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KKK IN THE PD: WHITE SUPREMACIST POLICE AND WHAT TO DO ABOUT IT

There is an epidemic of white supremacists in police departments. Police officers have been identified as members of white supremacist groups in Florida, Alabama and Louisiana. There have been scandals in over 100 different police departments, in over forty different states, in which individual police officers have sent overtly racist emails, texts, or made racist comments via social media. This is a nation-wide problem. It is one that is not limited to just beat officers; some of these shocking occurrences have even involved high-ranking members of their respective police forces.

Although the F.B.I. warned of white supremacists infiltrating police departments in 2006, the denial of the problem has only enabled it to continue seemingly unabated.

While there have been some moderate successes in criminal justice reform in the last decade, the existence of white supremacists in police departments hamper that success. Frequent incidents of overt police racism, and the ensuing media reports about them, make the general public, and particularly people of color, less likely to see racism at the hands of the police and criminal justice system as unconscious and more likely to view it as purposeful. These legitimate fears further diminish the criminal justice system in the eyes of the people to whom it is most harsh.

As tensions mount between communities of color and police, public opinion of police is low. A third of Americans have an unfavorable opinion of police. The number is even higher among African Americans: 60% have an unfavorable view of law enforcement. This dispiriting relationship threatens the reputation of the criminal justice system, the physical safety of certain communities and the very fabric of our country. Without swift action by state and federal law enforcement, things will only get worse. The problem cannot be overstated. So far, however, this problem has not attracted many solutions.

****206** One tool that could be employed to address the problem is a more expansive enforcement of the Brady doctrine. Prosecutors could be required to seek out information about police officers and disclose that information to the defense when they learn that an officer holds these biases. The Supreme Court has long held that the government must disclose any information that is favorable to the defense. There is no doubt that membership in a hate group or ascribing to racist beliefs would be fodder for cross-examination of an officer and useful to the defense.*

The Supreme Court has established that the government cannot avoid knowing information that is favorable to the defense. And police departments are considered the government for Brady purposes. The Supreme Court has never ruled on the issue of whether membership by a government witness in a hate group would be Brady material. Some courts have already found that evidence of racial animus should be disclosed to the defense by the government. By taking Brady seriously and searching for racist police officers, indigent criminal defendants will get fairer trials, the public will be informed of problem officers through public trials, and police and prosecutors get the opportunity to identify problematic police officers and take action to rid the force of these officers.

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INTRODUCTION

For years many have argued that our criminal justice system is biased against people of color.¹ While now there seems to be agreement among most that the system has been disproportionately applied against communities of color, recently the *207 only question has been whether this has happened by design or unwittingly by mostly good institutional actors.² At the same time that this conversation has taken place amongst academics, over the last several years there has been an alarming rise in hate groups and hate crimes in the United States.³ For many years scholars and law enforcement have been sounding the alarm about far-right extremism in this country.⁴ Particularly since the 2008 election of Barack Obama as president, the hate crime and hate group numbers have skyrocketed.⁵ The election of Donald Trump in 2016 has seen numbers rise even further.⁶

Appalling incidents of violence like those in Charlottesville, where a young woman was killed and 19 others were injured in 2017,⁷ the horrifying mass shooting in Charleston, South Carolina at a landmark black church that killed nine and wounded others in 2015,⁸ the attack that killed two men in Portland who saved a *208 young Muslim woman on a train in 2017,⁹ and the murder by a white supremacist of a black man in New York City in 2017¹⁰ have gripped the nation. When vulnerable minority groups feel threatened one would imagine there would be a desire to seek protection from law enforcement and their government.

Unfortunately, this significant rise in hate group membership and hate ideology is seen not just in the public but within law enforcement as well. Newer white supremacist organizations have focused on veterans,¹¹ college students¹² and infiltrating police departments.¹³ Communities of color feel they cannot seek safety by calling police. Many in communities of color already are afraid of police because of the killings of unarmed blacks and other minorities that have been making headlines for decades but particularly since the killings in Ferguson,¹⁴ Staten Island,¹⁵ Cincinnati¹⁶ and elsewhere.¹⁷ Some see racism as the cause of this violence against people *209 of color at the hands of police.¹⁸ For the most part, local law enforcement has allowed the killing of unarmed blacks to go on with few officers being prosecuted for these murders.¹⁹ The few that are prosecuted are almost always acquitted.²⁰ With a *210 weak civil rights division of the Department of Justice under President Trump,²¹ communities of color are unlikely to see any federal prosecution of law enforcement for unarmed shootings of black citizens, much less hate crimes.

Chillingly, since 2009 there have been a number of instances of police officers being identified as members of white supremacist groups in Florida, Alabama, and Louisiana.²² In that same period, there have been scandals in over a 100 different police departments, in 49 different states where individuals have sent overtly racist emails, texts, or made racist comments via social media.²³ In some cases these disturbing comments have been made to other officers; in other instances comments have been made on public social media platforms. This appears to be a nation-wide problem. This problem is not limited just to beat officers, some of these shocking occurrences have even involved high-ranking members of their respective police forces.²⁴

Some of these biases held by police officers are longstanding ones which existed before the individual became an officer. In many instances, the officer attempts to hold these biases secret so departments may not know when an officer may hold racist beliefs.²⁵ Civilians, as well as law enforcement, may not comprehend the scope of the problem. In some circumstances police officers harboring racist ideologies purposefully set out to influence other white officers that do not hold these views.²⁶ Some officers may become recruited into hate groups while in the department by their fellow officers.²⁷ Other officers may simply become so immersed in the culture of the police department that they may not even know that the views being expressed are ones based on white supremacy. In any event, people who hold white supremacist belief systems have no place being entrusted to enforce our nation's laws.

Although the F.B.I. warned of white supremacist infiltrating police department *211 in 2006,²⁸ the denial of the problem by local police brass has only enabled it to continue seemingly unabated. It seems that few departments are acknowledging the matter or taking any serious steps to curb this frightening problem. When an officer is identified as holding racist beliefs, police departments often claim that he or she was a “lone-wolf” and downplay any possibility that these beliefs are held by others in the department.²⁹ This false narrative that we live in a color-blind world and there is no racial bias in police department persists. Because of this storyline that these biases do not exist in departments, few steps are taken to curb these biases or identify officers who carry them.

While there have been some successes in criminal justice reform,³⁰ the existence of white supremacists in police departments hampers that success. The system can never achieve its purported goal of fairness while white supremacists continue to hide within police departments. Of course, people of color experience racism by *212 police officers, both implicit and explicit. These incidents of racial animus sometimes make the headlines.³¹ With news stories about police racism continuing consistently the general public, and particularly people of color, are less likely to see racism at the hands of the police and criminal justice system as unconscious and more likely to view it as purposeful. These legitimate fears further diminish the criminal justice system in the eyes of the people to whom it is most harsh.

The lack of feelings of safety and security in communities of color coupled with the rise of tensions with police have created a dispiriting relationship between police and the communities they are sworn to serve. White people are overrepresented on police forces in most major cities.³² This exacerbates the problem as people of color do not see themselves reflected in their local police departments. Public opinion of police is low with a third of Americans not having a favorable opinion of police--the number is even lower when limited to African Americans with 60% having an unfavorable view of law enforcement.³³ This tension threatens the reputation of the criminal justice system, the physical safety of certain communities and the very fabric of our country. Without swift action by state and federal law enforcement things will only get worse. The problem cannot be overstated. So far, however, this problem has not attracted many solutions.

