

ARTICLES

BRADY'S BLIND SPOT: IMPEACHMENT EVIDENCE IN POLICE PERSONNEL FILES AND THE BATTLE SPLITTING THE PROSECUTION TEAM

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The Supreme Court's Brady doctrine requires prosecutors to disclose favorable, material evidence to the defense, but in some jurisdictions, even well-meaning prosecutors cannot carry out this obligation when it comes to one critical area of evidence: police personnel files. These files contain valuable evidence of police misconduct that can be used to attack an officer's credibility on the witness stand and can make the difference between acquittal and conviction. But around the country, state statutes and local policies prevent prosecutors from accessing these files, much less disclosing the material they contain. And even where prosecutors can access the misconduct in these files, their ability to disclose this information, as required by the Constitution, is constrained by the efforts of police officers and unions who have used litigation, legislation, and informal political pressure to prevent Brady's application to these files. Suppression of this misconduct evidence can cost defendants their lives, but disclosure can also be costly. It can cost officers their livelihoods.

Using interviews with prosecutors, police officials, and defense attorneys around the country, as well as unpublished and published sources, this Article provides the first account of the wide disparities in Brady's application to police personnel files. It argues that critical impeachment evidence is routinely and systematically suppressed as a result of state laws and local policies that limit access

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to the personnel files and as a result of the conflict within the prosecution team over Brady's application to these files. Further, the Article challenges Brady's assumption that prosecutors and police officers form a cohesive "prosecution team" and that, in the words of the Supreme Court, "the prosecutor has the means to discharge the government's Brady responsibility if he will" by putting in place "procedures and regulations" to bring forth information known only to the police. Finally, the Article contends that privacy protections for police misconduct are incompatible with core aspects of the Brady doctrine and that systems that attempt to balance Brady against police privacy wind up sacrificing the former to the latter. As both a doctrinal and a normative matter, police misconduct should receive no protections from Brady's search and disclosure obligation.

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INTRODUCTION

The Supreme Court decided *Brady v. Maryland* in 1963,¹ and it has spent the past fifty years expanding the doctrine.² *Brady* requires prosecutors to disclose favorable, material evidence to the defense, including anything known to the prosecutor or to any member of the prosecution team.³ Recently, *Brady* violations have received much attention, with blame focused squarely on prosecutors. Courts have appointed special counsel to investigate *Brady*-violating prosecutors, threatened criminal proceedings against prosecutors who withhold *Brady* material,⁴ and gone as far as to declare “an epidemic of *Brady* violations abroad in the land.”⁵ Prosecutors must “stop playing games with *Brady*,” and courts must “deal more harshly with prosecutors who don’t play fair,” according to a recent *Los Angeles Times* editorial.⁶ The *New York Times* editorial board attacked *Brady* violations under the heading “Rampant Prosecutorial Misconduct.”⁷ Meanwhile, the scholarly literature has criticized prosecutors who “willfully bypass[] the disclosure rules,”⁸ “intentionally, knowingly, or at least recklessly withhold potentially exculpatory evidence,”⁹ and “require the accused to undertake a scavenger hunt for hidden *Brady* clues.”¹⁰

But there is a critical source of *Brady* material that even well-meaning prosecutors are often unable to discover or disclose: evidence of police misconduct contained in police personnel files. These files contain internal affairs reports, disciplinary write-ups, and performance evaluations, documenting a range of information that defendants can use to their advantage at trial. In many cases, these files contain evidence of an officer’s dishonesty—evidence that can be critical to impeaching the officer’s testimony. In some jurisdictions, this evidence of police misconduct is freely available to the public. But in other ju-

1. 373 U.S. 83 (1963).

2. *See, e.g.*, *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995).

3. *Id.*

4. *United States v. Jones*, 620 F. Supp. 2d 163, 166 (D. Mass. 2009); Notice of Filing of Report to Hon. Emmet G. Sullivan, *In re* Special Proceedings, No. 09-0198 (EGS) (D.D.C. Mar. 15, 2012), 2012 WL 858523; Neil A. Lewis, *Tables Turned on Prosecution in Stevens Case*, N.Y. TIMES (Apr. 7, 2009), <http://www.nytimes.com/2009/04/08/us/politics/08stevens.html>.

5. *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, C.J., dissenting from denial of rehearing en banc).

6. Editorial, *Don't Ignore the Brady Rule: Evidence Must Be Shared*, L.A. TIMES (Dec. 29, 2013), <http://articles.latimes.com/2013/dec/29/opinion/la-ed-brady-20131229>.

7. Editorial, *Rampant Prosecutorial Misconduct*, N.Y. TIMES (Jan. 4, 2014), <http://www.nytimes.com/2014/01/05/opinion/sunday/rampant-prosecutorial-misconduct.html>.

8. Daniel S. Medwed, *Brady's Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1540 (2010).

9. Alafair S. Burke, *Talking About Prosecutors*, 31 CARDOZO L. REV. 2119, 2128 (2010) (summarizing “the traditional *Brady* literature”).

10. Bennett L. Gershman, *Bad Faith Exception to Prosecutorial Immunity for Brady Violations*, HARV. C.R.-C.L. L. REV. AMICUS 11 (2010), http://harvardcrcl.org/wp-content/uploads/2010/08/Gershman_Publish.pdf.

risdictions, state laws and local policies make this information so confidential that not even the prosecutor can access the files without a court order. These restrictions on access, in turn, result in the routine and systematic suppression of *Brady* material. While the U.S. Supreme Court's constitutional interpretations are supposed to govern all criminal trials, the reality is that *Brady*'s due process demands are applied in dramatically different ways depending on where the defendant is tried.

Brady's application to police personnel files has grave implications for defendants and police officers. For defendants, the impeachment material in these files can mean the difference between life and death. Misconduct findings are so valuable because they are the police department's own assessment of the officer's credibility. A report in one case found that a detective's "image of honesty, competency, and overall reliability must be questioned."¹¹ Records in another revealed a detective's repeated lies to internal affairs investigators, a psychological assessment that the detective "should not be entrusted with a gun and badge," and a warning to the police department from the office of the state attorney general: "If you had a homicide tonight . . . , I would instruct you that [the detective] not be involved in the case in any capacity."¹² Findings from other cases excoriated officers for making false overtime claims,¹³ filing false police reports,¹⁴ and stealing from the police department.¹⁵ When this misconduct has come out, sometimes decades after trial, murder convictions have been overturned and people have been released from death row.¹⁶

Meanwhile, for officers, *Brady*'s application to their files jeopardizes not their lives but their livelihoods. Officers whose credibility is called into question by police misconduct may not be able to testify in future cases. And officers who cannot testify—so-called "*Brady* cops"—cannot make arrests, investigate cases, or conduct any other police work that might lead to the witness stand. Such officers would be well advised to start looking for a new profession. Making matters worse, officers fear that prosecutors and police chiefs will abuse the *Brady*-designation system by labeling officers as *Brady* cops in order to punish them outside the formal channels of the police disciplinary system and all its procedural protections. For the officers, then, *Brady* is a matter not only of defendants' due process rights but also of their own due process rights. To protect their interests, officers and police unions have pushed back on

11. *Milke v. Ryan*, 711 F.3d 998, 1012 (9th Cir. 2013) (internal quotation mark omitted).

12. *State v. Laurie*, 653 A.2d 549, 553 (N.H. 1995) (internal quotation marks omitted).

13. *Fields v. State*, 69 A.3d 1104, 1110 (Md. 2013).

14. *Miller v. City of Ithaca*, 914 F. Supp. 2d 242, 247 (N.D.N.Y. 2012).

15. *United States v. Robinson*, 627 F.3d 941, 946 (4th Cir. 2010); see also *Problem Officers: What They Did to End Up on List*, SEATTLE TIMES (June 24, 2007, 12:00 AM), http://seattletimes.com/html/localnews/2003760492_bradylist24m.html; *Spokane Officer Suspended for Link with Prostitute*, KHQ (May 20, 2013, 11:08 AM PDT), <http://www.khq.com/story/22299873/straubreleasesstatementaboutofficer>.

16. E.g., *Milke*, 711 F.3d at 1001, 1019; *Laurie*, 653 A.2d at 554.

Brady's application to police files, launching a campaign of litigation, legislation, and informal political pressure aimed at prosecutors and police chiefs.¹⁷ This conflict over *Brady's* application has split the prosecution team, pitting prosecutors against police officers and police management against police labor.

Despite the high stakes of applying *Brady* to police personnel files—or, perhaps, because of them—there is no nationwide consensus on how to approach this issue. Wide variations in *Brady's* application to these files stem from a multiplicity of state laws and local policies protecting personnel files, as well as from differences in the institutional dynamics between and within prosecutors' offices and police departments.

Using interviews with prosecutors, police officials, and defense attorneys around the country, as well as unpublished and published sources, this Article provides the first account of the wide disparities in *Brady's* application to police personnel files. It argues that critical impeachment evidence is routinely and systematically suppressed as a result of state laws and local policies that limit access to the personnel files. Beyond these policies, *Brady's* application to the files is further impeded by the conflict within the prosecution team. *Brady* assumes that prosecutors and police officers form a cohesive “prosecution team” and that, in the words of the Supreme Court, “the prosecutor has the means to discharge the government’s *Brady* responsibility if he will” by putting in place “procedures and regulations” to bring forth information known only to the police.¹⁸ But when it comes to *Brady's* application to these personnel files, the prosecution team is at war with itself, and this internal battle makes the concept of the prosecution team fall apart. Finally, the Article contends that privacy protections for police misconduct are incompatible with core aspects of the *Brady* doctrine and that systems that attempt to balance *Brady* against police privacy wind up sacrificing the former to the latter. The Article argues that, as both a doctrinal and a normative matter, police misconduct should receive no protections from *Brady's* search and disclosure obligation, and that, because the blame for *Brady* violations goes far beyond the prosecutor’s office, so must the solutions.¹⁹

This Article proceeds in five parts. Part I looks at how the Supreme Court’s *Brady* doctrine applies to police personnel files and at the doctrinal ambiguities the federal courts have failed to resolve.

17. See *infra* Part III.B.

18. *Kyles v. Whitley*, 514 U.S. 419, 438 (1995) (quoting *Giglio v. United States*, 405 U.S. 150, 154 (1972)) (internal quotation mark omitted).

19. Oft-advocated reforms—giving bite to prosecutors’ ethical guidelines, humiliating withholding prosecutors, and providing defendants access to prosecutors’ files—would be little help with this issue because they target the prosecutor. For examples of reform proposals, see R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 VAND. L. REV. 1429, 1460 (2011); Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 436-39 (2010) (surveying a range of proposed *Brady* reforms); and Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 708-14 (1987).

Parts II and III discuss how the states have applied *Brady* to these files. Part II examines how varying state laws and local policies affect *Brady* compliance. The discussion provides a novel framework that divides jurisdictions into four groups: (1) those where prosecutors cannot access the personnel files; (2) those where prosecutors need not access the files because the records of misconduct are accessible to the public and thus not considered *Brady* material; (3) those where prosecutors have access to the files and use that access to search for and disclose the misconduct information; and (4) those where prosecutors have access to the files but do not put systems in place to search for or disclose the information. Part III contends that, even when prosecutors can discover and disclose *Brady* material in the files, they face much pressure from police officers and unions not to. This conflict within the prosecution team over *Brady*'s application to the files—a conflict described as the “third rail” of the prosecutor-police relationship²⁰—has also pitted police brass against police labor. Part III argues that the internal conflict within the prosecution team is a further impediment to *Brady*'s application to records of police misconduct.

Part IV argues that police misconduct does not deserve the confidentiality protections it currently enjoys. Even if it did deserve such protections, the systems that purport to balance *Brady* against police confidentiality violate core tenets of the *Brady* doctrine and make bad public policy by allowing dishonest officers to continue to testify. Part V argues that the solutions for this *Brady* problem must look beyond prosecutors, and even beyond the police. Making police misconduct more accessible would benefit not only defendants but also society, ensuring fairer trials and forcing dishonest cops off the job.

I. *BRADY* IN THE FEDERAL COURTS

The Supreme Court significantly expanded *Brady*'s sweep over the last fifty years, charging prosecutors with the responsibility for learning of and disclosing favorable evidence found in an increasingly broad array of sources. This expansion took place with the Court focused on evidence in the prosecutor's or the police department's case files. But the logic and the language of the doctrine also dragged along another expanse of *Brady* material, sometimes referred to as “hidden” *Brady* evidence.²¹ This Article refers to this “hidden” *Brady* material as “unrelated-case” evidence. Such evidence meets the three criteria of *Brady*: it is (1) favorable to the defendant, (2) materially so, and (3) known to a member of the prosecution team. But what makes this evidence different from traditional *Brady* material is that it is unrelated to the case: it came to the prosecution team's attention not through the investigation of the

20. Telephone Interview with Jerry Coleman, Chief, Brady, Appellate & Training Div., S.F. Dist. Att'y Office (Feb. 12, 2014).

21. Application of Jeffrey F. Rosen, Santa Clara County District Attorney, for Leave to File Amicus Curiae Brief in Support of Petitioner; Amicus Curiae Brief at ii, *People v. Superior Court (Johnson)*, 176 Cal. Rptr. 3d 340 (Ct. App. 2014) (Nos. A140767, A140768).

case at hand but through the team members' involvement in other cases. Police misconduct evidence generally falls into this "unrelated-case" category.

However, while the Supreme Court's case law draws this material into the orbit of *Brady*, the Court never considered the special challenges posed to prosecutors by unrelated-case material. Specifically, the Court's *Brady* case law has provided no logical limit on how far the prosecutor must go to learn of and disclose material that is unrelated to the case at hand but is still known by some member of the prosecution team. And while the lower federal courts have fashioned some practical, case-by-case answers to the general question of *Brady*'s application to unrelated-case material, these guidelines do not settle the question of how *Brady* applies to police personnel files. This gap in the federal case law, in turn, has allowed the states to go in widely divergent directions on this issue. But before discussing the state of the federal case law, a short primer is required.

A. *Basics on Brady, Personnel Files, and Impeachment Evidence*

Brady requires prosecutors to disclose to defendants any favorable, material evidence known to any member of the prosecution team, including the police. A *Brady* violation has three elements.²² First, the evidence in question must be favorable to the defendant because it is either exculpatory or impeaching.²³ Second, the prosecutor must have suppressed the evidence, either by hiding it or by failing to learn of and disclose it. Good or bad faith on the part of the prosecutor is irrelevant. Finally, the suppressed evidence must be material enough that its disclosure would create a "reasonable probability" of a different outcome as to guilt or punishment.²⁴

This Article focuses on suppression, the second element of a *Brady* violation, and particularly on suppression that occurs when prosecutors fail to learn of something they should have learned of. This inquiry necessarily requires a definition of what the prosecutor should have known. The Supreme Court held, in a 1995 decision extending the *Brady* doctrine, that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."²⁵ Because officers are members of the prosecution team, and because they know of the misconduct in their own files, *Brady* requires the prosecutor to learn of and disclose this information. But this duty to learn raises difficult line-drawing questions about how far the prosecutor must go in scouring the officer's past. The Article ad-

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

23. *Id.* Evidence that is impeaching, as opposed to exculpatory, is sometimes called *Giglio* material, after the Supreme Court case extending *Brady* to impeachment evidence. *See Giglio*, 405 U.S. 150.

24. *Strickler*, 527 U.S. at 281.

25. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995); *see also* *Youngblood v. West Virginia*, 547 U.S. 867, 869-70 (2006) (per curiam); *Banks v. Dretke*, 540 U.S. 668, 693 (2004); *Strickler*, 527 U.S. at 275 n.12.

dresses those questions later on. For now, it is important to note that the Article's frequent discussion of the prosecutor's duty to learn is geared toward this second element of a *Brady* violation: suppression.

A brief discussion of police personnel files is also required.²⁶ These files contain many forms of *Brady* material. The Article focuses mostly on impeachment evidence in the files—performance evaluations, disciplinary write-ups, and internal affairs investigations that show an officer has lied. This information can be critical to a defendant in attacking the officer's credibility on the stand. Examples include findings that officers falsified reports, provided false testimony, stole money, or otherwise lied on the job.²⁷ Even when the initial misconduct does not implicate the officer's truthfulness, the internal affairs investigation that follows may do so if the officer is caught in a lie or a cover-up.²⁸

In addition, the files may also contain exculpatory, as opposed to impeachment, evidence. In one case, for example, internal affairs findings showed that a forensic technician's "lab work was characterized by sloppiness and haste."²⁹ The Ninth Circuit concluded that the findings "could have supported a defense theory that [the technician] inadvertently contaminated" the evidence.³⁰ Exculpatory evidence may also appear in the files when a police department launches an internal affairs investigation in parallel to a criminal investigation and comes across witness statements that are favorable to the defense, or when an officer's history of excessive force allows a defendant to argue that the officer was the aggressor and, thus, that the defendant acted in self-defense.³¹

The focus of this Article is on impeachment evidence contained in these files, so the basics of impeachment are worth mentioning. Impeachment evidence is anything that tends to call into question the credibility of a witness.

26. For simplicity's sake, the Article uses "police" as shorthand for "law enforcement." This is not intended to distinguish police from sheriffs' offices or other types of law enforcement agencies.

27. See, e.g., *United States v. Veras*, 51 F.3d 1365, 1374 (7th Cir. 1995); *State v. Richard W.*, 971 A.2d 810, 820-21 (Conn. App. Ct. 2009); *City of Hastings v. Law Enforcement Labor Servs., Inc.*, BMS Case No. 12-PA-0020, 2012 WL 759075, at *3 (Feb. 13, 2012) (Kapsch, Arb.); Mark Fazlollah, *Prolific Officer's Credibility at Issue*, PHILA. INQUIRER (Apr. 15, 2013), http://articles.philly.com/2013-04-15/news/38531719_1_drug-arrests-defense-attorneys-public-defender; *Problem Officers: What They Did to End Up on List*, supra note 15; Shawn Vestal, *Dismissal of Detective Sheds Light on 'Brady Officer'*, SPOKESMAN-REV. (July 23, 2011), <http://www.spokesman.com/stories/2011/jul/23/shawn-vestal-dismissal-of-detective-sheds-light>.

28. See, e.g., *Milke v. Ryan*, 711 F.3d 998, 1012 (9th Cir. 2013); *State v. Laurie*, 653 A.2d 549, 552-53 (N.H. 1995).

29. *United States v. Olsen*, 704 F.3d 1172, 1181 (9th Cir. 2013), cert. denied, 134 S. Ct. 2711 (2014).

30. *Id.*

31. E.g., Jeffrey F. Ghent, Annotation, *Accused's Right to Discovery or Inspection of Records of Prior Complaints Against, or Similar Personnel Records of, Peace Officer Involved in the Case*, 86 A.L.R.3d 1170, § 2[a], 3[c] (West 2015).

Trial judges have broad discretion in setting limits on the use of impeachment evidence, and rules differ across the country about how a witness may be impeached. In general, as provided by Federal Rule of Evidence 608(a) and its state-law equivalents, “[a] witness’s credibility may be attacked or supported by testimony about the witness’s reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character.”³² The information contained in the personnel files may be critical to a defendant in alerting her to the officer’s credibility problems and may help her locate people who can testify about the officer’s credibility problems.

The documents in the personnel file can also be critical in another form of impeachment: cross-examination of a witness about specific instances of conduct. Under Federal Rule of Evidence 608(b) and its state-law analogues, the court may allow a witness to be asked about “specific instances of . . . conduct” on cross-examination provided they are “probative of the character for truthfulness or untruthfulness of . . . the witness.”³³ While the internal affairs findings themselves will generally not be allowed into evidence,³⁴ defense counsel’s knowledge of these findings allows for questioning of the officer that can demolish the officer’s credibility. If asked about a specific instance of dishonesty, the officer will be forced into a cruel trilemma: Admit the misconduct, and come off as a liar. Deny the misconduct, and commit perjury. Claim no recollection, and have his memory called into question.

In cases that hinge on an officer’s testimony, the value of these various forms of impeachment evidence cannot be overstated. But the evidence is meaningless if the defendant never learns about it, and that is where *Brady* comes in.

B. *The Supreme Court*

What has the Supreme Court said about *Brady*’s application to police personnel files? The short answer is that the Court has never been required to decide a case involving *Brady*’s application to these files. What it has said is that the prosecutor has a duty to learn of favorable information known to any mem-

32. FED. R. EVID. 608(a).

33. *Id.* 608(b); see also 28 CHARLES ALAN WRIGHT & VICTOR J. GOLD, FEDERAL PRACTICE AND PROCEDURE § 6111, at 25 (2d ed. 2012) (“Most of the state versions of Rule 608 are identical to the federal provision as originally enacted or make no substantive changes.”). Some states, either by rule or by case law, limit questioning on specific instances of conduct to those that resulted in convictions. *E.g.*, LA. CODE EVID. ANN. art. 608(B) (2014) (“Particular acts, vices, or courses of conduct of a witness may not be inquired into or proved by extrinsic evidence for the purpose of attacking his character for truthfulness, other than conviction of crime as provided in Articles 609 and 609.1 or as constitutionally required.”). But courts have held that even these limitations must sometimes give way if the specific instances are particularly crucial to the defendant’s case. See, e.g., *State v. Walton*, 715 N.E.2d 824, 827 (Ind. 1999).

34. I say “generally” because some states, including Hawaii, do allow extrinsic evidence of specific instances of conduct. See HAW. R. EVID. 608(b).

ber of the prosecution team, including the police.³⁵ But, as noted earlier, the question of how far the prosecutor must go in probing the officer's background is not easily answered by the doctrine. This line-drawing problem has its roots in the story of how the Supreme Court expanded *Brady* over the years.

In 1963, the Court announced *Brady*'s due process doctrine, holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment."³⁶ But the doctrine quickly became more demanding. In the Court's 1972 decision in *Giglio v. United States*, *Brady* was expanded to include impeachment evidence.³⁷ *United States v. Bagley* further extended *Brady* in 1985, eliminating the requirement that the defendant make a request for the evidence.³⁸ The elimination of the need for a defense request placed a self-executing, affirmative obligation on the prosecution to discern and disclose the evidence, independent of any defense action.³⁹ In 1995, *Kyles v. Whitley* again extended *Brady*, announcing that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."⁴⁰

As a matter of doctrine and policy, there is much to recommend these extensions. They helped effectuate the original purpose of *Brady*: to prevent the government from suppressing evidence critical to a fair trial. But these expansions also had the effect of making the prosecutor's duty to discover, analyze, and disclose favorable information much more complicated. The literature has discussed how this expansion affected the prosecutor's *Brady* duties.⁴¹ The point to emphasize, however, is that *Brady*'s expansion had a much greater effect on unrelated-case material than it did on case-related material.⁴²

The expansion's effect on case-related material was relatively modest. "Case-related" material refers to information dredged up in the course of inves-

35. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

36. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

37. 405 U.S. 150, 154-55 (1972).

38. 473 U.S. 667, 682 (1985) (plurality opinion); *id.* at 685 (White, J., concurring in part and concurring in the judgment).

39. *Id.* at 682 (plurality opinion); *id.* at 685 (White, J., concurring in part and concurring in the judgment); *Banks v. Dretke*, 540 U.S. 668, 696 (2004); see 2 CHARLES ALAN WRIGHT & PETER J. HENNING, FEDERAL PRACTICE AND PROCEDURE § 256, at 151 (4th ed. 2009) ("The Court reiterated in *Banks v. Dretke* the requirement that prosecutors have an independent duty to disclose *Brady* material that is not conditioned on a defendant's request for such material" (footnote omitted)).

40. 514 U.S. at 437.

41. *E.g.*, Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S. TEX. L. REV. 685, 692 (2006).

