

2-6-2022

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### Recommended Citation

Vida B. Johnson, *White Supremacy's Police Siege on the United States Capitol*, 87 Brook. L. Rev. 557 (2022).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol87/iss2/3>

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# White Supremacy's Police Siege on the United States Capitol

Vida B. Johnson<sup>†</sup>

## INTRODUCTION

The attack that took place at the nation's Capitol on January 6, 2021, has proven that white supremacy and far-right extremism<sup>1</sup> in policing are some of our country's most dangerous problems. I have previously written about the crisis of white supremacists in law enforcement, and I am not alone. The Federal Bureau of Investigation (FBI) has issued warnings. Congress has held briefings on the topic.<sup>2</sup> Yet nothing has been done to investigate, much less end this terrifying problem. The country's lack of interest in this issue had frightening consequences for democracy and public safety on January 6, 2021.

January 6, 2021 gave the country live insight into the significant peril we face because of key problems within American policing. The world watched a very well-funded police department fail. This failure is emblematic of the issues in law enforcement that activists, scholars, people of color, reformers, and police abolitionists have been warning about for years. Implicit and explicit bias in American policing have resulted in a culture of policing that has made us all less safe. Police and prosecutors have spent a tremendous amount of time and money caging people of color at the expense of investigating and ending the real threats to the country's safety and security: the rise of domestic terrorism, hate crimes, and the far-right's assault on democracy and voting integrity.<sup>3</sup>

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<sup>†</sup> Associate Professor of Law, Georgetown Law. Sincere thanks to Jon Anderson, Yael Cannon, Daniel Harawa, Lucius Outlaw III., Maneka Sinha, and Kate Weisburd. Special thanks to Alexis Foster, DaNia Henry, Sarah Miller, and Sabrina Pearce for extraordinary research help.

<sup>1</sup> Far-right means views outside of the mainstream conservative movement. See *Extreme Right / Radical Right / Far-right*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/resources/glossary-terms/extreme-right-radical-right-far-right> [<https://perma.cc/8WK6-NR5L>].

<sup>2</sup> *Confronting White Supremacy (Part 1): The Consequences of Inaction: Hearing Before the Subcomm. on C.R. & C.L. of the Comm. on Oversight & Reform*, 116th Cong. 1 (2019).

<sup>3</sup> See *infra* text accompanying notes 75–78; Sections II.A, V; see also Ken Klippenstein, *As Trump Equivocates on White Supremacy, the FBI Warns of Right-Wing Terror*,

Although the stated aim of those at the Capitol that day was purportedly related to election fraud,<sup>4</sup> race and racism played a central role in the attack. The world saw the confederate flag flying both inside and outside the Capitol by the rioters on January 6. This symbol of racism and the violence of slavery was not the only sign of hatred at the Capitol that day. Notorious white supremacists were present at the Capitol.<sup>5</sup> Pepe the Frog shirts, a white supremacist cartoon symbol of the alt-right, a “Camp Auschwitz” shirt, and other racist accessories were worn by insurrectionists that day.<sup>6</sup> In addition to the use of racist symbols, some in the group used racial slurs.<sup>7</sup> Proud Boys who celebrate western chauvinism and other far-right groups were in the predominately white crowd.<sup>8</sup> Leaders and members of neo-Nazi groups like the National Socialist Club<sup>9</sup> and the Groyper Army<sup>10</sup> were also in attendance.

Rather than adequately responding to and stopping this mob of insurrectionists, the Capitol Police enabled hundreds of people to trespass and disrupt the constitutional duties of

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NATION (Sept. 30, 2019), <https://www.thenation.com/article/politics/white-supremacist-boogaloo/> (last visited Feb. 4, 2022).

<sup>4</sup> Rachel Weiner & Spencer S. Hsu, *Trump’s Election Fraud Claims Propelled Them to the Capitol on Jan. 6. His Ongoing Comments Are Keeping Them in Jail*, WASH. POST (June 9, 2021), [https://www.washingtonpost.com/local/legal-issues/trump-election-claims-capitol-breach-defendants/2021/06/08/036f57ee-bf22-11eb-9c90-731aff7d9a0d\\_story.html](https://www.washingtonpost.com/local/legal-issues/trump-election-claims-capitol-breach-defendants/2021/06/08/036f57ee-bf22-11eb-9c90-731aff7d9a0d_story.html) [<https://perma.cc/28WJ-UGTC>].

<sup>5</sup> Confessed white supremacist Bryan Betancur was tracked to the Capitol via his ankle monitor according to an affidavit from the Justice Department. Jordan Fischer, *White Supremacist Who Wanted to Be ‘Lone Wolf Killer’ Was on GPS Monitoring at Capitol During Riot, FBI Says*, WUSA9 (Jan. 19, 2021, 5:54 PM), <https://www.wusa9.com/article/news/national/capitol-riots/self-professed-white-supremacist-lone-wolf-killer-bryan-betancur-silver-springs-maryland-capitol-riot-gps/65-7de23ee4-8b44-417a-b578-8cd339b7c6a9> (last visited Feb. 4, 2022).

<sup>6</sup> Washington Post Staff, *Identifying Far-Right Symbols that Appeared at the U.S. Capitol Riot*, WASH. POST (Jan. 15, 2021, 2:56 PM), <https://www.washingtonpost.com/nation/interactive/2021/far-right-symbols-capitol-riot/> [<https://perma.cc/C65D-46ZC>]; David K. Li & Shamar Walters, *Man in ‘Camp Auschwitz’ Shirt, Photographed at U.S. Capitol Riot, Arrested in Virginia*, NBC NEWS (Jan. 13, 2021, 12:10 PM), <https://www.nbcnews.com/news/us-news/man-camp-auschwitz-shirt-photographed-u-s-capitol-riot-arrested-n1254070> [<https://perma.cc/W47C-C8P7>].

<sup>7</sup> Aaron Morrison, *Racism of Rioters Takes Center Stage in Jan. 6 Hearing*, AP NEWS (July 28, 2021), <https://apnews.com/article/joe-biden-government-and-politics-riots-race-and-ethnicity-capitol-siege-b3eb4a7f1a0d183c9db89a08c84a70cb> (last visited Feb. 4, 2022).

<sup>8</sup> The Proud Boys is an identity movement with ties to white supremacy. Its primary focus is “western chauvinis[m].” Rachael Levy & Erin Ailworth, *Who Are the Proud Boys? Canada Names Far-Right Group a Terrorist Organization*, WALL ST. J. (Feb. 5, 2021, 5:02 PM), <https://www.wsj.com/articles/who-are-proud-boys-11601485755> [<https://perma.cc/CJP9-Q4W6>].

<sup>9</sup> Sabrina Tavernise & Matthew Rosenberg, *These Are the Rioters Who Stormed the Nation’s Capitol*, N.Y. TIMES (May 12, 2021), <https://www.nytimes.com/2021/01/07/us/rioters-capitol.html> [<https://perma.cc/LEE6-FASX>].

<sup>10</sup> Christine Fernando & Noreen Nasir, *Years of White Supremacy Threats Culminated in Capitol Riots*, AP NEWS (Jan. 14, 2021), <https://apnews.com/article/white-supremacy-threats-capitol-riots-2d4ba4d1a3d55197489d773b3e0b0f32> (last visited Feb. 4, 2022).

Congress.<sup>11</sup> Rioters are believed to have caused close to \$1.5 million in damage to the Capitol.<sup>12</sup> The insurrectionists' gambit to overturn the election results of 2020 to favor Donald Trump caused members of Congress and the Senate to cower in hiding from imminent and lethal danger. The lives of the vice president, the speaker of the House, the majority leader of the Senate, and hundreds of other lawmakers were jeopardized by the failure of law enforcement. The Capitol Police did not just fail in their most core duty—to protect Congress—they also aided in the breach of our government.

It was not just the attendance of white supremacists that drew concerns of racial bias by police. It was also the generous way in which the mostly white insurrectionists were treated and the inadequate way in which law enforcement was prepared for the rioters.<sup>13</sup> Since the proliferation of cell phone cameras and dashcam videos, the world has witnessed the countless shootings of Black civilians by those sworn to protect them and the Constitution.<sup>14</sup> And only months before the insurrection at the Capitol, we witnessed the heavily militarized police response when American citizens protested violence by police.<sup>15</sup>

Despite the fact that police were on notice about the plans of the mob to disrupt Congress, rioters were met with a less imposing show of force than the response mustered for previous peaceful

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<sup>11</sup> See Emily Bevard, *Hundreds of Rioters Swarm US Capitol to Delay Election Certification*, ST. NEWS (Jan. 6, 2021), <https://statenews.com/article/2021/01/protesters-swarm-the-u-s-capitol-amidst-electoral-counting> [<https://perma.cc/LWF6-X8C8>].

<sup>12</sup> Spencer Hsu, *Jan. 6 Riot Caused \$1.5 Million in Damage to the Capitol—and U.S. Prosecutors Want Defendants to Pay*, WASH. POST (June 3, 2021, 3:19 PM), [https://www.washingtonpost.com/local/legal-issues/capitol-riot-defendants-pay-damages-restitution/2021/06/03/74691812-c3ec-11eb-93f5-ee9558eef4b\\_story.html](https://www.washingtonpost.com/local/legal-issues/capitol-riot-defendants-pay-damages-restitution/2021/06/03/74691812-c3ec-11eb-93f5-ee9558eef4b_story.html) [<https://perma.cc/AJQ6-4EWR>] (“The costs of the Capitol attack, however, go well beyond the \$1.5 million estimate prosecutors cited this week. A \$1.9 billion security funding bill passed by the House included \$40 million for the Architect of the Capitol for direct attack-related costs, part of more than \$730 million set aside to reimburse the National Guard and other agencies for expenses in responding to rioting that authorities said contributed to five deaths, assaults on 140 police officers and the evacuation of a joint session of Congress. The bill, passed May 20 and pending before the Senate, includes another \$529.7 million for the Architect of the Capitol for security improvements, including \$250 million to harden the Capitol complex through retractable or mobile fencing, bulletproof doors and windows, new entrance vestibules, and cameras.”).

<sup>13</sup> See Carol D. Leonnig et al., *Capitol Breach Prompts Urgent Questions About Security Failures*, WASH. POST (Jan. 7, 2021), [https://www.washingtonpost.com/politics/capitol-breach-security-failures/2021/01/06/e1e09b80-5061-11eb-b96e-0e54447b23a1\\_story.html](https://www.washingtonpost.com/politics/capitol-breach-security-failures/2021/01/06/e1e09b80-5061-11eb-b96e-0e54447b23a1_story.html) [<https://perma.cc/E2T9-UAJ9>]; see *infra* text accompanying notes 146–153.

<sup>14</sup> See Jaeah Lee & AJ Vicens, *Here Are 13 Killings by Police Captured on Video in the Past Year*, MOTHER JONES (May 20, 2015), <https://www.motherjones.com/politics/2015/05/police-shootings-caught-on-tape-video/> (last visited Feb. 4, 2022); see also Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/video/us/100000007159353/george-floyd-arrest-death-video.html> (last visited Feb. 4, 2022).

<sup>15</sup> Kim Barker et al., *In City After City, Police Mishandled Black Lives Matter Protests*, N.Y. TIMES (June 28, 2021), <https://www.nytimes.com/2021/03/20/us/protests-policing-george-floyd.html> [<https://perma.cc/28NV-J457>].

protestors,<sup>16</sup> and few arrests were made on the scene even though there was a significant amount of violence and property damage.<sup>17</sup> Due to law enforcement's failure to take the individuals responsible for the attack into custody immediately,<sup>18</sup> valuable evidence evaded detection. Contemporaneous searches on the scene of rioters may have revealed firearms or explosives. Warrants for cell phones taken from the insurrectionists could have revealed messages with valuable information about conspiracy and aims inside the Capitol. This will likely result in a lack of serious consequences for some of those involved. It may mean the difference between felony and misdemeanor convictions for some.

A conclusion must be drawn that the attack on the Capitol was enabled by white supremacy and other forms of racism in the very core of law enforcement. Whether those at the top of the Capitol Police Department were blind to the threat posed by Trump supporters because of their race, or were so sympathetic to Trump supporters' ideology and goals that they actively aided them, their response was at odds with their goal of public safety and national security. Foreign leaders noted that the divisions within our country were on stark display at the Capitol,<sup>19</sup> and our adversaries will no doubt continue to explore ways to exploit those divisions. The country must turn its attention to ending the significant threat to safety, national security, and democracy posed by far-right extremism and white supremacy in police departments.

Some law enforcement officials seem to have helped set up this insurrection. An attorneys general organization helped fund and organize the events of January 6.<sup>20</sup> The Republican Attorneys General Association sponsored a group called the Rule of Law

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<sup>16</sup> Joseph P. Williams, *The U.S. Capitol Riots and the Double Standard of Protest Policing*, U.S. NEWS & WORLD REP. (Jan. 12, 2021, 6:36 PM), <https://www.usnews.com/news/national-news/articles/2021-01-12/the-us-capitol-riots-and-the-double-standard-of-protest-policing> (last visited Feb. 4, 2022).

<sup>17</sup> Randi Richardson, *Capitol Police Made 14 Arrests Last Night, None Were D.C. Residents*, in *Jan. 7 Highlights and Analysis of Unrest in Washington, D.C.*, NBC NEWS (Jan. 7, 2021, 11:56 AM), <https://www.nbcnews.com/politics/congress/blog/2021-01-06-congress-electoral-vote-count-n1253179/ncrd1253295#blogHeader> [<https://perma.cc/4JWF-EW67>].

<sup>18</sup> Of the hundreds who breached the Capitol, only fourteen people were arrested by Capitol Police and only twenty-five were arrested by the DC Metropolitan Police Department on January 6, 2021. Zoe Tillman, *Hundreds of People Who Joined the Capitol Riot May Never Face Charges*, BUZZFEED NEWS (Mar. 16, 2021, 9:09 PM), <https://www.buzzfeednews.com/article/zoetillman/capitol-riot-hundreds-not-arrested> [<https://perma.cc/M2QL-PHC6>].

<sup>19</sup> Lena Surzhko Harned, *The US Is Falling Apart: How Russian Media Is Portraying the US Capitol Siege*, CONVERSATION (Jan. 22, 2021, 8:33 AM), <https://theconversation.com/the-us-is-falling-apart-how-russian-media-is-portraying-the-us-capitol-siege-153158> [<https://perma.cc/2URV-XXCJ>].

<sup>20</sup> Eddie Burkhalter, *Alabama AG Leads Nonprofit that Helped Organize March at Capitol*, ALA. POL. REP. (Jan. 7, 2021), <https://www.alreporter.com/2021/01/07/alabama-ag-leads-nonprofit-that-helped-organize-march-at-capitol/> [<https://perma.cc/ZY7T-BEAE>].

Defense Fund that sponsored the March to Save America (along with groups like Tea Party Patriots and Stop the Steal) and sent robocalls telling participants where to meet.<sup>21</sup> The attorney general of Alabama, Steve Marshall, has previously boasted of his relationship with the Rule of Law Defense Fund.<sup>22</sup>

Extreme right police officers from all over the country were involved in the movement. Law enforcement officers from across the United States participated in the antidemocratic rally that preceded the riot and milled about with those waving the flags of hate.<sup>23</sup> Charges have been brought against off-duty police officers who are alleged to have stormed the Capitol.<sup>24</sup> Many others have posted in support of the movement even after the attack.<sup>25</sup> Dozens of Capitol Police officers are under investigation, and six have been suspended for their role in the insurrection.<sup>26</sup>

Law enforcement was complicit in the siege in many different ways. Police officers are charged not only with maintaining public safety, but also with ensuring that the most fundamental processes of our democracy are carried out. They are given weapons, access to sensitive information, and a tremendous amount of power over life and liberty in order to accomplish those goals. As such, addressing the problem of extremism in policing is vital to our safety and to our functioning democracy.

At a time when far-right extremism threatens the entire country, with the rise in hate crimes, mass shootings by white supremacists, hate speech, armed white militias,<sup>27</sup> and now a violent insurrection, the country cannot rely on police to monitor and uphold our democratic institutions. Police themselves have been infiltrated by the very forces that threaten these

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> See generally *infra* Part III.

<sup>24</sup> Twenty former or off-duty officers have been charged. See Meryl Kornfield, *Husband-Wife Seattle Police Officers Fired for Being at Capitol Riot*, WASH. POST (Aug. 6, 2021, 10:17 PM), <https://www.washingtonpost.com/nation/2021/08/06/seattle-police-fired-capitol-riot/> [<https://perma.cc/L7H4-UXLH>]; Devlin Barrett et al., *FBI Focuses on Whether Some Capitol Rioters Intended to Harm Lawmakers or Take Hostages*, WASH. POST (Jan. 8, 2021, 8:18 PM), [https://www.washingtonpost.com/national-security/capitol-riot-fbi-hostages/2021/01/08/df99ae5a-5202-11eb-83e3-322644d82356\\_story.html](https://www.washingtonpost.com/national-security/capitol-riot-fbi-hostages/2021/01/08/df99ae5a-5202-11eb-83e3-322644d82356_story.html) [<https://perma.cc/4MMA-65TE>].

<sup>25</sup> Josiah Bates, *'A Fireable Offense.' Law Enforcement Agencies Grapple with Police Officers' Involvement in U.S. Capitol Riots*, TIME (Jan. 15, 2021, 9:52 AM), <https://time.com/5929398/police-officers-involved-capitol-riots-charges> (last visited Feb. 4, 2022).

<sup>26</sup> H.J. Mai, *Capitol Police Suspends 6 Officers, Investigates Dozens More After Capitol Riots*, NPR (Feb. 19, 2021, 2:03 PM), <https://www.npr.org/sections/insurrection-at-the-capitol/2021/02/19/969441904/capitol-police-suspends-6-officers-investigates-dozens-more-after-capitol-riots> [<https://perma.cc/ZJG8-EE9M>].

<sup>27</sup> Robert O'Harrow Jr. et al., *The Rise of Domestic Extremism in America*, WASH. POST (Apr. 12, 2021), <https://www.washingtonpost.com/investigations/interactive/2021/domestic-terrorism-data/> [<https://perma.cc/BR9W-DBCD>].

institutions.<sup>28</sup> Any law enforcement officer's sympathy towards the ideologies of extremism<sup>29</sup> leave us all compromised. If police departments are complicit in the attack on truth and democracy, they cannot be trusted to protect the general public, and thus they serve no functional purpose. Instead, they become a tool to be deployed only by far-right extremists.

Many Americans breathed a collective sigh of relief when reinforcements arrived at the Capitol from the National Guard and other police departments. Americans will only want to see more law enforcement focused on the threat posed by domestic terrorism. Those in the police abolitionist<sup>30</sup> and defund<sup>31</sup> the police movements, however, will point to the Capitol Police's inability to stop the attack on the Capitol and the police's lax attitude towards the attackers as cause for their call to defund or abolish police departments as fundamentally broken. Those who believe in the fundamental underpinnings of our system of government can agree that the threat posed by white supremacists and far-right extremists is an urgent one that must be dealt with immediately, and that weeding them out of law enforcement must be the first step.

This article will begin with a general overview of the problems of racism and white supremacy in policing. Then Parts II, III, IV, and V will discuss the four different ways that far-right extremism and white supremacy within policing made the attack on the Capitol possible. Throughout, I seek to illustrate how each problem in policing, exposed on January 6, harms people of color. The article will conclude in Part VI with ideas for police departments and lawmakers seeking reform.

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<sup>28</sup> See *infra* Part I.

<sup>29</sup> Kevin Rector & Richard Winton, *Law Enforcement Confronts an Old Threat: Far Right Extremism in the Ranks. 'Swift Action Must Be Taken,'* L.A. TIMES (Feb. 17, 2021, 5:00 AM), <https://www.latimes.com/california/story/2021-02-17/lapd-other-police-agencies-struggle-with-where-to-draw-the-line-with-political-extremism-in-their-ranks> [<https://perma.cc/5KJZ-2K9W>]; see also Vida B. Johnson, *KKK in the PD: White Supremacist Police and What to Do About It*, 23 LEWIS & CLARK L. REV. 205, 210 (2019).