One tool that could be employed to aid criminal defendants as well as the entire criminal justice system is to use the *Brady* doctrine³⁴ to seek out information about police officers and disclose to the defense that a particular officer holds these biases. The Supreme Court has long held that the government must disclose any information that is favorable to the defense.³⁵ There is certainly no doubt that membership in a hate group or ascribing to racist beliefs would be fodder for cross-examination of an officer and useful to the defense. The 1990s O.J. Simpson doublemurder trial is an example of how jurors can be so turned off by an officer's racism that they question the officer's veracity and role in the investigation. In that case, the officer's “racist past became a focal point” in the trial.³⁶

*213 The Supreme Court has established that the government cannot avoid knowing information that is favorable to the defense.³⁷ And police departments are considered the government for *Brady* purposes.³⁸ The Supreme Court has never

ruled on the issue of whether membership by a government witness in a hate group would be *Brady* but has approved cross-examination on the topic to show bias. Some courts have already found that evidence of racial animus should be disclosed to the defense by the government.³⁹ By taking *Brady* seriously and searching for racist police officers, indigent criminal defendants will get fairer trials, the public will be informed of problem officers through public trials, and police and prosecutors get the opportunity to identify problematic police officers and take action to rid the force of these officers.

This Article will make two main points. One is that explicit racial bias, not just unconscious bias, is a serious problem within police departments. This Article will add to the discussion about racism in the criminal justice system by showing that conscious racism exists in many police departments. Officers who have such beliefs are easier than ever to identify as a result of social media, text messages, emails and internet presence. The other main point is to suggest using the *Brady* doctrine as a tool for those who are serious about combatting racism in the criminal justice system. Section I will illustrate the fact that there are many officers who are members of hate groups or hold racist philosophies. These beliefs harm any individual person accused by the officer of a crime. In addition, they may infect other officers on the force. And ultimately, when discovered they can harm the community by increasing racial tensions and undermining confidence in the already beleaguered criminal justice system. The breadth of the problem will constitute the second and third sections of this piece. Section IV will examine the consequences of allowing the problem to continue without being sufficiently addressed. Section V will suggest the use of *Brady* as a way to ferret out the police with unacceptable extremist views on race. By conforming to the Due Process obligations of *Brady*, police departments and prosecutors must seek out this information not just in hiring, but throughout an officer's tenure in the force and before preparing for each case. The Article will also set forth tools outside of the *Brady* doctrine to tackle the problem of racist police.

I. HATE GROUPS AND THE POLICE

In Michelle Alexander's 2010 groundbreaking book, *The New Jim Crow*, she successfully makes the case that in the United States there has been a connection *214 between racial animus particularly towards blacks and the police especially since civil rights era.⁴⁰ Many have since shared that concern, both before and since her revolutionary book.⁴¹

America has been on notice about the problems with police and racism for some time. In 2006, the FBI warned about white supremacist groups infiltrating police departments.⁴² In 2009, the Department of Homeland Security warned of a resurgence in white supremacist groups as America had just elected its first black president.⁴³ The belief was that white supremacists were out to recruit new members and were specifically targeting angry former military personnel.⁴⁴ It was considered the biggest "domestic terrorism threat in the United States."⁴⁵

Things have not improved since then--they have only gotten worse. The last several years have seen a rise in hate groups in the United States. Anti-Muslim groups tripled in the U.S. just since 2015.⁴⁶ According to reporting by the Washington Post, there were 194 hate groups in 2008 but after President Obama was sworn in, the number sky rocketed to 1,000 in 2013.⁴⁷ The Trump presidency is considered by some to be a racialized response to the Obama years.⁴⁸ Those views are bolstered by the fact that the rise in hate group affiliation has continued to climb since Trump took office in 2017.⁴⁹

Unsurprisingly, with the rise in hate groups, hate crime numbers have soared *215 as well. There has been a surge in recruitment for white supremacist groups on college campuses.⁵⁰ Crimes against Muslims rose by 67%,⁵¹ and generally, hate group membership is up.⁵² Whether this reflects a backlash against President Obama as some have argued, a feeling among whites that with their diminishing numbers their culture will no longer be the dominant one in the United States,⁵³ or perhaps exacerbated by the racist rhetoric of the 2016 presidential campaign is up for debate.⁵⁴ Whatever the reason, the trend is more than a bit alarming, particularly to people of color.

But just when people of color feel their most vulnerable,⁵⁵ news stories have emerged that show that racist views and membership in hate groups is not limited to civilians. Instead, law enforcement officers with membership in hate groups and racist beliefs are found in police departments all over the country.

In addition to this being a problem for people of color who have reason to fear the police, law enforcement and public officials should be alarmed at the rise in *216 racial animus in police departments because if communities of color fear the police, those communities will be less interested in relying on traditional institutions for safety and security and reporting crime. Fewer reports of crime by minorities and unwillingness to cooperate with law enforcement as witnesses will be the result.⁵⁶ According to one study, there were 22,000 fewer 911 calls following police violence against a black man in Milwaukee, and the effect lasted a year after the shooting.⁵⁷ One can only assume that when communities of color hear local stories of hate group affiliations or explicitly racist beliefs being shared in their local police departments, or on social media, this will also cause them to distrust police. This is a problem for public safety, for the reputation of our systems, and prosecutors who need witnesses to make cases.

II. RACISM IN POLICE DEPARTMENTS

Unconscious bias is pervasive in our daily lives, and law enforcement is certainly no exception of course. Unconscious bias, also known as implicit bias, is the type of racial bias that forms over time as a result of societal norms and biases.⁵⁸ Implicit bias is extremely common and is believed to infect the majority of Americans, even people of color. Unconscious bias has had significant repercussions for people ensnared in the criminal justice system.⁵⁹ The phenomenon no doubt is meaningfully responsible for the system of mass incarceration. Implicit bias is distinct from white supremacy because the person who is discriminating does not necessarily know that she may favor one race over another. While this is a problem that needs to be addressed, it is important for legal observers and scholars not just to focus attention on the concerning impact of unconscious bias. It is important to *217 acknowledge the alarming amount of blatant and conscious racism at play in our criminal justice system as well.

White supremacy is the conscious belief that the white people are actually superior to other races. While both implicit and explicit bias have played a role in shaping our criminal justice system, this Article focuses on explicit racial biases--the biases that the individual knows that he or she holds (even if they refuse to name it white supremacy or even racism). People who have hate towards member of other racial groups may deliberately go into communities of color and act on their beliefs to subjugate and harm other races. White supremacy in police departments has clearly persisted.

Of course, conscious bias is nothing new to police departments. Some of the earliest police patrols began as groups of white citizens banding together to search for runaway slaves.⁶⁰ Police departments often turned a blind eye to lynchings and other racial violence allowing murder of black people and other violence to continue unabated by whites.⁶¹ Police departments in the South were filled with white supremacists in the 1950s.⁶²

However post-civil-rights-era American society has created a narrative attempting to distance law enforcement from the subjugation of people of color and the code of white supremacy.⁶³ But there have been many cracks in that storyline of color-blind law enforcement. In 1996, a legal scholar warned of white supremacists on the police force.⁶⁴ More than 25 years ago, in 1991, a federal judge in Los Angeles found that members of the LA sheriff's deputies in the Lynwood station were involved in a "neo-Nazi white supremacist gang" and that the officers targeted black and Latino residents of that community.⁶⁵ During the high profile O.J. Simpson trial in the mid-1990s, the lead detective was revealed to be a racist who had used *218 the "n" word many times and lied about it on the stand.⁶⁶ In 1999, in Cleveland, Ohio, racist and Nazi symbols were found in three of the six police precincts there.⁶⁷ It was believed that the symbols were placed there by officers as there were also allegations of some officers wearing lapel pins on their uniforms that symbolize white power.⁶⁸ In 2001, two Williamson County, Texas police officers were fired after they tried to recruit another officer into their KKK chapter.⁶⁹

