

# State Regulation of Policing: POST Commissions and Police Accountability

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*This Article examines the untapped potential of Peace Officer Standards and Training (POST) commissions to protect communities that experience police misconduct and discrimination. POST commissions, which are created by state laws and exist in all fifty states, have broad authority to regulate police officers and police departments. POST commissions determine eligibility and qualifications for police employment and regulate the content of training officers receive. Most POST commissions can also revoke certification of officers who commit serious misconduct or fail to meet continuing eligibility requirements set by the commissions. In some states, they can also impose statewide, compulsory reforms to policing policy.*

*POST commissions have yet to fulfill their potential to protect the public from harmful police behaviors because (1) they lack clear legislative or organizational mandates to protect the public against unethical or unjust policing and (2) their membership tends to be dominated by law enforcement officials with little or no input from the communities that are most burdened by aggressive and discriminatory policing. If legislatures address these structural problems, POST commissions could regulate policing to protect communities from police abuse and misconduct.*

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### INTRODUCTION

On May 25, 2020, Minneapolis police officer Derek Chauvin murdered George Floyd, an unarmed Black man, by pressing his knee into Floyd’s neck for over nine minutes. Chauvin was convicted of second-degree murder and sentenced to twenty-two and one-half years in prison.<sup>1</sup> Three other former Minneapolis police officers face pending charges for aiding and abetting the murder: two trainees reportedly held Floyd down, while a third officer prevented onlookers from intervening.<sup>2</sup> The murder of George Floyd, which prompted outrage and protests across the United States, illustrates profound systemic failures in current public safety regulation. Why was Chauvin, who had eighteen prior complaints against him and had been involved in two prior shootings, still patrolling the streets of Minneapolis and training new officers?<sup>3</sup> How could two new officers have emerged from the police academy without grasping their duty to intervene and protect

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1. Tim Arango, *Derek Chauvin is sentenced to 22 and a half years for murder of George Floyd*, (Jun. 25, 2021), <https://www.nytimes.com/2021/06/25/us/derek-chauvin-22-and-a-half-years-george-floyd.html> [<https://perma.cc/QB5P-RSTC>]; *What We Know About the Death of George Floyd in Minneapolis*, N.Y. TIMES (Jan. 12, 2021, 10:57 AM), <https://www.nytimes.com/article/george-floyd.html> [<https://web.archive.org/web/20210112170156/http://www.nytimes.com/article/george-floyd.html>]; Kim Barker, *The Black Officer Who Detained George Floyd Had Pledged to Fix the Police*, N.Y. TIMES (Sept. 15, 2020), <https://www.nytimes.com/2020/06/27/us/minneapolis-police-officer-kueng.html> [<https://perma.cc/CA4N-YQEB>]; Chao Xiong, *Former Officer Who Held Back Crowd at George Floyd Death Should Face Trial, Prosecutors Argue*, STAR TRIB. (Aug. 24, 2020, 8:32 PM), <https://www.startribune.com/former-officer-who-held-back-crowd-at-george-floyd-death-should-face-trial-prosecutors-argue/572210692/> [<https://perma.cc/5SLT-UU4N>].

2. Cassidy MacDonald, *After Derek Chauvin's guilty verdict, 3 other Minneapolis police officers await trial*, CBS NEWS (May 21, 2021, 12:08 PM); <https://www.cbsnews.com/news/derek-chauvin-supremacy-trial/>; *What We Know About the Death of George Floyd in Minneapolis*, *supra* note 1; Barker, *supra* note 1; Xiong, *supra* note 1.

3. Barker, *supra* note 1.

Floyd?<sup>4</sup> Why did the Minneapolis Police Department allow the use of chokeholds<sup>5</sup> when many other departments had banned them decades before?<sup>6</sup>

The police killings of George Floyd and of Breonna Taylor have brought new momentum to the long struggle for a systemic reconstruction of public safety in the United States.<sup>7</sup> While some recent public safety reform proposals have focused on federal interventions,<sup>8</sup> most public safety policymaking occurs at the state or local level.<sup>9</sup> Systemic reconstruction of public safety will, therefore, require state-level intervention.

Peace Officer Standards and Training (POST) commissions are the statewide regulatory bodies that govern local law enforcement agencies.<sup>10</sup> POST

4. *Id.*; Krout v. Goemmer, 583 F.3d 557, 565 (8th Cir. 2009) (“As of July 2006, it was clearly established that a state actor may be liable for an unreasonable seizure under the Fourth Amendment if he fails to intervene to prevent the unconstitutional use of excessive force by another official.”); *see also* Bell v. Kan. City Police Dep’t, 635 F.3d 346, 347 (8th Cir. 2011).

5. Jennifer Mayerle, *Minneapolis Agrees to Ban Chokeholds & Require Officers to Intervene Against Unauthorized Use of Force*, CBS MINN. (June 5, 2020, 4:10 PM), <https://minnesota.cbslocal.com/2020/06/05/after-george-floyds-death-minneapolis-bans-chokeholds-by-police/> [<https://perma.cc/3M92-7UHM>].

6. Larry Altman, *Chokeholds Have Been Banned in Los Angeles for Decades*, DAILY BREEZE (Dec. 4, 2014, 9:27 PM), <https://www.dailybreeze.com/2014/12/04/chokeholds-have-been-banned-in-los-angeles-for-decades/> [<https://perma.cc/NCS9-V2JK>]; Nolan Hicks, *City Council Approves Chokehold Ban, Other NYPD Reforms amid Budget Fight*, N.Y. POST: METRO (June 18, 2020, 5:43 PM), <https://nypost.com/2020/06/18/city-council-approves-chokehold-ban-and-nypd-reforms/> [<https://perma.cc/NNT6-568A>]; Mario Orellana, *Union Says HPD Has Not Used Chokehold in Decades After Mayor Turner Issues Ban*, CLICK2HOUS. (June 9, 2020, 9:54 P.M.), <https://www.click2houston.com/news/local/2020/06/10/union-says-hpd-has-not-used-chokehold-in-decades-after-mayor-turner-issues-ban/> [<https://web.archive.org/web/20200803155554/https://www.click2houston.com/news/local/2020/06/10/union-says-hpd-has-not-used-chokehold-in-decades-after-mayor-turner-issues-ban/>].

7. Brakkton Booker, *Breonna Taylor’s Mother Urges Criminal Charges: ‘Every Day Is Still March the 13th,’* NPR (Aug. 13, 2020, 2:30 P.M.), <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/08/13/902104185/breonna-taylors-mother-awaits-criminal-charges-every-day-is-still-march-the-13th> [<https://perma.cc/G5BL-LBW9>]. Since 2015, Black residents disproportionately have been killed by police nationwide: twenty-four percent of people fatally shot by police are Black, even though Black people represent only thirteen percent of the general population. *See 964 People Have Been Shot and Killed by Police in the Past Year*, WASH. POST: FATAL FORCE, <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/> [<https://perma.cc/LWD2-DHR5>] (last updated July 2, 2021).

8. The U.S. House of Representatives debated and passed a bill—the George Floyd Justice in Policing Act of 2020—that would have ended qualified immunity for law enforcement officers accused of misconduct, banned chokeholds, and incentivized departments to adopt stricter use-of-force policies. *See* George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. (2020). In 2021, the bill was again passed by the House, but has not yet been voted on by the Senate. George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. (2021).

9. Sarah A. Seo & Daniel Richman, *Police Reform Won’t Work Unless It Involves Federal and State Governments*, WASH. POST: MADE BY HISTORY (July 7, 2020, 3:00 AM), <https://www.washingtonpost.com/outlook/2020/07/07/police-reform-wont-work-unless-it-involves-federal-state-governments/> [<https://perma.cc/ZF9C-U8YV>].

10. *See, e.g., About POST*, CA.GOV: POST COMM’N ON PEACE OFFICER STANDARDS & TRAINING, <https://post.ca.gov/About-Us> [<https://perma.cc/Y45V-A353>] (last visited

commissions<sup>11</sup> exist in all fifty states<sup>12</sup> and in the District of Columbia.<sup>13</sup> They determine eligibility and qualifications for police employment<sup>14</sup> and coordinate police training programs, including the police academies that all newly hired officers must attend.<sup>15</sup> Most POST commissions can revoke the certification of officers who commit serious misconduct or fail to meet continuing eligibility requirements set by the commission.<sup>16</sup> In some states, they also create policy standards that all departments must meet or exceed.<sup>17</sup>

POST commissions have unique power to protect communities against unethical, discriminatory, or abusive policing. Within each state, POST commissions regulate almost every police officer<sup>18</sup> and agency, from small-town sheriffs' departments to major metropolitan agencies with thousands of officers who serve millions of people.<sup>19</sup> Thus, POST commissions have power to impose changes that will affect thousands of officers statewide, including officers employed by police and sheriffs' departments that may lack the resources or inclination to implement best practices, may lack civilian oversight,<sup>20</sup> and may not attract attention from the U.S. Department of Justice (USDOJ).<sup>21</sup>

July 17, 2021).

11. In some states, the police certification body is known by a different name. In Florida, for example, the body that certifies police officers is the Criminal Justice Standards and Training Commission. In Alaska, it is the Police Standards Council. For purposes of this paper, state agencies that regulate police standards and training are referred to, collectively, as "POST commissions."

12. Hawaii was the last state to create a POST commission in 2018. Hawaii's Police Standards Board has not yet finalized its training and certification standards as required by statute. *See* Gina Mangieri, *Hawaii Law Enforcement Standards Board Behind as Nation Turns Focus on Policing*, KHON2 (June 3, 2020, 10:39 AM), <https://www.khon2.com/news/always-investigating/hawaii-law-enforcement-standards-board-behind-as-nation-turns-focus-on-policing/> [https://perma.cc/7JC8-4CD9].

13. *DC POST Board (Police Officers Standards and Training Board)*, DC.GOV: METRO. POLICE DEP'T, <https://mpdc.dc.gov/page/dc-post-board-police-officers-standards-and-training-board> [https://perma.cc/WE3T-Y5YB] (last visited July 17, 2021).

14. *See infra* Section III.B.

15. *See infra* Section III.B.1.

16. *See infra* Section III.C.

17. *See infra* Section III.B.2.

18. Some POST commissions also regulate who can work as a correctional officer, reserve officer, or private security officer. *See* MATTHEW J. HICKMAN, *POST AGENCY CERTIFICATION PRACTICES*, 2015 (2016).

19. While regulation by POST commissions is the rule, there are rare exceptions. For example, California's POST program is a voluntary, incentive-based program. While the vast majority of departments in California participate, there are a handful of smaller departments that are not POST-participating. Most non-participating agencies are affiliated with schools, universities, district attorney offices, and probation departments. *See California Law Enforcement Agencies*, CA.GOV: COMM'N ON PEACE OFFICER STANDARDS & TRAINING, <https://post.ca.gov/le-agencies> [https://perma.cc/6QW6-WYSU] (last visited July 17, 2021).

20. *Police Oversight by Jurisdiction (USA)*, NAT'L ASS'N FOR CIVILIAN OVERSIGHT OF L. ENF'T, [https://www.nacole.org/police\\_oversight\\_by\\_jurisdiction\\_usa](https://www.nacole.org/police_oversight_by_jurisdiction_usa) [https://perma.cc/BKM4-YQ83] (last visited July 17, 2021).

21. C.R. DIV., U.S. DEP'T OF JUST. THE CIVIL RIGHTS DIVISION'S PATTERN AND PRACTICE POLICE REFORM WORK: 1994-PRESENT 41-48 (2017), <https://www.justice.gov/crt/file/922421/>

POST commissions can regulate policing proactively and can hold abusive officers accountable. Most mechanisms for police accountability can address police misconduct only after a civil rights violation occurs; they have limited power to change law enforcement policies that are ineffective or unjust. For example, the USDOJ Civil Rights Division can mandate policy changes only if a law enforcement agency has engaged in a pattern or practice of constitutional violations.<sup>22</sup> Similarly, because Supreme Court precedent sets an extraordinarily high bar for civil litigants who seek injunctive relief to prevent future acts of police misconduct,<sup>23</sup> plaintiffs are typically limited to seeking compensatory damages for harms that have already occurred.<sup>24</sup> Local civilian oversight agencies rarely possess the authority to compel changes to police policy or training.<sup>25</sup> POST commissions, by contrast, can impose training requirements, policy standards, and hiring criteria that could prevent harm and misconduct before they occur.

POST commissions have been largely overlooked in legal academic literature about accountability and racial justice in policing. This literature has tended to focus on the protections afforded by the Fourth and Fifth Amendments to the United States Constitution and by federal civil rights statutes.<sup>26</sup> Yet, as many scholars have

download [<https://perma.cc/NPE4-MX4G>]. Under the Trump administration, the USDOJ mostly retreated from pattern or practice litigation and from civil rights reform collaboration with law enforcement agencies, although President Biden has pledged to reinvigorate the DOJ Civil Rights Division. See Stephen Rushin, *Police Reform During the Trump Administration*, 2017 U. ILL. L. REV. ONLINE: TRUMP 100 DAYS (Apr. 29, 2017), <https://www.illinoislawreview.org/symposium/first-100-days/police-reform-during-the-trump-administration/> [<https://perma.cc/KDL5-2W9G>]; Carrie Johnson, *Advocates Push for Resurrection of DOJ Civil Rights Division Under Biden*, NPR (Nov. 29, 2020, 12:54 PM), <https://www.npr.org/2020/11/29/938948927/advocates-push-for-resurrection-of-doj-civil-rights-division-under-biden> [<https://perma.cc/KWV5-DZ54>]; Ayanna Alexander, *Biden DOJ Pick Aims to Revitalize Civil Rights Office Post-Trump (1)*, BLOOMBERG L. (Feb. 19, 2021, 8:23 AM) <https://news.bloomberglaw.com/us-law-week/biden-doj-pick-aims-to-revitalize-civil-rights-office-post-trump> [<https://perma.cc/RL6Q-TEKX>].

22. 34 U.S.C. § 12601.

23. In *City of Los Angeles v. Lyons*, 461 U.S. 95, 97–98, 111 (1983), the U.S. Supreme Court held that a plaintiff who had been subjected to a chokehold by LAPD officers lacked standing to seek injunctive relief. Although the plaintiff introduced evidence that LAPD officers had killed sixteen people with chokeholds over a nine-year period (including twelve African-Americans), the Court held that the plaintiff had failed to prove that he personally faced an immediate threat of being subjected to a chokehold in the future. *Id.* at 111.

24. Joanna C. Schwartz, *Who Can Police the Police?*, 2016 U. CHI. LEGAL F. 437, 450–51 (2016) (“The Supreme Court’s standing doctrine makes it difficult for a plaintiff to bring claims for injunctive relief against law enforcement; accordingly, plaintiffs rely primarily on damages actions.”).

25. JOSEPH DE ANGELIS, RICHARD ROSENTHAL & BRIAN BUCHNER, CIVILIAN OVERSIGHT OF LAW ENFORCEMENT: A REVIEW OF THE STRENGTHS AND WEAKNESSES OF VARIOUS MODELS 11 (2016), [https://d3n8a8pro7vnm.cloudfront.net/nacole/pages/161/attachments/original/1481727977/NACOLE\\_short\\_doc\\_FINAL.pdf?1481727977](https://d3n8a8pro7vnm.cloudfront.net/nacole/pages/161/attachments/original/1481727977/NACOLE_short_doc_FINAL.pdf?1481727977) [<https://perma.cc/A5XV-GEVJ>].

26. Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 782 (2012) (“Since the Warren Court, academics have largely confined their analysis of the problem of policing in law to constitutional analysis of police conduct that falls within the plausible scope of the Fourth and Fifth Amendments.”); Seth W. Stoughton, *The Incidental Regulation of Policing*, 98 MINN. L. REV. 2179, 2182 (2014).

noted, constitutional litigation has not offered reliable protection against discriminatory policing, excessive force, or other forms of police misconduct.<sup>27</sup> More recently, legal scholars have begun to explore a broader ecology of police regulation.<sup>28</sup> They have analyzed and proposed revisions to the matrix of state, federal, and local laws and contracts that directly and indirectly regulate policing.<sup>29</sup> They have also examined a wide array of government and private actors whose decisions can shape police policy, culture, and behavior.<sup>30</sup> But the scholarly literature

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27. See, e.g., Megan Quattlebaum, *Let's Get Real: Behavioral Realism, Implicit Bias, and the Reasonable Police Officer*, 14 STAN. J. C.R. & C.L. 1, 24 (2018); I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 34 (2011) (arguing that current Fourth Amendment case law “virtually gives officers carte blanche to engage in race-based pretextual stops”); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 328 (1997); Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1452 (2016); Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182, 1219–20 (2017); Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585, 587 (2011) (arguing that the exclusionary rule does not effectively deter police officers from conducting searches that violate the Fourth Amendment); *Mullenix v. Luna*, 577 U.S. 7, 26 (2015) (Sotomayor, J., dissenting) (“By sanctioning a ‘shoot first, think later’ approach to policing, the Court renders the protections of the Fourth Amendment hollow.”); *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (arguing that the Supreme Court’s “one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment”).