<sup>30</sup> For a discussion of the concept of police abolition, see Mariame Kaba, *Opinion, Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> [<https://perma.cc/UEP2-MZCK>].

<sup>31</sup> For more on the Defund movement, see Ranjani Chakraborty, *What "Defund the Police" Really Means*, VOX (June 26, 2020, 11:30 AM), <https://www.vox.com/2020/6/26/21303849/what-defund-the-police-really-means> (last visited Feb. 4, 2022); Christy E. Lopez, *Opinion, Defund the Police? Here's What that Really Means.*, WASH. POST (June 12, 2020), <https://www.washingtonpost.com/opinions/2020/06/07/defund-police-heres-what-that-really-means/> [<https://perma.cc/85S7-GBQX>].

## I. WHITE SUPREMACY IN POLICING

Policing is no stranger to explicit racism—the two go hand in hand. Some of the very first police departments in the southern states were groups of white men who gave themselves power to police enslaved people.<sup>32</sup> Police departments turned a blind eye to lynchings and other racial violence, allowing the murder of Black people and other violence by whites.<sup>33</sup> Police departments in the South were filled with avowed white supremacists through the 1950s.<sup>34</sup>

However, post-civil-rights-era American society created a narrative which attempted to distance law enforcement from the subjugation of people of color.<sup>35</sup> Police and the media rarely acknowledge policing's ties to slavery and explicit racism.<sup>36</sup> Courts often ignore the realities of racism in policing in coming to legal decisions.<sup>37</sup>

But pretending that racism and law enforcement are not intertwined has only masked the problem, not ended it. In 1996, a legal scholar warned of white supremacists in the police force.<sup>38</sup> More than twenty-five years ago, a federal judge in Los Angeles found that some LA sheriff's deputies in the Lynwood station were involved in a “neo-[N]azi, white supremacist gang,” and that the officers targeted Black and Latino residents of that community.<sup>39</sup>

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<sup>32</sup> See Stephen L. Carter, Opinion, *Policing and Oppression Have a Long History*, BLOOMBERG (Oct. 29, 2015, 6:19 PM), <https://www.bloomberg.com/view/articles/2015-10-29/policing-and-oppression-have-a-long-history> [https://perma.cc/6G9H-JDEH]; Victor E. Kappeler, *A Brief History of Slavery and the Origins of American Policing*, EKU ONLINE (Jan. 7, 2014), <http://plsonline.eku.edu/insidelook/brief-history-slavery-and-origins-american-policing> [https://perma.cc/ZU47-LHME].

<sup>33</sup> Samuel Whitehead, *Nearly 8 Decades Later, Georgia Police Chief Apologizes for Lynching* (Jan. 27, 2017, 4:36 PM), <http://www.npr.org/2017/01/27/512047341/nearly-8-decades-later-georgia-police-chief-apologizes-for-lynching> [https://perma.cc/D3A9-WJ2V]; EQUAL JUST. INITIATIVE, *LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR* 60 (2017), <https://eji.org/wp-content/uploads/2020/09/lynching-in-america-3d-ed-091620.pdf> [https://perma.cc/DSW4-EYCK].

<sup>34</sup> See Robin D. Barnes, *Blue by Day and White by (K)night: Regulating the Political Affiliations of Law Enforcement and Military Personnel*, 81 IOWA L. REV. 1079, 1101 (1996).

<sup>35</sup> Jill Lepore, *The Invention of the Police*, NEW YORKER (July 13, 2020), <https://www.newyorker.com/magazine/2020/07/20/the-invention-of-the-police> [https://perma.cc/GU24-ASYJ]; Elaine Frantz, *America's Long, Rich History of Pretending Systemic Racism Doesn't Exist*, VOX (May 16, 2019, 1:30 PM), <https://www.vox.com/first-person/2019/5/16/18627753/racism-kkk-police-brutality-sandra-bland> (last visited Feb. 4, 2022).

<sup>36</sup> Lepore, *supra* note 35; Frantz, *supra* note 35.

<sup>37</sup> For a discussion of this in the Fourth Amendment context, see generally Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999); and Ekow Yankah, *Pretext and Justification*, 40 CARDOZO L. REV. 1543 (2019).

<sup>38</sup> Barnes, *supra* note 34, at 1091 & n.50.

<sup>39</sup> *Thomas v. Cnty. of Los Angeles*, 978 F.2d 504, 507, 511 (appeal of lower court's preliminary injunction order entered on September 23, 1991); Hector Tobar, *Deputies in 'Neo-Nazi' Gang, Judge Found: Sheriff's Department: Many at Lynwood Office Have Engaged in Racially Motivated Violence Against Blacks and Latinos, Jurist Wrote.*, L.A. TIMES



During the high profile O.J. Simpson trial in the mid-1990s, the lead detective was revealed to be a racist who had used the “n” word many times and lied about it on the witness stand.<sup>40</sup> In 1999 in Cleveland, Ohio, racist and Nazi symbols were found in three of the six police precincts there.<sup>41</sup> It was believed that the symbols were placed there by officers as there were also allegations of some officers wearing lapel pins on their uniforms that symbolized white power.<sup>42</sup> In 2001, two Williamson County, Texas police officers were fired after they tried to recruit another officer into their Ku Klux Klan (KKK) chapter.<sup>43</sup>

Police affiliation in white supremacist groups is not only a phenomenon of decades ago, but continues today. In 2014, three out of thirteen officers in an all-white police department were members of a local chapter of the KKK in Fruitland Park, Florida.<sup>44</sup> A police officer in Louisiana was photographed giving a white supremacist salute at a KKK rally.<sup>45</sup> A white Little Rock, Arkansas officer shot and killed an unarmed Black child.<sup>46</sup> The civil lawsuit showed that, during his background check before being hired, he had disclosed that he had attended a KKK rally.<sup>47</sup> The department hired him anyway, which had deadly consequences.<sup>48</sup>

In addition to hate group membership, my previous research found “scandals in [well] over [one hundred] different police departments, in [forty-nine] different states where individuals have sent overtly racist emails[ or] texts, or made

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(Oct. 12, 1991, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1991-10-12-me-107-story.html> [<https://perma.cc/GB3N-QL9A>].

<sup>40</sup> Kenneth B. Noble, *Issue of Racism Erupts in Simpson Trial*, N.Y. TIMES (Jan. 14, 1995), <https://www.nytimes.com/1995/01/14/us/issue-of-racism-erupts-in-simpson-trial.html> [<https://perma.cc/QUN2-U3AQ>].

<sup>41</sup> Karin Scholz & Ted Wendling, *Racist Graffiti in the Cleveland PD*, PLAIN DEALER (July 22, 1999), [https://www.mdcbowen.org/p2/bh/racist\\_graffiti\\_in\\_the\\_cleveland.htm](https://www.mdcbowen.org/p2/bh/racist_graffiti_in_the_cleveland.htm) [<https://perma.cc/KLB2-VJKZ>].

<sup>42</sup> *Id.*

<sup>43</sup> ABC News, *Texas Officers Fired for Membership in KKK*, ABC NEWS (Jan. 7, 2006, 10:18 AM), <https://abcnews.go.com/US/story?id=93046&page=1> [<https://perma.cc/WM4J-RYVT>].

<sup>44</sup> Associated Press, *Florida Town Stunned by News of Police Department's KKK Ties*, TAMPA BAY TIMES (July 21, 2014), <http://www.tampabay.com/news/publicsafety/florida-town-stunned-by-news-of-police-kkk-ties/2189339> [<https://perma.cc/4YZ6-DV9B>].

<sup>45</sup> Michael German, *Hidden in Plain Sight: Racism, White Supremacy, and Far-Right Militancy in Law Enforcement*, BRENNAN CTR. FOR JUST. (Aug. 27, 2020), <https://www.brennancenter.org/our-work/research-reports/hidden-plain-sight-racism-white-supremacy-and-far-right-militancy-law> [<https://perma.cc/73RM-V5LF>].

<sup>46</sup> Radley Balko, Opinion, *If You Don't Get at that Rot, You Just Get More Officers Like Josh Hastings*, WASH. POST (Nov. 2, 2018), <https://www.washingtonpost.com/news/opinions/wp/2018/11/02/feature/if-you-dont-get-at-that-rot-you-just-get-more-officers-like-josh-hastings/> [<https://perma.cc/MK3P-832C>].

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

racist comments via social media.”<sup>49</sup> The Plain View Project has found many other examples of racist, sexist, and homophobic social media posts by police.<sup>50</sup>

Since my research published in 2019, other terrifying and high-profile instances of explicit racial bias by police officers have emerged. In 2019, a Black couple looking to buy a home toured a white police officer's house in the Detroit Area and found a KKK application framed in the house.<sup>51</sup> In the summer of 2020, police officers in San Jose, California said a number of offensive things, including one who said, “I say re-purpose the hijabs into nooses.”<sup>52</sup> That same summer, police officers in Wilmington, North Carolina were caught using racial slurs, dreaming of a race war, and murdering Black residents after one officer accidentally activated a camera in his patrol vehicle.<sup>53</sup> In early 2021, the director of the New York City Police Department's (NYPD) Equal Employment Opportunity Division,<sup>54</sup> a white officer, was accused of allegedly posting racist and offensive comments anonymously on a police message board under a pseudonym for years.<sup>55</sup> Despite being entrusted to protect the rights of police officers of color, it is clear from his posts that he holds a tremendous amount of racial animus for people of color. Unfortunately, the problem of racism in law enforcement has only continued.

Many of those employed within law enforcement point to these distressing instances of racial violence, or policing's disproportionate impact on communities of color, as evidence of implicit, or unconscious racial bias in policing. Police departments acknowledge that policing is fraught with this type of cognitive

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<sup>49</sup> Johnson, *supra* note 29, at 210.

<sup>50</sup> See THE PLAIN VIEW PROJECT, <https://www.plainviewproject.org/> [<https://perma.cc/HG8V-L3ZW>].

<sup>51</sup> Mariel Padilla, *Michigan Police Officer Is Terminated After K.K.K. Application Was Found in His Home*, N.Y. TIMES (Sept. 13, 2019), <https://www.nytimes.com/2019/09/13/us/officer-charles-anderson-ku-klux-klan.html> [<https://perma.cc/Y3U6-5LFG>].

<sup>52</sup> Minyvonne Burke & Shamar Walters, *4 Police Officers in San Jose Put on Leave over Racist, Anti-Muslim Facebook Posts*, NBC NEWS (June 27, 2020, 6:35 PM), <https://www.nbcnews.com/news/us-news/4-police-officers-san-jose-put-leave-over-racist-anti-n1232344> [<https://perma.cc/X8LB-VKQB>].

<sup>53</sup> Jason Slotkin, *North Carolina Police Chief Fires Three Officers over Racist Comments Caught on Tape*, NPR (June 25, 2020, 5:11 PM), <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/06/25/883358818/wilmington-n-c-police-fires-three-officers-over-racist-comments-caught-on-tape> [<https://perma.cc/C4U5-KUAA>].

<sup>54</sup> See *Equity and Inclusion*, NYPD, <https://www1.nyc.gov/site/nypd/bureaus/administrative/equity-inclusion.page> [<https://perma.cc/45UV-6LWQ>] (describing function of Equal Employment Opportunity Division).

<sup>55</sup> See *NYPD Anti-Discrimination Chief Retires Before Suspension for 'Vile, Racist' Messages*, NBC N.Y. (Jan. 12, 2021, 1:08 PM), <https://www.nbcnewyork.com/news/local/nypd-anti-discrimination-chief-suspended-without-pay-over-vile-racist-messages/2822729/> [<https://perma.cc/Z39C-GWXV>].

bias.<sup>56</sup> Police departments around the country have received diversity trainings and implicit bias training to combat the issue of unconscious racism in policing culture.<sup>57</sup> And solely blaming racism on unconscious bias has its merits. It allows officers to be open to new ideas without being defensive, as they are told that their biases and actions are not their fault, but the result of training, popular culture, or simply existing in America. But unconscious racial bias is not the only type of bias operating within law enforcement. Casting fraught racial issues in policing merely as unconscious, while failing to acknowledge the explicit racial animus in police departments, tolerates and normalizes overt racism. In addition, neglecting to address explicit racial bias fosters the belief that bad actors are merely random bad apples rather than a serious problem worthy of widespread action.

In addition to membership in explicitly racist groups, police have been infiltrated by other far-right extremist groups with less clear ties to white supremacy, but which espouse other types of hatred, like homophobia, misogyny, or islamophobia.<sup>58</sup> Police officers in California, Connecticut, Illinois, Louisiana, and Washington have been under scrutiny for their ties to the Proud Boys,<sup>59</sup> who, as mentioned previously, proclaim the virtues of western chauvinism. Sixteen Proud Boys are alleged to have taken part in the Capitol siege.<sup>60</sup> Police officers all over the country have been exposed for activity in the Oath Keepers<sup>61</sup> and

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<sup>56</sup> See Jacob Stark, *Addressing Implicit Bias in Policing*, INT'L ASS'N OF CHIEFS OF POLICE, <https://www.policechiefmagazine.org/addressing-implicit-bias-in-policing/> [https://perma.cc/Z7WA-PWRX].

<sup>57</sup> Martin Kaste, *NYPD Study: Implicit Bias Training Changes Minds, Not Necessarily Behavior*, NPR (Sept. 10, 2020, 5:00 AM), <https://www.npr.org/2020/09/10/909380525/nypd-study-implicit-bias-training-changes-minds-not-necessarily-behavior> [https://perma.cc/4EQQ-PW7G]; Tom James, *Can Cops Unlearn Their Unconscious Biases?*, ATLANTIC (Dec. 23, 2017), <https://www.theatlantic.com/politics/archive/2017/12/implicit-bias-training-salt-lake/548996/> [https://perma.cc/377Y-DPVD].

<sup>58</sup> Islamophobia, like anti-Semitism, can be tied to white supremacy. See David M. Shribman, *White Supremacy Fosters the Toxic Mix of Anti-Semitism and Racism*, JEWISH J. (Apr. 8, 2021), <https://jewishjournal.org/2021/04/08/white-supremacy-fosters-the-toxic-mix-of-anti-semitism-and-racism/> [https://perma.cc/Y3SB-RM24]; ERIK LOVE, ISLAMOPHOBIA AND RACISM IN AMERICA 4 (2017).

<sup>59</sup> See Appendix: Police Officer Membership in Proud Boys, Oath Keepers, and Three Percenters Groups.

<sup>60</sup> Bart Jansen, *'A Nightmare Scenario': Extremists in Police Ranks Spark Growing Concern after Capitol Riot*, USA TODAY (Mar. 22, 2021 5:04 PM), <https://www.usatoday.com/in-depth/news/politics/elections/2021/03/21/police-charged-capitol-riot-reignite-concerns-racism-extremism/4738348001/> [https://perma.cc/6CM2-BPXA]; see also Alan Feuer & Frances Robles, *Proud Boys Under Growing Scrutiny in Capitol Riot Investigation*, N.Y. TIMES (Apr. 13, 2021), <https://www.nytimes.com/2021/01/26/us/proud-boys-capitol-riot.html> [https://perma.cc/T5Q3-74LH].

<sup>61</sup> Jansen, *supra* note 60; see Feuer & Robles, *supra* note 60.

Three Percenters as well.<sup>62</sup> These two groups pursue police and members of the military to join their ranks because of their training.<sup>63</sup> A Chapel Hill, North Carolina police officer was alleged to have had a Three Percenter tattoo, and a Chicago, Illinois police officer was wearing a Three Percenter logo on a face mask he wore while policing a Black Lives Matter protest.<sup>64</sup> An Orange County, California sheriff's deputy was seen wearing an Oath Keepers patch while working a protest.<sup>65</sup> Oath Keepers are a group that distinguishes itself amongst other antigovernment militias because of their recruitment of active and retired police and military personnel.<sup>66</sup> As a result, two-thirds of Oath Keepers members have law enforcement backgrounds and the group is "one of the largest [antigovernment] extremist groups in the [United States]."<sup>67</sup> Both groups are far-right, armed antigovernment militia organizations.<sup>68</sup> The Oath Keepers are also alleged to have

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<sup>62</sup> *SC Police Officer Penalized for Three Percenters Sticker on Personal Vehicle*, WIS NEWS 10 (July 12, 2021, 4:35 PM), <https://www.wistv.com/2021/07/12/cpd-officer-penalized-three-percenters-sticker-personal-vehicle/> (last visited Feb. 4, 2022); Christine Byers, *The Story Behind the Picture of 3 Percenters Flag at St. Louis County Officer's House*, KSDK (Mar. 5, 2021, 2:31 PM), <https://www.ksdk.com/article/news/crime/byers-beat/three-percenters-flag-st-louis-county-officer-house/63-65b98e05-3907-4289-8d6d-0b1ee10cf64d> (last visited Feb. 4, 2022); Richard Winton, *O.C. Deputy Under Investigation After Wearing Extremist Paraphernalia Patch at George Floyd Protest*, L.A. TIMES (June 3, 2020), <https://www.latimes.com/california/story/2020-06-03/orange-county-deputy-three-percenters-patch-george-floyd-protest> (last visited Feb. 4, 2022).

<sup>63</sup> Will Carless & Michael Corey, *The American Militia Movement, a Breeding Ground for Hate, Is Pulling in Cops on Facebook*, REVEAL (June 24, 2019), <https://revealnews.org/article/the-american-militia-movement-a-breeding-ground-for-hate-is-pulling-in-cops-on-facebook/> [<https://perma.cc/DV4C-J7GF>]; see ANTI-DEFAMATION LEAGUE, *THE OATH KEEPERS: ANTI-GOVERNMENT EXTREMISTS RECRUITING MILITARY AND POLICE 1* (2015) [hereinafter *THE OATH KEEPERS*], <https://www.adl.org/sites/default/files/documents/assets/pdf/combating-hate/The-Oath-Keepers-ADL-Report.pdf> [<https://perma.cc/6UB5-TJGL>]; see also Alan Feuer & Matthew Rosenberg, *6 Men Said to Be Tied to Three Percenters Movement Are Charged in Capitol Riot*, N.Y. TIMES (June 10, 2021), <https://www.nytimes.com/2021/06/10/us/politics/three-percenter-capitol-riot.html> [<https://perma.cc/PNQ3-BFPE>].

<sup>64</sup> Carli Brosseau, *Officer's Tattoo Causes Chief to Question His Ability to Function Effectively*, CHARLOTTE OBSERVER (Sept. 4, 2018, 5:04 PM), <https://www.charlotteobserver.com/latest-news/article217573000.html> (last visited Oct. 3, 2021); Christopher Hacker, *CPD Investigating After Officer Wore Extremist Militia Logo to Downtown Protest Saturday*, CBS CHI. (June 8, 2020, 10:23 PM), <https://chicago.cbslocal.com/2020/06/08/cpd-investigating-after-officer-wore-extremist-militia-logo-to-downtown-protest-saturday/> (last visited Feb. 4, 2022).

<sup>65</sup> Rector & Winton, *supra* note 29.

<sup>66</sup> See *THE OATH KEEPERS*, *supra* note 63, at 1.

<sup>67</sup> *Id.* at 2; Mike Giglio, *A Pro-Trump Militant Group Has Recruited Thousands of Police, Soldiers, and Veterans*, ATLANTIC (Nov. 2020), <https://www.theatlantic.com/magazine/archive/2020/11/right-wing-militias-civil-war/616473/> [<https://perma.cc/F2F3-PJDX>].

