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 pronouncements in Brady *v.* Maryland *and its progeny place a constitutional obligation on prosecutors to disclose any evidence that would be favorable and material to the defense. But in some jurisdictions, even well-intentioned prosecutors cannot carry out this obligation with respect to one critical source of impeachment material: police personnel files. Such files contain invaluable material from internal affairs investigations and disciplinary reports—information that can destroy an officer's credibility and make the difference between a defendant's acquittal and conviction. But, while some jurisdictions make these files freely accessible, others employ a welter of statutes and local policies to keep these files so confidential that not even the prosecutor can look inside them. And, even where prosecutors can access the files, police officers and unions have used litigation, legislation, and informal political pressure to prevent prosecutors from disclosing* Brady *information in these files. While suppression can cost defendants their lives, disclosure of this information can cost officers their livelihoods, as "*Brady *cops" may find themselves out of work and unemployable.*

Using original interviews with prosecutors, police, and defense attorneys, as well as unpublished and published sources, this Article provides the first account of the wide state-to-state disparities in Brady*'s application to police personnel files. The Article argues that the widespread suppression of material in these files results not simply from prosecutorial cheating, but from the state statutory and local institutional constraints that give society's imprimatur to the withholding of* Brady *material. It further challenges the doctrinal 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*

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and regulations" to bring forth any Brady *material known to the police. Finally, the Article contends that the confidentiality these files currently receive is not only undeserved as a normative matter, but also incompatible with core tenets of the* Brady *doctrine.*

INTRODUCTION

In *Brady* v. *Maryland* and its progeny, the Supreme Court has declared that the prosecutor is constitutionally required to disclose to the defense any favorable, material evidence known to the prosecutor or to any member of the prose-

cution team. Violations of this due process edict have caused a great uproar recently, with the blame focused squarely on prosecutors. Courts have announced "an epidemic of *Brady* violations abroad in the land,"[1] appointed special counsel to investigate *Brady*-violating prosecutors, and promised criminal contempt proceedings for prosecutors who withhold *Brady* material.[2] The editorial board of the *Los Angeles Times* urged prosecutors "to stop playing games with *Brady*" and courts "to deal more harshly with prosecutors who don't play fair."[3] The *New York Times* decried *Brady* violations in an editorial entitled, "Rampant Prosecutorial Misconduct."[4] The scholarly literature has also blamed *Brady* violations on prosecutors who "willfully bypass[] the disclosure rules,"[5] "intentionally, knowingly, or at least recklessly withhold potentially exculpatory evidence,"[6] and are all too willing "to play games, to 'gamble' and 'play the odds,' to 'bury [their] head[s] in the sand,' to play 'hide' and 'seek' with the accused, and require the accused to undertake a scavenger hunt for hidden *Brady* clues."[7]

Amidst all the outrage directed at prosecutors, however, there is an important source of *Brady* material that even well-intentioned prosecutors are often unable to discover, much less disclose. That source is the police personnel file. Its contents—internal affairs investigative reports, disciplinary write-ups, and performance evaluations—document police officers' lies and are critical in impeaching officers' credibility on the stand. These personnel files are freely available to prosecutors, defendants, and the public in some jurisdictions, but in other jurisdictions, a welter of state laws and local policies makes them so confidential that even the prosecutors cannot access the files to check for *Brady* material. As a result, police misconduct is routinely and systematically suppressed, and the Supreme Court's constitutional caselaw, which is supposed to govern all trials in this country, winds up being applied in dramatically different ways depending on where the defendant is tried.

Whether and how *Brady* is applied to police personnel files has grave implications for both defendants and the police. For the defendant, the impeachment material in these can mean the difference between acquittal and conviction, between life and death. These misconduct findings are so valuable

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

[2] Neil A. Lewis, *Tables Turned on Prosecution in Stevens Case*, N.Y. TIMES, Apr. 7, 2009; In re Special Proceedings, Misc. No. 09-0198 (EGS) (D.D.C. Mar. 15, 2012), at 32, 2012 WL 858523; United States v. Jones, 620 F. Supp. 2d 163, 166 (D. Mass. 2009).

[3] Editorial, *Don't ignore the* Brady *rule: Evidence must be shared*, L.A. TIMES, Dec. 29, 2013.

[4] Editorial, *Rampant Prosecutorial Misconduct*, N.Y. TIMES, Jan. 4, 2014.

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

[6] Alafair S. Burke, *Talking About Prosecutors*, 31 CARDOZO L. REV. 2119, 2128 (2010). (summarizing "the traditional *Brady* literature").

