



## ARTICLE

## Cop-“Like” (“👍”): The First Amendment, Criminal Procedure, and the Regulation of Police Social Media Speech

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**Abstract.** What happens when a law-enforcement officer makes an offensive comment on social media? Increasingly, police departments, prosecutors, courts, and the public have been confronted with the legal and normative questions resulting from officers’ racist, sexist, and violent social media comments. On one side are calls for severe discipline and termination. On the other are demands that officers be permitted to express their views without fear of retaliation. The regulation of police social media speech has been largely conceived of in First Amendment terms. But because an officer’s comments affect her ability to testify, criminal procedure is also employed in regulating this speech. This Article fuses First Amendment and criminal-procedure doctrines to shed light on the problem of, and potential solutions for, the regulation of social media speech by officers.

This Article makes three core contributions. First, it describes the tensions between the First Amendment and criminal-procedure paradigms for regulating police social media speech. Second, it defines the challenges posed by pseudonymous, private, and otherwise “hidden” speech, which the criminal-procedure paradigm, but not the First Amendment one, is equipped to address. And third, this Article argues that police departments and prosecutors must proactively monitor their officers’ social media speech or risk undermining defendants’ criminal-procedure rights, the public’s faith in the legitimacy of the police force, and even the speech rights of police officers themselves.

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## Introduction

Cops use social media like the rest of us. They promote themselves and their causes, they boost friends and call out enemies, they share random moments of humor and indignation, and they momentarily escape from the tedium of the day. A Border Patrol agent who was fired for his inappropriate comments on Facebook explained the operational necessity of social media use.<sup>1</sup> “[W]e get a slow spot. You’re out in the desert right?” he said in a hearing contesting his discipline. “You got to keep mentally fit, so you jump on Facebook, jump on the internet. Scroll a little bit, have fun. Get the adrenaline flowing again, go have a good time.”<sup>2</sup> Mental fitness for the agent, however, can cause nightmares for the agency.

Law-enforcement officers who make racist, sexist, xenophobic, violent, and otherwise offensive comments undermine the legitimacy of their law-enforcement agencies and draw the ire of supervisors—when they are caught. With police departments under public scrutiny—an “existential challenge” to “the fundamental structure, purpose, and practices of law enforcement,” in the words of one department<sup>3</sup>—they are sensitive to any speech or conduct that makes them seem more biased or violent. When officers make biased or violent comments on social media, on or off duty, they can be subject to severe disciplinary action, as headlines around the country attest.<sup>4</sup> Meanwhile, officers subject to this discipline have complained that their First Amendment speech rights are being trampled in the name of political correctness. Legal challenges are just beginning to percolate through the courts,<sup>5</sup> and there is no reason to expect any reversal in this trend as social media becomes the default form of self-expression for more and more people.

Consider the case of Nate Silvester, a deputy marshal in Bellevue, Idaho. Five million people viewed a TikTok video he posted of his imagined

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1. *Hendricks v. Dep’t of Homeland Sec.*, 2020 M.S.P.B. No. SF-0752-20-0074-I-2, 2020 M.S.P.B. LEXIS 3596, at \*7 (Sept. 1, 2020).

2. *Id.* at \*29 (quoting the record).

3. Motion to Dismiss at 43, *Fenico v. City of Philadelphia*, No. 20-cv-03336, 2022 WL 226069 (E.D. Pa. Jan. 26, 2022), ECF No. 18.

4. See, e.g., Kyle Stucker, *First Amendment vs. Public Duty: Police Social Posts Renew Concerns About Bias, Solutions*, PROVIDENCE J. (updated Oct. 27, 2021, 12:18 PM ET), <https://perma.cc/QA83-XUNP>; Robert Salonga, *SJPD Social-Media Scandal: What Happened to the Officers Put on Leave After Blog Exposed Racist, Islamophobic Facebook Posts*, MERCURY NEWS (updated July 6, 2021, 4:59 AM), <https://perma.cc/Z57V-3TWT>; Joe Price, *New Jersey Police Officer Fired After Calling Black Lives Matter Protesters “Terrorists” on Social Media*, COMPLEX (May 6, 2021), <https://perma.cc/3WNC-LRTX>.

5. See, e.g., *Fenico*, 2022 WL 226069, at \*1; Complaint ¶ 10, *Sydanmaa v. L.A. Police Dep’t*, No. 20-cv-02190 (C.D. Cal. Nov. 16, 2020), ECF No. 1; *Bennett v. Metro. Gov’t*, 977 F.3d 530, 533-35 (6th Cir. 2020).

conversation with LeBron James. In uniform, from the front seat of his patrol car, Silvester films himself pretending to ask James what to do about a knife-wielding assailant threatening another’s life.<sup>6</sup> The confrontation is purportedly occurring just outside the car. Silvester identifies both assailant and victim as African American. “So you don’t care if a Black person kills another Black person,” Silvester asks James, “but you do care if a white cop kills a Black person even if he’s doing it to save the life of another Black person?”<sup>7</sup> In the closing seconds of the video, Silvester speaks out the window: “Sorry guys, you’re on your own, good luck!”<sup>8</sup> The short video, which referred to the police killing of Ma’Khia Bryant a few days before,<sup>9</sup> resulted in Silvester’s termination—and a book deal.<sup>10</sup> While his video was unusual for how widely it spread, there are numerous examples of police social media comments resulting in termination.

Racist, sexist, xenophobic, and violent speech has been documented on police social media accounts throughout the country. In 2019, the Plain View Project published a database of 5,000 Facebook comments and posts by police officers that, in the group’s view, “could undermine public trust and confidence in police.”<sup>11</sup> The Plain View Project scoured the police rosters in eight cities and looked at public Facebook posts by the officers named on those rosters.<sup>12</sup> After publication of the Plain View Project’s database, hundreds of officers in these cities faced punishment by their departments, including termination. In Philadelphia, for example, fifteen officers were terminated and 193 others were found to have violated department policy because of their Facebook comments.<sup>13</sup> Among the comments, officers referred to residents as “animals,”<sup>14</sup> compared “Obama Voters” to “chimpanzees with their hands

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6. Connor Perrett, *Idaho Cop Whose TikTok Mocked LeBron James over His Ma’Khia Bryant Comments Has Raised \$300,000*, INSIDER (May 1, 2021, 11:04 AM), <https://perma.cc/X7PQ-WBNJ>.

7. *Id.* (quoting Silvester’s now-deleted TikTok video).

8. Danya Hajjaji, *Nate Silvester, Cop Who Mocked LeBron James, Defended Kim Potter in Videos*, NEWSWEEK (Apr. 26, 2021, 11:55 AM EDT), <https://perma.cc/Q5QB-JMRY>.

9. *See* Perrett, *supra* note 6.

10. Jacob Scholl, *Small-Town Idaho Deputy Known for Viral Videos Fired for “Continued Policy Violations,”* IDAHO STATESMAN (updated May 27, 2021, 4:57 PM), <https://perma.cc/2Q9H-UYSB>.

11. *About the Project: Methodology*, PLAIN VIEW PROJECT, <https://perma.cc/QAB3-HL9Z> (archived Apr. 21, 2022).

12. *Id.*

13. Chris Palmer, William Bender & Jeremy Roebuck, *Philly Cops Are Fighting Back 2 Years After Racist Facebook Posts Got Them Fired*, PHILA. INQUIRER (May 31, 2021), <https://perma.cc/9YDS-VTNV>.

14. *Id.*

outstretched,”<sup>15</sup> characterized racial justice protesters as “savages,” and encouraged drivers to “Vroom Vroom” over protestors.<sup>16</sup> Some officers joked about shooting people in the heart,<sup>17</sup> called for “ban[ning] Islam from all Western nations,” and celebrated prison rape as a form of justice.<sup>18</sup> And those were just the comments that the Plain View Project was able to access from officers’ public Facebook profiles. Pseudonymous, private, and otherwise hidden social media posts present additional problems.

In Oakland, California, a pseudonymous account, @crimereductionteam, appeared on Instagram in fall 2020. The account began posting racist, sexist, and violent memes related to the Oakland Police Department and the residents of Oakland. According to news coverage, one of the memes labeled “a young white woman sitting on a couch as a ‘cop that just wants to fight crime’” and then showed “[f]ive Black men in underwear look[ing] over her shoulder, in a clear reference to exploitative group sex.”<sup>19</sup> The men were labeled “internal affairs,” “police commission,” “command staff,” “spineless cops,” and “criminals taking advantage of the situation.”<sup>20</sup> The meme was apparently a critique of local and national efforts to reform the police department.<sup>21</sup> Other posts on this Instagram page “made light of police officers using force, and dismissed police brutality complaints as annoyances.”<sup>22</sup> When inquiries from the media brought commanders’ attention to the page—which appeared to have involved posts by Oakland police officers—the department launched what the police chief would call a “scorched earth” internal affairs investigation to identify and discipline the culprits.<sup>23</sup> Federal Judge William Orrick, who was overseeing

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15. Motion to Dismiss, *supra* note 3, at 16.

16. *Id.* at 27-28.

17. *E.g., id.* at 18.

18. *E.g., id.* at 15, 26 (alteration in original); *see also Philly Police Officer Fired over Facebook Posts Reinstated*, AP NEWS (June 1, 2021), <https://perma.cc/DA9S-ACKQ> (noting the Plain View Project’s role in the “mass disciplining of Philadelphia officers, including 15 who were forced off the job and 193 officers in total being found to have violated department policy,” and adding that one of the terminated officers was later reinstated).

19. Darwin BondGraham, *Internal Oakland Police Investigation Focuses on Racist, Sexist Instagram Page*, OAKLANDSIDE (Jan. 11, 2021), <https://perma.cc/2ZAV-6AZ8>.

20. *Id.*

21. *See id.*

22. *Id.*

23. *See* Oakland Police Comm’n, Meeting Transcript 21 (Jan. 14, 2021), <https://perma.cc/AEA4-V2CS>; Conclusions & Recommendations Re: @crimereductionteam Instagram Page Oakland Police Department at 14-16, *Allen v. City of Oakland*, No. 00-cv-04599 (N.D. Cal. Sept. 20, 2021), ECF No.1474-1 (describing sequence of events leading to the investigation of the Instagram page).

the police department’s two-decades-old consent decree,<sup>24</sup> urged further investigation as well.<sup>25</sup> Nine months later, after an intensive investigation, the author of the page was determined to be a former Oakland police officer who had recently been terminated because of his role in a fatal shooting.<sup>26</sup> According to a news account, the investigation of the Instagram page concluded with the Oakland Police Department disciplining “nine officers for their misuse of social media,” though “[n]ot all of the discipline . . . was related to the Instagram account” itself.<sup>27</sup>

On the other side of the country, the New York City Police Department (NYPD) was similarly scandalized by the discovery that the commander of its Equal Employment Opportunity Division was secretly posting racist, sexist, homophobic, anti-Semitic, and otherwise offensive comments on an anonymous message board, the Rant.<sup>28</sup> The identity of the police commander came to light serendipitously,<sup>29</sup> as is typical in many of these cases, because police departments take almost no proactive steps to investigate their officers’ posts.<sup>30</sup> In 2020, the Rant was mentioned in *New York Magazine*.<sup>31</sup> An investigator working for city council read the story and began scrolling through the site.<sup>32</sup> According to news reports, he noticed that an anonymous user, “Clouseau,” had “posted hundreds of messages on the Rant, many of which attacked Black people, Puerto Ricans, Hasidic Jews and others with an unbridled sense of animus.”<sup>33</sup> Among the posts, Clouseau called President Obama a “Muslim savage,” described neighborhood baby showers as

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24. Eric Westervelt, *Oakland Residents Remain Skeptical as Federal Oversight of Police Ends After 20 Years*, NPR (May 13, 2022, 5:00 AM ET), <https://perma.cc/YW62-7WUM>.

25. Civil Minutes at 2, *Allen v. City of Oakland*, No. 00-cv-04599 (N.D. Cal. Feb. 23, 2021), ECF No. 1426 (“The court recognizes the verbal support of compliance efforts and urges full partnership with [the Oakland Police Department] and City leadership in rooting out members who do not respect all of the people they serve and fail to treat them equally.”).

26. David DeBolt & Darwin BondGraham, *Oakland Police Officer Fired for Fatal Shooting Created Instagram Page That Spread Racist, Sexist Memes*, OAKLANDSIDE (Sept. 21, 2021), <https://perma.cc/V4TC-KW22>.

27. *Id.*

28. William K. Rashbaum & Alan Feuer, *N.Y.P.D. Anti-harassment Official Accused of Racist Rants*, N.Y. TIMES (Nov. 5, 2020), <https://perma.cc/ZKX4-CBHK>; see also N.Y. CITY COUNCIL OVERSIGHT & INVESTIGATIONS DIV., A REPORT ON NYPD DEPUTY INSPECTOR JAMES FRANCIS KOBEL AND “CLOUSEAU” 2-10 (2020), <https://perma.cc/EV9W-7CR8> (describing the investigation’s findings and listing examples of controversial posts).

29. Rashbaum & Feuer, *supra* note 28.

30. See *infra* Part I.D.2.

31. Rashbaum & Feuer, *supra* note 28.

32. *Id.*

33. *Id.*

incomplete “without a group of Hennessey fueled savages causing their own brand of savagery,” and predicted that Orthodox Jews were headed for “demise” because of “all of the inbreeding.”<sup>34</sup> The first homicide of 2020, Clouseau predicted, would be “a gunshot wound in the 4-7 [precinct] over the last piece of jerk chicken at the buffet.”<sup>35</sup> The city-hall investigator followed a number of biographical clues in Clouseau’s posts—his start date on the police force, the date he proposed marriage to his wife, and the date that his mother passed away—straight to James Kobel, head of the NYPD’s Equal Employment Opportunity Division.<sup>36</sup> A forensic examination of Kobel’s phone and computer confirmed he was the author.<sup>37</sup> At a disciplinary trial in which Kobel chose not to participate, the allegations against him were substantiated, and he was dismissed.<sup>38</sup>

At the federal level, Congress is also enmeshed in a sprawling investigation of offensive social media posts by law-enforcement officers. In 2019, investigative reporting by ProPublica and the Intercept uncovered the private Facebook group, “I’m 10-15.”<sup>39</sup> (The code sign “10-15” stands for “aliens in custody.”)<sup>40</sup> As the Intercept explained it, the group was “a secret, invitation-only Facebook group for current and former Border Patrol agents that featured vulgar, violent, and misogynistic content directed at migrants and lawmakers.”<sup>41</sup> Despite containing over 9,500 Border Patrol agents and supervisors, including two successive Border Patrol chiefs,<sup>42</sup> the private group triggered scant disciplinary action until it was exposed in the news.<sup>43</sup> Among the offensive posts featured on “I’m 10-15” was a doctored photo of “a smiling President Donald Trump forcing [Representative Alexandria] Ocasio-Cortez’s

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34. Disciplinary Proc. Against Deputy Inspector James Kobel, Case No. 2020-22926, at 6-7 (N.Y.P.D. Feb. 3, 2021), <https://perma.cc/MU9G-9EUB>.

35. *Id.* at 6.

36. Rashbaum & Feuer, *supra* note 28.

37. *Disciplinary Proc. Against Deputy Inspector James Kobel*, Case No. 2020-22926, at 8-9.

38. *Id.* at 3.

39. See Ryan Devereaux, *Border Patrol Agents Tried to Delete Racist and Obscene Facebook Posts. We Archived Them.*, INTERCEPT (July 15, 2019, 10:16 AM), <https://perma.cc/HHS2-DL77>; A.C. Thompson, *Inside the Secret Border Patrol Facebook Group Where Agents Joke About Migrant Deaths and Post Sexist Memes*, PROPUBLICA (July 1, 2019, 10:55 AM EDT), <https://perma.cc/78AX-VGA7>.

40. Thompson, *supra* note 39.

41. Devereaux, *supra* note 39.

42. STAFF OF H. COMM. ON OVERSIGHT & REFORM, 117TH CONG., BORDER PATROL AGENTS IN SECRET FACEBOOK GROUP FACED FEW CONSEQUENCES FOR MISCONDUCT 1, 20 (2021).

43. See *id.* at 18-19 (“Despite the agency’s longstanding knowledge of employee misconduct on the ‘I’m 10-15’ group and other Facebook groups, [Customs and Border Protection] did not take sufficient disciplinary measures or other action to enforce its social media policies until it faced scrutiny during the summer of 2019.”); see also *id.* at 25-26.

head toward his crotch,” as well as numerous comments making light of immigrants’ deaths.<sup>44</sup> A Border Patrol agent posted a meme with the text: “HUNGARY LOCKS ILLEGAL IMMIGRANTS IN SHIPPING CONTAINERS TO STOP ILLEGAL BORDER CROSSINGS.”<sup>45</sup> On top of this meme, he wrote: “Can we apply this here?”<sup>46</sup> His personal Facebook page contained the statements “fuckmuslims” and “fuckislam” and made the false claim that Representative Ilhan Omar is a terrorist.<sup>47</sup> Roughly sixty agents were disciplined, but only two were terminated.<sup>48</sup> Under the Biden Administration, Congress was finally allowed access to the documents on the misconduct and discipline.<sup>49</sup>

Such examples of offensive social media speech raise questions for police officers and departments, prosecutors, courts, and the public: How do we distinguish permissible from impermissible speech? Who should do this line drawing? What, if anything, should be done to proactively detect troubling social media speech? This Article takes up these and other questions about the regulation of police social media speech.

Police social media use is typically analyzed through a First Amendment lens.<sup>50</sup> But if one also examines the problem through the lens of criminal procedure, several new insights arise. The Article identifies a deep tension between First Amendment and criminal-procedure law, especially with regard to police speech that is carried out through pseudonymous accounts or in private social media channels. By exploring the interplay of the First Amendment and criminal-procedure paradigms, the Article reframes the discussion about regulating police social media speech. This reframing raises

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44. Thompson, *supra* note 39; STAFF OF H. COMM. ON OVERSIGHT & REFORM, *supra* note 42, at 9, 12, 17.

45. Devereaux, *supra* note 39; A.C. Thompson, *After a Year of Investigation, the Border Patrol Has Little to Say About Agents’ Misogynistic and Racist Facebook Group*, PROPUBLICA (Aug. 5, 2020, 5:00 AM EDT), <https://perma.cc/U9SF-6QUA>.

46. Devereaux, *supra* note 39.

47. *Id.*

48. STAFF OF H. COMM. ON OVERSIGHT & REFORM, *supra* note 42, at 8 fig.2.

49. *See id.* at 4-5; *see also* Eric Katz, *Democrats Ask Trump Administration to Name Names of Feds Participating in Racist, Sexist Group*, GOV’T EXEC. (Jan. 11, 2021), <https://perma.cc/LJ7E-MK3L>.

50. *See, e.g.*, PAUL ASHTON, MORGAN KANE, BOBBI STRANG, JEFFREY TIGNOR & KURT VORNDRAN, POLICE COMPLAINTS BD., PERSONAL USE OF SOCIAL MEDIA: REPORT AND RECOMMENDATIONS OF THE POLICE COMPLAINTS BOARD TO MAYOR MURIEL BOWSER, THE COUNCIL OF THE DISTRICT OF COLUMBIA, AND CHIEF OF POLICE PETER NEWSHAM 11-45 (2020), <https://perma.cc/7JKS-ZQWW> (collecting and discussing social media policies from police departments around the country). *See generally infra* Part I.D (collecting sources that outline police-department policies and compliance advice, often in First Amendment terms).

the prospect of requiring police departments to do much more to detect and punish their officers’ social media speech, even before it becomes public.

The Article proceeds in three parts. In Part I, the Article provides a new account of how the First Amendment’s *Pickering* doctrine, which governs public employees’ speech, has been applied to police social media comments. It argues that this application of *Pickering* fails to address the issue of pseudonymous, private, or otherwise “hidden” social media speech—and may even exacerbate the problems raised by hidden speech by dissuading departments from investigating it. Under the *Pickering* paradigm, an officer’s biased or violent speech becomes actionable only if it can be traced back to the department. And departments make it known that they will not proactively uncover such speech, even where it is hidden under thin disguises. The shortcoming of the First Amendment approach, quite simply, is that it denies that there is any actionable harm from even the most incendiary police comments, provided they are “hidden” from discovery. This First Amendment theory of harm fails to recognize the damage that biased and violent speech can cause to an officer’s credibility as a witness and to the integrity of the justice system, even if the speech remains hidden.

In Part II, the Article applies a criminal-procedure paradigm to the problem of police social media speech. Seen through the lens of *Brady v. Maryland* and other criminal-procedure doctrines, the harm from an officer’s social media speech takes on a very different form. Criminal procedure identifies the harm from the speech in terms of what it reveals about the officer’s credibility as a witness. Biased and violent comments on social media are legally relevant because they can be used to impeach the officer. *Brady* and its progeny require, as a matter of constitutional law, that prosecutors seek out and disclose such significant impeachment evidence. If the criminal-procedure model is applied, police departments and prosecutors have a duty to seek out and disclose to the defense these social media posts that the defense would not be able to discover on its own. In short, criminal procedure imposes a duty on the prosecution team to proactively monitor officers’ speech, while the First Amendment approach permits departments and prosecutors to remain passively unaware of hidden speech. Part II also examines the awkwardness of the “off-label” application of criminal procedure to First Amendment and employment law problems.

Finally, Part III makes the normative argument for applying a criminal-procedure paradigm, rather than a First Amendment one, to police social media speech. The criminal-procedure paradigm would require police departments to seek out and remedy hidden social media speech. Though there are admittedly concerns about the intrusiveness of departments’ efforts to seek out hidden speech, these concerns are outweighed by the dangers of ignoring this speech. Hidden social media speech is just as corrosive to an officer’s credibility and to the integrity of the criminal justice system as named speech.

But police departments following the First Amendment paradigm allow such dangerous speech to remain hidden. Indeed, the failure to proactively investigate speech also serves to outsource enforcement priorities to the public, thus allowing for complaint-based viewpoint discrimination. To protect defendants’ due process rights, the justice system’s legitimacy, and police officers’ speech rights, police departments must proactively monitor hidden speech. Only the criminal-procedure paradigm can provide the doctrinal foundation for that monitoring.

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The debate about police social media speech concerns police departments, police officers, and criminal defendants, but not only them. It is also a matter of critical importance to the public. Police social media speech speaks to the legitimacy of the institutions that are charged with serving and protecting the public; when biased or violent speech occurs, it has the power to inflict fear in the population being policed. In Nashville, for example, a 911 dispatcher used a variant of the n-word on Facebook to celebrate Donald Trump’s 2016 election victory, prompting numerous complaints from members of the public.<sup>51</sup> One complainant commented that if a police officer or ambulance were slow to respond to a 911 call, it may be that “your skin is too dark[, so] your call may have just been placed on the back burner.”<sup>52</sup> The complainant added: “I want to know that my life is valuable and that I will be protected just as well as any other citizen despite the color of my skin. Please fix this!”<sup>53</sup> And in Oakland, during public comments on the inflammatory @crimereductionteam Instagram account, a resident confronted the police commission: “The devil has shown his face here. What are you prepared to do?”<sup>54</sup> This Article examines the doctrines and policies governing that question.

## **I. The First Amendment Paradigm**

In recent years, police labor attorneys have discussed police social media speech in First Amendment terms. As racial justice protests reached their height in the summer of 2020 and the presidential campaign further polarized the debate about policing, labor attorney Will Aitchison told his podcast listeners about the danger that officers face on social media.<sup>55</sup> “We are seeing our first wave of disciplinary cases resulting from police officers making social

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51. See *Bennett v. Metro. Gov’t*, 977 F.3d 530, 533-34 (6th Cir. 2020).

52. *Id.* at 534 (quoting the complainant’s Facebook post).

53. *Id.* at 535 (quoting the complainant’s statement to the mayor’s office).

54. Oakland Police Comm’n, *supra* note 23, at 15.

55. See *Ten Rules for Police Officer Social Media Posts*, LAB. RELS. INFO. SYS. (June 7, 2020), <https://perma.cc/UK3G-BSWV>.

media posts, mostly about the protests, but also about the George Floyd incident itself,” Aitchison said.<sup>56</sup> Gone were the days when employers would address “potentially inappropriate social media posts much the same way they would any other potential disciplinary offense”—that is, with “an investigation that would be referred to internal affairs” and “might take months to finish,” followed by “a pre-disciplinary hearing and then a final disciplinary decision.”<sup>57</sup> “Now,” explained Aitchison, “we’re seeing disciplinary decisions within a matter of days, and they’re almost always terminations.”<sup>58</sup> “Be extremely careful what you post,” warned labor lawyer John Berry in his blog post, “Tips for Police Officers and Social Media Accounts.”<sup>59</sup> “A good rule of thumb,” he explained, “is to not post anything that the officer would not be comfortable with his or her supervisors seeing.”<sup>60</sup>

“If you are thinking about using social media to . . . take a view that others may find offensive,” cautioned a newsletter from the labor attorneys representing sheriff’s deputies in one southern California county, “our suggestion would be—don’t do it. Because any such posting will not be protected under the First Amendment if it is likely to cause disruption.”<sup>61</sup> Another advisory article—*Facebook: Friend or Foe?*—reminded officers that social media has “led to the downfall of many police officers, court cases being lost, and agency embarrassment.”<sup>62</sup> “[D]on’t post anything on the internet that you would not want to see on the news!”<sup>63</sup> For rookies in the Seattle Police Department, the advice was folksier but amounted to the same thing: “If you can’t say it in front of your grandma, don’t say it.”<sup>64</sup>

In 2019, the International Association of Chiefs of Police called it “crucial” and “essential” for departments to educate officers on the First Amendment limits to their off-duty social media speech rights.<sup>65</sup> As far back as 2011, the

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56. *Id.* at 00:21-00:38.

57. *Id.* at 00:40-01:10.

58. *Id.* at 01:11-01:20.

59. John V. Berry, *Tips for Police Officers and Social Media Accounts*, POLICE L. BLOG (Jan. 12, 2018) (capitalization altered), <https://perma.cc/3X8Y-LVSL>.

60. *Id.*

61. Robert Rabe, *Facebook Post May Be Protected Speech*, LEGAL DEF. TR. (Riverside Sheriffs’ Ass’n Legal Def. Tr., Riverside, Cal.), Jan. 2021, at 2.

62. Thomas Bullock, *Facebook: Friend or Foe?*, VA. RISK SHARING ASS’N (Mar. 6, 2017), <https://perma.cc/JT83-LAU7>.

63. *Id.*

64. Ansel Herz, *Seattle Cop Defends Killer of Michael Brown, Accuses Obama of Racism*, STRANGER (Sept. 4, 2014, 3:00 PM) (quoting Ron Smith, then-president of the Seattle Police Officers Guild), <https://perma.cc/A45M-H83P>.

65. See INT’L ASS’N OF CHIEFS OF POLICE, SOCIAL MEDIA: CONCEPTS AND ISSUE PAPER 4-5, 7-9 (rev. 2019), <https://perma.cc/F7J9-REG4>.

association’s president was quoted as saying the following about police social media use: “This is something that all the police chiefs around the country, if you’re not dealing with it, you better deal with it . . . .”<sup>66</sup>

This Part considers police social media speech through the lens of the First Amendment. It first describes the basics of the First Amendment’s *Pickering* case law, which governs the speech rights of public employees.<sup>67</sup> Although some take issue with the current doctrine governing public employee speech,<sup>68</sup> the *Pickering* doctrine is well equipped to distinguish between permitted and prohibited speech. Where *Pickering* falls short—and where there is very little critical attention—is in the regulation of “hidden” speech: that is, speech that a public employee utters pseudonymously or in private channels, such that it is not easily connected to the speaker’s role as a government agent. This Part explains *Pickering*’s blind spot for hidden speech, and the ways in which police departments that embrace a First Amendment approach to this problem end up doing nothing to proactively monitor such dangerous speech. This ostrich-like approach to police social media speech is detrimental to defendants’ criminal-procedure rights, the integrity of the justice system, and officers’ speech rights themselves. Yet it has been generally overlooked by the First Amendment literature and case law.