42. Some commentators, however, question whether *Brady*'s reach has actually expanded. See Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of Brady v. Maryland*, 33 MCGEORGE L. REV. 643, 645 (2002) ("As *Brady*'s scope has been expanding to cover a broader range of government behavior and evidence, however, the Court simultaneously has been contracting the *Brady* right on another front, that of materiality.").

tigating the case—in short, the information in the prosecutor's and police department's case files. In the cases expanding *Brady*, the Justices frequently referred to *Brady* information as being contained in “the file,” by which they meant the case file.⁴³ But while the case law makes the prosecutor responsible for everything discovered in the process of investigating the case (i.e., the case-related material), the expanded *Brady* doctrine also seems to encompass unrelated-case material, provided the material is known to some member of the prosecution team.⁴⁴

This creates a difficult line-drawing problem for which Supreme Court cases provide no definitive answer: How far does the prosecutor's “duty to learn” extend? On the one hand, the duty to learn of unrelated-case material could become unmanageable if the prosecutor in each case had to search all the files in her office—or in the police department—to ensure those files do not contain any *Brady* material. Similarly, it would be very difficult if the prosecutor had a duty to learn of impeachment material contained in an officer's divorce proceedings or high school report cards. On the other hand, it is hard to imagine that the prosecutor could be allowed to turn a blind eye to evidence of a witness's dishonesty, known to members of the prosecution team, simply because the evidence was housed in a different case file and was not uncovered in the course of investigating this particular case. Clearly, the prosecutor's duty to learn cannot extend infinitely. But just as clearly, it cannot be strictly limited to case-related information, as such a strict limitation would permit a police officer to stay quiet about his knowledge of, say, an informant's history of lying, so long as those lies were discovered in a separate case.

Not only would a strict line against unrelated-case material clash with the language and logic of *Brady*'s “duty to learn,” but it would also ignore the fact that three Supreme Court *Brady* cases involved unrelated-case material. In

43. Supreme Court cases mentioning the *Brady* files always refer to case-related files. See, e.g., *Cone v. Bell*, 556 U.S. 449, 459 (2009) (discussing, in the *Brady* context, a criminal defendant's right to review “the prosecutor's file in his case”); *Bagley*, 473 U.S. at 695, 702 (Marshall, J., dissenting) (arguing that *Brady* requires the prosecutor to disclose “all evidence in his files that might reasonably be considered favorable to the defendant's case”); *United States v. Agurs*, 427 U.S. 97, 111 (1976) (“[W]e have rejected the suggestion that the prosecutor has a constitutional duty routinely to deliver his entire file to defense counsel”); *Giglio v. United States*, 405 U.S. 150, 154 (1972) (discussing, in the *Brady* context, “a combing of the prosecutors' files” (quoting *United States v. Keogh*, 391 F.2d 138, 148 (2d Cir. 1968)) (internal quotation mark omitted)). The focus on case-related material is further evidenced by dicta suggesting that open-file policies would be sufficient for *Brady* compliance, even though open-file policies—which allow defendants direct access to the prosecutor's case file—never give the defendant free run of unrelated-case files in the prosecutor's office or police department. See, e.g., *Connick v. Thompson*, 131 S. Ct. 1350, 1386 n.27 (2011) (Ginsburg, J., dissenting); *Strickler v. Greene*, 527 U.S. 263, 283 n.22 (1999); *Kyles*, 514 U.S. at 437; *Bagley*, 473 U.S. at 699 (Marshall, J., dissenting).

44. Cf. Robert Hochman, Comment, *Brady v. Maryland and the Search for Truth in Criminal Trials*, 63 U. CHI. L. REV. 1673, 1677 (1996) (“A search *Brady* claim arises when the prosecutor fails to gather, or to receive from others, evidence that might be material and favorable to the defense.”).

United States v. Agurs, the undisclosed evidence was a murder victim's criminal record, which was not drawn from the particular case.⁴⁵ In *Kyles v. Whitley*, information about a key informant's criminal conduct was among the evidence deemed to be *Brady* material, even though it was unrelated to the case.⁴⁶ And in *Pennsylvania v. Ritchie*, the Court dealt with a defendant's *Brady* request for child abuse records "related to the immediate charges" as well as earlier records stemming from "a separate report" of the defendant's abuse—a report that was unrelated to the investigation.⁴⁷ The *Ritchie* Court spent no time distinguishing between case-related and unrelated-case material, instead remanding the matter for the state court to conduct an in camera review.⁴⁸ In these three cases, the Supreme Court never indicated that the evidence's lack of connection to the case meant that it did not count as *Brady* evidence. At the same time, the Court never acknowledged the special challenges this material posed for the prosecutor's duty to learn, nor did it articulate where to draw the line on the prosecutor's duty to search unrelated-case material.

Evidence of police misconduct, contained in police personnel files, falls into this doctrinal crack insofar as it is generally not related to any specific case. But wherever the line is drawn on the prosecutor's duty to learn, the personnel files would seem to be within the prosecutor's constructive knowledge. Unlike the far-flung records of officers' divorce proceedings or high school report cards, the personnel files are official documents relating to the officers' official duties and found within the possession of the prosecution team. These factors mean that the misconduct is not only more likely to be useful to the defendant at trial—that is, to be favorable, material evidence—but also more likely to be practicably obtainable, given that the prosecutor need only check a few files to look for it. In short, on the spectrum of what the prosecutor has a duty to discover, the police misconduct records are not the borderline case.

Nonetheless, the Court's failure to acknowledge the special problems posed by this unrelated-case material has created an unfortunate ambiguity about the extent of the duty to learn. Typically, such ambiguities could be dealt with by the lower federal courts, but in the case of *Brady's* application to law enforcement personnel files, that clarification has not occurred.

C. *The Lower Federal Courts*

The lower federal courts have fashioned practical, case-by-case rules to define whether a prosecutor has a duty to learn of unrelated-case material. These rules ask whether a reasonable prosecutor would have learned of the information in light of the following factors: Was the person with actual knowledge

45. 427 U.S. at 100-01, 114; Brief for the United States, *Agurs*, 427 U.S. 97 (No. 75-491), 1976 WL 181371, at *5-7.

46. 514 U.S. at 428-29.

47. 480 U.S. 39, 43 (1987).

48. *Id.* at 61.

of the information on the prosecution team? Did the prosecutor have notice of the information's existence and importance? Was it logistically possible to locate the information? But the federal courts have not been able to settle how *Brady* applies to police personnel files. Nor have they been required to settle this question, because the Justice Department adopted a policy that requires federal agents' files to be searched upon request by the defense. As a result, there is a gap in the federal case law on how *Brady* applies to police personnel files.

1. *The limits of constructive knowledge*

How much of what the police know should be imputed to the prosecutor? The courts steer between two extremes in answering this question. Impute too little and the prosecution can "get around *Brady* by keeping itself in ignorance, or compartmentalizing information about different aspects of a case."⁴⁹ Impute too much and the search requirements become so onerous as to "condemn the prosecution of criminal cases to a state of paralysis."⁵⁰ A number of practical distinctions have been employed to limit a prosecutor's constructive knowledge.

First, the prosecutor is not responsible for information held by third parties or information held by arms of the government not "closely aligned" with the prosecution.⁵¹ The third-party determination is straightforward, but determining how closely aligned an agency must be is not, and it has resulted in a spatter of ad hoc judgments about what the prosecutor can be held to constructively know.⁵² A variation on this factor is that courts are inclined to impute knowl-

49. *Carey v. Duckworth*, 738 F.2d 875, 878 (7th Cir. 1984); *see also* *Hollman v. Wilson*, 158 F.3d 177, 181 (3d Cir. 1998); *United States v. Morris*, 80 F.3d 1151, 1169 (7th Cir. 1996); *United States v. Auten*, 632 F.2d 478, 481 (5th Cir. Unit A 1980); *cf.* *United States v. Thornton*, 1 F.3d 149, 158 (3d Cir. 1993) ("The prosecutors have an obligation to make a thorough inquiry of all enforcement agencies that had a potential connection with the witnesses.").

50. *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998) (quoting *United States v. Gambino*, 835 F. Supp. 74, 95 (E.D.N.Y. 1993), *aff'd*, 59 F.3d 353 (2d Cir. 1995)) (internal quotation marks omitted).

51. *United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir. 1992) ("The cases finding a duty to search have involved files maintained by branches of government 'closely aligned with the prosecution,' and in each case the court has found the bureaucratic boundary too weak to limit the duty." (citation omitted) (quoting *United States ex rel. Fairman*, 769 F.2d 386, 391 (7th Cir. 1985))).

52. *See* *United States v. Rivera-Rodríguez*, 617 F.3d 581, 595 (1st Cir. 2010) (finding a probation officer outside the prosecution team); *United States v. Pelullo*, 399 F.3d 197, 218 (3d Cir. 2005) (finding Pension and Welfare Benefits Administration (PWBA) records outside the prosecutor's constructive knowledge because the PWBA had no working relationship with the prosecution team); *Morris*, 80 F.3d at 1169 (finding the Office of Thrift Supervision, the Securities and Exchange Commission, and the Internal Revenue Service outside the prosecution team because the case law could not "be read as imposing a duty on the prosecutor's office to learn of information possessed by other government agencies that have no involvement in the investigation or prosecution at issue"). Judge Richard Nygaard syn-

edge to the prosecutor when she had authority over the person with actual knowledge of the information—though some courts say such authority is not necessary.⁵³

A second factor in determining the prosecutor's constructive knowledge is logistical. Circuit courts have held that prosecutors need not "search their unrelated files to exclude the possibility, however remote, that they contain exculpatory information," because that "would place an unreasonable burden on prosecutors."⁵⁴ They have also held that it would be "an unreasonable extension" of *Brady* to require prosecutors "'to sift fastidiously' through millions of pages" of documents in the government's possession.⁵⁵ Some circuits apply a sliding scale to the logistical question: "As the burden of the proposed examination rises, clearly the likelihood of a pay-off must also rise before the government can be put to the effort."⁵⁶ Others require specific requests from the defense to trigger the prosecutor's duty to learn:

[W]here a prosecutor has no actual knowledge or cause to know of the existence of *Brady* material in a file unrelated to the case under prosecution, a defendant, in order to trigger an examination of such unrelated files, must make a specific request for that information—specific in the sense that it explicitly identifies the desired material and is objectively limited in scope.⁵⁷

A third factor is the reasonable diligence doctrine, which holds that prosecutors do not have to learn of or disclose information that a reasonably diligent defendant could have located on her own.⁵⁸ While the definition of reasonable diligence is not always clear, the doctrine generally absolves prosecutors of

thesized the doctrine's development in *United States v. Risha*, 445 F.3d 298, 307-09 (3d Cir. 2006) (Nygaard, J., dissenting).

53. *Compare* *Moon v. Head*, 285 F.3d 1301, 1310 (11th Cir. 2002) (authority required), and *United States v. Dominguez-Villa*, 954 F.2d 562, 566 (9th Cir. 1992) (same), with *United States v. Jennings*, 960 F.2d 1488, 1490 (9th Cir. 1992) (authority not required), and *United States v. Osorio*, 929 F.2d 753, 762 (1st Cir. 1991) (same).

54. *United States v. Joseph*, 996 F.2d 36, 41 (3d Cir. 1993).

55. *United States v. Gray*, 648 F.3d 562, 567 (7th Cir. 2011) (quoting *United States v. Warshak*, 631 F.3d 266, 297 (6th Cir. 2010)); see also *United States v. Beers*, 189 F.3d 1297, 1304 (10th Cir. 1999) ("It is unrealistic to expect federal prosecutors to know all information possessed by state officials affecting a federal case, especially when the information results from an unrelated state investigation.").

56. *Brooks*, 966 F.2d at 1504; see also *United States v. Combs*, 267 F.3d 1167, 1175 (10th Cir. 2001) (citing the minimal "burden" on the prosecution of checking with Pretrial Services about its "star witness," but not reaching the issue because of materiality).

57. *Joseph*, 996 F.2d at 41.

58. See *United States v. Ladoucer*, 573 F.3d 628, 636 (8th Cir. 2009); *United States v. Rodriguez*, 162 F.3d 135, 147 (1st Cir. 1998); *United States v. Aichele*, 941 F.2d 761, 764 (9th Cir. 1991) ("When, as here, a defendant has enough information to be able to ascertain the supposed *Brady* material on his own, there is no suppression by the government."); 2 WRIGHT & HENNING, *supra* note 39, § 256, at 135 ("Evidence equally available to the defendant by the exercise of due diligence means that the government is not obligated under *Brady* to produce it.").

having to search court records or other publicly available government sources for *Brady* material.⁵⁹

These guidelines create a good deal of uncertainty about how far the prosecutor's constructive knowledge extends in general, and that uncertainty has not been settled in the context of police personnel files.

2. *Law enforcement personnel files*

Federal courts have had little to say about how *Brady*'s constructive knowledge doctrine—that is, the prosecutor's duty to learn—applies to law enforcement personnel files. In the 1980s and 1990s, a circuit split developed regarding federal prosecutors' duties, upon a defense request, to search federal agents' files. This split seemed primed for reevaluation and resolution in the wake of the Supreme Court's 1995 decision in *Kyles v. Whitley*. Instead, the split faded in significance because of a Justice Department policy requiring federal prosecutors, upon receiving a request from the defense, to have federal agents' files searched for *Brady* material. Because of this policy and the effect of the Antiterrorism and Effective Death Penalty Act (AEDPA) on the federal review of state convictions, the federal courts of appeals were left largely without the opportunity—or the need—to settle how *Brady* applies to these personnel files.

a. *The circuit split*

Going back to the 1970s and early 1980s, a few circuit decisions addressed *Brady*'s application to law enforcement personnel files. But they did so in a case-by-case manner that did not purport to create a blanket rule for the files.⁶⁰ The Ninth Circuit took the first step toward establishing a blanket rule in *United States v. Henthorn*, holding that federal prosecutors, upon request of the defendant, must search federal agents' personnel files for potential impeachment material.⁶¹ The Third Circuit later adopted this position.⁶² But the Sixth, Seventh, Eighth, and Eleventh Circuits came out differently.⁶³ Those circuits held

59. 2 WRIGHT & HENNING, *supra* note 39, § 256, at 140-41.

60. *E.g.*, *United States v. Muse*, 708 F.2d 513, 517 (10th Cir. 1983); *United States v. Deutsch*, 475 F.2d 55, 57-58 (5th Cir. 1973).

61. 931 F.2d 29, 30-31 (9th Cir. 1991); *see also* *United States v. Jennings*, 960 F.2d 1488, 1490 (9th Cir. 1992) (following *Henthorn*). The first attempt at such a rule was in *United States v. Cadet*, 727 F.2d 1453, 1467 (9th Cir. 1984), but this case, for unknown reasons, had little effect.

62. *United States v. Dent*, 149 F.3d 180, 191 (3d Cir. 1998).

63. *See* *United States v. Quinn*, 123 F.3d 1415, 1422 (11th Cir. 1997); *United States v. Driscoll*, 970 F.2d 1472, 1482 (6th Cir. 1992); *United States v. Pou*, 953 F.2d 363, 366-67 (8th Cir. 1992); *United States v. Andrus*, 775 F.2d 825, 843 (7th Cir. 1985) (“Mere speculation that a government file may contain *Brady* material is not sufficient to require a remand for *in camera* inspection, much less reversal for a new trial.” (quoting *United States v. Na-*

that if a personnel file was not searched, there was no need to remand the case for such a search unless the defendant, on appeal, could show more than “mere speculation” that the file would contain impeachment material.⁶⁴ Several other courts expressed ambivalence about which side of the split to join.⁶⁵

The difference in these approaches to the personnel files has been portrayed as a split between those circuits that require a *Brady* search upon defense request and those that do not. But the nature of the ostensible split was never so clear.⁶⁶ First, it was unclear whether the *Brady* rule articulated by these cases—whichever way the rule went—would apply to state prosecutors’ searches of state law enforcement files or whether it applied only to federal prosecutors’ searches of federal agents’ files.⁶⁷ Second, the courts on the majority side of the split—the Sixth, Seventh, Eighth, and Eleventh Circuits—did not explicitly absolve prosecutors of their *Brady* duties with respect to these files; rather, they applied a form of harmless error review in deciding whether to remand the case.⁶⁸ Third, in a number of the decisions on the majority side of the split, prosecutors did actually conduct *Brady* searches of the personnel files. What the reviewing courts refused to do was to order lower courts—or to allow defendants—to conduct additional searches on appeal.⁶⁹ Fourth, the Supreme Court destabilized whatever rules might have emerged from this putative split when it held, in *Kyles v. Whitley*, that prosecutors have a duty to learn of any favorable evidence known to other members of the prosecution team, including the police.⁷⁰ Indeed, *Kyles* so undermined these cases on both sides of the split that commentators expected the split would have to be reexamined in the wake of *Kyles*.⁷¹ But that reexamination never occurred.

varro, 737 F.2d 625, 631 (7th Cir. 1984)); see also *United States v. Van Brocklin*, 115 F.3d 587, 594 (8th Cir. 1997).

64. See, e.g., *Andrus*, 775 F.2d at 843.

65. *United States v. Brooks*, 966 F.2d 1500, 1502-04 (D.C. Cir. 1992); *Murray v. U.S. Dep’t of Justice*, 821 F. Supp. 94, 106 (E.D.N.Y. 1993).

66. Robert S. Mahler, *Extracting the Gate Key: Litigating Brady Issues*, CHAMPION, May 2001, at 14, 20 (“In short, in the Ninth Circuit ask and ye shall receive. Elsewhere, you better be prepared to make a showing of what you expect to find of an impeaching nature in a testifying officer’s personnel records.”).

67. See, e.g., *United States v. Dominguez-Villa*, 954 F.2d 562, 566 (9th Cir. 1992) (holding that, in federal prosecutions, the government “is not obligated to review state law enforcement files not within its possession or control”).

68. This deferential standard of review may amount to the same thing as excusing the search in the first place, but the uncertainty adds to the murkiness.

69. See, e.g., *United States v. Quinn*, 123 F.3d 1415, 1421-22 (11th Cir. 1997).

70. 514 U.S. 419, 437 (1995).

71. Cf. Lis Wiehl, *Keeping Files on the File Keepers: When Prosecutors Are Forced to Turn Over the Personnel Files of Federal Agents to Defense Lawyers*, 72 WASH. L. REV. 73, 104-05 (1997).

b. *The Justice Department policy*

To this day, the circuit split has not been resolved, but it has long since grown stale. Why did the courts of appeals never establish a uniform rule for *Brady*'s application to these files? Part of the explanation may well be the Justice Department's policy decision, in 1991, to require federal prosecutors to have federal agents' files searched upon defense request.⁷² This policy was designed to bring Ninth Circuit federal prosecutors in line with the search requirements articulated in *United States v. Henthorn*. But federal prosecutors around the country soon adopted this approach, essentially resolving the split as a matter of policy.⁷³ The Justice Department policy required each investigative agency within the Department's control to search agents' files for *Brady* material⁷⁴ and, if anything was found, to notify the prosecutor, who would then "determine whether the information should be disclosed or whether an in camera review by the district court is appropriate."⁷⁵

This policy evolved several times over the years to articulate specific definitions of *Brady*-qualifying material and specific protocols by which prosecutors could gain access to the files.⁷⁶ Despite the centralized guidelines, however, variations appeared in federal practice with respect to the personnel files. Federal agencies and federal prosecutors differed on which of their files were searched,⁷⁷ whether prosecutors received summaries or raw documentation of the misconduct,⁷⁸ and whether searches were required even without a defense

72. *Id.* at 106 (describing the 1991 memo sent to all U.S. Attorneys' Offices in the wake of *United States v. Henthorn*).

73. *See infra* notes 74, 79.

74. For example, in *Quinn*, the district judge stated at a suppression hearing: "As far as personal [sic] records go, the government has to see if they're . . . *Brady* or *Giglio* . . . Everybody knows that. . . [T]he government should be reviewing those records to determine whether this is *Brady* material . . ." 123 F.3d at 1421 (first, second, and third alterations in original); *see also* *United States v. Bertoli*, 854 F. Supp. 975, 1041 (D.N.J.) ("The Government is complying with, and will continue to comply with, the Department of Justice's *Henthorn* policy concerning the personnel files of all Government agents and all present or former Government employees expected to testify at trial." (quoting Government Personnel Files Brief at 6)), *aff'd in part, vacated in part*, 40 F.3d 1384 (3d Cir. 1994).

75. *United States v. Jennings*, 960 F.2d 1488, 1492 n.3 (9th Cir. 1992) (describing the federal government's counsel's explanation of the policy).

76. Office of the Att'y Gen., Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses ("Giglio Policy") (Dec. 9, 1996), <http://www.justice.gov/ag/policy-regarding-disclosure-prosecutors-potential-impeachment-information-concerning-law>; *see also* Lisa A. Regini, *Disclosing Officer Misconduct: A Constitutional Duty*, FBI L. ENFORCEMENT BULL., July 1996, at 27, 31.

77. *See* Brief for the United States at 6-8, *United States v. Herring*, 83 F.3d 1120 (9th Cir. 1996) (Nos. 95-10521, 95-10541) (describing Drug Enforcement Administration, Immigration and Naturalization Service, Bureau of Alcohol, Tobacco and Firearms, Internal Revenue Service, and Federal Bureau of Investigation policies).

78. *See id.*

request.⁷⁹ The current *United States Attorneys' Manual* requires prosecutors “to seek all exculpatory and impeachment information from all the members of the prosecution team,” including “federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant.”⁸⁰ Whatever flaws it possesses,⁸¹ the Justice Department policy nonetheless acknowledges that personnel files contain *Brady* material and that they must be searched accordingly.⁸²

c. *The policy's effect on the doctrine*

The gap in the federal case law on *Brady's* application to personnel files may well be an unintended consequence of this Justice Department policy. Under the policy, a federal defendant could simply request a search of the federal agents' files, and the ease of making this request arguably reduced the number of federal cases that otherwise would have put the *Brady* question before the

79. *United States v. Brassington*, No. 09-CR-45 (DMC), 2010 WL 3982036, at *16 (D.N.J. Oct. 8, 2010); Brief of Appellee & Supplemental Appendix, *United States v. Dent*, 149 F.3d 180 (3d Cir. 1998) (No. 97-1666), 1997 WL 33565644, at *35; Government's Omnibus Response to Defendant Jones' Pretrial Motions at 11, *United States v. Jones*, No. 2:07-cr-145-KJD-PAL (D. Nev. Aug. 11, 2008), 2008 WL 8626186; *see also* Response to the Defendant's Omnibus Pretrial Motions at 7, *United States v. Ramos*, No. 12-CR-103-S (W.D.N.Y. May 31, 2013) (“A search of the personnel files of the agents and officers who will [be] testifying for instances where they have been found to have engaged in misconduct and/or been disciplined will be made in this case (as it is done in all cases)”); Defendant Demarco Deon Williams's Motion to Compel Production of Impeachment Material & Brief in Support at 2, *United States v. Williams*, No. 08-CR-21-CVE, 2008 WL 938957 (N.D. Okla. Apr. 7, 2008) (quoting a federal prosecutor as acknowledging during a prior hearing a *Brady* policy of inquiring with local police agencies about internal affairs findings); Telephone Interview with Charles Miller, Assistant Prosecutor, Kanawha Cnty., W. Va., Former U.S. Att'y for the S. Dist. of W. Va. (Mar. 12, 2014) (“Every time a witness was identified who was a law enforcement officer or agent, a letter was sent to their agency asking for a review of their file, asking if there were any substantiated allegations of misconduct.”).

80. UNITED STATES ATTORNEYS' MANUAL § 9-5.001(B)(2) (2014).

81. *See* Telephone Interview with Rob Cary, Att'y, Williams & Connolly (Apr. 4, 2014) (describing the Justice Department's *Giglio* policy as “offensively protective” of agents).