<sup>68</sup> See Jaclyn Diaz & Rachel Treisman, *Members of Right-Wing Militias, Extremist Groups Are Latest Charged in Capitol Siege*, NPR (Jan. 19, 2021, 5:54 AM), <https://www.npr.org/sections/insurrection-at-the-capitol/2021/01/19/958240531/members-of-right-wing-militias-extremist-groups-are-latest-charged-in-capitol-si> [<https://perma.cc/49GJ-FJR4>]; see also Antigovernment Movement, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/ideology/antigovernment> [<https://perma.cc/2UPZ-7DSX>].

played a significant role in the Capitol Siege. Close to twenty people associated with the Oath Keepers are being prosecuted for involvement in the riot at the Capitol, including the leader and founder of the group.<sup>69</sup>

Although the FBI warned of white supremacists infiltrating police departments in 2006,<sup>70</sup> the denial of the problem by police brass has only enabled its continuance. It seems that few departments are acknowledging the matter or taking any serious steps to curb this frightening problem. When an officer is identified as holding racist beliefs, police departments often claim that he or she was a “lone-wolf” or a “bad apple” and downplay the possibility that these beliefs are held by others in the department.<sup>71</sup>

We know that far-right extremist groups, like the Oath Keepers, while not overtly focused white supremacist ideology, focus on recruitment of current and former law enforcement officers and members of the military.<sup>72</sup> According to federal prosecutors, numerous members of the group were involved in

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<sup>69</sup> Press Release, U.S. Dep’t of Just., *Leader of Oath Keepers and 10 Other Individuals Indicted in Federal Court for Seditious Conspiracy and Other Offenses Related to U.S. Capitol Breach, Eight Others Facing Charges in Two Related Cases* (Jan. 13, 2022), <https://www.justice.gov/opa/pr/leader-oath-keepers-and-10-other-individuals-indicted-federal-court-seditious-conspiracy-and> [<https://perma.cc/23HA-KAEF>]; Alan Feuer & Katie Benner, *More Oath Keeper Suspects Charged in Capitol Riot Plot*, N.Y. TIMES (Apr. 2, 2021), <https://www.nytimes.com/2021/02/19/us/politics/oath-keepers-capitol-riot-plot.html> [<https://perma.cc/8P2N-P7WX>].

<sup>70</sup> See FBI COUNTERTERRORISM DIV., FED. BUREAU OF INVESTIGATION, *WHITE SUPREMACIST INFILTRATION OF LAW ENFORCEMENT 7* (2006), [https://oversight.house.gov/sites/democrats.oversight.house.gov/files/White\\_Supremacist\\_Infiltration\\_of\\_Law\\_Enforcement.pdf](https://oversight.house.gov/sites/democrats.oversight.house.gov/files/White_Supremacist_Infiltration_of_Law_Enforcement.pdf) [<https://perma.cc/3BW8-TTKL>].

<sup>71</sup> See, e.g., Shawn Ley, *Canton Officer Suspended Amid Investigation into Alleged Racist Facebook Comment*, CLICK ON DETROIT (Nov. 11, 2016, 5:19 PM), <https://www.clickondetroit.com/news/canton-officer-suspended-amid-investigation-into-alleged-racist-facebook-comment> (last visited Feb. 4, 2022) (“‘The Canton Public Safety Department holds our employees to the highest of standards, and this type of behavior is not representative of the beliefs or core values of this organization,’ a spokesman said.”); Christopher Brennan, *Kentucky Police Officer Suspended After Racist Facebook Meme About Black Crime*, N.Y. DAILY NEWS (July 14, 2016, 9:32 AM), <http://www.nydailynews.com/news/national/kentucky-police-officer-suspended-racist-facebook-meme-article-1.2710936> (last visited Feb. 4, 2022) (“‘Every day the men and women of Metro Corrections work to strengthen race relations in this community. Sgt. Hale’s social media decision has hurt those good efforts,’ Louisville Corrections director Mark Bolton said in a statement Wednesday.”); Helen Eckinger, *Fruitland Park Cop Linked to Klan Quits*, ORLANDO SENTINEL (Feb. 7, 2009), <https://www.orlandosentinel.com/news/os-xpm-2009-02-07-kkkcop07-story.html> [<https://perma.cc/VU2Z-DFM8>] (“‘Isom said no other Fruitland Park officers were involved in the Klan with Elkins. ‘I can guarantee you that none of my police officers who work here are members of the KKK,’ Isom said.”); Scott Glover & Dan Simon, *‘Wild Animals’: Racist Texts Sent by San Francisco Police Officer*, *Documents Show*, CNN (Apr. 26, 2016, 6:14 PM), <https://www.cnn.com/2016/04/26/us/racist-texts-san-francisco-police-officer/index.html> [<https://perma.cc/PZ8F-LT96>] (“‘The chief reiterated he has ‘no tolerance for officers who hold such reprehensible views.’”).

<sup>72</sup> Giglio, *supra* note 67.

the Capitol insurrection,<sup>73</sup> one of whom was a former FBI agent who at one point had top-secret security clearance,<sup>74</sup> meaning that he was at one time a trusted law enforcement official with access to very sensitive information

It is clear that, because of the express ability to control others, the ability to use force, specialized training, and access to information about law enforcement priorities, policing is an attractive career to those who want to subjugate people of color and others drawn to authoritarianism. Failing to take seriously the years of evidence of the obvious danger posed by far-right extremist groups demonstrates a grievous law enforcement bias.

Of course, the existence of white supremacists in policing has ramifications far wider than the failed insurrection of early 2021. For communities of color, white supremacy has resulted in daily indignities in their neighborhoods in the form of harassment and stop and frisk practices.<sup>75</sup> Black and Brown people have suffered a disproportionate number of speeding tickets,<sup>76</sup> arrests,<sup>77</sup> convictions, and caging<sup>78</sup> at the hands of racist police, simply because of their skin color. Worst of all, unarmed Black people are more likely to be killed by police.<sup>79</sup> According to a Harvard study published in 2020, Black people are more than three times more likely to be killed by police than whites.<sup>80</sup> This phenomenon robs people of color of autonomy, wealth, and self-esteem because of the outsized role the criminal legal system plays in the everyday lives of people of color.

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<sup>73</sup> Rachel Weiner & Spencer S. Hsu, *Former FBI Official, a Navy Veteran, Is 'Key Figure' in Jan. 6 Riot, Prosecutors Allege*, WASH. POST (Feb. 11, 2021, 4:45 PM), [https://www.washingtonpost.com/local/legal-issues/thomas-caldwell-capitol-riot-detention/2021/02/11/a94bb3f2-6c92-11eb-9f80-3d7646ce1bc0\\_story.html](https://www.washingtonpost.com/local/legal-issues/thomas-caldwell-capitol-riot-detention/2021/02/11/a94bb3f2-6c92-11eb-9f80-3d7646ce1bc0_story.html) [https://perma.cc/RC8B-V96T].

<sup>74</sup> *Id.*

<sup>75</sup> Press Release, Rose Lenehan, Prison Pol'y Initiative, What "Stop-and-Frisk" Really Means: Discrimination & Use of Force (Aug. 17, 2017), <https://www.prisonpolicy.org/reports/stopandfrisk.html> [https://perma.cc/B263-JCCH].

<sup>76</sup> Kim Soffen, *The Big Question About Why Police Pull over So Many Black Drivers*, WASH. POST (July 8, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/07/08/the-big-question-about-why-police-pull-over-so-many-black-drivers/> [https://perma.cc/83FW-SFDW].

<sup>77</sup> *Id.*

<sup>78</sup> THE SENTENCING PROJECT, REPORT TO THE UNITED NATIONS ON RACIAL DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM 1, 6–7 (2018), <https://www.sentencingproject.org/wp-content/uploads/2018/04/UN-Report-on-Racial-Disparities.pdf> [https://perma.cc/7877-9NC3].

<sup>79</sup> Jon Swaine et al., *Black Americans Killed by Police Twice as Likely to Be Unarmed as White People*, GUARDIAN (June 1, 2015, 08:38 AM), <https://www.theguardian.com/us-news/2015/jun/01/black-americans-killed-by-police-analysis> [https://perma.cc/4MQW-RJYQ].

<sup>80</sup> Gabriel L. Shwartz & Jaquelyn L. Jahn, *Mapping Fatal Police Violence Across U.S. Metropolitan Areas: Overall Rates and Racial/Ethnic Inequities, 2013–2017*, PLOS ONE (June 24, 2020), <https://doi.org/10.1371/journal.pone.0229686> [https://perma.cc/TRM3-NA2Y].

## II. CAPITOL POLICE BRASS DID NOT ACCURATELY APPRECIATE THE THREAT POSED BY THE INSURRECTIONISTS

As discussed above, explicit bias motivated some of those involved in the attack, and some of those involved may identify as white supremacists. The Capitol was also made vulnerable because of some implicit biases on the part of law enforcement.<sup>81</sup> Unconscious biases are those of which we are not aware.<sup>82</sup> In many instances, unconscious biases cause people to view Black people as threatening.<sup>83</sup> Here, it seems that white people were underestimated as a threat, despite their promises and rhetoric about violence. The promise of violence was explicit by at least one of the organizers of the “Stop the Steal” rally.<sup>84</sup> Then President Donald Trump encouraged the crowd to “fight like hell” over the “stolen” election.<sup>85</sup> His attorney, former New York City mayor and US attorney, Rudy Giuliani, told the attendees, “let’s have trial by combat,” just before the group went to the Capitol.<sup>86</sup> Not only did these two and others use strong language leading up to the attack, violent rhetoric was also shared online. An online forum, theDonald.win, was a platform that had previously been banned from Reddit because of racism and sexism.<sup>87</sup> In the days leading up to the attack, 80 percent of the most popular posts on the site called for violence.<sup>88</sup>

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<sup>81</sup> See *infra* text accompanying notes 152–155 and accompanying text.

<sup>82</sup> See Richard L. Byyny, Editorial, *Cognitive Bias: Recognizing and Managing Our Unconscious Biases*, PHAROS, Winter 2017, at 2, 2–3, <https://www.med.upenn.edu/inclusion-and-diversity/assets/user-content/cognitive-bias.pdf> [<https://perma.cc/RM4Z-BWFP>].

<sup>83</sup> See *infra* source cited in note 156.

<sup>84</sup> Annie Grayer et al., *January 6 Committee Targets Organizers of Stop the Steal Rally in Latest Batch of Subpoenas*, CNNPolitics (Sept. 29, 2021, 7:48 PM), <https://www.cnn.com/2021/09/29/politics/january-6-subpoenas-stop-the-steal-rally/index.html> [<https://perma.cc/V5FK-8ELB>]; Atlantic Council’s DFRLab, *#StopTheSteal: Timeline of Social Media and Extremist Activities Leading to 1/6 Insurrection*, JUST SEC. (Feb. 10, 2021), <https://www.justsecurity.org/74622/stopthesteal-timeline-of-social-media-and-extremist-activities-leading-to-1-6-insurrection/> [<https://perma.cc/ZP7T-D5ZP>]; Daniel Lippman, *Facebook Bans Stop the Steal Organizer Ali Alexander*, POLITICO (Jan. 12, 2021, 2:35 PM), <https://www.politico.com/news/2021/01/12/facebook-bans-stop-the-steal-organizer-ali-alexander-458267> [<https://perma.cc/3WEX-QMWB>].

<sup>85</sup> Brian Naylor, *Read Trump’s Jan. 6 Speech, A Key Part of Impeachment Trial*, NPR (Feb. 10, 2021, 2:43 PM), <https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial> [<https://perma.cc/A9LJ-BATA>].

<sup>86</sup> Bobby Cuza, *Rudy Giuliani Is Accused of Inciting a Riot. It’s Not the First Time*, NY1 (Jan. 7, 2021, 9:50 PM), <https://www.ny1.com/nyc/all-boroughs/news/2021/01/08/rudy-giuliani-is-accused-of-inciting-a-riot-it-s-not-the-first-time-> [<https://perma.cc/FQ7D-KA5M>].

<sup>87</sup> Bobby Allyn, *Reddit Bans The\_Donald, Forum of Nearly 800,000 Trump Fans, Over Abusive Posts*, NPR (June 29, 2020, 5:10 PM), [https://www.npr.org/2020/06/29/884819923/reddit-bans-the\\_donald-forum-of-nearly-800-000-trump-fans-over-abusive-posts](https://www.npr.org/2020/06/29/884819923/reddit-bans-the_donald-forum-of-nearly-800-000-trump-fans-over-abusive-posts) [<https://perma.cc/L8TK-LZB3>].

<sup>88</sup> James Purtill, *Weeks of Rhetoric Online Made the January 6 Storming of the Capitol ‘Entirely Predictable’, Experts Say*, ABC NEWS (Jan. 7, 2021, 9:36 PM),

A. *White Far-Right Extremism Has Been Known to Be a Significant Threat*

It is not as though police departments were not on notice that far-right extremists can be dangerous prior to the January 6, 2021 insurrection. In addition to the warnings about the “Stop the Steal” rally, there were other warning signs. An October 2020 report said far-right groups were behind most US terrorist attacks that year.<sup>89</sup> Just after the election day, while votes were being counted in disputed swing states, there were reports of groups of Trump supporters appearing armed at vote-counting spaces in Maricopa County, Arizona and Detroit, Michigan.<sup>90</sup> Armed men were arrested in Philadelphia outside a convention center where votes were being counted.<sup>91</sup> The car the accused men were driving had stickers associated with QAnon,<sup>92</sup> the online conspiracy theory that imagines Donald Trump saving children from a pedophilia ring run by Democrats.<sup>93</sup> Supporters of the conspiracy theory were in attendance at the rally on January 6.<sup>94</sup> News media sounded the alarm connecting the prevalence of conspiracy theories circulating about the theft of the election along with the more entrenched QAnon conspiracy theory rising in popularity in the midst of the COVID-19 pandemic.<sup>95</sup> The presence of so many people taking up arms to monitor the counting of votes around the 2020 election should have connected the dots for law enforcement that protests at the request of Donald Trump at the certification of the electoral votes by Congress would be violent.

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<https://www.abc.net.au/news/science/2021-01-08/us-capitol-storming-planned-for-weeks-online-social-media/13039302> [<https://perma.cc/5WFD-VTP4>].

<sup>89</sup> Jenny Gross, *Far-Right Groups Are Behind Most U.S. Terrorist Attacks, Report Finds*, N.Y. TIMES (Feb. 20, 2021), <https://www.nytimes.com/2020/10/24/us/domestic-terrorist-groups.html> [<https://perma.cc/Y6UW-A6CE>].

<sup>90</sup> Tim Sullivan & Adam Geller, *Increasingly Normal: Guns Seen Outside Vote-Counting Centers*, DETROIT NEWS (Nov. 6, 2020, 10:38 PM), <https://www.detroitnews.com/story/news/nation/2020/11/06/increasingly-normal-guns-seen-outside-vote-counting-centers/114722860/> [<https://perma.cc/B7NA-GMAT>].

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> Kevin Roose, *What Is QAnon, the Viral Pro-Trump Conspiracy Theory?*, N.Y. TIMES (Feb. 4, 2021), <https://www.nytimes.com/article/what-is-qanon.html> [<https://perma.cc/Z5L5-J5LY>].

<sup>94</sup> Olivia Rubin et al., *QAnon Emerges as Recurring Theme of Criminal Cases Tied to US Capitol Siege*, ABC NEWS (Jan. 19, 2021, 7:31 PM), <https://abcnews.go.com/US/qanon-emerges-recurring-theme-criminal-cases-tied-us/story?id=75347445>. Web [<https://perma.cc/8WZ5-CKSL>].

<sup>95</sup> Ben Collins, *QAnon's Dominion Voter Fraud Conspiracy Theory Reaches the President*, NBC NEWS (Nov. 13, 2020, 4:53 PM), <https://www.nbcnews.com/tech/tech-news/q-fades-qanon-s-dominion-voter-fraud-conspiracy-theory-reaches-n1247780> [<https://perma.cc/EXE4-JLT6>].



But armed people congregating while vote counting was taking place was not the only siren blaring for law enforcement. Antimask rallies and protests against state shut-down orders as a result of the COVID-19 pandemic throughout 2020 involved armed white far-right extremists.<sup>96</sup> And a 2020 plot to kidnap, try, and execute the governor of Michigan was inspired by the governor's state-wide shut down.<sup>97</sup> It was thwarted before it was carried out by antigovernment white right-wing extremists.<sup>98</sup>

During the protests of the killings of George Floyd and Breonna Taylor in the summer and fall of 2020, white armed militias turned up to monitor the protests.<sup>99</sup> These armed groups, who were mostly white, made it their business to police Black Lives Matter protests.<sup>100</sup> Militias made appearances in at least fifty-five Black Lives Matter protests in 2020.<sup>101</sup> Some of these militias were formed in response to protests.<sup>102</sup> In at least one instance, a white man who was armed shot three people, killing one protestor.<sup>103</sup>

Violence by white supremacists, including at least two killings, took place during the 2020 protests surrounding the police murders of unarmed Black people.<sup>104</sup> A woman was killed, and others were injured at the white supremacist "Unite the Right"

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<sup>96</sup> Jason Wilson, *The Rightwing Groups Behind Wave of Covid-19 Restrictions*, GUARDIAN (Apr. 17, 2020, 4:00 PM), <https://www.theguardian.com/world/2020/apr/17/far-right-coronavirus-protests-restrictions> [<https://perma.cc/T2FA-9ZWQ>].

<sup>97</sup> Nicholas Bogel-Burroughs et al., *F.B.I. Says Michigan Anti-Government Group Plotted to Kidnap Gov. Gretchen Whitmer*, N.Y. TIMES (Apr. 13, 2021), <https://www.nytimes.com/2021/10/08/us/gretchen-whitmer-michigan-militia.html> [<https://perma.cc/3S8G-L7L6>]. For an explanation of why the plot was allegedly inspired by the governor's lockdown orders, see Ailsa Chang et al., *Investigation Lays Out Plot to Kidnap Michigan's Governor*, NPR (July 28, 2021, 4:40 PM), <https://www.npr.org/2021/07/28/1021892785/investigation-lays-out-plot-to-kidnap-michigans-governor> [<https://perma.cc/Q4FJ-JNS3>].

<sup>98</sup> Chang et al., *supra* note 97.

<sup>99</sup> Charles Marino, Opinion, *Putting Antifa and Black Lives Matter on Notice*, HILL (Feb. 23, 2021, 9:30 AM), <https://thehill.com/opinion/national-security/539903-putting-antifa-and-black-lives-matter-on-notice> [<https://perma.cc/6MWB-B9ZU>]; see Nicolle Okoren, *The Birth of Militia: How an Armed Group Polices Black Lives Matter Protests*, GUARDIAN (July 27, 2020, 5:00 PM), <https://www.theguardian.com/us-news/2020/jul/27/utah-militia-armed-group-police-black-lives-matter-protests> [<https://perma.cc/A243-ZM5D>].

<sup>100</sup> See Marino, *supra* note 99; Okoren, *supra* note 99.

<sup>101</sup> Safia Samee Ali, *Where Protestors Go, Armed Militias, Vigilantes Likely Follow with Little to Stop Them*, NBC NEWS (Sept. 1, 2020, 2:24 PM), <https://www.nbcnews.com/news/us-news/where-protesters-go-armed-militias-vigilantes-likely-follow-little-stop-n1238769> [<https://perma.cc/6BDT-HLS7>].

<sup>102</sup> *Id.*

<sup>103</sup> Joyce Sohyun Lee et al., *Kenosha: How Two Men's Paths Crossed in an Encounter that Has Divided the Nation*, WASH. POST (Nov. 19, 2020), <https://www.washingtonpost.com/investigations/2020/11/19/kenosha-shooting-kyle-rittenhouse-interview/> [<https://perma.cc/TPZ6-4MSJ>].