#### A. *Pickering*’s Application to Police Social Media Speech

The *Pickering* framework has been applied for half a century to all manner of government employees and all manner of speech.<sup>69</sup> The *Pickering* test for whether a public employee’s speech is protected from discipline starts with a threshold requirement: The employee must show that she spoke as a “private citizen”<sup>70</sup> on “a matter of public concern.”<sup>71</sup> An employee speaks as a private

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66. Erica Goode, *Police Lesson: Social Network Tools Have Two Edges*, N.Y. TIMES (Apr. 6, 2011) (quoting Mark A. Marshall, then-president of the International Association of Chiefs of Police), <https://perma.cc/3228-KTN7>.

67. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 565 (1968).

68. See, e.g., Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NW. U. L. REV. 1007, 1009 (2005); Helen Norton, *Constraining Public Employee Speech: Government’s Control of Its Workers’ Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 7 (2009); Cynthia Estlund, *Free Speech Rights That Work at Work: From the First Amendment to Due Process*, 54 UCLA L. REV. 1463, 1474 (2007).

69. See *Garcetti v. Ceballos*, 547 U.S. 410, 413, 416-17 (2006) (deputy district attorney); *City of San Diego v. Roe*, 543 U.S. 77, 78, 82-84 (2004) (per curiam) (police officer); *Rankin v. McPherson*, 483 U.S. 378, 379-80, 388 (1987) (employee of a county constable’s office); *Connick v. Myers*, 461 U.S. 138, 140 (1983) (assistant district attorney); *Pickering*, 391 U.S. at 564-65 (public school teacher).

70. See *Garcetti*, 547 U.S. at 419.

71. See *Rankin*, 483 U.S. at 388.

citizen when her speech is not part of her job function. For example, the prosecutor who speaks in a memo to her supervisors about how to move forward with a case is *not* speaking as a private citizen,<sup>72</sup> but the public school teacher who writes a letter to the editor criticizing the school district is.<sup>73</sup> The definition of “private citizen” can sometimes be complicated,<sup>74</sup> but it isn’t that complicated in the context of police officers and social media. Almost always, officers who post on Facebook are speaking as private citizens, rather than pursuant to their job functions.<sup>75</sup>

The “public concern” test is only a bit more complicated when it comes to police posts on social media. A comment is on “a matter of public concern” if it “relat[es] to any matter of political, social, or other concern to the community”<sup>76</sup> or is “a subject of legitimate news interest.”<sup>77</sup> Harassing comments directed at a coworker, resentments and grievances spewed at supervisors, or purely obscene rants fail the “public concern” test.<sup>78</sup> But an officer’s comments on the issues that cause the most controversy—policing, immigration, religion, politics, race, or deadly force—would all address matters of public concern.<sup>79</sup>

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72. See *Garcetti*, 547 U.S. at 421-22.

73. See *Pickering*, 391 U.S. at 564-65, 568.

74. See, e.g., *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1123-26 (9th Cir. 2008) (explaining that the parties disputed whether a “security specialist” of a school district acted as part of his official employment responsibilities when he wrote a letter complaining about inadequate safety and securities policies); see also *id.* at 1127-28 (describing the circuit split on whether the “private citizen” question is one for the judge or the jury).

75. See, e.g., *Moser v. Las Vegas Metro. Police Dep’t*, 984 F.3d 900, 905 (9th Cir. 2021); see also *Bennett v. Metro. Gov’t*, 977 F.3d 530, 537 n.1 (6th Cir. 2020) (“The first part of the test also includes whether the employee spoke as a private citizen or public employee in the course of employment. This prong is not at issue in this case, as neither party argues that Bennett’s post was made in the course of employment.” (citation omitted)).

76. *Connick v. Myers*, 461 U.S. 138, 146 (1983).

77. *City of San Diego v. Roe*, 543 U.S. 77, 83-84 (2004) (per curiam).

78. See Leon Friedman, *Public Employment Litigation*, in *EMPLOYMENT DISCRIMINATION AND CIVIL RIGHTS ACTIONS IN FEDERAL AND STATE COURTS* 169, 192-95 (ALI-ABA Course of Study, 2004) (cataloguing cases finding that speech was not a matter of public concern).

79. See *Grutzmacher v. Howard County*, 851 F.3d 332, 343 (4th Cir. 2017) (“[T]he ‘liberal’ and ‘assault liberal’ post and comment implicated a matter of public concern.”); *Locurto v. Giuliani*, 447 F.3d 159, 164-65, 175 (2d Cir. 2006) (“[P]ublic concern . . . is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication.” (first alteration in original) (quoting *Roe*, 543 U.S. at 83-84)); see also Emily Hoerner & Rick Tulskey, *Cops Across the US Have Been Exposed Posting Racist and Violent Things on Facebook. Here’s the Proof*, BUZZFEED NEWS (updated July 23, 2019, 3:32 PM ET), <https://perma.cc/T3QK-VYFY> (describing some of the controversial comments captured by the Plain View Project).

If the private-citizen and public-concern tests are satisfied, the burden shifts to the government employer to show that its interests in disciplining the speech outweigh the employee’s interests in speaking.<sup>80</sup> According to the Supreme Court, the government interest in discipline exists when employee speech “impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships[,] . . . impedes the performance of the speaker’s duties or *interferes with the regular operation of the enterprise*.”<sup>81</sup> This italicized clause—interference or disruption—is usually the grounds on which police departments and other public-safety agencies rely in punishing speech.<sup>82</sup>

Police departments need the public’s trust. They need the public to report crimes, to help investigate and prosecute crimes, and to abide by the rule of law. Without public cooperation, the agency cannot function. When social media comments by officers undermine the public trust, the government has an interest in disciplining the officers because the speech “interferes with the regular operation” of the agency.<sup>83</sup> Case law recognizes that law-enforcement agencies have a greater interest than other types of public employers in maintaining efficient operations, given that the safety of the public depends on their work.<sup>84</sup> Because of this interest, *Pickering* gives broad discretion to police departments to decide when speech disrupts its operations.<sup>85</sup> The bottom line

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80. See *Moser*, 984 F.3d at 904-05. It should be noted as well that a plaintiff bringing a First Amendment retaliation claim must prove that the protected speech was a “substantial or motivating factor in the adverse employment action.” *Id.* (quoting *Barone v. City of Springfield*, 902 F.3d 1091, 1098 (9th Cir. 2018)).

81. *Rankin v. McPherson*, 483 U.S. 378, 388 (1987) (emphasis added).

82. See, e.g., *Moser*, 984 F.3d at 911 (remanding the case to the district court to determine whether the plaintiff’s comments would disrupt the workplace); *Hernandez v. City of Phoenix*, 432 F. Supp. 3d 1049, 1067-68 (D. Ariz. 2020) (quoting the police department’s social media policy, challenged in court, which targeted speech that “interfere[s]” with work duties); *O’Laughlin v. Palm Beach County*, 500 F. Supp. 3d 1328, 1335 (S.D. Fla. 2020), *aff’d in part, vacated in part*, No. 20-14676, 2022 WL 982870 (11th Cir. Apr. 1, 2022). In *O’Laughlin*, the Eleventh Circuit held as unconstitutionally overbroad fire department’s social media policy that prohibited “content that could be reasonably interpreted as having an adverse effect upon Fire Rescue morale, discipline, operations, the safety of staff, or perception of the public.” 2022 WL 982870, at \*5-6 (quoting the department’s policy).

83. *Rankin*, 483 U.S. at 388.

84. See, e.g., *Moser*, 984 F.3d at 908 (“[T]he Ninth Circuit has recognized the special need for police departments to avoid disruption to provide public safety.” (citing *Byrd v. Gain*, 558 F.2d 553, 554 (9th Cir. 1977))).

85. See *Bennett v. Metro. Gov’t*, 977 F.3d 530, 544-45 (6th Cir. 2020) (“The diverse constituents of Metro Government need to believe that those meant to help them in their most dire moments are fair-minded, unbiased, and worthy of their trust.”); *Grutzmacher v. Howard County*, 851 F.3d 332, 346 (4th Cir. 2017) (“Plaintiff’s speech frustrated the [Fire] Department’s public safety mission and threatened ‘community trust’ in the Department, which is ‘vitaly important’ to its function.” (quoting the  
*footnote continued on next page*

is that police agencies have significant power to punish speech that interferes with their operations.

## B. Where Critiques of *Pickering* Miss the Mark

Of all *Pickering*'s features, its balancing test has generated the most controversy both in, and beyond, the context of police speech.

### 1. Critiques of *Pickering*

*Pickering*'s major innovation was to create significant protections for speech by public employees.<sup>86</sup> Nonetheless, *Pickering* and its progeny have been much criticized over the last fifty years for not going far enough to protect public employees' speech rights and for creating too much indeterminacy about the contours of these protections.<sup>87</sup> Both of those strands of criticism are seen in the context of police social media speech.

Scholarship has considered *Pickering*'s application to police officers<sup>88</sup> and social media speech,<sup>89</sup> but rarely to the union of the two.<sup>90</sup> Police-focused

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record)); *Locurto v. Giuliani*, 447 F.3d 159, 182-83 (2d Cir. 2006) (“[E]ffective police and fire service presupposes respect for the members of those communities, and the defendants were permitted to account for this fact in disciplining the plaintiffs.”).

86. Randy J. Kozel, *Free Speech and Parity: A Theory of Public Employee Rights*, 53 WM. & MARY L. REV. 1985, 1987 (2012) (“The Court expressly abandoned its former position that because citizens lack any entitlement to public employment, they also lack grounds for challenging employment conditions as unconstitutional.”).

87. See *infra* notes 96-102 and accompanying text.

88. See, e.g., Mary K. McCann, Comment, *Lucidity Sinks as These Twain Converge: Keeping Pickering Afloat Despite Locurto v. Giuliani and Melzer v. Board of Education*, 79 ST. JOHN'S L. REV. 221, 245-46, 250-51 (2005); André G. Travieso, Note, *Employee Free Speech Rights in the Workplace: Balancing the First Amendment Against Racist Speech by Police Officers*, 51 RUTGERS L. REV. 1377, 1379 (1999).

89. See, e.g., Timothy Zick, *The Costs of Dissent: Protest and Civil Liabilities*, 89 GEO. WASH. L. REV. 233, 254-55 (2021); Tatiana Hyman, Note, *The Harms of Racist Online Hate Speech in the Post-COVID Working World: Expanding Employee Protections*, 89 FORDHAM L. REV. 1553, 1579 (2021); Thalia Olaya, Note, *Public Employees' First Amendment Speech Rights in the Social Media World: #Fire or #Fire-d?*, 36 HOFSTRA LAB. & EMP. L.J. 431, 447 (2019); Alexis Martinez, Comment, *The Right to Be an Asshole: The Need for Increased First Amendment Public Employment Protections in the Age of Social Media*, 27 AM. U. J. GENDER SOC. POL'Y & L. 285, 293 (2019); Frank E. Langan, Note, *Likes and Retweets Can't Save Your Job: Public Employee Privacy, Free Speech, and Social Media*, 15 U. ST. THOMAS L.J. 228, 229 (2018); Lindsay A. Hitz, Note, *Protecting Blogging: The Need for an Actual Disruption Standard in Pickering*, 67 WASH. & LEE L. REV. 1151, 1155 (2010).

90. See, e.g., George S. Scoville III, *Purged by Press Release: First Responders, Free Speech, and Public Employment Retaliation in the Digital Age*, 97 OR. L. REV. 477, 482 (2019); Christina Jaremus, *#FiredforFacebook: The Case for Greater Management Discretion in Discipline or Discharge for Social Media Activity*, 42 RUTGERS L. REC. 1, 30-34 (2014-2015); Patricia

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scholarship wrestles with the amount of deference departments deserve in determining whether an officer’s comment is disruptive.<sup>91</sup> Some of the pieces argue against “government-manufactured public opinion crises” and demand “proof that controversial speech actually disrupted the efficient delivery of public services.”<sup>92</sup> Other police-focused works argue for the termination of officers who express racist views.<sup>93</sup> Social media-focused pieces detail distinctions between social media and other types of speech, arguing that “[s]ocial media should be treated differently than private conversations” because “people act differently on social media” and “because [social media activity] is preserved in the recess of cyberspace.”<sup>94</sup> Authors who argue for greater First Amendment protections also point to “[t]he heightened visibility of social media, anonymity of internet users, and collective outrage surrounding unpopular viewpoints” as reasons for doing more to protect social media comments.<sup>95</sup>

The concerns about *Pickering*’s application to police officers and to social media are part of a larger, well-developed body of literature criticizing *Pickering*. One type of critique takes issue with the idea that public employees should have any less First Amendment protection than members of the public who do not happen to work for the government.<sup>96</sup> *Pickering* lets public agencies punish their employees’ speech on the theory that it interferes with the agency’s operation.<sup>97</sup> But speech by private citizens may also interfere with the operation of government agencies.<sup>98</sup> Perhaps, the critics argue, there should be “parity” between employees and members of the public.<sup>99</sup> Another concern is that *Pickering* allows the government employer—and those who

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Sánchez Abril, Avner Levin & Alissa Del Riego, *Blurred Boundaries: Social Media Privacy and the Twenty-First-Century Employee*, 49 AM. BUS. L.J. 63, 90-92 (2012).

91. See, e.g., McCann, *supra* note 88, at 225 (“Part III suggests factors that a court should consider when deciding whether a disruption will occur, in order to ensure consistent and fair results.”).

92. See, e.g., Scoville, *supra* note 90, at 482.

93. See, e.g., Travieso, *supra* note 88, at 1379 (“[A]ny police officer who publicly displays racist beliefs toward any sector of the community must be terminated because his beliefs and actions endanger the efficiency of State law enforcement.”).

94. See, e.g., Jaremus, *supra* note 90, at 4-5; see also Sabrina Niewialkouski, Note, *Is Social Media the New Era’s “Water Cooler”? #NotIfYouAreAGovernmentEmployee*, 70 U. MIA. L. REV. 963, 970 (2016) (“Employee online venting and criticizing of their employer on social media not only allows the information to be more widespread than at the local water cooler, but also causes the speech itself to change.”).

95. See, e.g., Martinez, *supra* note 89, at 297.

96. E.g., Kozel, *supra* note 86, at 1988.

97. See *id.* at 1988, 2012-13; *supra* text accompanying notes 80-82.

98. Kozel, *supra* note 86, at 2018-19, 2021.

99. *Id.* at 1989, 2009-39.

complain to the government—to use the benefit of public employment (and the threat of losing that employment) to promote favored viewpoints.<sup>100</sup> The deeper *Pickering* allows the government to look into off-duty speech, the greater the fear of its power to promote favored viewpoints.<sup>101</sup> One scholar predicted that, if *Pickering* trends hold, employers would be allowed “to fire workers for any off-duty speech to which the public might object without any meaningful tether to the effectiveness of government operations” and render people “unemployable for many government jobs purely because of their unpopular or controversial off-duty expression.”<sup>102</sup> These concerns about *Pickering* are, of course, present in the debate about police social media speech, but they do not convey as much force as they could with other types of public employees, as the next Subpart discusses.

## 2. Misapplication to police social media speech

Though some will certainly disagree, the typical concerns about *Pickering* do not apply with the same force to police speech as they do to speech by other types of public employees. Police officers are different from other government actors. And the basis for treating them differently from, say, schoolteachers or sanitation workers or surgeons in public hospitals is the nature of their job duties. Officers are entrusted with authority to take away a person’s liberty or life in the name of the law. They also are critical links in the chain of custody of evidence that is relied upon by prosecutors at trial. The high level of authority invested in police comes along with a correspondingly high need for the public to trust their judgment and integrity. Officers who make biased and violent speech on social media undermine the public trust in their judgment and destroy their credibility as witnesses. The officer who expresses bias has thus undercut a core job requirement, even when those comments are made off duty. All of this is to say that there is a sounder basis for punishing an officer’s off-duty comments than for other types of public employees. The concern that *Pickering* does not do enough to protect free speech thus has less purchase when

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100. See Kozel, *supra* note 68, at 1019; see also Estlund, *supra* note 68, at 1474 (noting that “public employers might game the system to the detriment of both employees and the public” by “broadly defining employees’ jobs to include any sort of whistleblowing, yet failing to afford any recourse to the employee who is penalized for carrying out those job duties”).

101. See Mary-Rose Papandrea, *The Free Speech Rights of Off-Duty Government Employees*, 2010 BYU L. REV. 2117, 2164-65, 2174 (“It is tempting to give government employers wide berth to restrict the expressive activities of their employees given that most of the cases involve highly offensive speech. It is worth noting, however, that granting government employers this authority would authorize the punishment of employee speech simply because [it is] contrary to the views of the supervising government official.”).

102. Norton, *supra* note 68, at 6.

applied to police social media speech than when it is applied to speech by other types of public employees.

Another critique of *Pickering* that misses the mark in this context is the complaint about the predictability of outcomes. There is a great deal of concern about the difficulty in applying *Pickering*'s balancing test. Several law review articles have pointed to the difficulty police departments face in predicting whether a comment will lead to disruption of the agency's functions and thus to grounds for disciplining the officer under *Pickering*. On this subject, the Supreme Court has held that the public employer does not need to "allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action."<sup>103</sup> As several law review pieces have mentioned, however, there is a circuit split between courts that require the agency to show "actual" disruption to prevail in *Pickering* balancing and those that allow the agency to prevail where it presents merely a prediction of disruption.<sup>104</sup>

But the concerns about *Pickering*'s standards for predicting disruption<sup>105</sup> are actually more imagined than real in the context of police social media speech. In fact, courts have developed a rule of thumb that goes a long way toward converting the *Pickering* balancing standard into an easily administrable rule: When an officer makes speech that is biased<sup>106</sup> or

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103. *Connick v. Myers*, 461 U.S. 138, 152 (1983); see *Moser v. Las Vegas Metro. Police Dep't*, 984 F.3d 900, 910 n.8 (9th Cir. 2021) ("This does not mean that the government must wait until the media or a critical mass of people notices the challenged speech. Some statements may be so patently offensive (e.g., racial slurs) that the government can reasonably predict they would cause workforce disruption and erode public trust.").

104. Madyson Hopkins, Note, *Click at Your Own Risk: Free Speech for Public Employees in the Social Media Age*, 89 GEO. WASH. L. REV. ARGUENDO 1, 10 (2021) (quoting *Schalk v. Gallemore*, 906 F.2d 491, 496 (10th Cir. 1990)); Lilli B. Wofsy, Comment, *Will I Get Fired for Posting This?: Encouraging the Use of Social Media Policies to Clarify the Scope of the Pickering Balancing Test*, 51 SETON HALL L. REV. 259, 266 (2020).

105. *Cf. Bennett v. Metro. Gov't*, 977 F.3d 530, 553 (6th Cir. 2020) (Murphy, J., concurring in the judgment) (noting the difficulty of weighing the "significant interests" of the individual against those of the employer and noting that the *Pickering* balancing test "do[es] not provide helpful guidance to resolve concrete cases").

106. See, e.g., *Bennett*, 977 F.3d at 542 ("As [the government] stated in its letter to Bennett: 'To advance that mission, it is vitally important that all department employees conduct themselves in a manner free of bias, demonstrate unquestionable integrity, reliability, and honesty. The success of [the] agency can be measured by the perception and confidence the public has in the employees representing the agency.'" (second alteration in original)); *Grutzmacher v. Howard County*, 851 F.3d 332, 346 (4th Cir. 2017) ("Plaintiff's [racially biased] speech frustrated the Department's public safety mission and threatened 'community trust' in the Department, which is 'vitally important' to its function. '[T]he more the employee's job requires . . . public contact, the greater the state's interest in firing her for expression that offends her employer.'" (second and third alterations in original) (first quoting the record; and then quoting *McEvoy v. Spencer*, 124 F.3d 92, 103 (2d Cir. 1997))); *Locurto v. Giuliani*, 447 F.3d 159, *footnote continued on next page*

violent,<sup>107</sup> courts will treat it as nearly per se disruptive. Attorneys for the City of Philadelphia argued as much in recent filings resulting from the Plain View Project revelations.<sup>108</sup> They argued that speech will be found per se disruptive if it (1) indicates “bias or animus regarding race, ethnicity, religion, sexual orientation or gender identity”; or (2) promotes “violence, extrajudicial punishment, vigilantism, police brutality, misuse of power, or lack of respect for due process.”<sup>109</sup> Because the most bedeviling comments are precisely these biased and violent comments, *Pickering* actually stands ready as a rule-like solution, despite its reputation as an indeterminate standard.

To see what these rules look like in practice, consider the following social media comments by law enforcement. It is not difficult to predict how *Pickering* would resolve these cases:

- A Las Vegas jail guard posted a meme showing President Obama’s “HOPE” campaign poster, remade with the word “ROPE” and a noose around the then-President’s neck.<sup>110</sup> The officer criticized Black Lives Matter

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182-83 (2d Cir. 2006) (“The members of the African-American and other minority communities whose reaction to the [racist] float the defendants legitimately took into account . . . cannot properly be characterized as ‘outsiders seeking to heckle [the plaintiffs] into silence.’ Rather, effective police and fire service presupposes respect for the members of those communities, and the defendants were permitted to account for this fact in disciplining the plaintiffs.” (third alteration in original) (citation omitted) (quoting *Melzer v. Bd. of Educ.*, 336 F.3d 185, 199 (2d Cir. 2003))); *Pappas v. Giuliani*, 290 F.3d 143, 149 (2d Cir. 2002) (“The main consideration in assessing the employer’s interest is the capacity of the employee’s public speech to harm the effective functioning of the employer’s enterprise. The public perception in minority communities that risks to harm the mission of the Police Department is . . . the perception that ordinary cops are biased. An ordinary police officer’s distribution of these bigoted hate-filled materials reinforces that perception and thus harms the effectiveness of the Police Department. Furthermore, for police officers of one race to express hatred and scorn for members of another race obviously fans anger, dissension and racial tensions among officers of different races and thus inflicts harm of a second kind on the Department’s performance of its mission.”); *McMullen v. Carson*, 754 F.2d 936, 936-37 (11th Cir. 1985) (permitting the firing of a sheriff’s-office employee who worked as a Ku Klux Klan recruiter to “prevent a deleterious effect on the Sheriff’s ability to enforce the law in the community”); *Tindle v. Caudell*, 56 F.3d 966, 968 (8th Cir. 1995) (allowing the firing of an officer who appeared at a “Halloween party at the Fraternal Order of Police Lodge dressed in blackface, wearing bib overalls and a black, curly wig, and carrying a watermelon”).

107. See, e.g., *Moser*, 984 F.3d at 908 (“Under [the government’s] reading, Moser advocated unlawful violence against suspects, which would not be in the ‘core’ First Amendment zone . . .”).
108. Motion to Dismiss, *supra* note 3, at 30 (“The officers’ First Amendment claim should be dismissed because their social media postings were per se disruptive.” (capitalization altered)).
109. *Id.* at 35.
110. *Sabatini v. Las Vegas Metro. Police Dep’t*, 369 F. Supp. 3d 1066, 1075 (D. Nev. 2019), *rev’d sub nom. Moser*, 984 F.3d 900.

supporters as “ghetto trash race baiting scumbags’ who ‘blame their laziness and misfortunes on others’ and ‘[r]ace baiting pieces of shit’ who should ‘[b]urn in hell.’”<sup>111</sup>

- In Massachusetts, an officer delighted in news that a white supremacist had rammed a counterprotester in Charlottesville: “Hahahaha love this. Maybe people shouldn’t block roadways.”<sup>112</sup>
- “Act like a Thug Die like one!” commented a New Orleans officer on the killing of Trayvon Martin.<sup>113</sup>
- A District of Columbia officer posted a picture of the police department’s helicopter. The caption read: “On duty! Beautiful night to go hunting.”<sup>114</sup>
- An officer in Sparks, Nevada, saw a video of violence at a racial justice protest and took to Twitter to comment: “I’m going to build a couple AR pistols just for BLM, Antifa or active shooters who cross my path and can’t maintain social distancing.”<sup>115</sup>
- Regarding the killing of Philando Castile, who was shot four times by Minnesota police, an officer in Tennessee commented: “Yeah, I would have done 5.”<sup>116</sup>
- An officer in New Mexico listed his occupation as “human waste disposal,”<sup>117</sup> while an officer in Indiana listed his as “garbage man” and said that he “pick[s] up trash for a living.”<sup>118</sup>
- A Louisiana officer posted on social media that Representative Alexandria Ocasio-Cortez was a “vile idiot” who “needs a round, and I don’t mean the kind she used to serve.”<sup>119</sup>
- A Phoenix officer posted on social media: “Statistics show that criminals commit less crime after they’ve been shot.”<sup>120</sup>

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111. *Id.* at 1076 (alterations in original) (quoting the record).

112. Avery Anapol, *Cop Fired After Commenting “Love This” on Charlottesville Rally Car Attack Photo*, THE HILL (Dec. 4, 2017, 10:20 AM EST), <https://perma.cc/9JYL-CGHU>.

113. Naomi Martin, *Trayvon Martin Online Comments May Have Cost Ex-NOPD Cop Right to City Attorney in Wrongful-Death Suit*, NOLA.COM (July 20, 2013, 6:39 AM), <https://perma.cc/Q9UP-4VTG>.

114. ASHTON ET AL., *supra* note 50, at 4.

115. Complaint ¶ 28, *Forbush v. City of Sparks*, No. 21-cv-00163, 2021 WL 6551282 (D. Nev. Dec. 21, 2021), ECF No. 1.

116. *Venable v. Metro. Gov’t*, 430 F. Supp. 3d 350, 353 (M.D. Tenn. 2019).

117. Goode, *supra* note 66.

118. Bullock, *supra* note 62.

119. Chad Calder, *Gretna Police Officer Suggests U.S. Rep. Alexandria Ocasio-Cortez “Needs a Round” in Social Media Post*, NOLA.COM (updated July 21, 2019, 7:33 AM), <https://perma.cc/DM9H-AL6U>.

120. Uriel J. Garcia, *Phoenix Officer in Facebook Post Scandal Fired, Chief Says*, AZCENTRAL.COM (updated Oct. 22, 2019, 6:48 PM MT), <https://perma.cc/C6ZM-WJSE>.

When departments take disciplinary action based on biased or violent comments like these, courts are likely to agree that these comments are disruptive under the *Pickering* test.

Though no one expects police officers to stay abreast of case law, officers are expected to know their departmental policies. And police departments' social media policies often spell out these rules of thumb regarding bias and violence,<sup>121</sup> thus giving officers notice about the redlines for punishable speech. The Detroit Police Department's social media policy bans, for example, "derogatory material" that is "sexual, violent, racial, [or] religious" in nature "posted along with any Department approved reference."<sup>122</sup> As noted in a recent federal court decision, the Las Vegas Metropolitan Police Department's policy prohibited speech "that ridicules, maligns, disparages, or otherwise promotes discrimination against race, ethnicity, religion, sex, national origin, sexual orientation, age, disability, political affiliation, gender identity and expression or other explicit class of individuals."<sup>123</sup>

Harder questions arise when social media comments do not fit neatly within the bias and violence boxes. During the Supreme Court confirmation hearings for then-Judge Brett Kavanaugh, a Los Angeles Police Department (LAPD) sergeant took to social media to recount what was known about the sexual-assault allegations against the nominee. "[T]he very premise of an [sic] American justice is that you're innocent until proven guilty," the sergeant wrote. "Considering these circumstances," he continued, "there's no way that Kavanaugh can be proven guilty. Sooooo?"<sup>124</sup> Complaints came in from the public that the sergeant was "actively engaging in the shaming of multiple women who came forward with allegations."<sup>125</sup> Meanwhile, the sergeant said he was just providing a factual account of a matter of public importance.<sup>126</sup> Or consider the Phoenix police officers who received "supervisory coaching" for sharing Facebook memes with the biblical quote: "For he is the servant of God, an avenger who carries out God's wrath on the wrongdoer."<sup>127</sup> The police

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121. See ASHTON ET AL., *supra* note 50, at 11-45 (collecting social media policies).