But police membership in these types of groups or police officers holding racist ideologies is hardly in the distant past or even just of the last century. In 2014, it was discovered that three police officers of a thirteen member all white police department were members of a local chapter of the Ku Klux Klan in Fruitland park, Florida--a central Florida town.⁷⁰ These men were discovered because they were trying to recruit other officers to join them.⁷¹ One of the officers resigned while the other was fired when the ties to the group were discovered.⁷² Three cases were dismissed by prosecutors as a result of the discovery.⁷³

In 2015, a lieutenant in the Anniston County Police Department in Alabama was fired for being a member of the League of the South, a southern hate group.⁷⁴ Members of the department were aware of his ties to the group when he was hired but it was only once a story about his membership in the group was highlighted by the Southern Poverty Law Center's *Hatewatch* was he eventually fired.⁷⁵ While the Department initially claimed it could not “terminate an employee solely on his or her membership in a legal, lawfully formed, civic club or organization,”⁷⁶ it appears that it eventually revised that position.⁷⁷

***219** A Louisiana law enforcement officer was also fired when a photo of him surfaced on Facebook giving a Nazi salute next to a man in a white hood in 2015.⁷⁸ The officer claimed that he was simply at a rally against illegal immigration.⁷⁹

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In 2016, a Philadelphia, Pennsylvania officer was found to have a white supremacist tattoo on his forearm.⁸⁰ Despite outrage on social and print media about the officer, he was not fired after a hearing found that he had not violated any department rules because there was no policy on the matter.⁸¹ The Philadelphia police department has since adopted a new policy that bans “offensive, extremist, indecent, racist or sexist” tattoos.⁸²

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

***220** The racism in some police departments is not limited to just a few isolated extremist officers. Instead, it is seen at the top with the potential to permeate through the entire department and even certain entire communities. An Oklahoma police chief was discovered in 2017 to be the owner of several white supremacist websites.⁸³ While he first claimed he was the victim of identity theft, he was exposed as having been in a white supremacist movie entitled “Blood and Honour.”⁸⁴ The police chief also appears in a documentary about white supremacists. In it, he wears a shirt that reads “Terror Machine.”⁸⁵ He is considered by Southern Poverty Law Center to be one of the most influential white power leaders in the country.⁸⁶ It is hard to gauge just how many people have been influenced by this single officer's views through visiting his websites or viewing the movie in which he appeared.

In 2018, it was discovered that a Kentucky assistant police chief encouraged a new police recruit through Facebook messages to shoot black children if they were caught smoking marijuana.⁸⁷ This was in response to a question by the new officer as to what the “right thing” to do would be if he encountered minors smoking the substance. In other posts, the officer also encouraged rape of the hypothetical parents “[u]nless daddy is black. Then shoot them.”⁸⁸ In other messages, he referred to Martin Luther King, Jr. as a racist.⁸⁹ The officer worked for the department for 20 years. Given how freely he shared these disturbingly vile and vicious remarks with a ***221** new employee, one can only imagine how many other officers with whom he shared his racist views during his tenure in that department. Prosecutors found the messages while investigating the assistant chief for allegedly improperly interfering in an investigation,⁹⁰ not because any fellow officers or the recruit reported him for expressing these views.

In 2006, the FBI “detailed the threat” of white supremacist groups infiltrating police departments.⁹¹ The FBI cautioned that if they were successful, it would be a significant threat to national security.⁹² The FBI memo warned that these white supremacists would not share their views publicly so that they would not be discovered.⁹³ The planned infiltration suggests that some of the white supremacist officers know to keep their membership in these groups private. It seems safe to conclude that it is likely that there are far more members of white supremacist groups than those listed above or those who have been identified by the departments for which they work.

Despite these warnings, police departments do not have plans in place to out these types of officers.⁹⁴

III. RACIST VIEWS

Of course, not only those with memberships in an organized hate group are racist. Racist beliefs are held by members of the police departments not affiliated with hate groups. Those can be just as dangerous. Darren Wilson, the Ferguson officer who

killed Michael Brown, admitted using the “n” word after the shooting.⁹⁵ His feeling towards black men appear to have had fatal consequences.

Members of the San Francisco police department were found to have exchanged racist text messages in 2016.⁹⁶ Three of the four officers left the police force as result of the scandal and the fourth faced internal discipline instead.⁹⁷ The officers used epithets to describe African Americans, Latinos, as well as gay people.⁹⁸ These types of email and text scandals have taken place around the country. Across the *222 bay, Oakland police officers sent racist emails and texts to one another.⁹⁹ The Alameda Sheriff’s Department re-tweeted a tweet of Richard Spencer, a high-profile white supremacist.¹⁰⁰

The Obama Administration’s Department of Justice found that two officers in Ferguson, Missouri, sent racist emails to city officials in 2014 and 2015.¹⁰¹ An officer who patrolled in a black neighborhood in Baton Rouge, Louisiana, was investigated for calling black people “African monkeys” as well as the “n” word and said that, “I wish someone would pull a Ferguson on them and take them out.”¹⁰² In addition, he also said that he enjoyed “arresting those thugs with their saggy pants.”¹⁰³

A white Detroit officer called black citizens “monkeys” and resigned as a result of the controversy.¹⁰⁴ A Miami police officer was fired for sending hundreds of racist and sexist emails to fellow officers.¹⁰⁵ Ft. Lauderdale officers participated in similar conduct and even created a racist video together.¹⁰⁶ Two Montgomery County, Ohio, officers exchanged racist texts and emails, as well, between 2011 and 2013.¹⁰⁷

*223 Social media is another way that officers have shared racist beliefs that they may not feel comfortable sharing in person. During the Baltimore protests of the murder of Freddie Gray, an officer posted photos of black protesters on a car alongside a photo of baboons jumping on a car.¹⁰⁸ Other officers saw the post and reported the alarming post to supervisors.¹⁰⁹ Two different Utah officers posted discriminatory posts on Facebook in 2017. In one of the cases, a Layton police officer posted a racist meme on a Massachusetts NAACP president’s Facebook page.¹¹⁰ In the other, a Price, Utah, officer used the “n” word in a Facebook post.¹¹¹

Officials in Benton County, Arkansas, fired a police officer who made racist public Facebook posts.¹¹² A white woman officer in Pennsylvania took a selfie and posted the words, “I’m the law today n_____” on Snapchat and was later fired.¹¹³ A Talledega, Alabama, police officer was fired after sharing photos of Melania Trump and Michelle Obama that read, “Fluent in Slovenian, English, French, Serbian and German” with respect to Mrs. Trump and under a photo of former first lady Michelle Obama the post read, “Fluent in Ghetto.”¹¹⁴

*224 An NYPD officer made a Facebook comment in which he called New York Mayor De Blasio’s African-American wife a “former crack addict.”¹¹⁵ The same officer also said that black people should stop complaining and “get over” slavery.¹¹⁶ A Bartow, Florida, officer lost her job after comments in which she compared then-President Obama with a gorilla.¹¹⁷ A Chadbourne, North Carolina, officer was fired after one of his private Facebook friends leaked a racist tirade in which he insinuated that black people “are the bad guys”.¹¹⁸ A Rio Rancho, New Mexico, officer made a Facebook post where he advocated violence against Middle-Easterners.¹¹⁹

Kentucky police suspended an officer who shared a Facebook meme that pictured a white police officers with the words, “If we really wanted you dead all we’d have to do is stop patrolling your neighborhoods ... and wait.”¹²⁰ A Minnesota police officer made a Facebook post calling for violence against Black Lives Matter protesters and Muslims.¹²¹ A Bradenburg, Florida, officer, who had previously been officer of the month in 2015, was fired after he told a black man whose son had been killed by police, “I’m glad your kid is dead. Now go make another one.”¹²² A *225 2017 Facebook post by a Louisiana police officer showed a white mother appearing to drown her daughter with the caption “when your daughters [sic] first crush is a little negro boy.”¹²³ After first defending the post, and then apologizing for it, that officer ultimately resigned.¹²⁴