82. UNITED STATES ATTORNEYS' MANUAL, *supra* note 80, § 9-5.100(5)(c) (“[P]otential impeachment information relating to agency employees may include, but is not limited to . . . i) any finding of misconduct that reflects upon the truthfulness or possible bias of the employee, including a finding of lack of candor during a criminal, civil, or administrative inquiry or proceeding; ii) any past or pending criminal charge brought against the employee; iii) any allegation of misconduct bearing upon truthfulness, bias, or integrity that is the subject of a pending investigation; iv) prior findings by a judge that an agency employee has testified untruthfully, made a knowing false statement in writing, engaged in an unlawful search or seizure, illegally obtained a confession, or engaged in other misconduct; v) any misconduct finding or pending misconduct allegation that either casts a substantial doubt upon the accuracy of any evidence—including witness testimony—that the prosecutor intends to rely on to prove an element of any crime charged, or that might have a significant bearing on the admissibility of prosecution evidence.”).

federal courts. At the same time, the passage in 1996 of AEDPA greatly reduced the other major source of cases in which the federal courts could have made case law on this *Brady* issue: habeas review of state convictions.⁸³ The combination of the Justice Department's policy and AEDPA thus worked to choke off the opportunity—and the need—for the federal courts to settle the question of *Brady*'s application to police personnel files. And this helped create the gap in the federal case law.

I do not want to overstate the claim. Even with the Justice Department's policy and AEDPA, federal cases have addressed *Brady*'s application to law enforcement personnel files.⁸⁴ But these cases have not been interpreted—at least not yet—as defining uniform rules about whether *Brady* requires a search of testifying officers' files. Indeed, the federal case law applying *Brady* to these files has tended to address issues on the margins of the Justice Department's policy: Can prosecutors delegate the search duties?⁸⁵ Does a prosecutor have constructive knowledge of misconduct known to the officer but yet to be detected by anyone else?⁸⁶ These cases do not answer the core questions: Will knowledge of what is in the agents' personnel files be imputed to prosecutors? And does this constructive knowledge require prosecutors to conduct routine searches of the files?

In the end, the key point is that the federal courts, from the Supreme Court down, have not made explicit how *Brady* applies to law enforcement personnel files, and the Justice Department's policy, combined with AEDPA, helped take this question off the agenda. For federal defendants, it may not matter whether the files are searched as a matter of policy or as a matter of case law—so long as they are searched. But it does matter for state defendants. The lack of federal case law on this issue provided the states much leeway in deciding how *Brady*

83. Under the relevant AEDPA provision, federal courts cannot reach the merits of the case unless the state court's decision was "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," meaning a holding. 28 U.S.C. § 2254(d)(1) (2013); *see also* *Williams v. Taylor*, 529 U.S. 362, 405 (2000). That leaves little opportunity to make new law on habeas, because if the law announced is new, then it is not established enough for the state court's contrary decision to qualify for review on the merits. *See* *Harrison v. Lockyer*, 316 F.3d 1063, 1066 (9th Cir. 2003) (deferring to the California courts under AEDPA, but questioning how the defendant can be required to know what is in a personnel file before he can review it).

84. *E.g.*, *Milke v. Ryan*, 711 F.3d 998, 1006 (9th Cir. 2013); *Simmons v. Anderson*, 209 F.3d 718, 2000 WL 283172 (5th Cir. 2000) (per curiam) (unpublished table opinion); Michael Pariente, *The Fight for Personnel Files in Defending DUI Charges: Using Milke v. Ryan to Help Your Client*, Nevada CLE Webinar (May 7, 2014) (noting that *Milke v. Ryan* has had modest success in getting Nevada police files reviewed under *Brady*); *see infra* notes 85-86.

85. *United States v. Dent*, 149 F.3d 180, 191 (3d Cir. 1998) (finding that *Brady* requires the government to "direct the custodian of the [police personnel] files to inspect them for exculpatory evidence and inform the prosecution of the results of that inspection, or, alternatively, submit the files to the trial court for *in camera* review"); *United States v. Jennings*, 960 F.2d 1488, 1490 (9th Cir. 1992).

86. *United States v. Robinson*, 627 F.3d 941, 952 (4th Cir. 2010); *see also* *Breedlove v. Moore*, 279 F.3d 952, 962 (11th Cir. 2002).

applies to records of police misconduct, and this leeway has resulted in dramatic variations in *Brady*'s application across the nation.

II. *BRADY*'S APPLICATION TO POLICE PERSONNEL FILES IN THE STATES

In the absence of federal case law, a variety of *Brady* approaches have emerged in the states. This Part divides jurisdictions into four groups. In Group 1, state statutes and local policies make police personnel files so confidential that not even the prosecutor can look inside them to search for *Brady* material. In Group 2, state statutes make the misconduct a matter of public record, and, as public record, it is not considered to be within the scope of *Brady*. In Group 3, prosecutors have access to the personnel files while defendants do not, and the prosecutors put systems in place to learn of and disclose this *Brady* information. In Group 4, prosecutors have special access to the files that defendants do not, but the prosecutors do not put systems in place to learn of or disclose the *Brady* evidence.

There are several consequences to this inconsistent application of *Brady*. First, it deprives defendants of their constitutional due process rights simply by virtue of where they happen to be tried and thus calls into question the idea that *Brady* provides a floor of procedural rights below which state law cannot drop. Second, this patchwork of *Brady* regimes demonstrates the ways in which factors outside of constitutional law—state statutes, local policies, institutional conflicts—have real bearing on the meaning of doctrine. Any constitutional analysis of *Brady* must take into account these nontraditional factors. Finally, the disparities in *Brady*'s application across these four groups suggest that *Brady* violations have deeper, more seemingly legitimate causes than prosecutorial cheating, at least as far as police personnel files are concerned. When it comes to these files, the people suppressing impeachment evidence often do so overtly and under color of law, albeit law that appears to conflict with the Constitution.

A. *Group 1: "No Access" Regimes*

Brady requires prosecutors to learn of and disclose favorable, material information known to anyone on the prosecution team, including the police. In this first group of jurisdictions, however, prosecutors are barred by state laws or local rules from looking in the police personnel files to see whether the files contain *Brady* material. Whether a prosecutor can satisfy his disclosure requirement when he cannot access these files is the central tension in this first group of jurisdictions.

The poster child for these jurisdictions is California, where more than 500 law enforcement agencies employ roughly 80,000 police officers, or about one-

tenth of all the officers in the country.⁸⁷ By statute, law enforcement personnel records are “confidential and shall not be disclosed in any criminal or civil proceeding”⁸⁸ unless the party seeking the information shows “good cause for the discovery or disclosure sought.”⁸⁹ If good cause is shown, the judge will review the files in camera to decide what must be disclosed.⁹⁰ The officer and the officer’s representative are the only ones allowed to attend this in camera review.⁹¹

California’s legislature created these statutory protections for the files—collectively known as the *Pitchess* provisions—to protect police personnel files from overly intrusive discovery requests by criminal defendants and civil litigants.⁹² These statutory provisions were part of an effort by the legislature in 1978 to limit the reach of a 1974 California Supreme Court decision, *Pitchess v. Superior Court*, which gave criminal defendants the ability to subpoena certain materials from police personnel files.⁹³ The legislative history shows no indication that lawmakers were thinking of prosecutors or *Brady* when they passed the *Pitchess* laws; the legislation was designed to block discovery requests by defendants and civil litigants. But California courts have held that these statutory protections apply to prosecutors seeking access to the files for *Brady* purposes, just as they apply to everyone else.⁹⁴

The practice of applying these personnel file restrictions to prosecutors creates the obvious potential for a conflict between *Pitchess* and *Brady*. After all, how can a prosecutor carry out his *Brady* obligation to disclose evidence in these files if, under state law, he cannot look inside them on his own? Despite the apparent tension between the *Pitchess* statutes and *Brady*, California courts have done their best to avoid acknowledging a conflict. In 2002, the California Supreme Court explicitly left open the question whether *Pitchess* would violate *Brady* “if it were applied to defeat the right of the prosecutor to obtain access to officer personnel records in order to comply with *Brady*.”⁹⁵ The court was not bothered by any *Brady* implications the next year when it stated matter-of-factly that, unless prosecutors go through the *Pitchess* procedures, “peace of-

87. BRIAN A. REAVES, U.S. DEP’T OF JUSTICE, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, at 15 app. tbl.6 (2011).

88. CAL. PENAL CODE § 832.7(a) (West 2014).

89. CAL. EVID. CODE §§ 1043, 1045 (West 2014); see also Miguel A. Neri, *Pitchess v. Brady: The Need for Legislative Reform of California’s Confidentiality Protection for Peace-Officer Personnel Information*, 43 MCGEORGE L. REV. 301, 304 (2012) (discussing conflict over personnel files in California).

90. CAL. EVID. CODE § 1045(b); *City of L.A. v. Superior Court (Brandon)*, 52 P.3d 129, 134 (Cal. 2002) (quoting *City of Santa Cruz v. Mun. Court*, 776 P.2d 222, 226 (Cal. 1989) (en banc)).

91. CAL. EVID. CODE § 1045(b) (referring to procedures in CAL. EVID. CODE § 915(b)); see *People v. Mooc*, 36 P.3d 21, 29 (Cal. 2001).

92. See *City of Santa Cruz*, 776 P.2d at 227; Neri, *supra* note 89, at 309.

93. 522 P.2d 305, 309 (Cal. 1974) (en banc).

94. See Neri, *supra* note 89, at 309; *infra* notes 95-98.

95. *Brandon*, 52 P.3d at 136 n.2.

ficer personnel records retain their confidentiality vis-à-vis the prosecution.”⁹⁶ Shortly thereafter, the California Court of Appeal held that *Pitchess*’s bar on prosecutorial access to personnel files did not violate *Brady*.⁹⁷ The court reasoned, rather circularly, that because the prosecutor “does not have access to confidential peace officer files,” he could not have a *Brady* obligation to disclose information contained in them.⁹⁸ Other California appellate decisions have similarly concluded that the *Pitchess* statutes apply to prosecutors’ *Brady* searches.⁹⁹

In light of the restrictions on accessing the files, prosecutors around the state have taken a number of different approaches to applying *Brady* to the files. One approach is to say that prosecutors are excused from having to search the files, given that they are statutorily denied access to the contents of these files.¹⁰⁰ This approach finds support in the Court of Appeal’s decision in *People v. Gutierrez*, which held that prosecutors cannot be expected to disclose what they are not allowed to access.¹⁰¹ But it seems to be at odds with the U.S. Supreme Court’s decision in *Kyles v. Whitley*, which held that prosecutors have a duty to learn of favorable information known by members of the prosecution team.¹⁰²

Another approach to the conflict between *Brady* and the personnel file protections is to acknowledge that prosecutors have constructive knowledge of information in the personnel files and then enlist the help of the police and the judiciary in bringing forth that *Brady* material without the prosecutors’ directly accessing the files. One quarter of the state’s counties, including some of its largest, embrace disclosure systems like San Francisco’s, in which the police department—not the prosecutor—reviews officers’ personnel files for potential *Brady* material.¹⁰³ If the department’s *Brady* committee finds any material that

96. *Alford v. Superior Court*, 63 P.3d 228, 236 & n.6 (Cal. 2003).

97. *People v. Gutierrez*, 6 Cal. Rptr. 3d 138, 145-47 (Ct. App. 2003).

98. *Id.* at 147.

99. *E.g.*, *Abatti v. Superior Court*, 4 Cal. Rptr. 3d 767, 781-82 (Ct. App. 2003).

100. Telephone Interview with Jerry Coleman, *supra* note 20 (discussing *Brady* practices around California).

101. 6 Cal. Rptr. 3d at 147.

102. 514 U.S. 419, 437 (1995). Apparently, another approach is just to ignore the issue. See Jaxon Van Derbeken, *Police with Problems Are a Problem for D.A.*, S.F. CHRON. (May 16, 2010, 4:00 AM), <http://www.sfgate.com/bayarea/article/Police-with-problems-are-a-problem-for-D-A-3264681.php> (reporting the view of one retired prosecutor that “his colleagues were not eager to dig into officers’ backgrounds—even though the risks of not doing so were obvious”).

103. See Application of Gregory D. Totten, Ventura County District Attorney, for Leave to File Amicus Curiae Brief in Support of Petitioner; Amicus Curiae Brief at ii, *People v. Superior Court (Johnson)*, 176 Cal. Rptr. 3d 340 (Ct. App. 2014) (Nos. A140767, A140768) (listing counties with notification systems); Application of Michael L. Rains, on Behalf of Peace Officers’ Research Ass’n of California (PORAC), the PORAC Legal Defense Fund & the San Francisco Police Officers’ Ass’n, for Leave to File Amici Curiae Brief in Support of Petitions for Writ of Mandate, Prohibition or Other Appropriate Relief & Re-

might impeach the officer's credibility or otherwise materially help a defendant, it notifies the prosecutor that the officer "has material in his or her personnel file that may be subject to disclosure under *Brady*."¹⁰⁴ When the officer is slated to testify, the prosecutor uses this generic notification from the police to try to convince the court that there is good cause to trigger the in camera review allowed by the *Pitchess* statutes.¹⁰⁵ If the court finds good cause, it will review the file and decide what must be disclosed.¹⁰⁶ The allure of this system is the compromise it strikes among the interests of prosecutors, police officers, and defendants. Prosecutors and defendants get the *Brady* information disclosed, while police officers get to keep their files secret from everyone except the judge.

But the viability of this system is now in jeopardy, thanks to a recent California Court of Appeal decision. In August 2014, a panel of the Court of Appeal held that prosecutors have an obligation to learn of *Brady* material in law enforcement personnel files and that the statutory protections for the files do *not* prevent prosecutors from searching the files for *Brady* purposes.¹⁰⁷ The court reasoned, on statutory construction rather than constitutional grounds, that the prosecutor and the police form a single prosecution team, so allowing the prosecutor to search the files for *Brady* material is not the type of disclosure that the personnel file statute was designed to guard against.¹⁰⁸

This recent decision created conflicts within California appellate case law both on the question of whether prosecutors have a *Brady* duty to learn of information in police personnel files¹⁰⁹ and on the question of whether the *Pitchess* protections limit prosecutors' ability to search the files for *Brady* ma-

quests for Stay at iii, *Johnson*, 176 Cal. Rptr. 3d 340 (Nos. A140767, A140768) (listing counties where prosecutors must file *Pitchess* motions).

104. S.F. Police Dep't, Bureau Order No. 2010-01, Procedure for Disclosure of Materials from Law Enforcement Personnel Records in Compliance with Brady and Evidence Codes § 1043 Et Seq (Aug. 3, 2010) [hereinafter SFPD Disclosure Order]; Petition for Writ of Mandate, Prohibition or Other Appropriate Relief & Stay Request; Memorandum of Points & Authorities in Support of Petition at 16-17, *Johnson*, 176 Cal. Rptr. 3d 340 (Nos. A140767, A140768) [hereinafter SFPD Brief]. The possibility that the file might have more idiosyncratic impeachment material is ignored. See Petition for Writ of Mandamus/Prohibition at 45, *Johnson*, 176 Cal. Rptr. 3d 340 (Nos. A140767, A140768) ("[P]olice legal staff and its *Brady* committee have segregated from officer personnel files *only* information reflective of dishonesty, bias, or other evidence of conduct of moral turpitude." (bolding omitted)).

105. SFPD Disclosure Order, *supra* note 104.

106. *Id.*

107. *Johnson*, 176 Cal. Rptr. 3d at 346, 361-63, *depublished and review granted by* 336 P.3d 159 (Cal. 2014).

108. *Id.* at 350, 354-56, 358 ("[W]hen a prosecutor acting as the head of a prosecution team inspects officer personnel files, or portions thereof, for *Brady* purposes, that inspection does not constitute disclosure of the files in a criminal proceeding, or otherwise breach the confidentiality of the files.").

109. Compare *id.* at 362 (holding prosecutors do have a duty to learn), with *People v. Gutierrez*, 6 Cal. Rptr. 3d 138, 147 (Ct. App. 2003) (holding prosecutors do not have a duty to learn).

terial.¹¹⁰ By giving prosecutors direct access to the files, the recent appellate decision also threatened to upend the delicate compromises between prosecutors and police officers around the state over access to the files.

In October 2014, the California Supreme Court granted a petition for review in order to resolve the conflicts this case created within California appellate case law.¹¹¹ The grant of review makes the recent appellate decision uncuttable.¹¹² More importantly, the California Supreme Court's involvement in the case means we are soon likely to have more answers about how *Brady* applies to law enforcement personnel files, at least in the eyes of the highest court in the nation's most populous state.¹¹³

California is not the only state to face a conflict between *Brady* and police privacy protections. In New Hampshire, a state statute long protected the personnel files at the expense of *Brady* and its state-law analogue, *State v. Laurie*.¹¹⁴ In 2004, New Hampshire's Attorney General urged prosecutors and police agencies to create a system, much like the one in California, to reconcile these competing pressures.¹¹⁵ The system called for the police to notify prosecutors "whenever one of that agency's officers has been found to have engaged in conduct that would fall within one of the categories" of *Brady* material.¹¹⁶ This notification was to contain no "information regarding the underlying disciplinary matter, as that information is confidential by statute," the Attorney General explained.¹¹⁷ If one of these tainted officers was slated to testify, the prosecutor would ask for an in camera review of the officer's file and a protec-

110. Compare *Johnson*, 176 Cal. Rptr. 3d at 361 (holding prosecutors do have the ability to search files for *Brady* purposes), with *Gutierrez*, 6 Cal. Rptr. 3d at 147 (holding prosecutors do not have the ability to search files for *Brady* purposes), and *Abatti v. Superior Court*, 4 Cal. Rptr. 3d 767, 781-82 (Ct. App. 2003) (same).

111. *Johnson*, 336 P.3d 159.

112. CAL. R. CT. 8.1105(e)(1) ("Unless otherwise ordered . . . , an opinion is no longer considered published if the Supreme Court grants review or the rendering court grants rehearing.").

113. Case Summary, No. S221296, *People v. Superior Court (Johnson)*, CAL. CTS., http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2087847&doc_no=S221296 (last visited Mar. 30, 2015) ("This case presents the following issues: (1) Does the prosecution have a duty to review peace officer personnel files to locate material that must be disclosed to the defense under *Brady v. Maryland* (1963) 373 U.S. 83? (2) Does the prosecution have a right to access those files absent a motion under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531? (3) Must the prosecution file a *Pitchess* motion in order to disclose such *Brady* material to the defense?").

114. 653 A.2d 549, 550 (N.H. 1995). *Laurie* interprets the New Hampshire Constitution with reference to federal *Brady* law.

115. Memorandum from Peter W. Heed, Att'y Gen., N.H., to All Cnty. Att'ys & All Law Enforcement Agencies, Identification and Disclosure of *Laurie* Materials (Feb. 20, 2004), available at <http://www.gcglaw.com/resources/police-litigation/pdf/NH-Laurie.pdf> ("Because police department internal investigations files and personnel files are confidential by statute, a prosecutor cannot conduct a search of those files for *Laurie* material.").

116. *Id.*

117. *Id.*

tive order placing “all matters relating to the motion” under seal.¹¹⁸ The judge would then decide whether the information in the file had to be released under *Brady*.¹¹⁹

Compared to California courts, however, courts in New Hampshire have shown more flexibility in addressing the conflict between the personnel file statutes and *Brady*. In 2006, the state supreme court held that a trial judge did not abuse his discretion by ordering a prosecutor to review the personnel file directly, because the personnel file statute “cannot limit the defendant’s constitutional right to obtain all exculpatory evidence.”¹²⁰ Further, in 2012, the legislature amended the personnel file statute to say that “[e]xculpatory evidence in a police personnel file . . . shall be disclosed to the defendant” and that in camera review was required only “[i]f a determination cannot be made as to whether evidence is exculpatory.”¹²¹ However, the amendment did not make clear who “shall” search for the *Brady* material: prosecutors or police.

Nonetheless, New Hampshire prosecutors report that they are still unable to search the files, even in furtherance of their *Brady* responsibilities. “We’re not allowed to look into it,” said Assistant Attorney General Stacey Coughlin. “We rely on the police department to keep accurate record and to let us know if there are any issues”¹²² Defense attempts to get prosecutors to review the files directly, in light of the new statute, have also failed. In rejecting a defense motion to compel such a review, one judge ruled that “the plain language” of the statute “does not impose an affirmative duty on all prosecutors to examine the personnel files of all law enforcement witnesses.”¹²³ Meanwhile, police officers continue to lobby for increased confidentiality protections. In early 2014, the legislature took up—and rejected—a bill that would have further interfered with prosecutors’ *Brady* duties by preventing them from deciding what in the file is exculpatory.¹²⁴ Under the bill’s language, the assessment of what was exculpatory was up to the court and the court alone: “To determine whether or

118. *Id.*

119. *Id.*

120. *State v. Theodosopoulos*, 893 A.2d 712, 714 (N.H. 2006).

121. N.H. REV. STAT. ANN. § 105:13-b (2014) (emphasis added). The amendment has yet to be interpreted in a reported decision.

122. Telephone Interview with Stacey Coughlin, Assistant Att’y Gen., N.H. (Apr. 1, 2014). Of the amendment, Coughlin said, “I don’t think it has really changed anything. We still have the same duty.” *Id.*; see also Telephone Interview with Jeffery Strelzin, Senior Assistant Att’y Gen., N.H. (Mar. 31, 2014) (“We typically don’t look at the personnel files or have access to them”). Patricia LaFrance, head of the state’s largest prosecutor’s office, said her prosecutors generally rely on the police to flag misconduct, but occasionally they review the files directly. “Technically we are still operating under former AG Heed’s memorandum,” she added. E-mail from Patricia M. LaFrance, Hillsborough Cnty. Att’y, to author (Mar. 31, 2014) (on file with author).

123. Nancy West, *Court’s Denial of Police Record Review Raises Broader Question*, N.H. UNION LEADER (July 13, 2013, 11:12 PM), <http://www.unionleader.com/article/2013/07/13/NEWS03/130719612> (internal quotation mark omitted). The Attorney General’s Office is reexamining its policy. *Id.*; E-mail from Patricia M. LaFrance, *supra* note 122.

124. H.R. 1315, 163d Gen. Court, 2014 Sess. (N.H. 2014).

not evidence is exculpatory, an in camera review by the court shall be required.”¹²⁵ As it drags on, New Hampshire’s conflict over the personnel files continues to endanger *Brady* compliance.

Halfway across the country, the justice system in Colorado faces a similar conflict. In Colorado, the personnel files are confidential, and prosecutors cannot access them without a subpoena.¹²⁶ The Colorado Supreme Court announced, in a civil case, that courts should employ an ad hoc balancing test to determine whether to grant a subpoena for police personnel records.¹²⁷ The state’s high court later adopted that same test for criminal cases.¹²⁸ Anyone seeking access to the records—including the prosecutor—must subpoena them, thus forcing an in camera review of all factors that lean in favor of and against disclosing the material.¹²⁹ Among those factors are the importance of the information to the case, the extent to which disclosure would discourage future cooperation with investigators, and the effect disclosure would have on the government’s ability to engage in honest self-evaluation.¹³⁰

The Colorado Court of Appeals added one more hurdle to any attempt to gain access to the records: a threshold requirement needed to trigger in camera review. According to the court, to trigger in camera review, the moving party must present more “than bare allegations that the requested documents would relate to the officer’s credibility” and must “show how they would be relevant to his defense of the charges against him.”¹³¹ This threshold was necessary, the court explained, lest demands for in camera review become “unnecessarily burdensome to the courts and the police” by allowing defendants “in virtually every criminal case” to “obtain *in camera* review of all documents concerning the prior conduct of arresting officers.”¹³² The effect of this threshold requirement is to prevent prosecutors from routinely checking the files, given that they

125. *Id.*

126. Telephone Interview with Ken Kupfner, Chief Deputy Dist. Att’y, Boulder, Colo. (Mar. 28, 2014) (stating that personnel files are considered “privileged” and confidential”); *id.* (“Truth is, we don’t know anything about the internal affairs investigations Based on my experience, I know law enforcement sure as hell is not going to hand them over to [us] without a fight.”). Lynn Kimbrough, spokesperson for the Denver District Attorney’s Office, said prosecutors are “not really entitled to have” the personnel files. Christopher N. Osher, *Denver Cops’ Credibility Problems Not Always Clear to Defenders, Juries*, DENV. POST. (July 10, 2011, 1:00 AM MDT), http://www.denverpost.com/ci_18448755 (internal quotation mark omitted); see also Colo. Ass’n of Chiefs of Police et al., *Situational Examples in Support of “Best Practices” 1* (2014) (on file with author) (describing the subpoena process the defendant and prosecutor must use for personnel records).