<sup>104</sup> See *id.*; Okoren, *supra* note 99; see also Marino, *supra* note 99.

rally in August 2017 in Charlottesville, Virginia.<sup>105</sup> After that rally, then President Trump said there were, “very fine people on both sides,” seeming to refer to white supremacists as very fine people.<sup>106</sup> The statement from Trump seemed to offer approval of at least some white supremacists. In addition, during the 2020 presidential debates, Trump acknowledged the Proud Boys’ existence and asked the Proud Boys to “stand back and stand by” after Trump was asked by the debate moderator to disavow white supremacists, seemingly encouraging the Proud Boys.<sup>107</sup> Mentioning Proud Boys publicly on national television brought attention to the group, bringing interest, raising the profile, and growing membership for the group.<sup>108</sup> In light of the approval Trump showed to these groups, it would have been prudent to assume that supporters of the Proud Boys and other white supremacists groups would fight to keep him in office, even after the election was over.

In addition to white supremacists and far-right groups, individuals may have felt encouraged by Donald Trump as well. In the time that Donald Trump was president, multiple mass shootings were linked to white supremacists. The 2018 Tree of Life synagogue shooting in Pittsburgh, Pennsylvania was allegedly the work of an anti-Semite.<sup>109</sup> A shooting at a synagogue in Poway, California in 2019 was linked to a man who appears to have shared a racist and anti-Semitic worldview online.<sup>110</sup> A shooting at a Walmart in El Paso, Texas killed over twenty people.<sup>111</sup> The alleged shooter expressed an anti-

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<sup>105</sup> Vanessa Romo, *Charlottesville Jury Convicts ‘Unite the Right’ Protestor Who Killed Woman*, NPR (Dec. 7, 2018, 5:30 PM), <https://www.npr.org/2018/12/07/674672922/james-alex-fields-unite-the-right-protester-who-killed-heather-heyer-found-guilt> [https://perma.cc/FCH5-ZPFJ].

<sup>106</sup> CNBC, *President Donald Trump on Charlottesville: You Had Very Fine People, on Both Sides* | CNBC, YOUTUBE, at 1:05 (Aug. 15, 2017), <https://youtu.be/JmaZR8E12bs> (last visited Feb. 4, 2022).

<sup>107</sup> Ben Collins & Brandy Zadrozny, *Proud Boys Celebrate After Trump’s Debate Callout*, NBC NEWS (Sept. 29, 2020, 11:12 PM), <https://www.nbcnews.com/tech/tech-news/proud-boys-celebrate-after-trump-s-debate-call-out-n1241512> [https://perma.cc/QPB7-9ZCQ].

<sup>108</sup> Craig Timberg & Elizabeth Dwoskin, *Trump’s Debate Comments Give an Online Boost to a Group Social Media Companies Have Long Struggled Against*, WASH. POST (Sept. 30, 2020, 4:29 PM), <https://www.washingtonpost.com/technology/2020/09/30/trump-debate-rightwing-celebration/> [https://perma.cc/H5NE-RT6D].

<sup>109</sup> Alex Dobuzinskis, *U.S. to Seek Death Penalty for Accused Pittsburgh Synagogue Shooter*, REUTERS (Aug. 26, 2019, 4:31 PM), <https://www.reuters.com/article/us-pennsylvania-shooting-idUSKCN1VG27B> [https://perma.cc/FB58-LSF8].

<sup>110</sup> Jill Cowan, *What to Know About the Poway Synagogue Shooting*, N.Y. TIMES (Apr. 29, 2019), <https://www.nytimes.com/2019/04/29/us/synagogue-shooting.html> [https://perma.cc/344H-T3B2].

<sup>111</sup> Mehdi Hasan, *After El Paso, We Can No Longer Ignore Trump’s Role in Inspiring Mass Shootings*, INTERCEPT (Aug. 4, 2019, 10:10 AM), <https://theintercept.com/2019/08/04/el-paso-dayton-mass-shootings-donald-trump/> [https://perma.cc/3M7V-MP4E];

immigrant worldview and was pro-Trump.<sup>112</sup> A Dayton, Ohio shooting, carried out the very next day in which more than twenty people were shot, also appeared to be the work of another man who revered Donald Trump and hated Latinos.<sup>113</sup> These very high profile mass shootings, carried out in four different states by white supremacists, should have put law enforcement across the country on high alert to the extreme danger posed by those on the far-right who supported Donald Trump as he appealed to the public for help in defending his Presidency from the electoral victory by President Joe Biden.

But it was not just that police had not awoken to this recent threat of violence during the Trump presidency. Right wing antigovernment extremists have been a danger to those in authority for decades. In 1992, a violent eleven-day standoff took place between US marshals and some Ruby Ridge, Idaho residents over a man's desire not to comply with an arrest warrant.<sup>114</sup> During the standoff, the wife and son of the target of the warrant were killed by authorities.<sup>115</sup> Months later, a deadly standoff involving a religious cult and the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) took place after the ATF's attempt to execute a search warrant on the cult's compound near Waco, Texas.<sup>116</sup> This 1992 standoff led to the loss of more than eighty people, including children.<sup>117</sup> The Oklahoma City bombing of federal buildings in 1995 that killed 168 people, including nineteen children, was carried out by two antigovernment far-right extremists.<sup>118</sup> The standoffs in Waco and at Ruby Ridge are said to have inspired the antigovernment Oklahoma City bombers in one of the nation's biggest terror events.<sup>119</sup>

An armed standoff between officials from the federal government's Bureau of Land Management, an agency of the US

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Vanessa Romo, *El Paso Walmart Shooting Suspect Pleads Not Guilty*, NPR (Oct. 10, 2019, 4:31 PM), <https://www.npr.org/2019/10/10/769013051/el-paso-walmart-shooting-suspect-pleads-not-guilty> [<https://perma.cc/Z28C-NBM8>].

<sup>112</sup> Hasan, *supra* note 111.

<sup>113</sup> *Id.*

<sup>114</sup> See Jason Wilson, *Ruby Ridge, 1992: The Day the American Militia Movement Was Born*, GUARDIAN (Aug. 26, 2017, 6:00 AM), <https://www.theguardian.com/us-news/2017/aug/26/ruby-ridge-1992-modern-american-militia-charlottesville> [<https://perma.cc/S89U-P6CC>].

<sup>115</sup> *Id.*

<sup>116</sup> Dara Lind, *Waco and Ruby Ridge: The 1990s Standoffs Haunting the Oregon Takeover, Explained*, VOX (Jan. 5, 2016, 9:10 AM), <https://www.vox.com/2016/1/5/10714746/waco-ruby-ridge-oregon> [<https://perma.cc/GLD5-PL2W>].

<sup>117</sup> *Id.*

<sup>118</sup> Andrew Gumbel, *Oklahoma City Bombing: 20 Years Later, Key Questions Remain Unanswered*, GUARDIAN (Apr. 13, 2015, 7:00 AM), <https://www.theguardian.com/us-news/2015/apr/13/oklahoma-city-bombing-20-years-later-key-questions-remain-unanswered> [<https://perma.cc/L2HZ-DG58>].

<sup>119</sup> Lind, *supra* note 116.

Department of the Interior that oversees public lands, and an antigovernment cattle rancher and his supporters in Oregon took place in 2014 over whether individuals had to pay for cattle grazing on federal land.<sup>120</sup> These famous standoffs of the 1990s emboldened those with antigovernment worldviews in the Oregon standoff.<sup>121</sup> Law enforcement knew or should have known about antigovernment sentiments on the right, their ability to galvanize, their access to weapons, and their tendency towards violence when confronted by government officials who want to put limits on their behavior.

The failure to recognize the mounting threat from dangerous white right-wing groups proved deadly despite the long history of violence and their proclamations of exactly what they planned and prepared to do. Some will question whether the breach of the US Capitol was a result of a failure to adequately appreciate the threat posed by the rioters and insurrectionists planning to disrupt Congress, or something more willful. And there can be no doubt that Capitol Police did not prepare in a way to protect the Capitol from the threat it faced.

### *B. Capitol Police Had the Resources to Defend the Capitol*

Capitol Police had the resources that would have allowed them to successfully defend the Capitol had they prepared properly for the threat. Theirs is one of the best funded police forces in the country, with a more than \$500 million budget in fiscal year 2021 to cover salaries, weapons, tactical gear, and other equipment.<sup>122</sup> In 2016, the budget consumed \$1 for every \$12 Congress spent on its operations.<sup>123</sup> By 2016, the Capitol Police budget had grown six-fold and the size of the force had doubled since the 1990s.<sup>124</sup> The force has 2,100 police officers to guard a small number of buildings and the members of

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<sup>120</sup> Jaime Fuller, *The Long Fight Between the Bundys and the Federal Government, from 1989 to Today*, WASH. POST (Jan. 4, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2014/04/15/everything-you-need-to-know-about-the-long-fight-between-cliven-bundy-and-the-federal-government/> [https://perma.cc/Z8BA-53K5].

<sup>121</sup> *Id.*

<sup>122</sup> Chris Marquette, *Capitol Police, a Department Shrouded in Secrecy*, ROLL CALL (June 15, 2020, 5:00 AM), <https://www.rollcall.com/2020/06/15/capitol-police-a-department-shrouded-in-secrecy/> [https://perma.cc/RQV6-XGPU].

<sup>123</sup> David Hawkings, *Capitol Police: A Spending Force*, ROLL CALL (Apr. 7, 2016, 6:00 AM), <https://www.rollcall.com/2016/04/07/capitol-police-a-spending-force/> [https://perma.cc/7LF2-3W4A].

<sup>124</sup> Hawkings, *supra* note 123.

Congress.<sup>125</sup> Approximately 1,400 US Capitol Police officers were reportedly on duty at the time of the siege.<sup>126</sup>

The District of Columbia has a number of police departments with whom the Capitol Police have mutual aid agreements.<sup>127</sup> This means that other emergency responders have agreed, in advance, to help in an emergency.<sup>128</sup> The Metropolitan Police Department, one of the ten largest police departments in the United States,<sup>129</sup> along with the District's largest police force, did arrive as reinforcements. In addition to the resources of these two large police departments, the Amtrak Police Department is just two blocks away.<sup>130</sup> The District of Columbia also has the US Park Police<sup>131</sup> that police the nearby National Mall, the Supreme Court Police that are across the street from the Capitol,<sup>132</sup> and the Metro Transit Police Department that monitor DC's subway system.<sup>133</sup> In addition, a number of federal law enforcement police departments have their headquarters or offices in DC, including the US Marshals Service,<sup>134</sup> the Federal Protective Service,<sup>135</sup> the FBI,<sup>136</sup> the ATF<sup>137</sup> and the US Drug Enforcement Administration (DEA).<sup>138</sup> There were thousands of

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<sup>125</sup> Beth Reinhard et al., *With Budget but Little Accountability, Long-troubled Capitol Police Face Questions After Siege*, WASH. POST (Jan. 12, 2021, 9:12 AM), [https://www.washingtonpost.com/investigations/capitol-police-accountability-lapses-oversight/2021/01/12/15c5bd23c-5389-11eb-89bc-7f51ceb6bd57\\_story.html](https://www.washingtonpost.com/investigations/capitol-police-accountability-lapses-oversight/2021/01/12/15c5bd23c-5389-11eb-89bc-7f51ceb6bd57_story.html) [<https://perma.cc/L6Q2-5KWG>].

<sup>126</sup> Jaclyn Diaz, *Ex-Capitol Police Chief Says Requests for National Guard Denied 6 Times in Riots*, NPR (Jan. 11, 2021, 6:17 AM), <https://www.npr.org/2021/01/11/955548910/ex-capitol-police-chief-rebuffs-claims-national-guard-was-never-called-during-riots> [<https://perma.cc/HNH3-FQY3>].

<sup>127</sup> D.C. CODE § 2-209.04 (2001).

<sup>128</sup> See FED. EMERGENCY MGMT. AGENCY, NATIONAL INCIDENT MANAGEMENT SYSTEM GUIDELINE FOR MUTUAL AID 1-2 (Nov. 2017), [https://www.fema.gov/sites/default/files/2020-07/fema\\_nims\\_mutual\\_aid\\_guideline\\_20171105.pdf](https://www.fema.gov/sites/default/files/2020-07/fema_nims_mutual_aid_guideline_20171105.pdf) [<https://perma.cc/7TXU-DR9Y>].

<sup>129</sup> *About MPD*, DC.GOV, <https://mpdc.dc.gov/page/about-mpd> [<https://perma.cc/5GMD-MB4E>].

<sup>130</sup> *Cooperative Agreement: Amtrak and MPDC*, DC.GOV, <https://mpdc.dc.gov/page/cooperative-agreement-amtrak-and-mpdc> [<https://perma.cc/JYP3-ZZDU>].

<sup>131</sup> *United States Park Police*, NAT'L PARK SERV., <https://www.nps.gov/subjects/uspp/index.htm> [<https://perma.cc/VR6L-C5DV>].

<sup>132</sup> See *The Supreme Court Police*, SUP. CT., <https://www.supremecourt.gov/jobs/police/police.aspx> [<https://perma.cc/2RMY-URWV>]; *Visiting the Court: Hours & Directions*, SUP. CT., <https://www.supremecourt.gov/visiting/hoursanddirections.aspx> [<https://perma.cc/9S7Q-RU2Y>].

<sup>133</sup> *Metro Transit Police Department*, WASH. METRO. AREA TRANSIT AUTH., <https://www.wmata.com/about/transit-police> [<https://perma.cc/6NSH-ARTL>].

<sup>134</sup> *District of Columbia*, U.S. MARSHALS SERV., <https://www.usmarshals.gov/district/navigation/dc.htm> [<https://perma.cc/2CW7-Q2HE>].

<sup>135</sup> *The Federal Protective Service*, DEP'T OF HOMELAND SEC., <https://www.dhs.gov/topic/federal-protective-service> [<https://perma.cc/2VMG-SM5T>].

<sup>136</sup> *Contact Us*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/contact-us/fbi-headquarters> [<https://perma.cc/89D6-DVF5>].

<sup>137</sup> *Contact ATF Headquarters*, ATF, <https://www.atf.gov/contact/contact-atf-headquarters> [<https://perma.cc/VR3R-NCG8>].

<sup>138</sup> *Washington, DC Division*, U.S. DRUG ENF'T ADMIN., <https://www.dea.gov/divisions/washington-dc> [<https://perma.cc/VR6L-C5DV>].

additional police officers who could have been activated in the defense of the Capitol had Capitol Police asked for their assistance. Having too few law enforcement officers on scene was an avoidable problem.

The rally and plan to attack the Capitol was organized on public social media platforms like Twitter, Parler, Reddit, Instagram, and Facebook<sup>139</sup> for law enforcement who cared to be prepared to see. In fact, news media reported about the plans.<sup>140</sup> Due to the severity of the threats, the Washington, DC government issued warnings to its citizens not to travel downtown.<sup>141</sup> Non-law enforcement agencies recognized the threat of violence in the District of Columbia.

But if that was not sufficient warning for Capitol Police, Proud Boy<sup>142</sup> Enrique Tarrío was arrested a few days before the attack for the destruction of a flag belonging to a Black church in Washington, DC that took place months earlier.<sup>143</sup> Tarrío was arrested after traveling to the District of Columbia for the January 6 rally.<sup>144</sup> According to police, high-capacity magazines for the demonstration were found during that arrest.<sup>145</sup> This would have been an indication that the protestors planned violence. So even law enforcement officials not savvy enough to pay attention to social media had warning.

In the days before the siege, then Capitol Police Chief Steven Sund rejected offers from the Pentagon for additional help, yet assured House Speaker Nancy Pelosi and other lawmakers that he had a plan and was prepared.<sup>146</sup> Both the NYPD and FBI warned the Capitol Police of the threats they

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<sup>139</sup> Jessica Guynn, *Burn Down DC: Violence that Erupted at Capitol Was Incited by Pro-Trump Mob on Social Media*, USA TODAY (Feb. 12, 2021, 1:53 PM), <https://www.usatoday.com/story/tech/2021/01/06/trump-riot-twitter-parler-proud-boys-boogaloos-antifa-qanon/6570794002/> [https://perma.cc/6Y5E-EC32].

<sup>140</sup> Ben Collins & Brandy Zadrozny, *Extremists Made Little Secret of Ambitions to 'Occupy' Capitol in Weeks Before Attack*, NBC NEWS (Jan. 8, 2021, 12:36 PM), <https://www.nbcnews.com/tech/internet/extremists-made-little-secret-ambitions-occupy-capital-weeks-attack-n1253499> [https://perma.cc/E92A-FY7P].

<sup>141</sup> Julie Zauzmer Weil, *Bowser Warns D.C. Residents to Stay Away When Trump Supporters Amass Downtown Wednesday*, WASH. POST (Jan. 3, 2021, 6:44 PM), <https://www.washingtonpost.com/dc-md-va/2021/01/03/bowser-dc-trump-supporters-january-6/> [https://perma.cc/56KD-YUMQ].

<sup>142</sup> See *supra* note 8.

<sup>143</sup> Peter Hermann & Martin Weil, *Proud Boy Leader Arrested in the Burning of Church's Black Lives Matter Banner, D.C. Police Say*, WASH. POST (Jan. 4, 2021, 7:42 PM), [https://www.washingtonpost.com/local/public-safety/proud-boys-enrique-tarrio-arrest/2021/01/04/8642a76a-4edf-11eb-b96e-0e54447b23a1\\_story.html](https://www.washingtonpost.com/local/public-safety/proud-boys-enrique-tarrio-arrest/2021/01/04/8642a76a-4edf-11eb-b96e-0e54447b23a1_story.html) [https://perma.cc/XPT4-XCBH].

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> See Carol Leonnig et al., *Inside the Capitol Riot: Lawmakers and Aides Begged for Help as Police Lost Control*, INDEPENDENT (Jan. 10, 2021, 2:57 PM), <https://www.independent.co.uk/news/world/americas/us-politics/capitol-riots-senators-lawmakers-help-police-b1785079.html> (last visited Feb. 4, 2022).

were seeing online about the violent nature of the planned attack.<sup>147</sup>

The Capitol Police did not have helmets, gas masks, or riot gear on hand to protect officers from the bear spray, other aerosols, and flash bang grenades, nor did they implement other crowd control measures.<sup>148</sup> The situation was only brought under control after the Metropolitan Police Department arrived on the scene with reinforcements and with flash bang grenades and tear gas.<sup>149</sup> It is hard to imagine why Capitol Police would not have been provided with that type of equipment for a demonstration that promised to be violent in light of the intelligence they received and the history of violence from the groups promised to be in attendance.

An inspector general report released in April 2021 found that the Capitol Police ignored very specific warnings from the FBI about the danger posed to law enforcement and the public generally.<sup>150</sup> The intelligence report warned, “Stop the Steal’s propensity to attract white supremacists, militia members and others who actively promote violence may lead to a significantly dangerous situation for law enforcement and the general public alike.”<sup>151</sup> The Capitol Police received the warning on January 3, three days before the attack, that “[u]nlike previous . . . protests, . . . Congress itself [was] the target on the 6th,” and that a map of the Capitol’s tunnel system was circulating online.<sup>152</sup> Even though the Capitol Police had these warnings, someone nevertheless wrote in a report to Congress that there were “no specific known threats . . . to the joint session of Congress.”<sup>153</sup>

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<sup>147</sup> Ken Dilanian et al., *FBI, NYPD Told Capitol Police About Possibility of Violence Before Riot, Senior Officials Say*, NBC NEWS (Jan. 10, 2021, 4:02 PM), <https://www.nbcnews.com/news/crime-courts/fbi-nypd-told-capitol-police-about-possibility-violence-riot-senior-n1253646> [https://perma.cc/83TK-NRZX].

<sup>148</sup> Michael S. Schmidt & Luke Broadwater, *Officers’ Injuries, Including Concussions, Show Scope of Violence at Capitol Riot*, N.Y. TIMES (July 12, 2021), <https://www.nytimes.com/2021/02/11/us/politics/capitol-riot-police-officer-injuries.html> [https://perma.cc/J2VX-ALK2].

<sup>149</sup> Martin Austerhuhle & Jenny Gathright, *After a Mob Took Congress, Many Ask: How Did the Police Allow It to Happen?*, NPR (Jan. 7, 2021), <https://www.npr.org/local/305/2021/01/07/954459847/after-a-mob-took-congress-many-ask-how-did-the-police-allow-it-to-happen> [https://perma.cc/GPQ4-NXPA].

