Sheriffs*, COURIER & PRESS (Sept. 7, 2020, 12:00 AM) (claiming that partisan sheriff elections alienate communities and nonpartisan local elections force voters to learn more about candidates) [perma.cc/AD8G-ML7N].

260. See Times Editorial Board, *Editorial: Sheriffs Should Not Be Elected*, L.A. TIMES (Oct. 27, 2020, 3:00 AM) (arguing that sheriffs lack meaningful oversight and acknowledging the questions presented by appointing the position) [perma.cc/NQW9-H4ZN].

261. See Simon Clark, *How White Supremacy Returned to Mainstream Politics*, CTR. AM. PROGRESS (Jul. 1, 2020) (explaining that white nationalist groups have increasingly infiltrated mainstream American political and cultural discussions) [perma.cc/U2ZT-WNE9].

### V. Conclusion

Law enforcement employees in the United States have enjoyed abundant discretionary power despite the profession's racist foundation in white supremacist ideals. White supremacy in policing has proven to have harmful effects on individuals and communities. While a heightened speech, conduct, and association standard for law enforcement officers would create an appearance of impartiality by officers and agencies. The appearance of impartiality is imperative in the judicial system, as we cannot trust judges to *be* impartial if they do not at minimum *appear* impartial. The same is true for law enforcement employees. The duties and decisions of officers are too important for their speech to be left unchecked. A federal legislative solution is needed to establish uniformity and provide an enforcement mechanism so officers can be held accountable for disparaging conduct and speech. Law enforcement employees should never act in a way "that would put into question the propriety of [their] conduct in carrying out [their] duties."<sup>262</sup> When law enforcement employees harbor bias and align themselves with white supremacy, they can no longer be trusted to carry out their duties. Identifying and removing employees harboring bias toward people of color and marginalized communities is one step in the larger fight to reform American policing. The prevalence of white supremacy in law enforcement is vast and a bold proposal is necessary to keep our communities safe.

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262. *Maintaining the Public Trust*, *supra* note 199.