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Police officers in two different states seemed to mock the tragedy in Charlottesville, Virginia, on social media. A Springfield, Massachusetts, officer posted an image of the car, driven by a white supremacist, that rammed into a crowd of people killing one and injuring 19, and wrote “Hahahaha love this.”¹²⁵ A Kentucky officer joked, again on Facebook, about a post of the damaged car that was the weapon involved and wrote, “Minor front end damage. Nothing serious.”¹²⁶ Law enforcement officers who laugh about the death of a woman who was protesting racism does not seem to be in line with the stated values of the job of a police officer. There *226 have been more than 100 explicitly racist social media posts by police officers in over 40 different states.¹²⁷

Holding racist philosophies is not a characteristic limited to rank-and-file officers, but superiors as well. A high-ranking Los Angeles Police Department official shared racist and Islamophobic emails and resigned over the matter in 2016.¹²⁸ A Providence, Rhode Island, sergeant went on a racist Facebook tirade in 2015.¹²⁹ In 2015, an Oregon police chief resigned after being accused of calling black people “monkeys” in response to a lawsuit alleging racial discrimination.¹³⁰ The mayor of the town thanked the chief for his service following his resignation.¹³¹ A Westchester, New York, police chief kept his job after it was discovered that he sent racist emails to fellow officers.¹³² A Pennsylvania police chief used the “n” word in an email that suggested blacks in a particular neighborhood were illiterate.¹³³ He was asked to step down.¹³⁴ A Boca Raton, Florida, sergeant was fired after an investigation as to allegations that he used the “n” word with other officers and made other racially offensive remarks.¹³⁵ A New Jersey police chief sent an email calling for racial profiling of blacks in white neighborhoods was suspended for six months and then demoted.¹³⁶ The sheriff for Howard County, Maryland, resigned after the county's *227 Office of Human Rights issued a report that found that the sheriff often referred to black people as “n ——— s” and called a county executive a “Jew-boy.”¹³⁷ A 2017 DOJ report about Chicago, Illinois, found that dozens of officers, including supervisors, made racist remarks and disparaging comments about African-Americans and Muslims.¹³⁸

It should go without saying that most police officers are not white supremacists or even hold consciously racist views. Most are good people, but as the ones with hate-filled ideologies get more entrenched in police department, there is the risk that they will infect the ones who started the force without those values. The problem of racism is a serious one within law enforcement. Not only does it threaten to infect other officers, entrenched racism can keep people of color off the police force. Alarming, it can mean that police do not take seriously their jobs when they are called to protect communities of colors--it may mean that racist violence against communities of color by white supremacists is not responded to by law enforcement.¹³⁹ Most frighteningly, it can have deadly or violent consequences for people of color. In addition to violence from the police and law enforcement's lax response to white supremacist attacks in communities of color,¹⁴⁰ these legitimate fears can make communities less safe as members of the community stop turning to law enforcement for help.

The dozens of instances of overt racism by law enforcement officers captured on video or on social media, texts or emails, is stunning. Perhaps even more frightening is that there are likely many more instances that are unreported because the recipient of the message agrees or wants to protect the sender. Some officers who do not hold these extremist views and disapprove of those views may protect and fail to protect racist officers because of the well-known “blue wall of silence.”¹⁴¹ It is very *228 likely that the examples in this Article are indicative of a substantially more serious problem of racism within police departments. This is a national disgrace that should not be tolerated.

IV. RACIST DEEDS

Police officer racial animus is not just on display through group memberships, emails, or Facebook posts. Actions reveal beliefs as well. Even more troubling, racist beliefs can manifest as bias in arrests, the bringing of harsher charges, the fabrication of evidence and can even bring about violence in some cases. Indeed, in the United States, young black males are 21 times more likely to be killed by police than white men.¹⁴² Identifying and removing these officers who hold such beliefs could mean less police harassment and violence inflicted on civilians. Ridding police departments of racist officers will also improve the relationship between the police and the communities they serve.

The Obama administration's Justice Department has issued scathing reports of police departments in Baltimore, Maryland,¹⁴³ Ferguson, Missouri,¹⁴⁴ and Chicago, Illinois.¹⁴⁵ Each documents instances of explicit racism by police. The Chicago report states that the lack of trust seen in the community was justified and that there was substantial evidence that people of color were disproportionately experiencing negative encounters with the police over an extended period of time.¹⁴⁶

In 2017, a police officer in the District of Columbia wore a T-shirt to court that contained an icon associated with white supremacists that also contained an image of a grim reaper holding a rifle and police badge.¹⁴⁷ In Boston, Massachusetts, *229 an officer made a video of himself in uniform in which he declares “black people have met their match.”¹⁴⁸ This warning seems to be one worth taking note of.

A Kentucky officer was audio recorded calling three black men he stopped while on duty “monkeys.”¹⁴⁹ It is easy to imagine an officer who believes that black men are comparable to monkeys or who insults strangers to have a problem violating those men's civil rights. A Kansas officer was fired, though not prosecuted, for threatening a black woman's daughter on Facebook.¹⁵⁰ He stated, “we will see how much her life matters soon ... hold her close tonight, it will be the last time.”¹⁵¹ Two Memphis officers used Snapchat to show an image of what appeared to be a white officer pointing a gun at an emoji of a black child.¹⁵²

Contact with police can result in violence. One in 291 stops/arrests with police result in death or in an injury that requires hospital care.¹⁵³ An alarming number of black people have been injured or killed by police in this country. Two hundred and thirty-four African Americans were killed by police in the United States in 2016.¹⁵⁴ Despite the press about these killings, the number of shootings does not appear to *230 be declining in any significant way.¹⁵⁵ Police are much more likely to stop blacks and Latinos than whites.¹⁵⁶ Because a disproportionate number of people of color are stopped by police, they are disproportionately exposed to violence with police.¹⁵⁷ Although there are more white people than black people killed by police, black people are 2.5 times more likely to be shot and killed by police than white people because they make up a much smaller percentage of the population.¹⁵⁸ Unarmed blacks are 5 times more likely to be killed by police than unarmed whites.¹⁵⁹

The Cincinnati police officer who was on trial for murder of Samuel Dubose was wearing a confederate flag t-shirt under his uniform.¹⁶⁰ While that fact was excluded by the trial judge because the judge felt it would “inject an issue of race” into the trial,¹⁶¹ that the officer wore a symbol of the confederacy and one that many believe symbolizes racism, may suggest that bias was a motive for the killing. Two juries split on the issue of whether the killing was criminal or justified.¹⁶² Many people, particularly people of color, see the murder of black men at the hands of police as evidence of racial animus by the police.

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

*231 A Massachusetts state trooper who shot an unarmed person of color in 2018 was discovered to have made a number of racist remarks anonymously as Big Irish, on an online forum called *Masscops* in 2012.¹⁶³ In these posts the officer refers to black people as “crack smoking,” “EBT receiving,” and “gang banging.”¹⁶⁴ Referring to two racially diverse neighborhoods in Boston, he wrote, “[Expletive] the people of Mission Hill and Roxbury!!”¹⁶⁵ He also used the “n” word as well.¹⁶⁶ His numerous posts were no doubt seen by other Massachusetts police.