<sup>150</sup> Alex Moe et al., *Capitol Police Ignored Intelligence Warnings Ahead of Jan. 6 Riots, Watchdog Report Finds*, NBC NEWS (Apr. 14, 2021, 4:57 PM), <https://www.nbcnews.com/politics/congress/capitol-police-ignored-intelligence-warnings-ahead-jan-6-riots-watchdog-n1264054> [https://perma.cc/27Y3-HYMN].

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

In the days immediately following the siege, former Metropolitan Police Department Chief Charles Ramsey acknowledged that implicit bias by police officials was at play.<sup>154</sup> In an interview, Ramsey said,

There's a bias that exists that you just can't ignore . . . They're mostly white. They claim they love police. I think as a result of that, some people let their guard down. They didn't think they would attack and do the things they did. . . I don't see how you can draw any other conclusion.<sup>155</sup>

Implicit bias caused Capitol Police to be unprepared for the size, the strength, or the motives of the protestors. The unconscious bias of police that gave the rioters the benefit of the doubt is one of the ways that racial bias contributed to the breach of one of our houses of government, but it is not the only one.

While, in this instance, unconscious biases meant that police did not see the white crowd as dangerous, unconscious biases hurt people of color in two ways. First, police overestimate Black people and other people of color as threats and, secondly, police underestimate the threats that whites pose to people of color.<sup>156</sup> Unconscious biases must be neutralized out of police departments to protect everyone. These biases result in many of the same harms as explicit racial biases against people of color, like biases creating beliefs that a Black person doing something benign is suspicious that results in stops of people of color, or perceiving a Black person as more dangerous than a white person that ultimately results in police violence. As a result of these law enforcement biases, democracy itself was put at risk in early 2021. Yet, these biases put Black and Brown people in danger every single day.

### III. SOME CAPITOL POLICE OFFICERS' SYMPATHIES WERE WITH RIOTERS

Whether or not anyone in the Capitol Police upper management deliberately sabotaged the Capitol Police preparedness in order to enable the attack may be unknowable. Some reports from Capitol Police describe an absence of leadership

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<sup>154</sup> Kimberly Dozier & Melissa Chan, *Accusations of Bias, Racism Swirl Around Capitol Police After Mob Attack*, TIME (Jan. 8, 2021, 10:57 PM), <https://time.com/5928204/capitol-police-mob-attack/> [<https://perma.cc/HD6S-9CQS>].

<sup>155</sup> *Id.*

<sup>156</sup> See Press Release, Am. Psych. Ass'n, *People See Black Men as Larger, More Threatening than Same-Sized White Men* (Mar. 13, 2021), <https://www.apa.org/news/press/releases/2017/03/black-men-threatening> [<https://perma.cc/Q257-4PDE>]. Sociological evidence suggests that police see Black men as more threatening than their white counterparts. See Joshua Correll et al., *The Police Officer's Dilemma: A Decade of Research on Racial Bias in the Decision to Shoot*, 8 SOC. & PERSONALITY PSYCH. 201, 202 (2014).



that day.<sup>157</sup> Reportedly, “[o]fficers with days off were not recalled” and those who completed a shift were allowed to go home that day.<sup>158</sup> According to officer accounts, officers were told to prepare that day as if it were “any other protest.”<sup>159</sup> They were not informed that the organizers of the attack had planned to breach the Capitol, despite the fact that there were clear warnings about violence on social media platforms.<sup>160</sup> Officers were not told to bring their gas masks to work that day despite the fact that they had been issued them.<sup>161</sup> The chief never communicated to officers, never came over the radio to the line officers, and at least one deputy chief was not even at work that day.<sup>162</sup>

The Capitol Police offered no press conference about the Capitol siege and their officers’ role in it in the days immediately following the attack. The sergeant at arms of the House and the sergeant at arms of the Senate have both declined interviews of any sort both before and after the resignations they were asked to give.<sup>163</sup> The public has no accounting of their actions on January 6, 2020, or the days leading up to it and likely will not unless they are brought before Congress to testify.

At least thirty-five Capitol Police were being investigated for their role in the attack by the Capitol Police Office of Professional Responsibility.<sup>164</sup> Six have been suspended with pay.<sup>165</sup> The public has seen from contemporaneous photographs and videos that day that at least one Capitol Police officer posed for selfies with rioters.<sup>166</sup> Videos appear to show some officers allowing rioters past barricades, or in some instances, inside the building.<sup>167</sup> It is also reported that eight hundred people made

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<sup>157</sup> Chris Marquette, *Failure to Communicate: The Capitol Police Leadership Gap on Jan. 6*, ROLL CALL (May 10, 2021, 6:00 AM), <https://www.rollcall.com/2021/05/10/failure-to-communicate-the-capitol-police-leadership-gap-on-jan-6/> [<https://perma.cc/CVU2-3V6C>].

<sup>158</sup> *Id.*

<sup>159</sup> Emmanuel Felton, *Black Police Officers Describe the Racist Attacks They Faced as They Protected the Capitol*, BUZZFEED NEWS (Jan. 9, 2021, 4:32 PM), <https://www.buzzfeednews.com/article/emmanuelfelton/Black-capitol-police-racism-mob> [<https://perma.cc/RQQ4-PC9Q>].

<sup>160</sup> *Id.*; see *supra* text accompanying notes 139–140.

<sup>161</sup> Felton, *supra* note 159.

<sup>162</sup> *Id.*

<sup>163</sup> Glenn Thrush & Helene Cooper, *The Capitol Police Chief Says His Pleas for Backup Were Ignored by the Sergeants-at-Arms and the Pentagon*, N.Y. TIMES (Jan. 11, 2021), <https://www.nytimes.com/2021/01/11/us/capitol-police-backup-ignored.html> [<https://perma.cc/3CYY-8SU5>].

<sup>164</sup> Mai, *supra* note 26.

<sup>165</sup> *Id.*

<sup>166</sup> Louise Hall, *Police Officer Filmed Posing for Selfie with Pro-Trump Rioter Inside US Capitol*, INDEPENDENT (Jan. 7, 2021, 2:15 PM), <https://www.independent.co.uk/news/world/americas/us-politics/police-officer-selfie-rioter-us-capitol-trump-b1783760.html> (last visited Feb. 4, 2022).

<sup>167</sup> *Id.*

their way inside the Capitol.<sup>168</sup> Not all of them were met with resistance by police.<sup>169</sup>

In addition to the officers under investigation by Capitol Police, one Capitol Police officer has been charged in relation to the events of that day.<sup>170</sup> That officer, a more than twenty-five-year veteran of the force, is alleged to have committed obstruction of justice, by warning a participant in the attack to take down his social media posts, and thus destroying evidence about his conduct that day.<sup>171</sup> According to prosecutors, the officer informed the suspect that law enforcement was investigating everyone who entered the Capitol and that taking down posts about entering the building was in his interest.<sup>172</sup> The Capitol Police officer also indicated that he was sympathetic to the “political stance” of the suspect.<sup>173</sup>

It is not hard to imagine that other officers employed by the Capitol Police may be pro-Trump and involved in right or even white-identity extremist groups. In the days after the Capitol siege, 12 percent of Americans polled said that they supported the actions taken by the rioters.<sup>174</sup> It is easy, then, to imagine that at least a similar percentage of Capitol Police had similar sympathies. Given that white men are the group most likely to have voted for Donald Trump,<sup>175</sup> and that, as discussed below, white men are likely overrepresented on the Capitol Police force, it could be an even larger share than 12 percent of those guarding lawmakers that day that were in sympathy to the rioters.

Unfortunately, we do not know the exact demographics of the Capitol Police. It is believed that the force is “only 29% Black in a city that’s 46% Black.”<sup>176</sup> The Capitol Police is a uniquely

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<sup>168</sup> Devlin Barrett & Spencer Hsu, *Justice Department, FBI Debate Not Charging Some of the Capitol Rioters*, WASH. POST (Jan. 23, 2021, 1:21 PM), [https://www.washingtonpost.com/national-security/doj-capitol-rioters-charges-debate/2021/01/23/3b0cf112-5d97-11eb-8bcf-3877871c819d\\_story.html](https://www.washingtonpost.com/national-security/doj-capitol-rioters-charges-debate/2021/01/23/3b0cf112-5d97-11eb-8bcf-3877871c819d_story.html) [<https://perma.cc/BS3Z-FKE9>].

<sup>169</sup> *Id.*

<sup>170</sup> Luke Broadwater, *Capitol Police Officer Charged with Obstructing Justice in Jan. 6 Case*, N.Y. TIMES (Oct. 17, 2021), <https://www.nytimes.com/2021/10/15/us/politics/capitol-riot-police-officer-charged.html> [<https://perma.cc/E7UL-4P79>].

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> Chris Kahn, *Majority of Americans Want Trump Removed Immediately After U.S. Capitol Violence—Reuters/Ipsos Poll*, REUTERS (Jan. 8, 2021, 3:55 PM), <https://www.reuters.com/article/us-usa-election-trump-poll/majority-of-americans-want-trump-removed-immediately-after-u-s-capitol-violence-reuters-ipsos-poll-idUSKBN29D2VG> [<https://perma.cc/PN55-QGRM>].

<sup>175</sup> Fabiola Cineas & Anna North, *We Need to Talk About the White People Who Voted for Donald Trump*, VOX (Nov. 7, 2020, 9:00 AM), <https://www.vox.com/2020/11/7/21551364/white-trump-voters-2020> [<https://perma.cc/X9UQ-27XH>].

<sup>176</sup> Joshua Kaplan & Joaquin Sapien, “No One Took Us Seriously”: Black Cops Warned About Racist Capitol Police Officers for Years, PROPUBLICA (Jan. 14, 2020, 5:30 AM),

opaque law enforcement organization. Like Congress itself, it is not subject to the Freedom of Information Act (FOIA).<sup>177</sup> As a result, even basic information is not available. The exact number of officers or the demographic makeup of the force is not publicly available. Whites, and white males specifically, are routinely overrepresented in police departments.<sup>178</sup> Since the Capitol Police does not post its demographics publicly, it is likely that their racial composition is not noteworthy.

There have been past allegations of racism in the Capitol Police Department for years. Lawsuits going back as far as 2001 alleged the use of racial slurs, images of a swastika, and a K-9 police dog named after a Black officer, in addition to a failure to promote Black officers.<sup>179</sup> More than 250 Black police officers with the Capitol Police have sued their employer or former employer for racial discrimination.<sup>180</sup> Congress has not paid sufficient attention to this issue. And because they are the only body to whom the Capitol Police is accountable, the issue of racism by Capitol Police has largely been under the radar.<sup>181</sup>

#### IV. LAW ENFORCEMENT FROM ALL OVER THE COUNTRY ACTIVELY PARTICIPATED IN THE RALLY AND THE ATTACK

Prosecutors and former prosecutors attended the rally that led to the storming of the US Capitol while the Senate voted to certify the November 2020 election results. A Tennessee prosecutor is said to have been at the event that preceded the riot.<sup>182</sup> An Indiana prosecuting attorney was also there.<sup>183</sup> As mentioned, Trump's attorney, Rudy Giuliani, spoke at the rally and called for violence.<sup>184</sup>

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<https://www.propublica.org/article/no-one-took-us-seriously-black-cops-warned-about-racist-capitol-officers-for-years> [<https://perma.cc/HQK6-QJYM>].

<sup>177</sup> See Marquette, *supra* note 122.

<sup>178</sup> See Dan Keating & Kevin Uhrmacher, *In Urban Areas, Police Are Consistently Much Whiter than the People They Serve*, WASH. POST (June 4, 2020), <https://www.washingtonpost.com/nation/2020/06/04/urban-areas-police-are-consistently-much-whiter-than-people-they-serve/> [<https://perma.cc/3C56-SCRJ>].

<sup>179</sup> *After Legacy of Racism Charges, Capitol Police Promotes First Black Female Captains*, WJLA (Apr. 1, 2012), <https://wjla.com/news/local/after-legacy-of-racism-charges-capitol-police-promotes-first-Black-female-captains--74435> [<https://perma.cc/ZSQ8-UCBM>].

<sup>180</sup> Kaplan & Sapien, *supra* note 176.

<sup>181</sup> See *id.*

<sup>182</sup> Jamie Satterfield, *Tennessee Prosecutor Scrubbed Evidence of Attendance at DC Rally Ahead of Capitol Riot*, KNOXVILLE NEWS SENTINEL (Jan. 15, 2021, 3:56 PM), <https://www.knoxnews.com/story/news/politics/2021/01/15/tennessee-prosecutor-scrubbed-evidence-attendance-capitol-rally-before-riot/4163220001/> [<https://perma.cc/WWE4-7EQC>].

<sup>183</sup> Fox19 Digital Staff, *Dearborn Co. Prosecutor Attended Trump Speech; Condemns Violence at Capitol*, FOX19 (Jan. 19, 2021, 12:37 PM), <https://www.fox19.com/2021/01/19/dearborn-co-prosecutor-attended-trump-speech-condemns-violence-capitol/> [<https://perma.cc/TY4K-5ZJ4>].

<sup>184</sup> See Cuza, *supra* note 86.

And the Rule of Law Defense Fund (the Republican attorneys general group) helped finance and promote the rally that preceded the riot.<sup>185</sup> Like police, prosecutors are disproportionately white, as is the legal profession generally.<sup>186</sup> Even if one assumes that, like police, this disproportionately white demographic was more likely to have voted for Trump for president, it is concerning that even despite the additional education lawyers receive, there are prosecutors who believe the myth that the 2020 election was stolen.

Though attendance at a political rally is certainly not criminal, it is cause for concern. Attendance at the “Stop the Steal” rally on the day that Congress was to certify state electoral votes demonstrates an inability to distinguish fact from fiction. Because of the amount of power afforded police and prosecutors, local governments may not want to entrust those gullible enough to fall for inaccurate conspiracy theories and prone to right-wing propaganda with the security of others. Prosecutors and police officers attending a rally that led to a literal insurrection in which hundreds of people broke the law undermines public confidence of those who are sworn to uphold it.

Off-duty police officers with far-right ideologies from all over the country are alleged to have participated in the attack. According to a tally kept by *The Appeal*, almost fifty police officers are currently under investigation, and this tally does not include the Capitol Police under investigation.<sup>187</sup> The figure represents officers from seventeen different states.<sup>188</sup> An officer from a DC suburb was in attendance and was under investigation.<sup>189</sup> A lieutenant sheriff in Bexar County, Texas is under investigation for her role in breach of the Capitol.<sup>190</sup> Chris West, the sheriff of Canadian County, Oklahoma, traveled to the rally, but claimed not to have entered the Capitol buildings.<sup>191</sup>

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<sup>185</sup> See Brian Lyman, *Report: Donor Threatened to Withhold Contribution to Alabama AG's Dark Money Group If It Didn't Promote Capitol Rally*, MONTGOMERY ADVERTISER (Jan. 21, 2021, 1:47 PM), <https://www.montgomeryadvertiser.com/story/news/2021/01/21/donor-threatened-dark-money-group-headed-steve-marshall/4243389001/> [<https://perma.cc/4UKT-QQAD>].

<sup>186</sup> *Justice for All*, REFLECTIVE DEMOCRACY CAMPAIGN (July 2015), [https://wholeads.us/wp-content/uploads/2019/03/Justice-For-All-Report\\_31319.pdf](https://wholeads.us/wp-content/uploads/2019/03/Justice-For-All-Report_31319.pdf) [<https://perma.cc/KW9M-LHL2>].

<sup>187</sup> Jonathan Ben-Menachem, *The Cops at the Capitol*, APPEAL (Jan. 13, 2021), <https://theappeal.org/the-cops-at-the-capitol/> [<https://perma.cc/FG55-LBUT>] (click link to “spreadsheet” in second paragraph).

<sup>188</sup> *Id.*

<sup>189</sup> Lilly Price, *Anne Arundel Police Officer Suspended While Department Investigates Possible Involvement in Capitol Insurrection*, CAP. GAZETTE (Jan. 11, 2021, 6:25 PM), <https://www.capitalgazette.com/news/ac-cn-anne-arundel-police-suspension-capitol-insurrection-2021-0111-pqxjmesiindrjnyptffeggz7we-story.html> (last visited Feb. 4, 2022).

<sup>190</sup> Ben-Menachem, *supra* note 187.

<sup>191</sup> *Id.*

Several officers from Seattle traveled to DC for the riot and were placed on administrative leave.<sup>192</sup> Officers from Pennsylvania and California were in attendance.<sup>193</sup> A police chief from a New Hampshire town was there as well.<sup>194</sup> There were reports by Capitol Police officers that officers from other jurisdictions flashed their badges in order to gain entry into the Capitol.<sup>195</sup> The use of badges to show authority to violate the law is serious cause for concern.

It was not only beat officers who were involved in the events of January 6. There are allegations that a Philadelphia, Pennsylvania detective is under investigation for her attendance at the event.<sup>196</sup> The detective worked for the Recruit Background Investigations Unit, running background checks of officers being hired by the department, including conducting social media searches.<sup>197</sup> A Kentucky police officer was “reassigned” after attending the January 6, 2021 rally.<sup>198</sup> He was the state’s top recruiter.<sup>199</sup> Prior to his role as recruiter, he was the public affairs commander for the department.<sup>200</sup> It is concerning that public-facing officers whose job it was to attract young officers to the department were in attendance at the Pro-Trump rally organized by reality-denying, far-right forces.

There are allegations against several police officers for their involvement in the storming of the Capitol itself,<sup>201</sup> not just

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<sup>192</sup> Elise Takahama & Lewis Kamb, *Seattle Police Officers Who Were in DC During Riot at US Capitol Placed on Administrative Leave*, SEATTLE TIMES (Jan. 8, 2021, 11:01 PM), <https://www.seattletimes.com/seattle-news/seattle-police-officers-who-were-in-dc-during-wednesday-riots-placed-on-administrative-leave/> [https://perma.cc/7QTG-5R2C].

<sup>193</sup> Neil MacFarquhar, *Police Officers Who Traveled to Washington Are Being Investigated for Connection to the Capitol Melee.*, N.Y. TIMES (Jan. 9, 2021), <https://www.nytimes.com/2021/01/09/us/politics/capitol-police.html> [https://perma.cc/GY W2-G7DU]; Tom Porter, *Off-Duty Police Officers and Members of the Military Are Being Investigated over the Attack on the US Capitol*, BUS. INSIDER (Jan. 11, 2021, 7:00 AM), <https://www.businessinsider.com/off-duty-cops-and-military-investigated-after-capitol-riot-2021-1> [https://perma.cc/7RN4-ZGDM].

<sup>194</sup> Kim Bellware, *Police Departments Across the U.S. Open Probes into Whether Their Own Members Took Part in the Capitol Riot*, WASH. POST (Jan. 9, 2021, 10:00 PM), <https://www.washingtonpost.com/national-security/2021/01/09/investigating-police-rioters/> [https://perma.cc/NH4Y-PJPX].

<sup>195</sup> Felton, *supra* note 159.

<sup>196</sup> Mike Newall & William Bender, *Philadelphia Police Detective Subject of Internal Affairs Investigation After Allegedly Attending D.C. Rally*, PHILA. INQUIRER (Jan. 10, 2021), <https://www.inquirer.com/news/philadelphia/philly-detective-reassigned-trump-insurrection-capitol-20210111.html> [https://perma.cc/5KKH-KP6B].

<sup>197</sup> *Id.*

<sup>198</sup> Eleanor Klibanoff, *Kentucky State Police’s Top Recruiter Reassigned for Attending D.C. Trump Rally*, WFPL (Feb. 5, 2021), <https://wfpl.org/kentucky-state-polices-top-recruiter-reassigned-for-attending-capitol-rally/> [https://perma.cc/7GXB-2MDE].