[7] Bennett L. Gershman, *Bad Faith Exception to Prosecutorial Immunity for Brady Violations*, HARV. C.R.-C.L. L. REV.'S ONLINE COMPANION 1, 11 (Aug. 10, 2010).

because they constitute the police department's own assessment of the officer's credibility. A report in one case found a detective's "image of honesty, competency, and overall reliability must be questioned."[8] Records in another case 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 from 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."[9] Findings from other cases have excoriated officers for fraudulent overtime claims,[10] falsifying police investigative reports,[11] stealing drug-buy money,[12] and using police resources to facilitate criminal activity.[13] When such misconduct has come out, sometimes decades after trial, murder convictions have been overturned and people have been released from death row.[14]

For officers, *Brady*'s application to their personnel files jeopardizes not their lives, but their livelihoods. If the misconduct calls into question the officer's credibility, that officer may not be trusted to testify in any future cases. An officer who cannot testify—a so-called "*Brady* cop"—may find herself out of work and unemployable, as such an officer cannot make arrests, investigate cases, or carry out any other duties that might put her on the witness stand. Moreover, officers fear that prosecutors and police supervisors will use access to the files to abuse the *Brady*-cop designation, by labeling officers as *Brady* cops in order to punish them outside of formal disciplinary channels and those channels' attendant procedural protections. *Brady* has become not only a matter of defendants' due process trial rights, but also of police officers' due process employment rights. And the officers and their unions have used litigation, legislation, and informal political pressure to push back on *Brady*'s application to their files. 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 these files—or, perhaps, because of them—seemingly every jurisdiction has a different method for approaching the issue. These differences stem from variations in the complex overlay of state laws and local policies protecting personnel files, as well as from differences in the institutional dynamics between and within prosecutors'

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[8] Milke v. Ryan, 711 F.3d 998, 1012 (9th Cir. 2013).
[9] State v. Laurie, 653 A.2d 549, 553 (N.H. 1995).
[10] Fields & Colkley v. State, 69 A.3d 1104, 1110 (Md. 2013) (internal quotation marks omitted).
[11] Miller v. City of Ithaca, 914 F. Supp. 2d 242, 247 (N.D.N.Y. 2012).
[12] United States v. Robinson, 627 F.3d 941, 946 (4th Cir. 2010).
[13] *Problem officers: What they did to end up on list*, SEATTLE TIMES, June 24, 2007; *Spokane Officer Suspended For Link With Prostitute*, KHQ.COM, May 20, 2013, http://www.khq.com/story/22299873/straubreleasesstatementaboutofficer.
[14] *E.g.*, *Milke*, 711 F.3d at 1012; *Laurie*, 653 A.2d at 553.

offices and police departments.

Drawing on original interviews with prosecutors, police, and defense attorneys, as well as on unpublished and published sources, this Article provides the first account of the wide state-to-state disparities in *Brady*'s application to police personnel files. The Article argues that the widespread suppression of material in these files results not simply from prosecutorial cheating, but from the state statutes, local policies, and institutional conflicts that constrain the prosecutor's ability to carry out her *Brady* duties—constraints that give society's imprimatur to *Brady* suppression. The Article challenges the doctrinal assumption that prosecutors and police officers make up 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 any *Brady* material known to the police.[15] Finally, the Article contends that the confidentiality protections these files currently receive are not only undeserved as a normative matter, but also incompatible with core tenets of the *Brady* doctrine. Because the blame for *Brady* violations goes far beyond the prosecutor's office, so must the solutions.[16]

This Article proceeds in five parts. Part I argues that the Supreme Court's expansion of *Brady* over the years swept in an enormous swath of evidence known to the prosecution team, but not related to the case. The Supreme Court never considered the special problems this unrelated-case, or "hidden" *Brady* material, poses for prosecutors. While the lower federal courts have offered practical guidance for *Brady*'s application to unrelated-case material, they have not settled the question of how *Brady* applies to police personnel files.

Parts II and III discuss how the states have applied *Brady* without such guidance from the federal courts. Part II examines how varying state laws and local policies affect *Brady* compliance. The discussion divides jurisdictions into four groups: (1) those where prosecutors cannot access the personnel files; (2) those where they need not access the files (because the information is accessible to a reasonably diligent defendant); (3) those where prosecutors can, and do, access and disclose the information; and (4) those where prosecutors can, but do not, access or disclose the information. Part III contends that, even when prosecutors can discover and disclose *Brady* material in the files, police officers and their unions have used litigation, legislation, and political pressure

[15] Kyles v. Whitley, 514 U.S. 419, 438 (1995).

[16] Oft-advocate 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 prosecutor. Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. Crim. L. & Criminology 415, 435—39 (2010) (surveying a range of proposed *Brady* reforms); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. Rev. 693, 707—08 (1987); R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 VAND. L. REV. 1429, 1460 (2011).

to prevent prosecutors from doing so. This issue—the "the third rail" of the prosecutor-police relationship[17]—has also spilled over into a fight between the police brass and the police rank-and-file.

Part IV argues that police misconduct does not deserve the confidentiality protections it currently enjoys, and, even if it did deserve such protections, the procedures used to balance *Brady* against officer confidentiality violate core tenets of the *Brady* doctrine. 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 dirty cops off the job.