One of the most disturbing accounts of an officer with ties to the KKK is the Chicago police officer who was convicted of torturing 100 African Americans men allegedly suspected of crimes.¹⁶⁷ This officer visited many terrible horrors on black men, including applying cattle prods to men's testicles.¹⁶⁸ If he had been identified as someone with ties to the KKK much earlier, it is unlikely he would have been in the position to carry out these inconceivable deeds.

Because of the violence that may happen at the hands of the police, many fear bringing police into disputes. Some feel that it is not worth it to summon the police if that can bring violence into your home or to oneself.¹⁶⁹ This is particularly true for people of color. The erosion of trust between the police and the people they are meant to serve is a significant problem for society. If law is meant to be a vehicle for *232 public safety and security in any regard, then police, prosecutors, and judges all need to address this pressing issue of racism in police departments.

V. RACIAL BIAS IN THE CRIMINAL LAW

The solution of using *Brady* to get to this serious problem is not without obstacles. Unfortunately, American jurisprudence allows a significant amount of racial bias.¹⁷⁰ Many legal scholars and observers have opined about the ways that the Supreme Court has allowed police and prosecutors to discriminate in criminal cases.¹⁷¹ First, the Supreme Court allowed police to make stops of American citizens on less than probable cause in *Terry v. Ohio*.¹⁷² The Supreme Court has allowed for racially discriminatory impact in the criminal justice context as long as that is not the purpose behind a law.¹⁷³ Even more damaging to the rights of everyday people of color was when the Court next allowed police to make pretextual stops of citizens in its decision in *Whren*,¹⁷⁴ giving officers unfettered ability to stop black people and Latinos at higher numbers. As Michelle Alexander wrote, granting police officers enormous authority to stop individuals ensures that, “conscious and unconscious racial beliefs and stereotypes will be given free rein.”¹⁷⁵ Justice Sotomayor even mentions *Whren* in her dissent in *Utah v. Strieff* as one of the many reasons that people of color must have “the talk” with their children to keep them safe from police.¹⁷⁶

Supreme Court precedent and the entire criminal justice system are delegitimized by allowing affirmatively racist police on the force. Were the court to acknowledge the existence of white supremacist ideology on police forces, many cases would have to be reimagined. Take *Illinois v. Wardlow* for example--in that case the Court said flight at the sight of police amounts to reasonable suspicion justifying a stop if it takes place in a high crime area.¹⁷⁷ But if the Court were to consider the fact that the person fleeing was black and that the officer pursuing him was a white one who harbored racial animus towards black people as these texts, emails, and social media post show, the case would have to be decided differently.

Indeed, the Supreme Judicial Court of Massachusetts, has found that black people have legitimate reason to flee to avoid police and that flight should not be *233 considered in a probable cause analysis except in cases of investigatory stops.¹⁷⁸ The court cited the Boston police department's history of racial profiling against black men in coming to its ruling.¹⁷⁹ With that ruling, the court at acknowledged bias by police against black men.

And despite the number of cases that limit racial justice reform in the criminal justice system, there are other instances where the Supreme Court has made it clear that criminal defendants have the right to inquire into racial animus. Questions about racial prejudice are some of the only guaranteed questioning allowed by the defense under the constitution during jury selection.¹⁸⁰ Defense attorneys are permitted to question the racial motives of the prosecution in its dismissing of prospective jurors under *Batson*.¹⁸¹ The Court has ruled that racial bias during jury deliberations violates the Sixth Amendment,¹⁸² reversing its previous stance that jury deliberations were un-pierceable.¹⁸³ The Court wrote, “[t]he duty to confront racial animus in the justice system is not the legislature's alone.”¹⁸⁴ The court goes on to say that, “racial bias is a familiar and recurring evil that, if left unaddressed would risk systemic injury to the administration of justice.”¹⁸⁵ So, while the Supreme Court has allowed racial discrimination in the criminal justice system, it has also sought to limit it.

No legitimate criminal trial or appellate court would sanction or endorse white supremacist police officers existing on a police force. Requiring police and prosecutors to discover whether officers harbor conscious racism does not seem to be too extreme a position for the courts. Of course, the burden to the police and prosecutors to identify and discipline these officers is minimal when compared to the risks to individuals of color and the greater community if these officers continue to exist on the force. The system cannot continue as a legitimate one without either removing consciously biased police officers or acknowledging the inherent bias in the criminal justice system and giving defendants and arrestees avenues to address it through the law.

*234 VI. *BRADY* AND RACIAL BIAS

It is likely uncontroversial among reasonable people that white supremacist views should have no place on police forces. But yet, there is evidence that those views are expressed by some police officers. It should therefore be the goal of everyone in the criminal justice system to expose these police. Those in the best position to do so are police and prosecutors. The *Brady* doctrine applies to both police and prosecutors. The Supreme Court held in the landmark case of *Brady v. Maryland* “that the

suppression by the prosecution of evidence favorable to an accused ... violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”¹⁸⁶

There is no question that exposing a police officer with a record of racism can harm or undermine a criminal prosecution and is thus favorable to the defense. The 1990s O.J. Simpson double murder trial is an example of how jurors can be so turned off by an officer's racism that they question the officer's veracity and role in the investigation. In that case, the officer's “racist past became a focal point” in the trial.¹⁸⁷ In the O.J. Simpson case, Officer Mark Fuhrman was found to have used the “n” word at least 40 times and said other racist epithets in a recording.¹⁸⁸ This fact, and the fact that he denied it under oath and the recording proved he had lied, helped the defense argue that evidence of Simpson's guilt may have been planted by the officer.¹⁸⁹

With the Simpson case in mind, it is easy to see how information that the government possesses that an officer harbors racial animus is favorable to the accused. Due Process applies equally to police and prosecutors.¹⁹⁰ So, information that the individual police officer knows must be disclosed to the defense. Of course, most officers who have that type of hostility towards people of color would not disclose it for any number of reasons. But that does not alleviate everyone else of their responsibilities to the defense, to Due Process, and to *Brady*. Police superiors and prosecutors cannot turn a blind eye to problems. They must endeavor to learn about problems. This again shows how disclosing the information would be favorable to the defense as well as material.

Few cases directly get at whether a police officer's racist views constitute *Brady* material. The Supreme Court has never ruled on the issue. Appellate courts have found membership in a hate group to be a proper line of cross examination.¹⁹¹ But *235 given that bias and membership in a hate group are proper areas for cross-examination and in light of the fact that *Brady* applies to impeachment evidence information,¹⁹² bias or hate group membership is impeachment material. This is particularly true where the police officer witness is a central witness in a case (as they often are) and the defendant is a person of color.

A few lower courts have addressed the issue. In one 1999 case, prosecutors failed to disclose racist comments made by a DEA supervisor in a drug case. The court found that the suppressed information did not constitute *Brady* since the DEA agent did not testify.¹⁹³ However, in a 2008 case, *State v. Williams*, a New Jersey appellate court found that the government did need to disclose, as *Brady* material, information that a non-testifying superior officer used a racial epithet to describe the defendant, a black man.¹⁹⁴ The court wrote, “there can be no dispute that a criminal investigation infected by racial animus would violate a defendant's Due Process rights.”¹⁹⁵

The San Francisco police department turned over the racist and homophobic texts of the officer at the heart of the racist testing scandal for use by the defense in a case in which one of the officers was involved.¹⁹⁶ Prosecutors in D.C. informed the defense of an investigation into the officer involved in the controversial t-shirt there.¹⁹⁷ This decision, no doubt, was motivated by a desire to comply with *Brady* and Due Process. So, it seems that courts and prosecutors' offices would recognize this type of evidence as *Brady* evidence as it may (1) show bias against the defendants and (2) be evidence that impeaches the officer's character. Thus, it would be favorable to the defense.