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> Eric Westervelt, *Off-Duty Police Officers Investigated, Charged with Participating in Capitol Riot*, NPR (Jan. 15, 2021, 1:07 PM),

for attending the rally that preceded the violence. Two police officers from the same police department in a small town in Virginia have been arrested for breaking into the Capitol.<sup>202</sup> One boasted of his conduct on social media, “we actually attacked the government,” and in another post he is alleged to have written that he was “proud” of his role.<sup>203</sup> A white Chicago, IL police officer texted an acquaintance that he entered the Capitol on January 6, and later that day texted the same person the command, “N[\*\*\*\*] Don’t snitch.”<sup>204</sup> A Pennsylvania police officer from North Cornwall Township is accused of being at the front of the line of people that breached the Capitol.<sup>205</sup> Although he is alleged to have actually pushed against police, he apparently lamented on social media platform that the FBI was “targeting police” who were at the Capitol.<sup>206</sup> That police officers felt that they could simply take off of work to attend an event—the aim of which was to stop Congress from carrying out its constitutional duties of certifying the electoral vote—speaks to how well insulated officers are from consequences in their employment. It is chilling to consider that the police entrusted to uphold the Constitution created a constitutional crisis and delayed the certification of the election.

Not only did some officers think that they would be able to participate in this attempt to undermine election results with no consequences, others thought that the events should have gone even further. Days after the attack on the Capitol, a sheriff’s deputy in Polk County, Florida was arrested and charged with threats over an exchange he made with another officer through text messaging.<sup>207</sup> In the texts, he expressed sympathy for the rioters and outrage at the officer who shot and

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<https://www.npr.org/2021/01/15/956896923/police-officers-across-nation-face-federal-charges-for-involvement-in-capitol-riots> [<https://perma.cc/JBL6-EDG4>].

<sup>202</sup> Press Release, U.S. Att’y’s Off. for D.C., U.S. Dep’t. of Justice, Two Off-Duty Virginia Police Officers Charged in Federal Court Following Events at the U.S. Capitol (Jan. 13, 2021), <https://www.justice.gov/usao-dc/pr/two-duty-virginia-police-officers-charged-federal-court-following-events-us-capitol> [<https://perma.cc/2GLQ-BENB>].

<sup>203</sup> *Id.*

<sup>204</sup> Christopher Mathias, *Chicago Cop Arrested in Jan. 6 Attack Alleged Texted ‘We Inside the Capital LMFAO,’* HUFFINGTON POST (June 12, 2021), [https://www.huffpost.com/entry/chicago-cop-arrested-capitol-riot-chwiesiuk\\_n\\_60c3c15ce4b0583aec44985c](https://www.huffpost.com/entry/chicago-cop-arrested-capitol-riot-chwiesiuk_n_60c3c15ce4b0583aec44985c) [<https://perma.cc/C7NM-EWD3>].

<sup>205</sup> Hannah Knowles, *Front of the Pack: Off-duty Pa. Officer Charged at Police During the Capitol Riot, FBI Says*, WASH. POST (Feb. 21, 2021, 8:00 PM), <https://www.washingtonpost.com/nation/2021/02/21/officer-joseph-fischer-charged-capitol-riots/> [<https://perma.cc/33S8-WAQP>].

<sup>206</sup> *Id.*

<sup>207</sup> WFLA 8 On Your Side Staff, *I’ll Kill Them All: Polk County Deputy Arrested for Threatening Feds at U.S. Capitol Released on Bond*, NEWS CHANNEL 8 (Jan. 20, 2021, 6:06 AM), <https://www.wfla.com/news/polk-county/polk-county-deputy-arrested-after-written-threats-made-regarding-u-s-capitol-riots/> [<https://perma.cc/3RSN-44KF>].

killed a person who breached the Capitol (presumably Ashli Babbitt, the woman who was killed by police at the Capitol).<sup>208</sup> He said to his fellow officer that the streets of DC should run red with blood, among other disturbing plans.<sup>209</sup>

Police officers who spent their entire careers working for the government fought against their own government on January 6. Retired police officers participated in the insurrection. A former police chief from La Habra, California was indicted along five others on conspiracy charges.<sup>210</sup> The former California police chief is said to have founded a group called the American Phoenix Project.<sup>211</sup> The group called for violence and even the execution of those supporting President Biden's presidency being certified at the Capitol that day.<sup>212</sup> And a retired NYPD officer wearing a bullet proof vest is alleged to have attacked a police officer with a metal flagpole that had been used for a Marine Corps flag.<sup>213</sup>

To accomplish their goals, current and retired officers were at odds with the officers assigned to protect the Capitol and those inside. Police officers attacked a building that was protected by police officers.<sup>214</sup> To gain entry to the Capitol building breached in the melee, it was clear that police authority was undermined, and many officers were injured. Police unions report that 140 police officers were injured at the Capitol on January 6.<sup>215</sup> Four officers who were at the Capitol on January 6 "have died by suicide."<sup>216</sup> Officers suffered broken bones, head injuries, and were stabbed and beaten by the mob.<sup>217</sup> Police officers were willing to disobey

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<sup>208</sup> See *id.*; see also Ellen Barry et al., *Woman Killed in Capitol Embraced Trump and QAnon*, N.Y. TIMES (Aug. 23, 2021), <https://www.nytimes.com/2021/01/08/us/who-was-ashli-babbitt.html> [<https://perma.cc/PY2C-RRVD>].

<sup>209</sup> *Id.*

<sup>210</sup> Alanna Durkin Richer, *Ex-police Chief, 5 Others Charged in Capitol Riot Conspiracy*, USA TODAY (June 11, 2021, 1:42 AM), <https://www.usatoday.com/story/news/politics/2021/06/10/ex-police-chief-5-others-charged-capitol-riot-conspiracy/7646399002/> [<https://perma.cc/5JTK-9NWT>].

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> Jonah E. Bromwich, *Retired N.Y.P.D. Officer Who Guarded City Hall Charged in Capitol Riot*, N.Y. TIMES (July 27, 2021), <https://www.nytimes.com/2021/02/23/nyregion/nypd-officer-arrested-capitol-riot.html> [<https://perma.cc/4837-CE5A>].

<sup>214</sup> Spencer S. Hsu, *Current, Former Police Officers Charged in New Proud Boys Indictment in Capitol Riot*, WASH. POST (July 16, 2021, 5:43 PM), [https://www.washingtonpost.com/local/legal-issues/proud-boys-police-indictment-florida/2021/07/16/1fdbe642-e5a4-11eb-8aa5-5662858b696e\\_story.html](https://www.washingtonpost.com/local/legal-issues/proud-boys-police-indictment-florida/2021/07/16/1fdbe642-e5a4-11eb-8aa5-5662858b696e_story.html) [<https://perma.cc/65V6-LSZV>].

<sup>215</sup> Tom Jackman, *Police Union Says 140 Officers Injured in Capitol Riot*, WASH. POST (Jan. 27, 2021, 7:47 PM), [https://www.washingtonpost.com/local/public-safety/police-union-says-140-officers-injured-in-capitol-riot/2021/01/27/60743642-60e2-11eb-9430-e7c77b5b0297\\_story.html](https://www.washingtonpost.com/local/public-safety/police-union-says-140-officers-injured-in-capitol-riot/2021/01/27/60743642-60e2-11eb-9430-e7c77b5b0297_story.html) [<https://perma.cc/5CKL-KM72>].

<sup>216</sup> Jan Wolfe, *Four Officers Who Responded to the U.S. Capitol Attack Have Died by Suicide*, REUTERS (Aug. 2, 2021, 11:19 PM), <https://www.reuters.com/world/us/officer-who-responded-us-capitol-attack-is-third-die-by-suicide-2021-08-02/> [<https://perma.cc/Q5FM-765M>].

<sup>217</sup> See Jackman, *supra* note 215.

orders given by other officers and to cause circumstances in which other officers were seriously injured and one killed.<sup>218</sup> Lawlessness of some police officers endangered other police and democracy itself.

At least one police officer is alleged to have encouraged the attack without directly participating. A Kissimmee, Florida officer posted multiple posts on social media in support of protestors.<sup>219</sup> We may never know how many other law enforcement officers showed support for those planning the insurrection.

When one contemplates how easily some off-duty police officers and former police officers encouraged and resorted to violence toward one of the most sacred buildings in the country and fellow police, with cameras rolling and the nation watching, it is terrifying to consider what police may be capable of when no one watches, toward the least powerful—communities of color.

#### V. LAW ENFORCEMENT ENABLED THE SIEGE BY NOT ADEQUATELY INVESTIGATING VIOLENT FAR-RIGHT EXTREMISM FOR DECADES

Not only did police actually participate in the breaking into of the Capitol, the participation by officers was enabled by a law enforcement culture, and the culture among the nation as a whole, that has turned a blind eye to white supremacy and far-right extremism by police. Minimizing the threat posed to people of color and the national security threat posed by white supremacists, antigovernment militias, and other far-right groups helped enable the Capitol Siege in January 2021. Likewise, a failure to adequately investigate violent extremism allowed violence by far-right extremists to continue unabated culminating in the violence seen at the Capitol that day.

The FBI warned of the infiltration of law enforcement by white supremacists back in 2006.<sup>220</sup> More than fourteen years later, when a congressional subcommittee held hearings on white supremacists in law enforcement in the fall of 2020, the FBI was invited to discuss what action had taken place since the warning.<sup>221</sup> The FBI declined the invitation and attempted to

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<sup>218</sup> This is likely attributable to the groupthink phenomenon. See *infra* text accompanying notes 226.

<sup>219</sup> Elisha Fieldstadt, *Florida Police Officer Fired After Facebook Posts Supporting Capitol Riot, Mocking 'Black Lives Matter,'* NBC NEWS (Jan. 25, 2021, 3:30 PM), <https://www.nbcnews.com/news/us-news/florida-police-officer-fired-after-face-book-posts-supporting-capitol-riots-n1255535> [<https://perma.cc/V7D6-3PJB>].

<sup>220</sup> FBI COUNTERTERRORISM DIV., *supra* note 70, at 7.

<sup>221</sup> Press Release, Hous. Comm. on Oversight & Reform, S. Comm. Chairman Raskin Releases FBI Document on White Supremacists in Law Enforcement



disavow the report.<sup>222</sup> The chairman of the subcommittee, Congressman Jamie Raskin, then declassified the report so that the public could see that the report had very specific warnings that went unheeded.<sup>223</sup> Deliberate obfuscation about the existence of white supremacists working in law enforcement just months before the Capitol attack shows the extent to which law enforcement failed to protect Congress and the country.

Because the problem of the infiltration of police departments by white supremacists and other extreme identity organizations has been hidden for so long, the problem has been allowed to grow, and at the same time has allowed police departments to develop strategies to minimize the problem. Police chiefs and law enforcement leaders have been quick to label officers who are exposed as being part of a hate group or for having racial animus as a lone wolf or a single bad apple.<sup>224</sup> Distancing the offending officer from the rest of the force has the benefit to the department of making the public feel safe and maintaining the status quo but accomplishes little to make the community safer.

While there is an appeal to minimize the problem of far-right extremism in policing to avoid alarming the public, inaction about the rise of extremism in police ranks has caused a myriad of problems. Law enforcement's failure to investigate domestic threats to security like militias, white supremacists, and other far-right extremism not only leaves sensitive law enforcement information compromised, but the inaction puts dangerous people in positions of power over people of color. While I have previously written about the dangers police pose to people of color,<sup>225</sup> permitting extremism in policing allows extreme political thought to grow within the ranks of law enforcement to the point that it

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(Sept. 29, 2020), <https://oversight.house.gov/news/press-releases/subcommittee-chairman-raskin-releases-fbi-document-on-white-supremacists-in-law> [<https://perma.cc/3FQQ-PZPP>].

<sup>222</sup> See *Confronting Violent White Supremacy (Part IV): White Supremacy in Blue—Infiltration of Local Police Departments: Hearing Before the Subcomm. on C.R. & C.L. of the H. Comm. on Oversight & Reform*, 116th Cong. 3 (2020); see also Alice Sperr, *Unredacted FBI Document Sheds New Light on White Supremacist Infiltration of Law Enforcement*, INTERCEPT (Sept. 29, 2020, 11:30 AM), <https://theintercept.com/2020/09/29/police-white-supremacist-infiltration-fbi/> [<https://perma.cc/DJ4D-6MPS>].

<sup>223</sup> Press Release, Hous. Comm. on Oversight & Reform, *supra* note 221.

<sup>224</sup> See Malorie Cunningham, 'A Few Bad Apples': Phrase Describing Rotten Police Officers Used to Have a Different Meaning, ABC NEWS (June 14, 2020, 11:12 AM), <https://abcnews.go.com/US/bad-apples-phrase-describing-rotten-police-officers-meaning/story?id=71201096> [<https://perma.cc/944F-2XNC>].

<sup>225</sup> See Johnson, *supra* note 29, at 228–33; Vida B. Johnson, *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution*, 44 PEPP. L. REV. 245, 280, 293 (2017); Vida Johnson, *The Capitol Insurrection and White Supremacist Infiltration of US Police*, YES! MAG. (Jan. 19, 2021), <https://www.yesmagazine.org/opinion/2021/01/19/capitol-insurrection-police-white-supremacy/> [<https://perma.cc/HS52-JNP6>]; Vida B. Johnson, *The Epidemic of White Supremacist Police*, APPEAL (Aug. 7, 2017), <https://theappeal.org/the-epidemic-of-white-supremacist-police-4992cb7ad97a/> [<https://perma.cc/ZW2U-Q59X>].

becomes normalized inside the law enforcement community. Groupthink and other cognitive biases experienced by law enforcement officers may allow them to think that fringe beliefs are widespread even outside the law enforcement community.<sup>226</sup> It may explain how officers asked for time off of work and even posted photos of themselves at the rally hosted by extreme far-right personalities planning on disrupting Congress carrying out its constitutional responsibilities,<sup>227</sup> despite the law enforcement officers' oath to support the Constitution. The fact that multiple officers thought an acceptable reason to miss work would be to try to overturn the election shows how normalized these views became amongst law enforcement.

In addition to the failure to address white supremacy and far-right ideologies in policing, police failed to address the same ideologies as they grew nationwide amongst the civilian population. As discussed earlier, law enforcement had ample warning of the growing threat—the violence perpetrated by white supremacists in Charlottesville in 2017, and the multiple mass shootings by racists, anti-Semitic, and anti-immigrant terrorists in 2018 and 2019.<sup>228</sup> These newsworthy events sparking national discussions should have raised concerns of law enforcement. Whether the law enforcement was blind to the threat because of implicit biases or because their ranks were infiltrated by those same forces, law enforcement ultimately failed.

Law enforcement officials have done a dismal job enforcing laws that exist against these antigovernment and far-right groups. For example, while publicly carrying weapons in open carry states may be legal in many states, taking up arms as part of a militia group is against the law in all states.<sup>229</sup> But the largely white, armed, and uniformed militias that made appearances at many protests for the police killing of George Floyd faced few legal consequences for their actions in 2020.<sup>230</sup> In some instances, these groups were thanked and rewarded by

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<sup>226</sup> See *Groupthink*, PSYCH. TODAY, <https://www.psychologytoday.com/us/basics/groupthink> [<https://perma.cc/EB2N-EAR8>].

<sup>227</sup> See *supra* notes 166–167 and 202–206 and accompanying text.

<sup>228</sup> See *supra* Section II.A.

<sup>229</sup> See *State Fact Sheets*, GEO. UNIV. L. CTR., <https://www.law.georgetown.edu/icap/our-work/addressing-the-rise-of-unlawful-private-paramilitaries/state-fact-sheets/> [<https://perma.cc/7D57-DWPW>].

<sup>230</sup> Mara Hvistendahl & Alleen Brown, *Armed Vigilantes Antagonizing Protestors Have Received a Warm Reception from Police*, INTERCEPT (June 19, 2020, 1:55 PM), <https://theintercept.com/2020/06/19/militia-vigilantes-police-brutality-protests/> [<https://perma.cc/7A72-79BH>].

law enforcement on the scene of the protests.<sup>231</sup> Similar scenes played out at antimasking and vote counting rallies.<sup>232</sup>

Financial resources have not been deployed to adequately fight the problem of far-right extremism. In 2019, Michael Garrity, the FBI counterterrorism chief, testified before Congress that only 20 percent of the FBI's terrorism budget was devoted to domestic terrorism, with the rest of the resources devoted to terrorism threats from outside the United States.<sup>233</sup> When one considers that there has not been a noteworthy terrorist attack from outside the United States since the September 11, 2001 attack, but numerous acts of terrorism by American citizens inspired by far-right ideologies,<sup>234</sup> it is clear that the resources of the FBI have been misplaced.

Whether inattention or willful blindness, inaction not only allowed extremists to remain on police forces, but it also allowed the problem to fester nationwide while valuable resources were diverted elsewhere in the vital months just before the attack. Attorney General William Barr and those in the Department of Justice focused attention on Antifa and Black Lives Matter groups at the expense of investigating the role of white supremacist and far-right extremists.<sup>235</sup> Federal prosecutors reportedly felt pressure to investigate whether the looting and property damage seen over the 2020 summer protests related to the police murder of George Floyd, that saw some theft and a destruction of a police precinct, was the result of organized activity.<sup>236</sup> This change in federal law enforcement priorities in 2020 was made despite the attempted kidnapping of the governor of Michigan,<sup>237</sup> the multiple mass shootings by

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<sup>231</sup> Eric Litke, *Fact Check: Police Gave Kyle Rittenhouse Water and Thanked Him Before Shooting*, USA TODAY (Aug. 29, 2020, 2:00 PM), <https://www.usatoday.com/story/news/factcheck/2020/08/29/fact-check-video-police-thanked-kyle-rittenhouse-gave-him-water/5661804002/> [<https://perma.cc/N342-SBSB>].

<sup>232</sup> See Luke Mogelson, *The Militias Against Masks*, NEW YORKER (Aug. 17, 2020), <https://www.newyorker.com/magazine/2020/08/24/the-militias-against-masks> [<https://perma.cc/DJ2J-PHW3>]; see also David D. Kirkpatrick & Mike McIntire, *Its Own Domestic Army: How the G.O.P. Allied Itself With Militants*, N.Y. TIMES (Feb. 8, 2021), <https://www.nytimes.com/2021/02/08/us/militias-republicans-michigan.html> [<https://perma.cc/Y6X7-DKZL>].

<sup>233</sup> Laura Strickler et al., *We Have a Problem: Federal Agencies Scramble to Fight Domestic Terror with Limited Resources*, NBC NEWS (Aug. 5, 2019, 7:10 PM), <https://www.nbcnews.com/politics/national-security/we-have-problem-federal-agencies-scramble-fight-domestic-terror-limited-n1039441> [<https://perma.cc/5CHS-2CYS>].

<sup>234</sup> Robert O'Harrow Jr. et al., *The Rise of Domestic Extremism in America*, WASH. POST (Apr. 12, 2021), <https://www.washingtonpost.com/investigations/interactive/2021/domestic-terrorism-data/> [<https://perma.cc/6RFG-B32S>].

<sup>235</sup> Adam Goldman et al., *How Trump's Focus on Antifa Distracted Attention from the Far-Right Threat*, N.Y. TIMES (Feb. 1, 2021), <https://www.nytimes.com/2021/01/30/us/politics/trump-right-wing-domestic-terrorism.html> [<https://perma.cc/92MP-8XUN>].

<sup>236</sup> *Id.*

<sup>237</sup> See Bogel-Burroughs et al., *supra* note 97.

white supremacists in 2018 and 2019,<sup>238</sup> and the armed groups attending antimasking rallies<sup>239</sup> and vote counting rallies.<sup>240</sup>

The focus on antigovernment protests on the left pulled away resources from the known threat of the far-right extremists. FBI agents focused on counterterrorism were reassigned to Portland, Oregon to investigate the left.<sup>241</sup> Only a small number of agents were investigating the far-right extremists—only a few hundred agents were devoted to investigating over a thousand domestic terrorism cases, according to a *New York Times* report.<sup>242</sup>

Any rational observer can see that ignoring the threat for decades, failing to devote substantial resources to the problem as a priority of federal law enforcement, and the shifting of the small amount of resources away in the months preceding the Capitol siege from the proven violence and terrorism of white supremacists, allowed the thousands of people who converged on the Capitol to not adequately be assessed or monitored as the threat that they were. This attention to the threat is yet another way that law enforcement enabled the Capitol riots.