I. *BRADY* IN THE FEDERAL COURTS

The Supreme Court significantly expanded *Brady*'s sweep over the last fifty years, charging prosecutor with the responsibility for learning of and disclosing favorable evidence found in an increasingly broad array of sources. This expansion took place, however, with the Court focused on exculpatory and impeachment evidence that would be found in the prosecutor's and police's case file. But the doctrine the Supreme Court created also dragged along another expanse of *Brady* material: information materially favorable to the defendant, known to members of the prosecution team, but not derived from the investigation of the particular case at hand. This category of unrelated-case, or "hidden" *Brady* material, encompasses the type of information found in police personnel files. However, while the Supreme Court's cases draw this unrelated-case material into the orbit of *Brady*, they never consider the special challenges posed to prosecutors in learning of such unrelated-case material. What limits, if any, exist on the prosecutor's duty to learn of *Brady* material from unrelated cases?

The lower federal courts have fashioned some practical, case-by-case answers to the general question of *Brady*'s application to unrelated-case material, but the lower courts have not settled the specific question of how *Brady* applies to police personnel files—perhaps because they have not been required to. And the federal courts' silence has allowed the states to go in widely diverging directions on this issue. Before examining the federal caselaw, however, a short primer is required on *Brady*, personnel files, and impeachment.

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

In general, *Brady* requires prosecutors to disclose to defendants any favorable, material evidence known by any member of the prosecution team, including the police. A *Brady* violation has three elements.[18] First, the evidence in

[17] Telephone Interview with Jerry Coleman, *Brady* Chief, San Francisco District Attorney's Office, Feb., 12, 2014.

[18] Strickler v. Greene, 527 U.S. 263, 280 (1999).

question must be favorable to the defendant, either because it is exculpatory or because it is impeaching.[19] Second, the prosecutor must have suppressed the evidence, either by actively hiding it or by inadvertently failing to learn of and disclose it. Finally, suppression must be material, i.e., the suppression must create a "reasonable probability" of a different outcome as to guilt or punishment.[20]

This Article focuses on suppression, the second element of a *Brady* violation, and particularly on suppression that occurs by virtue of the prosecutor's failure to learn of impeachment evidence. This focus necessarily requires a definition of what the prosecutor should have known, i.e., what she is imputed to know. The starting point is the Supreme Court's holding in *Kyles* v. *Whitley* 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."[21] Because the officers and police departments involved in the case are members of the prosecution, their knowledge of the contents of these files is arguably attributed to the prosecutor. How much of the officers' knowledge is imputable to the prosecution is a question that taken up later on, but it may be helpful to note here that the discussion of what the prosecutor should have known is geared toward this second element of suppression. Failure to learn of and disclose information is only a *Brady* violation if the prosecutor had a duty to learn of and disclose it in the first place.

A brief discussion of personnel files is also required.[22] The reason it matters so much whether the prosecutor's constructive knowledge extends to these files is that the files contain much potentially impeaching evidence. The files are home to performance evaluations, disciplinary write-ups, and internal affairs investigations that can obliterate an officer's credibility on the stand. Examples of these disciplinary reports include police findings that officers falsified reports, provided false testimony, stole money from defendants—and from police departments—or otherwise lied on the job.[23] Even when the initial mis-

[19] *Id*. When it is impeachment, as opposed to exculpatory, evidence it is sometimes called *Giglio* material, after the Supreme Court case extending *Brady* to impeachment evidence. Giglio v. United States, 405 U.S. 150 (1972).

[20] *Strickler*, 527 U.S. at 280.

[21] Kyles v. Whitley, 514 U.S. 419, 437 (1995); Strickler v. Greene, 527 U.S. 263, 275 n.11 (1999); Banks v. Dretke, 540 U.S. 668 (2004); Youngblood v. W. Virginia, 547 U.S. 867, 870—71 (2006).

[22] 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.

[23] State v. Richard W., 115 Conn. App. 124, 140 (Conn. App. 2009); United States v. Veras, 51 F.3d 1365, 1374 (7th Cir. 1995); Shawn Vestal, *Dismissal of Detective Sheds Light on 'Brady Officer,'* SPOKESMAN REVIEW, July 13, 2011, at A5; *Problem officers: What they did to end up on list*, *supra* note 13; Mark Fazlollah, *Prolific officer's credibility at issue*, PHILA. INQUIRER, Apr. 14, 2013; *In re* Grievance Arbitration, BMS Case No. 12-PA-0020 (Feb. 13, 2012), http://mn.gov/bms/documents/awards/20120213%20Hastings.pdf.

conduct does not implicate the officer's truthfulness, the subsequent investigation of the misconduct may do so, if it finds that an officer lied to internal affairs investigators or attempted to cover up her misconduct.[24] Personnel files may also impeach an officer's testimony by showing sloppy evidence-collection practices, inaccurate laboratory techniques, or general incompetence.[25]