122. Detroit Police Dep't, Directive No. 102.8, Department Internet Usage/Web Pages/Social Networking 5 (rev. 2020), <https://perma.cc/2D6X-NPKY>.

123. Sabatini v. Las Vegas Metro. Police Dep't, 369 F. Supp. 3d 1066, 1072 (D. Nev. 2019) (alteration in original) (emphasis omitted) (quoting the social media policy), *rev'd sub nom.* Moser v. Las Vegas Metro. Police Dep't, 984 F.3d 900, 915 (9th Cir. 2021).

124. Complaint, *supra* note 5, ¶ 52 (quoting the sergeant's Facebook post).

125. *Id.* ¶ 55 (quoting an anonymous complainant).

126. *Id.* ¶ 52 ("Everything I've just written are the FACTS. Not spins from Fox News, CNN, Breitbart, the Washington Post, the New York Times, Jimmy Kimmel, Hannity, etc. Reach your own conclusions as to the merit of these allegations against Kavanaugh." (quoting the sergeant's Facebook post)).

127. Notice of Change in Factual Circumstances Regarding Plaintiffs' Amended Motion for a Preliminary Injunction at 1, Hernandez v. City of Phoenix, 432 F. Supp. 3d 1049 (D.

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department appears to have seen this as condoning violence, while the officers appear to have seen this as merely quoting scripture.

Another example of a wrinkle in applying *Pickering* arose in Las Vegas, where a SWAT sniper posted on Facebook about the arrest of a man who allegedly shot an officer: “[W]e caught that asshole . . . It’s a shame he didn’t have any holes in him.”<sup>128</sup> The police department removed the sniper from the SWAT team because it interpreted his comment as violent—“a little callous to killing,” in the words of his supervisor.<sup>129</sup> The officer claimed that “his comment suggested only that the police officer [who was shot] should have fired defensive shots.”<sup>130</sup> In the officer’s appeal from a grant of summary judgment, the Ninth Circuit held that the meaning of the comment was unclear on the existing record, and so it was improper to conclude, in light of the summary judgment standard, that this was a plea for extrajudicial violence rather than a request for better self-defense training for officers.<sup>131</sup> A factfinder would have to determine the meaning of the comment before *Pickering* balancing could be carried out.<sup>132</sup>

And certainly, where police speech touches on partisan political issues, the line drawing can be much harder than checking the box for bias or violence. For example, in a deposition, the lawyer for a Phoenix police officer who was fired for his Facebook posts asked the lieutenant responsible for internal affairs investigations what he would advise if an officer was considering posting the following on social media:

- “I love President Trump; I think our president is great; and I support the policies of the Trump administration.”<sup>133</sup>
- “I’m pro-life; the murder of unborn children is unacceptable.”<sup>134</sup>

Would these statements violate the police department’s policy? The sergeant responded that it was always a fact-intensive and case-by-case assessment whether a post crossed the line, and he would need additional information not provided in these hypotheticals.<sup>135</sup> The lieutenant then added

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Ariz. 2020) (No. 19-cv-05365), ECF No. 16; Exhibit 2 at 9, *Hernandez*, 432 F. Supp. 3d 1049 (No. 19-cv-05365), ECF No. 16-1 (capitalization altered).

128. *Moser*, 984 F.3d at 915 (Berzon, J., dissenting) (second alteration in original) (emphasis omitted) (quoting the officer’s Facebook comment).

129. *Id.* at 903 (majority opinion) (quoting the officer’s supervisors).

130. *Id.* at 902.

131. *Id.* at 908.

132. *Id.* at 911.

133. Exhibit 1: Excerpts of the Deposition of Lt. Eric Pagone at 9, 35, *Hernandez v. City of Phoenix*, 541 F. Supp. 3d 996 (D. Ariz. 2021) (No. 19-cv-05365), ECF No. 78-1.

134. *Id.* at 32.

135. *See id.* at 32-33.

his own practical wisdom: “[I]f you’re asking your supervisor if you can do something, then you probably shouldn’t do it.”<sup>136</sup>

The foregoing discussion illustrates how *Pickering* can be hard to apply to certain cases of police social media speech. Admittedly, the dividing line between permissible and impermissible speech can be difficult to draw, both for the officer making the post and for the police department contemplating the discipline. But tough calls and difficult line drawing are hallmarks of First Amendment law. These challenges are not indications that *Pickering* is broken or misguided. Nor is there a better alternative to balancing. A bright-line rule that categorically protected or refused to protect police speech would be even worse. The difficult cases of *Pickering* balancing should not overshadow the fact that *Pickering* is able to resolve many of the most inflammatory cases with its rule of thumb regarding bias and violence. If the *Pickering* regime succeeded in deterring biased and violent speech on social media—and failed to address anything else—it would still be a success.

### C. *Pickering*’s Problem with Hidden Speech

Unfortunately, there is still a large hole in *Pickering*’s application to police social media speech, and it concerns the investigation and detection of “hidden” speech. *Pickering* creates an impediment, or at least, a lack of incentive, to detect hidden social media speech by officers. Moreover, it may actually encourage the worst types of police social media speech to go underground.

The roots of the hidden-speech problem can be found in the balancing stage of *Pickering*, where the employer’s interests in disciplining speech are balanced against the employee’s interests in speaking.<sup>137</sup> For police departments, the main interest is in avoiding the harm that the speech will inflict on the public’s trust in the department and on the working relationships of employees within the department. In doctrinal terms, the departments are concerned with how the speech “interferes with the regular operation of the enterprise.”<sup>138</sup> Before speech can undermine the public trust, however, the public must hear about the speech, and, critically, it must realize that the speaker is an officer. Under *Pickering*, if no one knows that the speaker is an officer, then the police department has not suffered any disruption, so its interests in disciplining the speech may not have been met. Put another way, an officer who says the most outrageous things under a pseudonym or in private channels may not have “interfered” with the operations of the department, unless someone in the public realizes that this speech is coming from an officer.

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136. *Id.* at 33.

137. *Rankin v. McPherson*, 483 U.S. 378, 388 (1987).

138. *See id.*; *supra* text accompanying notes 80-82.

In considering what to do about “hidden” speech, the question is whether there is any First Amendment (or other) harm that results from it. If hidden speech is not disruptive, then police departments have no First Amendment justification for detecting and punishing it. If anything, departments may find themselves better off, from a First Amendment standpoint, if their officers keep their speech pseudonymous or in private channels. But there are many reasons to worry about the effect that hidden speech has on the integrity of the justice system, even if the First Amendment is not interested in it.

From time to time, courts have touched on *Pickering*’s treatment of “hidden” speech. The Supreme Court’s decision in *Rankin v. McPherson*<sup>139</sup> provides the most significant reference point for measuring the disruption of employee speech that has barely been disseminated at all. The *Rankin* case resulted from a public employee’s response to the attempted assassination of President Ronald Reagan. McPherson, an employee working in the backroom of a Texas constable’s office, told her coworker, “[I]f they go for him again, I hope they get him.”<sup>140</sup> Unbeknownst to McPherson, there was a third employee in the room who reported McPherson’s comment to the constable. McPherson was fired.<sup>141</sup> When the case reached the Supreme Court, a majority of the Justices found that McPherson’s termination violated the First Amendment because there was insufficient proof that this comment was disruptive.<sup>142</sup> *Rankin* thus showed how the government employer may find it hard to demonstrate any interference, under *Pickering*, when the offensive speech is hardly disseminated at all. “The risk that a single, offhand comment directed to only one other worker will lower morale, disrupt the work force, or otherwise undermine the mission of the office borders on the fanciful,” Justice Powell explained in his concurrence.<sup>143</sup> Where the speech is barely disseminated at all, or where it is not recognized as coming from a public employee, it is not disruptive. This, of course, has implications for hidden speech.<sup>144</sup>

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139. 483 U.S. 378.

140. *Id.* at 381 (quoting the record).

141. *Id.* at 381-82.

142. *See id.* at 388-89.

143. *Id.* at 393 (Powell, J., concurring).

144. *See* Langan, *supra* note 89, at 238 (“These principles [from *Rankin*], taken at face value, seem to suggest that a statement made on an individual’s private social networking profile that relates to a matter of public concern would be immunized. The case law that has developed in the thirty years since *Rankin*, however, has taken a decidedly pro-employer turn.”); *see also* Martin J. McMahon, Annotation, *First Amendment Protection for Law Enforcement Employees Subjected to Discharge, Transfer, or Discipline Because of Speech*, 109 A.L.R. Fed. 9, § 11 (1992) (collecting cases where courts found First Amendment protection for employees who “communicated . . . to employing agency personnel only”); Lawrence Rosenthal, *The Emerging First Amendment Law of*  
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In recent years, published decisions by the Sixth Circuit and Ninth Circuit have mentioned the issue of hidden speech. Both circuits hinted that pseudonymous or private police speech might not be disruptive. In the Sixth Circuit case, 911 dispatcher Danyelle Bennett used the n-word on Facebook to comment on the 2016 presidential election.<sup>145</sup> She was fired from her job after the public-safety agency for the Metropolitan Government of Nashville (Metro) received complaints.<sup>146</sup> “Had Bennett’s profile been private, or had it not indicated that she worked for Metro,” the Sixth Circuit noted, “Metro’s argument for terminating Bennett would not be as strong.”<sup>147</sup> In the Ninth Circuit case involving a SWAT sniper’s Facebook comments on the arrest of a suspect, the court cited *Rankin* for the proposition that “a court may discount the government employer’s fears of disruption if there is little evidence that the offending speech has been or will be discovered.”<sup>148</sup>

In both of these cases, the courts noted that it may be difficult to punish officers for speech that could not be connected to their police departments. Yet in both cases, someone in the public was able to connect the speech to the law-enforcement agency,<sup>149</sup> so the speech did not stay hidden.<sup>150</sup> There is a basic structural reason why courts do not get a lot of cases in which the speaker’s identity as a public employee is hidden: If no one from the public realizes that this is an officer speaking, no complaint is made to the department about the speech, and no disciplinary action transpires. Because departments do not engage in proactive monitoring of their officers’ speech, there are effectively

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*Managerial Prerogative*, 77 FORDHAM L. REV. 33, 65 n.108 (2008) (“Prior to *Roe*, these cases were resolved through an inquiry into whether the racist speech was disseminated in a manner that attempted to engage public concern and, if so, by application of the balancing test.”).

145. *Bennett v. Metro. Gov’t*, 977 F.3d 530, 533-34 (6th Cir. 2020).

146. *Id.* at 533.

147. *Id.* at 541.

148. *Moser v. Las Vegas Metro. Police Dep’t*, 984 F.3d 900, 902, 910 (9th Cir. 2021).

149. *See id.* at 903; *Bennett*, 977 F.3d at 534.

150. Other cases touching on hidden speech have dealt with officers who, outside of their official police duties, performed in and sold pornographic videos on the internet; operated a pornographic website featuring an officer’s wife; or participated in a sexually explicit photo-and-video session that was designed for online distribution. When these activities were discovered, the officers were disciplined. The Supreme Court and the courts of appeals that dealt with these cases did not reach the disruption issue, however, because they concluded that the materials were not on matters of public concern. *See City of San Diego v. Roe*, 543 U.S. 77, 78, 84 (2004) (per curiam); *Dible v. City of Chandler*, 515 F.3d 918, 922, 926-27 (9th Cir. 2008); *Thaeter v. Palm Beach Cnty. Sheriff’s Off.*, 449 F.3d 1342, 1344, 1356 (11th Cir. 2006); *cf. Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 458, 480 (3d Cir. 2015) (finding, pursuant to the *Pickering* balancing test, no First Amendment protection for a public school teacher who maintained a private blog under an alias of her first name and last initial).

no consequences for officers’ hidden speech, no matter how inflammatory they are.<sup>151</sup>

*Pappas v. Giuliani* provides the best example of a decision analyzing whether hidden speech interferes with a police department’s operations.<sup>152</sup> Rather strange facts led to the Second Circuit’s 2002 decision in this case. Pappas, an NYPD officer, became very angry upon receiving a solicitation in the mail from the Mineola Auxiliary Police Department.<sup>153</sup> In response to the solicitation, he stuffed racist and anti-Semitic literature into the solicitation’s return envelope and sent it back to the Mineola police.<sup>154</sup> This happened four more times.<sup>155</sup> Police on Long Island launched an investigation into this anonymous hate mailer after receiving the second return envelope, only to find out that the anonymous mailer was an NYPD officer.<sup>156</sup> They notified the NYPD, and Pappas was later terminated.<sup>157</sup> Pappas argued that the NYPD suffered no harm from his speech because he had taken steps to conceal his identity, and thus there was no basis under *Pickering* for punishing him.<sup>158</sup> The Second Circuit rejected the factual premise, though not the legal reasoning: “If Pappas had written his bigoted views in a private diary, or revealed them in confidence to his family or intimate friends, and they had become known accidentally, or through a breach of confidence, that case would present different considerations,” the majority concluded.<sup>159</sup> But the fact that Pappas had “aggressively” publicized his views by sending out the mailings seemed to weigh heavily against his claim that the police department could not punish him for his speech.<sup>160</sup>

Then-Judge Sonia Sotomayor’s dissent, however, echoed the idea that his speech could not be disruptive because it was so thoroughly concealed. Only an extended police investigation could unmask him.<sup>161</sup> The dissent found it unreasonable for the department “to launch an investigation, ferret out an employee’s views anonymously expressed away from the workplace and unrelated to the employee’s job, bring the speech to the attention of the media and the community, hold a public disciplinary hearing, and then terminate the

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151. This dynamic is the subject of the next Subpart.

152. 290 F.3d 143, 147 (2d Cir. 2002).

153. *See id.* at 144.

154. *Id.* at 144-45.

155. *Id.* at 145.

156. *Id.*

157. *Id.*

158. *See id.* at 147.

159. *Id.*

160. *Id.*

161. *See id.* at 159 (Sotomayor, J., dissenting).

employee.”<sup>162</sup> It was the government’s inquest, not the speech itself, that threatened to cause the disruption, Judge Sotomayor argued. “[I]t is not empty rhetoric,” she wrote, “when Pappas argues that he was terminated because of his opinions.”<sup>163</sup> Crucially, the *Pappas* majority and dissent both acknowledge that offensive speech may not actually interfere with the government agency’s operations when the speaker is not identified as a government employee. Without such interference, the justification for punishing the officer under *Pickering* may disappear.

It may sound tautological to say that there is no harm from speech that is not traceable to the government employee. Of course, speech is not harmful when no one knows about it. But this discussion of hidden speech has implications for police-department investigations of hidden speech. If the police department suspects that some officers—the department is not sure which ones—are posting offensive comments under pseudonymous accounts, should the police department take proactive steps to investigate? Or is there no harm to the government’s interests because these pseudonymous posts have not yet been traced to the department? Though there is sparse case law interpreting this aspect of *Pickering*, it would seem that there is no governmental interest in seeking out and punishing hidden speech because, simply, it has not affected the agency’s reputation.<sup>164</sup>

#### D. *Pickering*’s Perverse Incentives

*Pickering*’s application to hidden speech creates problems for regulating police social media speech. First, it incentivizes officers to comment pseudonymously and in private channels, especially when an officer has any doubt about the propriety of the content. Second, it encourages police departments not to take proactive efforts to detect offensive social media speech. While it is unlikely that officers themselves are interpreting *Pickering*, the enforcement regime built on *Pickering* sends the message: *Post under your own name at your own risk. Post under a pseudonym or in a private group and no one will come checking up on you.*

##### 1. Incentives for pseudonymous and private social media speech

Police departments’ social media policies can be read to encourage pseudonymous and private posts. This encouragement takes the form of policies that forbid officers from mentioning their affiliation with the police department or from posting anything that would allow the public to identify

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162. *Id.*

163. *Id.*

164. *See supra* notes 144-48 (discussing interpretations of *Rankin*).

them as officers.<sup>165</sup> For example, the Detroit Police Department cautions officers “not to disclose their employment with this Department” when using social media for personal use.<sup>166</sup> The social media policy written by the Massachusetts Chiefs of Police Association prohibits employees from online activity that “in any way, either directly or indirectly, identif[ies] [the individual] as an employee of the department for any reason.”<sup>167</sup> The NYPD’s social media policy “urge[s]” officers “not to disclose or allude to their status as a member of the Department.”<sup>168</sup> The International Association of Chiefs of Police suggests that agencies prohibit officers from “posting photographs or providing similar means of personal recognition that may cause them, or other individuals, to be identified as an employee of the agency.”<sup>169</sup> A similar push to use pseudonymous accounts and private channels can be seen in policies that

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165. Even the basic act of disclosing one’s name is enough to reveal the poster’s identity as an officer. *See Venable v. Metro. Gov’t*, 430 F. Supp. 3d 350, 359-60 (M.D. Tenn. 2019). In *Venable*, the court rejected an officer’s claim that “he should not be held accountable because he did not identify himself as a Nashville police officer,” because “[w]hat he did do was to make the postings under his real name, and the postings clearly suggested that the poster was a police officer.” *Id.* The court noted that “[i]t could not have surprised Venable that a rudimentary search on the internet would reveal that the ‘Anthony Venable’ in Nashville making the posts was a [Metro] officer.” *Id.*

166. *See ASHTON ET AL.*, *supra* note 50, at 31.

167. *See id.* at 40; *see also* Portland Police Bureau, Directive Manual 311.40 (2018), <https://perma.cc/K4XT-N9KE> (describing a similar policy).

168. *See ASHTON ET AL.*, *supra* note 50, at 26. This type of policy appears to be common practice. *See, e.g.*, Hous. Police Dep’t, General Order No. 200-41, Department Presence on Social Media and the Internet 2 (2020), <https://perma.cc/HJP8-RU3D> (“[W]hen posting information or material to the Internet or on social media or in any publicly accessible communication application or medium, employees shall carefully consider whether or not to identify themselves as employees the Houston Police Department or members of law enforcement.”); Off. of the Chief of Police, Metro. Police Dep’t—City of St. Louis, Special Order No. 9-06, Uses and Restrictions on Social Media Sites, at III-5 (2011) (“Employees may identify themselves as members of the Department on personal social media sites. However, those who identify themselves as Department employees must be clear that they are expressing their own views and not speaking or acting on behalf of [the Department].”).

169. INT’L ASS’N OF CHIEFS OF POLICE, *supra* note 65, at 5; *see also* Off. of the Chief of Police, *supra* note 168, at III-5 (prohibiting the use of “Department patch, badge, logo, uniform, vehicle markings, or other object which is particular to the Department”); Letter from Michael R. Moore, Chief of Police, Los Angeles Police Dep’t, to the Hon. Bd. of Police Comm’rs 3 (Apr. 14, 2021), <https://perma.cc/B47M-8L5J> (“Department personnel shall not use any [LAPD] trademarks or insignia materials in their personal account name, or in any other way that could reasonably imply the account is officially endorsed by the Department.”). A sample policy, published by a former trainer for the Georgia Public Safety Training Center, tells officers that they “shall not identify themselves, in any way, as an employee of [their] department.” Cara Donlon-Cotton, *Sample Social Media Policy*, LAW & ORD., July 2010, at 12, 14.

remind officers to pay attention to their privacy settings.<sup>170</sup> As the policies explain, officers should ensure that their personal social media posts cannot be traced back to the police departments that employ them. While safety concerns certainly animate the advice to keep one’s identity private on social media, these policies also seem concerned with the effect that social media posts can have on the reputation of the police departments.<sup>171</sup>

It is not only the policies that convey this message. Police labor attorneys and others also emphasize the importance of hiding one’s identity on social media. “Ask yourself—can someone figure out that I’m a police officer from my social media profile or from my prior posts?” one advice podcast says.<sup>172</sup> “When one is discussing anything controversial on social media, never identify yourself as a peace officer or firefighter or that you are employed in public safety,” wrote attorney Robert Rabe in a newsletter for the Riverside Sheriffs’ Association Legal Defense Trust in California.<sup>173</sup> “If you are thinking about using social media to be critical of your Department, or take a view that others may find offensive, our suggestion would be—don’t do it.”<sup>174</sup> As one officer testified, there are even social media trainings in which presenters “recommend[] to police officers to use pseudonyms on social media.”<sup>175</sup> Given such advice, it is not surprising that pseudonymous accounts have become commonplace in police social media culture.<sup>176</sup> Indeed, pseudonymous posts

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170. See, e.g., INT’L ASS’N OF CHIEFS OF POLICE, *supra* note 65, at 4 (suggesting that law-enforcement agencies develop policies that cover officers’ personal use of social media because social media content can be disseminated “even if posted under strict privacy settings”); see also ASHTON ET AL., *supra* note 50, at 40 (“Department personnel should be aware that privacy settings and social media sites are constantly in flux, and they should never assume that personal information posted on such sites is protected.”); Milwaukee Police Dep’t, General Order No. 2017-30, Standard Operating Procedure 685—Social Networking Sites 2 (2017), <https://perma.cc/6ABM-5XM8> (“Members should never assume that personal information posted on such sites is protected and private.”).

171. As two political scientists observed in their survey of state-government social media policies, “guidance is often focused on not embarrassing the organization.” Adam M. Brewer, *A Manager’s Guide to Free Speech and Social Media*, 50 PUB. PERS. MGMT. 430, 450 (2021) (citing Willow S. Jacobson & Shannon Howle Tufts, *To Post or Not to Post: Employee Rights and Social Media*, 33 REV. PUB. PERS. ADMIN. 84 (2013)).

172. *Ten Rules for Police Officer Social Media Posts*, *supra* note 55.

173. Rabe, *supra* note 61, at 2.

174. *Id.*

175. Nagel v. City of Jamestown, 326 F. Supp. 3d 897, 902 (D.N.D. 2018).

176. See, e.g., Genevieve Bookwalter, *Comment on Instagram Post Has Evanston Activists Calling for Stricter Social Media Policy for Police Officers*, CHI. TRIB. (Sept. 3, 2020, 8:56 PM), <https://perma.cc/JX7S-YDD4> (discussing pseudonymous social media posts by an officer); *Police Sergeant Disciplined for Comments on Protest Video*, AP NEWS (Aug. 10, 2020), <https://perma.cc/QK65-9HDS> (“The tip alleged a Colorado Springs police sergeant used the pseudonym Steven Eric when posting comments including, ‘KILL  
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are so common in police social media culture that, when the former director of the NYPD’s social media operation wrote a column reminding officers that “[t]here is no safe space” on social media, she felt the need to add that “[this is] also true if you choose to use a pseudonym rather than your real name.”<sup>177</sup> Granted, there are many reasons an officer might choose to post pseudonymously or in private channels, even if she had never heard of *Pickering* or her department’s policies. But it is notable how the official guidance by police groups may be fueling the phenomenon of pseudonymous and private speech on social media.

It could be, of course, that hidden police speech is no problem at all. Maybe the harm from an officer’s biased or violent comments does not materialize if no one realizes that the speaker is an officer. The marginal biased or violent comment is just another drop in the ocean of online acrimony. Where it interferes with the public’s trust in the police or instills fear that biased and violent people are wielding police powers, there is an interest in punishing it, but the content of the speech takes on this additional menace only if it can be tied to an officer. That argument, essentially a justification of not applying *Pickering* balancing to hidden speech, is at least internally coherent.

Another argument for why hidden speech presents no problem is that officers deserve some measure of privacy, some autonomy of thought. For the police department to seek out and expose comments that the officers have tried to keep hidden could be seen as an overzealous intrusion that actually *causes* the harm from speech that would otherwise be inert.<sup>178</sup>

Yet, as will be discussed in Part II, there are harms from biased and violent speech, even when the public does not find out about the speech. Bias and violence are grounds for impeachment. Speech that undermines the credibility of an officer is harmful to his ability to serve as a witness. When that speech is not disclosed to the defense, its suppression is harmful to the defendant’s due process rights. That the impeaching speech is concealed in pseudonymous posts or private social media channels does not erase its value as a reflection of the officer’s character as a witness. Indeed, the officer who takes steps to conceal her bigotry may have even less credibility in the eyes of a jury, if the efforts to conceal the bias suggest dishonesty.

The policy consequences are just as dire. A police department that allows officers to espouse biased and violent views, so long as they conceal their

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THEM ALL.’”); Aidan Quigley, *Burlington Police Official’s Anonymous Trolling More Extensive than City Found*, VTDIGGER (Jan. 30, 2020), <https://perma.cc/HTA4-VV27>; see also *infra* note 189.

177. See Yael Bar-tur, *Why Law Enforcement Shouldn’t Be Tempted by Parler (Or Any Other Echo Chamber)*, POLICE1 (Nov. 17, 2020), <https://perma.cc/4FE3-2USE>.

178. See *supra* text accompanying notes 161-63.

identity from the public, risks undermining the integrity of all of its officers. Once it gets out that some of the anonymous commenters are police officers—as it did in Oakland, New York, and elsewhere—the damage to the integrity of the justice system is amplified by the uncertainty about which officers made the comments. Where there is no transparency about which officers are posting what, a cloud of suspicion can hang over the entire group. And efforts to prevent and punish this speech are all the more difficult where the speech takes place through pseudonymous and anonymous channels. It is one thing to say that the monitoring of social media speech is too onerous or invasive to be justified. But it is quite another to say that there is no need to monitor because the hidden speech is harmless. As the criminal-procedure discussion below argues, hidden speech can be just as harmful, if not more so, than named speech. In this regard, it is troubling to have a First Amendment doctrine—and police policies built upon this doctrine—that encourages offensive speech to go underground.

## 2. Incentives not to monitor officers’ social media speech

This problem of hidden social media speech is exacerbated by the failure of police departments to proactively monitor their officers’ social media comments. Not only do the departments encourage their officers to conceal their identities,<sup>179</sup> but the departments also announce that they will not proactively monitor what their officers say on social media.<sup>180</sup>

For example, in April 2021, at a meeting of the Los Angeles Police Commission, LAPD Police Chief Michael Moore was asked whether the department was “proactive” in reviewing social media posts by officers.<sup>181</sup> “[O]ur resources don’t allow us to do that,” he said. “[T]here’s no active monitoring of social media accounts today in any type of persistent way that’s not led by some evidence or information of a possible allegation of misconduct.”<sup>182</sup> In December 2020, an NYPD deputy commissioner was asked about monitoring officers’ online comments in light of the scandal involving Deputy Inspector James Kobel,<sup>183</sup> the official who posted racist and otherwise

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179. *See supra* text accompanying notes 165-77.

180. *See, e.g., LAPD Commission Meeting of 04-27-2021*, LA CITYVIEW 35, at 02:37:38-02:39:28 (May 1, 2021), <https://perma.cc/C9HY-75KN> (to locate, select “View the live page”); Milwaukee Police Dep’t, *supra* note 170, at 2; *see also* William K. Rashbaum & Ashley Southall, *N.Y.P.D. Anti-harassment Official Fired Over Racist Online Rants*, N.Y. TIMES (Feb. 3, 2021), <https://perma.cc/6GDS-47Y3>.

181. *LAPD Commission Meeting of 04-27-2021*, *supra* note 180, at 02:37:38-02:37:48.

182. *Id.* at 02:38:55-02:39:28.

183. Rashbaum & Southall, *supra* note 180.

bigoted comments on the Rant.<sup>184</sup> While “monitoring the Rant message board had not been a priority” for the department, the commissioner stated that “[i]t certainly is on our radar now” but that “[w]hat we will do about it, and how we go about, down the road . . . is still an open question.”<sup>185</sup> In Milwaukee, the police department’s social media policy leaves no doubt about what the police department will do to proactively investigate: nothing. “[T]he department does not actively monitor member off duty use of [social networking sites],” the policy states.<sup>186</sup> In other words, if no one complains about an officer’s online conduct, departments are not going to bother checking up on it.