Brady, rooted in Due Process, requires that anything that the government knows that is favorable to the defense be turned over to the defense for use at trial. The rule applies to the entire prosecutor team--police as well. *Kyles v. Whitley* made clear that not only must prosecutors learn of exculpatory information known to police but suggests that “procedures and regulations” be put in place to ensure it.¹⁹⁸

It is hard to imagine that courts would believe that if police or prosecutors knew that a police officer witness was a white supremacist that the government would not have to turn that information over if the defendant were of the same race against whom the officer harbors racial hatred. If this premise is accurate then police *236 and prosecutors should have to discover who on the police force holds these racist ideologies. This is information that is within the possession of the government because it is the government agent him or herself who possesses it.

In some jurisdictions¹⁹⁹ prosecutors already turn over to the defense police officer complaints and internal investigations and discipline under the Supreme Court's mandate in *Giglio*²⁰⁰ that any information that impeaches a government witness' credibility be disclosed.²⁰¹ While this practice has been done inconsistently across the country by prosecutors, this is an area

that is receiving attention by scholars.²⁰² It seems obvious that at least where officer credibility is an issue in a case and the defendant is not white, that evidence of racial bias should be disclosed as impeachment information.

Similarly, the Court in *Davis v. Alaska* found that motive to curry favor with the government was evidence about which the defense was entitled to confront a government witness.²⁰³ In a different context, the Supreme Court found that a witness's membership in a white supremacist group, the Aryan Brotherhood prison gang, was proper grounds for bias cross-examination because their "common membership in an organization, even without proof that [they had] personally adopted its tenets, is certainly probative of bias."²⁰⁴ It seems clear that bias possessed by an officer is fertile ground for cross-examination.

There is little doubt that some prosecutors and police departments will resist an obligation to seek out information that police harbor racial animus. Such a responsibility may be seen as too large an undertaking, or police and prosecutors may not want to infringe on the close relationship they enjoy with one another by investigating their friends or colleagues on the force. A possible argument that could be advanced by prosecutors against such a rule might be that it is not required by the Supreme Court's decision in *Arizona v. Youngblood*.²⁰⁵ The Court found in *Youngblood* that the government did not violate Due Process when they failed to *237 test a semen sample and failed to preserve it for testing by the defense.²⁰⁶ The holding in *Youngblood* was that the government's failure to preserve was negligent rather than in bad faith.²⁰⁷

The government could analogize to *Youngblood* and argue that they shouldn't have the obligation to look for information if they do not know it exists. In *Youngblood*, it was assumed that the government did not know whether or not the information contained in the sample would be inculpatory²⁰⁸ or not.²⁰⁹ But unlike *Youngblood* when an officer holds these conscious beliefs, he is aware of them. Comparisons to *Youngblood* therefore fail.

Another instance in which prosecutors or police may argue that impeaching information does not need to be disclosed is where only the motion to suppress implicates police officer credibility or where that is the only instance in which the officer may be a witness. *Brady* has traditionally been seen as applying to motions to suppress. However, the Ninth Circuit,²¹⁰ Fifth Circuit,²¹¹ and District of Columbia Court of Appeals have found that the government's failure to turn over information that was favorable to a motion also violated *Brady*.²¹² So in many jurisdictions the government cannot win that argument either.

Rather than avoiding learning this powerful information about police officer bias or failing to disclose it, the government should endeavor to learn it. At the beginning of every prosecution, prosecutors should investigate the officers involved. This should be particularly true where there was evidence gathered by officers that might be subject of a motion to suppress or if the facts of the case are such that the officer's credibility may play a central role. In those types of cases--drugs cases, undercover stings, assault on a police officer cases--the prosecutors should look to see whether there exists any evidence that the officer harbors racial biases. This would mean examining their social media accounts and monitoring their emails²¹³ *238 and texts for key words that could be suggestive of racial animus. This investigation must be done without the officer being informed of it. Offending officers no doubt would take down troubling posts.

The Court long ago found that prosecutors may not avoid learning information that is favorable to the defense.²¹⁴ Indeed there is an affirmative "duty to learn" information known to the police.²¹⁵ So obviously while an individual police officer knows he harbors these beliefs, he is not going to disclose them to the prosecutor handling cases in which he is a witness. That means that prosecutors and police supervisors must learn which police officers carry with them racial animus. Pursued with integrity and zeal, *Brady* is a valid way for police and prosecutors to tackle the serious problem of intentional bias on police forces in the United States.

VII. OTHER SOLUTIONS

It must be acknowledged that many police and prosecutors have failed to implement the goals of *Brady*. Judges and scholars have also noted that prosecutors generally have a dismal record at living up to *Brady*'s mandate.²¹⁶ Prosecutors' and the police's failure to comply with *Brady* is one of the main reasons cited in explaining wrongful convictions.²¹⁷ *Brady* is also the most

common reason appellate courts reverse criminal convictions.²¹⁸ It has been called “one of the most unenforced constitutional mandates in the criminal justice system.”²¹⁹

Scholars and the public have been suggesting solutions to the problems of police accountability. Likewise, while it is in the interest of justice to rid police departments of these obviously racist officers, prosecutors have so far shown little interest in doing so. With so few prosecutions of police even in the wake of high profile murders of unarmed civilians, it is not hard to see that most prosecutors have failed to act vigorously to rid police departments of troubled officers.²²⁰ Few efforts to rid *239 departments of problem officers, even in this moment of heightened scrutiny, have been seen.

In addition to the constitutional reasons that the government must share with the defense that an officer has extremist views, police departments and prosecutors have other reasons to find out which officers are explicit racists. The best way to avoid a white supremacist on the police department is to never hire him or her in the first place. Screening interview questions must be employed. Prospective applicants should also have to submit to tattoo checks so that any white supremacist tattoos will be identified.²²¹ Deep investigation into any particular hire is prudent. While costly, these measures are another way to protect the safety of the community and the police force. Prospective officers should have to prove they are not racist before they are given a gun and free reign to stop citizens.

Many police departments use personality tests during hiring.²²² But those may not get at racial bias. Questions that ferret out unacceptable views on race should be asked of prospective officers. Unconscious bias testing should also be employed.²²³ Avoiding employees with significant biases should be the goal of any fair employer. But given how disproportionate the criminal justice system has come down on people of color and recognizing how racism in the criminal justice system delegitimizes it, not hiring racist police should be one of the foremost goals of police departments.

Background checks and personality tests should not be limited only to new hires. Officers already employed by the department must also be screened for extreme racial views. Superior officers in particular need to be vetted carefully prior to any promotion.

Because of their position of power, an officer who harbors racial animus will fail to report other officers. Internet and social media investigations should be performed periodically at random in order to discover whether any officer is hiding membership in a hate group or harboring racist views. These searches must be held secret until they are completed with few aware that they are taking place. Outside contractors could be hired for the job.

*240 Departments that are serious about keeping racists out of their departments must also monitor emails and texts in addition to social media and internet presence. For officers already in departments, surveillance of their social media, texts, and emails should take place periodically and in secret. We know that many police departments have the resources to do this type of investigation because they conduct these types of investigations against the citizens of the areas they serve in other investigations.

Employers already have the right to monitor the use of company phones and email. There is little question that the department has the legal right to monitor email, texts, and on-duty social media use. As a public policy matter this type of monitoring is essential to keep officers who are biased off the force.

Once officers are discovered that harbor these views, they must be fired immediately. Extremist racial views simply should not be tolerated by anyone on the force. Officers who received or viewed the inappropriate texts or emails but failed to report them should also face discipline even if they remained silent and did not respond. This will encourage fellow officers to report other officers with troubling views. The message has to be sent that people with these views will not remain on the force.