Finally, the basics of impeachment are worth mentioning. As the name suggests, impeachment evidence calls into question the credibility of a witness's testimony. Trial judges have much discretion in setting limits on the use of impeachment evidence, and rules differ somewhat across the country, but the chief way the personnel-file material can be used is in attacking a police officer's character for truthfulness. Federal Rule of Evidence 608(b) and its state analogues provide that the court may allow cross-examination about "specific instances of a witness's conduct" "if they are probative of the character for truthfulness or untruthfulness of . . . the witness."[26] Even though the disciplinary documents will not themselves be admitted as evidence, the questions based on these documents can demolish an officer's credibility by forcing a cruel trilemma on the officer: Admit the misconduct, and come off as a liar. Deny the misconduct, and commit perjury. Or, claim no recollection, and call one's own faculties of memory into question. In cases that hinge on an officer's testimony, the value of such cross-examination cannot be overstated.

B. The Supreme Court

The Supreme Court has never addressed *Brady*'s application to law enforcement personnel files, and its expansion of *Brady* over the years has created problems for lower federal courts in applying *Brady* to these files. As noted above, the conceptual difficulty lies in defining the prosecutor's constructive knowledge of information known to other members of the prosecution team but not related to the case.

The Supreme Court's due process demands started out simply enough in its 1963 *Brady* v. *Maryland* decision. That case held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due pro-

[24] State v. Laurie, 653 A.2d 549, 552—53 (N.H. 1995); Milke v. Ryan, 711 F.3d 998, 1012 (9th Cir. 2013).

[25] United States v. Olsen, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, C.J., dissenting from denial of rehearing en banc) (report criticized investigator's "'diligence and care in the laboratory, his understanding of the scientific principles about which he testified in court, and his credibility on the witness stand.'"). In rarer cases, the files can also contain exculpatory, as opposed to impeaching, material when a police department launches an internal affairs investigation in parallel to a criminal investigation, or when an officer's history of excessive force could help a defendant's claim of self-defense. But such exculpatory material is not the focus of this Article.

[26] *E.g.*, Fed. R. Evid. 608(b).

cess where the evidence is material either to guilt or to punishment."[27] Over the years, the doctrine would get significantly more demanding. In 1972, the Supreme Court in *United States* v. *Giglio* extended *Brady* to include impeachment, not just exculpatory, evidence.[28] In 1985, the Court in *United States* v. *Bagley* extended *Brady* further, eliminating the requirement that the defendant make a request for the evidence.[29] This placed a self-executing, affirmative obligation on the prosecution, independent of any defense action.[30] In 1995, the Supreme Court in *Kyles* v. *Whitley* extended *Brady* even further, 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."[31] These incremental extensions invigorated *Brady*'s original due process principles and eliminated some perverse incentives for the prosecutor to stay ignorant of *Brady* material. But they came at the expense of increasing the complexity of the prosecutor's duty to discover, analyze, and disclose favorable information.

This expansion of the prosecutor's *Brady* responsibilities has been recognized in the literature.[32] The point to emphasize, however, is how much greater of an effect this expansion had on unrelated-case material than on case-related material. As the Supreme Court expanded *Brady*'s reach, the justices appeared to have only case-related material in mind, but the framework they developed dragged along an exponentially larger universe of unrelated-case material.[33] While case-related material could be found in a limited number of prosecution and police files related to the investigation, unrelated-case material could exist in any of any of the thousands of cases the prosecutor's office or police department handled—or in administrative records, such as personnel files, that

[27] Brady v. Maryland, 373 U.S. 83, 87 (1963).
[28] Giglio v. United States, 405 U.S. 150, 154 (1972).
[29] United States v. Bagley, 473 U.S. 667, 682—83 (1985).
[30] *Id*.; Banks v. Dretke, 540 U.S. 668, 696 (2004); *see* WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, § 256 ("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.").
[31] Kyles v. Whitley, 514 U.S. 419, 437 (1995).
[32] *E.g*., Bennett L. Gershman, *Reflections on* Brady *v*. Maryland, 47 S. TEX. L. REV. 685, 692 (2006).
[33] Supreme Court cases mentioning the *Brady* files always refer to case-related files. *Giglio*, 405 U.S. at 154; United States v. Agurs, 427 U.S. 97, 111 (1976); Cone v. Bell, 556 U.S. 449, 459 (2009) ("the prosecutor's file in his case"), *Bagley*, 473 U.S. at 695, 702 (1985) (Marshall, J., dissenting). The focus on case-related material is further evidenced by dicta suggesting open-file policies would be sufficient for *Brady* compliance, even though open-file polices—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. Strickler v. Greene, 527 U.S. 263, 283 n.22 (1999); *Kyles*, 514 U.S. at 437; *Bagley*, 473 U.S. 473 U.S. at 699 (Marshall, J., dissenting); Connick v. Thompson, 131 S. Ct. 1350, 1386 n.27 (2011) (Ginsburg, J., dissenting).

have no connection to any case.[34]

Would the prosecutor of a 2014 robbery be imputed knowledge of the fact that his star witness lied to police and was dumped from the witness list in a 2010 murder investigation? Does the knowledge of a witness's credibility problems that an officer discovers in one case get imputed to the prosecutor in the next case if the police officer works on both cases? Under the terms of the Supreme Court's *Brady* expansions, such unrelated-case material would be imputed to the prosecutor—provided it was favorable and material—because the prosecutor is constructively aware of anything known to any member of the prosecution team.[35] At the same time, imputing so much information to the prosecutor risks requiring a Sisyphean search every time the prosecutor wants to try a case.