28. Harmon, *supra* note 26, at 786.

29. See, e.g., *id.* at 790–92; Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 767–77 (2017); Samuel Walker & Morgan Macdonald, *An Alternative Remedy for Police Misconduct: A Model State “Pattern or Practice” Statute*, GEO. MASON U. C.R. L.J. 479, 481–82 (2009); Stoughton, *supra* note 26, at 2183–84; Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1239 (2017); Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-escalation, Preseizure Conduct, and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629, 661 (2018); Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1417–19 (2000); Maria Ponomarenko, *Rethinking Police Rulemaking*, 114 NW. U. L. REV. 1, 7 (2019).

30. See, e.g., Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1348 (2015) (USDOJ Civil Rights Division); Walker & Macdonald, *supra* note 29, at 481–82 (state attorneys general and state legislatures); I. Bennett Capers, *Crime, Legitimacy, and Testifying*, 83 IND. L.J. 835, 875–76 (2008) (local prosecutors); Rushin, *supra* note 29, at 1239 (police unions and civil service commissions); Merrick Bobb, *Civilian Oversight of the Police in the United States*, 22 ST. LOUIS U. PUB. L. REV. 151, 159 (2003) (civilian oversight bodies); Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1082 (2010) (public entity insurers); John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539 (2017) (public entity insurers); Ingrid V. Eagly & Joanna C. Schwartz, *Lexipol: The Privatization of Police Policymaking*, 96 TEX. L. REV. 891, 891 (2018) (private police policymaking companies); Karena Rahall, *The Green to Blue Pipeline: Defense Contractors and the Police Industrial Complex*, 36 CARDOZO L. REV. 1785, 1785 (2015) (defense contractors); Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 391 (2016) (citizen copwatching groups); Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 457 (2004) (internal organizational culture); Seth W. Stoughton, *Principled Policing: Warrior Cops and Guardian Officers*, 51 WAKE FOREST L. REV. 611 (2016) (same); Samuel Walker, “Not Dead Yet”: *The National Police Crisis, a New Conversation About Policing, and the Prospects for Accountability-Related Police Reform*, 2018 U. ILL. L. REV. 1777, 1792–99 (police industry groups like the Police Executive Research Forum).

on police regulation has largely overlooked POST commissions.<sup>31</sup> Although a few scholars have argued for expansion or increased utilization of POST power to regulate pre-employment background checks<sup>32</sup> and decertify officers who commit misconduct,<sup>33</sup> legal scholars have yet to systematically address how POST commissions could be constructed to protect the public against discriminatory, unethical, or violent policing.<sup>34</sup>

This Article aims to fill this gap by proposing fundamental changes to POST commissions' structure, mandate, and membership, so that POST commissions can realize their potential to protect communities against violent, discriminatory, and unethical policing. In Part I, we contend that the legislative and institutional mandate of each POST commission must state that a primary goal of its regulatory and enforcement powers is to protect people against incompetent, abusive, or discriminatory policing, as other professional regulatory bodies do.<sup>35</sup> Part II argues that POST commissions, which are typically dominated by law enforcement officials, should include substantial representation of the public, especially representatives of Black, Native, Latinx, and other communities that experience burdensome or discriminatory policing. Part III recommends rules that POST commissions might adopt to better protect the public from incompetent or abusive policing.

#### I. A PUBLIC INTEREST MANDATE

Reconstruction of POST commissions must begin with a redefinition of their mission and purpose. POST commissions should commit to protecting people from harm by members of the profession, as other statewide professional governance

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31. Even articles that aim to provide an overview of policing reform strategies have not addressed POST commissions as vehicles for reform. *See, e.g.*, Schwartz, *supra* note 24 (comparing nine categories of individuals and entities with the potential to promote police accountability and reform); Walker, *supra* note 30 (discussing a broad series of police reform efforts at the national, state, and local levels after the events in Ferguson in 2014).

32. Ben Grunwald & John Rappaport, *The Wandering Officer*, 129 YALE L. J. 1676, 1695–96 (2020).

33. Roger Goldman & Steven Puro, *Decertification of Police: An Alternative to Traditional Remedies for Police Misconduct*, 15 HASTINGS CONST. L.Q. 45, 48–50 (1987) [hereinafter Goldman & Puro (1987)]; Roger L. Goldman & Steven Puro, *Revocation of Police Officer Certification: A Viable Remedy for Police Misconduct?*, 45 ST. LOUIS U. L.J. 541, 542–44 (2001) [hereinafter Goldman & Puro (2001)]; Roger L. Goldman, *State Revocation of Law Enforcement Officers' Licenses and Federal Criminal Prosecution: An Opportunity for Cooperative Federalism*, 22 ST. LOUIS U. PUB. L. REV. 121, 121 (2003) [hereinafter Goldman (2003)]; Roger L. Goldman, *A Model Decertification Law*, 32 ST. LOUIS U. PUB. L. REV. 147, 149 (2012) [hereinafter Goldman (2012)].

34. As Rachel Harmon has observed, “little has been written about how [POST commissions] should be organized to avoid undue influence by the police officers and departments they regulate, what their powers can usefully be, or how their regulations interact with other means of promoting lawful and harm-efficient policing.” Harmon, *supra* note 26, at 806.

35. State governing bodies in other professions, such as nursing, medicine, and law, typically do have legislative mandates to protect the public. *See infra* Part I.

bodies do. For example, California’s Medical Practice Act states: “Protection of the public shall be the highest priority for the Medical Board of California in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.”<sup>36</sup> Near-identical language is included in the authorizing statutes of California’s governing bodies for the professions of nursing,<sup>37</sup> psychology,<sup>38</sup> law,<sup>39</sup> cosmetology,<sup>40</sup> and general contractors.<sup>41</sup> Yet the authorizing statute for California’s POST commission is silent about protecting the public against harm by police.<sup>42</sup> Instead, it states only that the commission’s power to set minimum selection standards for officers should be exercised “[f]or the purpose of raising the level of competence of local law enforcement officers.”<sup>43</sup>

The absence of a public-protection mandate is typical of most POST-authorizing statutes. When state statutes identify any purpose for the POST, they usually emphasize that police training should be “of a professional quality” in order to protect public safety and the administration of criminal justice.<sup>44</sup> Only three

36. CAL. BUS. & PROF. CODE § 2001.1

37. *Id.* § 2708.1 (“Protection of the public shall be the highest priority for the Board of Registered Nursing in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.”)

38. *Id.* § 4990.16 (“Protection of the public shall be the highest priority for the board in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.”)

39. *Id.* § 6001.1 (“Protection of the public . . . shall be the highest priority for the State Bar of California and the board of trustees in exercising their licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.”)

40. *Id.* § 7303.1 (“Protection of the public shall be the highest priority for the Board of Barbering and Cosmetology in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.”)

41. *Id.* § 7000.6 (“Protection of the public shall be the highest priority for the Contractors’ State License Board in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.”)

42. CAL. PENAL CODE §§ 13500–13553.

43. *Id.* § 13510(a).

44. *See, e.g.*, ALASKA STAT. § 18.65.130 (2021); LA. STAT. ANN. § 40:2401 (2020); MISS. CODE ANN. § 45-6-1 (2021); N.J. STAT. ANN. § 52:17B-66 (West 2020); N.C. GEN. STAT. § 17C-1 (2021); N.H. REV. STAT. ANN. § 106-L:1 (2020); 42 R.I. GEN. LAWS § 42-28.2-1 (2021); S.D. CODIFIED LAWS § 23-3-26 (2020); *see also* IOWA CODE § 80B.2 (2021) (“It is the intent of the legislature in creating the academy and the council to maximize training opportunities for law enforcement officers, to coordinate training and to set standards for the law enforcement service, all of which are imperative to upgrading law enforcement to professional status.”); 50 ILL. COMP. STAT. § 705/1 (2021) (stating that Police Standards Board is created “for the purpose of encouraging and aiding municipalities . . . in their efforts to raise the level of law enforcement by upgrading and maintaining a high level of training and standards for law enforcement executives and officers.”).

states—Maine, Vermont, and Massachusetts—identify professional discipline as a central goal of their respective POST commissions.<sup>45</sup> Only two states—Indiana and South Carolina—identify the promotion of equity as a purpose of the POST commission.<sup>46</sup>

Most states provide no legislative statement of the mission or purpose of their POST commissions.<sup>47</sup> In the absence of a legislative mandate, many POST commissions have adopted their own mission statements. Like the statutes that create POST commissions, the mission statements that POST commissions adopt typically focus on promoting police competence, excellence, or “professionalism”<sup>48</sup>

45. ME. STAT. tit. 25, § 2801(2) (2021); VT. STAT. ANN. tit. 20, § 2351 (2021); MASS. GEN. LAWS ch. 6E, § 3 (2021). In 2020, both Vermont and Massachusetts enacted laws substantially changing the powers and composition of their respective POST commissions. *See* 2020 Vt. Acts & Resolves no. 219; VT. STAT. ANN. tit. 20, § 2351 (2021); MASS. GEN. LAWS ch. 6E, § 2 (2021). Prior to this 2020 legislation, adjudicating charges of unprofessional conduct was not listed as a central goal for either the Vermont Criminal Justice Training Council (now the Vermont Criminal Justice Council) or the Municipal Police Training Committee (now the committee on police training commission, a subpart of a broader Peace Officer Standards and Training Commission). *See* 2020 Vt. Acts & Resolves 219; VT. STAT. ANN. tit. 20, § 2351; MASS. GEN. LAWS ch. 6E, § 2.

46. IND. CODE ANN. § 5-2-1-1 (West 2020) (“In order to ensure the public safety and general welfare of the people of the state of Indiana and to promote equity for all segments of society, a program of mandatory training for law enforcement officers is established.”); S.C. CODE ANN. § 23-23-10(a) (2020) (“In order to ensure the public safety and general welfare of the people of this State, and to promote equity for all segments of society, a program of training for law enforcement officers and other persons employed in the criminal justice system in this State is hereby proclaimed and this chapter must be interpreted to achieve these purposes principally through the establishment of minimum and advance standards in law enforcement selection and training.”).

47. *See, e.g.*, ALASKA STAT. ANN. § 18.65.130 (West 2020); 50 ILL. COMP. STAT. ANN. 705/1 (West 2021); LA. STAT. ANN. § 40:2401 (2020); MISS. CODE ANN. § 45-6-1 (West 2021); N.J. STAT. ANN. § 52:17B-66 (West 2020); N.H. REV. STAT. ANN. § 106-L:1 (2020); N.C. GEN. STAT. ANN. § 17C-1 (West 2020); 42 R.I. GEN. LAWS ANN. § 42-28.2-1 (West 2020).

48. *See, e.g.*, N.H. POLICE STANDARDS & TRAINING COUNCIL, <https://www.pstc.nh.gov/> [<https://perma.cc/GT66-UZWS>] (last visited July 17, 2021) (“The mission of NH Police Standards and Training Council is to shape, sustain and strengthen the competency and professionalism of New Hampshire law enforcement, in service to our State.”); PUB. SAFETY OFFICER STANDARDS & TRAINING – POST – MONT. DEPT JUST., <https://dojmt.gov/post/> [<https://perma.cc/22VP-AN86>] (last visited July 17, 2021) (“To ensure competency and promote quality performance by public safety officers by establishing, maintaining, and promoting excellence in standards and training.”); *About Us*, ST. VT.: CRIM. JUST. TRAINING COUNCIL, <https://vcjtc.vermont.gov> [<https://perma.cc/3XGA-53QN>] (last visited July 17, 2021) (“The mission of the Vermont Criminal Justice Training Council is to improve public safety by promoting excellence in law enforcement through the implementation of the highest standards for training, certification, and recognized best practices.”); *Mission, Values, Vision*, COMMISSION ON PEACE OFFICER STANDARDS & TRAINING, <https://post.ca.gov/mission-values-vision> [<https://perma.cc/46LZ-XY44>] (last visited July 17, 2021); *Kentucky Law Enforcement Council*, KENTUCKY JUSTICE & PUBLIC SAFETY CABINET, <https://justice.ky.gov/Boards-Commissions/Pages/klec.aspx> [<https://perma.cc/PXP6-WG4N>] (last visited July 24, 2021) (“Our mission statement is ‘Assist law enforcement agencies in hiring the best qualified applicants available at the least cost with the least inconvenience in a timely manner understanding throughout that agency pre-employment needs vary greatly by the size of the agency.’”); ILL. L. ENFORCEMENT TRAINING & STANDARDS BOARD, <https://www.ptb.illinois.gov/about/agency-information/> [<https://perma.cc/NL3G-66N4>] (last visited July 17, 2021) (“It is the mission of the Board to provide standards and training which enhance the ability of law enforcement to readily

without explicitly acknowledging that the public might require protection against misconduct or discrimination by members of the profession. Only nine POST mission statements mention officer ethics, integrity, or compliance with the law.<sup>49</sup> Only one POST body, the Utah Peace Officer Standards and Training Division, mentions the protection of citizens' rights as a central aspect of its mission.<sup>50</sup>

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and quickly adapt to our rapidly changing society and which can lead to public recognition of law enforcement as a profession.”).

49. See ARIZ. PEACE OFFICER STANDARDS & TRAINING BOARD, <https://post.az.gov/> [<https://perma.cc/WH9M-G4RB>] (last visited July 17, 2021) (“The Arizona Peace Officer Standards and Training Board stands to foster public trust and confidence by establishing and maintaining standards of integrity, competence, and professionalism for Arizona peace officers and correctional officers.”); *Criminal Justice Standards & Training Commission (CJSTC)*, FLA. DEP’T L. ENF’T, <https://www.fdle.state.fl.us/CJSTC/Commission/CJSTC-Home.aspx> [<https://perma.cc/Q952-EPYQ>] (last visited July 17, 2021) (“To ensure that all citizens of Florida are served by criminal justice officers who are ethical, qualified, and well-trained.”); GA. PEACE OFFICER STANDARDS & TRAINING COUNCIL, <https://www.gapost.org/> [<https://perma.cc/NH98-TCZU>] (last visited June 29, 2021) (“[T]o provide the citizens of Georgia with qualified, professionally trained, ethical and competent peace officers and criminal justice professionals”); *About KSCPOST*, KAN. COMM’N ON PEACE OFFICERS’ STANDARDS & TRAINING, <https://www.kscpost.org/kscpost.html> [<https://perma.cc/3456-N7V3>] (last visited July 17, 2021) (“providing the citizens of Kansas with qualified, trained, ethical, competent, and professional peace officers. . . . [and] adopting and enforcing professional standards for certification of peace officers to promote public safety and preserve public trust and confidence.”); *Board on Law Enforcement Standards and Training (BLEOST)*, MISS. DEP’T PUB. SAFETY: BLEOST, <https://www.dps.ms.gov/public-safety-planning/standards-and-training/BLEOST> [<https://perma.cc/ML68-WU3P>] (last visited July 17, 2021) (“[T]o insure that law enforcement candidates are selected according to high standards of education, fitness and morals”); *About Us*, NEV. COMM’N ON PEACE OFFICER STANDARDS & TRAINING, <http://post.nv.gov/About-Us/> [<https://perma.cc/YZA5-3VFX>] (last visited July 17, 2021) (“To develop and deliver professional training ensuring that all Nevada peace officers and their agencies comply with established statutes and regulations.”); *Criminal Justice Education & Training Standards*, NC DEPT. OF JUST., <https://ncdoj.gov/law-enforcement-training/criminal-justice/> [<https://perma.cc/G88K-EX7J>] (last visited July 17, 2021) (“[T]o assure that all of the State’s criminal justice officers are both competent and ethical in the conduct of their duties.”); *Criminal Justice Training and Certification*, OREGON.GOV: DEP’T PUB. SAFETY STANDARDS & TRAINING COMM’N, <https://www.oregon.gov/dpsst/cj/pages/default.aspx> [<https://perma.cc/U2HC-64TF>] (last visited July 17, 2021) (“There are two critical components of the DPSST Mission that work together to promote excellence in Oregon’s public safety professions—delivering quality training and upholding professional standards . . . . Upholding professional standards ensures the integrity of Oregon’s criminal justice system by ensuring that officers meet and maintain all established training, physical, emotional, intellectual and moral fitness standards for all public safety disciplines.”); *TCOLE Mission*, TEX. COMM’N ON L. ENF’T, <https://www.tcole.texas.gov/content/tcole-mission> [<https://perma.cc/P35D-HQV5>] (last visited July 17, 2021) (“[T]o establish and enforce standards to ensure that the people of Texas are served by highly trained and ethical law enforcement, corrections, and telecommunications personnel.”); *About POST*, UTAH DEP’T PUB. SAFETY, <https://post.utah.gov/about-post-2/> [<https://perma.cc/IW7A-7NWQ>] (last visited July 17, 2021) (stating that its mission includes “elevating the integrity of the profession.”).