Police departments do not proactively monitor their officers’ speech even though they spend a great deal of time, money, and effort to track what members of the public—including supporters of Black Lives Matter and other activists and protesters—say on social media.<sup>187</sup> There is an apparent inconsistency between not monitoring what officers say on social media and actively monitoring what members of the public say.

Yet this lack of proactive monitoring is completely consistent with the First Amendment approach to social media speech. If officers are making biased or violent comments, but those comments do not result in complaints from the public or elsewhere, then those officers’ departments may feel there is no *Pickering* harm. By contrast, when the comments do generate complaints, there is readily available evidence of interference with the department’s work, and the complaints can be punished under *Pickering*.<sup>188</sup> Logically, then, there is little incentive for the departments to take on proactive monitoring, especially of hidden speech, because there is no First Amendment problem until the problematic speech comes to light. It should be noted that, even under a First Amendment paradigm, a department might want to monitor its officers’ speech to get ahead of problems. But the importance that *Pickering* places on public reputational harm may explain why there is no pressure on departments to monitor hidden speech.

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184. See *supra* text accompanying notes 28-30.

185. Rashbaum & Southall, *supra* note 180 (quoting NYPD deputy commissioner Benjamin B. Tucker).

186. Milwaukee Police Dep’t, *supra* note 170, at 2.

187. See *Police: Social Media Surveillance*, BRENNAN CTR. FOR JUST., <https://perma.cc/Y6FR-REA9> (archived Apr. 26, 2022) (describing police departments’ efforts to monitor the public on social media); Rachel Levinson-Waldman & Ángel Díaz, *How to Reform Police Monitoring of Social Media*, BROOKINGS: TECHSTREAM (July 9, 2020), <https://perma.cc/CU64-Z4EG> (describing the tools that police departments use to monitor social media); Margaret Hu, *The Ironic Privacy Act*, 96 WASH. U. L. REV. 1267, 1273-74 (2019) (describing the Department of Homeland Security protocol for using social media data).

188. See *supra* text accompanying notes 106-09.

Unfortunately, the lack of proactive investigation makes it even easier for officers to hide behind pseudonymous accounts and private channels. Because there is no realistic fear that the law-enforcement agency is monitoring social media, an officer posting an inflammatory comment need only evade public and media detection. There is not the additional difficulty of evading the agency’s investigative efforts because, well, the police department is not trying to identify pseudonymous accounts.

Considering all the incentives and advice to use pseudonymous posts, it is unsurprising that so many police officers do exactly that.<sup>189</sup> The social media posts that we learn about—the ones that generate stories and disciplinary actions—are, of course, the posts in which officers were unsuccessful in concealing their identities as officers. But these unsuccessful efforts suggest that even somewhat careless officers got the message about the need to hide their identity. It stands to reason that officers with more social media savvy are likely out there right now posting comments under pseudonyms that have yet to be linked to their identities as police officers.<sup>190</sup> Again, there are many reasons other than the First Amendment analysis that an officer might want to comment pseudonymously or in a private channel. Many social media speakers conceal their identity, even those having nothing to do with law enforcement. But the key point, for our purposes, is that the *Pickering* doctrine and the police-department policies based upon it seem to encourage hidden speech.

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189. Examples of pseudonyms include: “Dominic Brimm,” used by Thomas Nagel, *see* Nagel v. City of Jamestown, 952 F.3d 923, 926-27 (8th Cir. 2020); “Chrissy Gillrakers,” used by Christina Arribas, *see* State Attorney Issues “Death Letter” over Bartow Cop’s “Gorilla” Comment, SPECTRUM NEWS (Mar. 10, 2017, 5:55 AM ET), <https://perma.cc/3ZNQ-7P5J>; “Yo Stuff,” used by Kristine Amato, *see* Complaint ¶¶ 198, 202, Fenico v. City of Philadelphia, No. 20-cv-03336, 2022 WL 226069 (E.D. Pa., Jan. 26, 2022), ECF No. 1; “Chris Joseph,” used by Christian Fenico, *see* *id.* ¶¶ 23, 30; “Clouseau,” used by James Kobel, *see* Rashbaum & Feuer, *supra* note 28; “Ron Nighthawk,” used by Ronald E. Hasty, *see* Charles Jaco, *Hundreds of Racist, Violent Facebook Posts Linked to St. Louis Police Officers by National Group*, METROSTL.COM (updated Feb. 27, 2020), <https://perma.cc/ERH6-GZTJ>; and “Krys NavaJew,” used by Christina Begay, *see* Meg O’Connor, *Phoenix Cops Bash Muslims, Call Black People Thugs in Shocking Facebook Posts*, PHX. NEW TIMES (June 3, 2019, 4:58 PM), <https://perma.cc/M5XH-RNB5>.

190. Officers using pseudonyms can be exposed in a variety of ways. It might be a former friend who reports the officer. Or, in other instances, the officer might be exposed in much more anodyne ways. A pseudonymous account could post biographical details about the officer. Or an officer’s Facebook friends could tag him in a photograph. Or the pseudonymous officer could post a picture of himself in uniform. It apparently takes a lot of discipline and rigor to hide one’s identity over a long period of time. *See infra* notes 349-53 and accompanying text. It is also worth highlighting the observation that some police labor attorneys have made to me: The officers who get caught by the Plain View Project and other investigative projects tend to be older than the average officer and less familiar with the privacy settings of social media platforms.

To be fair, it is not that the police departments are explicitly or even consciously encouraging their officers to make offensive posts under pseudonyms. Rather, the social media policies discussed above say that officers ought not post biased, violent, or otherwise offensive content to social media.<sup>191</sup> But the effect of *Pickering* and the enforcement policies that are built on it is to create strong incentives for pseudonymous speech. Effectively, officers can post whatever they want, as long as it stays underground.

This problem of hidden speech is not unique to social media, but it is arguably more pronounced in this medium than others. In an analog world, it is hard to hide one’s identity while speaking. To retain one’s anonymity, the speaker may have to limit the reach of his speech. A speaker cannot very well give an anonymous speech at the Rotary Club, for example, nor will newspapers accept pseudonymous letters to the editor. Attaching one’s name to the speech is part of what gives it legitimacy. Yet in the digital world, anyone can speak pseudonymously without having to limit their audience. In fact, a speaker does not even have to choose between named and pseudonymous speech. He can make polite comments under his own name and vile ones under a pseudonym. This practice is common enough that there is even a name for a pseudonymous account that is used in this way: a “sockpuppet account.”<sup>192</sup> Anonymity and pseudonymity are part of social media dialect. This simultaneously makes it more understandable why officers post pseudonymously and more urgent to regulate this type of speech.

#### E. *Pickering’s* Harm to Police Speech Rights

There is another potential problem with the First Amendment approach to police social media speech. Because departments do not investigate speech proactively, they effectively outsource the enforcement agenda to the public and to motivated interest groups. The only posts that the departments investigate are posts that someone has referred to the departments. This may contribute to a feeling by officers that viewpoint discrimination—a dangerous abridgment of free-speech rights—is at work.<sup>193</sup> Police officers as a group are

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191. See *supra* text accompanying notes 121-23.

192. Srijan Kumar, Justin Cheng, Jure Leskovec & V.S. Subrahmanian, *An Army of Me: Sockpuppets in Online Discussion Communities*, 26 INT’L CONF. ON WORLD WIDE WEB 857, 858 (2017).

193. See, e.g., Complaint, *supra* note 189, ¶ 7 (“The Plaintiffs allege that the City of Philadelphia has adopted an arbitrary and double standard by selectively enforcing its policies against the Plaintiffs [and] singling them out based on the political views expressed in their social media. . . . [T]he severity of the penalties varied based on the viewpoints expressed by the Plaintiffs and other officers within their department, and constitutes arbitrary viewpoint discrimination.”); Complaint ¶ 50, *Melvin v. Kenney*, No. 20-cv-03529 (E.D. Pa. July 19, 2020), 2020 WL 4059924, ECF No. 1 (“[D]efendant Plain View in its wholly private capacity but as a result of their conspiracy with the  
*footnote continued on next page*”)

more right of center than their constituents,<sup>194</sup> especially in big cities. For example, even in jurisdictions like Philadelphia that vote heavily Democratic,<sup>195</sup> the police unions endorsed Donald Trump in both the 2016 and 2020 presidential elections.<sup>196</sup> Within this political context, an officer’s conservative comment may be more likely to trigger a complaint from a liberal resident of the city than an officer’s liberal comment would be. Because police departments’ investigations are driven by the complaints they receive, the entire apparatus for investigating social media comments may be structurally prone to punish conservative posts more frequently than liberal posts—even if there is the same baseline chance that a conservative or liberal viewpoint will be offensive.

It does not seem to be the case that there is the same baseline chance. Today’s political discourse provides more examples of violent and biased rhetoric on the right than on the left.<sup>197</sup> But it is possible to imagine violent

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other defendants acting under color of state law, discriminated against the Plaintiffs on the basis of their race, ethnicity and sex, targeting Caucasian and non-African-American and non-Muslim police officers to investigate without cause and fire and/or constructively fire them simply because they are male and Caucasian or non-African-American and non-Muslim.”); Complaint ¶ 60, *Venable v. Metro. Gov’t*, 430 F. Supp. 3d 350 (M.D. Tenn. 2019) (No. 18-cv-00148) (“The effect of the Defendant’s practice, custom and policy is to erect a double standard which discriminates against the Plaintiff based on the content and viewpoint of his speech activity.”). A Nevada officer disciplined for social media commentary characterized his department’s policy as the following: “You’d better not engage in social media debates on anything, even important matters of public policy and national concern, because if anyone out there on the internet decides that something you said was ‘malicious’ or ‘intimidating,’ we’ll target you for official discipline and adverse employment consequences.” Complaint, *supra* note 115, ¶ 59.

194. See, e.g., James Rainey, *Union Leader Tells Republican Convention Why Cops Back Trump*, L.A. TIMES (Aug. 26, 2020, 7:31 PM PT), <https://perma.cc/K5FQ-5QP6> (noting that the National Association of Police Organizations, “a collection of about 1,000 police unions,” endorsed Trump in the 2020 presidential election); Philip Bump, *Police Made a Lot More Reported Contributions in 2020 than Normal—Mostly to Republicans*, WASH. POST (Feb. 25, 2021, 5:17 PM EST), <https://perma.cc/CYF2-99DQ>.

195. *Voting & Election Statistics: Current Registration Statistics—Voter Registration Statistics by County*, PA. DEP’T ST., <https://perma.cc/7ZWQ-G8XC> (last updated May 23, 2022) (to locate, select “View/Download File”) (identifying Philadelphia voter registration by party: 796,951 affiliated with the Democratic Party; 118,094 affiliated with the Republican Party; 100,069 claiming “No Affiliation”; and 33,557 identified as “all Other Voters”).

196. Michael Tanenbaum, *Philadelphia Police Union Endorses Donald Trump for President*, PHILLY VOICE (Sept. 18, 2016), <https://perma.cc/YF7M-SDA9>. But cf. Robby Brod, *Philly’s Black Firefighters Sue Union Brass Over Trump Endorsement*, WHYY (updated Nov. 13, 2020), <https://perma.cc/C7Y2-8726>.

197. Arguably, right-of-center social media comments are more likely to express biased or violent views than left-of-center comments, and this could be an independent explanation for why there may be a political skew to the resulting discipline. See Lisa Lerer & Astead W. Herndon, *Menace Enters the Republican Mainstream*, N.Y. TIMES *footnote continued on next page*

and biased comments by left-wing officers—or a changed political landscape in which such comments proliferate. Reliance on public reporting to initiate investigations means that a police department could take a perfectly neutral position when it comes to its investigations but, nonetheless, see a political skew in its work because of who in the public files complaints.

The wave of disciplinary actions caused by the Plain View Project illustrates this dynamic. The Plain View Project was founded by criminal defense lawyers and appears to have a left-leaning orientation.<sup>198</sup> In identifying the 5,000 comments it deemed offensive, the Plain View Project asked whether each comment “could undermine public trust and confidence in police.”<sup>199</sup> These types of judgment calls are inherently subjective and, thus, incorporate whatever political orientation the Plain View Project reviewers or other complainants have. It seems inevitable that there will be a partisan skew when the police department’s investigations rely on the public and outside interest groups to make complaints. This time, the complaints came from the Plain View Project and identified right-of-center comments. Next time, the assessment of offensive comments may be carried out by a right-leaning group, such as Project Veritas or its equivalent.<sup>200</sup>

This potential skew in complaints and enforcement is one of the problems with police departments not engaging in proactive investigation. Already, police officers and their advocates fear that officers’ free-speech rights are being infringed by the *Pickering* test and, especially, its application to off-duty speech. That a police agency can punish speech because the speech’s message interferes with the agency’s ability to function has already given rise to claims of viewpoint discrimination—a particularly dangerous form of speech regulation.<sup>201</sup> It is one thing for the government to go too far in limiting what

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(updated Nov. 16, 2021), <https://perma.cc/XJ9C-57ZK>; Nate Silver & Allison McCann, *Are White Republicans More Racist than White Democrats?*, FIVETHIRTYEIGHT (Apr. 30, 2014, 3:15 PM), <https://perma.cc/M2FU-3428>.

198. See Shaila Dewan, *When Police Officers Vent on Facebook*, N.Y. TIMES (June 3, 2019), <https://perma.cc/K84M-CRRE>.

199. *About the Project: Methodology*, *supra* note 11.

200. See Adam Goldman & Mark Mazzetti, *Project Veritas and the Line Between Journalism and Political Spying*, N.Y. TIMES (updated Nov. 12, 2021), <https://perma.cc/NY2C-FES8>; *Overview*, PROJECT VERITAS, <https://perma.cc/GZ9S-AMXH> (archived Apr. 27, 2022) (describing the organization’s mission as “expos[ing] corruption, dishonesty, self-dealing, waste, fraud, and other misconduct in both public and private institutions to achieve a more ethical and transparent society”).

201. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (“When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the  
*footnote continued on next page*”).

any of its employees can say. It is an even graver First Amendment violation for the government to use its position to promote one viewpoint over another.

If departments made proactive efforts to identify speech violations, they could more fairly enforce their rules across the political spectrum. The departments would not be reliant upon, or at the mercy of, those outside the department making complaints. The police department that takes no proactive steps to enforce its social media policies could find itself punishing only those officers whose comments run afoul of the prevailing political viewpoints. Biased or violent statements that are politically popular may evade discipline, even though they should not. In this way, the First Amendment framework that incentivizes hidden speech may also, unintentionally, inflict a First Amendment harm in the form of viewpoint discrimination.

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The First Amendment approach to police social media speech is troubling because it fails to grapple with hidden speech and, if anything, encourages more of it. Sending the speech underground protects the agency’s reputation and, thus, serves the governmental interests identified in *Pickering*. But it creates an even more dangerous situation where biased and violent comments can metastasize. As the next Part argues, the First Amendment approach to police social media speech is insufficient. A criminal-procedure paradigm is, instead, required to regulate this speech.

## II. The Criminal-Procedure Paradigm

Criminal procedure provides a different paradigm for regulating police social media speech. For criminal procedure, an officer’s statements on social media are legally relevant because they can be used to impeach the officer’s credibility as a witness.<sup>202</sup> Prosecutors may even be constitutionally required to seek out and disclose these statements under the due process doctrine

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opinion or perspective of the speaker is the rationale for the restriction.” (citations omitted)).

202. Impeachment evidence may relate to the witness’s bias, conduct, or character. *E.g.*, 1 WEINSTEIN’S EVIDENCE MANUAL § 12.01 (LexisNexis 2022) (“[B]ias is always significant in assessing the witness’s credibility . . . .”); *id.* § 12.03 (“[Federal Rule of Evidence] 608(a) permits the admission of opinion or reputation evidence of character for the purpose of attacking or supporting the witness’s credibility . . . .”); *id.* (describing how Rule 608(b) permits impeachment through “specific acts evidence” when that evidence “is probative of truthfulness or untruthfulness”). As noted by a leading treatise, “The Federal Rules of Evidence do not define character evidence. Character is a general description of a person’s disposition or of a personality trait such as honesty, temperance, or peacefulness.” *Id.* § 7.01 (emphasis omitted); *see also infra* notes 280, 283-84 and accompanying text.

announced in *Brady v. Maryland* and its progeny.<sup>203</sup> For better or worse, criminal procedure provides a tool for regulating police social media speech—a tool not available for the regulation of other types of public employees. What makes police officers different from other types of employees is that their credibility is critical to their core job function: testifying in court.

Part II reviews the academic literature and other commentary on criminal procedure’s application to police social media speech. This Part then discusses cases that have applied criminal-procedure doctrines to police social media speech, and it considers whether this application makes legal sense. Fundamentally, this Part asks why criminal procedure is employed in this “off-label” manner: What are the benefits and drawbacks of applying criminal-procedure doctrine to problems that typically sound in First Amendment and employment law? Critically, the criminal-procedure paradigm employs a different conception of the harm from offensive police speech than the one employed by the First Amendment paradigm. And because of this different assessment of the problem, it requires a different policy intervention. Specifically, the criminal-procedure approach would require police departments to take proactive steps to monitor and reveal social media speech—even hidden speech.

#### A. Literature and Other Commentary

In recent years, commentators have suggested that *Brady v. Maryland* should be employed to counter white-supremacist infiltration of police departments.<sup>204</sup> *Brady* is a due process doctrine that requires prosecutors to disclose to the defense all “favorable,” “material” evidence known to anyone “acting on the government’s behalf in the case, including the police.”<sup>205</sup> An officer’s credibility problems fit within the sweep of *Brady*, so long as they are known to some member of the prosecution team; as a result, they must be disclosed to the defense.<sup>206</sup> In a 2019 article, Vida Johnson argued that an

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203. 373 U.S. 83, 87 (1963); *United States v. Agurs*, 427 U.S. 97, 106-08 (1976); *Giglio v. United States*, 405 U.S. 150, 153-55 (1972); *United States v. Bagley*, 473 U.S. 667, 683-84 (1985); *Kyles v. Whitley*, 514 U.S. 419, 437-39 (1995).

204. See *infra* note 207 and accompanying text.

205. *Kyles*, 514 U.S. at 437-39; see *Brady*, 373 U.S. at 85-87; Andrew Guthrie Ferguson, *Big Data Prosecution and Brady*, 67 UCLA L. REV. 180, 219, 230 (2020).

206. See Ferguson, *supra* note 205, at 230-32; Kate Levine, *Discipline and Policing*, 68 DUKE L.J. 839, 901 (2019); see also Jason Kreag, Essay, *Disclosing Prosecutorial Misconduct*, 72 VAND. L. REV. 297, 326 (2019) (observing that “[e]ven the most robust open-file discovery regime . . . would still result in some violations,” in part because “law enforcement disciplinary records, a prime source of *Brady* material, may remain shielded from disclosure by state laws”); Jonathan Abel, *Brady’s Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 762 (2015).

officer’s racial bias falls within the scope of *Brady* and that, therefore, any outward manifestations of that bias should be disclosed to the defense.<sup>207</sup> Johnson’s article, *KKK in the PD*, discusses social media comments as one example of outward expressions of bias by police.<sup>208</sup> Other examples include officers’ racist tattoos, their attendance at white-supremacist events, and their membership in white-supremacist organizations.<sup>209</sup> Soon after Johnson’s article, Michael German, a fellow at the Brennan Center for Justice, authored a fascinating account of the need to root out white-supremacist infiltration of law enforcement.<sup>210</sup> Among the methods he advocated was an aggressive application of the *Brady* doctrine.<sup>211</sup> In congressional testimony, German called for implementing *Brady* through “clear policies regarding . . . overt and explicit expressions of racism—with specificity regarding tattoos, patches, and insignia as well as social media postings.”<sup>212</sup> For these scholars, offensive social media posts by police are signs of bias that should be extirpated from the ranks of the police force; *Brady* is the doctrinal hook to do so.

In trade publications, trainings, and advisory statements, law-enforcement practitioners have also recognized that police social media posts can be *Brady* material. “Remember one of the things that has to be disclosed under the *Brady* rule is any evidence that an officer might have been guilty of discriminatory conduct or bias,” explained one labor attorney on a podcast about officers’ social media posts.<sup>213</sup> A white paper by the International Association of Chiefs of Police opined that *Brady* “may extend to communications made by officers—even in their private lives—via social media.”<sup>214</sup> Prosecutor-led trainings and

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207. Vida B. Johnson, *KKK in the PD: White Supremacist Police and What to Do About It*, 23 LEWIS & CLARK L. REV. 205, 213, 235-38 (2019).

208. *Id.* at 223 (“Social media is another way that officers have shared racist beliefs that they may not feel comfortable sharing in person.”).

209. *See id.* at 218-19.

210. *See* Michael German, *Hidden in Plain Sight: Racism, White Supremacy, and Far-Right Militancy in Law Enforcement*, BRENNAN CTR. FOR JUST. (Aug. 7, 2020), <https://perma.cc/X7UR-BNEV>.

211. *Id.*

212. *Confronting Violent White Supremacy (Part IV): White Supremacy in Blue—The Infiltration of Local Police Departments: Hearing Before the Subcomm. on C.R. & C.L. of the H. Comm. on Oversight & Reform*, 116th Cong. (2020) (statement of Michael German, Fellow, Brennan Center for Justice) (emphasis added), <https://perma.cc/BD9Q-LDC3>.

213. *Ten Rules for Police Officer Social Media Posts*, *supra* note 55, at 14:28-14:42.

214. INT’L ASS’N OF CHIEFS OF POLICE, *supra* note 65, at 9-10. The white paper stated that [w]hen an officer’s postings indicate bias or a propensity toward violence in particular, they become of great value to defense lawyers seeking to impeach an officer’s testimony and may seriously affect the outcome of the case.

. . . Criminal defense lawyers are known to engage in networking with their colleagues to identify officers whose speech or conduct may call into question their credibility in any future

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seminars have echoed the importance of treating police social media speech as potential *Brady* material.<sup>215</sup> Social media’s impact on an officer’s credibility has also been the topic of police academy trainings and departmental continuing education programs.<sup>216</sup>

Hartford Police Chief James Thody put it bluntly, after one of his officers used social media to request an “air strike” on a blighted portion of the city. “An officer that expresses a particular disdain for any group of people cannot be considered impartial by the public or the courts,” Thody wrote in his memo to the Hartford police.<sup>217</sup> He added, “These comments can be used to impeach an officer’s testimony in court, create distrust in all future actions of the officer, and permanently alter or even end an officer’s career.”<sup>218</sup> Prosecutors in some states have policies requiring their trial attorneys to check with officers about social media comments that could affect their credibility.<sup>219</sup> As the D.C. Police Complaints Board stated, “Officers’ personal social media accounts may serve as gold-mines of evidence of their biases for criminal defense and civil rights attorneys.”<sup>220</sup> Other prosecutors populate their “*Brady* lists” with the names of social media offenders, among others with credibility problems. The “*Brady*

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case in which the officer testifies. In some instances, this may reduce the officer’s usefulness to the agency to the point that the officer must be placed on desk duty or terminated.

*Id.* (footnote omitted); see also JUSTIN P. MURPHY & ADRIAN FONTECILLA, SOCIAL MEDIA EVIDENCE IN CRIMINAL PROCEEDINGS: AN UNCERTAIN FRONTIER 5 (2013), <https://perma.cc/4WUX-5ZV7> (noting that criminal defendants “may attempt to use novel methods of obtaining exculpatory social media evidence” and adding that “a law enforcement officer’s social media account records may be obtained under *Brady v. Maryland* or *Giglio v. United States*”).

215. See, e.g., Tami A. Perdue, Potential Impeachment Disclosures—A Prosecutor’s Ethical Duty to Disclose 7 (2017), <https://perma.cc/PE5B-HPT9> (“Prejudice and bias against a group of people can be very relevant to impeachment of an officer’s testimony. This kind of information can often be found in comments that officers make publicly on social media.”).
216. See, e.g., Brandon Parker, Joshua Engroff, Andrew Flynn & Jack Murphy, Me. Crim. Just. Acad., Social Media in Law Enforcement § 1.0.8 (2013), <https://perma.cc/BC8L-EWNC> (to locate, select “View/Download File”) (noting the “disadvantages” of using social media sites, such as the danger that an “improper use of agency site/communication equipment . . . can be the basis for *Brady*/*Giglio* requests from defense attorneys” (capitalization altered)).
217. Don Stacom, *Connecticut Police Departments Warn Officers Against Offensive Off-Duty Facebook Posts*, HARTFORD COURANT (Nov. 29, 2019, 6:00 AM), <https://perma.cc/NC89-AAF4> (quoting Hartford Interim Police Chief Jason Thody).
218. *Id.*
219. See, e.g., Andrew Ford, *Police Misconduct in NJ: State to Track Bad Cops After Report, but Loopholes Remain*, ASBURY PARK PRESS (updated June 19, 2019, 12:40 PM), <https://perma.cc/DGX8-ABZA> (noting a new policy from the attorney general of New Jersey requiring prosecutors to ask testifying officers, among other questions, “Could any of your social media posts be used to question your credibility?”).
220. ASHTON ET AL., *supra* note 50, at 9.

list” is a roster of officers with credibility problems. Each time one of the officers is slated to testify, the list reminds the prosecutor that there may be credibility evidence about the officer that is required to be disclosed.<sup>221</sup> The worse the credibility evidence, the less likely that the officer will be used as a witness. And an officer who finds himself blacklisted as a witness may soon find himself looking for a new job.

Certainly, there is a perception that offensive social media posts can qualify as *Brady* material. But stepping back from these confident assertions, the fit between the *Brady* doctrine and these social media posts is more complicated. Basic doctrinal questions have yet to be analyzed. Most pressing is the question whether the *Brady* doctrine’s “duty to learn” would even extend to posts on social media.<sup>222</sup> This Part attempts to fill these gaps in the literature.

## B. Case Examples

Up to this point, the literature has not analyzed actual cases invoking criminal procedure to regulate police social media speech. This Subpart fills that gap by describing cases in which criminal procedure has been applied to police social media speech. The goal of this account is to illustrate the strengths and weaknesses of applying criminal procedure to this speech problem.

### 1. Plain View Project cases

In 2019, the Plain View Project published a database of more than 5,000 offensive Facebook posts and comments made by police officers.<sup>223</sup> Founded by defense attorney Emily Baker-White and a team of researchers, the Plain View Project made national headlines when it published its database.<sup>224</sup> The publication of the database quickly resulted in terminations or disciplinary

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221. See Ryan T. Cannon, Note, *Reconciling Brady and Pitchess: Association for Los Angeles Deputy Sheriffs v. Superior Court, and the Future of Brady Lists*, 55 SAN DIEGO L. REV. 729, 736 (2018); Abel, *supra* note 206, at 746, 773-75; see also *infra* text accompanying notes 235-76.

222. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (“[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.”).

223. *About the Project: Methodology*, *supra* note 11; Mitch Smith, *72 Philadelphia Officers Benched After Offensive Social Media Posts*, N.Y. TIMES (June 20, 2019), <https://perma.cc/R7MJ-2LXC>.