While three Supreme Court *Brady* cases have involved unrelated-case material,[36] the Court has never acknowledged the special challenges this material posed, nor has it articulated where to draw the line between the search-all and search-none extremes—or even whether such a line can be drawn. It is into this doctrinal crack that the personnel files fall. The language and logic of the Court's *Brady* doctrine would seem to encompass the personnel files. But the Court has not considered the *Brady* problems posed by unrelated-case material in general, much less by police personnel files in particular. Normally, such ambiguities are dealt with by the lower federal courts, but in the case of *Brady*'s application to police personnel files, the lower courts were not motivated or able to answer the question.

C. The Lower Federal Courts

The lower federal courts have fashioned practical, case-by-case rules to define whether a prosecutor had constructive knowledge of unrelated-case material. These rules essentially ask whether a reasonable prosecutor would have learned of the information in light of a variety of factors: Was the person with actual knowledge 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? Beyond the general rule about *Brady*'s application to unrelated-case material, however, the federal courts have not been able to settle how *Brady* applies to police personnel files. Nor has there been the need to settle the issue, given that the Justice Department adopted a policy requiring federal agents' files be searched upon request. The result is a

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

[35] *Kyles*, 514 U.S. at 438.

[36] *Agurs*, 427 U.S. at 100, 101, 114; *Kyles*, 514 U.S. at 428—29; Pennsylvania v. Ritchie, 480 U.S. 39, 39 (1987).

dearth of federal caselaw on the personnel-file issue.

1. The Limits of Constructive Knowledge

How much of what the police know should be imputed to the prosecutor? The courts steer between two poles 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."[37] Impute too much and the search requirements becomes so onerous as to "condemn the prosecution of criminal cases to a state of paralysis."[38] 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. While the third-party determination is straightforward, the determination of how closely aligned an agency must be for its information to be imputed to the prosecution is not straightforward, and it has resulted in a spatter of ad hoc judgments.[39] A variation on this factor is that courts are inclined to impute knowledge when the prosecutor had authority over the person with actual knowledge of the information—though some decisions are adamant that such authority is not necessary.[40]

A second factor in determining the prosecutor's constructive knowledge is the logistical feasibility of discovering the information. Circuits 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,"[41] and 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.[42]

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[37] Hollman v. Wilson, 158 F.3d 177, 181 (3d Cir. 1998); Morris, 80 F.3d at 1169; United States v. Auten, 632 F.2d 478, 481 (5th Cir. 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."); Carey v. Duckworth, 738 F.2d 875, 878 (7th Cir. 1984).

[38] United States v. Avellino, 136 F.3d 249, 255 (2d Cir. 1998).

[39] United States v. Rivera-Rodriguez, 617 F.3d 581, 595 (1st Cir. 2010); United States v. Morris, 80 F.3d 1151, 1169 (7th Cir. 1996). Judge Richard Nygaard synthesizes the doctrine's development. United States v. Risha, 445 F.3d 298, 309 (3d Cir. 2006) (Nygaard, J., dissenting).

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

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

[42] United States v. Gray, 648 F.3d 562, 567 (7th Cir. 2011); United States v. Beers, 189 F.3d 1297, 1304 (10th Cir. 1999) ("It is unrealistic to expect federal prosecutors to know all in-

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."[43] Others require specificity in defense requests: "[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."[44]

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 his own.[45] While the definition of reasonable diligence is not always clear, the doctrine generally absolves prosecutors of searching court records or other publicly available government sources for *Brady* material, provided the defendant could have located these records on his own.

All in all, these guidelines create a good deal of uncertainty about how far the prosecutor's constructive knowledge extends in any particular context. And the federal courts have not resolved the constructive-knowledge question in the specific context of police personnel files.

2. Law Enforcement Personnel Files

Federal courts have had relatively little to say about how *Brady*'s constructive knowledge doctrine applies to law enforcement personnel files. In the 1980s and 1990s, a circuit split developed regarding the federal prosecutor's duty, 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 decision in *Kyles* v. *Whitley*. Instead, it faded in significance as the Justice Department adopted a policy in federal prosecutions requiring that federal agents' files be searched upon defense request. Because of this policy and because of the Antiterrorism and Effective Death Penalty Act's effect on federal review of state convictions, the federal courts were left largely without the opportunity or the need to settle how *Brady* should apply to police personnel files. This, in turn, allowed the states to do as they pleased.

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formation possessed by state officials affecting a federal case, especially when the information results from an unrelated state investigation.").