50. *About POST*, *supra* note 49 (stating that their mission is to “provide professional standards and training, leadership and certification for peace officers and dispatchers as we work to protect the rights and privileges of Utah’s citizens while elevating the integrity of the profession”). In addition, Oregon’s Board of Public Safety Standards and Training has adopted regulatory language stating that its moral fitness standards are “critical to upholding the public’s trust in the public safety profession” and “protecting the public.” See OR. ADMIN. R. 259-008-0300(1) (2021).

It is in the public interest for POST commissions to set officer selection and training standards, and POST commissions do this. It is equally important, though, that POST commissions ensure that police officers behave in ethical and equitable ways. In most states, neither the legislative mandate nor the POST mission statement contains any explicit requirement that the commission protect the public against misconduct or discrimination by police.<sup>51</sup>

While the well-being of communities requires the effective suppression of crime, true public safety also requires that people—including victims, witnesses, lawbreakers, observers, bystanders, and the general public—be protected against discriminatory or violent policing. POST commissions can and should aim to protect individuals and communities against the physical, dignitary, and constitutional harms that can result from discriminatory, unethical, or abusive policing. POST commissions should embrace—and state legislatures should impose—an explicit obligation to prevent discrimination and promote equitable policing.<sup>52</sup>

## II. COMMUNITY REPRESENTATION ON POST COMMISSIONS

The reconstruction of POST commissions requires not only a shift in legislative mandate, but also changes in membership. POST commissions might view their responsibilities differently if residents of heavily policed communities, justice-involved people, victims of police misconduct, criminal defense attorneys, and civil rights advocates had a greater voice and representation on POST commissions.

When Clarence Castile attended his first meeting as a newly appointed member of the Minnesota Peace Officers Standards and Training Board in 2017, his first initiative was to ask the Board to rename a new twelve-million dollar police training fund after his nephew, Philando Castile.<sup>53</sup> Minnesota police officer Jeronimo Yanez had shot and killed the thirty-two-year-old Philando at a traffic stop the prior year.<sup>54</sup> “We don’t want to make any more Philando Castiles, and we

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51. See *supra* notes 47–50 and accompanying text.

52. See, e.g., IND. CODE § 5-2-1-1 (2020) (“In order to ensure the public safety and general welfare of the people of the state of Indiana and to promote equity for all segments of society, a program of mandatory training for law enforcement officers is established.”); S.C. CODE § 23-23-10(a) (“In order to ensure the public safety and general welfare of the people of this State, and to promote equity for all segments of society, a program of training for law enforcement officers and other persons employed in the criminal justice system in this State is hereby proclaimed and this chapter must be interpreted to achieve these purposes principally through the establishment of minimum and advance standards in law enforcement selection and training.”).

53. MINN. BD. OF PEACE OFFICER STANDARDS & TRAINING, BOARD MEETING (July 27, 2017), <https://dps.mn.gov/entity/post/about/meetingminutesdocumentlibrary/July%2027%202017%20Board%20Minutes.pdf> [https://perma.cc/9R3F-MY56].

54. German Lopez, *Philando Castile Minnesota Police Shooting: Officer Cleared of Manslaughter Charge*, VOX (June 16, 2017, 4:15 PM), <https://www.vox.com/2016/7/7/12116288/minnesota-police-shooting-philando-castile-falcon-heights-video> [https://perma.cc/LNA7-67XE].

don't want any more officers in the shape or form of [J]eronimo Yanez," Mr. Castile argued.<sup>55</sup> Despite the Governor's support for renaming the fund, the POST Board rejected the name change by a vote of eight to two, retaining the fund's original name: the Peace Officer Training Assistance Fund.<sup>56</sup> Mr. Castile and the only other public member of the POST Board were outvoted by the other eight members,<sup>57</sup> all of whom were current or retired police officers or law enforcement instructors.<sup>58</sup> POST Board Executive Director Nathan Gove later stated that he believed the POST Board voted against renaming the training fund because the board "didn't want to get in the middle" and "does not want to be involved in sort of partisan, high[ly] divisive issues."<sup>59</sup>

In order to protect people against police discrimination and misconduct, POST commissions should represent the communities that experience the most intrusive and burdensome policing, such as Black,<sup>60</sup> Indigenous,<sup>61</sup> Latinx,<sup>62</sup> and LGBTQ+ people,<sup>63</sup> people with disabilities,<sup>64</sup> and people experiencing

55. MINN. BD. OF PEACE OFFICER STANDARDS & TRAINING, *supra* note 53, at 2.

56. Erin Golden, *Police Standards Board Votes Against Naming Training Fund for Philando Castile*, STAR TRIB. (July 27, 2017, 10:01 PM), <http://www.startribune.com/police-standards-board-votes-against-naming-training-fund-for-philando-castile/436985783/> [https://perma.cc/U3M6-9K2Q].

57. MINN. BD. OF PEACE OFFICER STANDARDS & TRAINING, *supra* note 53, at 3. The Minnesota legislature has since expanded its POST commission to include two additional public members. See MINN. STAT. ANN. § 626.841 (2020).

58. *Id.*; *Law Enforcement AAS Instructors*, ALEXANDRIA TECH. & CMTY. COLL., <https://www.alextech.edu/programs/law-enforcement-aas/instructors> [https://perma.cc/EAN2-YP9D] (last visited July 17, 2021); *Lakes Area Police Department Transitioning into New Era*, CHISAGO CNTY. PRESS (Dec. 1, 2016, 2:46 PM), <https://chisagocountypress.com/main.asp?SubSectionID=1&ArticleID=22589&SectionID=1> [https://perma.cc/8839-V7KK].

59. See Mara H. Gottfried, *Police Standards Board Rejects Effort to Rename Training Fund for Philando Castile*, TWIN CITIES PIONEER PRESS (July 27, 2017, 6:57 PM), <https://www.twincities.com/2017/07/27/minnesota-police-standards-board-rejects-effort-to-name-training-fund-for-philando-castile/> [https://web.archive.org/web/20170729220747/https://www.twincities.com/2017/07/27/minnesota-police-standards-board-rejects-effort-to-name-training-fund-for-philando-castile/].

60. Ryan Gabrielson, Eric Sagara & Ryann Grochowski Jones, *Deadly Force, in Black and White: A ProPublica Analysis of Killings by Police Shows Outside Risk for Young Black Males*, PROPUBLICA (Oct. 10, 2014, 11:07 AM), <https://www.propublica.org/article/deadly-force-in-black-and-white> [https://perma.cc/65TN-77K9]; *The Counted: People Killed by Police in the US*, GUARDIAN, <https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database> [https://perma.cc/2Z62-FVG3] (last visited July 17, 2021); *Findings*, STAN. OPEN POLICING PROJECT, <https://openpolicing.stanford.edu/findings/> [https://perma.cc/Z4HF-5DK8] (last visited June 29, 2021).

61. *The Counted: People Killed by Police in the US*, *supra* note 60.

62. *Id.*

63. *Protected and Served?*, LAMBDA LEGAL, <https://www.lambdalegal.org/protected-and-served> [https://perma.cc/P6AE-PRJD] (last visited July 17, 2021); SANDY E. JAMES, JUDY L. HERMAN, SUSAN RANKIN, MARA KEISLING, LISA MOTTET & MA'AYAN ANAFI, NAT'L CTR. FOR TRANSGENDER EQUAL., *THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 168* (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> [https://perma.cc/3J6S-S9DV].

64. Ayobami Lanionu & Phillip Atiba Goff, *Policing the Most Vulnerable: Measuring Disparities in Police Use of Force and Injury Among Persons with Serious Mental Illness* (date) (unpublished

homelessness.<sup>65</sup> In reality, however, POST commissions are typically comprised mainly of law enforcement officials and local government leaders, with limited (if any) representation of other stakeholders.<sup>66</sup> This is, fortunately, beginning to change: in response to the nationwide protests of mid-2020, several states enacted legislation to increase public representation on their POST commissions,<sup>67</sup> and Massachusetts became the first and only state to require a civilian majority on its POST commission.<sup>68</sup>

The limited public representation on most POST commissions is a product of legislative design: most statutes do not provide for any public participation in the appointment or selection of most POST commissioners, and few seats are reserved for community representatives. Most POST commission members are appointed by the governor or another elected official.<sup>69</sup> POST statutes typically require the governor to appoint commissioners who represent city government and the law enforcement side of the criminal justice system, such as police chiefs, patrol officers, prosecutors, mayors, and city managers.<sup>70</sup> These requirements can prevent governors from appointing POST commissioners who reflect and represent the interests of heavily policed communities even if they want to.<sup>71</sup>

Most states also reserve *ex officio* seats on the POST commission for certain state, local, or federal government and public safety officials, such as mayors, state attorneys general, and directors of local FBI field offices.<sup>72</sup> Seventeen states also reserve seats for officials or designees of bodies such as police unions, police professional organizations, and interest groups representing local government officials.<sup>73</sup> New Jersey, for example, allots ten of the nineteen seats on its POST

manuscript) (on file with author).

65. Leila Miller, *Use-of-Force Incidents Against Homeless People Are Up*, *LAPD reports*, L.A. TIMES (Jan. 21, 2020, 10:12 PM), <https://www.latimes.com/science/story/2020-01-21/use-of-force-incidents-against-homeless-people-are-up-lapd-reports> [https://perma.cc/X9XQ-A26T] (reporting that, during the third quarter of 2019, one third of LAPD use of force incidents involved people who were homeless); NAT'L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS 2019, at 50 (2019), <http://nlchp.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf> [https://perma.cc/5ALQ-89DP].

66. See *infra* Part II.

67. See *infra* note 85-91.

68. Chelsea Siegal, *Gov. Baker Signs Police Reform Legislation*, WWLP (Jan. 7, 2021, 10:56 PM), <https://www.wwlp.com/news/massachusetts/gov-baker-signs-police-reform-legislation/> [https://perma.cc/3TA8-XHDY].

69. See, e.g., CAL. PENAL CODE § 13500; 50 ILL. COMP. STAT. 705/3; GA. CODE ANN. § 35-8-3; KY. REV. STAT. ANN. § 15.315; N.H. REV. STAT. ANN. § 106-L:3.

70. *Id.*

71. See e.g., S.C. CODE ANN. § 23-23-30 (2020) (reserving all seats on POST commission for law enforcement officers, corrections officials, and other government officials); LA. STAT. ANN. § 40:2403 (2020) (reserving all POST seats for law enforcement officials and prosecutors).

72. See, e.g., CAL. PENAL CODE § 13500 (West 2021); ILL. COMP. STAT. ANN. 705/3 (West 2021); GA. CODE ANN. § 35-8-3 (West 2020); FLA. STAT. ANN. § 943.11 (West 2020).

73. ALA. CODE § 36-21-41 (2020); DEL. CODE ANN. tit. 11, § 8402 (2020); FLA. STAT. § 943.11

commission to leaders of law enforcement and correctional professional organizations.<sup>74</sup> North Carolina reserves thirteen of the thirty-four seats on its POST commission for the designees of various law enforcement professional organizations.<sup>75</sup> Only one state, Virginia, reserves seats for public defenders or members of the defense bar.<sup>76</sup>

Half of U.S. states reserve POST commission seats for members of the public, but these seats are often filled by people with strong ties to law enforcement. In Ohio, for example, the sole “public” member of the Ohio Police Training Commission worked as a probation officer for over twenty years.<sup>77</sup> In Alaska, where four of thirteen seats are reserved for members of the “public at large,” two of the public seats are currently occupied by former police officers with over twenty years of law enforcement experience each.<sup>78</sup> In Arizona, all public members of the POST board have strong ties to law enforcement.<sup>79</sup> One “public” board member is a retired prosecutor.<sup>80</sup> Another is a former employee of the Arizona Department of Public Safety, the founder of a nonprofit organization focused on serving law

(2020); GA. CODE ANN. § 35-8-3 (2020); KY. REV. STAT. ANN. § 15.315 (West 2021); LA. STAT. ANN. § 40:2403 (2020); MD. CODE ANN. PUB. SAFETY § 3-203 (West 2020); MASS. GEN. LAWS ch. 6, § 116 (2021); MICH. COMP. LAWS § 28.603 (2020); MISS. CODE ANN. § 45-6-5 (2021); N.J. STAT. ANN. § 52:17B-70 (West 2020); N.Y. EXEC. LAW § 839 (McKinney 2021); N.C. GEN. STAT. § 17C-3 (2021); OKLA. STAT. tit. 70, § 3311 (2020); OR. REV. STAT. § 181A.360 (2020); VT. STAT. ANN. tit.20, § 2352 (2021); VA. CODE ANN. § 9.1-108 (2021).

74. N.J. STAT. ANN. § 52:17B-70 (West 2020).

75. N.C. GEN. STAT. § 17C-3 (2021).

76. VA. CODE ANN. § 9.1-108 (2021) (reserving a seat for the Executive Director of the Virginia Indigent Defense Commission).

77. As of June 2021, the sole public representative on the Ohio Police Training Commission, Wynette Carter-Smith, is married to a police officer and herself spent decades working as a probation officer. See *Ohio Peace Officer Training Commission*, OHIO ATTY GEN., <https://www.ohioattorneygeneral.gov/Law-Enforcement/Ohio-Peace-Officer-Training-Academy/Ohio-Peace-Officer-Training-Commission> [<https://perma.cc/UF6V-NZNF>] (last visited July 17, 2021); Natalie Driscoll, *Nettie Carter-Smith's Life Has Been Fueled by a Passion to Serve*, HUB SPRINGFIELD (Aug. 27, 2020), <https://www.hubspringfield.com/features/Nettie-Carter-Smith-082720.aspx> [<https://perma.cc/J7RQ-DZJ8>].

78. As of June 2021, two of the three public members on the Alaska Police Standards Commission—G “Scott” Campbell and Daniel Weatherly, were retired Alaska State Troopers. See *Confirmation Hearings: Alaska Police Standards Council Before the Senate State Affs. Standing Comm.*, 31 Alaska State Leg., 2d Reg. Sess. (Alaska 2020), <http://www.akleg.gov/basis/Meeting/Detail?Meeting=SSTA%202020-02-20%2015:30:00>. [<https://perma.cc/L6CD-582D>]; Tom Anderson, G. Scott Campbell, Tom Clemons, John Murphy & John Tidwell Jr., *This ‘John Doe Free Pass’ Judge Deserves A ‘No’ Vote From Alaskans Who Care About Violent Sex Crimes*, MUST READ ALASKA (Oct. 28, 2020), <https://mustreadalaska.com/this-john-doe-free-pass-judge-deserves-a-no-vote-from-alaskans-who-care-about-violent-sex-crimes/> [<https://perma.cc/3CGR-4LWZ>] (“G. Scott Campbell is a Alaska State Trooper (Retired) and former Director of Public Safety & Chief of Police for the North Slope Borough Police Department. He is a retired U.S. Marine.”)

79. See *infra* notes 81–83 and accompanying text.

80. *Board Members*, ARIZ. PEACE OFFICER STANDARDS & TRAINING BD., <https://post.az.gov/about-us/board-members> [<https://perma.cc/3VF8-JP2F>] (last visited July 17, 2021); Leesa Berens Weisz, LINKEDIN, <https://www.linkedin.com/in/leesa-berens-weisz-31982510> (last visited July 17, 2021).

enforcement, military, and first responders, and is married to a police officer.<sup>81</sup> A third board member, appointed to represent higher education, is a retired police executive.<sup>82</sup>

People with strong ties to law enforcement can occupy ostensibly public seats on POST commissions because many states that reserve such seats either fail to define the term “public,”<sup>83</sup> or state simply that public members must not be law enforcement officers,<sup>84</sup> leaving open the possibility that they could be occupied by former law enforcement officers or other people with strong financial, professional, or family ties to law enforcement. Only seven states reserve seats for members of the public who have never served as law enforcement officers and have no business or professional connections to law enforcement.<sup>85</sup> Even fewer reserve seats for individuals who represent the interests of heavily-policed communities.<sup>86</sup> Connecticut is the only state that reserves POST commission seats for “justice-impacted” people.<sup>87</sup> Only Vermont reserves a seat for a person with lived experience of mental illness.<sup>88</sup> A few states reserve seats for advocates for groups

81. *Id.*; Ariz. Peace Officer Standards and Training Bd., Minutes of the December 19, 2018 Meeting of the Arizona Peace Officer Standards and Training Board 2 (2018), <https://post.az.gov/sites/default/files/121918%20Minutes.pdf> [<https://perma.cc/C35W-SM4J>] (“Jamie Kelly has been selected to fill the public member vacancy on the Board. She is the current executive director of Not All Heroes.”); Jaime Kelly, LINKEDIN, <https://www.linkedin.com/in/jamiekelly> (last visited July 17, 2021) (describing Not All Heroes as an organization “dedicated to providing the necessary connections for individuals in need while serving Law Enforcement, Fire Service, Dispatchers, Military and Veterans as well as families.”); Not All Heroes, FACEBOOK, <https://www.facebook.com/notallheroes/> (last visited July 17, 2021) (“I am lucky to be the wife of a Glendale Police Officer. Although he does not consider himself to be a hero, to me he is a true hero . . . . Not All Heroes was founded due to the need for a single location of available resources and assistance for the true heroes in our community.”).