224. Temitope Fadayomi, *How a Philadelphia Lawyer Exposed Police Officers’ Racist and Violent Facebook Posts*, LAW.COM: LEGAL INTELLIGENCER (Sept. 29, 2020, 11:01 AM), <https://perma.cc/96KR-JFZ3> (to locate, select “View the live page”).

actions for more than 100 officers in Philadelphia, St. Louis, and Phoenix.<sup>225</sup> The largest number of disciplinary actions came from Philadelphia, where seventy-two officers were disciplined as a result of the Plain View Project’s revelations.<sup>226</sup> A federal lawsuit by nine of the officers alleged that they were “black-listed and placed on a ‘Giglio List or Brady list.’”<sup>227</sup> Progressive prosecutor Larry Krasner told the Philadelphia news media about the criminal-procedure fallout from these Facebook posts: Some of the officers would land on “the ‘do not call’ list of police officers not asked to testify in court due to credibility issues,” while others could still testify but would be subject to having their comments disclosed to the defense in each case “under the Brady Rule.”<sup>228</sup> In the Philadelphia cases, criminal procedure was used to fortify the city’s *Pickering* argument. In defending itself from the officers’ First Amendment lawsuit, the city argued that the officers’ posts created credibility problems that “would jeopardize criminal prosecutions. This disruptiveness outweighs any of Plaintiffs’ individual expressive interests.”<sup>229</sup> The city’s argument provided an example of how First Amendment doctrine and criminal-procedure doctrine could pull in the same direction.

In St. Louis, progressive prosecutor Kimberly Gardner took action on her own to respond to the publication of the Plain View Project’s database. Gardner announced that her office would treat twenty-two of the officers as credibility impaired. Seven of those officers were permanently banned from “present[ing] themselves or cases to the Circuit Attorney’s Office.”<sup>230</sup> Any case in which these officers were “essential witnesses” would be refused.<sup>231</sup> Effectively, Gardner used her authority as prosecutor to severely limit the

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225. Palmer et al., *supra* note 13; Garcia, *supra* note 120; Scott Calvert, *Philadelphia Takes Officers Off Street Over Racist Social-Media Posts*, WALL ST. J. (June 20, 2019, 3:55 PM ET), <https://perma.cc/NRE9-ZJG4> (to locate, select “View the live page”).

226. Smith, *supra* note 223; N’dea Yancey-Bragg, *72 Philadelphia Police Officers on Administrative Duty After Alleged Offensive Posts*, USA TODAY (updated June 20, 2019, 4:31 PM ET), <https://perma.cc/6JUR-923S>.

227. Complaint, *supra* note 189, ¶¶ 3, 5; *see also* Giglio v. United States, 405 U.S. 150, 154-55 (1972) (extending *Brady* to impeachment evidence).

228. Ryan Briggs, *Krasner: Racist Facebook Posts Could Get Officers Barred From Criminal Trials*, WHY (June 3, 2019), <https://perma.cc/S47K-FE2Y>; Max Mitchell, *Attorneys Eye Fallout From Philadelphia Police Officers’ Racist Facebook Posts*, LAW.COM: LEGAL INTELLIGENCER (June 7, 2019), <https://perma.cc/V96C-ZVS2> (to locate, select “View the live page”) (quoting a criminal defense lawyer in Philadelphia as saying that “[a]nyone who’s got active cases is going through that database and seeing if [officers involved with] any of their defendants are in there”).

229. Motion to Dismiss, *supra* note 3, at 35.

230. *City Prosecutor Expands Brady List Based on Bigoted Social Media Posts*, ST. LOUIS AM. (June 20, 2019), <https://perma.cc/Q3L2-UDV9>.

231. *Id.*

scope of the officers’ job responsibilities by preventing the officers from referring cases for prosecution, swearing out search warrants, and testifying.<sup>232</sup> Even though prosecutors have no formal power to discipline officers, Gardner’s sanctions were tantamount to placing the officers on restricted duty. It was a controversial move, and Gardner seems to have been aware that her actions challenged the department’s monopoly on disciplining its officers. “While the St. Louis Metropolitan Police Department may be limited in their actions due to its labor agreements,” Gardner explained, “the Circuit Attorney’s Office has no such privity with those contracts.”<sup>233</sup> In a lawsuit against the City of St. Louis and its police union, Gardner identified the lack of action against these social media–offending officers as proof that the police department and union harbored racial animus. The lawsuit alleged that neither entity “took any action against the vast majority of the members or officers who have made racist or offensive posts, promulgated any policies, or instituted any training or discipline to address prevalent racism within their ranks of which they were or should have been aware.”<sup>234</sup> As in Philadelphia, St. Louis’s elected prosecutor used criminal-procedure doctrine to address a problem that has traditionally been governed by *Pickering* and employment law.

## 2. Cases not involving the Plain View Project

Beyond the Plain View Project cases, police departments and prosecutors have invoked *Brady* and criminal procedure to deal with offensive social media speech by police. The Wisconsin Court of Appeals recently decided a case concerning the termination of a Milwaukee police officer whose social media posts landed him on the *Brady* list.<sup>235</sup> The officer, Erik Andrade, drew the attention of newspapers and the police chief with his Facebook comments about policing and other topics.<sup>236</sup> Andrade appeared to make light of the arrest and tasing of NBA player Sterling Brown, an incident that led to a

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232. See *id.*; Calvert, *supra* note 225.

233. *City Prosecutor Expands Brady List Based on Bigoted Social Media Posts*, *supra* note 230.

234. Amended Complaint ¶ 44, *Gardner v. City of St. Louis*, No. 20-cv-00060, 2020 WL 5814461 (E.D. Mo. Sept. 30, 2020), ECF No. 42.

235. *Andrade v. Milwaukee Bd. of Fire & Police Comm’rs*, No. 2020-AP-333, 2021 WL 3870078, at \*3-4 (Wis. Ct. App. Aug. 31, 2021).

236. Ashley Luthern & Gina Barton, *Bucks Rookie Sterling Brown’s Lawsuit Shows Police Officer’s Racially Charged Facebook Posts*, MILWAUKEE J. SENTINEL (updated June 19, 2018, 4:49 PM CT), <https://perma.cc/849X-MBT4>; *Andrade*, 2021 WL 3870078, at \*14 (Dugan, J., dissenting).

\$750,000 settlement for Brown due to allegations of police misconduct.<sup>237</sup> In another instance, Andrade used what the department deemed to be racist language to complain on Facebook about “THESE HOES” he saw on one of the streets he patrolled.<sup>238</sup> “It’s hilarious when people talk about mass incarceration,” Andrade separately commented, “lmao [laughing my ass off] like wtf [what the fuck] is that? Mostly all the people I deal with at work cannot stay locked up and they should be. . . . [I]f you don’t commit crimes, you don’t get incarcerated.”<sup>239</sup> Milwaukee Police Chief Alfonso Morales concluded that Andrade’s posts were “offensive and defamatory” because they “brag about the use of force, mock African-Americans for speaking in a certain manner, . . . and undermine[] trust in the department.”<sup>240</sup> According to his testimony at Andrade’s disciplinary hearing, the police chief was planning to impose a discipline less severe than termination, but he decided to “solicit[] the opinion” of the district attorney’s office before making a final decision.<sup>241</sup> The district attorney’s office told the police chief that Andrade “would not be permitted to testify,” thus invoking the lens of criminal procedure.<sup>242</sup> This decision by the prosecutor led the police department to fire Andrade because, in the agency’s view, “department operations require full service officers, which includes the ability to testify credibly in court.”<sup>243</sup> In the litigation that followed, Andrade claimed that the criminal-procedure argument was pretextual, asserting that there was “no genuine concern” over his ability to testify and that, in fact, he was even “chairing’ a trial for the District Attorney’s Office . . . up to the day of his discharge.”<sup>244</sup> The Wisconsin Court of Appeal upheld his termination.<sup>245</sup>

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237. *Andrade*, 2021 WL 3870078, at \*1-3; Doha Madani, *Milwaukee Council Agrees to \$750,000 Settlement with Sterling Brown over Forceful Arrest*, NBC NEWS (May 4, 2021, 5:52 PM PDT), <https://perma.cc/KA8X-XENQ>.

238. Appeals of Erik A. Andrade 3, 9 (Bd. of Fire & Police Comm’rs of Milwaukee Jan. 4, 2019), <https://perma.cc/M8BJ-KHN4>, *aff’d sub nom. Andrade*, 2021 WL 3870078.

239. *Id.* at 3 (first and second alterations in original) (quoting Andrade’s comment to a news article).

240. *Id.* at 9.

241. *Id.* at 6.

242. *Id.*

243. *Id.*

244. Brief of Petitioner-Appellant at 8, *Andrade v. Milwaukee Bd. of Fire & Police Comm’rs*, No. 2020-AP-333, 2021 WL 3870078 (Wis. Ct. App. Aug. 31, 2021), 2020 WL 3256351 (emphasis omitted).

245. *Andrade*, 2021 WL 3870078, at \*12 (“We conclude that the Board’s decision to discharge Andrade for violating the department’s Code of Conduct complied with the proper standard of law. We conclude that judicial estoppel is unwarranted. We also conclude that the Board maintained competency to issue its written decision. For these reasons, we affirm the circuit court.”).

In Shelton, Connecticut, police officer Daniel Judkins made offensive posts on Facebook.<sup>246</sup> Among the posts was one that featured a defendant in court receiving a long sentence. Using a racial epithet, Judkins wrote: “N— want to be Gangsta Until that time is given,” a reference to the long prison sentence.<sup>247</sup> Another post of his was a meme with the text: “MUSLIM MAN SAY [sic] GAYS SHOULD HANG FROM LIGHT POSTS AND NO BODY PANICS. CHRISTIAN MAN SAYS GAYS WON’T SEE KINGDOM OF GOD, AND EVERYONE LOSES THEIR MINDS!”<sup>248</sup> Judkins was terminated for violating police-department policy. Among other explanations for the firing, the city cited the criminal-procedure implications of his posts. “[H]is Facebook posts destroy his credibility,” the city argued, with a citation to *Brady* and *Giglio*. “[T]hese posts can be used to impeach [Judkins’s] credibility in prosecutions involving minorities as they show bias regarding ‘gangsta’ culture, gun violence, anti-Muslim comments, and derogatory language against President Obama.”<sup>249</sup> The officer countered that “the ‘Brady/Giglio’ issue[] . . . is a ‘red herring’ because it is full of conjecture, since the posts do not constitute material that warrants being disclosed as ‘clear evidence of bias or prejudice by virtue of animus towards an entire class of persons,’” citing state case law.<sup>250</sup> The administrative panel reviewing his termination agreed that this was not *Brady* or *Giglio* material—for reasons discussed in the next Subpart—and expressed “serious reservations about allowing an outside agency, namely the prosecutor’s office, which is outside of the control of the City, to make a decision as to whether a police officer can retain his employment.”<sup>251</sup> A state judge later reversed the administrative panel’s decision, concluding that the arbitrators “improperly refused to hear pertinent and material evidence” and vacating the arbitration award.<sup>252</sup>

In Oregon, child-welfare investigator Jennifer Shepherd made a series of disparaging posts on Facebook about the people she encountered during home

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246. City of Shelton, Case No. 2018-A-0026, at 1 (Conn. State Lab. Dep’t Bd. of Mediation & Arb. Apr. 18, 2019), 2019 WL 11663824 (Judkins, Arb.), *rev’d sub nom.* City of Shelton v. Shelton Police Union, Inc., No. AAN-CV-19-6033187-S, 2020 WL 8019757 (Conn. Super. Ct. Nov. 5, 2020).

247. *Id.* at 2 (racial epithet not elided in original source).

248. *Id.* at 2-3 (alteration in original).

249. *Id.* at 7-8.

250. *Id.* at 11.

251. *Id.* at 21.

252. City of Shelton v. Shelton Police Union, Inc., No. AAN-CV-19-6033187-S, 2020 WL 8019757, at \*4 (Conn. Super. Ct. Nov. 5, 2020); Brian Gioiele, *Judge Rejects Reinstatement of Shelton Cop Fired over Facebook Posts*, SHELTON HERALD (Nov. 22, 2020), <https://perma.cc/8HLA-A45W>.

inspections and investigations. In one post, she described several rules that she would impose on society, if she had the power to do so:

(1) If you are on public assistance, you may not have additional children and must be on reliable birth control . . . (2) If you’ve had your parental rights terminated by [Oregon Department of Human Services], you may not have more children . . . it’s sterilization for you buddy!<sup>253</sup>

Shepherd separately suggested that she should be informed when people go to jail so that she could “get their ‘benefits’ turned off.”<sup>254</sup> Shepherd’s supervisors became concerned about the posts and asked two prosecutors in the district attorney’s office whether these Facebook comments would affect Shepherd’s ability to testify.<sup>255</sup> The prosecutors indicated that Shepherd’s credibility would be “permanently compromised”—“terminally and irrevocably compromised,” in the words of one of them.<sup>256</sup> This determination formed the basis for the welfare agency’s decision to terminate Shepherd.<sup>257</sup> In an appeal from her termination, however, Shepherd obtained testimony from two senior prosecutors asserting that her social media speech was not *Brady* material and that the prosecutors who had called it *Brady* material were wrong.<sup>258</sup> The district court nonetheless concluded that the termination was legal and the *Brady* analogy reasonable.<sup>259</sup>

Around the country, *Brady* lists have begun to capture the names of social media offenders. A deputy in Whatcom County, Washington, joked on Facebook about the apology by the Victoria’s Secret lingerie company for putting a Native American headdress on a fashion model. “Time to get the small pox blankets out and shut some people up,” the deputy wrote.<sup>260</sup> The local prosecutor placed this deputy on the *Brady* list, even though the prosecutor and his staff otherwise felt that the deputy was “a well-qualified, hardworking and good deputy sheriff.”<sup>261</sup> A deputy sheriff in Shelby County, Tennessee, was placed on the *Brady* list for a Facebook post in which he “showed a picture of an African American man with the words ‘North

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253. Shepherd v. McGee, 986 F. Supp. 2d 1211, 1214 (D. Or. 2013) (third alteration in original).

254. *Id.*

255. *See id.* at 1215-16.

256. *Id.* at 1218 (quoting Oregon Department of Justice Senior Assistant Attorney General Brian Raymer).

257. *See id.*

258. *Id.* at 1219-20.

259. *Id.* at 1218-19, 1222.

260. Letter from David S. McEachran, Prosecuting Att’y, Whatcom Cnty., to Bill Elfo, Sheriff, Whatcom Cnty. 1 (Oct. 13, 2017), <https://perma.cc/VQ85-5TXR>.

261. *Id.* at 2.

American Pavement Ape (Africanus Criminalis).”<sup>262</sup> Philadelphia police officer Mario DeLaurentiis was placed on the *Brady* list for posting “an inappropriate image on his social media account (Facebook) that violated PD policy.”<sup>263</sup> Though the record of DeLaurentiis’s disciplinary action does not specify the content of the image, it was posted on July 9, 2016,<sup>264</sup> which coincides with the shooting of five police officers in Dallas, Texas.<sup>265</sup>

In Bartow, Florida, Officer Christine Arribas made the following Facebook post, shortly after the 2016 presidential election: “This year we lost two gorillas, one is in heaven”—a reference to a gorilla at the Cincinnati Zoo who was shot to death—“and one is moving out of the White House. One will be missed, one will not be.”<sup>266</sup> The post was made under a pseudonym, “Chrissy Gillrakers.”<sup>267</sup> After complaints from a local pastor and the Poor Minority Justice Association, Arribas was suspended for two days.<sup>268</sup> The local prosecutor soon issued a letter (i.e., a *Brady* notice) stating that he would not allow Arribas to testify in future cases. “Our office must be able to vouch for the credibility of the officers who testify on behalf of the State of Florida,” the letter said.<sup>269</sup> “The evidence of your bias is so strong, that your credibility is damaged to the point that this office will no longer use you as a witness in any of our cases.”<sup>270</sup> Arribas was fired soon after.<sup>271</sup>

In the neighboring prosecutorial circuit, prosecutor Aramis Ayala put Orlando Police Department officer Robert Schellhorn on the *Brady* list for his

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262. Daniel Connolly, *For Police, the Brady List Is the Opposite of an Honor Roll. Here’s Who’s on It in Memphis*, COM. APPEAL (updated Feb. 1, 2020, 10:52 AM CT), <https://perma.cc/YC4H-WMFV> (to locate, select “View the live page”).

263. Mark Fazlollah, Craig McCoy, Anh Nguyen, Dan Spinelli, Dylan Purcell & Michele Tranquilli, *The Full List of Philadelphia’s 66 Problem Cops*, PHILA. INQUIRER, <https://perma.cc/RJ33-JA7F> (archived Apr. 29, 2022) (to locate, select “View the live page”) (listing a roster of sixty-six Philadelphia police officers who face allegations of misconduct).

264. *Id.*

265. Faith Karimi, Catherine E. Shoichet & Ralph Ellis, *Dallas Sniper Attack: 5 Officers Killed, Suspect Identified*, CNN (updated July 9, 2016, 1:37 AM EDT), <https://perma.cc/YV2H-ZEB2>.

266. *State Attorney Issues “Death Letter” over Bartow Cop’s “Gorilla” Comment*, *supra* note 189.

267. *Id.*

268. *Id.*

269. *Id.*; Letter from Brian Haas, State Att’y, Florida Tenth Jud. Cir., to Christina Arribas, Police Officer, Bartow Police Dep’t (Mar. 9, 2017) (on file with author).

270. Letter from Brian Haas, *supra* note 269.

271. Suzie Schottelkotte, *Bartow Police Officer Fired Following Racist Comment on Facebook*, LEDGER (updated Mar. 27, 2017, 8:16 AM EDT), <https://perma.cc/YW4T-JVAD>.

offensive Facebook posts.<sup>272</sup> Schellhorn had been disciplined for racist and sexist comments he made in private messages on Facebook.<sup>273</sup> These included criticism of professional athletes for speaking up about the killing of Black civilians but not commenting on the shooting of two local police officers. “[W]hat exactly are the ‘black rights’ that these useless savages are standing up for???” Schellhorn asked in one post.<sup>274</sup> In another, he referred to the victim of a white supremacist’s infamous car-ramming in Charlottesville as “an asshole killed by another asshole.”<sup>275</sup> In a back-and-forth debate on Facebook, Schellhorn posted a picture of tampons and wrote that they were “[f]or the guys that act like little bitches.”<sup>276</sup>

In these and other cases, prosecutors and police departments concluded that the social media comments raised criminal-procedure concerns. The next Subpart examines whether these First Amendment and employment law applications of criminal procedure are consistent with criminal-procedure doctrine.

### C. The Doctrinal Fit

Like it or not, criminal procedure is being used to regulate police social media speech. The only real questions are whether the doctrine supports this use and whether it makes for good policy. This Subpart examines the doctrinal fit.

The threshold question is what type of criminal-procedure rules apply to police social media speech. If social media comments reflect an officer’s credibility problems, are they true “*Brady* material” that must be disclosed as a matter of constitutional law,<sup>277</sup> or are they some form of nonconstitutional discovery material covered by statutory or ethical rules? The answer matters a great deal because, if they are *Brady* material, then prosecutors have a duty to seek out and disclose these comments, and no statutes or local practices can stand in the way. But if they are some manner of nonconstitutional

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272. Tess Sheets & Jeff Weiner, *State Attorney Aramis Ayala Releases List of Central Florida Cops with Questionable Credibility as Witnesses*, ORLANDO SENTINEL (July 14, 2020, 6:14 PM), <https://perma.cc/KP82-8U3N>.

273. City of Orlando, 19-2 Lab. Arb. Awards (CCH) ¶ 7500, 8999-20, 8999-22 (Sept. 16, 2019) (Laporte, Arb.); see also Tess Sheets, *Orlando Officer Speaks at Hearing on Discipline for Facebook Rant: I Regret Using “Unbelievably Hateful Language,”* ORLANDO SENTINEL (Dec. 20, 2018, 4:00 PM), <https://perma.cc/58DS-6MT7>.

274. *City of Orlando*, 19-2 Lab. Arb. Awards (CCH) at 8999-21 to -22.

275. *Id.* at 8999-22.

276. *Id.* at 8999-23.

277. *Strickler v. Greene*, 527 U.S. 263, 281 (1999).

impeachment material, then statutes and local policies can prevent their discovery and disclosure.

According to the Supreme Court, three factors must be analyzed to determine whether some piece of evidence is *Brady* material. The evidence must be (1) favorable to the defense; (2) materially so; and (3) suppressed by the prosecution.<sup>278</sup>

### 1. Favorable

*Brady* material must be favorable to the defendant, either because it helps to exculpate the defendant or to impeach a prosecution witness.<sup>279</sup> There is a straightforward argument for why social media posts amount to favorable evidence: Witnesses can be questioned about bias, dishonesty, and even a propensity for violence.<sup>280</sup> Where these statements on social media reflect such credibility issues, the defense could use them to undermine the testimony of an officer.

But there are also arguments that these social media comments do not amount to favorable evidence for the defense. One line of argument is that an officer’s comments on Facebook are not sufficiently probative to be admissible at a trial,<sup>281</sup> and even if they were, they would open the door to evidence about

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278. *Id.* at 281-82 (“There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.”).

279. *Id.*

280. *Giglio v. United States*, 405 U.S. 150, 154 (1972) (“When the ‘reliability of a given witness may well be determinative of guilt or innocence,’ nondisclosure of evidence affecting credibility falls within this general rule.” (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959))); *United States v. Figueroa*, 548 F.3d 222, 229 (2d Cir. 2008) (describing the evidence rule governing the impeachment of a witness for bias); Jeffrey F. Ghent, Annotation, *Accused’s Right to Discovery or Inspection of Records of Prior Complaints Against, or Similar Personnel Records of, Peace Officer Involved in the Case*, 86 A.L.R. 3d 1170, § 2(a) (1978).

281. When the Plain View Project identified biased and violent social media comments by sheriff’s deputies in Lake County, Florida, state prosecutor Brad King declined to place any of these deputies on the *Brady* list, despite direct pleas from the American Civil Liberties Union and other civil rights groups. King said: “While the statements do in some instances reflect poor judgment by the officers, there is no legal reason that their credibility could be impeached in a criminal prosecution nor is there a legal reason to abandon prosecutions because of the statements.” Lisa Maria Garza, *Lake County Deputies Are Credible Witnesses Despite Offensive Facebook Posts, State Attorney Says*, ORLANDO SENTINEL (Aug. 29, 2019, 10:16 AM), <https://perma.cc/S993-TMJD> (quoting Brad King); see also *City of Shelton*, Case No. 2018-A-0026, at 1 (Conn. State Lab. Dep’t Bd. of Mediation & Arb. Apr. 18, 2019), 2019 WL 11663824 (Judkins, Arb.) (raising the question of relevance and stating that the police department’s characterization of the social media posts as *Brady* material “is subject to a good amount of conjecture . . .

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an officer’s good character. In other words, the claim is that the use of this impeachment evidence would not be favorable to the defendant because it would allow the prosecutor to ultimately build up the credibility of the officer. Another argument is that the comments would be favorable only in cases in which the officer’s biases or violence are already at issue in the case.

These counterarguments are unavailing. To be favorable, evidence does not need to amount to conclusive proof that the officer lacks credibility. A comment showing that the officer uses the n-word, for example, would be one piece of evidence that would favor the defense. Even if it might invite evidence of the officer’s good character, the officer’s bigoted language could be damning. Likewise, the idea that biased comments would matter only if bias was already in the case is a bit of a non sequitur. Maybe the racist comments would be less favorable in a case where, say, the officer, the defendant, and all the witnesses are white. But an officer’s bigotry might call his character for truthfulness into question even in such a case, which is to say nothing of the many cases in which racial bias could be directly at issue. All in all, officers’ social media comments would seem to satisfy the “favorable evidence” prong of *Brady*.

Furthermore, the questions of the actual admissibility of the posts are not dispositive of a comment’s favorability. Even if a judge barred the jury from hearing or seeing the officer’s actual social media post, the inadmissible material can still be *Brady* evidence. As a leading treatise describes, while some courts limit *Brady*’s duty to disclose “to matters that would be admissible in evidence, . . . [m]ost courts . . . now view admissibility as a critical end-product, but note that the duty to disclose could encompass inadmissible information where that information appears likely to lead the defense to the discovery of admissible evidence.”<sup>282</sup> If the prosecutor is forced to disclose the social media comments to the defense, that disclosure could prompt the defense to do its own deeper investigation of the officer, or it could simply give the defense a good-faith basis to question the officer about his biases. In this way, the admissibility of the posts is a separate issue from the question of whether the evidence is favorable under *Brady*.

Though documented instances are hard to find, there are several high-profile examples of social media content being used to impeach police officers.<sup>283</sup> If more prosecutors and police officials tracked these social media

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[which] shows that the disclosure of these Facebooks [sic] posts and the disqualification of the Grievant as a witness is far from a certainty”), *rev’d sub nom.* *City of Shelton v. Shelton Police Union, Inc.*, No. AAN-CV-19-6033187-S, 2020 WL 8019757 (Conn. Super. Ct. Nov. 5, 2020).

282. 6 WAYNE R. LAFAYE, JEROLD H. ISRAEL, NANY J. KING & ORIN S. KERR, *CRIMINAL PROCEDURE* § 24.3(b) (West 2021).

283. See, e.g., Jim Dwyer, *The Officer Who Posted Too Much on MySpace*, N.Y. TIMES (Mar. 10, 2009), <https://perma.cc/E8KT-57BC> (describing an NYPD officer who was cross-  
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comments, they might well be used more frequently as impeachment evidence. The fact that sophisticated public defender agencies have been collecting and cataloging police social media posts for their own impeachment efforts is all the more reason to conclude that police social media speech satisfies the favorability element of *Brady*.<sup>284</sup>

## 2. Materiality

To amount to a *Brady* violation, the favorable evidence that was suppressed must have been material—that is, significant enough that there is a “reasonable probability” that the outcome of the trial would have been different if the evidence had been disclosed.<sup>285</sup> Police social media comments, like any piece of evidence, may or may not be material, depending on the balance of the evidence in the case. If there is overwhelming evidence of the defendant’s guilt, then a piece of potential *Brady* evidence will have to pass a high threshold to be material—because the conviction would likely occur even if the evidence were disclosed. In a case in which the evidence is in equipoise, even the most marginally favorable piece of information would satisfy the materiality standard. Thus, the materiality element of the *Brady* test does not counsel for or against treating social media comments as *Brady* material.

## 3. Suppression

The final element of a *Brady* violation is “suppression.”<sup>286</sup> Favorable, material evidence is not *Brady* material unless it is suppressed by the prosecutor. This element of *Brady* is the most in need of analysis when it comes to police social media posts. As a legal term of art, “suppression” includes not only those situations in which a prosecutor actively withholds evidence, but

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examined on his MySpace postings, which led to an acquittal on the felony charge against a defendant whom the officer had arrested); Goode, *supra* note 66 (“In an Arkansas case, a federal appeals court cited as evidence of a police officer’s character photos he posted on MySpace showing him pointing a gun at the camera, flanked by a skull and the legend ‘the PUNISHER.’”); Colleen Long, *NYPD Facebook Probe Raises Free Speech Question*, NBC NEWS (Dec. 11, 2011, 4:25 PM PST), <https://perma.cc/JQ63-WYNT> (describing how public defenders won an acquittal using posts by NYPD officers in a Facebook group about the West Indian Day Parade).

284. See Barry Scheck, Preface, *The Integrity of Our Convictions: Holding Stakeholders Accountable in an Era of Criminal Justice Reform*, 48 GEO. L.J. ANN. REV. CRIM. PROC., at iii, xiv-xv (2019) (noting that the New York Legal Aid Society’s “Cop Accountability” database collects “investigations of the social media sites” of officers); Jason Tashea, *Databases Create Access to Police Misconduct Cases and Offer a Handy Tool for Defense Lawyers*, ABA J. (Feb. 1, 2016, 3:00 AM CST), <https://perma.cc/5RHG-U46J>.

285. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

286. *Id.*

also those in which a prosecutor fails to turn over evidence or fails to learn about the evidence in the first place.<sup>287</sup> The prosecutor’s good faith in failing to disclose or discover favorable evidence is no excuse.<sup>288</sup> Moreover, the universe of material that fits within *Brady* is not limited to what the prosecutor actually knows. Rather, the prosecutor is imputed knowledge of anything known to “others acting on the government’s behalf in the case, including the police.”<sup>289</sup> Thus, if an officer learns that a witness has credibility problems but never tells the prosecutor about it, that knowledge is nonetheless imputed to the prosecutor, and the failure to disclose that information is a *Brady* violation.<sup>290</sup>

The question of how far a prosecutor’s constructive knowledge extends has come up in a variety of scenarios. In the paradigmatic case of constructive knowledge, a prosecutor is deemed to know about exculpatory evidence that police officers collected in their own files but never turned over to the prosecution.<sup>291</sup> More challenging questions regarding the extent of a prosecutor’s constructive knowledge have involved police disciplinary records. Even where the disciplinary records are confidential and prosecutors have no actual access to them, courts have nonetheless found that the impeachment evidence in the confidential files amounts to *Brady* material.<sup>292</sup> That is true, because the police department and the police officer whom the records concern are deemed members of the prosecution team.<sup>293</sup> Accordingly, the prosecutor

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287. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (describing a prosecutor’s duty to disclose, including the “duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police”); *Milke v. Ryan*, 711 F.3d 998, 1016-18 (9th Cir. 2013) (“[I]nadvertent failure to disclose is enough for a *Brady* violation.”); see also Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 552 (2007) (“[T]he extent of a prosecutor’s duty to search for *Brady* evidence in places where a prosecutor is charged with constructive knowledge has not been carefully analyzed or explained.”).

288. See sources cited *supra* note 287.

289. See *Kyles*, 514 U.S. at 437.

290. *Id.* at 437-38.

291. See *id.* at 437-38; *Ass’n for L.A. Deputy Sheriffs v. Superior Ct.*, 447 P.3d 234, 239 (Cal. 2019) (“Such disclosure may be required even if the prosecutor is not personally aware that the evidence exists. Because the duty to disclose may sweep more broadly than the prosecutor’s personal knowledge, the duty carries with it an obligation to ‘learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.’” (citation omitted) (quoting *Kyles*, 514 U.S. at 437)); *Milke*, 711 F.3d at 1005-06, 1012 (“The prosecutor is charged with knowledge of any *Brady* material of which . . . the investigating police agency is aware.”); *People v. Superior Ct. (Johnson)*, 377 P.3d 847, 852 (Cal. 2015); *United States v. Jennings*, 960 F.2d 1488, 1490 (9th Cir. 1992) (“[The prosecution’s] personal responsibility [for *Brady* compliance] cannot be evaded by claiming lack of control over the files or procedures of other executive branch agencies.”); *United States v. Osorio*, 929 F.2d 753, 762 (1st Cir. 1991).

292. See, e.g., *Ass’n for L.A. Deputy Sheriffs*, 447 P.3d at 249, 250 n.6.

293. *Id.* at 249.

has a *Brady* duty to learn of and disclose any impeachment evidence in the disciplinary files when that officer is a witness.<sup>294</sup> Where to draw the line on a prosecutor’s duty to learn, however, is an unsettled and unsettling question. It cannot be that a prosecutor must comb through every case file in the office or reach back to the officer’s high school report card to ensure that they are free of favorable information. Yet the prosecutor must do something to learn of material known to members of the prosecution team.

The duty to learn of an officer’s social media comments certainly tests the boundaries of *Brady*. But before discussing the contours of how the constructive-knowledge doctrine ought to apply to social media speech, it is important to mention one additional consideration about suppression: the reasonably diligent–defendant doctrine. According to many state courts and ten of the twelve federal circuit courts (but not the Supreme Court), there is no *Brady* duty to disclose any material that a reasonably diligent defendant could obtain on her own.<sup>295</sup> This rule applies even if that information is favorable, material, and known to the prosecutor.<sup>296</sup> The idea is that evidence is not suppressed if the defendant actually knew about it or if the defendant should have known about it through reasonable diligence.<sup>297</sup> As a practical matter, this means that *Brady* typically does not require the disclosure of public records, court records, and online materials, provided that a reasonably

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294. See, e.g., *supra* note 290; *McNesby ex rel. Fraternal Ord. of Police Lodge No. 5 v. City of Philadelphia*, 267 A.3d 531, 544 (Pa. Commw. Ct. 2021) (“[W]e conclude the trial court properly dismissed Appellants’ complaint to the extent that it seeks to enjoin the City from providing information from appellant officers’ personnel files to [District Attorney (DA)] Krasner, and to enjoin DA Krasner from creating and maintaining an internal Do Not Call List, or from disclosing potentially exculpatory or impeachment information to criminal defense counsel.”); *Stacy v. State*, 500 P.3d 1023, 1039 (Alaska Ct. App. 2021) (“[U]nder Alaska law, prosecutors have a duty to learn of *Brady* material that may be in the personnel files of law enforcement officers or other members of the prosecution team. We note that this duty extends not only to police agencies of the same government bringing the prosecution, but it may also extend to officers from cross-jurisdictional agencies who have a ‘close working relationship’ with the prosecution” (quoting *United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir. 1992))). For a discussion of the New Hampshire state constitution, which courts have interpreted somewhat more expansively than *Brady*, see *Duchesne v. Hillsborough Cnty. Att’y*, 119 A.3d 188, 192-93 (N.H. 2015) (“Our decision in *Laurie* demonstrated the need for prosecutors and law enforcement agencies to share [personnel-file] information that pertains to police officers who may act as witnesses for the prosecution.”).

295. Kate Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of Brady Through the Defendant Due Diligence Rule*, 60 UCLA L. REV. 138, 141, 147-48, 153-54, 153 n.80, 154 n.82 (2012) (collecting cases from all federal circuits and from many state supreme courts); see also Thea Johnson, *What You Should Have Known Can Hurt You: Knowledge, Access and Brady in the Balance*, 28 GEO. J. LEGAL ETHICS 1, 3-4 (2015) (critiquing the *Brady* reasonable-diligence requirement for defendants).

296. See Weisburd, *supra* note 295, at 140-41.

297. See Johnson, *supra* note 295, at 3.

diligent defendant (or her attorney) would be on notice about them and have the ability to access them.<sup>298</sup> In this way, there is a Goldilocks quality to the definition of *Brady* suppression. If the evidence is so obscure that no one on the prosecution team knows about it, then it will not be imputed to the prosecutor. And if the evidence is so accessible that any reasonably diligent defendant could obtain it, then the evidence is also not *Brady* material. The sweet spot for *Brady* is evidence that members of the prosecution team know about but that a reasonably diligent defendant could not access on her own.

With this definition in mind, we may need to reclassify the social media posts discussed in Part II.B above. Many of those comments could fail the suppression test of *Brady* if they are deemed accessible to a reasonably diligent defendant. For example, where an officer’s social media speech is accessible on the internet or reported in the newspaper, a reasonably diligent defendant would seem to have knowledge of it, and therefore the prosecutor would not have a *Brady* duty to disclose it. Thus, the prosecutors, police departments, and commentators who treat this social media speech as *Brady* material<sup>299</sup> may be interpreting *Brady* too broadly.<sup>300</sup>

At the same time, the current classification of social media speech as *Brady* material does not sweep broadly enough when it comes to officers’ hidden speech. As noted throughout Part I above, police departments are doing essentially no proactive investigation of their officers’ social media speech, especially when it comes to hidden speech. Yet this hidden speech, if it is known to any member of the prosecution team, would seem to fit within the principles of suppression. After all, if it is hidden, then a reasonably diligent defendant could not access it. This means that its discovery or lack thereof would depend entirely on the actions of the prosecution team. The failure to disclose this material would amount to suppression. Put another way, the public social media speech would not qualify as *Brady* material because it is accessible to all, but the hidden social media speech would be *Brady* material because it would be known only to the prosecution team. Of particular significance here, if this hidden speech is *Brady* material, then there would be a constitutional duty on the part of the prosecutor to seek out such comments and disclose them. Admittedly, this would mark a major departure from

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298. Compare *United States v. Payne*, 63 F.3d 1200, 1208 (2d Cir. 1995) (“Documents that are part of public records are not deemed suppressed if defense counsel should know of them and fails to obtain them because of lack of diligence in his own investigation.”), with *Milke v. Ryan*, 711 F.3d 998, 1018 (9th Cir. 2013) (holding that court documents had been suppressed when the defendant was able to discover them only after ten researchers spent nearly 7,000 hours reviewing court records).

299. For these cases, see Part II.B above.

300. One caveat to this observation is that prosecutors and police departments may be using “*Brady*” as a colloquial term to describe impeachment evidence generally.

current practices, and it would amount to a significant contrast with *Pickering’s* willingness to ignore hidden speech.<sup>301</sup> But neither of these observations provides a principled reason to claim that hidden speech is outside the scope of *Brady*.

As a matter of doctrine, the key question about the applicability of *Brady* to hidden speech is whether members of the prosecution know about the hidden speech. If a member of the prosecution team is aware of the offensive speech, then the prosecutor will be imputed knowledge of this evidence and, consequently, the prosecutor will have a duty to seek out and disclose this evidence. Again, I recognize that this is a controversial position and one that prosecutors may find hard to absorb into their current understanding of *Brady*. No prosecutor’s office that I could find is engaged in proactive monitoring of social media as part of its *Brady* duty. But if members of the prosecution team—most likely, other officers—are aware of these comments, the constructive-knowledge doctrine must kick in.

The *Brady* issue, then, turns on whether one thinks that members of the prosecution team know of others’ hidden speech. There is certainly room for debate on this issue, but in many cases, the stronger argument will be on the side of finding that constructive knowledge exists. Take the case of Officer Christina Arribas, who landed on the *Brady* list for comparing President Obama to a chimpanzee.<sup>302</sup> Arribas posted under the pseudonym “Chrissy Gillrakers,”<sup>303</sup> and there is no apparent reason to think the prosecutor in her jurisdiction had actual knowledge of Arribas’s post, much less knowledge that Chrissy Gillrakers was actually an officer. Nor is there any reason to think that a reasonably diligent defendant would be able to discover that the pseudonymous post was made by Officer Arribas—at least prior to the news coverage Arribas received. That means that the applicability of *Brady* to Arribas’s post hinges on whether some member of the prosecution team knew that the “Chrissy Gillrakers” account was an officer posting offensive speech.

One theory of the prosecution team’s knowledge could be that Arribas herself is a member of the prosecution team, and therefore her knowledge of her own biased speech must be imputed to the prosecutor. This has a logical consistency and even elegance. It would create a strict liability regime for officers’ credibility problems, on social media and beyond. An officer who made a racist post or, say, was engaged in a course of criminal activity that had yet to be detected would have a duty to report her problems to the prosecutor. Of course, no officer would report herself if she were actively trying to conceal

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301. See *supra* Part I.C.

302. See *supra* text accompanying notes 266-70; *State Attorney Issues “Death Letter” over Bartow Cop’s “Gorilla” Comment*, *supra* note 189.

303. *State Attorney Issues “Death Letter” over Bartow Cop’s “Gorilla” Comment*, *supra* note 189.

her misconduct, but the import would be that if the misconduct ever came to light, it would be deemed a *Brady* violation, regardless of whether anyone else on the prosecution team knew. This theory of constructive knowledge has not arisen very often. But where it has, it has been rejected in holdings<sup>304</sup> or, more often, in dicta.<sup>305</sup>

There is another theory of constructive knowledge, however, that would be more viable for the specific context of hidden police speech. An officer’s pseudonymous or otherwise hidden comments could be imputed to the prosecutor if other members of that officer’s department, or even squad, knew about them. A comparison to the context of police disciplinary records is helpful. Courts have held that a prosecutor has a duty to learn of and disclose police disciplinary records under *Brady* even when the prosecutor does not have direct access to those records, because the police department is aware of the records and the department is a member of the prosecution team.<sup>306</sup> The

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304. See, e.g., *People v. Garrett*, 18 N.E.3d 722, 731 (N.Y. 2014) (“O’Leary’s knowledge of his own alleged misconduct and the civil action against him could not be imputed to the People for *Brady* purposes.”).

305. See, e.g., *United States v. Robinson*, 627 F.3d 941, 951-52 (4th Cir. 2010) (“Because the dismissed officers obviously knew about their own misconduct and because they were working on the government’s behalf, Robinson argues the prosecution violated its duty to disclose those improprieties even though no prosecutor actually knew about them. Whatever the proper scope of *Brady*’s imputed knowledge doctrine, it cannot be this broad.”); *United States v. Robinson*, 809 F.3d 991, 996 (8th Cir. 2016). Scholars have also commented on the challenges and opportunities concerning a prosecutor’s constructive knowledge. See Scheck, *supra* note 284, at xi (“[A]s the use of [big data prosecution] systems spreads, law enforcement is increasingly in *constructive* possession of an unstructured trove of favorable information with no robust way to search, find, and retrieve it.”).

306. See *supra* text accompanying notes 206, 292-94; see also *McNesby ex rel. Fraternal Ord. of Police Lodge No. 5 v. City of Philadelphia*, 267 A.3d 531, 544 (Pa. Commw. Ct. 2021) (“Unquestionably, the District Attorney has an affirmative duty to disclose potentially exculpatory evidence, as well as evidence that could be used to impeach prosecution witnesses, whether that evidence is in the possession of the Office of the District Attorney or the City itself and must provide that evidence to the accused. Furthermore, the City has a derivative duty to assist the District Attorney with fulfilling his constitutional obligation to criminal defendants, by providing the District Attorney, at his request, with information regarding such allegations.” (citations omitted)); *Gantert v. City of Rochester*, 135 A.3d 112, 116 (N.H. 2016) (“We have recently explained the background and operation of ‘Laurie Lists.’ As relevant here, prosecutors have a duty to disclose ‘both exculpatory information and information that may be used to impeach the State’s witnesses.’ This duty extends to information known only to law enforcement agencies, such as information located in police officers’ confidential personnel files.” (citations omitted)) (quoting *Duchesne v. Hillsborough Cnty. Att’y*, 119 A.3d 188, 192 (N.H. 2015)); *Ass’n for L.A. Deputy Sheriffs v. Superior Ct.*, 447 P.3d 234, 249 (Cal. 2019) (“There can be no serious doubt that confidential personnel records may contain *Brady* material. An officer may provide important testimony in a criminal prosecution. Confidential personnel records may cast doubt on that officer’s veracity. Such records can constitute material

*footnote continued on next page*

same theory would work with hidden speech. While *Brady* might not require the officer to reveal her own hidden speech to the prosecutor,<sup>307</sup> other officers would have to tell the prosecutor what they know or else violate the dictates of *Brady*.

This theory of constructive knowledge is made more compelling by the “duty to intercede” that police departments impose on their officers.<sup>308</sup> When an officer observes a colleague’s misconduct, on or off the street, she has a duty to stop it and to report it to superiors.<sup>309</sup> This duty to intercede typically contemplates physical misconduct.<sup>310</sup> But it would also provide a sound basis for requiring an officer to report what she knows about social media comments made by her colleagues. Namely, each officer who witnessed an offensive social media post by a colleague would have a duty to report it to the department, thus creating constructive knowledge that would be attributed to the prosecutor.<sup>311</sup> And who is more likely to know the true identity of a pseudonymous account than one of the officer’s colleagues? It makes sense that officers will follow each other’s social media accounts, as friends and colleagues do in other professions. Because these officers are tasked with a particular

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impeachment evidence. These are not close questions. Because confidential records may contain *Brady* material, construing the *Pitchess* statutes to permit *Brady* alerts best ‘harmonize[s]’ *Brady* and *Pitchess*.” (alteration in original) (citation omitted) (quoting *Ass’n for L.A. Deputy Sheriffs v. Superior Ct.*, 221 Cal. Rptr. 3d 51, 81 (Ct. App. 2017) (Grimes, J., concurring and dissenting), *rev’d*, 447 P.3d 234)).

307. See *supra* notes 304-05 and accompanying text.

308. See *Figueroa v. Mazza*, 825 F.3d 89, 106 (2d Cir. 2016) (“A police officer is under a duty to intercede and prevent fellow officers from subjecting a citizen to excessive force, and may be held liable for his failure to do so if he observes the use of force and has sufficient time to act to prevent it.”); Laura Scarry, *What You Need to Know About Officer Duty to Intervene*, LEXIPOL (Sept. 11, 2020), <https://perma.cc/X3AV-866M>.

309. See, e.g., Detroit Police Dep’t, Directive No. 304.2, Use of Force 8-9 (rev. 2020), <https://perma.cc/LYJ5-K5SQ>; Balt. Police Dep’t, Policy No. 319, Duty to Intervene 1-2 (2021), <https://perma.cc/W3DS-EGKU>; Boise Police Dep’t, Policy & Procedures Manual 74 (2019), <https://perma.cc/42E4-NLVE>.

310. See Zachary D. Kaufman, Police Policing Police 14-27 (Apr. 9, 2022) (unpublished manuscript) (on file with author) (providing a comprehensive analysis of nationwide duty-to-intervene statutes); see, e.g., MINN. STAT. § 626.8475 (2021); VT. STAT. ANN. tit. 20, § 2368(b)(7) (2021) (“A law enforcement officer has a duty to intervene when the officer observes another officer using a chokehold on a person.”); *Priester v. City of Riviera Beach*, 208 F.3d 919, 927 (11th Cir. 2000) (stating that the rule “[t]hat a police officer had a duty to intervene when he witnessed the use of excessive force and had the ability to intervene was clearly established in February 1994” and collecting cases); *Mick v. Brewer*, 76 F.3d 1127, 1135 (10th Cir. 1996) (“Defendants . . . contend the district court erred by concluding that the law is clearly established: (1) regarding excessive force, and (2) that a law enforcement official has an affirmative duty to intervene to prevent another law enforcement official’s use of excessive force. We disagree.” (footnote omitted)).

311. The attribution could also run from the officer directly to the prosecutor.

duty—the duty to intercede—their knowledge of each other’s posts would create a duty to act.

Indeed, the police chief in Oakland, California, cited the duty to intercede in response to citizen concerns about pseudonymous social media posts by police. At a police commission meeting, members of the public took the department to task for failing to report offensive statements that belatedly came to light.<sup>312</sup> The chief responded: “[F]rankly [the] duty to intercede is not just . . . for uses of force and for things that are committed out into the public in terms of overt policing, but it is a duty to intercede and to report when you see any violation, any violation.”<sup>313</sup> The social media policy written by the Massachusetts Chiefs of Police Association is just as explicit that “[a]ny employee becoming aware of or having knowledge of a posting or of any website or web page in violation of the provision of this policy shall notify his or her supervisor immediately for follow-up action.”<sup>314</sup> The same is true of the Milwaukee Police Department’s social media policy, which requires that “[m]embers who become aware of or have knowledge of a posting in violation of the provisions of this policy shall notify a supervisor immediately.”<sup>315</sup> In addition, some police departments and prosecutors’ offices have instituted screening questions to ask officers, before they testify in court, about their social media posts.<sup>316</sup> This screening function would be another way to establish institutional knowledge of offensive social media comments by officers and, thus, to attribute that knowledge to the prosecutor under *Brady*.

This analysis of suppression would shift the *Brady* focus from one set of social media posts to another. The publicly accessible posts that officers make under their own names or under easy-to-pierce pseudonyms receive much attention, but they may not qualify as *Brady* material, because a reasonably diligent defendant would be able to access them. Meanwhile, the more deeply hidden social media posts—posts that are currently ignored by First Amendment–focused policies—are closer to the heart of true *Brady* material, because the reasonably diligent defendant cannot access them on her own. Where police officers are viewing each other’s personal social media feeds—and there is reason to believe that this may be common<sup>317</sup>—the conditions are

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312. See Oakland Police Comm’n, *supra* note 23, at 15-16.

313. *Id.* at 16.

314. See ASHTON ET AL., *supra* note 50, at 40.

315. Milwaukee Police Dep’t, *supra* note 170, at 3.

316. Ford, *supra* note 219; see also Perdue, *supra* note 215, at 7 (directing prosecutors to “keep an eye” out for legal developments regarding the impeachment of officers with evidence of bias, such as comments expressed on social media).

317. E.g., Hendricks v. Dep’t of Homeland Sec., 2020 M.S.P.B. No. SF-0752-20-0074-I-2, 2020 MSPB LEXIS 3596, at \*13 (Sept. 1, 2020) (“[I]t’s no secret that border patrol brass [at] footnote continued on next page

right to impute these colleagues’ knowledge of the posts to the department and, thus, to the prosecutor.

Opponents of this paradigm will find it far-fetched to expect officers to inform on each other. But that critique is not actually responsive to the question of whether the hidden social media posts are *Brady* material. The *Brady* duty has a long history of being violated.<sup>318</sup> And no wonder. It requires prosecutors and police officers to reveal information that, by definition, makes it more difficult for them to secure convictions. If officers refuse to honor their *Brady* obligations with respect to hidden social media speech, however, they are not only violating due process, but they are also running the risk that the offending material will somehow come to light. And if the material does someday come to light, defendants will be able to point to these *Brady* violations as grounds for challenging their convictions.

In response to this Article’s *Brady* analysis, there will doubtless be claims that no prosecutor could or should spend their time tracking credibility evidence contained in hidden social media posts. That objection mirrors what prosecutors and police advocates said about impeachment evidence in police disciplinary records—that it was asking too much of prosecutors to stay abreast of it.<sup>319</sup> And with the disciplinary records, at least, there was a closed universe of files where the *Brady* material could be found. The duty to learn of social media speech anywhere in the expanse of cyberspace would be daunting.

Such resistance is understandable, but unpersuasive. There are ways to make the process manageable. Prosecutors could, for example, ask officers under oath about their social media comments. Prosecutors, invoking *Brady*, could require officers to disclose their social media handles—or, potentially, even their passwords—to some monitoring apparatus. Similar proposals are under consideration in pockets of the country, and they are discussed in more depth in Part III.A.1 below.<sup>320</sup> The fact that it might be difficult to detect some type of impeachment material does not mean that such material is outside the scope of *Brady*.

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station, sector and headquarters were all in the [Facebook] group. Everybody knew. It was no secret.” (quoting a Border Patrol agent)).

318. *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (mem.) (Kozinski, C.J., dissenting from the order denying the petition for rehearing en banc) (“There is an epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it.”); *id.* at 631 (stating that “*Brady* violations have reached epidemic proportions in recent years, and the federal and state reporters bear testament to this unsettling trend” and then listing cases); Gershman, *supra* note 287, at 531 (“Prosecutors have violated [*Brady*’s] principles so often that it stands more as a landmark to prosecutorial indifference and abuse than a hallmark of justice.”).

319. *E.g.*, Abel, *supra* note 206, at 777 (describing Oregon prosecutors’ objections to reviewing police personnel records).

320. See *infra* notes 354–58 and accompanying text.

Moreover, critics of applying *Brady* to hidden speech must also consider the alternative. If *Brady* does not apply to an officer’s biased or violent comments on social media, even comments that other officers know about, why not? What legal principle exempts members of the prosecution team from having to disclose what they know of a witness’s—in this case, an officer’s—extreme credibility problems? *Brady*’s application to police social media speech does not mean that a prosecutor would have to do a full social media workup on every potential witness in every case; it just means that if members of the prosecution team already know about a witness’s credibility problems, they must disclose those problems. If the underlying statements are favorable and material—as expressions of bias and violence would be—then the officer’s knowledge about his colleagues’ comments are imputed to the prosecutor, just as a detective’s knowledge about an informant’s credibility problems would have to be passed along, too.<sup>321</sup> There is no hashtag exception to *Brady*.

Ultimately, then, hidden social media posts fit within the *Brady* rubric better than the posts that are more widely publicized. Part III.B below discusses the significant policy consequences that flow from this insight. In brief, if this hidden material is truly *Brady* material, then prosecutors and their police colleagues have a constitutional duty to seek out and disclose this evidence. To do so, they must adopt a paradigm shift in their investigative and enforcement practices.

#### 4. Non-*Brady* criminal-procedure material

Even if the social media posts are not *Brady* material, that is not the end of the criminal-procedure analysis. Prosecutors may be required to disclose this social media material as a matter of statutory law or ethical rules. Federal and state statutes impose disclosure duties on prosecutors.<sup>322</sup> So do the rules of

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321. See *supra* text accompanying note 290.

322. MARC ALLEN, NAT’L REGISTRY OF EXONERATIONS, NON-*BRADY* LEGAL AND ETHICAL OBLIGATIONS ON PROSECUTORS TO DISCLOSE EXCULPATORY EVIDENCE 7 & tbl.2, 12 tbl.4 (2018), <https://perma.cc/KYJ2-VCSV>; FED. R. CRIM. P. 16. The Advisory Committee described the ways in which discovery obligations under the federal rule go beyond *Brady*:

Disclosure of documents and tangible objects which are “material” to the preparation of the defense may be required under the rule of *Brady v. Maryland*, without an additional showing that the request is “reasonable.” In *Brady* the court held that “due process” requires that the prosecution disclose evidence favorable to the accused. Although the Advisory Committee decided not to codify the *Brady* Rule, the requirement that the government disclose documents and tangible objects “material to the preparation of his defense” underscores the importance of disclosure of evidence favorable to the defendant.

Limiting the rule to situations in which the defendant can show that the evidence is material seems unwise. It may be difficult for a defendant to make this showing if he does not know what the evidence is.

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professional responsibility.<sup>323</sup> In addition, some prosecutors’ offices maintain policies of disclosing more than the minimum required by law.<sup>324</sup> In this way, criminal procedure is still relevant, even if the social media posts do not qualify as true *Brady* material. There are several reasons, however, that it matters whether these social media comments are *Brady* material or some other form of criminal-procedure material. First, if they are *Brady* material, then prosecutors would have a constitutional duty to seek out and disclose this material. Prosecutors and police departments would have to change their practices to start identifying and disclosing their officers’ social media posts, as some police departments have already begun to do.<sup>325</sup> Second, if disclosure of social media speech is a *Brady* duty, it is immune from efforts to repeal or limit its reach.

#### D. Why Criminal Procedure?

This Subpart considers why criminal-procedure doctrine is being applied to problems that typically sound in First Amendment and employment law. Tactical and strategic considerations make it desirable for police departments and prosecutors to invoke criminal procedure in this sphere. This Subpart examines the benefits and downsides of this off-label use of criminal-procedure doctrine to regulate police misconduct.

*Brady* and criminal procedure give the police department an advantage in carrying out discipline, compared to the traditional channels of processing a disciplinary complaint. Most police departments have well-developed procedural rules for adjudicating allegations of misconduct. These procedures can make it difficult to sustain allegations against officers and difficult to impose discipline on even those who are found to have violated departmental policies.<sup>326</sup> *Brady* and criminal procedure can provide a shortcut through these

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FED. R. CRIM. P. 16 advisory committee’s note to 1974 amendment (citation omitted).

323. ALLEN, *supra* note 322, at 1, 4, 5 tbl.1, 11, 12 tbl.4.

324. Gershman, *supra* note 287, at 542-43 (describing “open file” policies); Brian P. Fox, Note, *An Argument Against Open-File Discovery in Criminal Cases*, 89 NOTRE DAME L. REV. 426, 429 (2013) (same). While a prosecutor’s “open file” policy may disclose more than is required in some cases, material that should be disclosed under *Brady* may still be omitted under such a policy. This can happen, for example, where detectives possess exculpatory or impeaching evidence but do not turn it over to the prosecutor, thus preventing that information from making it into the “open file.” As one scholar noted, “even under the most liberal open file policy, open file disclosure does not necessarily include all relevant documents, including *Brady* evidence.” Gershman, *supra* note 287, at 545; see also Fox, *supra*, at 446-48 (“There are several examples of ways prosecutors have used the guise of an open-file policy to make defendants believe they have all of the applicable evidence.”).