[43] United States v. Brooks, 966 F.2d 1500 (D.C. Cir. 1992); United States v. Combs, 267 F.3d 1167, 1175 (10th Cir. 2001) (citing minimal "burden" on prosecutor of checking with Pretrial Services about "star witness," but not reaching issue because of materiality).

[44] *Joseph*, 996 F.2d at 41.

[45] WRIGHT & MILLER, *supra* note 30, § 256 ("Evidence equally available to the defendant by the exercise of due diligence means that the government is not obligated under *Brady* to produce it.").

a. The Circuit Split

Going back to the 1970s, a few circuit decisions addressed *Brady*'s application to personnel files, but they did so in a case-by-case manner that did not purport to set out a blanket rule for such files.[46] The Ninth Circuit took the first step toward establishing such a 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.[47] The Third Circuit later adopted this position.[48] But the Sixth, Seventh, Eighth, and Eleventh Circuits came out differently.[49] These circuits instead held that if a personnel file was not searched upon a defendant's request, there would be no need to remand for such a search unless the defendant could show more than "mere speculation" that the file would contain impeachment material.[50] Several other circuits expressed ambivalence about which side of the split to join.[51]

This split has been portrayed as pitting circuits that require a *Brady* search upon request against those that do not, but the actual consequences of this split for *Brady* were always murky.[52] First, it was not clear whether the *Brady* rule in these cases—whichever way it went—applied to state prosecutors' searches of state law enforcement files, or only federal prosecutors' searches of federal agents' files.[53] Second, the circuits on the majority-side of the split do not exactly excuse prosecutors from their *Brady* duty of searching the files; rather, they apply a form of harmless-error review in deciding whether to remand the case.[54] 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

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

[47] United States v. Henthorn, 931 F.2d 29, 30 (9th Cir. 1991). United States v. Jennings, 960 F.2d 1488, 1490 (9th Cir. 1992). 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.

[48] United States v. Dent, 149 F.3d 180, 191 (3d Cir. 1998).

[49] 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."); United States v. Pou, 953 F.2d 363, 366 (8th Cir. 1992); United States v. Quinn, 123 F.3d 1415, 1422 (11th Cir. 1997); *see also* United States v. Van Brocklin, 115 F.3d 587, 594 (8th Cir. 1997); United States v. Driscoll, 970 F.2d 1472, 1482 (6th Cir. 1992).

[50] *Id*.

[51] Untied States v. Brooks, 966 F.2d 1500, 1504 (D.C. Cir. 1992); Murray v. U.S. Dep't of Justice, 821 F. Supp. 94, 106 (E.D.N.Y. 1993).

[52] Robert S. Mahler, *Extracting the Gate Key: Litigating Brady Issues*, CHAMPION, at 14 (May 2001) ("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.").

[53] The Ninth Circuit held there was no categorical duty on federal prosecutors to search state agents' files. United States v. Dominguez-Villa, 954 F.2d 562, 566 (9th Cir. 1992).

[54] 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.

the reviewing courts refused to do was to order trial courts, or defendants, to become involved in additional searches of the files.[55] Fourth, the Supreme Court's ruling in *Kyles* v. *Whitley* destabilized whatever rules might have emerged from this circuit split, as *Kyles* called on prosecutors to learn of any favorable evidence known to other members of the prosecution team.[56] Indeed, the doctrine was shaky enough, in light of *Kyles*, that commentators predicted the circuit split would have to be reexamined.[57] But that never happened.

b. The Justice Department Policy

While the circuit split remains to this day, it has long since grown stale. Part of the explanation for this split's fading importance is the Justice Department's decision, in 1991, to adopt a policy requiring federal prosecutors to search federal agents' personnel files upon defense request.[58] This policy was designed to bring Ninth Circuit federal prosecutors in line with that circuit's search requirements, but the policy was soon adopted by federal prosecutors around the country, essentially resolving the split as a matter of policy.[59] The Justice Department policy required each investigative agency within the Justice Department to search its agents' files for *Brady* material,[60] and, if anything resulted, to notify the prosecutor, who was supposed to "determine whether the information should be disclosed or whether an in camera review by the district court is appropriate."[61]

This policy evolved over the years to articulate specific definitions of *Brady*-qualifying material and specific protocols by which prosecutors could gain access to the files.[62] Despite the centralized guidelines, however, varia-