82. *Board Members*, *supra* note 80; *About Us*, ARIZ. PEACE OFFICER STANDARDS & TRAINING BD., <https://post.az.gov/about-us> [<https://perma.cc/K9F3-ZUBN>] (last visited July 17, 2021); *Kevin Robinson*, ARIZ. ST. UNIV., <https://ccj.asu.edu/content/kevin-robinson-1> [<https://perma.cc/9AGH-BDRV>] (last visited July 17, 2021).

83. *See, e.g.*, WASH. REV. CODE ANN. § 43.101.030 (West 2020); OHIO REV. CODE ANN. § 109.71 (West 2020); NEB. REV. STAT. § 81-1407 (2020); MINN. STAT. ANN. § 626.841 (West 2020).

84. *See, e.g.*, CAL. PENAL CODE § 13500 (West 2021) (stating public members “shall not be law enforcement officers”); WIS. STAT. § 15.255 (2021).

85. N.M. STAT. ANN. § 29-7-3 (2020) (requiring that citizen members may not be “a police officer or retired police officer or have familial or financial connections to a police officer or any agency or department for which a police officer works.”); MD. CODE ANN. PUB. SAFETY § 3-203 (West 2020); MO. REV. STAT. § 590.120 (2020); OR. REV. STAT. § 181A.360 (2020); TENN. CODE ANN. § 38-8-102 (2021); TEX. OCC. CODE ANN. § 1701.051 (West 2019). New Hampshire and Vermont prohibit public from having family connections to law enforcement, but not financial connections. N.H. REV. STAT. ANN. § 106-L:3 (2020); VT. STAT. ANN. tit. 20, § 2352 (2021).

86. CONN. GEN. STAT. § 7-294b(b) (2020); MICH. COMP. LAWS § 28.603 (2020); MASS. GEN. LAWS ch. 6E, § 2 (2021); MICH. COMP. LAWS § 28.620 (2020); VA. CODE ANN. § 9.1-108 (2021); VT. STAT. ANN. tit. 20, § 2352 (2021); *see also* D.C. CODE § 5-107.03 (2021).

87. CONN. GEN. STAT. § 7-294b(b) (2020). Connecticut previously reserved five seats on its board for “public members,” but did not define the term. CONN. GEN. STAT. § 7-294b(a) (2020).

88. VT. STAT. ANN. tit. 20, § 2352 (West 2020). Connecticut also reserves two seats for members who may be either people with disabilities or advocates for people with disabilities. CONN. GEN. STAT. § 7-294b(b) (2020).

that experience disparate policing<sup>89</sup> or members of state civil rights offices.<sup>90</sup> Most states that reserve POST commission seats for members of or advocates for heavily policed communities did so after the nationwide protests in mid-2020.<sup>91</sup>

While police leadership, retired police officers, and police union representatives bring subject-matter expertise to the project of professional regulation, they have no particular expertise in civil rights law, racial or social justice, or the effects of policing on public health. Nor can police officers adequately represent the priorities of heavily policed communities. They do not necessarily know how their practices may affect members of communities that are burdened by intense or confrontational policing, and they are unlikely to propose the same solutions that community members might suggest.

By contrast, nearly every regulatory body that oversees law, medicine, or nursing requires substantial public representation. Public representatives are required for medical boards in forty-nine states and for boards of nursing in all fifty states.<sup>92</sup> Medical boards reserve, on average, twenty-five percent of seats for nonphysicians.<sup>93</sup> The American Bar Association's Model Rules for Lawyer

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89. VA. CODE ANN. § 9.1-108 (2021) (reserving a seat for the Executive Director of the Virginia Indigent Defense Commission); VT. STAT. ANN. tit. 20, § 2352 (2021) (reserving seats on the Vermont Criminal Justice Council for one mental health crisis worker and two people nominated by the Vermont chapter of the NAACP); CONN. GEN. STAT. § 7-294b(b) (2020) (reserving two seats for members who may be either advocates for people with disabilities or people with disabilities); MD. CODE ANN. PUB. SAFETY § 3-201 (West 2020) (reserving a seat on the Maryland POST commission for a person with expertise in mental health); MASS. GEN. LAWS ch. 6E, § 2 (2021) (reserving seats on the Massachusetts POST commission for a social worker, for an attorney nominated by the civil rights and social justice section council of the Massachusetts Bar Association, and a person nominated by the Massachusetts Commission Against Discrimination.). In addition, the District of Columbia recently enacted temporary legislation requiring that its POST board include five community representatives, one each with expertise in law enforcement oversight, juvenile justice reform, criminal defense, violence prevention or intervention, and gender-based violence or LGBTQ advocacy, as well as the Executive Director of the Office of Police Complaints. *See also* D.C. CODE § 5-107.03 (2021) (temporarily reserving POST seats for community members with expertise in law enforcement oversight, juvenile justice reform, criminal defense, violence prevention or intervention, and gender-based violence or LGBTQ advocacy. This legislation is set to expire 225 days after taking effect.).

90. VT. STAT. ANN. tit. 20, § 2352 (2021) (reserving seats for the Vermont Director of Racial Equity and a person nominated by the Executive Director of the Vermont Civil Rights Commission); *see also* MICH. COMP. LAWS § 28.620 (2020) (reserving, via executive order, a POST commission seat for the Executive Director of the Michigan Department of Civil Rights).

91. In 2020, Vermont, Massachusetts, and Connecticut enacted laws changing the composition of their respective POST commissions. *See* 2020 Vt. Acts & Resolves no. 219; VT. STAT. ANN. tit. 20, § 2351 (2021); MASS. GEN. LAWS ch. 6E, § 2 (2021); CONN. GEN. STAT. § 7-294b(b) (2020); *See also supra* notes 85–90 and accompanying text.

92. NAT'L COUNCIL OF STATE BDS. OF NURSING, 2019 BOARD STRUCTURE SURVEY (2019), <https://www.ncsbn.org/2019BoardStructure.pdf> [<https://perma.cc/E52A-TMWR>]; FED'N OF STATE MED. BDS., BOARD COMPOSITION (2019), <https://www.fsmb.org/siteassets/advocacy/key-issues/state-medical-board-composition.pdf> [<https://perma.cc/39U2-74WN>].

93. *See* FED'N OF STATE MED. BDS., *supra* note 92.

Disciplinary Enforcement recommend that public members comprise at least one-third of each attorney disciplinary board.<sup>94</sup>

Public representation on state regulatory boards is even more important for policing than for other regulated professions. No other profession is entrusted with the power to take away life or liberty in the name of the state. Like doctors and other healthcare professionals, police officers make on-the-job decisions with life-and-death consequences. Yet people who are harmed by police often have limited remedies available to them.<sup>95</sup> A person who is harmed by a physician, nurse, or lawyer can litigate through the ordinary civil process. Moreover, the companies and institutions that employ such professionals face potential liability when their members engage in professional misconduct. Furthermore, a person who is dissatisfied with the behavior of a nurse, physician, or lawyer can often choose to be served by a different practitioner. By contrast, members of the community typically have no say over which officers are assigned to police their communities. If they experience loss, injury, or discrimination at the hands of a police officer, they face special barriers to litigation not faced by other civil litigants.<sup>96</sup> The imbalance of power between citizens and police necessitates an exceptionally strong community voice in police governance.

More states should follow the lead of states such as Massachusetts, Connecticut, and Vermont and revise their POST commissions' membership criteria to give greater voice to the non-police public, especially members of heavily policed communities. States should reserve a substantial portion of seats on their POST commission for people who have never been employed by a police department and who have no familial or financial connections to any police officer or agency.<sup>97</sup> Most of these non-police public seats should be reserved for members of and advocates for communities that often experience burdensome policing, such as Black, Native, and Latinx people, people with lived experience of mental illness, and justice-impacted people.

### III. STATEWIDE REGULATION OF POLICING TO PROTECT COMMUNITIES

Motivated POST commissions could protect the public against unjust policing in a number of ways. First, POST commissions, which act as gatekeepers to the profession of policing statewide, can screen out unsuitable police applicants before they ever patrol a community. Second, POST commissions can reshape policing

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94. MODEL RULES FOR LAW. DISCIPLINARY ENF'T r. 2 (AM. BAR ASS'N 2020).

95. Rachel Harmon, *Limited Leverage: Federal Remedies and Policing Reform*, 32 ST. LOUIS U. PUB. L. REV. 33 (2012).

96. Schwartz, *supra* note 24, at 450–54 (citing barriers to police accountability litigation such as qualified immunity); *see also* City of Los Angeles v. Lyons, 461 U.S. 95 (1983).

97. *See, e.g.*, N.M. STAT. ANN. § 29-7-3 (2020) (requiring that citizen members of POST commissions may not be “a police officer or retired police officer or have familial or financial connections to a police officer or any agency or department for which a police officer works”).

ethics and practice through their power to regulate training and set minimum policy standards that every law enforcement agency must follow. Third, POST commissions can decertify officers who have engaged in acts of violence or misconduct. This section proposes rules that POST commissions could adopt in each of these areas to better protect the public from incompetent, discriminatory, or abusive policing.

#### *A. Screen Out Unfit Police Applicants*

Police officers are empowered by the state to use force, including lethal force, to compel submission. They must use this power only when necessary, and officers must be scrupulously vetted to ensure that they will not abuse it. Because civil service protections and union contracts typically make it difficult to remove officers once they are hired, pre-employment screening is crucial.<sup>98</sup>

Failure to screen out dangerous or unfit recruits can result in the death of innocent people. In November 2014, twelve-year-old Tamir Rice was playing with a toy gun at a public playground.<sup>99</sup> Cleveland police officer Timothy Loehmann shot him on sight.<sup>100</sup> Two years earlier, Loehmann had been forced to resign from another Ohio police department for repeated failure to follow directions on firearm safety and because he had become dangerously distracted and weepy during firearms training.<sup>101</sup> Nonetheless, he was hired by the Cleveland Police Department in March 2014. Eight months later, he shot Tamir Rice.<sup>102</sup>

POST commissions can and should adopt standards for pre-employment screening that require all law enforcement agencies to reject candidates whose behavioral histories seem incompatible with lawful and equitable policing, such as violence; discrimination; hate group membership; or problems with impulse control, anger management, or emotional regulation. The two most common pre-employment screening tools prescribed by state law are background checks and psychological fitness screenings.<sup>103</sup>

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98. See Rushin, *supra* note 29; Fisk & Richardson, *supra* note 29. For example, one Massachusetts police department has twice attempted to fire one officer for assaulting women both on and off duty. Each time, the officer successfully challenged his termination in arbitration. Peter Goonan & Patrick Johnson, *Twice-fired Springfield Police Officer Anthony Bedinelli Has Termination Overturned*, MASSLIVE (Feb. 20, 2019), <https://www.masslive.com/news/2019/02/twice-fired-springfield-police-officer-anthony-bedinelli-has-termination-overturned.html> [<https://perma.cc/LKE3-DQFB>].

99. Shaïla Dewan & Richard A. Oppel Jr., *In Tamir Rice Case, Many Errors by Cleveland Police, Then a Fatal One*, N.Y. TIMES (Jan. 22, 2015), <https://www.nytimes.com/2015/01/23/us/in-tamir-rice-shooting-in-cleveland-many-errors-by-police-then-a-fatal-one.html> [<https://perma.cc/H39F-ZUH7>].

100. *Id.*

101. Tom McCarthy, *Cleveland Officer Who Fatally Shot Tamir Rice Judged Unfit for Duty in 2012*, GUARDIAN (Dec. 4, 2014, 3:52 PM), <https://www.theguardian.com/us-news/2014/dec/03/officer-who-fatally-shot-tamir-rice-had-been-judged-unfit> [<https://perma.cc/ZZW6-BZT5>].

102. *Id.*; Dewan & Oppel, *supra* note 99.

103. See *infra* notes 104, 141–142 and accompanying text.

### 1. *Comprehensive Background Checks*

Almost all states require prospective officers to complete some form of background check before they can begin duty.<sup>104</sup> The stringency of these background check requirements, however, varies widely among states. POST commissions can increase the likelihood that mandatory pre-employment background checks screen out candidates who might harm the public by setting clear, robust, and mandatory behavioral history standards for police candidates; establishing thorough background check procedures, including social media checks;<sup>105</sup> and verifying that new police officers satisfy the minimum requirements.

First, state legislatures and POST commissions should set minimum selection standards designed to identify individuals who are likely to engage in unethical, abusive, or discriminatory policing. Most states require that all prospective and current officers demonstrate good moral character,<sup>106</sup> and most disqualify prospective police officers who have been convicted of felony offenses or specified misdemeanors.<sup>107</sup> There is, however, no uniformity in state regulations that define good moral character or lack thereof.<sup>108</sup> Factors commonly included in moral character definitions include criminal history, past drug use, false statements to POST, and a history of discipline by a different state POST commission.<sup>109</sup> Many relevant behavioral patterns, though, go unmentioned in POST regulations defining moral character and other minimum selection standards. For example, a few states

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104. *Cf.* LA. STAT. ANN. § 40:2403–2405.7 (2020) (setting minimum training standards but not minimum behavioral history standards); LA. ADMIN. CODE tit. 22, § 4703 (2021) (same); N.J. ADMIN. CODE § 13:1–5.1 (2021) (setting minimum certification standards that do not include background check requirement); N.Y. COMP. CODES R. & REGS. tit. 9, § 6000.4–.8 (2021) (setting physical fitness standards, but not moral character or background check requirements).

105. *See, e.g.*, MICH. COMM’N ON L. ENF’T STANDARDS, ADVISORY STANDARD AND SELECTED BEST PRACTICES FOR BACKGROUND INVESTIGATIONS (2019), [https://www.michigan.gov/documents/mcoles/Background\\_Investigation\\_Advisory\\_Standard\\_Final\\_10-17-2019\\_668906\\_7.pdf](https://www.michigan.gov/documents/mcoles/Background_Investigation_Advisory_Standard_Final_10-17-2019_668906_7.pdf) [<https://perma.cc/CK6G-GYJE>].

106. *Cf.* COLO. REV. STAT. § 24-31-305(1)(a) (2021); CONN. AGENCIES REGS. § 7-294e-16(a) (2021); MASS. GEN. LAWS ch. 6, § 116 (2021); 550 MASS. CODE REGS. 3.06 (2020); MO. CODE REGS. ANN. tit. 11, § 75-13.020 (2005); N.Y. EXEC. LAW § 840(2) (McKinney 2020); OKLA. STAT. tit. 70, § 3311 (2020); OHIO ADMIN. CODE 109:2-1-03 (2020); 270-30-00 R.I. CODE R. § 2.4 (2020); VA. CODE ANN. §15.2-1705(A) (2021).

107. *See, e.g.*, ALASKA ADMIN. CODE tit. 13, § 85.010(b)(1) (2021), COLO. REV. STAT. § 24-31-305(1)(A) (2021); CONN. AGENCIES REGS. § 7-294E-16(A) (2021); OHIO ADMIN. CODE 109:2-1-03 (2020).

108. *See, e.g.*, FLA. ADMIN. CODE ANN. r. 11B-27.0011(1)–(3) (2021); OR. ADMIN. R. 259-008-0010(5) (2021); UTAH CODE ANN. §§ 53-6-203, -211 (West 2021); CAL. CODE REGS. tit. 11, § 1953 (2021); 12 N.C. ADMIN. CODE 09B .0101 (2020); 79 NEB. ADMIN. CODE § 005.02 (2020).