It may be wise for police departments and prosecutors to hire outsiders to do these searches of longtime officer's email, texts, and social media accounts. Conflicts of interest²²⁴ and friendships with the offending officers may cause one to give an officer the benefit of the doubt. Officers often rely on one another in the street for personal safety and need one another for advancement and promotion. Prosecutors of course need police officers to help them build their criminal cases, so they may be wary of surveillance techniques. Prosecutors and police who are distanced from prevailing office culture or building cases that rely on officers need to be individuals empowered to make decisions to rid the police department of officers who carry racist attitudes.

Police unions must stop protecting these appalling attitudes as well. Police unions have enormous power²²⁵ and do a great job advocating for their members. But this means that they protect individual police officers who have committed horrible acts and hold dreadful views.²²⁶ This instinct to protect all officers for every offense has been detrimental to police departments and police officers as a whole in the long run as it results in these bad apples being reinstated to the force or avoid punishment *241 altogether. Police officers often face few repercussions for their actions.²²⁷ Police unions' ability to help officers avoid serious consequences for racist behavior and violence²²⁸ has no doubt contributed to it spreading on the force and the diminished reputation of police in many communities.

Unions have generally been seen as opposed to policing reforms.²²⁹ A less aggressive stance against police discipline, including the termination of consciously biased officers, should be a goal of police unions that would ultimately help all good police officers as well as the reputation of the criminal justice system. However, unions ultimately answer to their members.

Since prosecutors generally have done a lackluster job of policing the police when it comes to shooting of unarmed citizens or living up to the ideals of *Brady*, other institutional players must become involved. Interested legislatures or mayors in cities and towns where mayors have oversight over police departments should consider mandating the measures suggested here to identify the officers with these inexcusable views. While these steps may seem difficult to implement and costly, they could potentially save individual cities significant resources in fewer civil settlements. This could also help the criminal justice system regain some of its loss of legitimacy in the eyes of the communities these officers are supposed to serve.

Allowing racist officers to remain on the force gives them an opportunity to recruit more officers. Even if they do not try to explicitly recruit other officers into their groups, they may be able to infect them in their attitudes towards people of color in more subtle ways. Racist officers may be more likely to plant evidence, profile and behave violently towards people of color in the communities they police. As discussed earlier, this has significant ramifications for the community and the perceptions of the criminal justice system.

CONCLUSION

Prosecutors in New Jersey had a role in the firing of the chief there who emailed his fellow officers and told them to racially profile black people in white neighborhoods.²³⁰ They informed the town council that the chief's statement violated the *242 constitution and the police profiling statute in that state.²³¹ Prosecutors in San Francisco turned over evidence of racial bias to the defense.²³² Prosecutors elsewhere can take a more active role in the quality of the officers they work with. The *Brady* doctrine is the legal mechanism through which prosecutors can help rid police departments of their most racist members. Providing the defense with information about which officers hold these views will mean that police officers are exposed in open public courtrooms. This in turn will mean that those officers will either be removed from the force or unable to be witnesses for the government in criminal trials, which will at least mean that their ability to advance in their jobs will come to a halt.

If prosecutors use *Brady's* mandate of turning over all favorable information to the accused, police departments would be motivated to make sure that they did not hire officers who hold consciously racist beliefs. White supremacists would be unable to find jobs in police departments and those already installed in departments would be terminated.

Prosecutors have generally done a poor job of complying with their *Brady* obligations as it remains the top reason for appellate reversals, and failure to comply with *Brady* is one of the top reasons for wrongful convictions. Expanding or extending the police and prosecutors' job into looking for racism in their ranks then seems difficult. Social media, texts messages, and other electronic means of communication have made this search much easier.

But with or without the use of *Brady* as a tool by prosecutors, police departments and local governments should begin to test prospective applicants and surveil their social media and internet presence. And just as important, current officers' emails and texts need to be monitored for racist content in addition to their social media accounts and other online identities.

Good prosecutors want to be seen as legitimately pursuing public safety goals rather than pursuing a racist agenda set by extremist police. Racist police hurt the cases that prosecutors look to them to help bring. Prosecutors and police should be active

in identifying and ending the careers of those who hold racist views. Prosecutors are slightly more divorced from the officers they work with than members of the force that may rely on their fellow officers for safety in the streets.

Only with good institutional partners like prosecutors and progressive police chiefs can we rid police departments of police officers with racial prejudice. The *Brady* doctrine is one tool that can be used to accomplish this necessary and important goal.

***243 Appendix**

States and Police Departments with Incidents

STATE	POLICE DEPARTMENT	FOOTNOTE #(S)	CITATION(S)
AL	Anniston County Police Department	74-77	Stephen Crews, <i>Alabama Cops Suspended After Hate Group Allegations</i> , DOTHAN FIRST, http://www.dothanfirst.com/news/top-stories/alabama-cops-suspended-after-hate-group-allegations (last visited July 5, 2018); Lance Griffin, <i>Residents Ask Dothan Commission to Remove Police Chief Steve Parrish</i> , DOTHAN EAGLE (Dec. 15, 2015), http://www.dothaneagle.com/news/government/residents-ask-dothan-commission-to-remove-police-chief-steve-parrish/article_907b914c-a372-11e5-b4e6-5b1d7e475562.html .
	Talladega Police Department	114	Lindsey Bever, <i>Alabama Officer Fired Over Racist Meme Calling Michelle Obama 'Fluent in Ghetto'</i> , WASH. POST (Nov. 19, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/11/19/alabama-officer-fired-over-racist-meme-calling-michelle-obama-fluent-in-ghetto/?utm_term=.4254209d44d3 .
AK	Anchorage Police Department		Laurel Andrews, <i>Jury Awards Former Anchorage Police Officers Nearly \$1 Million Each in Racial Discrimination Suit</i> , ALASKA DISPATCH NEWS (Mar. 8, 2017), https://www.adn.com/alaskanews/crime-courts/2017/03/07/jury-awards-former-anchorage-police-officers-nearly-1-million-each-in-racial-discrimination-lawsuit/ ; Megan Holland, <i>Police Officers Claim Racism in Lawsuit</i> , ALASKA DISPATCH NEWS (Sept. 27, 2016), https://www.adn.com/alaska-

			news/article/police-officers-claim-racism-lawsuit/2010/06/30/.
AZ	Phoenix Police Department		Michael Ferraresi, <i>Fired Police Officer's Slurs vs. Others Tallied in Report</i> , ARIZ. REPUBLIC (June 17, 2010), http://archive.azcentral.com/arizonarepublic/local/articles/2010/06/17/20100617phoenix-police-officer-racial-slurs.html .
AR	Benton County Sheriff's Office	112	Brandon Riddle, <i>Department: Arkansas Officer Fired Over Social Media Posts on Black Lives Matter Movement</i> , ARK. ONLINE (Sept. 27, 2016), http://www.arkansasonline.com/news/2016/sep/27/arkansas-officer-fired-over-social-media-posts-pol/ .
	Little Rock Police Department		Benjamin Fearnow, <i>African-American Police Chief Accused of Racial Discrimination by Four Black Officers</i> , NEWSWEEK (Mar. 13, 2018), http://www.newsweek.com/little-rock-police-discrimination-lawsuit-racism-kenton-buckner-african-843510 .
CA	Los Angeles Police Department	66	Kenneth B. Noble, <i>Issue of Racism Erupts in Simpson Trial</i> , N.Y. TIMES (Jan. 14, 1995), https://www.nytimes.com/1995/01/14/us/issue-of-racism-erupts-in-simpson-trial.html .
	Los Angeles County Sheriff Department	128	Justin Carissimo, <i>Top Los Angeles Police Official Resigns Over Racist and Islamophobic Emails</i> , INDEPENDENT (May 1, 2016), http://www.independent.co.uk/news/world/americas/top-los-angeles-police-official-resigns-over-racist-and-islamophobic-emails-a7009536.html .
	San Francisco Police Department	96-98	Michael Barba, <i>Racist Text Scandal Reaches Appeals Court as SF Seeks to Discipline Officers</i> , S.F. EXAMINER (May 9, 2018), http://www.sfexaminer.com/racist-text-scandal-reaches-appeals-court-sf-seeks-discipline-officers/ ; Peggy Bunker, <i>San Francisco Police Officer Linked to Racist Texts is Fired</i> , NBC BAY AREA (Apr. 3, 2017), http://www.nbcbayarea.com/news/local/San-Francisco-Police-Officer-Linked-to-Racist-Texts-is-Fired-418024043.html ; <i>Former SFPD Lieutenant Linked To Texting Scandal Pleads Guilty To Filing False Report</i> , CBS S.F. BAY AREA (Sept. 14, 2017), http://sanfrancisco.cbslocal.com/2017/09/14/sfpd-lieutenant-guilty-plea-texting-