325. See *infra* Part III.A.1.

326. See Stephen Rushin, *Police Disciplinary Appeals*, 167 U. PA. L. REV. 545, 570-71 (2019).

procedural protections. When an officer is deemed to be a “*Brady* cop,” police departments may have more leeway in taking disciplinary action against the officer. They may not have to go through the extensive process of proving the harm caused by the officer’s social media posts—proof required by First Amendment doctrine.<sup>327</sup> Rather, they can point to the fact that the officer is forbidden from testifying because of his *Brady* status. (Some *Brady* officers are permitted to testify, but prosecutors must disclose impeachment evidence about them each time they are slated to take the stand.)<sup>328</sup> If the officer cannot effectively testify, that can be an additional basis for an adverse employment action.<sup>329</sup> For a police department seeking to discipline an officer, or for the prosecutor trying to do the same, *Brady* is a convenient tool. Applying *Brady* to social media posts provides yet another avenue for removing a troublesome officer who might otherwise succeed in raising First Amendment challenges to his termination or discipline. As seen in Philadelphia, a department can point to an officer’s social media posts and the resulting credibility problems as evidence of disruption under *Pickering*.<sup>330</sup>

The *Brady* designation can also be helpful to police departments because it shifts the blame for the firing onto the prosecutor. Where the police department might face a legal or political backlash for firing an officer based on that officer’s social media speech, *Brady* and criminal procedure allow the police department to claim that its hands were tied: *The prosecutor made the decision, not us*. In some cases, the police department may even go through the

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327. As discussed in the text accompanying notes 69-82 above, police departments may discipline speech under *Pickering* only when the speech interferes with or disrupts the regular operation of the department.

328. *People v. Superior Ct. (Johnson)*, 377 P.3d 847, 862 (Cal. 2015), describes the *Brady* notification process: “[The police department] notifie[s] the prosecution, who in turn notifie[s] the defendant, that the officers’ personnel records might contain *Brady* material.”

329. *See, e.g., Appeals of Erik A. Andrade* 9-10 (Bd. of Fire & Police Comm’rs of Milwaukee Jan. 4, 2019), <https://perma.cc/M8BJ-KHN4>, *aff’d sub nom. Andrade v. Milwaukee Bd. of Fire & Police Comm’rs*, No. 2020-AP-333, 2021 WL 3870078 (Wis. Ct. App. Aug. 31, 2021); *City of Shelton*, Case No. 2018-A-0026, at 7-8 (Conn. State Lab. Dep’t Bd. of Mediation & Arb. Apr. 18, 2019), 2019 WL 11663824 (Judkins, Arb.), *rev’d sub nom. City of Shelton v. Shelton Police Union, Inc.*, No. AAN-CV-19-6033187-S, 2020 WL 8019757 (Conn. Super. Ct. Nov. 5, 2020).

330. *See supra* notes 225-29 and accompanying text. The *Brady* designation also has the benefit of providing the required “nexus” between off-duty conduct by the employee and the department’s operations. *See Hendricks v. Dep’t of Homeland Sec.*, 2020 M.S.P.B. No. SF-0752-20-0074-1-2, 2020 MSPB LEXIS 3596, at \*45-46 (Sept. 1, 2020) (“When such charges of misconduct are sustained by preponderant evidence, the agency must show that there is a nexus between the sustained charges and either the employee’s ability to accomplish his duties satisfactorily or some other legitimate government interest.”). Anything the officer says off duty has a nexus to his job because it affects his ability to testify.

process of asking the prosecutor to reconsider her *Brady* decision, only to have that request denied. Such was the case in Carlton County, Minnesota, where Detective Sergeant Scott Holman was placed on the *Brady* list by the newly elected district attorney and then promptly fired.<sup>331</sup> Holman sued the prosecutor and the city, alleging that he was placed on the *Brady* list for political reasons—because of social media posts opposing the previous police chief, who was a friend of the new prosecutor.<sup>332</sup> In litigation, the city argued that it had “requested the County Attorney to reconsider her decision on the *Brady* issue” but “due to the prosecutorial discretion of . . . [the] County Attorney position, the City had no other means by which it could challenge the decision.”<sup>333</sup> The city had no choice, or so it argued.

The prosecutor is well equipped to bear responsibility for using criminal procedure to effectively discipline a police officer. That is true because the prosecutor enjoys absolute immunity for his *Brady* determinations. A prosecutor’s *Brady* designation is, essentially, a decision not to charge a case involving a particular witness, not to call that witness at trial, or, if that witness is called, to provide defense counsel with required impeachment material about that witness. These core prosecutorial decisions are granted absolute immunity.<sup>334</sup> An officer’s attempt to force a prosecutor to remove him from the *Brady* list will also generally be unsuccessful, though there are beginning to be cases to the contrary.<sup>335</sup> To be sure, there are political and

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331. Complaint ¶¶ 10-11, 47-60, *Holman v. Ketola*, No. 20-cv-00224 (D. Minn. Jan. 15, 2020), ECF No. 1.

332. *Id.* ¶ 7.

333. Defendants’ Statement of the Case at 2, *Holman v. Ketola*, No. 20-cv-00224 (D. Minn. Oct. 16, 2020), ECF No. 35; see also *Appeals of Erik A. Andrade*, at 6 (describing how the police department asked the prosecutor’s office about the impact of problematic social media posts on the credibility of the officer); *Shepherd v. McGee*, 986 F. Supp. 2d 1211, 1215 (D. Or. 2013) (noting that the Oregon Department of Human Services spoke to prosecutors regarding plaintiff’s social media posts).

334. *E.g.*, *Savage v. Maryland*, 896 F.3d 260, 273-74 (4th Cir. 2018) (“[W]hen, as here, the alleged prosecutorial conduct involves the decision not to call an officer as a witness and communication of that decision to the relevant employer, it is ‘intimately tied to the judicial process’ and thus entitled to absolute immunity.” (quoting *Botello v. Gammick*, 413 F.3d 971, 977 (9th Cir. 2005))); *Roe v. City & County of San Francisco*, 109 F.3d 578, 583 (9th Cir. 1997); *Harrington v. Almy*, 977 F.2d 37, 38, 42 n.3 (1st Cir. 1992); cf. *Van de Kamp v. Goldstein*, 555 U.S. 335, 339 (2009) (“We ask whether [absolute] immunity extends to claims that the prosecution failed to disclose impeachment material due to: (1) a failure properly to train prosecutors, (2) a failure properly to supervise prosecutors, or (3) a failure to establish an information system containing potential impeachment material about informants. We conclude that a prosecutor’s absolute immunity extends to all these claims.” (citation omitted)).

335. Some courts have begun to order that officers’ names be removed from *Brady* lists, even if those courts do not allow damages against the prosecutor because of absolute immunity. WILL AITCHISON, *THE RIGHTS OF LAW ENFORCEMENT OFFICERS* 210 (8th ed. 2020) (“While prosecutors have broad immunity from lawsuits for damages for  
*footnote continued on next page*”).

practical consequences that a prosecutor may suffer for antagonizing police officers and unions. But those concerns may be counterbalanced by the benefits that accrue to the prosecutor who is seen as taking action against biased and violent officers. In Philadelphia and St. Louis, progressive prosecutors Larry Krasner and Kimberly Gardner were not shy about alerting the public to their actions against the officers exposed by the Plain View Project.<sup>336</sup> Indeed, in St. Louis, the prosecutor made a point of contrasting her actions against the officers with the inaction of the police department and police union.<sup>337</sup> *Brady* can be a welcome invitation for prosecutors to weigh in on the problem of biased and dishonest officers. Because the police chain of command is entirely separate from the prosecutorial chain of command, prosecutors do not have any formal power to carry out disciplinary actions against officers. But by designating them *Brady* cops, the prosecutors can impose severe, if informal, discipline on them.

Not surprisingly, *Brady*'s use in the social media context has been controversial. Police officers allege that *Brady* is being used pretextually—that the *Brady* designation for social media posts is about fast-tracking disciplinary actions, rather than about protecting criminal defendants' due process rights.<sup>338</sup> For example, one arbitration panel in a social media case expressed “serious reservations about allowing an outside agency, namely the prosecutor’s office, which is outside of the control of the City, to make a decision as to whether a police officer can retain his employment.”<sup>339</sup> The

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wrongful placement on a *Brady* list, a different line of cases is emerging where officers have lodged due process and/or privacy claims seeking to compel prosecutors to remove them from their *Brady* lists.”); see also *id.* (citing *Duchesne v. Hillsborough County Attorney*, 119 A.3d 188 (N.H. 2015), as “the most notable case”).

336. See *supra* Part II.B.1.

337. See *supra* text accompanying notes 230-34.

338. See, e.g., Complaint, *supra* note 331, ¶¶ 3, 5, 7; Brief of Petitioner-Appellant, *supra* note 244, at 8, 10 (arguing, on behalf of a terminated officer, that the *Brady* designation was solely to facilitate the disciplinary process, and offering the fact that the officer was chairing a trial with the same prosecutor’s office up until the date of his firing as proof that the prosecutor did not actually lack faith in his credibility).

339. City of Shelton, Case No. 2018-A-0026, at 21 (Conn. State Lab. Dep’t Bd. of Mediation & Arb. Apr. 18, 2019), 2019 WL 11663824 (Judkins, Arb.), *rev’d sub nom.* City of Shelton v. Shelton Police Union, Inc., No. AAN-CV-19-6033187-S, 2020 WL 8019757 (Conn. Super. Ct. Nov. 5, 2020); see Grievant 1, 2019 WL 2493245, at \*5 (Am. Arb. Ass’n Mar. 25, 2019) (De Treux, Arb.) (“In short, municipalities and police bargaining representatives are torn between their mutually-agreed standard of just cause for discharge and a [district attorney’s office] decision that renders an officer unable to perform all the duties of the position, including the effective prosecution of a defendant dependent on the officer’s testimony.”); see also *Roe v. Lynch*, 997 F.3d 80, 86 (1st Cir. 2021) (Lipez, J., concurring) (“A prosecutor’s determination that a police officer is generally *Brady*- or *Giglio*-impaired has serious consequences for the police officer’s reputation and employment. That determination—which effectively renders an officer unable to

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panel went on to say that, if the prosecutor could exercise this much influence, “there would be no meaningful avenue for an officer to seek an appeal, or reversal of the prosecutor’s decision, even if that decision was arbitrary and capricious.”<sup>340</sup> This same concern is mentioned when prosecutors put officers on the *Brady* list for any type of internal disciplinary action. With good reason, there is concern that *Brady* could be used as an excuse to mete out discipline that would not have been called for within the police department’s own formal disciplinary processes. According to Rick Poulson, an attorney representing the union of some Philadelphia officers in litigation regarding their social media posts, a progressive district attorney who “wants to see more officers disciplined” might be tempted to take officers “off the playing field, take the chess pieces off the board” by labeling them *Brady* cops.<sup>341</sup> In the words of Will Aitchison, a leading law-enforcement labor attorney, the *Brady* decision by the St. Louis prosecutor in her Facebook cases was “clearly an attempt to act as an HR manager for the police department.”<sup>342</sup>

These concerns about *Brady* as a form of prosecutorial discipline are probably more pronounced when the predicate for the discipline is a social media post. Unlike falsifying an overtime report, getting written up for drinking alcohol on duty, or any other traditional type of misconduct, posting a biased comment on social media is a newfangled offense. That may make it all the more controversial for a prosecutor or police department to use it as a basis for placing an officer on the *Brady* list. And, as noted above, even when an officer is on the *Brady* list, that does not mean he is barred from testimony. It merely means that the prosecutor may have to disclose to the defense information about the officer’s credibility problem.<sup>343</sup> Because the credibility implications of social media speech are themselves evolving, the placement on the *Brady* list for one of these comments can seem surprising and improper. That does not mean it is wrong.

### III. Implication

When it comes to police social media speech, the First Amendment and criminal-procedure approaches are in conflict. The criminal-procedure

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testify not only in a particular case, but also in future cases—will likely, at a minimum, result in loss of the officer’s duties as an investigator and, as here, may lead to the termination of employment. The potential for abuse also exists.”)

340. *City of Shelton*, Case No. 2018-A-0026, at 21-22.

341. Telephone Interview with Richard G. Poulson, Partner, Willig, Williams & Davidson (June 8, 2021).

342. Telephone Interview with Will Aitchison, Founder & Exec. Dir., Lab. Rels. Info. Sys. (July 8, 2021).

343. *See supra* note 328.

approach is the better choice, especially for hidden speech. Under the criminal-procedure paradigm, prosecutors have a duty to disclose any credibility problems that result from an officer’s speech, provided that the officer’s speech is known to some member of the prosecution team (including the police). This duty to disclose would in turn require police departments to take some action to seek out offensive police speech on social media. Unfortunately, the current First Amendment paradigm allows police departments to effectively ignore the harmful speech, as long as the speech is not connected to the department. Biased, violent, and otherwise impeaching speech remains undetected, even ignored.

To give some concrete examples, prosecutors and police officials in Oakland would have been required, under the criminal-procedure approach, to detect and disclose the racist and sexist Instagram account long before it came to light in the press.<sup>344</sup> The same would be true of prosecutors and NYPD officials with regard to the racist, xenophobic, and anti-Semitic posts written by its antidiscrimination commander.<sup>345</sup> The criminal-procedure approach would not permit the departments to let these social media posts fester unexamined.

This does not mean police departments have to keep abreast of every post that an officer makes on social media. But if an officer makes a post that impugns his credibility as a witness, and if that post is known to any member of the prosecution team, there would be a duty to disclose that post to the defense. A failure to do that would be no different than suppressing any other type of impeachment material about a witness. This paradigm is a significant break from the current First Amendment regime.

#### A. Proactive Monitoring and Its Drawbacks

The claim that *Brady* requires disclosure of hidden police social media speech will face a fair amount of skepticism, practically, doctrinally, and politically. The following discussion addresses those concerns.

##### 1. Logistical

The logistics of monitoring social media speech are difficult, and all the more so when that speech involves pseudonymous accounts and private channels. As LAPD Chief Michael Moore said, even the LAPD lacks the resources to carry out any monitoring of employees’ social media speech.<sup>346</sup> If one of the most sophisticated departments in the country cannot do it, others

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344. See *supra* notes 19-25 and accompanying text.

345. See *supra* notes 28-38 and accompanying text.

346. LAPD Commission Meeting of 04-27-2021, *supra* note 180, at 02:38:55-02:39:28.

would face even greater challenges. After all, each officer could have multiple accounts, named and unnamed, and there could be numerous posts on each account each day. Who could possibly keep track?

Two different responses to this concern come to mind. It could perhaps be possible to develop search technology that would track employees' posts for keywords of concern. But this Article, focused on doctrine, is not well positioned to consider the technical capabilities of such a program. What this Article can observe is that a monitoring program could be successful in catching and deterring harmful speech even if it detected only a small fraction of the biased or violent speech by officers. This should be a very familiar theory to law-enforcement institutions, as it is the foundational theory of crime suppression: deterrence. Police agencies cannot monitor every resident's activity all the time. The idea of deterrence is that the threat of detection and punishment, even when it is remote, will cause people to change their behavior. Thus, the choice is not between an omniscient future program of monitoring and the current, reactive one. An agency could act on the margins by engaging in some random audits of officers' accounts or instituting policies that require officers to report their peers. And when some speech is discovered, a proactive approach might lead to further investigation of the officer's comments and those within the department who are communicating with her. Instead of waiting for a complaint from the public, the departments could take the initiative.

Some indication that auditing could succeed can be seen in the success of the Plain View Project. Researchers there were able to use entirely public information—police department rosters and public Facebook profiles—to detect biased and violent comments by officers, even those made pseudonymously or anonymously.<sup>347</sup> Where the officers' comments are made under their own names and are accessible to the public, they would arguably fall outside of the *Brady* requirement because of the reasonably diligent-defendant doctrine.<sup>348</sup> But publicly available posts from pseudonymous or anonymous accounts would not be traceable by the reasonably diligent defendant back to the officer, so those comments would fit within the sweep of *Brady*. And, as the Plain View Project has demonstrated, those pseudonymous and anonymous comments can be detected through concerted sleuthing of publicly available information.

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347. *About the Project: Methodology*, *supra* note 11 (“Some users reported specific police departments as their employers; others posted pictures of themselves in uniform. Some discussed making arrests or performing other police duties. When a [Plain View Project] researcher obtained verification and confirmation for a profile, the researcher captured the screen with the verifying information and added it to [the Plain View Project]’s files.”).

348. *See supra* notes 295-300 and accompanying text.

As the Plain View Project has explained, it is possible to identify officers through a series of clever inferences. Some officers posted comments under their own names, and those officers were easy to find on Facebook.<sup>349</sup> Others, who used pseudonyms or had common names, could be identified by their connections to known officers.<sup>350</sup> Sometimes, the pseudonymous officers were tagged in other officers' photos, thus revealing their identity. Other times, officers with pseudonymous accounts posted selfies in uniform or with their badges. Still other pseudonymous users failed to conceal the URLs that contained clues about their real names.<sup>351</sup>

Another example of tracking with public information can be seen in the work of journalists at the Center for Investigative Reporting. The journalists downloaded the member lists from a number of police Facebook groups and the member lists from white-supremacist Facebook groups.<sup>352</sup> They then cross-referenced the lists, identifying hundreds of officers who appeared on both.<sup>353</sup> If this identification can be done with publicly available data, certainly a motivated police department could do the same with that public information or even more with private information provided by its own employees.

Indeed, the idea of proactive monitoring is beginning to gather attention. Last spring, the annual report of California's Racial and Identity Profiling Advisory (RIPA) Board called on all law-enforcement agencies to adopt “an

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349. David A. Harris, #106: *Police Attitudes in Plain View*, CRIM. INJUSTICE, at 10:45-13:45 (Sept. 3, 2019), <https://perma.cc/WN62-5W9T> (interviewing Plain View Project founder Emily Baker-White).

350. *Id.* at 11:53-12:44 (containing Emily Baker-White's explanation of search methods: “So you search for names on Facebook. But, as you can imagine, that is not the most efficient way to find someone, especially if the person has an even somewhat common name. And, so, we found that it was easier to find people by looking through their networks. So, if we found a couple officers who had . . . said they were officers, and then they had a whole bunch of friends who were engaged in conversation with them, it was much easier to find other officers in the department by looking at one officer's friends than it was by cold-searching names in the Facebook search bar.”); *see, e.g.*, Jaco, *supra* note 189.

351. Telephone Interview with Emily Baker-White, Founder, Plain View Project (June 24, 2021).

352. *See* Will Carless & Michael Corey, *To Protect and Slur* (pt. 1), REVEAL (June 14, 2019), <https://perma.cc/4UL9-BEA8>. Carless and Corey detailed their investigation process:

To find cops with connections to extremist groups, we built lists of two different types of Facebook users: members of extremist groups and members of police groups.

We wrote software to download these lists directly from Facebook, something the platform allowed at the time. In mid-2018, in the wake of the Cambridge Analytica scandal and after we already had downloaded our data, Facebook shut down the ability to download membership lists from groups. Then we ran those two datasets against each other to find users who were members of at least one law enforcement group and one far-right group.

We got 14,000 hits.

*Id.*

353. *Id.*

approach similar to The Plain View Project” in which “agencies . . . proactively conduct a review of their personnel’s social media to identify problematic behavior and discipline officers to demonstrate to the entire agency that racist or bigoted viewpoints are not tolerated.”<sup>354</sup> The RIPA Board also suggested the use of background checks during the hiring process “to evaluate explicit biases” and recommended “monitor[ing] agency-issued cell phones and computers to ensure employees do not use those devices to exchange racist or otherwise offensive content.”<sup>355</sup>

Around the country, other police departments have begun to take steps in this direction. The Albuquerque Police Department, in the aftermath of a scandal, hired a compliance officer to audit officers’ personal social media accounts.<sup>356</sup> Other police departments have begun to screen the social media accounts of police recruits.<sup>357</sup> The point of this discussion is not to prescribe a particular method or scope of monitoring, but rather to say that some proactive monitoring must occur. The failure to learn of and disclose biased or violent social media speech is a *Brady* violation, just like the failure to learn of and disclose any other favorable and material information known to members of the prosecution team. Out of sight, out of mind should not be the legal theory for treating hidden speech.

Given their role as employers, as investigators, and as government agencies, police departments should be able to go even further than the Plain View Project in detecting impeachment material on social media. As alluded to above, police departments could task their IT departments with monitoring computer or cell phone use for keywords that indicate offensive speech. They could also make explicit that officers have a duty to intercede when an employee spots misconduct on social media, much like when an employee

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354. RACIAL & IDENTITY PROFILING ADVISORY BD., ANNUAL REPORT 2021, at 30-31 (2021), <https://perma.cc/9SLX-XUS9>.

355. *See id.*

356. Jeff Proctor, *Economidy Discipline: Four Days*, ALBUQUERQUE J., May 28, 2011, at A1 (noting that the police department employed a “compliance officer” who “randomly check[ed] officers’ social media pages”); *see also* Donlon-Cotton, *supra* note 169, at 15 (proposing a sample social media policy stating that “[a]ny candidate seeking employment with this department shall complete an affidavit attesting to all the social media and social networking platforms in which they participate or maintain” and requiring candidates to “provide the designated background investigator with access to the social networking platforms in which they participate or maintain”).

357. *E.g.*, ASHTON ET AL., *supra* note 50, at 3 (noting that new hires of the D.C. Metropolitan Police Department are subject to social media background checks); *id.* at 38 (“[Internet-based content searches during employment screening] should be conducted by a non-decision maker. Information pertaining to protected classes shall be filtered out prior to sharing any information found online with decision makers.” (quoting the Massachusetts Chiefs of Police Association’s social media policy)).

spots misconduct in the use of force on the street.<sup>358</sup> It is worth noting, too, that police departments already use technology to monitor social media posts by members of the public, including those protesting against overly aggressive policing.<sup>359</sup> Surely, these departments could devise a way to monitor their own officers’ comments.

The alternative to proactive monitoring is what we have now: a laissez-faire approach to police social media speech. Unless and until someone complains about the officer’s speech, there will be no effort to seek it out and punish it.

## 2. Legal

From the Fourth Amendment to employment law, there are a number of potential legal challenges to proactive monitoring. The success or failure of these legal challenges will dictate the nature and scope of the proactive monitoring. This Subpart identifies some of the potential issues, but it does not purport to give a comprehensive account of how the monitoring would be done. The aim of this discussion is to identify the various types of challenges that could be raised and to suggest why none of them, even if successful, would preclude all types of proactive monitoring.

A number of Fourth Amendment cases, most prominently *City of Ontario v. Quon*, require police departments to have reasonable suspicion before conducting searches of employee pagers and cellphones.<sup>360</sup> As a Fourth Amendment issue, then, proactive monitoring that involves searches of an officer’s phone would be governed by *Quon*’s requirements. There would have to be the requisite level of suspicion for the search, and the scope of the search would also have to be reasonable.<sup>361</sup> But *Quon*’s suspicion standard is relatively easy to satisfy and would come into play only if the department sought to search the officer’s devices. The department could glean whatever information it wanted from public-facing social media accounts, and that would not

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358. This is a point that a number of police departments have already begun to emphasize. *See supra* notes 313-15.

359. *See supra* note 187 and accompanying text.

360. *See City of Ontario v. Quon*, 560 U.S. 746, 761 (2010) (“[W]hen conducted for a ‘noninvestigatory, work-related purpos[e]’ or for the ‘investigatio[n] of work-related misconduct,’ a government employer’s warrantless search is reasonable if it is ‘justified at its inception’ and if ‘the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of’ the circumstances giving rise to the search.” (alterations in original) (quoting *O’Connor v. Ortega*, 480 U.S. 709, 725-26 (1987) (plurality opinion))).

361. *Id.*

amount to a search.<sup>362</sup> A subpoena to the social media company could disclose even more information. Moreover, if *Brady* requires proactive monitoring of hidden speech for all testifying officers, then it might suddenly appear far more reasonable, under Fourth Amendment standards, for the police departments to routinely conduct searches of officers’ electronic devices. Where one officer knows that his colleague’s social media posts amount to biased or violent comments, there would be a duty to disclose that to the department and prosecutor, and this knowledge would seem to satisfy the Fourth Amendment threshold for a search.

Electronic privacy laws could also stand in the way of some types of proactive monitoring, especially if the police department demands information from its employees about social media account names and passwords. As Justice Cuéllar of the California Supreme Court recently noted, the case law is still developing on the issue of how the federal Stored Communications Act<sup>363</sup> applies to Facebook and other social media companies.<sup>364</sup> And state privacy statutes, including the California Electronic Communications Privacy Act, might impede some police departments’ access to their employees’ social media content.<sup>365</sup> But these statutes have exceptions for law-enforcement warrants.<sup>366</sup>

Employment law might also limit the ability of police departments to monitor social media speech. Officers could point to the California Labor Code,

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362. See Jeramie D. Scott, Essay, *Social Media and Government Surveillance: The Case for Better Privacy Protections for Our Newest Public Space*, 12 J. BUS. & TECH. L. 151, 157 (2017) (“The law currently provides little recourse to protect publicly available social media posts and information from government monitoring. Although the mass gathering and analysis of social media data implicates the First and Fourth Amendments, current case law does not adequately support the use of either Amendment to curb the mass surveillance of social media.”); see also, e.g., CAL. PENAL CODE § 1546.1(b)(4) (West 2022).

363. 18 U.S.C. §§ 2701-2713.

364. *Facebook, Inc. v. Superior Ct.*, 471 P.3d 383, 412 (Cal. 2020) (Cuéllar, J., concurring) (“Courts—including our own—have nonetheless assumed that social media entities such as Facebook are regulated by the [Stored Communications Act (SCA)]. . . . [Courts should] endeavor to discern whether Congress’s purpose in enacting the SCA encompassed protecting communications held by social media companies such as Facebook. That question is an important one.”); see Kristen L. Mix, *Discovery of Social Media*, 5 FED. CTS. L. REV. 119, 130 (2011).

365. See PENAL § 1546.1(a)-(b) (prohibiting the government or its agents from compelling the production of “electronic communication information” without a search warrant or other extenuating circumstances).

366. *Id.* Moreover, subscriber information is carved out of the definition of “electronic communication information” protected by the statute. See *id.* § 1546(d) (“‘Electronic communication information’ does not include subscriber information as defined in this chapter.”).

which prohibits private employers from conducting certain types of social media research:<sup>367</sup>

- (b) An employer shall not require or request an employee or applicant . . . to . . .
  - (1) Disclose a username or password for the purpose of accessing personal social media.
  - (2) Access personal social media in the presence of the employer.
  - (3) Divulge any personal social media, except as provided in subdivision (c).<sup>368</sup>

The exception in subsection (c), however, is an important one because it states that the Labor Code’s protections for “personal social media” do not apply to “social media reasonably believed to be relevant to an investigation of allegations of employee misconduct or employee violation of applicable laws and regulations.”<sup>369</sup>

But even if these provisions applied to police employers, they would not completely bar proactive monitoring. First, as noted above, monitoring could occur where “reasonably believed” to be connected to an investigation or to compliance with the law. Second, if the comments are made publicly, albeit under a pseudonym, the content would not be protected. As the Plain View Project has demonstrated, it is possible to uncover pseudonymous and anonymous accounts through a careful parsing of publicly available content. And, again, even if the statutes were read to prevent police departments from accessing social media material, *Brady’s* federal constitutional mandate would override these statutory protections.

Police labor contracts could also constrain the ability of the departments to proactively investigate social media posts. Recent decisions by the National Labor Relations Board, though not binding on police departments, could

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367. CAL. LAB. CODE § 980(b) (West 2022). This provision of the California Labor Code does not appear to apply to public employees, and a 2013-2014 bill, A.B. 25, that would have expanded protections to public employees did not make it out of the state senate. *See* Assemb. 25, 2013 Leg. (Cal 2013); *AB-25 Employment: Social Media. Bill Analysis*, CAL. LEGIS. INFO., <https://perma.cc/GB2U-A44T> (archived May 3, 2022) (to locate, select “View the live page,” then select “07/02/13—Senate Floor Analyses”) (“This bill specifies that the prohibition barring employers from requiring or requesting an employee (or prospective employee) to disclose their private username or password for the purpose of accessing their social media accounts applies to both public and private employers. Specifically, the bill defines ‘employer’ as the state, a city, a county, a city and county, or a district.”); *AB-25 Employment: Social Media. Bill History*, CAL. LEGIS. INFO., <https://perma.cc/YSH9-REH3> (archived May 3, 2022).