127. *Martinelli v. Dist. Court*, 612 P.2d 1083, 1088 (Colo. 1980) (en banc).

128. *People v. Walker*, 666 P.2d 113, 122 (Colo. 1983) (en banc); see also *Denver Policemen’s Protective Ass’n v. Lichtenstein*, 660 F.2d 432, 436 (10th Cir. 1981).

129. *Walker*, 666 P.2d at 122.

130. *Id.* (citing *Martinelli*, 612 P.2d at 1089).

131. *People v. Blackmon*, 20 P.3d 1215, 1220 (Colo. App. 2000). It was not enough for the subpoena to “essentially request[] any documents that reflected on the officer’s credibility.” *Id.*

132. *Id.*

must know something about what the files contain before they can get the court to consider granting access.¹³³ This impediment to routine inspection of the files, like those in California and New Hampshire, is troublesome because *Brady* is supposed to impose a self-executing, affirmative duty on the prosecution to search for material in every case.¹³⁴

In the spring of 2014, however, the associations representing Colorado prosecutors, police chiefs, and sheriffs—but not police officers—drafted a “best practices” protocol that would create a notification system like those in California and New Hampshire. Under the system, the prosecutor is “required to notify the defendant . . . when there is information in a peace officer’s or civilian employee’s personnel or internal affairs file that may affect the agency employee’s credibility.”¹³⁵ For the prosecutor to carry out her *Brady* obligation, the policy declares, it is “necessary for the law enforcement agencies in the State of Colorado to notify the District Attorney’s Office of the existence of such information.”¹³⁶ But the notification is not supposed to say anything about the contents of the officer’s file except that the file contains material that “may affect his/her credibility in court.”¹³⁷

Other states have also brushed up against this issue. In Vermont, where state troopers’ personnel files are made confidential by statute, the state supreme court denied a defendant’s *Brady* claim that he should have received material from a trooper’s file.¹³⁸ In Maine, the legislature amended its personnel file statute in 2013 to create a *Brady* exception. The law making the files confidential, the amendment reads, “does not preclude the disclosure of confidential personnel records” to prosecutors for purposes “related to the determination of and compliance with the constitutional obligations . . . to provide discovery to a

133. Some prosecutors apparently can access the files. Osher, *supra* note 126.

134. See *Kyles v. Whitley*, 514 U.S. 419, 438 (1995) (“[T]he prosecution’s responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.”); *United States v. Garrett*, 238 F.3d 293, 302 (5th Cir. 2000) (“The *Brady* line of cases announces . . . the self-executing constitutional rule that due process requires disclosure by the prosecution”); *infra* Part IV.C.2; see also *supra* note 39 and accompanying text (noting the self-executing nature of the prosecutor’s *Brady* obligation).

135. Colo. Ass’n of Chiefs of Police et al., *Brady/Rule 16 “Best Practices”* 1 (2014) (on file with author).

136. *Id.* (emphasis omitted).

137. *Id.* at 4 ex. 1; see also *id.* at 3 (“The actual personnel or internal affairs file or any material contained therein shall not be provided to the District Attorney’s Office absent a court order following an in-camera review.”). The protocols line up with the Denver Police Department’s “asterisk list,” which was implemented after criticism by an independent police monitor. See Osher, *supra* note 126.

138. *State v. Roy*, 557 A.2d 884, 893 (Vt. 1989) (“There is no exception in the statute for use of the records in court proceedings. It is clear that the intent of the statute is that the records not be subject to disclosure except for the statutory purposes.”), *overruled in part by* *State v. Brillon*, 955 A.2d 1108 (Vt. 2008). The court left open “the possibility that a defendant could have access to internal investigation files in a proper case and in a proper manner.” *Id.* at 895.

defendant in a criminal matter.”¹³⁹ The amendment was supported by the Maine Association of Criminal Defense Lawyers and by the Maine Attorney General.¹⁴⁰

Jurisdictions that prevent prosecutors from reviewing the personnel files create a host of doctrinal problems for *Brady*, and the notification systems they employ to get around these problems are themselves deeply flawed, as will be discussed later on.¹⁴¹ But it is important to note here that, for all the problems with these notification systems, they at least acknowledge the prosecutor’s duty to have the files searched for *Brady* material.

B. Group 2: “Public Access” Regimes

Jurisdictions in this second group of *Brady* regimes make records of police misconduct publicly accessible. The fact that these records are public eliminates the prosecutor’s obligation to discover and disclose them under *Brady*. That is because, under the reasonably diligent defendant doctrine, the prosecutor does not have to learn of or disclose any information that a reasonably diligent defendant could have accessed on his own.¹⁴² Nonetheless, some prosecutors in these jurisdictions do seek out and disclose this information.

Florida is the flagship for this public access group, which includes Texas, Minnesota, Arizona, Tennessee, Kentucky, Louisiana, and South Carolina.¹⁴³

139. ME. REV. STAT. tit. 30-A, § 503 (2014). Courts have yet to interpret the amendment.

140. *An Act Regarding the Disclosure of Certain Records in Criminal Matters: Hearing on L.D. 900 Before the J. Standing Comm. on the Judiciary*, 126th Leg., 1st Reg. Sess. (Me. 2013) (prepared statement of Walter F. McKee, Chair, Legislative Committee, Maine Association of Criminal Defense Lawyers) (“There is no good reason why records that may show a defendant is innocent should somehow be protected from disclosure because of the confidentiality of personnel records.”); *id.* (prepared statement of William R. Stokes, Deputy Att’y Gen., Maine) (stating that *Brady* compliance could be more effective “if state law authorized the law enforcement employer to disclose the confidential personnel records to the prosecutor for determination of whether discovery of the material is warranted”).

141. *See infra* Part IV.C.

142. *See supra* note 58.

143. *See City of Baton Rouge v. Capital City Press, L.L.C.*, 7 So. 3d 21, 22-23 (La. Ct. App. 2009) (noting records’ public status in Louisiana); *Burton v. York Cnty. Sheriff’s Dep’t*, 594 S.E.2d 888, 895 (S.C. Ct. App. 2004) (“[W]e find the manner in which the employees of the Sheriff’s Department prosecute their duties to be a large and vital public interest that outweighs their desire to remain out of the public eye.”); REPORTERS COMM. FOR FREEDOM OF THE PRESS, PRIVATE EYES: CONFIDENTIALITY ISSUES AND ACCESS TO POLICE INVESTIGATION RECORDS 3 (2010), available at <http://www.rcfp.org/private-eyes/internal-investigation-records> (noting that Tennessee makes records public with minor exceptions); Steven D. Zansberg & Pamela Campos, *Sunshine on the Thin Blue Line: Public Access to Police Internal Affairs Files*, COMM. LAWYER, Fall 2004, at 34, 35 (quoting Kentucky’s Attorney General as stating that “disciplinary action taken against a public employee is a matter related to his job performance and a matter about which the public has a right to know” (quoting *Stewart*, Ky. Op. Att’y Gen. 00-ORD-97, 2000 WL 641066, at *5 (Apr. 13, 2000)) (internal quotation marks omitted)); E-mail from Sharon Ruiz, Pub. Defender, Nashville, Tenn., to author (Mar. 12, 2014) (on file with author) (“Yes, personnel files are public rec-

In Florida, disciplinary findings in police personnel files are open to the public, including defendants, so prosecutors do not have to seek out or disclose information from the files.¹⁴⁴ In Broward County, for example, the district attorney's office notifies defendants when there is an ongoing criminal investigation of an officer, as this information would not be publicly available, but it does not track internal affairs issues. The task of tracking down internal affairs reports falls to the defendant, explains Tim Donnelly, Special Prosecutions Chief at the Broward County prosecutor's office: "A savvy defense attorney will go to the department and they'll get the internal affairs records on the officer."¹⁴⁵

A similar story plays out in Texas. "Police personnel files are actually available to defense attorneys by either open-records requests or subpoena, just as they are to us," said Kevin Petroff, Felony Division Chief of the Galveston County District Attorney's Office. "That arguably takes them out of traditional notions of 'Brady' evidence."¹⁴⁶ In Harris County, home to Houston, prosecutors do not review personnel files for *Brady* material, nor do they maintain a list of officers with *Brady* problems, because disciplinary records are already publicly available. "[I]f it's an allegation of untruthfulness or something else that reflects upon moral turpitude or that would—if you were putting your defense attorney hat on—would cause you to want to pursue it, sometimes we hear about it and sometimes we don't," said Scott Durfee, general counsel for the district attorney's office.¹⁴⁷

However, some prosecutors still do review the personnel files for *Brady* material, even though it is publicly available. In Ramsey County, Minnesota, prosecutors maintain an aggressive *Brady* policy, even though misconduct records are accessible to the public. Several years ago, prosecutors in the county asked the St. Paul Police Department to search all of its personnel files for any of eleven categories of "potential" *Brady* information covering dishonesty, bias, and excessive force.¹⁴⁸ Once the files had been pulled, prosecutors person-

ord. We generally ask our investigators to pull them. Officers are notified when their files are pulled, so it sometimes causes some political ill will.").

144. See FLA. STAT. § 119.07 (2014); Telephone Interview with Bob Dillinger, Pub. Defender, Sixth Judicial Circuit, Fla. (Feb. 11, 2014). Only records of open investigations are confidential, and this exemption is set to expire in 2018. FLA. STAT. § 119.071(2)(k).

145. Telephone Interview with Timothy Donnelly, Chief, Special Prosecutions Unit, Broward State Att'y Office, Fla. (Mar. 31, 2014).

146. E-mail from Kevin Petroff, Felony Div. Chief, Galveston Cnty. Dist. Att'y Office, to author (Apr. 7, 2014) (on file with author). It is worth noting, however, that a number of large municipal agencies in Texas are governed by the state's civil service code, which limits public access to disciplinary records. TEX. LOC. GOV'T CODE ANN. § 143.089(g) (West 2013). The Houston Police Department, which is governed by this civil service code, makes summaries of police misconduct publicly available through the city's human resources department but requires a subpoena before it will release the information to defendants. Telephone Interview with Tuan Nguyen, Att'y, Hous. Police Dep't (Apr. 9, 2014).

147. Telephone Interview with Scott Durfee, Gen. Counsel, Harris Cnty. Dist. Att'y Office, Tex. (Apr. 8, 2014).

148. Telephone Interview with Rick Dusterhoft, Prosecutor, Ramsey Cnty. Dist. Att'y Office, Minn. (Feb. 26, 2014).

ally reviewed them to decide which officers to put on the *Brady* list, and they have continued to update the list monthly based on new misconduct findings from the police.¹⁴⁹ Prosecutor Rick Dusterhofs, who led the project, said prosecutors keep track of this information, even though not required to by *Brady*, because they want to avoid cross-examination ambushes by defendants whose attorneys obtained the police records and ineffective assistance of counsel claims by defendants whose attorneys did not obtain the information.¹⁵⁰

Another example of voluntary *Brady* disclosures can be found in Arizona's Maricopa County, home to Phoenix. In 2004, the Maricopa County Attorney's Office launched an aggressive policy aimed at digging up *Brady* material in police personnel files, even though Arizona is a public-record state.¹⁵¹ Bill Amato, the prosecutor who led the project, met with the chiefs of the county's two dozen law enforcement agencies and warned them of possible civil liability if they withheld *Brady* material from these files. "[I]f I get screwed on this," he remembers saying, "I'm taking my finger and I'm pointing it directly at you . . . [Y]ou guys now have some skin in the game."¹⁵² Within weeks, the police agencies dumped so many personnel records on Amato that he had to get a second office for the overflow.¹⁵³

Under the Maricopa County policy, law enforcement agencies are required to provide records of all disciplinary actions that concern "a law enforcement employee's truthfulness, bias, or moral turpitude."¹⁵⁴ Prosecutors have even used tips from police officers and the defense bar to ask about misconduct the police agencies did not initially disclose.¹⁵⁵ Once the prosecutor receives the records, she can then disclose them on her own or provide them to the trial

149. *Id.*

150. *Id.*; MINN. STAT. § 13.43 (2014) (describing the public-record status of government personnel data); *see also* Wiehl, *supra* note 71, at 118.

151. ARIZ. REV. STAT. ANN. § 39-121 (2014); Phx. Police Dep't, Operations Order 2.9(8) (rev. June 2013), *available at* <https://www.phoenix.gov/policesite/Documents/Public%20Ops%2006%2001%2014.pdf>; Telephone Interview with Jeremy Mussman, Deputy Dir., Maricopa Cnty. Pub. Defender, Ariz. (Feb. 27, 2014); *see also* State v. Robles, 895 P.2d 1031, 1035 (Ariz. Ct. App. 1995) ("Although we have found no Arizona authority directly on point, we decline appellant's invitation to adopt *Henthorn*. Rather, we adopt the threshold materiality showing required in *United States v. Driscoll*." (citations omitted)). *But see* Telephone Interview with Daisy Flores, Former Cnty. Att'y, Gila Cnty., Ariz. (Mar. 3, 2014) (stating that the public-record rule "doesn't necessarily mean agencies are very forthcoming about internal investigations").

152. Telephone Interview with Bill Amato, Police Legal Advisor, Tempe Police Dep't, Ariz., Former Prosecutor, Maricopa Cnty., Ariz. (Mar. 28, 2014).

153. *Id.*

154. MARICOPA CNTY. ATT'Y OFFICE, PROSECUTION POLICIES & PROCEDURES § 6.4 (rev. Oct. 3, 2011) (on file with author).

155. Letter from Bill Amato, Police Legal Advisor, Tempe Police Dep't, to Karl Auerbach, Acting Chief, Salt River Police Dep't (Dec. 10, 2004) ("Unfortunately we continue to receive information from the defense bar and other police officers about cases that have not been reported to our office.").

judge, who will decide what to release.¹⁵⁶ Why did prosecutors establish such a system, given the information's public-record status? Amato said that, under his reading of *Brady* case law, "there is an affirmative obligation on the prosecution" to have that information, regardless of whether the defendant could get it on his own.¹⁵⁷

This description of *Brady*'s application in public-record states helps to demonstrate the diversity of approaches to the *Brady* issue. It also provides a retort to the claim that prosecutors could not possibly handle the burden of keeping track of misconduct in police personnel files: make the misconduct public, and prosecutors need not spend any time worrying about it.¹⁵⁸

C. Group 3: "Access and Disclosure" Regimes

In the third group of jurisdictions, prosecutors have access to police personnel files while defendants do not, which places a *Brady* obligation on the prosecutors to learn of and disclose material from these files. In these jurisdictions, prosecutors use their access to put in place systems to comply with their *Brady* duties. Of the four types of disclosure regimes, this is the most straightforward because it treats personnel file evidence like any other favorable, material information known to the prosecution team.

Prosecutors in Washington State fall into this disclosure group. Statewide associations representing prosecutors, police chiefs, and sheriffs have adopted model rules calling on law enforcement agencies to "review all their internal investigation files to determine if any possible *Brady* information exists on any of their employees who may be called as witnesses by the prosecution."¹⁵⁹ Where such information exists, the agencies "must submit the information to the prosecutor," who is then free to disclose it without asking the court for permission.¹⁶⁰ Prosecutors in King County, home to Seattle, employ *Brady* lists

156. *Id.*; Bill Amato, BRADY and Officer Integrity, PowerPoint Presentation to Tempe Police Dep't (n.d.) (on file with author).

157. Telephone Interview with Bill Amato, *supra* note 152; Kyle Daly, *Pinal County Attorney's Office Compiling List of Cops with Questionable Integrity*, INMARICOPA.COM (Aug. 12, 2013, 12:29 PM), <http://www.inmaricopa.com/Article/2013/08/12/pinal-county-attorney-office-lando-voyles-brady-list-cops-questionable-integrity-lizarraga> (announcing the Pinal County Attorney's Office's *Brady* list).

158. *See infra* notes 184-87 and accompanying text.

159. WASH. ASS'N OF SHERIFFS & POLICE CHIEFS, MODEL POLICY FOR LAW ENFORCEMENT AGENCIES REGARDING BRADY EVIDENCE AND LAW ENFORCEMENT WITNESSES WHO ARE EMPLOYEES/OFFICERS 3 (2009); *see* Mary Ellen Reimund, *Are Brady Lists (aka Liar's Lists) the Scarlet Letter for Law Enforcement Officers? A Need for Expansion and Uniformity*, INT'L J. HUM. & SOC. SCI., Sept. 2013, at 1, 2 (discussing *Brady* list use in Washington); *see also* WASH. ASS'N OF PROSECUTING ATT'YS, MODEL POLICY, DISCLOSURE OF POTENTIAL IMPEACHMENT EVIDENCE FOR RECURRING INVESTIGATIVE OR PROFESSIONAL WITNESSES 3-5 (2013).

160. WASH ASS'N OF SHERIFFS & POLICE CHIEFS, *supra* note 159, at 3.

to track the misconduct of the 3000 law enforcement agents in the county, as do prosecutors in other Washington counties.¹⁶¹

In North Carolina, police personnel files are confidential by statute,¹⁶² and case law prevents defendants from subpoenaing them without providing “specific factual allegations detailing reasons justifying disclosure.”¹⁶³ But prosecutors have easy access to the files, and some use that access to seek out and disclose *Brady* information. In 2013, District Attorney Ben David, former head of the North Carolina Conference of District Attorneys, implemented a “heightened Giglio screening process” for New Hanover and Pender Counties.¹⁶⁴ The policy requires all officers to self-report *Brady*¹⁶⁵ issues in their backgrounds and requires all police agencies to search officers’ personnel records for credibility issues going back ten years.¹⁶⁶ “Our duty in North Carolina is nearly absolute to disclose what we know and what we should know,” said Tom Old, the prosecutor directing the project. “What we should know is what is contained in internal affairs files”¹⁶⁷ In Old’s estimation, prosecutors have “an affirmative duty to gain access to those [files] and disclose anything that reflects on an officer’s credibility or bias.”¹⁶⁸

Elsewhere in North Carolina, disclosure is less formal and less forthcoming. Prosecutors in Buncombe County, home to Asheville, have no policy for checking personnel files for *Brady* material.¹⁶⁹ In Pitt County, the city attorney—not the prosecutor—has the task of going through the personnel files for potential *Brady* material. According to the policy of one police department there, the city attorney is allowed to disclose the information to prosecutors only if prosecutors agree not to disclose it to the defense without in camera review.¹⁷⁰

In the District of Columbia, prosecutors maintain a list of officers with credibility issues.¹⁷¹ Upon disciplining a police officer, the Metropolitan Police

161. Reimund, *supra* note 159, at 2.

162. See N.C. GEN. STAT. § 126-24 (2014); *id.* § 160A-168.

163. *In re Brooks*, 548 S.E.2d 748, 755 (N.C. Ct. App. 2001).

164. Procedure for Disclosure of *Brady/Giglio* Material, Attachment to Memorandum from Benjamin R. David, Dist. Att’y, N.C. Fifth Prosecutorial Dist., to Law Enforcement Officers of the Fifth Prosecutorial Dist. (Apr. 3, 2013) (on file with author).

165. The policy speaks of “*Giglio* material,” which is a reference to *United States v. Giglio*, in which the Supreme Court extended *Brady* to impeachment evidence. 405 U.S. 150, 154 (1972). Any *Giglio* material is *Brady* material.

166. Procedure for Disclosure of *Brady/Giglio* Material, *supra* note 164.

167. Telephone Interview with Tom Old, Assistant Prosecutor, Fifth Prosecutorial Dist., N.C. (Mar. 31, 2014).

168. *Id.*

169. Telephone Interview with Megan Apple, Assistant Dist. Att’y, Buncombe Cnty., N.C. (Mar. 31, 2014).

170. See GREENVILLE POLICE DEP’T, POLICIES & PROCEDURES MANUAL § 104.1.2 (rev. Aug. 15, 2013).

171. Barker, OEA No. 1601-0143-10, slip op. at 8, 10, 13 (D.C. Office of Employee App. Nov. 28, 2012) (quoting testimony by Roy McCleese, Chief of the Appellate Division of the U.S. Attorneys Office); CONVICTION INTEGRITY PROJECT, CTR. ON THE ADMIN. OF

Department forwards the officer's name to a *Brady* committee within the prosecutor's office, which reviews the officer's records to decide whether she should be included on the *Brady* list.¹⁷² When a *Brady* officer is slated to testify, the prosecutor checks with the officer's supervisor for more details about the nature of the misconduct and ultimately decides whether the officer's testimony in that case would withstand the impeachment evidence that must be disclosed.¹⁷³

D. Group 4: "Access but No Disclosure" Regimes

In some jurisdictions, even though prosecutors have special access to the personnel files, they do not put in place systems to seek out *Brady* material in the files. This failure is sometimes attributable to ignorance of or disregard for the law. Other times, the decision not to search the files is driven, or at least abetted, by police departments and courts that treat the personnel files as a land where *Brady* does not shine. In some jurisdictions, prosecutors, police, and the courts effectively ignore *Brady*'s application to personnel files, leaving defendants to make do with whatever impeachment material they can scrounge from the files via subpoena.

Some jurisdictions show no recognition that internal affairs findings have implications for *Brady*, and this lack of awareness means that prosecutors never learn of the misconduct they would be required to disclose. For example, retired police lieutenant Richard Lisko asked the head of internal affairs at an unnamed Maryland agency about the agency's *Brady* policy for misconduct records. "What's that?" the internal affairs commander asked. "You mean the gun

CRIMINAL LAW, ESTABLISHING CONVICTION INTEGRITY PROGRAMS IN PROSECUTORS' OFFICES 26 n.16 (2012).

172. Lindsey, OEA No. 1601-0081-09, slip op. at 7 (D.C. Office of Employee App. Oct. 28, 2011) (quoting testimony by Robert Hildum, Deputy Attorney General for Public Safety for the D.C. Office of the Attorney General (OAG), indicating that the OAG reviews the officer's misconduct and decides whether or not to use the officer's testimony). The list is actually called the "Lewis List," in reference to *Lewis v. United States*, 408 A.2d 303, 307 (D.C. 1979).