109. *See, e.g.*, FLA. ADMIN. CODE ANN. r. 11B-27.0011(1)–(3) (2021); OR. ADMIN. R. 259-008-0010(5) (2021); 12 N.C. ADMIN. CODE 09B .0101 (2020); 79 NEB. ADMIN. CODE § 005.02 (2020).

define a history of excessive force,<sup>110</sup> sexual harassment or misconduct,<sup>111</sup> dishonesty,<sup>112</sup> or discrimination<sup>113</sup> as evidence of lack of moral character, but many other states do not mention any of these.<sup>114</sup> Many statutes and POST regulations leave “moral character” completely undefined.<sup>115</sup>

POST commissions could and should require background checks not only for criminal history and substance abuse, but also for any history of domestic or other violence, professional misconduct, or dishonesty. Ties to white supremacist organizations or a known history of discrimination or domestic violence should be disqualifying evidence of poor moral character.<sup>116</sup> Florida, for example, prescribes that an officer has failed to maintain good moral character if he or she (1) knowingly, willfully, and actively participates in an activity intended to benefit a hate group, as defined in statute; or (2) engages in discriminatory conduct that does not involve an expression of public concern and that would cause a reasonable person to believe that the officer cannot perform the duties of office in a fair and impartial manner.<sup>117</sup>

POST commissions should also set clear and stringent background check procedures to ensure that background investigators identify red flags in a police candidate’s behavioral history. Some POST commissions have specified minimum

110. See, e.g., FLA. ADMIN. CODE ANN. r. 11B-27.0011 (2021); N.H. CODE ADMIN. R. ANN. Pol. 301.05(m) (2021); OR. ADMIN. R. 259-008-0300(5) (2021).

111. See, e.g., FLA. ADMIN. CODE ANN. r. 11B-27.0011 (2021); N.H. CODE ADMIN. R. ANN. Pol. 301.05(m) (2021).

112. See, e.g., FLA. ADMIN. CODE ANN. r. 11B-27.0011 (2021); N.H. CODE ADMIN. R. ANN. Pol. 301.05(m) (2021); OR. ADMIN. R. 259-008-0010(6) (2021).

113. See, e.g., FLA. ADMIN. CODE ANN. r. 11B-27.0011 (2021).

114. See, e.g., 12 N.C. ADMIN. CODE 09B .0101 (2020); MISSISSIPPI PEACE OFFICER STANDARDS AND TRAINING (BLEOST) PROFESSIONAL CERTIFICATION POLICY AND PROCEDURES MANUAL § 101.03(5) (2013); COMM’N ON L. ENF’T STANDARDS & TRAINING, ARK. DEP’T OF PUB. SAFETY, CLEST RULES 1001, 1002(3)(3); S.D. ADMIN. R. 2:01:02:01(4) (2021); MICH. ADMIN. CODE r. 28.14203(e) (2021); TENN. COMP. R. & REGS. 1110-020.03(1)(i) (2019); 250 IND. ADMIN. CODE 2-3-5 (2021); KAN. STAT. ANN. § 74-5605(b)(5) (2020).

115. See, e.g., COMM’N ON L. ENF’T STANDARDS & TRAINING, ARK. DEP’T OF PUB. SAFETY, *supra* note 114, at 1001, 1002(3)(3); S.D. ADMIN. R. 2:01:02:01(4) (2021); MICH. ADMIN. CODE r. 28.14203(e) (2021); TENN. COMP. R. & REGS. 1110-020.03(1)(i) (2019); 250 IND. ADMIN. CODE 2-3-5 (2021); KAN. STAT. ANN. § 74-5605(b)(5) (2020).

116. Seventy-two officers in Philadelphia were put on desk-duty in 2019 after The Plain View Project publicized hundreds of racist and violent Facebook posts by law enforcement officers in several departments across the country. Orion Donovan-Smith & Kayla Epstein, *72 Philadelphia Police Officers Pulled Off Street Amid Probe Into Racist Facebook Posts*, WASH. POST (June 20, 2019), <https://www.washingtonpost.com/nation/2019/06/20/philadelphia-cops-pulled-off-street-amid-probe-into-racist-facebook-posts/> [https://perma.cc/L9JD-CELY]; Emily Hoerner & Rick Tulsy, *Cops Around the Country Are Posting Racist and Violent Messages on Facebook*, INJUSTICE WATCH, <https://www.injusticewatch.org/interactives/cops-troubling-facebook-posts-revealed/> [https://perma.cc/73TT-GXS4] (last visited July 16, 2021); see also ); see also Kim Shayo Buchanan, Hilary Rau, Kerry Mulligan, Tracie Keesee & Phillip Atiba Goff, *White Supremacy in Policing: How Law Enforcement Agencies Can Respond*, CTR. FOR POLICING EQUITY (2021)..

117. FLA. ADMIN. CODE r. 11B-27.0011(15)(a)–(b) (2021).

areas of inquiry for background checks of would-be officers.<sup>118</sup> In Arizona, for example, pre-employment background checks must include the applicant's criminal record, driving record, education verification, military history, a polygraph examination, and interviews with the applicant's relatives, neighbors, and past employers.<sup>119</sup> Missouri, by contrast, requires only a fingerprint check against state and federal criminal records.<sup>120</sup> Other POST commissions are vague as to what a pre-employment background check should entail: Montana's POST regulations, for example, say only that the required background check should verify an applicant's good moral character and be "thorough."<sup>121</sup>

Finally, POST commissions could conduct or review the background checks themselves, rather than relying on the hiring law enforcement agency to conduct them.<sup>122</sup> While some POST commissions require the hiring law enforcement agency to submit verification that a background check was completed,<sup>123</sup> they do not typically conduct routine review of the stringency or results of police departments' background checks.<sup>124</sup>

When the background check is performed by the police department that seeks to hire the applicant, conflicts of interest may arise, especially when the department faces a hiring shortage.<sup>125</sup> Background check requirements may narrow a police department's available applicant pool,<sup>126</sup> tempting the hiring law enforcement

118. See, e.g., NEV. ADMIN. CODE § 289.110 (2018); CAL. CODE REGS. tit. 11, § 1953 (2021); FLA. ADMIN. CODE r. 11B-27.0011 (2021); N.H. CODE ADMIN. R. POL. 301.05(m) (2021); 37 PA. CODE § 203.11 (2021); OR. ADMIN. R. § 259-008-0015 (2021).

119. See ARIZ. ADMIN. CODE § R13-4-106 (2019).

120. MO. CODE REGS. ANN. tit. 11, § 75-13.020 (2005).

121. MONT. ADMIN. R. 23.13.201(2)(e) (2020).

122. See, e.g., CAL. CODE REGS. tit. 11, §§ 1950, 1953 (2021); FLA. ADMIN. CODE r. 11B-27.0022 (2020); ARIZ. ADMIN. CODE § 13-4-106 (2019).

123. See, e.g., FLA. ADMIN. CODE r. 11B-27.0022 (2020); FLA. DEP'T OF L. ENF'T, STANDARDS, FORM CJSTC-77, EMPLOYMENT BACKGROUND INVESTIGATIVE REPORT, <https://www.fdle.state.fl.us/CJSTC/Documents/Rules-Forms/Table-1-Forms/PDFs/CJSTC-77.aspx> [<https://perma.cc/TF29-F62Y>]; ARIZ. ADMIN. CODE § 13-4-106 (2019).

124. In California, departments must retain narrative background reports for audit, but these are not reviewed pre-certification. See, e.g., CAL. CODE REGS. tit. 11, §§ 1950, 1953 (2021); see also CALIFORNIA COMMISSION ON PEACE OFFICER STANDARDS AND TRAINING, POST BACKGROUND INVESTIGATIONS MANUAL: GUIDELINES FOR THE INVESTIGATOR 2020, at 4-13, 4-15 (2020), [https://post.ca.gov/portals/0/post\\_docs/publications/background-investigation-manual/Background\\_Investigation.pdf](https://post.ca.gov/portals/0/post_docs/publications/background-investigation-manual/Background_Investigation.pdf) [<https://perma.cc/N8RV-HEEH>].

125. Kristine Frazo, *Police Staffing Shortages a Nationwide Trend*, ABC 7 NEWS (Jan. 1, 2020), <https://wjla.com/news/nation-world/police-staffing-shortages-a-nationwide-trend> [<https://perma.cc/65AS-YJ6Y>].

126. For example, in 2018, roughly eighty-five percent of applicants to the Portland Police Department failed to pass required background checks. Lindsay Nadrich, *Portland Police, Struggling to Find Qualified Candidates, Have More Than 100 Openings*, KGW 8 (May 23, 2019, 7:27 AM), <https://www.kgw.com/article/news/local/portland-police-struggling-to-find-qualified-candidates-have-more-than-100-openings/283-1a138c49-d308-44df-9c3d-970c298f0803> [<https://web.archive.org/web/20190523180958/https://www.kgw.com/article/news/local/portland-police-struggling-to-find-qualified-candidates-have-more-than-100-openings/283-1a138c49-d308-44df-9c3d-970c298f0803>].

agency to relax its minimum selection standards and ignore behavioral red flags. In 2009, for example, the Los Angeles Sheriff's Department loosened its character standards during a major hiring push, hiring applicants who had criminal records or histories of misconduct as police officers at other agencies.<sup>127</sup> Many of these new officers committed additional crimes after they were hired.<sup>128</sup> In rural areas, the effects of hiring shortages can be even more severe. In 2019, for example, despite an Alaska law disqualifying people with domestic violence convictions from working as police officers,<sup>129</sup> all seven police officers in Stebbens, Alaska, were men with prior convictions for domestic violence.<sup>130</sup> Town administrators said they had been unable to find applicants without such histories.<sup>131</sup>

POST commissions might, like many state bar associations, retain investigators to assess whether police applicants meet the minimum standards set by state statutes and POST regulations.<sup>132</sup> They could also require police departments' background investigators to notify the POST commission whenever they uncover evidence that a candidate may have a history of violence, substance abuse, discrimination, or other disqualifying conduct—even if the candidate denies the allegations or offers evidence of subsequent rehabilitation.

POST commissions can also discourage rehiring of problem officers from other agencies by being more transparent with the public. More states could follow the example of Oregon's Department of Public Safety Standards and Training, which operates a publicly accessible online database of law enforcement certification and decertification records.<sup>133</sup> This step, though standard among other

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127. L.A. CNTY. OFF. INDEP. REV., REVIEW OF LOS ANGELES SHERIFF'S BACKGROUND INVESTIGATIONS PROCESS (Feb. 18, 2009), [http://shq.lasdnews.net/shq/LASD\\_Oversight/LASDBackground.pdf](http://shq.lasdnews.net/shq/LASD_Oversight/LASDBackground.pdf) [<https://perma.cc/GN99-8XHZ>].

128. *Id.*

129. ALASKA ADMIN. CODE tit. 13, § 85.010(b)(1) (2021).

130. Kyle Hopkins, *Dozens of Convicted Criminals Have Been Hired as Cops in Rural Alaska. Sometimes, They're the Only Applicants*, ANCHORAGE DAILY NEWS (Jul. 18, 2019), <https://www.adn.com/lawless/2019/07/18/the-alaska-village-where-every-cop-has-been-convicted-of-domestic-violence/> [<https://perma.cc/U7J3-7JD5>].

131. *Id.* Most perpetrators of domestic violence are men. If Stebbens had chosen instead to recruit women, the town might not have had to resort to an all-male police force made up entirely of convicted domestic abusers. MATTHEW R. DUROSE, CAROLINE WOLF HARLOW, PATRICK A. LANGAN, MARK MOTIVANS, RAMONA R. RANTALA & ERICA L. SMITH, BUREAU OF JUST. STATS., NCJ 207846, FAMILY VIOLENCE STATISTICS 13 (2005), <https://www.bjs.gov/content/pub/pdf/fvs02.pdf> [<https://perma.cc/HC2F-ZHE6>] (finding men comprised 75.6% of family violence offenders).

132. See *Character and Fitness Investigations*, NAT'L CONF. OF BAR EXAM'RS, <http://www.ncbex.org/character-and-fitness/> [<https://perma.cc/73HF-RMX6>] (last visited July 17, 2021).

133. OR. CRIM. JUST. INFO. RECS. INQUIRY SYS., [http://dpsstnet.state.or.us/PublicInquiry\\_CJ/smsgoperson.aspx](http://dpsstnet.state.or.us/PublicInquiry_CJ/smsgoperson.aspx) [[https://web.archive.org/web/20210224044537/http://dpsstnet.state.or.us/PublicInquiry\\_CJ/smsgoperson.aspx](https://web.archive.org/web/20210224044537/http://dpsstnet.state.or.us/PublicInquiry_CJ/smsgoperson.aspx)] (last visited Feb. 24, 2021).

professional governing bodies,<sup>134</sup> is unusual among POST commissions.<sup>135</sup> Congress could also support the work of state POST commissions by creating a national database of fired and decertified officers, similar to the National Practitioner Data Bank for healthcare practitioners.<sup>136</sup> A national database could require police departments to report officer terminations, resignations under threat of termination, civil judgments, and settlement payments. Background investigators and hiring agencies could then query this database when conducting background checks on new hires.<sup>137</sup>

State legislatures could also direct POST commissions to create similar databases at the state level. Colorado, for example, recently passed a statute requiring the POST board to create a searchable public database of officer untruthfulness, decertifications, and terminations.<sup>138</sup> POST commissions can also contribute to—and require hiring agencies to query—the National Decertification Index,<sup>139</sup> a voluntary, partial database of decertification actions maintained by the International Association of Directors of Law Enforcement Standards and Training.<sup>140</sup>

## 2. Impartial Psychological Screenings

Psychological fitness screenings are another common tool for screening new police hires. Twenty-five states require prospective officers to demonstrate psychological fitness prior to employment,<sup>141</sup> and two more provide for conditional

134. DAVID A. JOHNSON & HUMAYUN J. CHAUDHRY, MEDICAL LICENSING AND DISCIPLINE IN AMERICA 220–21 (2012).

135. See *Information Records Inquiry System - I.R.I.S.*, OREGON.GOV, <https://www.oregon.gov/dpsst/PS/Pages/IRIS.aspx> [<https://perma.cc/7Z8S-4T44>] (last visited July 17, 2021).

136. OFF. OF CMTY. ORIENTED POLICING SERVS., PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING (2015); See Ben Grunwald & John Rappaport, *The Wandering Officer*, 129 YALE L.J. 1676, 1760–61 (2020) (proposing federal database of fired officers).

137. See Grunwald & Rappaport, *supra* note 136.

138. S. 20-217, 72nd Gen. Assemb., 2nd Reg. Sess. (Colo. 2020).

139. The NDI is not available to the general public but can be queried by hiring law enforcement agencies. *About NDI*, INT’L ASS’N DIRS. L. ENF’T STANDARDS & TRAINING, <https://www.iadlest.org/our-services/ndi/about-ndi> [<https://perma.cc/F99L-73FH>] (last visited July 17, 2021).

140. The International Association of Directors of Law Enforcement Standards and Training is a private non-governmental organization comprised of POST directors of every state in the United States. IADLEST FACT SHEET, INT’L ASS’N OF DIRS. OF L. ENF’T STANDARDS & TRAINING (2021), [https://www.iadlest.org/Portals/0/IADLEST%20Fact%20Sheet%205-11-20\\_1.pdf?ver=ACWVhUR66V36RadIPpkNA%3d%3d](https://www.iadlest.org/Portals/0/IADLEST%20Fact%20Sheet%205-11-20_1.pdf?ver=ACWVhUR66V36RadIPpkNA%3d%3d) [<https://perma.cc/3KAK-2BTH>].