			<p>scandal/; Scott Glover & Dan Simon, <i>'Wild Animals': Racist Texts Sent by San Francisco Police Officer, Documents Show</i>, CNN (Apr. 26, 2016), https://www.cnn.com/2016/04/26/us/racist-texts-san-francisco-police-officer/index.html; Aaron Pero, <i>San Francisco Police Officer Fired for Racist Text Messages</i>, KRON 4 (Apr. 4, 2017), http://kron4.com/2017/04/04/san-francisco-police-officer-fired-for-racist-text-messages/.</p>
			<p>Justin Carissimo, <i>Calif. Police Officer Investigated Over Alleged Racial Slur During Traffic Stop</i>, CBS NEWS (Jul. 9, 2017), http://www.cbsnews.com/news/vallejo-police-officer-racial-slur-cellphone-video-traffic-stop/.</p>
			<p>Bay City News, <i>SFPD Officer Charged in Alleged Whistleblowing Case Draws Support of Protesters</i>, S.F. EXAMINER (Nov. 15, 2017), http://www.sfexaminer.com/sfpd-officer-charged-alleged-whistleblowing-case-draws-support-protesters/; Jaxon Van Derbeken, <i>'Living Hell': Accused San Francisco Police Officer Claims Whistleblower Retaliation</i>, NBC BAY AREA (Sept. 30, 2017), https://www.nbcbayarea.com/news/local/Living-Hell-Accused-San-Francisco-Police-Officer-Claims-Whistleblower-Retaliation448819653.html.</p>
			<p>Michael Barba, <i>Muslim Officer Blows Whistle on 'Blatant Racism' in SFPD</i>, S.F. WEEKLY (Apr. 10, 2018), http://www.sfexaminer.com/muslim-officer-blows-whistle-blatant-racism-sfpd/; Allie Rasmus & Lisa Fernandez, <i>Afghan San Francisco Police Officer Says Some Colleagues Called Him a Terrorist, Muted Body Cameras</i>, FOX 2 KTVU (Apr. 11, 2018), http://www.ktvu.com/news/afghan-police-officer-in-san-francisco-says-colleagues-called-him-a-terrorist-mocked-other-cultures; Nuala Sawyer, <i>Another Racism Scandal Hits SFPD</i>, S.F. WEEKLY (Apr. 10, 2018), http://www.sfweekly.com/news/another-racism-scandal-hits-sfpd/.</p>
	Oakland Police Department	99	<p>Rachel Swan et al., <i>Oakland Police Bombshells: Racist Texts, Latest Chief Steps Down</i>, SF GATE (June 18, 2016), https://www.sfgate.com/news/article/</p>

			Latest-Oakland-police-chief-is-out-after-two-days-8310286.php.
	Alameda County Sheriff's Office		Kimberly Veklerov, <i>Alameda County Sheriff's Office Catches Heat for Retweet of White Nationalist</i> , SF GATE (Aug. 15, 2017), http://www.sfgate.com/bayarea/article/Alameda-County-sheriff-s-office-catches-heat-11820797.php .
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Footnotes

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- 182  *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 869, 871 (2017).
- 183 See  *id.* at 866, 875, 876 n.2 (“The extraneous influence exception, like the no-impeachment rule itself, is directed at protecting jury deliberations against unwarranted interference.”).
- 184  *Id.* at 867.
- 185 *Id.* at 868.
- 186  *Brady v. Maryland*, 373 U.S. 83, 87 (1963).
- 187 V. Dion Haynes, *Fuhrman Bargains Out of Jail Time*, CHI. TRIBUNE (Oct. 3, 1996), http://articles.chicagotribune.com/1996-10-03/news/9610030184_1_detective-mark-fuhrman-mr-fuhrman-simpson-civil-trial.
- 188 *Id.*
- 189 *Id.*
- 190 See  *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).
- 191 See, e.g.,  *United States v. Figueroa*, 548 F.3d 222, 229 (2d Cir. 2008).
- 192  *Giglio v. United States*, 405 U.S. 150, 153-54 (1972).
- 193 *United States v. Willis*, 43 F. Supp. 2d 873, 880-82, 885, 889 (N.D. Ill. 1999).
- 194  *State v. Williams*, 956 A.2d 375, 381 (N.J. 2008).
- 195  *Id.* at 380.

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- 198 *Id.*
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- 200  *Giglio v. United States*, 405 U.S. 150, 154 (1972).
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- 203  *Davis v. Alaska*, 415 U.S. 308, 318 (1974).
- 204  *United States v. Abel*, 469 U.S. 45, 52 (1984).
- 205  *Arizona v. Youngblood*, 488 U.S. 51 (1988).
- 206  *Id.* at 51.
- 207 “[F]ailure to preserve potentially useful evidence does not constitute a denial of Due Process of law.”  *Id.* at 58.
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- 209  *Youngblood*, 488 U.S. at 59.
- 210  *United States v. Gamez-Orduno*, 235 F.3d 453, 461 (9th Cir. 2000).
- 211  *Smith v. Black*, 904 F.2d 950, 965-66 (5th Cir. 1990), *vacated on other grounds*, *Smith v. Black*, 503 U.S. 930 (1992).

- 212  *Biles v. United States*, 101 A.3d 1012, 1019-20 (D.C. Cir. 2014); *see also* *Porter v. United States*, 7 A.3d 1021, 1025-26 (D.C. Cir. 2010).
- 213 L.V. Anderson, *Is Your Boss Reading Your Email?*, SLATE (Feb. 24, 2016), http://www.slate.com/articles/business/the_ladder/2016/02/is_your_boss_reading_your_email_and_monitoring_your_internet_use.html. *See also*  *City of Ontario v. Quon*, 560 U.S. 746, 747, 751, 760-62, 765 (2010) (the practice of employers reading the emails of employees is common and legal).
- 214  *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).
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- 217 Brian Gregory, *Brady is the Problem: Wrongful Convictions and the Case for "Open File" Criminal Discovery*, 46 U.S.F.L. REV. 819, 819 (2012).
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- 219 Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 434 (2010), <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7353&context=jclc>.
- 220 *See* Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447, 1449 (2016).
- 221 *See* Daniel Trotta, *U.S. Army Battling Racists Within Its Own Ranks*, REUTERS (Aug. 12, 2012), <https://www.reuters.com/article/us-usa-wisconsin-shooting-army/u-s-army-battling-racists-within-its-own-ranks-idUSBRE87K04Y20120821> (military recruits are supposed to submit to tattoo checks to check for membership in gangs or white supremacist organizations.).
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- ²²⁷ *See id.*
- ²²⁸ *See id.*
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- ²³⁰ Salinger, *supra* note 136.
- ²³¹ *See id.*
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