173. *Barker*, OEA No. 1601-0143-10, slip op. at 8; *Lindsey*, OEA No. 1601-0081-09, slip op. at 4-5. Brad Weinsheimer, chair of the District of Columbia's *Brady* committee, testified to three types of misconduct on the list: (1) an arrest, (2) an ongoing investigation (because the officer may want to "curry favor" with the prosecution), and (3) "information that we determine goes to veracity," such as "prior bad acts that relate to veracity, that relate to truth telling." *Lindsey*, OEA No. 1601-0081-09, slip op. at 4 (quoting Weinsheimer's prior testimony). Other jurisdictions around the country employ similar systems of tracking officer misconduct. *E.g.*, Plaintiffs' Response to Witness Jerome Gorman's Motion to Quash & for Protective Order at 5-6, *Callahan v. Unified Gov't*, No. 2:11-CV-02621-KHV-KMH (D. Kan. Mar. 20, 2013) (Wyandotte County, Kansas); CONVICTION INTEGRITY PROJECT, *supra* note 171, at 26 (Jefferson Parish, Louisiana); Donnie Johnston, *Culpeper Officer Pleads Not Guilty in Fatal Shooting*, FREE LANCE-STAR (June 8, 2012, 7:55 AM), http://www.fredericksburg.com/local/culpeper-officer-pleads-not-guilty/article_4959d8a6-56d4-5146-a0bd-ef6d43deae4c.html (Culpeper, Virginia).

law?”¹⁷⁴ Lisko next asked the agency’s legal director about the *Brady* policy for disclosing police misconduct. “We don’t have one,” the attorney said. “We require a subpoena, and then we challenge it in court.”¹⁷⁵

Another illustration of this lack of awareness can be seen in Michigan, where the Commission on Law Enforcement Standards encountered a question in 2007 about “what duties exist on the part of law enforcement agencies to provide personnel files of police officers in pending criminal cases under the Giglio rule.”¹⁷⁶ The Commission’s attorney researched the question and reported back a month later that no duty exists. “The Giglio case in Federal practice has not been extended to the state,” he said, so it was “not an immediate question that police or law enforcement officials need to be concerned with . . . relative to an affirmative duty to turn over personnel records.”¹⁷⁷

Even where prosecutors acknowledge *Brady*’s application to personnel files, some have been slow to institute search and disclosure practices. For example, a New York statute makes police personnel files confidential but permits prosecutors to look in the files.¹⁷⁸ This special access thus foists a *Brady* obligation on prosecutors to learn of misconduct in the files. But District Attorney Gwen Wilkinson, of upstate Tompkins County, said she has no formal system for learning of impeachment evidence in the personnel files—though she plans to implement one soon.¹⁷⁹ Indeed, her lack of a system for learning of police misconduct was an issue in a civil rights suit brought by a police officer in Tompkins County.¹⁸⁰

174. Richard Lisko, *Agency Policies Imperative to Disclose Brady v. Maryland Material to Prosecutors*, POLICE CHIEF, Mar. 2011, at 12, 12 (internal quotation marks omitted). This was a reference to the Brady Handgun Violence Prevention Act of 1993. *See also* Telephone Interview with Daisy Flores, *supra* note 151 (“[L]aw enforcement agencies don’t understand. You say *Brady* to them, and they think it has to do with gun control.”).

175. Lisko, *supra* note 174, at 12 (internal quotation marks omitted).

176. Mich. Comm’n on Law Enforcement Standards, Commission Meeting Minutes 11 (Mar. 14, 2007), https://www.michigan.gov/documents/mcoles/2_Minutes_3-14-2007_193332_7.pdf. As noted earlier, *Giglio* material is *Brady* material.

177. *Id.*

178. N.Y. CIV. RIGHTS LAW § 50-a (McKinney 2014) (“The provisions of this section shall not apply to any district attorney or his assistants . . . or any agency of government which requires the records . . . in the furtherance of their official functions.”).

179. Telephone Interview with Gwen Wilkinson, Dist. Att’y, Tompkins Cnty., N.Y. (Apr. 2, 2014). Wilkinson said that the “[r]equirements of *Giglio* are going to be much more stringent” going forward. *Id.*

180. Examination Before Trial of Gwen Wilkinson at 30, *Miller v. City of Ithaca*, 914 F. Supp. 2d 242 (N.D.N.Y. 2012) (No. 3:10-cv-597) (reporting that no formal or informal protocol exists for informing the prosecutor of police misconduct). The officer alleged that he complained of racial discrimination in the police department and, in retaliation for this complaint, police supervisors improperly told the district attorney about his disciplinary record, even though there was no system in place to disclose this material in general. According to the officer’s suit, the district attorney then agreed to use the information to “provide a sham ‘opinion’ concerning [the officer’s] purported lack of credibility so as to allow [the police department] to exact punishment against [the officer] for his complaints of discrimination.” Amended Complaint at 11-12, *Miller*, 914 F. Supp. 2d 242 (No. 3:10-cv-597).

Similarly, prosecutors in Charleston, West Virginia, have access to police misconduct files but have only recently begun looking in these files. Charles Miller, a longtime federal prosecutor who joined the district attorney's office several years ago, said he "quickly saw that we really weren't doing anything with respect to *Giglio*" material in personnel files.¹⁸¹ This realization prompted him, with the district attorney's blessing, to ask all law enforcement agencies in the county to "review the files of all their officers and notify us if there are any substantiated allegations of misconduct."¹⁸² Not all his colleagues in the state do the same, he said.¹⁸³

Some prosecutors have argued that, as a matter of doctrine, they are not required to learn of information in police personnel files. In Oregon, in 2013, one prosecutor after another said as much in hearings before the legislature. "[I]magine the resources that would be required to go into every one of those personnel files on some periodic basis—I don't know, monthly—to see if there had been some finding of dishonesty or some kind of actionable misconduct that some defense attorney might consider impeachable," said one district attorney. "It's staggering."¹⁸⁴ The first assistant to another district attorney added: "To ask prosecutors to be aware of the contents of their personnel files, to be aware of commendations and of demerits contained within those personnel files, is simply asking too much."¹⁸⁵ Still another district attorney insisted: "How far do we have to delve into witnesses' lives, victims' lives, you know, law enforcement's lives?"¹⁸⁶ The executive director of the Oregon District Attorneys Association wrote that such a search requirement was "a demand that the government pry into everyone's life to see if there is anything there."¹⁸⁷ Notwithstanding these statements, a task force of Oregon prosecutors and law enforcement leaders is now drafting guidelines on *Brady*'s application to these files.¹⁸⁸

In many jurisdictions, personnel file material is considered more of a discovery matter than a *Brady* matter; courts discuss what a defendant must do to access the files or to trigger in camera review, but do not ask what the *prosecu-*

181. Telephone Interview with Charles Miller, *supra* note 79.

182. *Id.*

183. *Id.*

184. *Hearings on S.B. 492 Before the S. Comm. on Judiciary, 77th Leg., Reg. Sess. (Or. 2013)* (testimony of Alex Gardner, Lane County District Att'y), *video available at* http://oregon.granicus.com/MediaPlayer.php?clip_id=2020.

185. *Id.* (testimony of Jeff Howes, First Assistant, Multnomah County District Att'y Office).

186. *Hearings on S.B. 492 Before the H. Comm. on Judiciary, 77th Leg., Reg. Sess. (Or. 2013)* (testimony of Scott Healy, Clackamas County District Att'y), *video available at* http://oregon.granicus.com/MediaPlayer.php?clip_id=1348.

187. *Id.* (written statement of Doug Harclerod, Executive Director, Oregon District Att'ys Association) (recounting what "[o]ne experienced" district attorney said), *available at* <https://olis.leg.state.or.us/liz/2013R1/Downloads/CommitteeMeetingDocument/25268>.

188. E-mail from Eriks Gabliks, Dir., Or. Dep't of Pub. Safety Standards & Training, to author (Mar. 23, 2014) (on file with author).

tor must do to search the files. “There are relatively few cases involving the right of a defendant to have the prosecution review personnel files of law enforcement officers,” explained the Delaware Supreme Court, after carrying out a nationwide survey of the case law. “Nevertheless, those decisions are almost unanimous in holding that in response to a specific motion, or upon subpoena *duces tecum*, the prosecution is required to review the identified personnel files for *Brady* material.”¹⁸⁹ Unfortunately, instead of considering the prosecutor’s duty toward these files, court opinions focus on what the *defendant* must do to gain direct access or to trigger in camera review. For example, a leading New York case holds that a defendant who wants access to the personnel files should at least advance “some factual predicate which would make it reasonably likely that the file will bear such fruit and that the quest for its contents is not merely a desperate grasping at a straw.”¹⁹⁰ Other courts have adopted similar threshold requirements for the personnel files, commonly requiring the defendant to establish “a factual basis for the requested files” before he can trigger in camera review or access the file himself.¹⁹¹

The demotion of the personnel file issue from *Brady*’s constitutional status to that of a mere discovery request has a number of problematic implications. The most important implication of this discovery approach is that it shifts from the prosecutor to the defendant the difficult burden of justifying why the file’s confidentiality should be pierced. Under the discovery approach, the burden falls on the defendant to make a threshold showing about what the files contain before the court will even consider reviewing the files. The paradox is that the defendant must already know something about what is in the file before he can get help learning what is actually in the file. If he knows nothing about the file—as one might expect of such a confidential source—the defendant will get

189. *Snowden v. State*, 672 A.2d 1017, 1023 (Del. 1996). But some courts do not agree. Last summer, New York’s high court said, in dicta, “While prosecutors should not be discouraged from asking their police witnesses about potential misconduct, if they feel such a conversation would be prudent, they are not required to make this inquiry to fulfill their *Brady* obligations.” *People v. Garrett*, 18 N.E.3d 722, 732 (N.Y. 2014) (discussing, in the context of a civil rights suit, evidence known to the officer but not to the prosecutor).

190. *People v. Gissendanner*, 399 N.E.2d 924, 928 (N.Y. 1979). *But see* *March v. State*, 859 P.2d 714, 718 (Alaska Ct. App. 1993) (holding that “a good faith basis for asserting that the materials in question may lead to the disclosure of favorable evidence” is enough to trigger review).

191. *Snowden*, 672 A.2d at 1023 (citing *State v. Kaszubinski*, 425 A.2d 711, 714 (N.J. Super. Ct. Law Div. 1980)); *see* *Rodgers v. State*, 547 S.W.2d 419, 429 (Ark. 1977) (en banc) (“But, in the exercise of discretion, the necessity for a defendant’s searching confidential matter must be weighed against the public policy of confidentiality or secrecy. This, the trial court may do by an *in camera* inspection of the material sought.” (citations omitted)); *Dempsey v. State*, 615 S.E.2d 522, 525 (Ga. 2005) (ruling that the defendant has the “burden of showing that the personnel files were not the subject of a fishing expedition, but were relevant to . . . guilt, innocence or appropriate penalty”); *Patterson v. State*, 381 S.E.2d 754, 755 (Ga. Ct. App. 1989) (“When the defense seeks to discover the personnel files of an investigating law enforcement officer, some showing of need must be made.” (quoting *Cargill v. State*, 340 S.E.2d 891, 911 (Ga. 1986), *overruled in part* by *Manzano v. State*, 651 S.E.2d 661 (Ga. 2007)) (internal quotation marks omitted)). *See generally* Ghent, *supra* note 31.

no help from the court in learning more. Were this treated as a *Brady* problem rather than a discovery problem, it would at least be the prosecutor's responsibility to grapple with this catch-22, and prosecutors have shown somewhat more capacity for doing so than defendants.¹⁹²

In sum, whether they think *Brady* is a gun control law, a problem not pressing enough—or too difficult—to solve, or a matter of mere discovery, these Group 4 jurisdictions fail to acknowledge *Brady*'s application to police personnel files. In short, they treat the files as a *Brady* blind spot.

III. THE *BRADY* BATTLE WITHIN THE PROSECUTION TEAM

Beyond the access issues discussed above, there is another significant dynamic that impedes *Brady*'s application to police misconduct: the conflict within the prosecution team. Even when prosecutors learn of police misconduct, police officers spend much energy pressuring them not to disclose it. This pressure is motivated by the fear that disclosure will lead to severe employment consequences for the officers. Police officers and their unions have used litigation, legislation, and informal political pressure to mount a campaign against *Brady*'s application to their files. This conflict between prosecutors and police officers is easily overlooked, however, because prosecutors and police officers are widely seen as forming a cohesive prosecution team. Indeed, the Supreme Court's *Brady* case law is premised on the assumption that "the prosecutor has the means to discharge the government's *Brady* responsibility if he will" by putting in place "procedures and regulations" to bring forth *Brady* material known to any member of the prosecution team, including the police.¹⁹³ But the conflict within the prosecution team undermines that assumption and constrains the prosecutor's ability to fulfill his constitutional obligations.

The battle over *Brady*'s application to personnel files has also created divisions within police departments. Police officers suspect police management of using the *Brady* process to punish officers outside of the departments' official disciplinary systems and their attendant procedural protections. For officers, *Brady* has become an issue not just of defendants' due process rights but also of their own due process rights, as officers struggle to protect themselves from the uses and abuses of the *Brady*-cop designation. This aspect of due process helps explain why police officers and their advocates take such a hard line against *Brady*'s application to these files. Indeed, the frequent failure to apply *Brady* to these personnel files cannot be understood without accounting for this conflict, which has riven the prosecution team.

192. See *supra* Part II.A.

193. *Kyles v. Whitley*, 514 U.S. 419, 438 (1995) (quoting *Giglio v. United States*, 405 U.S. 150, 154 (1972)) (internal quotation mark omitted).

A. *The Prosecutor's (and the Police Chief's) Brady Power*

Brady's application to law enforcement personnel files is an issue very much on the minds of the police. “[O]ne of the most important issues facing law enforcement is the one surrounding the *Brady* List,” declared Jim Parks, then-president of Arizona’s largest police association. “[W]e have been fighting this issue because there appears to be no set standard for placing an officer on the list, removing an officer from the list, or . . . defining [who] makes those decisions.”¹⁹⁴ Another officer railed against his placement on a *Brady* list, calling it “tantamount to being placed on a government blacklist, which when publicized to prospective law enforcement employers effectively excludes the blacklisted individual from his chosen occupation in law enforcement.”¹⁹⁵ Still another officer derided it as a “blacklist[]” that violates due process and goes beyond any “obligation of law.”¹⁹⁶ Prosecutors, too, have acknowledged the gravity of the *Brady* designation, ominously referring to a *Brady*-list placement as “the kiss of death.”¹⁹⁷

But what, specifically, is a *Brady* list, and why does it threaten these officers? *Brady* lists, *Giglio* lists, liars lists, asterisk lists, potential impeachment disclosure databases, and law enforcement integrity databases are all terms used to describe the mechanism by which prosecutors within an office alert each other to an officer’s credibility problems.¹⁹⁸ There is a wide range in who maintains these lists—police or prosecutors—and in how the lists are constructed, with some providing only vague warnings that a credibility problem exists and others specifying the details of the misconduct. Strictly speaking, placement on the *Brady* list does not bar an officer from testifying. Depending on the severity of the impeachment material and the value of the officer’s testimony in the case, the prosecutor may still decide to call the officer as a witness. But the *Brady*-cop designation immediately puts a question mark on the officer’s ability to testify, and that question mark has severe employment con-

194. Jim Parks, *President’s Message: Brady (“Liar’s”) List a Most Important Issue*, AZCOPS SPEAKS (Ariz. Conference of Police & Sheriffs, Local 7077, Tucson, Ariz.), Spring 2004, at 2, 2.

195. Complaint for Damages & Injunctive Relief for Violation of Individual Civil Rights & Liberties at 4, *Tillotson v. Dumanis*, No. 10CV1343WQH AJB, 2012 WL 667046 (S.D. Cal. Feb. 28, 2012); see also Parks, *supra* note 194, at 2 (“The unjustified placement of an officer on a *Brady* list is, in many cases, a career ender. An officer on the list is often barred from holding any position which might result in the officer testifying in court. Officers lose the ability to promote or transfer and are stigmatized as ‘liars.’”).

196. Complaint for Damages & Injunctive Relief for Violation of Individual Civil Rights & Liberties with Supplemental State Law Claims at 7, 9, *Nazir v. Cnty. of L.A.*, No. CV10 6546-MRP (AGR) (C.D. Cal. Sept. 1, 2010).

197. Telephone Interview with Brian Kramer, Exec. Dir., Office of the State Att’y for the 8th Judicial Dist., Fla. (Mar. 31, 2014).

198. See CAL. GOV’T CODE § 3305.5 (West 2014) (“‘*Brady* list’ means any system, index, list, or other record containing the names of peace officers whose personnel files are likely to contain evidence of dishonesty or bias, which is maintained by a prosecutorial agency or office in accordance with the holding in *Brady v. Maryland* . . .”).

sequences. An officer who cannot be counted on to testify also cannot be counted on to make arrests, investigate cases, or carry out any other police functions that might lead to the witness stand. *Brady* cops may thus find themselves fast-tracked for termination and hard-pressed to find future work.¹⁹⁹

Considering the grave employment consequences, one might expect strong substantive and procedural protections to guard against mistakenly or unfairly placing an officer on the *Brady* list. But that is not the case. Unlike in police department disciplinary proceedings, which provide many procedural protections to accused officers, prosecutors can make *Brady*-cop designations based on flimsy evidence and without giving officers an opportunity to contest the allegations beforehand or to appeal the decisions afterward.²⁰⁰ Even if, on appeal, the officer overturns the misconduct finding that landed him on the *Brady* list, the prosecutor can continue to label the officer as a *Brady* cop if he doubts the officer's credibility.²⁰¹ And forget whatever progressive discipline system might govern the traditional punishment of police misconduct²⁰²: a prosecutor can put an officer on the *Brady* list for a small, first-time offense and leave her there for life without giving her any chance to clear her name.

The sense of unfairness engendered by this process is only exacerbated by the potential for police management to misuse *Brady* in clashes with police labor. Not without justification, officers suspect prosecutors of using the *Brady*

199. Telephone Interview with Richard Lisko, Program Manager, Int'l Ass'n of Chiefs of Police (Feb. 21, 2014) ("[The] challenge for many police chiefs and sheriffs: 'I have a guy who is now prevented from testifying. What do I do with him?'"). As the president of the California Police Chiefs Association recently said, "Most departments up and down the state don't have the ability to put someone in a non-enforcement position for the rest of their career Unfortunately, they really can't stay employed in the law enforcement profession." Melody Gutierrez & Kim Minugh, *California Police Unions Fight Discipline of Officers Under Prosecutors' Lists*, MERCED SUN-STAR (Sept. 12, 2013, 12:00 AM), <http://www.mercedsunstar.com/news/state/article3278731.html>.

200. See *United States v. Olsen*, 704 F.3d 1172, 1182 (9th Cir. 2013) ("[T]his circuit . . . has held materials from ongoing investigations to be favorable under *Brady*."); Parks, *supra* note 194, at 2 (justifying his Arizona police union's fight against *Brady* lists "because there appears to be no set standard for placing an officer on the list, removing an officer from the list, or . . . defining [who] makes those decisions"); Mike Carter, *Prosecutors Keep List of Problem Officers*, SEATTLE TIMES (June 24, 2007, 12:00 AM), http://seattletimes.com/html/localnews/2003760490_bradycops24m.html (recounting the president of the Seattle Police Officers' Guild's belief that only information about a "rare disciplinary finding of dishonesty against an officer" should be turned over, and reporting that the prosecutor's office has nonetheless turned over information about officers not yet disciplined).

201. Complaint at 4-6, *Garza v. City of Yakima*, No. CV-13-3031-LRS (E.D. Wash. Mar. 22, 2013) (opposing an officer's placement on the *Brady* list while challenging disciplinary findings); Complaint at 4-5, *Neri v. Cnty. of Stanislaus Dist. Att'y Office*, No. 1:10-cv-00823-AWI-GSA (E.D. Cal. May 11, 2010) (contesting disclosure of unsustained allegations as *Brady* material); see also Complaint for Damages & Demand for Jury Trial at 8-9, *Riley v. City of Richmond*, 3:13-cv-04752-MMC (N.D. Cal. Oct. 11, 2013) (alleging that the plaintiff officer remained on the *Brady* list even after being acquitted of the charges that originally led to placement on the list).

202. *E.g.*, N.J. OFFICE OF THE ATT'Y GEN., INTERNAL AFFAIRS POLICY & PROCEDURES 8 (rev. July 2014), available at <http://www.nj.gov/oag/dcj/agguide>.

designation to aid police chiefs in punishing disfavored officers. In the District of Columbia, for example, the police department apparently asked the prosecutor's office to make *Brady*-cop determinations in order to facilitate the firing of officers who were otherwise protected from termination by the statute of limitations on their misconduct.²⁰³ In Washington State, an officer claimed he landed on the *Brady* list because the department wanted to punish him without navigating the obstacles of the formal disciplinary process.²⁰⁴ His federal civil rights suit resulted in reinstatement and an \$812,500 settlement.²⁰⁵ In Texas, police officers accused the Ellis County district attorney of labeling one of their colleagues a *Brady* cop in order to help the police chief fire the officer.²⁰⁶ The officers claimed the *Brady* label rendered their colleague "unfit for duty" and, in so doing, made him ineligible for the labor protections he would otherwise have received.²⁰⁷ In an interview, Patrick Wilson, the Ellis County district attorney, denied the allegations and called them irrelevant: "[E]ven if the chief woke up one morning and like a lightning bolt from the sky said, 'I'm going to screw with this officer today and tell the D.A. he's a liar, with no basis at all,' once the chief has said that, the bell has rung. That's how liberal my view of *Brady* [is]."²⁰⁸

The alignment between prosecutors and police chiefs may also be seen in police management organizations' endorsements of *Brady*'s application to personnel files. In 2009, the International Association of Chiefs of Police advised its members of the "affirmative duty" to seek out impeachment material, including material contained in personnel files.²⁰⁹ Another example comes from the Idaho Peace Officer Standards and Training group, led by sheriffs and prosecutors who are appointed by the governor to the board. This group has emphasized that "[l]aw enforcement agencies have the responsibility to ensure prosecutors are informed of an officer's past record of dishonesty in reports or conduct impacting truthfulness."²¹⁰ Similarly, a panel of prosecutors, police chiefs, and academics recommended more robust *Brady* policies, including

203. See Barker, OEA No. 1601-0143-10, slip op. at 13-14 (D.C. Office of Employee App. Nov. 28, 2012); Lindsey, OEA No. 1601-0081-09, slip op. at 11 (D.C. Office of Employee App. Oct. 28, 2011).

204. First Amended Complaint for Damages & Injunctive Relief at 2, *Wender v. Snohomish Cnty.*, No. CV 07-197 Z (W.D. Wash. Oct. 25, 2007), 2007 WL 5043448.

205. Press Release, MacDonald Hoague & Bayless, Fired Mountlake Terrace Police Sergeant Who Criticized Drug War Reaches \$812,500 Settlement with Municipalities (Jan. 12, 2009) (on file with author).

206. Telephone Interview with Patrick M. Wilson, Cnty. & Dist. Att'y, Ellis Cnty., Tex. (Apr. 8, 2014).

207. *Id.*

208. *Id.*; see also Telephone Interview with Timothy Donnelly, *supra* note 145 ("The same officers keep coming back. Some are hard to get rid of, to fire. Departments want to send them to us. I say this is a management issue, not a criminal [one].").

209. NAT'L LAW ENFORCEMENT POLICY CTR., INT'L ASS'N OF CHIEFS OF POLICE, *BRADY* DISCLOSURE REQUIREMENTS 4 (2009).

210. *The Need for Truth: Behind Brady & Giglio*, INTEGRITY BULL. (Idaho Peace Officer Standards & Training, Meridian, Idaho), May 2012, at 1, 1-2.

those pertaining to police misconduct records.²¹¹ Other groups representing police management have also endorsed such *Brady* lists.²¹² These examples suggest that prosecutors and police managers often share common interests in *Brady*'s application to these files—interests that conflict with those of police officers.

B. *Police Officer Pushback*

While officers can neither prevent prosecutors from deeming them *Brady* cops nor force prosecutors to reverse their *Brady* decisions, officers can pressure prosecutors to use their discretion in the officers' favor. Officers have spent a great deal of effort in such attempts, using litigation, legislation, and informal political pressure to blunt *Brady*'s application to their files, and this campaign has met with some success.