Failing to address this known threat was a catastrophic collapse of local and federal law enforcement. It is illustrative of structural racism by police—failing to police known dangerous white extremists to focus on nonwhite terrorists outside our borders and Black Lives Matter activists. The failure to investigate the known threat of white supremacists and far-right extremists shows us how easily law enforcement power can be deployed to harm certain groups of people. It also illustrates that law enforcement priorities are not connected to goals of public safety. This is a common refrain of police abolitionists and the defund movement.<sup>243</sup>

## VI. REFORMING POLICE

There were calls to defund and abolish police and a general erosion in trust after the 2020 deaths of George Floyd

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<sup>238</sup> See Dobuzinskis, *supra* note 109; Cowan, *supra* note 110; Hasan, *supra* note 111.

<sup>239</sup> See Wilson, *supra* note 96.

<sup>240</sup> See Simon Romero et al., *In a Year of Protest Cries, Now It's 'Count Every Vote!' and 'Stop the Steal!'*, N.Y. TIMES (Nov. 5, 2020), <https://www.nytimes.com/2020/11/05/us/election-protests-vote-count.html> [<https://perma.cc/MQE7-U558>].

<sup>241</sup> Goldman et al., *supra* note 235.

<sup>242</sup> *Id.*

<sup>243</sup> Alex Woodward, *'We Are the Ones Who Keep Us Safe': How Abolitionists See an America Without Police and Prisons*, INDEPENDENT (June 19, 2020, 11:54 PM), <https://www.independent.co.uk/news/world/americas/abolish-police-us-prison-reform-defund-13th-amendment-a9571816.html> (last visited Feb. 4, 2022).

and Breonna Taylor months prior to the Capitol siege.<sup>244</sup> The circumstances within policing that enabled the Capitol siege are the results of problems that have persisted in law enforcement for decades. Racism—both implicit and explicit—is at its roots. Implicit bias allowed dangerous white movements to grow with little attention by law enforcement. Implicit bias also allowed these white groups not to be the priority of law enforcement. And implicit bias gave white police officers the benefit of the doubt that they did not need to be monitored once hired. And the explicit racial bias also enabled these same phenomena—to what extent may have to remain unknown. In any event, the problem of far-right extremists amongst police is a national problem as illustrated by the fact that officers from all over the country were in attendance at the rally preceding the siege, that officers have been found to be in white supremacist groups, hold white supremacist views, and participate in far-right groups and militias all over the United States.

To begin to conquer this persistent problem requires a concerted effort by lawmakers, law enforcement officials, policymakers, and city leaders. Abolitionists and defund movement groups may disagree that police reform is possible or worthwhile. However, it is vital that white supremacists and far-right extremists do not control the vast violent weaponry of policing for the reasons we witnessed on January 6, 2021. The work is urgent. Until we dismantle and root out those who are, or sympathize with white supremacists, defunding and right sizing police will be impossible, because the far-right understands how important a tool police are to racial oppression.

#### A. *Obstacles to Reform*

Despite the urgency to committing to immediate police reform, there are many obstacles that must also be tackled. A reason that dozens of officers may have felt comfortable attending a polarizing political rally is that police officers enjoy tremendous job security. Because of the strength of police unions in most communities in America, it is very difficult for officers to be fired.<sup>245</sup>

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<sup>244</sup> Sam Levin, *Movement to Defund Police Gains 'Unprecedented' Support Across US*, GUARDIAN (June 4, 2020, 6:00 AM); <https://www.theguardian.com/us-news/2020/jun/04/defund-the-police-us-george-floyd-budgets> [<https://perma.cc/9DWX-98QZ>]; Lopez, *supra* note 31; Kaba, *supra* note 30.

<sup>245</sup> Tate Fegley, *Police Unions and Officer Privileges*, 25 INDEP. REV. 165, 170–75 (2020); Stephen Rushin, *Police Disciplinary Appeals*, 167 U. PA. L. REV. 545, 557–61 (2019); Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1222 (2017).

Of course, the First Amendment also protects officers for their political choices, speech, and conduct.<sup>246</sup> As a general rule, police officers cannot be fired for their political beliefs.<sup>247</sup> This is not a limitless protection, however. It is a choice to become a police officer and some limitations come with that decision. Many public servants, like federal employees, have limits placed on their First Amendment freedoms that limit what they can do or say while on duty or with their work-issued phones or computers.<sup>248</sup> Even off-duty officers can cross the line of what conduct the First Amendment protects. Specifically, courts have found that when an officer's political speech undermines a police department's relationship of trust in the community, the officer can be fired.<sup>249</sup>

The blue wall of silence is another protection for police officers with explicit racial animus. This is the police culture that makes it unpopular and even dangerous to turn in other officers when they violate department policy, act unethically, or violate the law. Much has been written about this unwritten rule that many officers follow.<sup>250</sup> One reason this blue wall persists may be because it is so difficult to fire an officer. A well-meaning officer has every reason to believe that the officer who violates the law or expresses racial bias in a group text will be at work the next day and next year after he is reported. Officers understand that reporting an offending officer to a superior officer risks his or her safety in the field if he needs assistance while on duty. So strong is the wall of silence that calls for help from a whistleblowing officer may go unheeded.<sup>251</sup> Knowing one

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<sup>246</sup> See Andrew Cohen, *Police Officers, Insurrection Day, and the First Amendment*, BRENNAN CTR. FOR JUST. (Feb. 1, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/police-officers-insurrection-day-and-first-amendment> [https://perma.cc/36VT-HM2P].

<sup>247</sup> See *Branti v. Finkel*, 445 U.S. 507, 513–20 (1980) (holding that public employees are protected from termination based on their political affiliation).

<sup>248</sup> See DAVID L. HUDSON JR., *BALANCING ACT: PUBLIC EMPLOYEES AND FREE SPEECH* 2–5 (2002), [https://www.freedomforuminstitute.org/wp-content/uploads/2014/09/fac\\_firstreport\\_public-employees-free-speech.pdf](https://www.freedomforuminstitute.org/wp-content/uploads/2014/09/fac_firstreport_public-employees-free-speech.pdf) [https://perma.cc/K4F4-G6E3]; Cohen, *supra* note 246; see also 5 U.S.C. § 7323 (prohibitions on certain political activities of federal employees).

<sup>249</sup> See *Locurto v. Giuliani*, 447 F.3d 159, 183 (2d Cir. 2006); see also *Dible v. City of Chandler*, 515 F.3d 918, 928 (9th Cir. 2008).

<sup>250</sup> Gabriel J. Chin & Scott C. Wells, *The “Blue Wall of Silence” as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 237 (1998); Rick Bragg, *Blue Wall of Silence: Graft Shielded Behind Old Code*, N.Y. TIMES (Apr. 26, 1994), <http://www.nytimes.com/1994/04/26/nyregion/blue-wall-of-silence-graft-shielded-behind-old-code.html> [https://perma.cc/2A7T-9TST]; Johnson, *supra* note 225, at 267–68.

<sup>251</sup> See, e.g., Aziz Huq & Richard H. McAdams, *Litigating the Blue Wall of Silence: How to Challenge the Police Privilege to Delay Investigation*, 2016 U. CHI. LEGAL F. 213, 214–15 (telling the story of Baltimore police officer who was retaliated against for whistleblowing and eventually resigned); see also Philip Hayden, Opinion, *Why an Ex-FBI Agent Decided to Break Through the Blue Wall of Silence*, USA TODAY (Jan. 31, 2019, 12:28 PM), <https://www.usatoday.com/story/opinion/policing/2019/01/31/blue-wall-of-silence-policing-the-usa-cops-community/2604929002/> [https://perma.cc/3BJ8-PCM7].

will face an officer he has reported and may no longer be able to depend on his fellow officers for back up in the field, is a huge disincentive for one officer to report a fellow officer. It may also be another way for far-right extremist views to become more entrenched in the department if those views go unchallenged. Younger officers may think that these views are shared by everyone, and to fit in may also express similar views, further entrenching them within the department.

Any efforts at police reform will be wise to consider the strength of the blue wall, First Amendment protections, and union contracts. Police Abolitionists and defund police movements have gained in popularity since their inception<sup>252</sup> and offer an important framing about how intractable the problems of police corruption and racial bias are. Reforms may meet resistance from those movements as well. Abolitionists believe that only by divesting in police can real transformation take place and that attempts at reform only serve to relegitimize policing.<sup>253</sup> Those in the defund camp see that by “shrinking the scope of police responsibilities,” we can shrink the damage police inflict.<sup>254</sup> In turn, the money previously used for policing can be better used by investing in services to better support communities.<sup>255</sup>

A likely result of the attack on the Capitol may very well be discussions of an increase in funding because of how flat-footed Capitol Police appeared in the contemporaneous videos and news accounts. These forces could further increase the dominance of those police in the everyday lives of people of color instead of protecting the Capitol.

## B. *Ideas for Reform*

### 1. Federal Law Enforcement Registry and License

A national federal licensing program and accompanying standards for police would set some minimal guidelines for police officers. Cities and municipalities could require officers to get the federal law enforcement license as a condition of employment. The federal license could facilitate and pay for another background check beyond what an individual department might provide when the individual applies for their

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<sup>252</sup> Levin, *supra* note 244.

<sup>253</sup> Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1844 (2020).

<sup>254</sup> See Lopez, *supra* note 31.

<sup>255</sup> *Id.*

license. The federal program could also require antiracism training and conduct periodic outside monitoring of the police officers once they are on the force.

If an officer is terminated from the force, the federal program could then terminate the officer's license. This would make such an officer unable to secure employment in another department which requires this same license. Vitally, this would mean that officers could not move from one town to another after termination. It is often the case that terminated or disgraced officers get hired by another police department.<sup>256</sup>

There are federal licensing requirements in other professions. A license is required to sell or manufacture firearms, ammunition, and other destructive devices.<sup>257</sup> This license is granted by ATF.<sup>258</sup> Aircraft pilots require certification from the Federal Aviation Administration.<sup>259</sup> This is true even for student and amateur pilots.<sup>260</sup> Commercial airline pilots require an advanced license.<sup>261</sup> One can see why the federal government would mandate special certification for these two very dangerous professions in which the license-carrier bears a tremendous amount of responsibility. The same can be said for police. Professions with even less relationship to public safety require a federal license.<sup>262</sup>

While there may be some constitutional concerns with the federal government regulating local police departments,<sup>263</sup> departments could opt-in to a federal program. Local police officers often work in collaboration with and at the direction of federal law enforcement.<sup>264</sup> Local police officers also receive

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<sup>256</sup> Nikita Lalwani & Mitchell Johnston, *What Happens When a Police Officer Gets Fired? Very Often Another Police Agency Hires Them*, WASH. POST (June 16, 2020), <https://www.washingtonpost.com/politics/2020/06/16/what-happens-when-police-officer-gets-fired-very-often-another-police-agency-hires-them/> [https://perma.cc/N7R4-BWNJ].

<sup>257</sup> 27 C.F.R. § 478.42.

<sup>258</sup> *Id.*

<sup>259</sup> 14 C.F.R. § 61.3.

<sup>260</sup> *Become a Pilot*, FED. AVIATION ADMIN. (Nov. 16, 2020), [https://www.faa.gov/pilots/become/student\\_cert/](https://www.faa.gov/pilots/become/student_cert/) [https://perma.cc/4T92-H8XT].

<sup>261</sup> 14 C.F.R. § 121.1(c).

<sup>262</sup> To ship alcohol, one must possess a permit. 27 U.S.C. § 203(a). Even owning a winery requires a permit. *Id.*

<sup>263</sup> *See, e.g.*, CONG. RSCH. SERV., LSB10487, CONGRESS AND LAW ENFORCEMENT REFORM: CONSTITUTIONAL AUTHORITY (2020) (briefly outlining limits on Congressional authority to regulate local law enforcement), <https://crsreports.congress.gov/product/pdf/LSB/LSB10487> (last visited Feb. 4, 2022).

<sup>264</sup> Christopher Slobogin, *Testifying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1047 (1996) (recognizing the importance of a "good working relationship" between prosecutors and police officers); *see also* Letitia James, *Prosecutors and the Police: The Inherent Conflict in Our Courts*, MSNBC (Sept. 16, 2016, 10:19 PM), <https://www.msnbc.com/msnbc/prosecutors-police-inherent-conflict-our-courts-msna473016> [https://perma.cc/A4M6-RY4P].



financial support from the federal government.<sup>265</sup> These monies could be tied to a licensing requirement. In addition, police officers are charged with enforcing state and federal laws and are also entrusted to respect federal constitutional rights of the citizens. Federal regulation for those imbued with tremendous responsibility, who have to carry out important duties, and are meant to safeguard the community, seems warranted. This solution is one requiring attention.

## 2. Weaken Contracts with Police Unions

Police officers enjoy job security stronger than in many other professions. The existence of police union contracts makes police reform difficult.<sup>266</sup> It is difficult to suspend or fire officers. Officers who actually violate policy or laws are difficult for departments to be rid of permanently. Even when an officer is fired by superiors, the department may have to take an officer back after termination because of the multiple levels of appeals afforded to officers.<sup>267</sup> According to Professor Stephen Rushin, “[t]he vast majority of . . . police departments give officers the ability to appeal disciplinary sanctions through multiple levels of appellate review.”<sup>268</sup> Often, the final decision about disciplinary action or termination “rests with [an] outside arbitrator[.]”<sup>269</sup> These arbitrators are frequently sympathetic to law enforcement.<sup>270</sup> In some jurisdictions, this means that even after an officer is terminated, he could return or be given a significant financial payout not to return.<sup>271</sup>

Knowing that ridding a department of a problem officer will be difficult can be a significant disincentive for superiors to initiate steps towards discipline or termination. Knowing it to be an arduous battle that may ultimately result in a payout or the officer’s return may not be worth it to police management. The inability of police departments to deliver swift punishment may mean that other officers may believe that the offending behavior is acceptable or was approved by superiors, therefore further entrenching the conduct into the law enforcement culture.

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<sup>265</sup> Brian Naylor, *How Federal Dollars Fund Local Police*, NPR (June 9, 2020, 5:10 AM), <https://www.npr.org/2020/06/09/872387351/how-federal-dollars-fund-local-police> [<https://perma.cc/AUF5-MF7R>].

<sup>266</sup> Stephen Rushin, *Federal Enforcement of Police Reform*, 82 *FORDHAM L. REV.* 3189, 3196 (2014); *see also* note 245 and accompanying text.

<sup>267</sup> Rushin, *Police Disciplinary Appeals*, *supra* note 245, at 550.

<sup>268</sup> *Id.* at 551.

<sup>269</sup> *Id.* at 552.

<sup>270</sup> *Id.* at 550–52.

<sup>271</sup> *See id.*

Weakening safeguards in employment contracts for officers who violate policies, or the law, is vital. When contracts come up for renegotiation, the most important thing any city or municipality can do is to weaken job security for officers. Rushin has called for a lessening the “layers of appellate review” to make termination of problem officers easier to accomplish.<sup>272</sup> Addressing the difficulty in terminating bad officers is an imperative step towards ridding police forces of those who hold white supremacist or extremist views. Until officers face swift consequences in their employment and in court for their misdeeds, not only will they continue with bad behavior, but other officers will not turn them in, only allowing the problem to grow. Police unions’ ability to protect its members stand in the way of progress for society.

When it comes time to renegotiate contracts, city governments must prioritize ridding departments of bad officers over all other terms. Weakening protections for job security for officers must be the highest priority in these negotiations for the safety of civilians.

### 3. Create New Department Policies About Group Affiliation

In addition to rooting out officers who hold racial animus, police departments need to develop policies that prevent membership in groups that promote the overthrow of the government like the Oath Keepers, Three Percenters, and Boogaloo Bois.<sup>273</sup> In some instances, the existence of private militia groups violates state laws.<sup>274</sup> According to Mary McCord, a law professor and expert on militia groups, “many states . . . prohibit private individuals, untrained, unaccountable to civilian authority from taking on official functions.”<sup>275</sup> When a police officer has membership in one of these armed groups, it sanctions the activities of the group in a way that undermines the law. And perhaps more obviously as agents of the government who enforce laws, police officers cannot also agitate to overthrow our governmental institutions and actively promote the perspectives of these types of groups.

Groups like the Proud Boys with ties to white supremacy, but that may not be considered explicitly racist, must also be

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<sup>272</sup> *Id.* at 588.

<sup>273</sup> *See supra* notes 62–63 and accompanying text. For background on Boogaloo Bois, see Klippenstein, *supra* note 3.

<sup>274</sup> *Are Citizen Militias Legal?*, NPR (Aug. 30, 2020, 5:20 PM), <https://www.npr.org/2020/08/30/907720068/are-citizen-militias-legal> [<https://perma.cc/W5JM-A8RR>].

<sup>275</sup> *Id.*

banned. In 2019, when a Connecticut officer was revealed to be a member of the Proud Boys, his chief said his membership did not violate any policy.<sup>276</sup> Membership in a group like the Proud Boys, which espouses misogynistic, transphobic, and anti-immigrant viewpoints,<sup>277</sup> is absolutely inconsistent with fairly and consistently enforcing laws. The existence of Proud Boys on a police force undermines public trust between vulnerable and minority communities.

Membership in militia groups, antigovernment groups, and groups that discriminate against others cannot be tolerated. Police swear an oath to our Constitution and to protect and serve us all. It cannot be acceptable for police to belong to groups that undermine the authority of the government to govern or deny the humanity of any group.

#### 4. Increase Diversity

One way to improve police departments is to increase racial and gender diversity on police forces. As discussed, white males are overrepresented in police departments, and this is the group most likely to be involved in hate groups.<sup>278</sup> “Nationwide, the share of white officers exceeds the share of the white population.”<sup>279</sup>

There are benefits to diversity that go beyond mere symbolism. Diverse police departments are more likely to have the confidence of the community.<sup>280</sup> There are declines in crime rates when Black people police Black communities.<sup>281</sup> People of color and women are less likely to belong to far-right groups<sup>282</sup> and more likely to blow the whistle on racist behavior than their white male counterparts.<sup>283</sup>

Yet police departments are experiencing difficulties recruiting Black people to policing in the post-Ferguson

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<sup>276</sup> Michael Kunzelman, *Chief: Officer's Proud Boys Membership Didn't Break Policy*, AP NEWS (Oct. 15, 2019), <https://apnews.com/article/12ece8cedbf045259dcedebf619141e7> [<https://perma.cc/4YNL-46LJ>].

<sup>277</sup> *Proud Boys*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/proudboys> [<https://perma.cc/58FY-AYVA>].

<sup>278</sup> See *supra* note 178 and accompanying text.

<sup>279</sup> Lauren Leatherby & Richard A. Oppel Jr., *Which Police Departments Are as Diverse as Their Communities?*, N.Y. TIMES (Sept. 23, 2020), <https://www.nytimes.com/interactive/2020/09/23/us/bureau-justice-statistics-race.html> [<https://perma.cc/6ALN-QXHU>].

<sup>280</sup> *Id.*

<sup>281</sup> The Associated Press, *Diversity in Law Enforcement May Improve Policing, Study Shows*, NBC NEWS (Feb. 11, 2021, 3:02 PM), <https://www.nbcnews.com/news/nbcblk/diversity-law-enforcement-may-improve-policing-study-shows-n1257515> [<https://perma.cc/5D2P-8T9Q>].

<sup>282</sup> See David Futrelle, *The 'Alt-right' Is Fueled by Toxic Masculinity—and Vice Versa*, NBC NEWS (Apr. 1, 2019, 10:35 AM), <https://www.nbcnews.com/think/opinion/alt-right-fueled-toxic-masculinity-vice-versa-ncna989031> [<https://perma.cc/F9XQ-G87Y>].