368. LAB. § 980(b); *see also* MICH. COMP. LAWS § 37.273 (2022) (prohibiting an employer from “[r]equest[ing] an employee or an applicant for employment to grant access to, allow observation of, or disclose information that allows access to or observation of the employee’s or applicant’s personal internet account”); ARK. CODE ANN. § 11-2-124(b)(1)(A) (2021).

369. LAB. § 980(c); *see also* MICH. COMP. LAWS § 37.275(b), (c); GUIDE TO HR POLICIES AND PROCEDURES MANUALS § 7:57 (West 2021).

buttress officers’ claims that they maintain privacy interests in their social media accounts.<sup>370</sup> But, once again, such rights would have to give way if they interfere with *Brady’s* constitutional mandate.

Finally, it must be mentioned that there is another set of statutes—those regulating public records—that would lend support to proactive monitoring. A public official, including an officer, who communicates regarding public business can be forced to disclose that information subject to a public-records request, even if that communication is carried out over a private email account or through private text messages.<sup>371</sup> A member of the public can, for example, request all text messages between the personal cellphone of the mayor and the police chief.<sup>372</sup> Where those private communications relate to government business—and here, there would be a question whether a racist or violent post relates to public business—the communications are subject to the public-records act.<sup>373</sup> Logically, if a member of the public could compel the production of communications from an officer’s personal device, so, too, could the police employer. Thus, for all the concerns that state privacy laws would impede proactive monitoring, there are also reasons to think that state public-records laws would support departments’ efforts to carry out monitoring.

### 3. Policy

The last category of objections might loosely be called “policy” objections, but they are infused with logistical and doctrinal considerations. Why should a government agency, controlled by elected officials, be entitled to probe the personal and private communications of its employees? At the heart of this concern is the sense that every person is entitled to some sanctuary in which

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370. *Union Tank Car Co.*, 369 N.L.R.B. No. 120, at 2 (July 17, 2020) (“The rule’s prohibition against statements *to other employees* ‘that are intended to injure the reputation of the Company or its management personnel’ significantly restricts Section 7 rights.”).

371. *City of San Jose v. Superior Ct.*, 389 P.3d 848, 852 (Cal. 2017) (“Employees’ communications about official agency business may be subject to [the California Public Records Act] regardless of the type of account used in their preparation or transmission.”); *Toensing v. Att’y Gen.*, 178 A.3d 1000, 1002 (Vt. 2017); *Nissen v. Pierce County*, 357 P.3d 45, 52-54 (Wash. 2015); *Better Gov’t Ass’n v. City of Chicago*, 169 N.E.3d 1066, 1073 (Ill. App. Ct. 2020) (“[T]he communications that pertain to public business from the named officials’ personal accounts are subject to [the Freedom of Information Act].”); see *Cheyenne Newspapers, Inc. v. Bd. of Trs.*, 384 P.3d 679, 680 (Wyo. 2016).

372. See, e.g., *Request #20-2288*, PUB. REC. REQUESTS OAKLAND, CA, <https://perma.cc/3XM5-PNVV> (last updated Sept. 18, 2020) (requesting “[a]ll text or chat messages in any form or application (SMS, MMS, WhatsApp, WeChat, Signal, Instagram, Twitter, Facebook, Hangouts, Skype, Teams) sent by Former Acting Oakland Police Chief Darren Allison to Oakland Mayor . . . Libby Schaaf”).

373. See sources cited *supra* note 371.

their private thoughts are protected from punishment—and public employees should not have to give up their careers to maintain that freedom of thought and expression. This is essentially what the *Pickering* doctrine sought to regulate in the First Amendment context.<sup>374</sup> How does one balance the interest of public employees with the needs of their public employers?

The hidden-speech issue is particularly vexing because it involves a class of speech that the public employee has attempted to keep private—to keep from impeding the workings of the department.<sup>375</sup> If even this private speech is now subject to scrutiny by the employer, what freedom is left for the employee? Then-Judge Sotomayor’s dissent in *Pappas v. Giuliani* anticipated these concerns, albeit in the context of anonymous snail mail rather than anonymous social media. Her opinion argued that the police department should not be able to complain about an operational harm that has materialized solely as a result of the department’s efforts to unearth an employee’s hidden speech.<sup>376</sup>

Such positions in favor of public-employee privacy have an undeniable appeal. The specter of authoritarian rule seems ever closer when the government invites itself into private communications. Yet the privacy rationale for opposing monitoring is ultimately unpersuasive.

First, social media comments are not thoughts. They are published and shared with others, even when they are pseudonymous or private. Social media comments are not even diary entries, written down and secreted away in a bureau drawer. The very purpose of social media is to share speech with others. Nor is a racist post on social media the same as a racist comment at the dinner table or in the locker room. Once it is put online, it has the potential to proliferate, and, just as importantly, it has the potential to be memorialized forever. Even messages that erase after a few minutes or hours can be captured in screen shots and disseminated. Sharing a thought on Facebook is not a good way to keep that thought private.

Second, even under the current *Pickering* standard, there is no “I’m off the clock” defense. As noted above, police departments have disciplined officers for producing or selling pornographic material as well as other conduct deemed unbecoming of an officer, even when it has taken place off duty and outside of to their official role as officers.<sup>377</sup> An officer’s reputation and integrity are critical to the officer’s ability to enforce the law. When departments have come

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374. See generally *supra* Part I.

375. See *supra* Part I.C.

376. *Pappas v. Giuliani*, 290 F.3d 143, 154 (2d Cir. 2002) (Sotomayor, J., dissenting) (discussing the impropriety of punishing employee speech “where there is virtually no evidence of workplace disruption resulting directly from the speech”).

377. See *supra* note 150.

across off-duty activity that brings disrepute to the officer, and ultimately threatens the department, the departments have survived First Amendment challenges to their disciplinary actions. Indeed, the criminal-procedure paradigm gives even less credence to claims that some conduct should be ignored because it was off duty. As with any witness’s statements, an officer’s prior comments reflect that officer’s beliefs and values. Where off-duty speech is biased or violent, it raises concerns about the officer as a witness and an impartial agent of the law. The officer who gets caught making racist comments at an off-duty barbeque can be impeached by them, every bit as much as if he had made those statements during a traffic stop. Furthermore, the idea that someone can be biased or violent off duty and then leave those biases at the office door is psychologically dubious. Given how much discretion and decisionmaking authority an officer has, there is no way to believe that a racist officer can make bias-free decisions on the job.

What makes hidden police speech more difficult as a legal issue than, say, other off-duty conduct is the fact that the officer may have taken great efforts to keep the conduct concealed. It is different from making a public speech or attending a protest that espouses bias. The officer making the hidden speech has tried to sever the connection between the speech and the department. But if the police department has discovered that speech, then the connection has not been severed. And if one accepts the criminal-procedure paradigm, then the harm from this hidden speech is the same, regardless of whether it is widely disseminated or only learned of by one other colleague.<sup>378</sup> A racist witness is a racist witness and that bias is grounds for impeachment, even if the witness and others take pains to conceal it. Put another way, it would be quite cynical to say that departments should not be monitoring their officers’ speech because, if they turn a blind eye, none of this speech will ever come to light. This willful blindness is hard to defend legally, and it is also naïve from a practical standpoint: There are no guarantees that social media speech will stay hidden indefinitely.

A more technical, but just as important, defense of proactive monitoring would point to the trigger for the *Brady* duty. The officer’s social media speech has to become known to some other member of the prosecution team—which includes police colleagues—before it triggers any *Brady* duty to disclose.<sup>379</sup> If the officer’s speech remains unknown to others in the department, then it would escape the sweep of *Brady*. This limiting principle makes a good deal of

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378. For the reasons discussed in the next paragraph below and Part II.C.3 above, *Brady* would apply only to speech that is known to another police officer or prosecutor.

379. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995); see *supra* text accompanying notes 286-90.

sense: Once another officer knows of this biased comment, it has spread within the department, and the duty to intercede converts it into *Brady* material.<sup>380</sup>

I have no doubt that there will be readers skeptical about many aspects of this analysis. Some will be certain that no prosecutor would ever seek out this social media information, no judge would ever admit it at trial, and no officer would ever report a colleague for making these comments. To those readers, I ask whether such skepticism is based on an assessment of how officers will actually behave or on an assessment of what the doctrine requires. Consider some of the inflammatory comments expressing biased or violent sentiments that are quoted in this Article.<sup>381</sup> Are you sure that a prosecutor, upon seeing these comments, would promptly proceed to put that officer on the witness stand? For those who are sure that no judge will allow the admission of such evidence, remember that *Brady* is not limited to admissible evidence. *Brady* encompasses evidence reasonably likely to lead to admissible evidence, including questioning about an officer's bias.<sup>382</sup> Where in the laws of evidence are officers prevented from being impeached based on their hidden speech? And for those of you so sure that no officer would turn in his colleague, what does that have to do with constitutional law? The same argument could be made that no officer would turn over exculpatory material that could set the accused defendant free. But that disclosure is nonetheless required by *Brady*. Besides, if an officer fails to come forward with this impeachment material and it somehow comes to light later on, then the hard-fought conviction may be vacated on the grounds of a *Brady* violation.

There is no dispute that the proactive monitoring called for in this Article would be a new (and perhaps unsettling) application of *Brady*. But social media is also new. And when constitutional doctrine meets new technology, there is often uncertainty about how to proceed. The novelty of applying *Brady* to police social media speech does not invalidate it. Indeed, prosecutors and police departments around the country are beginning to recognize this frontier of *Brady*.

Aside from doctrine, there are also strong policy reasons to insist on proactive monitoring of police social media speech. A policy of ignoring social media speech, so long as the speech stays hidden, is not desirable if society cares about the credibility of police officers or the integrity of the cases that rely on these officers. There is significant harm that accrues to the justice system from these comments.

If police officers are going to express biased and violent views to each other, society has an interest in tracking these comments and disciplining these

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380. See *supra* text accompanying notes 308-17.

381. For some examples, among many, see Parts I.B and II.B above.

382. See *supra* note 282 and accompanying text.

speakers. The public interest is not served by allowing biased and violent officers to hold onto their jobs of great authority while espousing these views to each other in private. Unfortunately, the current First Amendment framework is set up to drive controversial police social media speech underground, where it is harder to remedy.<sup>383</sup> Moreover, underground speech deprives society of the chance to hear police officers' insights on matters of public concern. The current approach is the worst of all worlds from the perspective of *Pickering*: biased and violent speech becomes more elusive, while legitimate speech is chilled by divorcing the speech from the speaker's identity as an officer, thus altering the message and gravitas of the speech.<sup>384</sup>

As noted in Part I.E above, proactive monitoring could also protect officers' free-speech rights by taking away control of the enforcement agenda from the public. In its current form, the decisions about who to investigate for social media speech violations appear to be entirely driven by complaints received from the public. This has allowed members of the public and interested groups to determine the enforcement priorities, often with a partisan skew. If the department itself carried out proactive monitoring, it could do more to ensure that offensive comments across the political spectrum were being detected and punished equally.

Certainly, a proactive approach to monitoring speech could enable skewed enforcement by police departments. Officers who have beliefs that conflict with management could find themselves the targets of department-initiated purges. A left-leaning police chief and administration could focus efforts on discovering and rooting out right-leaning social media comments. And a right-leaning police chief and administration could focus efforts on comments of the opposite political valence. But even though this hypothetical sounds ominous, the criminal-procedure approach would help prevent abuses. If a department wanted to punish an officer for speech violations, it would have to show how the comments connected to some grounds for impeachment: bias or violence (or dishonesty). The rules of evidence would be a guardrail against open-ended attacks on an officer for unpopular beliefs. If a liberal officer made a comment that offended the police chief's political sensibilities, that would not give a reason for discipline unless it connected to some area of examination that would be allowed in court to impeach that witness. Any officer—right, left, or otherwise—should be subject to sanction for biased or violent comments. By taking control of the enforcement agenda, the department would be able to

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383. *See supra* Part I.D.

384. The only benefit of sending speech underground is that it prevents the speech from receiving the imprimatur of the police department. But this is only a small benefit of sending offensive speech underground, and it is counterbalanced by many other concerns.

ensure that disciplinary actions are drawn from the full range of biased and violent comments, not just those that get reported by the public.

One additional comment is necessary: A proactive monitoring regime might turn up comments that do not, strictly speaking, impeach the officer’s credibility but do, according to the department, interfere with the operations of the agency. In other words, the investigation might lead to some comment that is not a basis for impeachment under the rules of evidence but that does interfere with the operations of the department, thus implicating *Pickering*. In such cases, the criminal-procedure approach would not give any special disciplinary powers to the department; the department would still have to survive the *Pickering* test before it could punish an officer. A police chief would not have a free hand in firing officers who support Bernie Sanders or Donald Trump; those who state that global warming is an existential crisis or an insidious hoax; or those who argue that kids should or should not have to wear masks at school. These comments would neither lead to impeachment in court nor interfere with the operations of the agency under *Pickering*. In short, proactive monitoring would not authorize a political purge of officers. All it would do is unearth potential cases of offensive speech. The speech would still have to be adjudicated through either the *Pickering* or criminal-procedure paradigm before any discipline could be taken. To oppose proactive monitoring for fear that it could be misused is to ignore the reality that the misuse is already possible under the law. There is nothing preventing the ideologue police chief from initiating a proactive investigation or sham disciplinary proceeding. But she would find no First Amendment or criminal-procedure grounds for sustaining the discipline.

## B. Culture Change or Cancel Culture?

What motivates the debate about regulating police social media speech? Depending on one’s point of view, regulating police social media speech is either part of a broader effort to effect cultural change within the ranks of the police or it is part of a McCarthyist effort to root out and punish officers with unpopular views. In the police-reform literature, there is much discussion about the need for culture change.<sup>385</sup> The argument is that reforming law and

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385. See, e.g., Seth W. Stoughton, *Principled Policing: Warrior Cops and Guardian Officers*, 51 WAKE FOREST L. REV. 611, 612, 616 nn.18-20 (2016) (“I contend that a more fundamental reform is necessary: the core principles of policing need to be adjusted to change how officers view their job and their relationship with the community.”); OFF. OF CMTY. ORIENTED POLICING SERVS., THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING IMPLEMENTATION GUIDE: MOVING FROM RECOMMENDATIONS TO ACTION 2 (2015), <https://perma.cc/DQ3K-MCCM> (listing its first recommendation as “[c]hang[ing] the culture of policing”); Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 456, 521-22 (2004).

policy can go only so far in fixing the problems with policing. What is needed is a transformation in the culture of policing—a shift from occupying a neighborhood to serving it.<sup>386</sup> From this perspective, winnowing out officers with biased and violent views is a useful step in changing police culture. Even where termination and disciplinary actions do not change the hearts of officers, these actions at least send the message that bias and violence are condemned by the department. For critics of the criminal justice system, officers who express biased or violent views on social media must be removed from the police force or else all the investigations and prosecutions that involve these officers will be tainted.<sup>387</sup>

For police advocates, however, there is the sense that officers are being unfairly singled out for punishment. Why should a racist officer be unmasked and disciplined when a racist surgeon at a public hospital, a racist public school teacher, or a racist city manager would not be? Arguably, the logic of proactively monitoring speech could extend to many other types of public employees beyond the police: teachers, paramedics, code inspectors, court clerks, tax assessors, and others. Their biased comments and violent expressions could destroy public trust in the agencies that employ them, yet this Article’s proposal ignores them, focusing entirely on police officers. In this framing of the issue, the regulation of police social media speech can seem like little more than a pretext for a campaign against the police. Police departments cannot demand a particular political orthodoxy from their employees, the argument would go, so they use concerns about credibility as an excuse for taking otherwise impermissible disciplinary actions.

This final Subpart of this Article addresses why police social media speech should be subjected to monitoring that goes beyond what other public employees face. Among the most important differences between police and other employees is the scope of their day-to-day authority. Society invests officers with the power to deprive a person of liberty, and even life, in the name of the law. This authority makes them subject to a higher level of scrutiny than other types of public employees. One might naturally worry

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386. See sources cited *supra* note 385.

387. Letter from Exec. Comm. of the Florida Council of Churches et al. to Brad King, State Att’y, Florida Fifth Jud. Cir. 1 (July 24, 2019), <https://perma.cc/JQ77-DUUV> (“Those kind of views call into question an officer’s ability to do his or her work in an unbiased manner that prosecutors can rely upon, from making charging decisions to calling officers as witnesses in trials. For this reason, you should establish a public list of officers whom your office will not call on or rely on to prosecute cases because of their violation of the public trust.”); Letter from ACLU of Arizona et al. to William Montgomery, Maricopa Cnty. Att’y (Aug. 2, 2019) (on file with author) (“The County Attorney’s office should create a ‘no call’ or ‘exclusion’ list of officers with a history of dishonesty, bias, or violence, including those officers recently revealed to have made racist and offensive Facebook posts.”).

more about the biased and violent police officer than the biased and violent sanitation worker. The second reason officers are different is their role as witnesses. Although there are other public employees whose duties invest them with great authority, even authority over the public's safety and well-being, no other class of public employees can point to in-court testimony as so essential a job requirement. Where an officer's on-duty or off-duty comments impugn her credibility, her ability to function as an officer is degraded. Furthermore, officers are not just witnesses; they are members of the prosecution team. Prosecutors have a constitutional duty to learn of and disclose anything about the officer-witness that is impeaching.<sup>388</sup> The same cannot be said of a paramedic, a hospital administrator, or a public-utilities supervisor. While these public employees are responsible for the health and safety of the public, and while it would certainly be concerning to have employees in those positions making biased and violent comments, they lack a nexus to in-court testimony. And none of these other types of public employees is a member of the prosecution team.

Apart from the comparison between officers and other employees, one might fear that officers are being treated differently from other witnesses. This Article's proposal for proactive monitoring does not mean that prosecutors would have to stay abreast of every social media comment by every lay witness in every case. Why should officers be singled out? The answer is that *Brady* applies only to impeachment material known by a member of the prosecution team. That prosecution team is made up of prosecutors and the police. A lay witness for the prosecution is not a member of the prosecution team. If that lay witness makes biased or violent statements on social media, they would be imputed to the prosecutor under *Brady* only if they were known by some member of the prosecution team. The reason the officer-witness's off-duty statements are imputed to the prosecutor is because those comments are known to other officers—that is, to members of the prosecution team. This situation is very much like impeachment material contained in an officer's disciplinary records. Because the impeachment material is known to the police agency—a part of the prosecution team—it is imputed to the prosecutor.<sup>389</sup> By contrast, impeachment evidence in a lay witness's work records at, say, Microsoft are not imputed to the prosecutor because neither the witness nor the employer is a member of the prosecution team. This point bears emphasis because it is the linchpin of why credibility evidence about officers is treated differently under *Brady* from credibility evidence about lay witnesses. Under *Kyles v. Whitley*, the trigger for imputing knowledge to the prosecution is that

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388. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995); see *supra* text accompanying notes 286-90.

389. See *supra* text accompanying notes 292-94.

some member of the prosecution team already knows about it.<sup>390</sup> Officers are treated differently from other witnesses because they are members of the prosecution team.

One might also worry about the slippery slope. Maybe police departments would articulate an ideal profile for their employees, one designed to maximize their credibility. Would any officer who deviated from that ideal be subject to discipline because the deviation made them less credible? In the extreme, could a department punish an officer who posts a picture of himself playing with children’s toys or competing in a hot dog-eating contest because these posts somehow erode the officer’s gravitas? Might the department use that diminution to justify disciplinary action because the officer is no longer an *ideal* witness? If the criminal-procedure paradigm could permit this type of forced conformity, there would, indeed, be serious concerns. It is one thing to punish an officer who undermines his credibility with biased and violent comments, but quite another thing to punish an officer whose credibility is undermined by a goofy or immature persona.

But the criminal-procedure paradigm would not lead to such a parade of horrors. While these posts might diminish the officer’s gravitas, it would not lend itself to grounds for impeaching the officer in court, so it would not be considered *Brady* material. Because neither playing with children’s toys nor participating in a hot dog-eating contest speaks to bias, violence, or dishonesty, neither one would be grounds for in-court impeachment.<sup>391</sup> Thus, adopting the criminal-procedure paradigm would not give license to police departments to impose complete conformity in the name of witness credibility.

If anything, a criminal-procedure approach to the police-speech problem would actually provide useful benchmarks for distinguishing permissible from impermissible speech. Instead of *Pickering’s* free-floating predictions about disruption, the criminal-procedure approach would tie the grounds for discipline to the well-established rules of evidence. A robust body of law already channels the types of questions that can be the grounds for attacking a witness’s credibility. Questions related to bias are permitted, as are questions related to violence and dishonesty.<sup>392</sup> But evidence law prohibits open-ended efforts to smear an officer. An officer’s debauchery or coarseness or arrogance might, in a colloquial way, hurt the officer’s credibility as a witness, but the rules of evidence do not allow questioning on these topics to impeach the officer. In this way, the criminal-procedure approach is more protective of

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390. See *supra* text accompanying notes 379-80.

391. See *supra* note 202 and accompanying text (describing grounds for impeachment).

392. See *supra* note 202 and accompanying text.

officers and more objective in application than the *Pickering* test.<sup>393</sup> The criminal-procedure focus is not on the embarrassment caused to the department, but rather on the grounds that the rules of evidence would allow for impeachment.

Furthermore, there already are claims that *Brady* is used pretextually to discipline disfavored officers.<sup>394</sup> The prosecutor’s power to place an officer on the *Brady* list necessarily lends itself to the power to abuse the *Brady* designation. This is not unique to social media. Prosecutors who maintain *Brady* lists will always have the potential to abuse the power to designate an officer as untrustworthy. The potential misuse by prosecutors, however, must be weighed against the potential benefits of disclosing credibility evidence about the officers and providing some assurance to the public that officers will be disciplined for biased and violent comments. Indeed, the public benefits from the exposure of the biased and violent views of public servants who are entrusted to enforce the law. Another benefit to the public is the protection of defendants’ constitutional rights. It demands too much of society to forgo these benefits out of some fear that a prosecutor could misuse her *Brady* power. And solutions already exist to protect officers from prosecutorial abuses. A number of states, including California, prevent officers from being punished solely on the basis of their *Brady* list designations.<sup>395</sup> Yes, the prosecutor can decree that an officer is prohibited from testifying. But the department cannot discipline the officer on that basis unless the underlying misconduct allegations have been sustained by the department’s internal processes. This type of employment protection is one way to reconcile the prosecutor’s *Brady* power with the police officer’s right to due process in employment decisions. If a prosecutor puts an officer on a *Brady* list—for whatever reason, including social media misuse—the police department still cannot take employment action against the officer until the officer’s conduct has been reviewed through formal disciplinary channels.

It is an article of faith that civil servants cannot be weeded out of the bureaucracy for their political beliefs. If they could be, then the character of police departments could be dramatically altered by purges each time a new mayor or police chief took office. The politicization of the civil bureaucracy, and all the instability and illegitimacy it would create, is much to be feared. But some beliefs—and, specifically, the outward expression of those beliefs—are disqualifying for law-enforcement officers. The officer who expresses bias or

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393. Besides, *Pickering* already allows departments to punish officers if their speech interferes with the function of the agency. A department determined to discipline an officer for some of these more far-fetched speech acts would have to demonstrate a disruption in the workings of the agency.

394. See, e.g., *supra* text accompanying notes 338-42.

395. Abel, *supra* note 206, at 786-87 (describing statutes in California and Maryland).

makes violent comments should be punished for undermining the public trust in that officer and the police department *and* for undermining that officer’s ability to testify in court. In this respect, the First Amendment and the criminal-procedure paradigms agree that officers may not make biased and violent comments.

The point of divergence is whether *hidden* speech can be ignored or must be sought out. That is the chief conflict between the First Amendment and criminal-procedure approaches. And those who oppose seeking out hidden speech must explain the virtue of allowing officers to escape discipline, so long as they keep their comments out of the public eye. To countenance these comments, so long as they stay hidden, is a troubling stance because it turns a blind eye to biased and violent speech and because it encourages a form of institutional opacity and dishonesty. If proactive monitoring seems hard to accept, consider the untenable position of the opposite approach, the status quo: Biased and violent speech are prohibited on the surface, but permitted as long as they remain hidden. And hidden this speech will remain, because there is nothing done institutionally to uncover it. Under the criminal-procedure paradigm, racism and other explicit biases are not mere viewpoints to be dealt with evenhandedly. They are scourges to be extirpated from the justice system.<sup>396</sup>

## Conclusion

Social media speech by police officers is an eye-catching, inflammatory issue that has profound consequences for officers’ jobs and for public trust in the justice system. And the issues being debated about regulating this speech—freedom of expression versus defendants’ due process rights, freedom of conscience for the officer versus freedom from police abuse for constituents—stir passionate responses.

How should police social media comments be regulated? Who should make those decisions? Which doctrines and methods should be employed? As this Article has explored, there is a deep tension between the First Amendment approach to this problem and the criminal-procedure approach. At the heart of this debate is whether police departments should take proactive measures to monitor their officers’ speech. As social media use becomes even more

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396. See *Buck v. Davis*, 137 S. Ct. 759, 776 (2017) (finding that a defense attorney provided ineffective assistance of counsel when he failed to object to an expert’s “potent” evidence of a “powerful racial stereotype”); *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017) (describing “racial bias” as “a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice”); *Batson v. Kentucky*, 476 U.S. 79, 84 (1986).

pervasive, police departments, prosecutors, courts, and the public will have to decide the answers to these questions.

The criminal-procedure approach is the right path forward. Not only does criminal procedure draw on *Brady*'s constitutional imperative to investigate this speech, but it also provides the foundation of evidence law to sort permissible from impermissible comments. Speech that would open up questions about an officer's bias, violence, or honesty would be grounds for concern. Other types of comments might still be subject to discipline if, under *Pickering*, they interfered with the operations of the police department. But the criminal-procedure paradigm would not require these other types of speech to be sought out and disclosed.

Criminal procedure also provides a theory for *who* should make the decisions about the line between permissible and impermissible speech. When criminal procedure is invoked to regulate police social media speech, the prosecutor is invited into the decisionmaking process; it is no longer just a matter of what police commanders think. And the prosecutor, in turn, brings the sensibilities of the jury—the “conscience of the community.”<sup>397</sup> That is because the prosecutor's evaluation of the officer's credibility is actually an assessment of what the jury would think of the information.<sup>398</sup> Would a reasonable juror doubt the credibility of the officer based on these social media comments? That is the touchstone of *Brady*. If there is any bedrock moral authority for distinguishing between permissible and impermissible speech, the jury is it.<sup>399</sup>

Hidden offensive speech damages the credibility of officers every bit as much as open, named speech. If anything, the concealment of this biased speech makes it worse because it suggests dishonesty and a lack of transparency. Biased and violent speech, even where hidden, is an anvil around the neck of the justice system. It undermines the investigations and prosecutions that result from the work of the officers who utter these statements. Only the criminal-procedure approach—and not the First Amendment one—can deal with this type of speech.

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397. *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968).

398. *Giglio v. United States*, 405 U.S. 150, 154 (1972) (“A new trial is required if ‘the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . . .’” (alterations in original) (quoting *Napue v. Illinois*, 360 U.S. 264, 271 (1959))); *Kyles v. Whitley*, 514 U.S. 419, 445 (1995) (referring to the effect of suppressed evidence on the jury).

399. *Peña-Rodriguez*, 137 S. Ct. at 860 (“The jury is a tangible implementation of the principle that the law comes from the people.”); *Witherspoon*, 391 U.S. at 519 (stating that the jury expresses “the conscience of the community”).