1. *Litigation*

Police officers have employed a range of causes of action to fight back against the *Brady*-cop designation. One claim is defamation, in which an officer alleges that prosecutors and their police chief collaborators damaged the officer's reputation by placing him on a *Brady* list.²¹³ Defamation claims are sometimes paired with claims of breach of contract and tortious interference with contract. In one case, an officer resigned from the police department on the condition that his *Brady* problems not be revealed to prospective employers.²¹⁴ But, on the verge of landing a new job, the officer learned that the prosecutor in his old jurisdiction was planning to share the officer's *Brady* status with the prosecutor in the officer's new jurisdiction.²¹⁵ This prompted a suit for defamation, breach of contract, invasion of privacy, false light, and tortious interference with contract—a suit that the officer promptly lost on summary

211. CONVICTION INTEGRITY PROJECT, *supra* note 171, at 26 (“DA offices should also establish a database or network for tracking *Brady* and/or *Giglio* information as it relates to key witnesses, such as police officers . . . who will potentially work with a prosecutor in the future.”).

212. See WASH. ASS'N OF SHERIFFS & POLICE CHIEFS, *supra* note 159, at 3; Colo. Ass'n of Chiefs of Police et al., *supra* note 135, at 1-3.

213. See, e.g., *Walters v. Cnty. of Maricopa*, No. CV 04-1920-PHX-NVW, 2006 WL 2456173, at *1 (D. Ariz. Aug. 22, 2006); Giana Magnoli, *Ex-Santa Maria Police Officer Files Lawsuit Claiming Wrongful Termination*, NOOZHAWK (Aug. 19, 2012, 11:39 PM), http://www.noozhawk.com/article/081912_fired_police_officer_sues_santa_maria; Rebecca Woolington, *Cornelius Officer Files Tort Against City, Claims Officials Recommended His Placement on List Questioning Credibility*, OREGONIAN (Aug. 20, 2013, 8:18 PM), http://www.oregonlive.com/forest-grove/index.ssf/2013/08/cornelius_officer_files_tort_a.html.

214. *Lackey v. Lewis Cnty.*, No. C09-5145RJB, 2009 WL 3294848, at *4 (W.D. Wash. Oct. 9, 2009).

215. *Id.* at *5.

judgment.²¹⁶ Some officers have even sought—unsuccessfully—to enjoin prosecutors and police departments from disseminating *Brady* information about them.²¹⁷ These suits are often frivolous to begin with and made doubly and triply so by courts' reluctance to interfere with prosecutors' *Brady* decisions and courts' deference to the doctrines of absolute and qualified immunity. But the suits nonetheless illustrate the intensity of this conflict within the prosecution team.

Another common cause of action is retaliation, which requires the plaintiff to prove she suffered an adverse employment action as a result of some protected activity.²¹⁸ Officers claim to have been placed on *Brady* lists for criticizing the district attorney's policies in the local newspaper,²¹⁹ failing to support the prosecutor's reelection campaign,²²⁰ providing testimony that was truthful but unhelpful to the prosecution,²²¹ and complaining to city officials about corruption in the police department.²²² In one retaliation case in federal court, a narcotics detective alleged that the district attorney placed him on the *Brady* list for raising questions about improprieties on the part of one of the district attorney's employees.²²³ According to the disputed facts in the court's denial of summary judgment, the prosecutor threatened to put the detective on the *Brady* list unless the detective apologized and was transferred out of the narcotics unit.²²⁴ The case settled soon thereafter.²²⁵ The detective's lawyer called "the *Brady* listing . . . an abuse of the prosecutor's power."²²⁶ And it certainly is

216. *Id.* at *11-13. These suits illustrate the practical, if not legal, dilemmas facing prosecutors and police chiefs: keep quiet in the name of labor peace or speak up in the interests of *Brady*. In this case, the sheriff's office chose the former, while the prosecutor chose the latter. *Id.* at *5.

217. *Doyle v. Lee*, 272 P.3d 256, 258-59 (Wash. Ct. App. 2012).

218. Robert Roy, Annotation, *Right to Jury Trial in Action for Retaliatory Discharge from Employment*, 52 A.L.R.4TH 1141, § 1[a] (West 2015).

219. First Amended Complaint at 5, *Barnett v. Marquis*, 16 F. Supp. 3d 1218 (D. Or. 2014) (No. 3:13-cv-01588-HZ).

220. *Doyle*, 272 P.3d at 258.

221. Telephone Interview with Chris Bugbee, Att'y (Mar. 18, 2014) (explaining that federal prosecutors "basically implor[ed]" county prosecutors to create a *Brady* list and place his police officer client on it because of unhelpful testimony).

222. Complaint for Damages at 7, *Monico v. City of Cornelius*, No. 3:13-cv-02129-HZ (D. Or. Dec. 2, 2013); *see also* *Rodriguez v. District of Columbia*, No. 2011 CA 7096 B (D.C. Super. Ct. Feb. 1, 2012) (discussing retaliation). In another case, a governmental review board in Arizona found indications in 2013 that a police chief used *Brady* to retaliate against officers who sued him, but it discontinued its review because of a lack of evidence and a policy of "encourag[ing] police leaders to contribute information to the *Brady* Lists." Arizona Peace Officer Standards & Training Board, Minutes of Special Complaint Subcommittee 1-2 (Nov. 20, 2013) (on file with author).

223. *Walters v. Cnty. of Maricopa*, No. CV 04-1920-PHX NVW, 2006 WL 2456173, at *3-4 (D. Ariz. Aug. 22, 2006).

224. *Id.* at *4.

225. Notice of Settlement, *Walters*, No. CV 04-1920-PHX NVW.

226. E-mail from Robert Kavanagh, Att'y, to author (Mar. 6, 2014) (on file with author).

troubling to think that placement on the list could hinge on an apology or a transfer, neither of which seems connected to the officer's credibility. Indeed, one *Brady* list swept so broadly that a judge was placed on the list for his handling of a search warrant application.²²⁷ That a judge could land on a *Brady* list raises questions about how far the *Brady* lists have drifted from their original purpose.

In addition to these damages suits, police litigation has taken aim at the mechanics of *Brady* tracking. In one case, a police department succeeded in overturning a trial court's order that three officers provide their birthdates to the prosecution so that the prosecution could check the officers' criminal histories.²²⁸ Other litigation has targeted public defenders who assemble databases of officer credibility problems gleaned not only from criminal proceedings and internal affairs investigations but also from newspapers, social media, civil suits, and divorce proceedings.²²⁹

Still another strand of this litigation campaign targets the employment consequences of the *Brady* designation, rather than the *Brady* designation itself. Even if the officers cannot shake the *Brady* label, they can sometimes stave off termination. This can create a difficult situation for police management, which may find itself stuck with an officer who cannot testify because the prosecutor does not trust her, but who also cannot be terminated because the officer fought off her termination through arbitration.²³⁰ In Washington State, for example, a deputy fired for twenty-nine instances of misconduct, including some involving dishonesty, appealed his termination.²³¹ The arbitrator declared the termination excessive and reversed it.²³² The trial court affirmed the arbitrator, but the

227. Gary Grado, *Tempe Judge's Credibility Questioned*, E. VALLEY TRIB. (Oct. 6, 2011, 6:01 AM), http://www.eastvalleytribune.com/news/article_3724d038-4963-536a-9f02-25ff0f1a6e7fe.html (reporting that the judge's comments about the warrant application caused the prosecutor to question the judge's credibility).

228. *Garden Grove Police Dep't v. Superior Court*, 107 Cal. Rptr. 2d 642, 642-43 (Ct. App. 2001).

229. *Coronado Police Officers Ass'n v. Carroll*, 131 Cal. Rptr. 2d 553, 556 (Ct. App. 2003); see *San Diego Public Defender's Office "Police Practices Program" to Receive Defender Program of the Year Award*, BUS. WIRE, May 4, 2001, available at <http://www.thefreelibrary.com/San+Diego+Public+Defender%27s+Office+%60%60Police+Practices+Program%27%27+to...-a074093934>; see also Mark H. Moore et al., *The Best Defense Is No Offense: Preventing Crime Through Effective Public Defense*, 29 N.Y.U. REV. L. & SOC. CHANGE 57, 67 (2004) (discussing the Los Angeles Public Defender's database).

230. Telephone Interview with Robert W. Hood, Dir., Cnty. Prosecution & Violent Crime Div., Ass'n of Prosecuting Att'ys (Mar. 14, 2014) (noting the complications that occur when a *Brady* cop is reinstated by order of a court). "What does the prosecutor now do with that officer?" Hood asked. "I don't know that it is the prosecutor's place to tell the police department what to do with its assignments." *Id.*

231. *Kitsap Cnty. Deputy Sheriff's Guild v. Kitsap Cnty.*, 165 P.3d 1266, 1267, 1271 (Wash. Ct. App. 2007), *rev'd*, 219 P.3d 675 (Wash. 2009) (en banc); see Elliot Spector, *Should Police Officers Who Lie Be Terminated as a Matter of Public Policy?*, POLICE CHIEF, (Apr. 2008), http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=print_display&article_id=1458&issue_id=42008.

232. *Kitsap Cnty. Deputy Sheriff's Guild*, 219 P.3d at 677.

Court of Appeals reversed on the grounds that it was against public policy to force a department to employ a dishonest cop.²³³ Ultimately, however, the state supreme court reinstated the officer, holding that the legislature had not articulated an explicit public policy in favor of making honesty a job requirement for officers.²³⁴ A year later, the legislature fixed that omission by statute, but the episode reveals the breadth and complexity of *Brady*'s implications for employment law, even when all parties act in good faith.²³⁵

2. Legislation

The next form of pushback involves legislation. While statutes in many states already protect the confidentiality of police personnel files, officers and unions have pushed for legislation that would specifically address the employment consequences of *Brady*'s application to their files.²³⁶ Effective the first day of 2014, a California statute provides that adverse employment action "shall not be undertaken by any public agency against any public safety officer solely because that officer's name has been placed on a Brady list, or [because] the officer's name may otherwise be subject to disclosure pursuant to *Brady v. Maryland*."²³⁷ The legislation still allows police departments to discipline officers for the misconduct underlying a *Brady* designation, but the mere fact that the prosecutor or the police chief said the officer has a *Brady* problem cannot be used to support any adverse employment action.²³⁸

California's new law helps prevent *Brady* from being used to punish officers outside of a department's formal disciplinary channels. The law shifts the costs of misusing the *Brady* designation from the police officer to the police department. If the prosecutor declares an officer to be a *Brady* cop but has no grounds to support that designation, police management will not be able to discipline the officer because it will not be able to prove the misconduct and, according to the new legislation, the prosecutor's *Brady* decision is no longer grounds to support a disciplinary action. Instead, police management will find itself in the uncomfortable position of having to employ an officer who can neither testify nor be terminated.²³⁹ Meanwhile, the officer will hold on to his job.

233. *Id.* at 677.

234. *Id.* at 680-81.

235. WASH. REV. CODE § 43.101.021 (2014); see NAT'L LAW ENFORCEMENT POLICY CTR., *supra* note 209, at 5 n.22; Reimund, *supra* note 159, at 3.

236. See *supra* Part II.A.

237. CAL. GOV'T CODE § 3305.5 (West 2014).

238. *Id.* ("This section shall not prohibit a public agency from taking punitive action . . . against a public safety officer based on the underlying acts or omissions for which that officer's name was placed on a *Brady* list . . .").

239. See *supra* notes 230-35 and accompanying text; see also Gutierrez & Minugh, *supra* note 199 ("Bill proponents say under the current system, an officer may be suspended for 30 days following an internal investigation into misconduct, but subsequently fired when placed on the *Brady* list. Proponents argue that essentially puts employment decisions in the hands of the district attorney's office. Police union officials say the bill requires agencies to

Not surprisingly, lobbying associations representing local government and police management fought against this legislation, describing it as a “dangerous public safety precedent”²⁴⁰ that would place “unnecessary restrictions on a public agency’s ability to discipline a public safety officer.”²⁴¹

In Maryland, a similar law went into effect in October 2014.²⁴² The legislation was initially opposed by police management groups, including the Maryland Association of Counties, which saw it as an attempt to limit the prerogative of “Chiefs and Sheriffs . . . to transfer or reassign an officer if testimony integrity issues arise.”²⁴³ However, police management agreed to support a revised version of the bill that explicitly permitted the use of *Brady* lists, while prohibiting agencies from taking punitive action based solely on an officer’s inclusion on the list.²⁴⁴ More such legislation is sure to follow in other states.

3. *Political pressure*

Beyond litigation and legislation, police officers have tried to blunt the consequences of *Brady* by exerting informal political pressure on prosecutors and police chiefs. While prosecutors may use the *Brady* power to exert much influence over officers’ careers, prosecutors are also dependent on officers to bring in new cases, conduct follow-up investigations, and carry out various other tasks required for successful prosecutions.²⁴⁵ For elected prosecutors, the reliance on the police is even greater because officers make up an important electoral constituency. A district attorney who alienates the police rank and file may find herself out of a job. These factors give the police some leverage against prosecutors’ misuse of *Brady*.

introduce placement on Brady lists into a disciplinary hearing only after a decision on ‘guilt’ has been made, akin to introducing evidence at the sentencing phase of a criminal trial.”).

240. Press Release, League of Cal. Cities, Brady List Bill Now on Governor’s Desk, Veto Request Letters Needed (Aug. 30, 2013), <http://www.cacities.org/Top/News/News-Articles/2013/August/Brady-List-Bill-Now-on-Governor%E2%80%99s-Desk,-Veto-Request>.

241. Letter from Eraina Ortega, Cal. State Ass’n of Cntys., Natasha Karl, League of Cal. Cities, & Julianne Broyles, Cal. Ass’n of Joint Powers Auths., to Loni Hancock, Chair, Cal. Senate Pub. Safety Comm. (Mar. 27, 2013), *available at* <http://blob.capitoltrack.com/13blobs/dbd19c31-1031-48cc-b0e0-733b60e1ac07>.

242. MD. CODE. ANN., PUB. SAFETY § 3-106.1 (LexisNexis 2014).

243. Memorandum from Natasha Mehu, Md. Ass’n of Cntys., to Appropriations Comm. (Feb. 18, 2014), *available at* <http://www.ciclt.net/ul/mdcounties/SB0686JPR.pdf>.

244. Natasha Mehu, *2014 End of Session Wrap-Up: Public Safety & Corrections*, MD. ASS’N COUNTIES (Apr. 9, 2014), <http://conduitstreet.mdcounties.org/2014/04/09/2014-end-of-session-wrap-up-public-safety-corrections>.

245. Telephone Interview with Jerry Coleman, *supra* note 20; Telephone Interview with Rick Dusterhoft, *supra* note 148 (“The courts . . . put us between a rock and [a] hard place [with] all these protections for the unions and the officers and all these disclosure requirements.”); Telephone Interview with Joshua Marquis, Dist. Att’y, Clatsop Cnty., Or. (Feb. 25, 2014) (“We really are in an extraordinarily difficult situation We’re often put in an adversarial position with the very people we have to rely on to develop our cases . . .”).

The signs of the officers' influence can be seen in the willingness of some prosecutors to inject due process protections into the *Brady* process. Prosecutors' due process concessions include giving officers an opportunity to provide their side of the story before a *Brady* decision is made, allowing officers a chance to appeal the *Brady* decision within the district attorney's office, pledging to reconsider a *Brady* designation if the disciplinary action upon which it is based is reversed on appeal, and even providing for the sunseting of an officer's *Brady* status, pegged to the police department's records retention schedule.²⁴⁶ In other cases, concessions to due process may consist of the prosecutor's promise to rely only on sustained complaints rather than mere speculation, or to limit what information the prosecutor will disclose, such as summaries of the misconduct versus the underlying documents themselves.²⁴⁷ It is worth emphasizing, however, that these concessions are entirely voluntary, and the prosecutor can violate any of them in the name of *Brady* compliance.

Police officers and their unions also exert much pressure on police chiefs and thus indirectly on the *Brady* process.²⁴⁸ Observers claim that the stronger the union, the weaker *Brady*'s application to personnel files. Bill Amato, who led Maricopa County's development of a *Brady* system and now serves as counsel for the Tempe Police Department, said East Coast colleagues are often "reluctant to become more aggressive in this area" because of the strength of their police unions.²⁴⁹ He recalled a debate with an attorney at one such department, where prosecutors were not allowed access to the personnel files.

246. Press Release, League of Cal. Cities, *supra* note 240; *see also* MARICOPA CNTY. ATT'Y OFFICE, *supra* note 154, § 6.4; Telephone Interview with Bill Amato, *supra* note 157; Memorandum from Peter W. Heed, *supra* note 115; Gutierrez & Minugh, *supra* note 199; Andrew Scott & Nuno Tavares, *How the Placer County DSA Negotiated a Brady Protocol*, PORAC LEGAL DEF. FUND (May 1, 2011, 12:00 PM), <http://poracldf.org/news/detail/29> ("The District Attorney also agreed to review the Brady Database at least once a year and to entertain requests by an officer to be removed from the list based on new information. The protocol also adopted [the union's] language, making the lawful destruction of a peace officer's records—pursuant to the five-year destruction rule—a basis for requesting the officer's removal from the list.").

247. This concession regarding summaries gives the officer a chance to fight off defense subpoenas for the more detailed, raw documentation. WASH. ASS'N OF PROSECUTING ATT'YS, *supra* note 159, at 5; Parks, *supra* note 194 (citing a candidate for district attorney's pledge to work with officers to create statewide standards for *Brady* lists, under which the decision to place an officer on the *Brady* list "would not be the County Attorney's decision alone" but rather would be made by "[a] panel, upon hearing all the evidence"); Memorandum from Benjamin R. David, *supra* note 164, at 4; Thadeus Greenon, *Kalis Arrest Shines Spotlight on DA's Brady Policy; DA's Office Has Written Policy for Dealing with Officers with Character Issues*, TIMES-STANDARD (Apr. 22, 2011, 12:01 AM PDT), http://www.times-standard.com/ci_17907205 (disclosing that the policy in Humboldt County, California, provides that "officers and departments shall . . . be given 15 days to respond in writing or during an in-person meeting with the district attorney to discuss the allegations or supporting materials").

248. Telephone Interview with Scott Durfee, *supra* note 147 ("The police chief is between a rock and a hard place. Totally. I don't envy him in that spot.").

249. Telephone Interview with Bill Amato, *supra* note 152.

“Her entire defense was, ‘My chief would not survive this,’” Amato said.²⁵⁰ David O’Neil, a captain with the Brentwood Police Department in Tennessee, also connected union power to the *Brady* issue. The “at-will status of employees in southern states makes it a lot easier for officers to be fired,” he said. “When we have a bad officer, it doesn’t linger on. . . . We’re not going to tolerate it.”²⁵¹ Such observations suggest the influence police officers and unions can have, not just on the employment consequences of *Brady* but also on the application of the doctrine itself.

* * *

The *Brady* battle within the prosecution team is not something cases or scholarship have taken into account, perhaps because it often simmers below the level of reported decisions. But the competing interests of prosecutors, police chiefs, and police officers—interests both legitimate and illegitimate—take on constitutional significance insofar as they affect *Brady*. This conflict within the prosecution team helps explain why there is so much resistance to *Brady*’s application to police personnel files. Is it any wonder that officers have mobilized against *Brady*, given the unreviewable prosecutorial discretion, the motives and opportunities for abuse, and the severe employment consequences of the *Brady*-designation process? This battle within the prosecution team suggests why officers might think the best way to protect themselves is on the front end: by denying prosecutors access to the files.

IV. PROTECTIONS FOR POLICE PERSONNEL FILES VIOLATE *BRADY*

Given the importance of the misconduct information to defendants and the potential abuses of the *Brady* system that threaten officers, it might be tempting to employ some type of balancing system that would keep the personnel records confidential unless a court orders them disclosed. But such balancing systems wind up violating core aspects of the *Brady* doctrine. Worse still, the balancing systems inflict this damage on *Brady* in furtherance of policy goals that are not really in the public interest.

This Part argues that records of police misconduct do not deserve the confidentiality protections afforded to child abuse records and other sensitive documents, regardless of courts’ analogies to those sensitive records. Officers are public officials serving in positions of great public trust. Official documenta-

250. *Id.*

251. Interview with David O’Neil, Captain, Brentwood Police Dept., Tenn. (Apr. 29, 2014). The collective bargaining agreement with one New Mexico union permits *Brady* access to the otherwise confidential personnel files. Agreement Between the State of New Mexico and New Mexico Motor Transportation Employee’s Association: August 12, 2009 Through December 31, 2011, at 33-36 (2009), available at http://www.spo.state.nm.us/nmmtea_contract_2009final.pdf.

tion of their misconduct should be accessible to the public, or at least to prosecutors. This Part further argues that, even if police misconduct deserves some protected status, the traditional methods of balancing *Brady* against evidentiary privileges do not work in the personnel file context. This failure results both from the officer's special status as a witness and a prosecution team member and from specific procedural flaws in systems that purport to balance *Brady* against police privacy.

A. *Brady Versus Other Evidentiary Privileges*

State courts have struggled, in a variety of criminal cases, to balance *Brady* against evidentiary privileges, including those protecting child abuse, rape crisis counseling, medical, psychiatric, social services, juvenile delinquency, educational, and executively privileged records.²⁵² In balancing the disclosure mandated by *Brady* against the protections provided by these privileges, courts frequently turn to the Supreme Court's 1987 decision in *Pennsylvania v. Ritchie*.²⁵³ In *Ritchie*, a defendant charged with sexually abusing his daughter subpoenaed records from the county's Department of Children and Youth Services, hoping the records would contain information that could be used to impeach the victim's testimony.²⁵⁴ The government refused to release the records because they were made confidential by statute.²⁵⁵ When the case made it to the Supreme Court, the defendant claimed he was entitled, under *Brady*, to exculpatory and impeachment evidence in the files, regardless of any state statutory protections.²⁵⁶ The Supreme Court agreed that *Brady* reached information in these files and remanded the case for the trial court to look for any

252. *State v. Peseti*, 65 P.3d 119, 134 (Haw. 2003); *People v. Foggy*, 521 N.E.2d 86, 91 (Ill. 1988); *State v. Robertson*, 134 So. 3d 610, 611 (La. Ct. App. 2013); *Zaal v. State*, 602 A.2d 1247, 1261-62 (Md. 1992); *People v. Stanaway*, 521 N.W.2d 557, 561 (Mich. 1994); *State v. Paradee*, 403 N.W.2d 640, 642 (Minn. 1987); *People v. Davis*, 637 N.Y.S.2d 297, 301 (Nassau Cnty. Ct. 1995); *City of Dayton v. Turner*, 471 N.E.2d 162, 163 (Ohio Ct. App. 1984); *State v. Fleischman*, 495 P.2d 277, 282 (Or. Ct. App. 1972) ("Nor can the state invoke the privilege claim . . . which it attempted to make in the trial court. When the state chooses to prosecute an individual for crime, it is not free to deny him access to evidence that is relevant to guilt or innocence, even when otherwise such evidence is or might be privileged against disclosure." (footnote omitted)); *cf. Berry v. State*, 581 So. 2d 1269, 1275 (Ala. Crim. App. 1991) (describing the privilege protecting the identity of an informant); *Thornton v. State*, 231 S.E.2d 729, 733 (Ga. 1977) ("When such an informer's identity is required under the standards set forth in *Brady*, the trial court must go further and weigh the materiality of the informer's identity to the defense against the State's privilege not to disclose his name . . ."); *In re Crisis Connection, Inc.*, 949 N.E.2d 789, 800 (Ind. 2011) (discussing the victim advocate privilege); *Goldsmith v. State*, 651 A.2d 866, 873 (Md. 1995) (discussing the psychotherapist-patient privilege).

253. 480 U.S. 39 (1987); *see Peseti*, 65 P.3d at 134; *Foggy*, 521 N.E.2d at 91; *State v. Brossette*, 634 So. 2d 1309, 1317 (La. Ct. App. 1994); *State v. Little*, 861 P.2d 154, 158 (Mont. 1993); *see also Kirby v. State*, 581 So. 2d 1136, 1140 (Ala. Crim. App. 1990).

254. *Ritchie*, 480 U.S. at 43-44.

255. *Id.* at 43.