141. See ALASKA ADMIN. CODE tit. 13, § 85.010 (a) (2021); ARK. ADMIN. CODE § 132.00.1-1002(i) (2020); CAL. CODE REGS. tit. 2, § 599.975 (2021); COLO. REV. STAT. ANN. § 24-31-303(5)(b) (2021); CONN. AGENCIES REGS. § 7-294e-16 (2004); 1-800-801 DEL. ADMIN. CODE § 3.5 (2020); IOWA ADMIN. CODE r. 501-2.2 (2020); KAN. STAT. ANN. § 74-5605(b)(6) (2020); KY. REV. STAT. ANN. § 15.382 (15) (2021); 16-227-3 ME. CODE R. § 3(L) (2020); MD. CODE ANN., PUB. SAFETY & CORR. SERVS. § 12.04.01.04(F)(2) (2021); MINN. R. 6700.0700, subpart 1 (H) (2021); MISS. PEACE OFFICER STANDARDS & TRAINING, BLEOST PROFESSIONAL CERTIFICATION POLICY

psychological evaluation of candidates based on criminal history or when background investigations raise questions about their emotional health or stability.<sup>142</sup>

Police officers have enormous discretion and must make judgments about use of force—including deadly force—in tense, time-pressured encounters.<sup>143</sup> The ability to think clearly and exercise good judgment under pressure, then, is an essential job qualification for police officers. A history of mental illness or mental health treatment should not necessarily be disqualifying, and states should avoid adopting policies that would discourage officers from seeking treatment for addiction, anxiety, depression, or post-traumatic stress disorder, all of which police officers experience at high rates.<sup>144</sup> But untreated or uncontrolled mental or substance abuse disorders may interfere with officers' competent discharge of their duties.<sup>145</sup>

Pre-employment interviews by psychologists could also provide an additional opportunity to identify behavioral tendencies and patterns that may predict future misconduct, such as poor impulse control, cynicism, dishonesty, aggressive or antagonistic behavior, and substance abuse.<sup>146</sup> While some of these behavioral patterns might be identified in a thorough investigative background check, criminal background checks will miss problematic behavioral patterns that did not result in arrest or conviction. Even when an agency has conducted a comprehensive background check, psychological interviews provide a way for agencies to follow up on the findings of the background check.<sup>147</sup>

The stringency of mandatory psychological screening varies widely across states. In Alaska, for example, a prospective officer must submit a form completed and signed by a licensed psychologist or psychiatrist stating that the candidate is “mentally capable of performing the essential functions of the job of police officer

AND PROCEDURES MANUAL 101.03(4), at 117, <https://www.sos.ms.gov/ACProposed/00013666b.pdf> [<https://perma.cc/599L-LW3E>]; NEV. ADMIN. CODE § 289.110(2)(i) (2018); N.H. REV. STAT. § 106-L:6 (VI) (2020); N.M. STAT. ANN. § 29-7-6(6) (2018); 12 N.C. ADMIN. CODE 9B.0101(6)(2020); N.D. CENT. CODE § 12-63-06(4) (2019); OKLA. STAT. ANN. tit. 70, § 3311 (E)(1)(c) (2020); 37 Pa. Code § 203.11(a)(7) (2021); TENN. CODE ANN. § 38-8-106(9) (West 2020); TEX. OCC. CODE ANN. § 1701.306 (a)(1) (West 2019); VT. ADMIN. CODE 6-1-1:16(g) (2020); WASH. ADMIN. CODE § 139-07-030(2) (2020); WYO. STAT. ANN. § 9-1-704(b)(vii) (West 2020).

142. ALA. ADMIN. CODE r. 650-X-2-.05(3) (2017) (requiring psychological testing for those applicants with past, enumerated misdemeanor convictions); IDAHO ADMIN. CODE r. 11-11-01-061 (2017) (requiring psychological testing “where a question of emotional stability or disorder is indicated by physician or the background investigation. . .”).

143. See *Graham v. Connor*, 490 U.S. 386 (1989).

144. See Brian A. Chopko, Patrick A. Palmieri & Richard E. Adams, *Associations Between Police Stress and Alcohol Use: Implications for Practice*, 18 J. LOSS & TRAUMA 482 (2013).

145. *Id.*

146. GARY L. FISCHLER, IDENTIFYING PSYCHOLOGICAL PREDICTORS OF POLICE OFFICER INTEGRITY PROBLEMS (2004), <https://psycheval.com/wp-content/uploads/2016/07/Integrity-Project-Final-Report-12-19-04.pdf> [<https://perma.cc/X3ED-K5T6>].

147. *Id.*

and is free from any emotional disorder that may adversely affect the person's performance."<sup>148</sup> Psychological evaluations limited to questions of mental capacity and the presence or absence of diagnosable mental disorders may not be sufficient to uncover disqualifying behavioral patterns, such as violence, poor impulse control, and discrimination.<sup>149</sup>

In California, on the other hand, POST regulations specify that pre-certification mental evaluations must consider not only the absence of psychological disorders, but whether the candidate has any "job relevant psychological, emotional or mental traits [or] characteristics" that might adversely affect performance.<sup>150</sup> A qualified mental health professional must interview each prospective officer and submit a detailed report to the screening program's chief psychologist explaining whether the candidate meets the minimum psychological standards for appointment.<sup>151</sup> Also, recent California legislation requires the POST commission to review and update its psychological screening standards no later than January 1, 2022, to incorporate identification of explicit and implicit bias based on race, ethnicity, gender, nationality, religion, disability, or sexual orientation.<sup>152</sup>

### B. Reshape Police Standards and Culture

POST commissions can also reshape policing norms, rules, and practices. POST commissions are generally responsible for police training, which has a strong influence on departmental cultures and professional norms. In some states, POST commissions can also define policy standards that police departments must adopt or exceed.<sup>153</sup>

POST commissions can use these powers to build professional norms that will protect heavily policed communities. While organizational change and increased accountability are crucial to ensuring that departments implement policies in good faith, written policies and training norms set expectations and lay the foundation for professional accountability. Social science research suggests that people are less likely to discriminate or use violence when rules of decision or behavioral norms are clear and unambiguous.<sup>154</sup>

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148. See ALASKA ADMIN. CODE tit. 13, § 85.010(a) (2021).

149. See James F. Albrecht, POLICE BRUTALITY, MISCONDUCT AND CORRUPTION: CRIMINOLOGICAL EXPLANATIONS AND POLICY IMPLICATIONS 37–39 (2017); ELLEN M. SCRIVNER, THE ROLE OF POLICE PSYCHOLOGY IN CONTROLLING EXCESSIVE FORCE (1994).

150. CAL. CODE REGS. tit. 2, § 599.975 (2021).

151. *Id.*; see also CAL. COMM'N ON PEACE OFFICER STANDARDS & TRAINING, PEACE OFFICER PSYCHOLOGICAL SCREENING MANUAL (2020), [https://post.ca.gov/portals/0/post\\_docs/publications/psychological-screening-manual/Peace\\_Officer\\_Psychological\\_Screening\\_Manual.pdf](https://post.ca.gov/portals/0/post_docs/publications/psychological-screening-manual/Peace_Officer_Psychological_Screening_Manual.pdf) [<https://perma.cc/Q9VF-4CBG>].

152. CAL. GOV'T CODE § 1031.3 (West 2021).

153. See *infra* Section III.B.2.

154. Phillip Atiba Goff & Hilary Rau, *Predicting Bad Policing: Theorizing Burdensome and Racially Disparate Policing Through the Lenses of Social Psychology and Routine Activities*, 687 ANNALS AM. ACAD. POL. & SOC. SCI. 67–88 (2020).

### 1. Police Training and Continuing Education

POST commissions have broad influence over the curriculum, rigor, and methodology of police training and over who provides it.<sup>155</sup> They certify, and in many cases operate, basic training academies that all newly hired police officers must attend. They ensure that officers meet statutory minimum training requirements, and they have broad powers to require additional in-service training.<sup>156</sup> POST commissions regulate the number of training hours that officers must complete and the topics that training must cover.<sup>157</sup> POST commissions determine which academies, instructors, and courses satisfy these requirements<sup>158</sup> and, in some states, determine which law enforcement training programs can be reimbursed with state funds.<sup>159</sup> POST commissions can and should leverage their powers over police training to promote equitable policing and reduce unnecessary use of force.

Most police academies spend many more hours teaching applicants how to use a firearm than they spend on teaching de-escalation. The average police trainee receives fifty-eight hours of firearms training, but only eight hours of training on de-escalation.<sup>160</sup> Most officers will never fire a gun in their entire career,<sup>161</sup> but nearly all officers will often face the much more common challenge of de-escalating interactions with people who are agitated, inebriated, belligerent, terrified, or who are experiencing a mental health emergency.<sup>162</sup> Many police training curricula teach officers that policing is extremely dangerous to the officer and that the officer's single most important goal is to survive each shift.<sup>163</sup> Such curricula train officers to fear the people they are sworn to serve and protect, and leave them underprepared to resolve difficult interpersonal encounters without resorting to force.<sup>164</sup>

155. See *infra* notes 156–159, 175–176 and accompanying text.

156. See, e.g., ALASKA STAT. § 18.65.220 (2020); IDAHO CODE § 19-5109(1)(a), (d) (2020); N.Y. EXEC. LAW § 840(1)(b), (d) (McKinney 2020); FLA. STAT. ANN. § 943.12 (West 2020); MICH. COMP. LAWS ANN. § 28.609 (West 2020); OR. REV. STAT. § 181A.365(5)(c) (2020).

157. See, e.g., CAL. CODE REGS. tit. 11, §§ 1005, 1011, 1051–84 (2021); N.Y. COMP. CODES R. & REGS. tit. 9, § 6025.3–5 (2021).

158. See, e.g., FLA. ADMIN. CODE r. 11B-20.001 to 21.002 (2021); IDAHO CODE § 11.11.01.031 (2021); IOWA CODE §§ 501-4.1 to -4.4(80B) (2020).

159. See, e.g., MINN. R. 6700.1800 (2020).

160. POLICE EXEC. RSCH. F., RE-ENGINEERING TRAINING ON POLICE USE OF FORCE (2015), <https://www.policeforum.org/assets/reengineeringtraining1.pdf> [<https://perma.cc/4JY5-A2L3>].

161. Rich Morin & Andrew Mercer, *A Closer Look at Police Officers Who Have Fired Their Weapon on Duty*, PEW RSCH. CTR.: FACT TANK (Feb. 8, 2017), <https://www.pewresearch.org/fact-tank/2017/02/08/a-closer-look-at-police-officers-who-have-fired-their-weapon-on-duty/> [<https://perma.cc/UQN6-L99D>].

162. POLICE EXEC. RSCH. F., *supra* note 160.

163. Stoughton, *supra* note 30, at 639.

164. Seth Stoughton, a law professor and former police officer, reports that in the police academy, “[o]fficers learn to treat every individual they interact with as an armed threat and every situation as a deadly force encounter in the making . . . everyone is a threat until conclusively proven

POST commissions can require both initial and in-service training that will equip officers to resolve situations equitably and without unnecessary force. They can, for example, require training on topics like de-escalation; crisis intervention; procedural justice; bias-free policing; and interactions with vulnerable groups such as people with limited English proficiency, people in mental health crisis, Deaf people and others with disabilities, immigrants, and victims of sexual assault and domestic violence. Many POST commissions already engage in this work: since 2014, several POST commissions have increased requirements for police training on crisis intervention, de-escalation, and mental illness.<sup>165</sup>

POST commissions can also influence professional norms by implementing training curricula and continuing training requirements that emphasize restraint, de-escalation, and respect for human life, dignity, and privacy. POST commissions can, for example, require that police academies train officers to exhaust other alternatives before resorting to force—a higher bar than the minimum constitutional standard that police force be “objectively reasonable” under the circumstances.<sup>166</sup>

The professional norms communicated in POST training curricula can even influence how courts interpret the scope of constitutional protections against excessive force. While federal courts emphasize that police violation of an internal policy or state law does not necessarily mean that any constitutional violation has taken place,<sup>167</sup> some courts permit evidence in civil rights cases that a defendant violated standard professional practices.<sup>168</sup> If all officers in a state are trained to

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otherwise.” Seth Stoughton, *Law Enforcement’s “Warrior Problem,”* 128 HARV. L. REV. F. 225, 228 (2014–2015).

165. MARTHA PLOTKIN & TALIA PECKERMAN, COUNS. OF STATE GOV’TS JUST. CTR., THE VARIABILITY IN LAW ENFORCEMENT STATE STANDARDS: A 42-STATE SURVEY ON MENTAL HEALTH AND CRISIS DE-ESCALATION TRAINING 2–3 (2017), <https://csgjusticecenter.org/wp-content/uploads/2020/02/JC-LE-Survey.pdf> [<https://perma.cc/VKK8-3QCE>]; Marshall Griffin, *New Training Standards for Missouri Law Officers Include De-Escalation Techniques*, ST. LOUIS PUB. RADIO (Dec. 1, 2015, 4:56 PM), <https://news.stpublicradio.org/post/new-training-standards-missouri-law-officers-include-de-escalation-techniques#stream/0> [<https://perma.cc/5BT5-3DM8>]; David Hun, *Nixon Directs Commission to Boost Police Officer Training*, ST. LOUIS POST-DISPATCH (Aug. 6, 2015), [https://www.stltoday.com/news/local/crime-and-courts/nixon-directs-commission-to-boost-police-officer-training/article\\_b33ca859-019e-5d2a-98d2-432e7510d54e.html](https://www.stltoday.com/news/local/crime-and-courts/nixon-directs-commission-to-boost-police-officer-training/article_b33ca859-019e-5d2a-98d2-432e7510d54e.html) [<https://perma.cc/LAGL-QJYL>].

166. *Graham*, 490 U.S. at 397.

167. *See, e.g.,* *Phillips v. Norris*, 320 F.3d 844, 847 (8th Cir. 2003) (“[T]here is no federal constitutional liberty interest in having state officers follow state law or prison officials follow prison regulations.”); *Holland v. City of New York*, 197 F. Supp. 3d 529, 549 (S.D.N.Y. 2016); *Case v. Kitsap Cnty. Sheriff’s Dep’t*, 249 F.3d 921, 930 (9th Cir. 2001) (“[T]here is no § 1983 liability for violating prison policy. [Plaintiff] must prove that [the official] violated his constitutional right . . .” (quoting *Gardner v. Howard*, 109 F.3d 427, 430 (8th Cir. 1997))); *Gagne v. City of Galveston*, 805 F.2d 558, 560 (5th Cir. 1986) (“[A]llegations about the breach of a . . . regulation are simply irrelevant to the question of an official’s eligibility for qualified immunity in a suit over the deprivation of a constitutional right.”).

168. *See, e.g.,* *Abdullahi v. City of Madison*, 423 F.3d 763, 772 (7th Cir. 2005) (“[T]he plaintiff’s proffered expert testimony that Brooks’ tactics violated standard police practices, while not

follow a particular standard when using force or making an arrest, then a jury might conclude that the “reasonable officer” who serves as the benchmark in Fourth Amendment cases would also conform to that standard. Accordingly, a few courts have explicitly considered POST standards in determining whether a law enforcement officer used excessive force in violation of the Fourth Amendment<sup>169</sup> or whether a law enforcement executive was responsible for an unconstitutional failure to train.<sup>170</sup> Thus, POST regulation of police training could influence not only police culture but potentially the judiciary’s view of use of force as well.

Finally, POST commissions can refuse to provide continuing education credit or tuition reimbursement for training courses that promote overly aggressive, “warrior” approaches to policing. Widespread police training programs like “Bulletproof Warrior” and those offered by William Lewinski’s Force Science Institute have received national criticism for promoting a fear-based approach to police-community encounters and for teaching officers that they risk being murdered if they hesitate to use deadly force.<sup>171</sup> Minnesota officer Jeronimo Yanez reportedly attended a Bulletproof Warrior training two years before he shot Philando Castile at a traffic stop in 2016.<sup>172</sup> Bad police training can also spread

dispositive, may also be deemed relevant to the reasonableness inquiry . . .”); *Jimenez v. City of Chicago*, 732 F.3d 710, 721 (7th Cir. 2013) (noting that it was appropriate for police-practices expert to “describ[e] sound professional standards and identify[] departures from them”); *Restivo v. Hessemann*, 846 F.3d 547, 580 (2d Cir. 2017) (holding that district court properly admitted expert testimony on “what minimally accepted police practices required and about his opinion that [the defendant’s] conduct departed from accepted police practices”); *Kedra v. Schroeter*, 876 F.3d 424, 450 (3d Cir. 2017) (“[O]fficials are expected to use the benefit of their expertise and professional training when confronted with situations in which they are responsible for preventing harm to other individuals.”)

169. *See, e.g.*, *Young v. County of Los Angeles*, 655 F.3d 1156, 1162 (9th Cir. 2011) (considering evidence regarding California POST curriculum on pepper spray in assessing the reasonableness of deputy’s use of pepper spray in Fourth Amendment case); *Smith v. City of Hemet*, 394 F.3d 689, 703 (9th Cir. 2005) (holding that a reasonable jury could consider whether officer’s actions comported with standards set by state POST board in assessing whether use of force was reasonable).

170. *See Newsome v. Higham*, No. 7:08-CV-8 (HL), 2010 WL 1258013, at \*5 (M.D. Ga. Mar. 29, 2010) (holding that a jury could find that a sheriff was liable for failure to train a prison official who sexually assaulted a prisoner based on evidence that the sheriff allowed correctional officer to work without completing minimum POST training); *see also* Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 295 (2017).