[55] *E.g.*, *Quinn*, 123 F.3d at 1421.
[56] Kyles v. Whitley, 514 U.S. 419, 437 (1995).
[57] *E.g.* 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 (1997).
[58] *Id.* at 106 (1991 memo on *Henthorn* sent to all U.S. Attorneys' Offices).
[59] *See infra* notes 60, 65.
[60] *E.g.*, United States v. Bertoli, 854 F. Supp. 975, 1041 (D.N.J. 1994) ("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."); United States v. Quinn, 123 F.3d 1415, 1421 (11th Cir. 1997) (quoting district court: "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.").
[61] United States v. Jennings, 960 F.2d 1488, 1492 n.3 (9th Cir. 1992).
[62] U.S. ATT'Y GEN'L, POLICY REGARDING THE DISCLOSURE TO PROSECUTORS OF POTENTIAL IMPEACHMENT INFORMATION CONCERNING LAW ENFORCEMENT AGENCY WITNESSES ("GIGLIO POLICY"), Dec. 9, 1996; *see also* Lisa A. Regini, Legal Instructor at FBI Academy, *Disclosing Officer Misconduct A Constitutional Duty*, July, 1996, *available at* http://www2.fbi.gov/publications/leb/1996/july966.txt.

tions appeared in federal practice regarding which personnel files particular agencies searched,[63] whether prosecutors received summaries or raw documentation of the misconduct,[64] and whether searches were required without a defense request.[65] The current U.S. 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."[66] Whatever flaws the policy possesses, it nonetheless acknowledges that personnel files contain *Brady* material, and that they must be searched accordingly.[67]

c. The Policy's Effect on the Doctrine

One unintended consequence of this policy is the lack of federal caselaw on *Brady*'s application to these files. A defendant eager to have these files searched could just make a request under the Justice Department's policy. This arguably reduced the number of cases that would have otherwise put *Brady*'s application to personnel files in front of the federal courts. With the Justice Department policy tamping down on the flow of federal cases, the only source for the federal courts to rule on this issue was state convictions presented to the federal judiciary on habeas review. But the passage of the Antiterrorism and Effective Death Penalty Act (AEDPA) in 1996 greatly reduced the federal courts' ability to review and extend federal law in habeas cases.[68] Thus, the

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[63] *Id*.

[64] *See* Gov't Brief, at 6—8, United States v. Herring, 83 F.3d 1120 (9th Cir. 1996) (DEA, INS, ATF, IRS, and FBI policies).

[65] United States v. Dent, at *36 (3d Cir. 1997), 1997 WL 33565644. Gov't's Response to Defendant Jones' Pretrial Motions, at 11, United States v. Jones, 2:07-cr-145-KJD-PAL, Doc. No. 329 (D. Nev., Aug. 11, 2008); United States v. Brassington, 2:09-cr-00045-DMC Document 190 (D.N.J., Oct. 8, 2010) at 28—29. Telephone Interview with Charles Miller, Assistant Prosecutor, Kanawha County, former U.S. Attorney for the S.D. W.Va., Mar. 12, 2014 ("Every time a witnesses 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."); United States v. Ramos, 1:12-cr-00103-WMS-JJM, Doc. No. 156 (W.D.N.Y.); Deft. Demarco Deon Williams's Motion to Compel Production of Impeachment Material and Brief in Support, at 2, United States v. Williams, No. 08-CR-21-CVE, Doc. 17 (N.D. Okla., March 21, 2008).

[66] U.S. Attorney's Manual, § 9.5001.B.2.

[67] Telephone Interview with Rob Cary, Attorney, Williams & Connolly, April 4, 2014 (Justice Department's *Giglio* policy "offensively protective" of agents).

[68] 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); 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* United States v. Williams, 18 F. App'x 637, 643 (9th Cir. 2001) (rejecting as unpreserved claim that

combination of the Justice Department policy and AEDPA largely denied the federal courts the opportunity or the need to settle the question of *Brady*'s application to police personnel files, leading to a gap in the federal caselaw.

I do not want to overstate the claim. Even with the Justice Department's policy and AEDPA in place, federal cases have addressed *Brady*'s application to law enforcement personnel files.[69] 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 caselaw dealing with *Brady*'s application to these files tends to tackle issues on the margins of the Justice Department's policy: Can prosecutors delegate the search duties?[70] Is a prosecutor constructively knowledgeable of misconduct that is known only to the officer?[71] These fringe cases do not answer the core question whether prosecutors will routinely be imputed knowledge of what is in the agents' personnel files.

In the end, the point remains 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, has taken this question off the agenda. For federal defendants, it probably does not matter whether the files are searched as a matter of policy or as a matter of caselaw. But it does matter for state defendants. The lack of federal caselaw concerning these files has permitted the states much leeway in deciding how *Brady* applies to police misconduct, and this leeway has resulted in dramatic differences in *Brady*'s application across the nation.

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

In the absence of federal caselaw, 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 the files so confidential that not even the prosecutor can look inside them to search for *Brady* material. In

Kyles required federal prosecutors to search local officers' internal affairs files); Harrison v. Lockyer, 316 F.3d 1063, 1065 (9th Cir. 2003) (deferring to California courts under AEDPA, but questioning how defendant can be required to know what is in personnel file before he can review it).

[69] *E.g.*, Simmons v. Anderson, 209 F.3d 718 (5th Cir. 2000) (unpublished); Milke v. Ryan, 711 F.3d 998, 1006 (9th Cir. 2013); *see infra* note 70.