256. *Id.* at 42-43. He also raised confrontation and compulsory-process claims.

Brady material.²⁵⁷ But the Court noted that defendants could not force courts into such in camera reviews simply by requesting review; rather, the party requesting review of the file would have to “establish[] a basis for his claim that it contains material evidence.”²⁵⁸ In short, the Court endorsed threshold requirements for triggering in camera review.

The extent of the showing required to trigger in camera review becomes quite important in *Brady* balancing regimes, but courts have not reached consensus on how high that threshold should be. Different states and different privileges require anything from the showing of a “good faith basis” for the request to the showing, by “some demonstrable fact, that there is a reasonable probability that the records are likely to contain material information necessary to the defense.”²⁵⁹ The benefit of high thresholds, proponents note, is that they make the files’ confidentiality protections meaningful. Without such threshold showings, “in every case a trial judge could become privy to all counseling records of a sexual assault victim . . . in the absence of any demonstrated need that would justify such an intrusion.”²⁶⁰ The downside of these high thresholds, however, is that they prevent routine review of the files because the person requesting review must already know something about what the files contain before she can get the court to help find out more. The trouble with not being able to carry out routine review of the files is that it interferes with the due process requirement that *Brady* information be disclosed in all criminal cases.²⁶¹

This general problem with *Brady*’s application to privileged and confidential information becomes worse in the police personnel file context, for reasons discussed below.

257. *Id.* at 61. On remand, the trial court could also instruct defense counsel to review the files subject to a protective order.

258. *Id.* at 58 n.15.

259. *People v. Stanaway*, 521 N.W.2d 557, 570-71 (Mich. 1994) (“Many [jurisdictions] require the defendant to make a preliminary showing that the privileged information is likely to contain evidence useful to his defense.”); *see, e.g.*, MONT. CODE ANN. § 41-3-205(2) (2014) (“Records may be disclosed to a court for in camera inspection if relevant to an issue before it.”); *March v. State*, 859 P.2d 714, 717-18 (Alaska Ct. App. 1993) (“The proper procedure to be followed when a party requests discovery of confidential materials is for the court to conduct an *in camera* inspection of those materials and then determine which, if any, are discoverable. . . . As long as the party seeking discovery has a good faith basis for asserting that the materials in question may lead to the disclosure of favorable evidence, the trial court should conduct an *in camera* review before ruling on a request for discovery.”); *State ex rel. Romley v. Superior Court (Roper)*, 836 P.2d 445, 452 (Ariz. Ct. App. 1992) (holding that a victim’s medical records statutory privilege is pierced if the trial court finds the records are “exculpatory and are essential to presentation of the defendant’s theory of the case, or necessary for impeachment of the victim relevant to the defense theory”); *City of L.A. v. Superior Court (Brandon)*, 52 P.3d 129, 134 (Cal. 2002); *State v. Hutchinson*, 597 A.2d 1344, 1347 (Me. 1991) (allowing in camera review upon a showing that “access . . . may be necessary for the determination of any issue before [the court]” (first alteration in original)).

260. *People v. Foggy*, 521 N.E.2d 86, 92 (Ill. 1988).

261. *See infra* Part IV.C.2.

B. *Why Police Personnel Files Are Different*

Police officers are not like other privilege-holding witnesses, and records of their misconduct do not deserve the same level of protection afforded to more archetypal privilege holders. This Subpart argues that privacy protections are not justified for records of police misconduct and that, even if they were, there would be significant hazards in applying these protections in the context of *Brady*, given police officers' special status in the criminal justice system.²⁶²

1. *Justifications for the privilege*

By their nature, evidentiary privileges exclude truthful, relevant information that might otherwise aid the court in its truth-seeking efforts. This exclusion is justified in terms of other societal interests. The leading justifications for the privileges that protect crime victim and crime witness information are the desire to prevent victims and witnesses from being harmed in the trial process by humiliating inquests into sensitive details of their lives and the desire to encourage future victims and witnesses to participate in the reporting, investigation, and prosecution of crimes.²⁶³ These rationales are often employed to justify the protections for police misconduct records,²⁶⁴ but they are ultimately

262. In terms of Wigmore's four requirements for a valid communication privilege, this Subpart can be seen to attack requirements two and four: that the confidentiality is "essential to the full and satisfactory maintenance of the relation" between the communicating parties, and that "[t]he injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation." 8 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2285, at 527 (John T. McNaughton ed., 1961) (emphases omitted).

263. *E.g.*, *Ritchie*, 480 U.S. at 60 ("If [child abuse] records were made available to defendants, even through counsel, it could have a seriously adverse effect on Pennsylvania's efforts to uncover and treat abuse. . . . Relatives and neighbors who suspect abuse also will be more willing to come forward if they know that their identities will be protected."); *Davis v. Alaska*, 415 U.S. 308, 319 (1974) ("The State argues that exposure of a juvenile's record of delinquency would likely cause impairment of rehabilitative goals of the juvenile correctional procedures. This exposure, it is argued, might encourage the juvenile offender to commit further acts of delinquency, or cause the juvenile offender to lose employment opportunities or otherwise suffer unnecessarily for his youthful transgression."); Euphemia B. Warren, *She's Gotta Have It Now: A Qualified Rape Crisis Counselor-Victim Privilege*, 17 *CARDOZO L. REV.* 141, 159-60 (1995) ("Without the critical support counselors provide, many victims would be unable to report the crime to law enforcement officials, thus perpetuating the low reporting rate of rape." (footnote omitted)).

264. *E.g.*, *Martinelli v. Dist. Court*, 612 P.2d 1083, 1090 (Colo. 1980) (en banc) (noting the police concern about "the possible chilling effect of disclosure on the process of procuring such information from citizen-complainants and the possible adverse impact on the complainants of disclosure of their identities," and noting the further police concern that "knowledge on the part of individual police officers that the information they provide to S.I.B. investigators will later be subject to disclosure in civil litigation will have a detrimental effect on frank and open communication between the officers and the investigators"); *State v. Renneke*, 563 N.W.2d 335, 339 (Minn. Ct. App. 1997) ("For a police officer to face the continual resurrection of old personnel complaints, no matter how unfounded, every time he or she makes an arrest leading to criminal charges, is more than a minor embarrassment.

unpersuasive, especially when used to justify why *prosecutors* should not have access to the personnel files.

It is not hard to see why crime victims and witnesses have greater interests in protecting sensitive aspects of their lives than police officers do in concealing their official misconduct. The officer is a public official, invested with great public trust, and that trust comes with the expectation that the officer will carry out her duties according to the law and to police department rules. An officer disciplined for breaking these rules has no right to demand that this discipline remain private. Indeed, there is a strong societal interest in allowing members of the public to stay informed of such official misconduct. And that interest is even stronger when buttressed by a defendant's constitutional rights under *Brady*. Of course police officers will be embarrassed by disclosure of their misconduct. But unlike victims and witnesses who are thrust into the spotlight of the criminal justice system, officers enter this arena voluntarily, and their misconduct—documented by their public employers—does not merit the protection given to child abuse records or rape crisis counseling communications.

A second rationale for protecting police misconduct is geared more to the interests of the police department than to those of the particular officer. The claim is that internal affairs systems would not be able to function if the results of internal affairs investigations were disclosed. The theory is that citizens would be afraid to come forward with complaints if they knew their complaints would not be kept confidential, and officers would be unwilling to report on their colleagues if they could not be guaranteed confidentiality.²⁶⁵ As one court explained, the fear is that disclosing internal affairs reports “will have a detrimental effect on frank and open communication between the officers and the investigators.”²⁶⁶

Over time, it could become a considerable deterrent to an officer's vigorous enforcement of the law.”), *abrogated on other grounds by* State v. Underdahl, 767 N.W.2d 677 (Minn. 2009); State *ex rel.* St. Louis Cnty. v. Block, 622 S.W.2d 367, 370-71 (Mo. Ct. App. 1981) (“Here we are faced with a strong need to maintain the confidentiality of the Bureau of Internal Affairs' investigatory files. This confidentiality is essential to protect the integrity of the police department and to maintain an effective disciplinary system. . . . Witnesses have been told their interviews were confidential. Systematic disclosure would inhibit officers and citizens from divulging information in the future.”); State v. Kaszubinski, 425 A.2d 711, 712-13 (N.J. Super. Ct. Law Div. 1980) (“Persons charged with the responsibility of conducting the affairs of the police department must be able to rely on confidential information prepared for internal use. The integrity of this information would be eroded if public exposure were threatened.”); People v. Gissendanner, 399 N.E.2d 924, 927 (N.Y. 1979) (“Among other values the [police disciplinary privilege] is said to serve are the maintenance of police morale and the encouragement of both citizens and officers to co-operate fully without fear of reprisal or disclosure in internal investigations into misconduct.”).

265. See *supra* note 264.

266. *Martinelli*, 612 P.2d at 1090; see *Denver Policemen's Protective Ass'n v. Lichtenstein*, 660 F.2d 432, 437 (10th Cir. 1981) (“The [Policemen's Protective] Association asserts that the government interest in confidentiality is of paramount importance because if they cannot guarantee confidentiality, citizens and police officers alike will be reluctant to make statements or likely fail to be completely candid in their statements. They further assert that

This claim is unavailing for several reasons. First, it overlooks the fact that many states do make this discipline available, not only to prosecutors and defendants but also to the public.²⁶⁷ And there is no evidence that internal affairs investigations in those jurisdictions have suffered as a result. Second, *Ritchie* made clear that, even when it is contained in confidential child abuse files, *Brady* material must be disclosed if it can be located.²⁶⁸ As a result, internal affairs investigations cannot guarantee that *Brady* material will be kept confidential if it is found. The only question is whether the confidentiality should prevent prosecutors or judges from searching the files without first making some showing of what the files will contain. Third, as one court noted, officers who participate in internal affairs investigations must realize that if the investigation finds criminal wrongdoing, the prosecutor will be notified.²⁶⁹ Thus, it makes little sense to claim that allowing prosecutors to search the files for *Brady* material will deter cooperation with internal affairs investigations, because the participants in these investigations should already know that their statements could find their way to the ears of a prosecutor.

Two other arguments about disclosure's effects on internal affairs are worth addressing. First, there may be a fear that greater openness about police misconduct will invite an avalanche of frivolous complaints, transforming *Brady* into an engine for harassing the police. But this fear is overstated. If the complaints truly are frivolous, they will not result in misconduct findings and will have vanishingly little effect on an officer's ability to testify. Second, there is a concern that more liberal disclosure of misconduct will cause departments to pull back on their internal affairs investigations in order to avoid implicating an officer's credibility.²⁷⁰ For example, departments might avoid the charge of "falsifying a police report," choosing instead to call it "failure to follow report-writing protocols." This type of gamesmanship is certainly possible—and worrisome—especially given the benefits to the police department of not losing an officer to the *Brady* list. But police departments also have reasons to maintain vigorous internal affairs systems, both as a means of protecting the integrity of the police force and as a way of pursuing the Machiavellian management strategies addressed in Part III.²⁷¹ While some departments might rein in their internal affairs investigations, others would resist doing so, and the possibility of

lack of such statements will impede future investigations and ultimately interfere with the proper functioning of the police department.”).

267. *See supra* Part II.B.

268. *See supra* notes 253-58 and accompanying text. The Court even stated that the “obligation to disclose exculpatory material does not depend on the presence of a specific request.” *Ritchie*, 480 U.S. at 58 n.15.

269. *Martinelli*, 612 P.2d at 1090.

270. Telephone Interview with Richard Lisko, *supra* note 199; Telephone Interview with Darrel Stephens, Exec. Dir., Major Cities Chiefs Police Ass'n (Feb. 27, 2014).

271. *See, e.g., supra* notes 203-08 and accompanying text.

such a negative effect does not seem significant enough to justify the privilege for police misconduct.²⁷²

In the end, the supposed benefits of making these misconduct findings confidential just do not justify the toll inflicted on defendants' *Brady* rights.

2. *The police officer's special status*

The protected status of police personnel files is further complicated by the police officer's special status as a witness. First, unlike other privilege holders, officers are both witnesses *and* members of the prosecution team. The significance of the officer's being a member of the prosecution team results from the prosecutor's duty to learn of favorable information known by others on the team, including the police.²⁷³ Because the officer is part of the team, her knowledge of the misconduct in these files should be imputed to the prosecutor, just as the officer's knowledge of any other prosecution witness's credibility problems would be. No such argument can be made of other privilege holders who may be victims or witnesses—and may even be friendly to the prosecution—but are not part of the prosecution team.

Another difference between the officer and the archetypal privilege holder is the officer's status as a serial witness. The child abuse victim, for example, is likely to testify in only a single case. Whatever humiliation accrues to him from the release of privileged information and whatever chilling effect this disclosure has on future child abuse investigations, the disclosure of the information benefits only the particular defendant in the case. But police officers, as serial witnesses, may testify in hundreds of cases. If their personnel records are revealed in one case, the disclosure could benefit defendants in hundreds of other cases. This is one positive externality of disclosing misconduct in a particular case. The other is that the threat of exposing an officer's misconduct in case after case will keep prosecutors from using dishonest officers and will help usher these officers out of the profession.

A final characteristic that makes officer witnesses different from other privilege-holding witnesses is more basic, albeit harder to prove. Judges and juries may be predisposed to trust an officer by dint of her position, especially when her credibility is pitted against the credibility of a criminal defendant.²⁷⁴ If the officer takes the stand with an enhanced reputation for truthfulness, it would seem perverse to give that credibility an additional boost by allowing the officer to conceal the type of misconduct that would ordinarily be used to im-

272. Indeed, another incentives story is that disclosing police misconduct will deter misbehavior within the police force, lessening the load on internal affairs investigators and allowing them to do more thorough investigations.

273. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

274. *E.g.*, David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 472-73 (1999); RGK, *Why Does Kopf Believe Cops Most of the Time?*, HERCULES & UMPIRE (Apr. 18, 2014), <http://herculesandtheumpire.com/2014/04/18/why-does-kopf-believe-cops-most-of-the-time>.

peach other witnesses. In a well-reasoned dissent, one California Supreme Court justice complained about this very double standard. “Ironically, jurors are routinely asked before a trial whether they can judge the credibility of police officer witnesses the same as any other witness who testifies,” the justice wrote. “Yet the Legislature has enacted a scheme . . . that exalts police officers over all other witnesses who have committed misconduct.”²⁷⁵

The special status of the police officer witness thus makes it doctrinally and normatively problematic to protect police misconduct from disclosure.

C. *Procedural Problems with Brady Balancing Systems*

The discussion above suggests why records of police misconduct should not receive confidentiality protections. But even if police misconduct deserved the protected status it currently receives in some jurisdictions, the procedures used to balance *Brady* against police privacy are deeply flawed.

Four procedural aspects of these balancing systems are particularly disturbing. First, *Brady* decisions are made in the abstract by people who lack sufficient knowledge of the facts and the theories of the case to know whether evidence is favorable and material—two of *Brady*'s requirements. Second, systems that protect the files until judges order them disclosed typically require threshold showings to trigger in camera review. But these threshold requirements prevent *Brady*'s routine application to police personnel files by requiring prosecutors to know something about what the files contain before the court will take a look. Third, the process of in camera review exacerbates the conflict of interest within the prosecution team by allowing officers to make ex parte communications with the court about the files and by inviting officers into court to argue against the disclosure of their files—to argue against *Brady* compliance. Fourth, even when judges do disclose records of police misconduct after in camera review, they often do so subject to strict protective orders that prevent prosecutors from sharing the information with each other or from using it in future cases involving the officer. These restrictions conflict with *Brady*'s assumption that a prosecutor has constructive knowledge of anything known by any other prosecutor in the office. In the end, these procedural flaws lead *Brady* balancing systems to shortchange *Brady* in favor of police confidentiality.

1. *Brady decisions made in the abstract*

A number of jurisdictions require *Brady* decisions to be made by people who have access to the personnel files but lack knowledge of the facts or theories of the particular criminal case. The problem, doctrinally, is that case-specific knowledge is required to determine what is and is not *Brady* material. Without knowledge of the case, it is impossible to tell what information is *fa-*

275. *City of L.A. v. Superior Court (Brandon)*, 52 P.3d 129, 149 (Cal. 2002) (Moreno, J., dissenting).

avorable and *material*—two of *Brady*'s three requirements.²⁷⁶ To assess whether the evidence is favorable, there has to be some comprehension of how the defendant would use the evidence in the particular case. To know whether the evidence is material, there has to be some knowledge of how close the case is.²⁷⁷ What is favorable and material in one case may be neither in the next case.²⁷⁸

The *Brady*-in-the-abstract problem occurs in regimes in which prosecutors are not allowed to view the personnel records.²⁷⁹ In those jurisdictions, police bureaucrats review the files for potential *Brady* information and then flag the files so courts can decide whether the information is, in fact, *Brady* material, provided the court actually grants in camera review.²⁸⁰ The police bureaucrat, however, will struggle to assess favorability and materiality because he knows nothing of the particular case. In fact, his review of the files takes place long before there is any case at all.²⁸¹ And the police reviewer may not have the legal training required to identify what might or might not be useful to the defendant.²⁸² Perhaps it goes without saying, but this behind-the-scenes review also takes place without any opportunity for defense counsel to argue how the information—which she does not even know about—would be useful to her client.²⁸³ All of these factors raise questions about how the police reviewer can know what qualifies as *Brady* material.

The *Brady*-in-the-abstract problem also arises when judges make the *Brady* determinations, albeit in an attenuated form. Even though the judge is making this determination in the context of an actual case, she is not particularly well placed to say what is and what is not *Brady* material. That is because the in camera review takes place significantly before the trial; thus, the specific theories of the case and the weight of the evidence may not be apparent. Indeed, in

276. See *supra* Part I.A.

277. *United States v. Agurs*, 427 U.S. 97, 112 & n.21, 113 (1976).

278. The special prosecutor who investigated the Justice Department's misconduct in the Senator Ted Stevens case noted the *Brady*-in-the-abstract problem: "The review of the government's files for *Brady* information was conducted by FBI and IRS agents, some of whom were unfamiliar with the facts or with *Brady*/*Giglio* requirements, unassisted and unsupervised by the prosecutors." Notice of Filing of Report to Hon. Emmet G. Sullivan, *In re* Special Proceedings, No. 09-0198 (EGS) (D.D.C. Mar. 15, 2012), 2012 WL 858523.

279. See *supra* Part II.A.

280. See *supra* Parts II.A, II.C.

281. Order Re *Brady* Motions at 7, *People v. Johnson*, No. 12029482 (Cal. Super. Ct. Jan. 7, 2014) ("[W]hile the [Police] Department knows what the officers' personnel files contain, it lacks knowledge of the facts, circumstances and legal theories of [defendant's] particular case. Not being trial counsel, the Department cannot ascertain what 'could determine the trial's outcome.'" (quoting *City of L.A. v. Superior Court (Brandon)*, 52 P.3d 129, 138 (Cal. 2002))); Telephone Interview with Daisy Flores, *supra* note 151 ("Police agencies typically aren't having an attorney look at the file. It's some clerk . . ."); Carter, *supra* note 200 ("[N]obody in law enforcement knows what sort of misconduct should trigger the addition of an officer's name to the prosecutor's list.").

282. See Telephone Interview with Daisy Flores, *supra* note 151.

283. SFPD Disclosure Order, *supra* note 104.

some jurisdictions, the judge who makes the *Brady* decision is a motions judge who is not even assigned to try the case.²⁸⁴ The *Brady*-in-the-abstract issue also rears up in jurisdictions in which prosecutors can access the misconduct directly but instead ask the police to make the first pass through the files to narrow the search.²⁸⁵

These *Brady*-in-the-abstract concerns raise questions about whether balancing systems that rely on such determinations can comply with Supreme Court doctrine. Granted, the abstract nature of these determinations is not an insurmountable problem. On the favorability side of the analysis, anything that undermines the officer's credibility might be deemed favorable.²⁸⁶ And on the materiality side, the police or court reviewer could just disclose anything even marginally favorable, thus embracing the Supreme Court's command that prosecutors err on the side of disclosure.²⁸⁷ But that is not the route these reviewers have taken, nor would we expect such a liberal approach to disclosure in jurisdictions in which police confidentiality is so valued.

The irony of the *Brady*-in-the-abstract problem is that there already exists someone within the government who is familiar with the facts and the theories of the case: the prosecutor. It is no coincidence that the prosecutor is the one the Supreme Court charges with the duty of *Brady* compliance.²⁸⁸ While the prosecutor may lack knowledge of some defense evidence or theory, and while she may be inclined to shirk her *Brady* duties, she is at least familiar enough with the state's case to make an intelligent *Brady* determination, if she chooses.²⁸⁹ But *Brady*'s application to these files is so politically sensitive that jurisdictions have elected to send the prosecutor to the sidelines, instead devising ways to obey *Brady* without relying on the prosecutor. The problem, as we will see throughout the following discussion, is that sidelining the prosecutor tampers with the internal logic of *Brady*, resulting in serious doctrinal problems.²⁹⁰

2. *Threshold requirements for triggering in camera review*

The second procedural problem is that the threshold showings required for in camera review prevent *Brady* from being routinely applied. In camera review is an element of three disclosure systems: those in which prosecutors have no

284. *E.g.*, Order Re *Brady* Motions, *supra* note 281, at 11.

285. *E.g.*, *supra* notes 154, 159, 164.

286. This determination would not be easy for exculpatory information, however.

287. *Kyles v. Whitley*, 514 U.S. 419, 439 (1995) ("This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence.").

288. *Id.*

289. Whether one trusts her to make these determinations responsibly is a legitimate question, but nonetheless a question distinct from whether she is, doctrinally, the best-placed person to do so.

290. There is also the fear that the police might not do the review conscientiously.

access to personnel files,²⁹¹ those in which prosecutors have access but prefer to get a court ruling before making disclosure,²⁹² and those in which defendants must seek out *Brady* information on their own via subpoena.²⁹³ In all these systems, the question of what showing is required to trigger in camera review is critically important because it threatens *Brady*'s routine application. In California, prosecutors cannot trigger in camera review of the files “‘without first establishing a basis for [the] claim that it contains material evidence,’ that is evidence that could determine the trial’s outcome, thus satisfying the materiality standard of *Brady*.”²⁹⁴ In Colorado, prosecutors must “show how the information requested is relevant to the case at issue,” and this showing must exceed “bare allegations that the requested documents would relate to the officer’s credibility.”²⁹⁵ These threshold requirements mean the person asking the court to look for *Brady* material must already know something about what the file contains, thus creating a catch-22.²⁹⁶ The higher the required showing, the less routinely the search will be performed, and the further *Brady* drifts from the Supreme Court’s vision of *Brady* as a self-executing, affirmative obligation that governs all criminal cases.²⁹⁷

Further, the threshold requirements create a scaling problem for in camera review. Police officer testimony is a ubiquitous feature of criminal prosecutions, and any time an officer’s testimony is significant to the outcome of the case, his credibility can become a critical issue. That means courts potentially face an enormous demand for in camera review of police personnel files. Courts have some flexibility to raise or lower the bar for triggering in camera review given that the threshold requirements are defined rather vaguely. But, while they can get away with lowering the threshold for less common privileges, such as those protecting the child abuse records in *Pennsylvania v. Ritchie*, they face significant institutional pressure not to lower the bar when it comes to police personnel files. That is because even a modest lowering of the threshold could lead to a dramatic increase in the number of reviews the courts are required to conduct. For example, the California Judges Association recently estimated that relaxing the standards for reviewing police personnel files would cost “tens of thousands of judicial hours” each year in Los Angeles alone.²⁹⁸

291. See *supra* Part II.A.

292. E.g., MARICOPA CNTY. ATT’Y OFFICE, *supra* note 154, § 6.13; WASH. ASS’N OF PROSECUTING ATT’YS, *supra* note 159, at 6-7 (explaining that while prosecutors can reveal information at their discretion, they will generally opt for in camera review first).