<sup>283</sup> Kaplan & Sapien, *supra* note 180.

landscape.<sup>284</sup> Because Black people expect that their white colleagues will not see their humanity as equally valuable, they do not want to have to depend on them for safety in the field nor do they want to be seen as taking part in the subjugation of people of color by the government.<sup>285</sup> Even when police departments in cities become more diverse, in recent years the growth has been largely in new Latino and Asian police officers, not Black officers.<sup>286</sup>

Evidence suggests that having Black superiors in upper management in a police department translates into fewer police killings of civilians.<sup>287</sup> But it is more difficult for a Black officer to rise to ranks of chief if there are few Black officers on the force.

Gender diversity in police departments is also important to make communities being policed safer from police. Women are less likely to belong to extremist groups,<sup>288</sup> less likely to use deadly force,<sup>289</sup> and more likely to de-escalate a tense situation than men.<sup>290</sup> The presence of a female officer on the scene tends to make use of force by male police officers less likely.<sup>291</sup> Women are less likely to be accused of misconduct than their male counterparts.<sup>292</sup> Despite these advantages of women in policing, women make up less than 13 percent of American police forces and 3 percent of police chiefs.<sup>293</sup> Police departments are wise to seek out racial and gender diversity. Fewer police shootings

<sup>284</sup> Leatherby & Opper, *supra* note 279.

<sup>285</sup> See, e.g., Martin Kaste, *Why Police Departments Have a Hard Time Recruiting Blacks*, NPR (Dec. 10, 2014, 5:59 PM), <https://www.npr.org/2014/12/10/369865012/why-police-departments-have-a-hard-time-recruiting-blacks> [<https://perma.cc/2F4V-7NZR>] (quoting a prospective Black officer, “I mean, if you get into a majority-white police force, you think they’re going to be racist.”).

<sup>286</sup> *Id.*

<sup>287</sup> See *id.*

<sup>288</sup> See Futrelle, *supra* note 282 (noting that the alt-right is “overwhelmingly male-dominated”).

<sup>289</sup> See Renee Stepler, *Female Police Officers’ On-the-job Experiences Diverge from Those of Male Officers*, PEW RSCH. CTR. (Jan. 17, 2017), <https://www.pewresearch.org/fact-tank/2017/01/17/female-police-officers-on-the-job-experiences-diverge-from-those-of-male-officers/> [<https://perma.cc/5QXA-UWVK>] (finding that “[f]emale officers are much less likely than male officers to report that they have ever fired their weapon while on duty”).

<sup>290</sup> See *id.* (finding that “female officers [are] less likely than their male counterparts to agree that aggressive tactics are sometimes necessary”).

<sup>291</sup> See Sophie Kaplan, *Police Departments Struggle to Recruit Female Officers*, AP NEWS (Jan. 26, 2019), <https://apnews.com/article/9317fc2780e34020a8cd9b98187034f8> (last visited Feb. 4, 2022).

<sup>292</sup> *Id.*

<sup>293</sup> 2018 *Crime in the United States, Table 74*, FBI: UNIFORM CRIME REP., <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/topic-pages/tables/table-74> [<https://perma.cc/XM5S-7WN3>]; Lindsey Van Ness, *Percentage of Women in State Policing Has Stalled Since 2000*, PEW RSCH. CTR. (Oct. 20, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/10/20/percentage-of-women-in-state-policing-has-stalled-since-2000> [<https://perma.cc/35AX-5GJK>] (noting that only 3 percent of those in law enforcement leadership positions are women).

would save departments money in wrongful death and excessive force lawsuits, and may increase community trust.

As with racial diversity, police departments struggle to attract women to policing. Advertising campaigns tend to focus on aggressive violent police practices like SWAT teams and other militarized aspects of policing—advertisements that have the effect of discouraging women from joining the force.<sup>294</sup> The dearth of women on police forces may also make women think the job is not for them.<sup>295</sup>

Rooting out police with extreme views will open up new opportunities on police forces. Campaigns that focus on the importance of diversity to the population's safety may appeal to women and people of color who want the police force to reflect the demographics of their community.

##### 5. Monitor Officers Once They Are Hired

Departments serious about ridding their force of far-right extremism should monitor their officers. Surveillance of officer emails and texts for key words associated with racial bias and extremist culture will expose officers who may have drifted outside of acceptable norms. Routine social media checks are also essential. This cannot only take place at hiring, but periodically throughout an officer's tenure. Monitoring of emails, texts, and social media platforms should be done by outside contractors with no allegiance to the officers, so the officers are not warned.

Americans tend to become more political as they age.<sup>296</sup> So, a worldview of a hypothetical person at age twenty-two when hired on a police force may not be the one they have at thirty-seven. It is possible for one to drift towards a political extreme with time. This argues in favor of monitoring the political beliefs of law enforcement officers. It is dangerous to have police officers that are unable to discern fact from fiction while they have the ability to enforce laws by force.

Monitoring social media accounts should be a condition of employment. Some departments have social media policies in place

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<sup>294</sup> See Kaplan, *supra* note 291.

<sup>295</sup> See *id.*; Van Ness, *supra* note 293 (quoting a woman interviewee from the Philadelphia Police Department: "We can't be what we can't see.").

<sup>296</sup> Drew DeSilver, *The Politics of American Generations: How Age Affects Attitudes and Voting Behavior*, PEW RSCH. CTR. (July 9, 2014), <https://www.pewresearch.org/fact-tank/2014/07/09/the-politics-of-american-generations-how-age-affects-attitudes-and-voting-behavior/> [https://perma.cc/279U-JRYN].

that make clear that hate will not be tolerated. And employers have a right to monitor the use of work-issued phones and computers.<sup>297</sup>

Police officials already use social media to communicate with the public and to investigate crimes. However, they should not be the ones that monitor their fellow officers. Because of the blue wall of silence and cognitive biases, it would be too easy for one officer to give a fellow officer the benefit of the doubt about a post. Police outsiders must be employed for this role. It must also be done without warning.

## 6. Use Special Prosecutors to Prosecute Police

Legal experts have called for the use of special prosecutors when police violate the law.<sup>298</sup> The argument is that the reason that police are rarely prosecuted when they violate the law is that prosecutors are too aligned and too dependent on police to want to be at odds with them.<sup>299</sup> Because prosecutors rely on police to investigate and build cases for them, they cannot risk alienating them because the success of any particular prosecutor's career is too dependent on police officers.<sup>300</sup> In addition to career-related relationships, many police and prosecutors can work together for years or even decades and develop friendship.<sup>301</sup> Some have even called this relationship between police and prosecutors a "conflict of interest" that should require recusal by local prosecutors.<sup>302</sup>

Special or independent prosecutors would not suffer from the same biases and conflicts of interest when it comes to the question of whether or not to prosecute a police officer.<sup>303</sup> A prosecutor who does not need to curry favor with the department to which a police officer being investigated belongs is in a better position to credibly assess the evidence against him. While the cost of setting up an independent prosecutor office is likely very steep, settlement awards can cost cities millions of dollars a year.<sup>304</sup> Cities have spent more

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<sup>297</sup> 18 U.S.C. § 2511(2)(a)(i). Many corporations monitor the emails and social media accounts of their employees. See *The Future of Employee Monitoring*, GARTNER (May 3, 2019), <https://www.gartner.com/smarterwithgartner/the-future-of-employee-monitoring/> [<https://perma.cc/93HR-9DK5>].

<sup>298</sup> Kami Chavis Simmons, *Increasing Police Accountability: Restoring Trust and Legitimacy Through the Appointment of Independent Prosecutors*, 49 WASH. U. J.L. & POL'Y 137, 139 (2015).

<sup>299</sup> *Id.* at 144–45, 151.

<sup>300</sup> Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447, 1465–72 (2016).

<sup>301</sup> *Id.* at 1470–71.

<sup>302</sup> *Id.* at 1447.

<sup>303</sup> See *id.* at 1495.

<sup>304</sup> Amelia Thomson-DeVeaux et al., *Cities Spend Millions on Police Misconduct Every Year. Here's Why It's So Difficult to Hold Departments Accountable*, FIVE THIRTY EIGHT

than \$3 billion over the last ten years.<sup>305</sup> The financial and emotions costs to the overpoliced communities and communities who suffer the brunt of police misconduct cannot be underestimated.

One might point to the fact that the US Attorney's Office (USAO) prosecuted police identified as being at the Capitol on January 6 as evidence that a special prosecutor is helpful. The officers identified as having been at the Capitol are, with one exception, state or local police officers<sup>306</sup>, not federal agents like FBI, DEA, or ATF. The USAO only rarely has to rely solely on the testimony of a state or local officer to build a prosecution and would suffer only minimal blowback for prosecuting an officer from a department from which the USAO will not need to rely. The relationship between the USAO and a state or local police officer is the type of distant unaffiliated one that should be aspired to in prosecutions of police officers.

When officers sworn to uphold the law face no legal consequences when they violate it, the criminal legal system loses credibility within the community they police and within the community as a whole. This has played itself out in a post-Ferguson world where violent encounters between unarmed citizens of color and police are captured on video. The world has seen the double standard in the aggressive enforcement of law against people of color and the lack of accountability for police.

In addition to undermining the relationship between citizens and police, the lack of consequences for police even when they break the law means no deterrence for other officers who aspire to break the law. Officers learn that excessive use of force will be tolerated.

Until police officers expect to face consequences when they misbehave, violate policy, or break laws, there is little reason for an officer to treat the community with respect, abide by the laws they enforce, or demand the same of fellow officers.

## CONCLUSION

The threat of white supremacy, other forms of racism, and far-right ideologies in policing enabled the attack on the Capitol on January 6, 2021. Until this fact is acknowledged, police will continue to be a threat to the nation's safety. The purpose of any police department is to protect the community it serves and the US Constitution, but the infiltration of far-right

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(Feb. 22, 2021), <https://fivethirtyeight.com/features/police-misconduct-costs-cities-millions-every-year-but-thats-where-the-accountability-ends/> (last visited Feb. 4, 2022).

<sup>305</sup> *Id.*

<sup>306</sup> See Ben-Menachem, *supra* note 187.

forces into law enforcement threatens the community and erodes whatever trust law enforcement enjoys.

On January 6, 2021, police struggled to control the mob of far-right rioters because police and other law enforcement officers were in the group. Capitol Police failed to recognize the threat posed by the mob because their biases told them that the white crowd waving confederate and blue lives matter flags were allies, not enemies. The police struggled to protect lawmakers because some Capitol Police officers were enabling their entry into the Capitol and offering encouragement to the insurrectionists. Finally, the Capitol Police struggled to protect lawmakers because law enforcement agencies did not devote resources to focusing on the threat of far-right extremists despite the overwhelming evidence of their dangerousness and threat to the safety of our society.

State and federal police and prosecutors spend billions of taxpayer dollars on prosecuting crimes of poverty and drug offenses but ignore the very real threat of white supremacists and other far-right domestic terrorists. These misplaced priorities have made us all less safe despite decades of warnings of the dangers of these violent groups. The insurrection at the Capitol was the latest example of law enforcement's inability to keep us secure.

The nation witnessed how close our democracy came to falling to an angry mob live on television on January 6, 2021. The danger was felt by most. But, this is the threat that many people of color feel whenever police are deployed to their neighborhoods since the inception of the nation. The crisis in policing is finally on display for everyone to see. Failure to act swiftly and get to the root of the problems in policing endangers us all.



## APPENDIX

POLICE OFFICER MEMBERSHIP IN PROUD BOYS,  
OATH KEEPERS, AND THREE  
PERCENTERS GROUPS

Headline	Date	Synopsis
<i>Chicago Police Department Investigating Officer's Alleged Ties to the Proud Boys</i> <sup>307</sup>	May 27, 2020	Leaked chat logs appear to show Officer Robert Bakker communicating and organizing meetups last summer with members of the Proud Boys. Bakker denied being a member.
<i>Chief: Officer's Proud Boys Membership Didn't Break Policy</i> <sup>308</sup>	Oct. 15, 2019	East Hampton, Connecticut officer, Kevin P. Wilcox, was a dues-paying member of the Proud Boys. The police chief said this did not violate department policies. Wilcox was allowed to retire a week later, two months before he was already scheduled to retire.
<i>Sheriff's Deputy Fired After Social Media Posts Reveal Ties to Far-Right Proud Boys</i> <sup>309</sup>	Aug. 17, 2018	Louisiana sheriff's deputy, Brian Green, was fired after it was revealed that he was a member of the Proud Boys. He was also an administrator on the Proud Boy's Louisiana Vetting Page.

<sup>307</sup> Tom Schuba & David Struett, *Chicago Police Department Investigating Officer's Alleged Ties to the Proud Boys*, CHI. SUN TIMES (May 27, 2020, 6:15 PM), <https://chicago.suntimes.com/2020/5/27/21272143/chicago-police-department-officers-antifa-proud-boys> [https://perma.cc/9YQZ-WGBV].

<sup>308</sup> Michael Kunzelman, *Chief: Officer's Proud Boys Membership Didn't Break Policy*, AP NEWS (Oct. 15, 2019), <https://apnews.com/article/12ece8cedbf045259dcddeb619141e7> (last visited Feb. 4, 2022).

<sup>309</sup> Luke Barnes, *Sheriff's Deputy Fired After Social Media Posts Reveal Ties to Far-Right Proud Boys*, THINK PROGRESS (Aug. 17, 2018, 4:13 PM), <https://thinkprogress.org/sheriffs-deputy-fired-for-being-part-of-far-right-proud-boys-group-3d445cbbaf57/> [https://perma.cc/7HZX-5RF7].

Headline	Date	Synopsis
<i>Police Officer Partnered in Businesses with Auburn-Area Proud Boy Charged in Capitol Siege, Records Show</i> <sup>310</sup>	Feb. 11, 2021	Four-year veteran police officer who had worked for two police departments in Western Washington State was a business partner of the “sergeant of arms” for the Seattle chapter of the Proud Boys.
<i>California Police Fire Officer Who Was a Proud Boy, Saying They Have No Tolerance for ‘Hate Groups’</i> <sup>311</sup>	Apr. 11, 2021	Fresno Police officer rallied with the Proud Boys at a November 2020 pro-Trump rally that became violent.
<i>How Oath Keepers Are Quietly Infiltrating Local Government</i> <sup>312</sup>	Dec. 9, 2020	John D. Shirley, the constable of Hood County, Texas, located just outside of Fort Worth, was a sworn member of the Oath Keepers.
<i>A Pro-Trump Militant Group Has Recruited Thousands of Police, Soldiers, and Veterans</i> <sup>313</sup>	Sept. 30, 2020	A leaked Oath Keepers database showed that about two-thirds of members had a background in law enforcement or the military.

<sup>310</sup> Lewis Kamb, *Police Officer Partnered in Businesses with Auburn-Area Proud Boy Charged in Capitol Siege, Records Show*, SEATTLE TIMES (Feb. 11, 2021, 7:30 PM), <https://www.seattletimes.com/seattle-news/police-officer-partnered-in-businesses-with-auburn-area-proud-boy-charged-in-capitol-siege-records-show/> [https://perma.cc/VNN9-697X].

<sup>311</sup> Hannah Knowles, *California Police Fire Officer Who Was a Proud Boy, Saying They Have No Tolerance for ‘Hate Groups’*, WASH. POST (Apr. 11, 2021, 7:00 AM), <https://www.washingtonpost.com/nation/2021/04/11/fresno-rick-fitzgerald-proud-boys/> [https://perma.cc/9TYD-7WYF].

<sup>312</sup> Ciara O’Rourke, *How Oath Keepers Are Quietly Infiltrating Local Government*, POLITICO (Dec. 9, 2020, 4:30 AM), <https://www.politico.com/news/magazine/2020/12/09/oath-keepers-far-right-group-infiltrate-local-government-texas-443773> [https://perma.cc/HNA3-KTAQ].

<sup>313</sup> Mike Giglio, *A Pro-Trump Militant Group Has Recruited Thousands of Police, Soldiers, and Veterans*, ATLANTIC (Nov. 2020), <https://www.theatlantic.com/magazine/archive/2020/11/right-wing-militias-civil-war/616473/> [https://perma.cc/F2F3-PJDX].

Headline	Date	Synopsis
<i>The American Militia Movement, a Breeding Ground for Hate, is Pulling in Cops on Facebook</i> <sup>314</sup>	June 24, 2019	<p>Sheriff's deputy in a Montana county, Greg McWhirter, appeared in official Oath Keepers videos.</p> <p>Active cops from New York, Illinois, Missouri, and Kentucky were identified as members of a Three Percenter offshoot's Facebook group.</p> <p>Chief of Licking Police Department in Missouri, Patrick Burton was a member of the Missouri Oath Keepers Facebook group for at least three years.</p> <p>Deputy Dave Schuman of Boundary County, Idaho posted frequently in the Facebook group "Oath Keepers of Boundary County."</p> <p>Officer Eric Salmestrelli of the Portland Police Bureau in Oregon was an Oath Keepers Facebook group member.</p>
<i>To Protect and Slur: Inside Hate Groups on Facebook, Police Officers Trade Racist Memes, Conspiracy Theories and Islamophobia</i> <sup>315</sup>	June 14, 2019	<p>Almost 150 active or retired law enforcement members were involved in violent antigovernment groups on Facebook, such as the Oath Keepers and Three Percenters.</p>

<sup>314</sup> Will Carless & Michael Corey, *The American Militia Movement, a Breeding Ground for Hate, Is Pulling in Cops on Facebook*, REVEAL NEWS (June 24, 2019), <https://revealnews.org/article/the-american-militia-movement-a-breeding-ground-for-hate-is-pulling-in-cops-on-facebook/> [https://perma.cc/FZ62-72AT].

<sup>315</sup> Will Carless & Michael Corey, *To Protect and Slur*, REVEAL NEWS (June 14, 2019), <https://revealnews.org/article/inside-hate-groups-on-facebook-police-officers-trade-racist-memes-conspiracy-theories-and-islamophobia/> [https://perma.cc/8FYA-7S5T].

<b>Headline</b>	<b>Date</b>	<b>Synopsis</b>
<i>Fort Worth-Area Law Officers' Emails Show Past Ties to Paranoid Oath Keepers Militia</i> <sup>316</sup>	Jan. 23, 2021	Emails show at least three current or past county constables in the Fort Worth area have ties to the Oath Keepers.
<i>Officer's Tattoo Causes Chief to 'Question His Ability to Function Effectively'</i> <sup>317</sup>	Sept. 4, 2018	A Chapel Hill Police officer was put on paid leave following questions about a tattoo on his forearm of the roman numeral "three" encircled with stars, associated with the Three Percenters.
<i>CPD Investigating After Officer Wore Extremist Militia Logo to Downtown Protest Saturday</i> <sup>318</sup>	June 8, 2020	A Chicago Police officer wore a mask bearing the logo of a Three Percenters while on duty at a protest.

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<sup>316</sup> *Fort Worth-Area Law Officers' Emails Show Past Ties to Paranoid Oath Keepers Militia*, FORT WORTH STAR TELEGRAM (Jan. 23, 2021), <https://www.star-telegram.com/news/politics-government/article248562800.html> (last visited Nov. 8, 2021).

<sup>317</sup> Carli Brosseau, *Officer's Tattoo Causes Chief to 'Question His Ability to Function Effectively'*, CHARLOTTE OBSERVER (Sept. 4, 2018, 5:04 PM), <https://www.charlotteobserver.com/latest-news/article217573000.html> (last visited Nov. 8, 2021).

<sup>318</sup> Christopher Hacker, *CPD Investigating After Officer Wore Extremist Militia Logo to Downtown Protest Saturday*, CBS CHI. (June 8, 2020, 10:23 PM), <https://chicago.cbslocal.com/2020/06/08/cpd-investigating-after-officer-wore-extremist-militia-logo-to-downtown-protest-saturday/> (last visited Feb. 4, 2022).