171. Mitch Smith & Timothy Williams, *Minnesota Police Officer’s ‘Bulletproof Warrior’ Training is Questioned*, N.Y. TIMES (Jul. 14, 2016), <https://www.nytimes.com/2016/07/15/us/minnesota-police-officers-bulletproof-warrior-training-is-questioned.html> [https://perma.cc/HQ4B-DY3L]; Radley Balko, Opinion, *A Day with ‘Killology’ Police Trainer Dave Grossman*, WASH. POST: THE WATCH (Feb. 14, 2017, 5:29 AM), <https://www.washingtonpost.com/news/the-watch/wp/2017/02/14/a-day-with-killology-police-trainer-dave-grossman/> [https://perma.cc/A4HZ-8XUA] (“In the class recorded for ‘Do Not Resist,’ Grossman at one point tells his students that the sex they have after they kill another human being will be the best sex of their lives.”); Matt Apuzzo, *Training Officers to Shoot First, and He Will Answer Questions Later*, N.Y. TIMES (Aug. 1, 2015), <https://www.nytimes.com/2015/08/02/us/training-officers-to-shoot-first-and-he-will-answer-questions-later.html> [https://perma.cc/NN9L-CZKT].

172. Jennifer Bjorhus, *Officer Who Shot Castile Attended ‘Bulletproof Warrior’ Training*, STAR TRIB. (Jul. 14, 2016, 10:27 AM), <http://www.startribune.com/officer-in-castile-case-attended->

dangerous misinformation and conspiracy theories. In October 2020, the International Law Enforcement Educators and Trainers Association promoted a lengthy document that describes Black Lives Matter activists as terrorists plotting a violent revolution to overthrow the U.S. government.<sup>173</sup> The document further alleged that Black Lives Matter and antifa activists have “trained, dedicated snipers” stationed in certain cities and are fronts for Russia and China.<sup>174</sup>

In 2020, the Minnesota legislature prohibited its POST commission from offering continuing education credit or reimbursement for “warrior-style training,” which it defined as “training for peace officers that dehumanizes people or encourages aggressive conduct by peace officers during encounters with others in a manner that deemphasizes the value of human life or constitutional rights, the result of which increases a peace officer’s likelihood or willingness to use deadly force.”<sup>175</sup> If a POST board decertifies a training course that promotes an overly aggressive, fear-based approach to policing, officers will hesitate to enroll in it because their tuition would not be reimbursed. Many POST commissions possess broad authority to regulate and certify police instructors and training schools<sup>176</sup> and could decertify inappropriate training curricula even in the absence of legislative action.

## 2. Model Policies and Minimum Policy “Floors”

POST commissions can also influence police standards and behavior by adopting model policies or policy “floors” that limit police departments’ rulemaking discretion and promote police accountability. While written law enforcement policies are not a panacea, they establish a foundation for police accountability: officers cannot be held accountable for violating a standard that was never established.

In several states, POST commissions have the power to develop model

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bulletproof-warrior-training/386717431/ [https://perma.cc/CMH9-WJP7].

173. Ryan J. Foley, *Police Guide That Calls BLM a Terrorist Group Draws Outrage*, AP NEWS (Dec. 2, 2020), <https://apnews.com/article/police-guide-calls-blm-terrorist-group-8dc0afce2ce6b60dbaa0d1d9c53ce1e3> [https://perma.cc/DQ6N-D9EH].

174. *Id.*

175. MINN. STAT. ANN. § 626.8434 (West 2021); *see also* Jennifer Bjorhus, *State Police Licensing Board Plans Response to Failings in Minnesota’s Rape Investigations*, STAR TRIB. (July 27, 2018, 5:25 AM), <https://www.startribune.com/minnesota-police-licensing-board-to-address-failings-in-rape-investigations/489240711/> [https://perma.cc/SA92-Q6UP] (discussing Minnesota activists’ efforts to convince the POST board to decertify Bulletproof Warrior training courses).

176. *See, e.g.*, ARIZ. REV. STAT. ANN. § 41-1822 (2020) (granting POST the power to prescribe minimum standards for training facilities for law enforcement officers); 50 ILL. COMP. STAT. 705/6 (West 2020) (“The Board shall select and certify schools within the State of Illinois for the purposes of providing basic training . . . and of providing advanced or in-service training . . . which . . . may be either publicly or privately owned and operated.”); DEL. CODE ANN. 11, §8404 (West 2019-2020) (granting council the power to certify and decertify police instructors and police training schools); FLA. STAT. ANN. § 943.12(3) (West 2020) (same); GA. CODE ANN. §35-8-9(b) (West 2020) (same).

policies or minimum policy standards on topics identified by state law.<sup>177</sup> POST commissions have adopted model policies addressing use of force,<sup>178</sup> police pursuits,<sup>179</sup> sexual assault and domestic violence investigations,<sup>180</sup> use of electronic weapons,<sup>181</sup> fair and impartial policing,<sup>182</sup> nonenforcement of federal immigration

177. See CAL. PENAL CODE §§ 13516, 13517, 13517.5, 13517.7 (West 2021); CONN. GEN. STAT. § 7-294o (West 2020); FLORIDA STAT. ANN. § 943.1701 (West 2020); 50 ILL. COMP. STAT. 705/7.5 (West 2020); MD. CODE ANN. PUB. SAFETY §3-207(e) (West 2020); MASS. GEN. LAWS. ch. 6, § 116A(a) (West 2020); MINN. STAT. ANN. §§ 626.8454, 626.8457, 626.8458, 626.8471 (West 2021); N.H. REV. STAT. Ann. § 106-L:5(XI) (2020); N.Y. EXEC. LAW § 840(1)(j), (1)(k), (3)(f), (3)(f)(1), (3)(g), (4)(a) (McKinney 2021); UTAH ADMIN. CODE r. 728-503-1 (LexisNexis 2021); VT. STAT. ANN. tit. 20, §§ 2366(a), 2402(b) (2021); Va. Code Ann. § 9.1-102(37) (2021); WASH. REV. CODE ANN. § 43.101.226 (West 2020); WIS. STAT. ANN. § 165.85(4)(d)–(e)(1) (West 2020); see also S. No. 2963(d)(f), 191 Gen. Ct. (Mass. 2020).

178. MODEL POL'Y: USE OF CONDUCTED ELEC. WEAPONS (CONN. POLICE OFFICER STANDARDS AND TRAINING COUNS. 2014), [https://portal.ct.gov/-/media/POST/GENERAL\\_NOTICES/2014/GN1402USEOFELECTRONICWEAPONSPUBLICACT14149.pdf](https://portal.ct.gov/-/media/POST/GENERAL_NOTICES/2014/GN1402USEOFELECTRONICWEAPONSPUBLICACT14149.pdf) [https://perma.cc/H39T-NLPZ]; BD. OF TRS. MINIMUM STANDARDS: POL'Y 1 USE OF PHYSICAL FORCE (ME. CRIM. JUST. ACAD. 2020), available at <https://www.maine.gov/dps/mcja/training/index.htm> [https://perma.cc/G83W-GVLC], USE OF FORCE AND DEADLY FORCE MODEL POL'Y (MINN. PEACE OFFICER STANDARDS AND TRAINING BD. 2021), <https://dps.mn.gov/entity/post/model-policies-learning-objectives/Documents/pdf.pdf> [https://perma.cc/LXV5-5JXR].

179. 50 ILL. COMP. STAT. 705/7.5 (West 2020), Minn. Stat. Ann. § 626.8458 (West 2021), UTAH ADMIN. CODE r. 728-503 (LexisNexis 2021); VA. CODE ANN. § 9.1-102(37)(g) (2021); WASH. REV. CODE ANN. § 43.101.226 (West 2020); WIS. STAT. ANN. § 165.85(4)(d)–(e)(1) (West 2020); WIS. ADMIN. CODE LES § 3.07 (2020); BD. OF TRS. MINIMUM STANDARDS: POL'Y 2 POLICE PURSUIT POL'Y (ME. CRIM. JUST. ACAD. 2020), available at <https://www.maine.gov/dps/mcja/training/index.htm> [https://perma.cc/59GD-BFK6]; MODEL POL'Y: POLICE MOTOR VEHICLE PURSUIT POL'Y (CONN. POLICE OFFICER STANDARDS & TRAINING COUNS. 2014), [https://portal.ct.gov/-/media/POST/GENERAL\\_NOTICES/2019/19-04-Updated-Model-Pursuit-Policy.pdf](https://portal.ct.gov/-/media/POST/GENERAL_NOTICES/2019/19-04-Updated-Model-Pursuit-Policy.pdf) [https://perma.cc/V77B-WBS8].

180. See, e.g., CAL. PENAL CODE §§ 13516, 13517, 13517.5, 13517.7 (West 2021); BD. OF TRS. MINIMUM STANDARDS: POL'Y 3 DOMESTIC VIOLENCE POL'Y (ME. CRIM. JUST. ACAD. 2020), available at <https://www.maine.gov/dps/mcja/training/index.htm> [https://perma.cc/5E89-8JKY]; MASS. GEN. LAWS ch. 6, § 116A(a) (West 2020), MINN. STAT. ANN. § 629.342 (West 2021); VA. CODE ANN. § 9.1-102(37) (2021).

181. CONN. GEN. STAT. ANN. § 54-1t(b)(1) (West 2020) (“Each law enforcement agency that authorizes a police officer employed by such agency to use an electronic defense weapon shall: (A) Not later than January 31, 2015, adopt and maintain a written policy that meets or exceeds the model policy developed by the Police Officer Standards and Training Council regarding the use of an electronic defense weapon.”).

182. BD. OF TRS. MINIMUM STANDARDS: POL'Y 6 VIOLATIONS OF THE MAINE CIVIL RIGHTS ACT / HATE OR BIAS CRIMES POLICY (ME. CRIM. JUST. ACAD. 2020), <https://www.maine.gov/dps/mcja/training/index.htm> [https://perma.cc/8N3D-XTS4]; MINN. STAT. ANN. § 626.8471 (West 2021); VT. STAT. ANN. tit. 20, § 2366 (2021); VA. CODE ANN. § 9.1-102(37) (2021).

law,<sup>183</sup> and procedures for investigating complaints against officers.<sup>184</sup> While some states' POST model policies are nonbinding recommendations of best practices,<sup>185</sup> others require police departments to enact POST-prescribed policies<sup>186</sup> or set policy floors that all law enforcement agencies within the state must meet or exceed.<sup>187</sup>

In many states, POST power to set policy floors is limited to specific topics identified by the legislature.<sup>188</sup> A few states confer broad authority on POST to set minimum standards related to police use of force.<sup>189</sup> Such power could, for example, be used to enact statewide bans on the use of neck restraints or the firing of munitions indiscriminately into crowds. State legislatures could empower POST to regulate policing in the public interest by granting broad authority to set minimum policy standards in key policy areas such as use of force, force investigations, crowd management, equitable policing, sexual misconduct, and investigation of citizen complaints. State legislatures should direct POST commissions to use their policymaking authority to promote equity, reduce use of force, and protect the public from police misconduct.

POST commissions' policymaking power may also counterbalance the growing influence of private companies over police policymaking. As Ingrid Eagly and Joanna Schwartz have reported, over 3,000 law enforcement agencies in thirty-five states contract with private police policymaking company Lexipol to author their policy manuals.<sup>190</sup> Over ninety-five percent of the law enforcement agencies in California have Lexipol-created policies.<sup>191</sup> Eagly and Schwartz note that

183. VT. STAT. ANN. tit. 20, § 2366 (2021) (“Agencies and constables may not adopt a policy that allows for greater communication or involvement with federal immigration authorities than is permitted under the [Criminal Justice Training Council’s] model policy [on fair and impartial policing.]”); MODEL FAIR & IMPARTIAL POLICING POLY (VT. CRIM. JUST. TRAINING COUNS. 2017), <https://vcjc.vermont.gov/sites/vcjc/files/files/Fair%20and%20Impartial%20Policing%20Policy%2012-7-2017.pdf> [<https://perma.cc/YVX4-Q335>].

184. VT. STAT. ANN. tit. 20, § 2366 (2021), ALLEGATIONS OF MISCONDUCT MODEL POLICY (MINN. PEACE OFFICER STANDARDS AND TRAINING BD. 2011), <https://dps.mn.gov/entity/post/model-policies-learning-objectives/Documents/Allegations-of-Misconduct-Model-Policy.pdf> [<https://perma.cc/NS8U-SQXW>].

185. *See, e.g.*, WIS. ADMIN. CODE LES § 3.07 (2020) (setting advisory standards on police pursuit driving techniques).

186. *See, e.g.*, MINN. STAT. ANN. § 626.8457 (West 2021); (requiring law enforcement agencies to adopt policies on unprofessional conduct that are identical or substantially similar to the model policy adopted by the POST board).

187. *See, e.g.*, tit. 20, § 2366; BD. OF TRS. MINIMUM STANDARDS: POL’YS 1–12 (ME. CRIM. JUST. ACAD. 2020), <https://www.maine.gov/dps/mcja/training/index.htm> [<https://perma.cc/R6ED-CHBD>]; An Act Concerning the Use of Electronic Defense Weapons by Police Officers, 2014 Conn. Acts 14–149 (Reg. Sess.).

188. *See, e.g.*, FLORIDA STAT. ANN. § 943.1701 (West 2020) (domestic violence); MASS. GEN. LAWS ch. 6, § 116A(a) (West 2020) (domestic and sexual violence); VT. STAT. ANN. tit. 20, §§ 2366–2368 (2021) (unbiased policing, electronic control weapons, and body-worn cameras).

189. *See, e.g.*, MINN. STAT. ANN. § 626.8452 (West 2021); ME. REV. STAT. ANN. tit. 25, § 2803-B (West 2020).

190. Eagly & Schwartz, *supra* note 30, at 891.

191. *Id.* at 893.

while companies like Lexipol provide a valuable service to some small departments, “reliance on this private entity to establish standards for public policing also raises several concerns arising from its for-profit business model, focus on liability risk management, and lack of transparency or democratic participation.”<sup>192</sup> Lexipol has urged law enforcement agencies to reject reforms suggested by leading law enforcement industry groups like the Police Executive Research Forum (PERF), cautioning departments not to adopt use-of-force policies more stringent than the constitutional floor set in *Graham v. Connor*<sup>193</sup> and objecting to PERF’s suggestion that sanctity of life should be the central principle of every use-of-force policy.<sup>194</sup> POST commissions can use their policy-setting power to ensure that law enforcement agencies adopt rules that prioritize protection of the public over protection of police departments against lawsuits.

### C. Discipline and Decertify Dangerous Officers

Too often, officers who commit serious acts of violence or misconduct remain employed by police departments or find new police work after being fired.<sup>195</sup> Detroit police officer Gary Allen Steele fired a gun near his girlfriend’s head during

192. *Id.* at 891.

193. Bruce Praet, *National Consensus Policy on Use of Force Should Not Trigger Changes To Agency Polices*, LEXIPOL (Jan. 25, 2017), <https://www.lexipol.com/resources/blog/use-caution-when-changing-use-of-force-policy-language/> [https://perma.cc/T38A-8X8B] (“While ‘de-escalation’ has become the latest buzzword and is conceptually advisable, agencies must exercise extreme caution when mandating action with the use of inflexible ‘shalls.’”).

194. Michael Ranalli, *Priority of Life: Building a Better Model for PERF’s First Guiding Principle*, LEXIPOL (June 8, 2016), <https://www.lexipol.com/resources/blog/priority-life-building-better-model-perfs-first-guiding-principle-2/> [https://perma.cc/2Y35-CC5A].