293. See, e.g., *supra* notes 190-91 and accompanying text.

294. City of L.A. v. Superior Court (*Brandon*), 52 P.3d 129, 138 (Cal. 2002) (emphasis omitted) (citation omitted) (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 n.15 (1987)).

295. *People v. Blackmon*, 20 P.3d 1215, 1220 (Colo. App. 2000).

296. See *supra* notes 133-34, 192 and accompanying text.

297. See *supra* notes 39, 134 and accompanying text.

298. Letter from Robert A. Glusman, Cal. Judges Ass’n, to Barbara J.R. Jones, Presiding Justice, Cal. Court of Appeal 1 (Feb. 26, 2014) (on file with author).

And it is not just the increased workload that irks the judiciary. There is an institutional resentment on the part of judges toward carrying out a duty that they think should belong to the prosecutor. As the California Judges Association wrote:

[J]udges should be available to review specific files and make *Brady* materiality determinations when close questions are presented But it is an entirely different matter to newly require the trials courts to review every police personnel file and make every materiality determination—a constitutional obligation that rests with the prosecution.²⁹⁹

Indeed, in a recent case, a San Francisco trial judge complained that the frequent demands for in camera *Brady* review were turning judges into “glorified paralegals routinely pawing through mounds of documents that could never ‘determine the trial’s outcome.’”³⁰⁰

In sum, these threshold requirements, which are staples of *Brady* balancing systems, pose significant problems for *Brady* compliance because they prevent the files from being searched in run-of-the-mill cases. To the extent these thresholds can be lowered or eliminated, that would ease the doctrinal problems they pose. But at the same time, these threshold requirements are an essential safeguard against the judiciary’s being crushed by the demand for in camera review. If courts granted in camera review every time there was a request by the prosecutor or the defendant, they would be forced either to spend an inordinate amount of time reviewing the files or else to carry out the review so perfunctorily as to make the review worthless. In that sense, the problem is more profound than just lowering or eliminating the threshold requirements for in camera review. The problem is that in camera review cannot be carried out on a large enough scale to ensure that *Brady* routinely applies to police personnel files—to ensure that the critical information in these files is located and disclosed.³⁰¹

299. *Id.* (emphasis added).

300. Order Re *Brady* Motions, *supra* note 281, at 11 (quoting *City of L.A. v. Superior Court (Brandon)*, 52 P.3d 129, 138 (Cal. 2002)). This was the case that led to the recent California Court of Appeal decision and subsequent California Supreme Court grant of review discussed in Part II.A. At one point, Judge Richard B. Ulmer remarked that “they used to trundle these in, in big long carts and just dump it up like a dump cart, and sometimes it would lap up against the edge of the desk.” Reporter’s Transcript of Proceedings at 19, *People v. Johnson*, No. 12029482 (Cal. Super. Ct. Jan. 6, 2014). The Court of Appeal similarly disapproved of “routinely shifting the responsibility for performing the initial *Brady* review from the prosecution to the court.” *People v. Superior Court (Johnson)*, 176 Cal. Rptr. 3d 340, 363 n.20 (Ct. App.) (“That allocation of responsibility has long been a fundamental aspect of modern constitutional criminal procedure, and it is not to be altered lightly.”), *depublished and review granted by* 336 P.3d 159 (Cal. 2014). However, that Court of Appeal decision is no longer citable because of the California Supreme Court’s grant of review. *See supra* note 112.

301. *See* Telephone Interview with Scott Durfee, *supra* note 147 (“[T]he tricky part about being *Brady*-qualifying information is that you have to know it exists. You can’t make a representation to the court that this officer has a *Brady*-qualifying [piece of evidence] in his file that deserves in camera review without knowing that it’s in there. And the only way to know what’s in there is by looking at it.”).

3. *Conflicts of interest and ex parte communication*

In camera review creates a further procedural problem: it exacerbates the conflict of interest within the prosecution team over *Brady*'s application to personnel files. This issue potentially arises in any of the *Brady* regimes that employ in camera review. While the prosecutor's constitutional *Brady* duty is clear—to disclose favorable, material evidence—the police officer's duty is more conflicted. As a member of the prosecution team, the officer has a duty to help the prosecutor comply with *Brady*. But the officer also has a personal interest in shielding his misconduct from disclosure. In camera review legitimizes and empowers this personal interest by inviting the officer into court to explain why his file should not be reviewed by the court and why anything the review turns up should not be disclosed. By making the officer a party to the case, the in camera procedure encourages the officer to pursue his own interests in non-disclosure, even if they conflict with his and the prosecutor's *Brady* duties. Further complicating this procedure is the fact that the officer will typically be represented in these proceedings by a city attorney whose duty is to pursue the confidentiality interests of the officer, rather than to ensure *Brady* compliance.³⁰²

This conflict of interest is even more unseemly in light of some of the special prerogatives afforded officers and their attorneys. In California, after an in camera review has been ordered, but before the judge receives the file, the police officer and her attorney are allowed to remove from the file anything they deem irrelevant, though they are supposed to be “prepared to state in chambers and for the record” what they have removed.³⁰³ This means that the judge does not review the entire file to make sure *Brady* information has not been overlooked or suppressed; she reviews only what the officer and the city attorney deem relevant. Moreover, California statute permits officers and their designees to be present in chambers as the court reviews the file, even though prosecutors, defendants, and defense counsel are excluded.³⁰⁴ The in camera process even allows the officer to carry out ex parte communication with the court. A practice advisory published by the League of California Cities, titled *Pitchess Motions and Brady Disclosures: How Hard Can You/Should You Push Back?*, urges police attorneys, “during the in camera review,” to “argue the relevance of certain complaints and investigation materials contained in the officer's

302. JULI CHRISTINE SCOTT, *PITCHESS MOTIONS AND BRADY DISCLOSURES: HOW HARD CAN YOU/SHOULD YOU PUSH BACK?* 12 (2005) (“It is the city attorney's role in these proceedings to protect the officers' privacy interests by making sure that the trial courts are well educated about the law in this area.”).

303. *People v. Mooc*, 36 P.3d 21, 30 (Cal. 2001); SCOTT, *supra* note 302, at 7 (“Defense attorneys would of course like a general fishing expedition. Limit the Catch!” (italics omitted)).

304. SCOTT, *supra* note 302, at 7 (“Mooc is a great case for several reasons It also reaffirms that neither the defense attorney nor the district attorney are allowed in the in camera proceedings.” (italics omitted)).

file,” despite the fact that the other affected parties are not present to dispute the argument.³⁰⁵

To be sure, the officer’s conflict of interest would exist independently of the in camera process, but in camera review makes it worse by granting it legitimacy. This conflict raises further concerns about whether balancing systems that rely on such review are compatible with *Brady*.

4. *Protective orders interfere with constructive knowledge*

The final problem with these balancing systems is their use of protective orders. In California, New Hampshire, Maryland, and elsewhere, protective orders have been used routinely—and to devastating effect—to limit what prosecutors and defense attorneys can do with the *Brady* information that courts do release from the personnel files.³⁰⁶ After courts have reviewed the files in camera and disclosed misconduct pursuant to *Brady*, they often subject these disclosures to strict protective orders that prevent prosecutors and defense attorneys from alerting their colleagues to an officer’s misconduct or using their own knowledge of the misconduct in future cases involving the officer. These protective orders undermine *Brady*’s assumption that prosecutors will have constructive knowledge of and disclose any favorable, material evidence known to others in the prosecutor’s office or on the prosecution team.³⁰⁷

But the information sharing demanded by *Brady* is precisely what the protective orders prevent. The problem is pointed enough when protective orders prevent one prosecutor from telling another prosecutor in the office about an officer’s credibility problems. But the problem borders on the absurd when protective orders prevent a prosecutor who learns about an officer’s credibility problems in one case from disclosing that information in future cases involving

305. *Id.* at 9-10; see also JULI C. SCOTT, FUNDAMENTALS OF OPPOSING MOTIONS FOR DISCOVERY OF PEACE OFFICER PERSONNEL RECORDS (PITCHESS *MOTIONS*) 12 (2012) (“[B]e prepared to argue the relevance of the materials you do bring at the in camera, although some judges are uncomfortable with this.” (italics omitted)).

306. Memorandum from Peter W. Heed, *supra* note 115; see also Reply in Support of Request to Stay & Order Trial at 3, *People v. Superior Court (Johnson)*, 176 Cal. Rptr. 3d 340 (Ct. App. 2014) (Nos. A140767, A140768) (“Case law makes clear that the protective order should specify that disclosure is limited to the present case”); SCOTT, *supra* note 305, at 14 (“Your protective order should of course . . . require the destruction of any copies and return of originals upon conclusion of the case.” (italics omitted)); Kevin Heade, *Are Brady Materials Limited by Protective Orders?*, FOR THE DEFENSE (Maricopa Cnty. Pub. Defender’s Office, Phx., Ariz.), Nov. 2011-Jan. 2012, at 7, 7 (reproducing the text of a protective order); Telephone Interview with Edie Cimino, Felony Trial Att’y, Office of the Pub. Defender, Balt., Md. (May 19, 2014).

307. See *Kyles v. Whitley*, 514 U.S. 419, 438 (1995) (“[N]o one doubts that police investigators sometimes fail to inform a prosecutor of all they know. But neither is there any serious doubt that ‘procedures and regulations can be established to carry [the prosecutor’s] burden and to insure communication of all relevant information on each case to every lawyer who deals with it.’” (alteration in original) (quoting *Giglio v. United States*, 405 U.S. 150, 154 (1972))).

the same officer. In such a situation, the prosecutor has actual knowledge of misconduct that the Constitution requires her to disclose, but the trial court's protective order requires her to keep the information secret. It is not just a matter of having the prosecutor take her knowledge from the earlier case and present it to the judge as good cause justifying in camera review. The prosecutor is not even permitted to use the protected information to make the good cause showing in the new case.³⁰⁸ And, as noted above, the threshold showing for in camera review can be quite challenging. If the judge refuses to order in camera review in the new case, the prosecutor will have actual knowledge of what the file contains and a certainty that it qualifies as *Brady* material, but will have no ability to alert the defense.³⁰⁹

This is not just a hypothetical problem.³¹⁰ In the San Francisco *Brady* case discussed earlier, prosecutors had actual knowledge that the "key" police officer witnesses had more than 500 pages of *Brady* material in their personnel files.³¹¹ Prosecutors knew this, according to their appellate brief, because "they received that material after in camera review in prior cases. But they are forbidden by protective orders in those cases from using that information in any subsequent case."³¹² Despite this knowledge on the part of the prosecutors, the judge refused to order in camera review because the prosecutors, hampered by the protective order, could not specify how the information in the personnel files would satisfy *Brady*'s materiality standard.³¹³

This San Francisco case, with prosecutors who knew of the misconduct but were bound to silence, illustrates the conflict between these protective orders and *Brady*. But even where the prosecutor does not have actual knowledge of the officer's misconduct, the protective orders are problematic because they prevent prosecutors in the same office from sharing *Brady* information, despite the doctrine's demands that they do so.³¹⁴

308. See *supra* Part IV.B.

309. Of course, the prosecutor could avoid the problem by dropping the charges.

310. See *supra* notes 107-08, 300 and accompanying text. In addition, Baltimore public defenders are challenging protective orders that prevent *Brady* sharing. "[The protective order] says I'm not supposed to be able to talk about the disclosure with anybody who does not have a direct functional responsibility on this case," said Edie Cimino, a public defender in Baltimore. "I can't be Chinese-walled away from my supervisory chain and my trial team who don't have direct functional responsibility" in the case. Telephone Interview with Edie Cimino, *supra* note 306. "How are we supposed to forget the information after one case, and let the agent go on to the next investigation without informing those prosecutors?" one federal prosecutor asked. "If the agent is removed from this district because of a *Henthorn* problem and is transferred to Nevada, do we have an obligation to inform Nevada? It's not *Brady* yet, but it may be if the prosecutor there gets a *Henthorn* request." Wiehl, *supra* note 71, at 118.

311. SFPD Brief, *supra* note 104, at 19, 23, 36 n.4.

312. *Id.* at 36 n.4 (citation omitted).

313. Order Re *Brady* Motions, *supra* note 281, at 6-7.

314. See *supra* note 307 and accompanying text.

* * *

Beyond the particular procedural faults, the overarching problem with these balancing systems is the negligence they endorse toward *Brady*'s application to police personnel files. Prosecutors, judges, and defendants remain in the dark about what these files contain, and the balancing systems are all too willing to let the ignorance persist, despite the great potential of these files to contain *Brady* material. The problem is that the courts are made the gatekeepers of the *Brady* material in the files, but prosecutors or defendants must know something about what the files contain before the courts will help ensure *Brady* material is not being suppressed. The requirements for intervention by the courts are little help in discovering impeachment material hidden in the many confidential files about which nothing happens to be known. The impeachment evidence contained in those files is thus allowed to go unexamined and undisclosed.

Indeed, when it comes to police personnel files, the systematic failure of these *Brady* balancing systems is their failure to be systematic—their failure to allow for the routine search of these files for critical impeachment evidence. This failure to learn of impeachment evidence is all the more troubling because it is the product of an effort to accommodate an interest—police officer confidentiality—that does not make sense as a matter of policy. These privacy protections allow dishonest officers to continue to testify and, as a result, to hold on to their jobs.

In the end, the problem is that police officers do not deserve confidentiality protections for their misconduct, and even if they do, the systems that purport to balance *Brady* against these privacy protections are incompatible with core tenets of the *Brady* doctrine.

V. SOLUTIONS

The root causes of *Brady* violations stretch far beyond prosecutors, at least when it comes to evidence of police misconduct. In jurisdictions where police departments withhold information from prosecutors, where courts refuse to look in the personnel files, or where prosecutors have access to impeachment material but do not disclose it, *Brady* violations result from an undeserved solicitude for police confidentiality. Whether by statute, by policy, or by political pressure, police personnel files have taken on a protected status that allows those who are inclined to suppress evidence of police misconduct to do so, not as rogue actors, but with the imprimatur of the state. This broad-based responsibility for *Brady* violations undermines the standard account of such violations as creatures of prosecutorial cheating. It also suggests that the standard *Brady* solutions—increasing punishment for prosecutors, increasing court oversight of the *Brady* disclosure process, and mandating “open file” policies—may have

little effect on the suppression of personnel file evidence because prosecutors are often not the ones in control.³¹⁵

Because the causes of *Brady* violations go beyond prosecutors, so must the solutions. The most elegant solution to the *Brady* problems discussed in this Article would be to make records of police misconduct accessible to the public. Public access would both facilitate defendants' access to the information and relieve prosecutors of the hassle of learning of and disclosing the information. If the information were public, a reasonably diligent defendant would be able to access it and the information would thus fall outside the sweep of *Brady*.³¹⁶ Despite its virtues, however, this public-access solution is unlikely to succeed because it would face enormous political resistance from those who support police officer confidentiality and because it goes beyond what is needed to address the *Brady* problem. As far as *Brady* is concerned, police officers can keep their files secret from the public, so long as this confidentiality does not impede prosecutors' access.

Short of making police misconduct records public, there are a number of potential solutions. First, and most importantly, jurisdictions should acknowledge that the personnel files must be searched in every case in which an officer's testimony could prove significant to the trial's outcome, even if the defendant fails to request such a search. *Brady* imposes a self-executing, affirmative obligation on the prosecution to seek out any favorable information known to other members of the prosecution team, and the officers on the prosecution team certainly know about the misconduct contained in these files.³¹⁷ This knowledge should be imputed to the prosecutor, just as officers' knowledge of an informant's credibility problems would be.

While there is debate about how far this constructive knowledge extends—whether it includes credibility evidence contained in divorce proceedings or high school report cards, for example³¹⁸—it is not necessary to establish the outer limit of the prosecutor's duty to learn in order to see that the personnel files fall within it.³¹⁹ An explicit holding by the courts—the higher, the better—that these personnel files must be searched in all federal and state prosecutions would help clarify the law on this point.

However, even if a defense request is required to trigger a prosecutor's search obligations, state laws and local policies should not impede the prosecutor from looking at the file herself. The systems that create such impediments wind up undermining the *Brady* doctrine. As argued throughout the Article, the

315. See *supra* note 19; see also CONVICTION INTEGRITY PROJECT, *supra* note 171, at 23; Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 531 (2007).

316. See *supra* Part II.B.

317. See *supra* notes 39, 134 and accompanying text.

318. See *United States v. Robinson*, 627 F.3d 941, 946 (4th Cir. 2010); *Breedlove v. Moore*, 279 F.3d 952, 956 (11th Cir. 2002); *People v. Garrett*, 18 N.E.3d 722, 731-32 (N.Y. 2014).

319. See *supra* Part I.B.

prosecutor is the only one, other than the defendant, who knows enough about the facts and theories of the case to make the *Brady* determinations. Jurisdictions that sideline the prosecutor by denying him access to the files end up foisting the *Brady* duty on police bureaucrats and judges, neither of whom are institutionally capable of carrying out this obligation on the scale required to routinely apply *Brady* to personnel files.

While prosecutors may delegate the initial search of the files to police reviewers, they should provide clear guidance to ensure that these reviewers flag all favorable credibility evidence, regardless of its perceived materiality, given that the materiality determinations cannot be made in the abstract.³²⁰ In addition, prosecutors should sometimes review the files directly, even if they delegate the bulk of the searching to the police. This threat of direct review, though rarely carried out, would help deter police reviewers from suppressing *Brady* information. As it currently stands, police reviewers in some jurisdictions can withhold information from the files without fear that prosecutors will ever find out, because prosecutors have no ability to check the reviewers' work.

For jurisdictions that insist on delegating the search of the files to judges, despite the judiciary's institutional inadequacies, the procedural problems discussed in Part IV must be taken into account. Courts should lower or eliminate the threshold showings required to trigger in camera review. Whatever additional work is created could be partially offset by reducing the use of protective orders. This reduction would allow prosecutors to share *Brady* material with other prosecutors and with defense counsel, without requiring a fresh in camera review each time a *Brady* officer appears as a witness. In general, courts should be very leery of issuing protective orders for misconduct evidence that will likely be significant in future cases involving the officer. Where courts insist on protective orders, these orders should at least permit prosecutors to share this information with others in their office, thus aligning protective-order practices with *Brady*'s constructive knowledge doctrine.

Beyond the systemic changes discussed above, there are ways that defendants, prosecutors, and individual judges can attack this problem on a case-by-case basis. Defendants could file motions asking courts to require prosecutors to certify that they have checked police witnesses' personnel files for *Brady* material.³²¹ Or prosecutors who were so inclined could refuse to use the testimony of any officer who does not make her personnel file available, thus pressuring the officer into waiving any privilege she has over the records.³²² Simi-

320. *E.g.*, *United States v. Herring*, 83 F.3d 1120, 1121 (9th Cir. 1996).

321. In North Carolina, in the wake of a junk-science scandal at the state crime lab, defense attorneys have demanded prosecutors certify that they checked the lab technicians' files for anything that would undermine their testimony. *See* Sample Motion to Disclose Results of Certification Exam (n.d.) (on file with author); *see also* Jason Kreag, *The Brady Colloquy*, 67 STAN. L. REV. ONLINE 47 (2014), http://www.stanfordlawreview.org/sites/default/files/online/articles/67_Stan_L_Rev_Online_47_Kreag.pdf.

322. Obviously, though, this would add friction to the relationship between prosecutors and officers. *See* *Becerrada v. Superior Court*, 31 Cal. Rptr. 3d 735, 739 (Ct. App. 2005)

larly, a trial judge who is frustrated with routinely reviewing personnel files could opt for a jury instruction explaining to the jury that the officer would not provide prosecutors with access to the officer's personnel file and that the jury is free to draw whatever inferences it chooses from that refusal.³²³

Many variations on the above solutions are possible, but the core problem remains. *Brady's* application to these personnel files threatens the interests of the police, a powerful and influential constituency. There are systems that could be employed to mollify police concerns on the margins. For instance, states could enact statutes like those in California and Maryland that would prevent police departments from basing disciplinary action on a prosecutor's decision to put an officer on the *Brady* list.³²⁴ This would not address the problem that prosecutors can add officers to the *Brady* list for inappropriate reasons, but it would at least prevent the officers from suffering employment consequences as a result.

Nonetheless, even with such employment protections, there are many reasons to believe that officers and their advocates will continue to resist *Brady's* application to these files and, thus, little reason to expect a lessening in the tensions between *Brady* and police officer confidentiality provisions. What is ultimately required to address the core problem is for prosecutors, courts, legislators, and the electorate to prioritize the demands of *Brady* over the interests of the police. And that is a lot to ask.

CONCLUSION

Systems that balance officers' confidentiality interests against *Brady's* constitutional requirements get it completely wrong. These protections benefit dishonest cops by allowing them to testify and, thus, to continue to work the streets. Meanwhile, these protections harm defendants, who are denied critical impeachment evidence to which they are entitled under *Brady*. And they harm society by undermining due process and by allowing dishonest officers to stay on the job. More liberal rules for disclosing records of misconduct would improve *Brady* compliance and help cleanse police departments of tainted officers.

("The recognition by the Supreme Court that an officer remains free to discuss with the prosecution any material in his files, in preparation for trial, means that the officer practically may give to the prosecution that which it could not get directly."); Application of the Appellate Committee of the California District Attorneys Association for Leave to File Amicus Curiae Brief in Support of Petitioner at 9, *People v. Superior Court (Johnson)*, 176 Cal. Rptr. 3d 340 (Ct. App. 2014) (Nos. A140767, A140768).

323. Cf. Jones, *supra* note 19, at 450-52 (urging a *Brady* jury instruction for intentionally withheld evidence); Robert Weisberg, Note, Defendant v. Witness: *Measuring Confrontation and Compulsory Process Rights Against Statutory Communications Privileges*, 30 STAN. L. REV. 935, 983 (1978) (proposing a jury instruction for cases in which an evidentiary privilege is used to exclude potentially exculpatory or impeaching material).

324. See *supra* Part III.B.2.

This Article has sought to explain how *Brady* developed a blind spot when it comes to evidence in police personnel files. The story involves a combination of decisions at all levels of government and the courts. The Supreme Court's case law set up a far-ranging but ill-defined obligation to seek out and disclose *Brady* material. By its terms, this obligation encompasses information known to members of the prosecution team but unrelated to the case, such as the contents of the personnel files. But this doctrinal requirement was, just as surely, not created with such unrelated-case material in mind. For their part, the lower federal courts have not clearly articulated how *Brady* should apply to evidence of misconduct contained in police personnel files. That is largely because they have not been required to, in light of the Justice Department's *Brady* policy and the effects of AEDPA.

In the absence of federal case law, states have been left alone to navigate between the statutes, policies, and institutional pressures opposing disclosure, on the one hand, and *Brady*'s doctrinal demands for disclosure, on the other. This has resulted in a wide variety of *Brady* practices around the country and has led to defendants' losing the protections of *Brady* simply by virtue of where they happen to be tried.

From state to state and county to county, the excuses for failing to search the personnel files are varied, persistent, and unpersuasive. There is little practical justification for this failure. Nor is there a doctrinal justification. The analogies to *Pennsylvania v. Ritchie* and other cases balancing *Brady* against evidentiary privileges do not stand up to scrutiny because police officers are not like other privilege holders. Systems that purport to balance officers' privacy rights with defendants' *Brady* rights wind up giving short shrift to *Brady*. The division within the prosecution team has only added to the difficulty in applying *Brady* to these files, with officers claiming *Brady* threatens their own due process rights.

The cumulative effect of all these impediments is that personnel files and all the impeachment material they contain are often ignored with impunity. In too many places, the belief persists that these files can go unexamined without violating *Brady*—that these files are somehow beyond the reach of the *Brady* doctrine. This view lacks firm footing in good law or good policy, and the sooner it is discarded, the better.