195. Timothy Williams, *Cast-Out Police Officers Are Often Hired in Other Cities*, N.Y. TIMES (Sept. 10, 2016), <https://www.nytimes.com/2016/09/11/us/whereabouts-of-cast-out-police-officers-other-cities-often-hire-them.html> [https://perma.cc/G3PB-KNCX]; Courtney Teague, *Senate Waters Down Bill To Set Minimum Police Officer Standards*, HONOLULU CIV. BEAT (Apr. 4, 2018), <https://www.civilbeat.org/2018/04/senate-waters-down-bill-to-set-minimum-police-officer-standards/> [https://perma.cc/2K29-A2VG]; Roger L. Goldman, *Opinion, Rogue Cops Should Not Be Recycled From One Police Department to the Next*, GUARDIAN (May 20, 2015, 7:15 PM), <https://www.theguardian.com/commentisfree/2015/may/20/rogue-cops-should-not-be-recycled-from-one-police-department-to-the-next> [https://perma.cc/6FXV-PCJ3]; Anthony Fisher, *Why It’s So Hard to Stop Bad Cops From Getting New Police Jobs*, REASON (Sept. 30, 2016, 1:00 PM), <https://reason.com/2016/09/30/why-its-so-hard-to-stop-bad-cops-from-ge/> [https://perma.cc/K6S5-CJDK]; Christopher N. Osher, *Felony Guilty Plea Did Not End Colorado Cop’s Career; Havoc Followed*, DENVER POST (Dec. 12, 2015, 1:08 PM), <https://www.denverpost.com/2015/12/12/felony-guilty-plea-did-not-end-colorado-cops-career-havoc-followed/> [https://perma.cc/VU8L-UZYM]; Robert Faturechi & Ben Poston, *Sheriff’s Department Hired Officers with Histories of Misconduct*, L.A. TIMES (Dec. 1, 2013), <https://graphics.latimes.com/behind-the-badge/> [https://perma.cc/H2QH-RFZJ]; Kimbriell Kelly, Wesley Lowery & Steven Rich, *Forced Out Over Sex, Drugs and Other Infractions, Fired Officers Find Work in Other Departments*, WASH. POST (Dec. 28, 2017), [https://www.washingtonpost.com/investigations/forced-out-over-sex-drugs-or-child-abuse-fired-officers-find-work-in-other-departments/2017/12/22/e0512774-d3a7-11e7-95bf-df7c19270879\\_story.html](https://www.washingtonpost.com/investigations/forced-out-over-sex-drugs-or-child-abuse-fired-officers-find-work-in-other-departments/2017/12/22/e0512774-d3a7-11e7-95bf-df7c19270879_story.html) [https://perma.cc/27JP-3D3C].

an argument.<sup>196</sup> After being charged with attempted murder, he pled guilty to misdemeanor assault and was permitted to stay on the force.<sup>197</sup> Officer Eddie Boyd resigned from the St. Louis Police Department after striking two children in the face with weapons without justification, only to be rehired by two other Missouri police departments.<sup>198</sup> Ethan Ferguson was fired from the Honolulu Police Department after falsifying reports and lying to his supervisors about transporting a minor girl, but went on to be hired at a new job as a state conservation officer, where he sexually assaulted another teenage girl.<sup>199</sup>

POST commissions' decertification power can prevent violent police officers from harming more people when law enforcement agencies fail to act.<sup>200</sup> Forty-seven states empower POST commissions to revoke an officer's certification, preventing the officer from working as a police officer anywhere within the state.<sup>201</sup> All POST agencies that have decertification authority can revoke an officer's certification if the officer is convicted of a felony, and forty-six states can revoke certification based on certain misdemeanor convictions.<sup>202</sup> Most states also empower POST commissions to decertify officers who commit serious misconduct on the job.<sup>203</sup>

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196. Louise Radnofsky, Zusha Elinson, John R. Emshwiler & Gary Fields, *Why Some Problem Cops Don't Lose Their Badges*, WALL ST. J. (Dec. 30, 2016, 12:10 PM), <https://www.wsj.com/articles/why-some-problem-cops-dont-lose-their-badges-1483115066> [<https://perma.cc/FCV3-RK35>].

197. *Id.*

198. Williams, *supra* note 195.

199. Michael Martinez & Keith Allen, *Hawaii Officer Charged with Sexual Assault of Girl While on Duty*, CNN (Jan. 15, 2016, 8:50 PM), <https://www.cnn.com/2016/01/15/us/hawaii-dlnr-officer-ethan-ferguson-charge-sexual-assault/index.html> [<https://perma.cc/C3T4-4E5V>]; Nick Grube, *Woman Sues Hawaii for Hiring Ex-Cop Who Then Assaulted Her*, HONOLULU CIV. BEAT (Jan. 3, 2018), <https://www.civilbeat.org/2018/01/woman-sues-hawaii-for-hiring-ex-cop-who-then-assaulted-her/> [<https://perma.cc/3727-LCK3>].

200. *See infra* notes 201–203 and accompanying text.

201. The three states that lack decertification authority are California, Rhode Island, and New Jersey. *See* CAL. PENAL CODE § 13503(i) (West 2021); N.J. STAT. ANN. § 40A:14-122 (West 2020); 42 R.I. Gen. Laws § 42-28.2-10 (2020). California's POST Commission previously held limited authority to cancel officer certificates, but police unions successfully lobbied the state legislature to rescind the commission's decertification power in 2003. *See* Roger L. Goldman, *Importance of State Laws in Police Reform*, 60 ST. LOUIS U. L.J. 363, 386 n.137 (2016).

202. *See, e.g.*, ALASKA ADMIN. CODE tit. 13, § 85.110(b)(1) (2021); NEB. REV. STAT. ANN. § 81-1403(6) (West 2020); TEX. OCC. CODE ANN. § 1701.501 (West 2019). Ohio's POST commission has exceptionally limited decertification authority: the commission can revoke an officer's license only based on a felony conviction or guilty plea, or when an officer charged with a felony agrees to surrender his certificate as part of a misdemeanor plea agreement. *See* OHIO REV. CODE ANN. §§ 109.77(F), 2929.43(D) (West 2020).

203. *See e.g.* ARIZ. ADMIN. CODE § R13-4-109(A)(8), (12) (2019) (authorizing decertification when an officer commits "malfeasance, misfeasance, or nonfeasance in office"); S.C. CODE ANN. REGS. R. 37-026 (2021) (requiring decertification when the Council is presented with satisfactory evidence that an officer has committed misconduct as defined in applicable regulations); NEB. REV. STAT. ANN. § 81-1403(6) (West 2020) (authorizing decertification for violation of POST rules); N.D. CENT. CODE § 12-63-04(4) (2019) (same); ME. STAT. ANN. tit. 25, § 2806-A (West 2020) (authorizing decertification for "gross deviations from the standard of conduct to which a reasonable officer would

Most POST commissions, however, rarely use these powers. Two states—Florida and Georgia—were responsible for more than half of the 1,847 certification revocations in 2015.<sup>204</sup> Twelve states that had decertification power either never used it that year or used it only once or twice.<sup>205</sup> Even when officers commit crimes or egregious misconduct, POST commissions do not consistently decertify them. A 2015 *Wall Street Journal* report analyzed a database of 3,458 police officers across the United States whose arrests between 2005 and 2011 resulted in either convictions, job termination, or both. Four years later, 332 of these officers—almost ten percent—were still working as police officers.<sup>206</sup> A 2019 investigative report found that one out of five California officers convicted of a crime over the past ten years kept their jobs for at least a year after conviction.<sup>207</sup>

There are many possible reasons why POST decertification power is currently underutilized. First, as shown in Parts I and II, members of POST commissions are unlikely to see police accountability as central to their mandate because neither the state nor the commission directs them to use their powers to protect the public against police misconduct. Additionally, in some states, the bar for decertification is too high to be useful. In several states, for example, misconduct is not grounds for decertification unless it results in a criminal conviction.<sup>208</sup> Such limitations make it extremely difficult for POST commissions to decertify officers who commit even serious forms of misconduct. Some forms of police misconduct, such as sexual harassment and racial profiling, may not be punishable as criminal offenses. Others, such as excessive force, could theoretically be punished as criminal assault or homicide, but such prosecutions are extremely rare.<sup>209</sup> State legislatures could bolster police accountability by ensuring that POST commissions discipline officers for acts of violence or on-the-job misconduct regardless of whether that conduct

adhere”); ALASKA ADMIN CODE tit. 13, § 85.110(b)(1) (2021) (authorizing decertification if an officer fails to maintain good moral character); FLA. STAT. ANN. § 943.1395(7) (West 2020) (same); *cf.* COLO. REV. STAT. ANN. 24-31-305(2) (West 2021); 50 ILL. COMP. STAT. ANN. 705/6.1(a), (e) (West 2020); IND. CODE ANN. § 5-2-1-12.5(a)(1) (West 2020); MICH. COMP. LAWS ANN. § 28.609 Sec. 9 (12) (West 2020); OHIO REV. CODE ANN. §§ 109.77(F), 2929.43(D) (West 2020); TEX. OCC. CODE ANN. § 1701.501(d)(1) (West 2019); VA. CODE ANN. § 15.2-1707(A)(ii)–(iv) (West 2020); UTAH CODE ANN. § 53-6-211(1)(d) (West 2020).

204. HICKMAN, *supra* note 18.

205. Connecticut, Delaware, Indiana, Louisiana, Maryland, Minnesota, Mississippi, New Hampshire, North Dakota, Pennsylvania, South Carolina, and Wisconsin. *See id.*

206. Radnofsky et al., *supra* note 196.

207. Robert Lewis & David DeBolt, *Many California Cops Have Kept Their Jobs After Being Convicted of a Crime*, VOICE SAN DIEGO (Nov. 10, 2019), <https://www.voiceofsandiego.org/topics/public-safety/many-california-cops-have-kept-their-jobs-after-being-convicted-of-a-crime/> [https://perma.cc/S6S2-U3H5].

208. *See, e.g.*, 50 ILL. COMP. STAT. ANN. 705/6.1 (West 2020); IND. CODE ANN. § 5-2-1-12.5 (West 2020); MICH. COMP. LAWS ANN. § 28.609 Sec. 9 (12) (West 2020); OHIO REV. CODE ANN. § 109.77(F) (West 2020); LA. ADMIN CODE. tit. 22, § 4731 (2021).

209. *See* Tom Jackman & Devlin Barrett, *Charging Cops with Crimes is Still Difficult for Prosecutors*, WASH. POST (May 29, 2020, 4:25 PM), <https://www.washingtonpost.com/crime-law/2020/05/29/charging-cops-with-crimes-is-still-difficult-prosecutors/> [https://perma.cc/764F-WWLK].

leads to a criminal conviction.<sup>210</sup>

Moreover, most POST statutes confer broad discretion as to whether and when to decertify, even in cases of severe misconduct. If an officer commits severe misconduct, POST commissions in most states *may* decertify the officer, but decertification is not compulsory unless the officer is convicted of a specified crime.<sup>211</sup> More states could choose to follow the example of states like Oregon, which mandates decertification if an officer is terminated for corruption, false testimony, falsification of evidence, brutality, sexual abuse, intimidation, or deliberately obtaining a false confession.<sup>212</sup>

Even if they have power to decertify and want to use it, POST commissions typically lack the investigative staff and institutional resources that would be required to investigate and adjudicate decertification cases. Currently, POST commissions delegate investigations to the law enforcement agency that employs the officer, rather than investigating complaints independently.<sup>213</sup> Self-investigation is not sufficient to ensure accountability for police misconduct. Ineffective accountability systems,<sup>214</sup> inadequate supervision,<sup>215</sup> and a culture of cover-up<sup>216</sup> remain serious problems in many police departments. State legislatures should ensure that POST commissions have adequate powers, staff, and resources to

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210. Goldman & Puro (1987), *supra* note 33, at 74; Goldman & Puro (2001), *supra* note 33, at 553–55; Goldman (2003), *supra* note 33, at 122–23; Goldman (2012), *supra* note 33; Goldman, *supra* note 201.

211. *See, e.g.*, ARIZ. ADMIN. CODE § 13-4-109.01 (2020); MINN. R. 6700.1600 (2020); 12 N.C. ADMIN. CODE 9A.0204(b)(2) (2020); RULES: CHAPTER 8 (WYO. PEACE OFFICER STANDARDS AND TRAINING COMM’N 2018); WASH. REV. CODE ANN. § 43.101.105 (West 2020); N.M. STAT. ANN. § 29-7-13(A) (West 2020).

212. Or. Admin R. 259-008-300(2)(e) (2021); *see also* S.C. CODE ANN. REGS. R. 37-026(A)(4) (2021) (requiring decertification of officers who are found to have committed misconduct as defined in statute); S. 20-217, 72d Assemb., 2d Reg. Sess. (Colo. 2020) (requiring decertification of any officer found civilly liable for excessive force or failure to intervene to prevent excessive force); S. 2963 ch. 6E, § 10, 191 Gen. Ct., (Mass. 2020) (requiring decertification when an officer has been terminated for specified misconduct and all appeals of the termination have been completed).

213. *See, e.g.*, POST BD. COMPLAINT PROCESS (MINN. PEACE OFFICER STANDARDS AND TRAINING BD. last visited Apr. 7, 2021), <https://dps.mn.gov/entity/post/contact/Documents/POST%20Complaint%20process%202020%20web%20version.pdf> [https://perma.cc/5J8L-CJH8] (“Investigations are not conducted by Board staff.”).

214. *See, e.g.*, Stephen Rushin, *Police Disciplinary Appeals*, 167 U. PA. L. REV. 545 (2019) (arguing that police disciplinary appeals create significant barriers to internal accountability within police departments).

215. *See, e.g.*, Armacost, *supra* note 30, at 474; U.S. DEP’T OF JUST., CIVIL RIGHTS DIVISION’S PATTERN AND PRACTICE POLICE REFORM WORK: 1994–PRESENT, at 44–47 (2017) (discussing several investigations revealing patterns of weak discipline and inadequate supervision); CARL B. KLOCKARS, SANJA KUTNJAK IVKOVICH, WILLIAM E. HARVER & MARIA R. HABERFELD, U.S. DEP’T OF JUST., NCJ 181465, THE MEASUREMENT OF POLICE INTEGRITY (2000), <https://www.ncjrs.gov/pdffiles1/nij/181465.pdf> [https://perma.cc/92E6-57P8].

216. *See* Gabriel J. Chin & Scott C. Wells, *The “Blue Wall of Silence” as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 250–51 (1998); Stoughton, *supra* note 30, at 661–62; KLOCKARS ET AL., *supra* note 215, at 6.

investigate complaints of misconduct and take appropriate disciplinary action<sup>217</sup>—even when police departments fail to do so.<sup>218</sup>

When the professional regulatory bodies of other professions have increased resources for investigation, disciplinary actions have increased accordingly. For example, in the 1980s, the California State Bar faced strong criticism that its disciplinary system was slow, opaque, and ineffective.<sup>219</sup> California overhauled state bar disciplinary procedures and increased its resources for professional discipline. In 1985, the California State Bar had a budget of \$17.8 million, forty-four percent of which was spent on attorney discipline. By 1992, the Bar's budget had increased to over \$50 million, seventy-five percent of which was dedicated to professional discipline processes.<sup>220</sup> During that time frame, the number of attorneys disciplined by the State Bar each year more than doubled.<sup>221</sup>

Finally, POST commissions might use their decertification powers more frequently if POST commissions routinely received information about officer terminations, discipline, and other potentially concerning incidents. State legislatures could require law enforcement agencies to share officer disciplinary records with POST or to notify POST whenever an officer is fired, resigns under threat of termination, or is disciplined for excessive force, dishonesty, witness or evidence tampering, perjury, or sexual assault.<sup>222</sup> Agency disciplinary action should not, however, be the only trigger for mandatory reporting. For many police departments, union contracts and law enforcement officers' bill of rights laws create substantial obstacles to imposing discipline on officers who commit even serious acts of misconduct.<sup>223</sup> State legislatures could also require law enforcement agencies to notify POST commissions when an officer is arrested or charged with a crime, is found civilly liable for excessive force or misconduct, is involved in a shooting, or is involved in any other encounter that results in serious injury or death. State legislatures could also mandate that law enforcement agencies notify POST

217. In at least some states, including California, Oregon, and Mississippi, POST commissions obtain funding through assessments and surcharges on criminal and traffic convictions. *See About POST*, *supra* note 10 (“POST funding comes from the State Penalty Fund, which receives money from penalty assessments on criminal and traffic fines.”); OR. REV. STAT. ANN. § 137.300(2)(a) (West 2020); MISS. CODE ANN. § 45-6-15 (2021). Funding obtained through assessments on criminal and traffic convictions may not suffice to support a full staff of investigators. Moreover, this funding stream necessarily entails a conflict of interest: training and regulation that reduces the number of arrests and citations would reduce the commission's funding. Funding through state general funds or licensing fees for certified officers or trainers could eliminate these conflicts of interest and put POST commissions in a better position to investigate citizen complaints and hold officers accountable for misconduct.

218. *See supra* notes 190–191 and accompanying text.

219. William T. Gallagher, *Ideologies of Professionalism and the Politics of Self-Regulation in the California State Bar*, 22 PEPP. L. REV. 485, 603–04 (1995).

220. *Id.*

221. *See, e.g.*, Rushin, *supra* note 29, at 1196–98; Fisk & Song Richardson, *supra* note 29, at 749–50.

222. *See, e.g.*, N.H. REV. STAT. ANN. § 105:19 (2020).

223. *See, e.g.*, Rushin, *supra* note 29; Fisk & Song Richardson, *supra* note 29.

commissions when they receive a complaint that an officer has committed sexual assault or tampered with evidence. Such information sharing could empower POST commissions to investigate and intervene where the employing agency's response (or nonresponse) is insufficient.

#### CONCLUSION

POST commissions must do more than ensure that officers know how to investigate crimes and use firearms. Their highest priority must be to protect the public, as the governing bodies of other regulated professions do. POST commissions could and should use their powers to ensure that the public is protected not only against crime, but also against individual and institutional decisions that result in misconduct, discrimination, or violence. For POST commissions to fulfill this potential, we need structural change. POST commissions must include meaningful representation of the communities that are most exposed to burdensome policing, and they need a clear mandate to use their powers to promote equity and protect the public. These changes could recreate POST commissions as agents of change, empowered to promote equitable and accountable public safety.