[70] United States v. Dent, 149 F.3d 180, 191 (3d Cir. 1998) (*Brady* requires 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); Michael Pariente, CLE Webinar, "The Fight for Personnel Files in Defending DUI Charges: Using *Milke* v. *Ryan* To Help Your Client," May 7, 2014 (*Milke* v. *Ryan* has had modest success in getting Nevada police files reviewed under *Brady*).

[71] United States v. Robinson, 627 F.3d 941, 952 (4th Cir. 2010); Breedlove v. Moore, 279 F.3d 952, 956 (11th Cir. 2002).

Group 2, state statutes make the misconduct a matter of public record, so the prosecutor is not required to look in the files at all because a reasonably diligent defendant could access the misconduct on her own. In Group 3, prosecutors can and do look in the personnel files, disclosing police misconduct as if it were any other type of *Brady* material. In Group 4, prosecutors can but do not look in the files.

There are several consequences to this inconsistent application of *Brady*. First, it deprives some 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 the doctrine. Any constitutional analysis of *Brady* must take into account these non-traditional 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. When it comes to police personnel files, the people suppressing impeachment evidence often do so overtly and under color of law, albeit law that is in conflict with the constitution.

A. Group 1: Prosecutors Cannot Search the Files

Brady requires prosecutors to learn of and disclose favorable, material information known by any member of the prosecution team. In this first group of jurisdictions, however, the prosecutor is barred by state law from looking in the police personnel files to see whether they contain the very information the constitution requires him to disclose. 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 roughly one tenth of all officers in the country.[72] By statute, law enforcement personnel records are "confidential" and "shall not be disclosed in any criminal or civil proceeding" unless the party seeking the information shows "good cause for the discovery or disclosure sought."[73] If good cause is shown, the judge will review the files in camera, with only the officers and their lawyers present, to decide what must be disclosed.[74] California's legislature created these statutory

[72] U.S. DEP'T. OF JUSTICE, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, App. tbl. 6, http://www.bjs.gov/content/pub/pdf/csllea08.pdf.

[73] Cal. Penal Code § 832.7; Cal. Evid. Code § 1043. *See* 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 (2012) (discussing personnel-file conflict in California).

[74] Cal. Penal Code § 832.7; Cal. Evid. Code § 1043.

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.[75] The legislative history shows no indication that lawmakers had prosecutors or *Brady* in mind when they passed the *Pitchess* laws, but California courts have held that these statutory protections apply to prosecutors' seeking access to the files for *Brady* purposes, just like they apply to anyone else.[76] At least, that was the undisputed position of the courts until this August, when a California Court of Appeal panel created a split in the caselaw by holding that *Pitchess* does not bar prosecutors from accessing the files to search for *Brady* material.[77]

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 assiduously avoided 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*."[78] 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 officer personnel records retain their confidentiality vis-a-vis the prosecution."[79] Shortly thereafter, the California Court of Appeal held that *Pitchess*'s bar to prosecutors' accessing the personnel files did not violate *Brady*.[80] It 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.[81] Other California appellate decisions have also concluded that the *Pitchess* statutes apply to prosecutors' searches of the personnel files for *Brady* information.[82]

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 to this problem insists that prosecutors are excused from having to search the files, given that they are statutorily denied access to them.[83] This approach finds support in the Court of Appeal's decision in *Peo-*

[75] City of Santa Cruz v. Court, 776 P.2d 222, 227 (Cal. 1989); Neri, *supra* note 73, at 309.
[76] *See infra* notes 78—81; Neri, *supra* note 73, at 309.
[77] *See infra* notes 90—94.
[78] Los Angeles v. Superior Court (*Brandon*), 52 P.3d 129, at 136 n.2 (Cal. 20020.
[79] Alford v. Superior Court, 63 P.3d 228, 236 & n.6 (2003).
[80] People v. Gutierrez, 112 Cal. App. 4th 1463, 1474—75 (2003).
[81] *Id*.
[82] *E.g*., Abatti v. Superior Court, 112 Cal. App. 4th at 56, 58 (2003).
[83] Telephone Interview with Jerry Coleman, *supra* note 17 (discussing *Brady* practices around California).

ple v. *Gutierrez*, mentioned above, which held that prosecutors cannot be expected to disclose what they are not allowed to access,[84] but it seems at odds with the U.S. Supreme Court's holding in *Kyles* v. *Whitley* that prosecutors are imputed knowledge of any favorable, material evidence known by members of the prosecution team, including the police.[85]

Another to the problem acknowledges that prosecutors have constructive knowledge of information in the personnel files, and enlists the help of the police and the judiciary in bringing forth that *Brady* material without the prosecutors' directly accessing the files. A 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.[86] If the department's *Brady* committee finds any material that 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*."[87] When the officer is slated to testify, the prosecutor uses this 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.[88] If the court finds good cause, it will review the file and decide what must be disclosed.[89] 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 other than the judge.

But the viability of this system is now in jeopardy, thanks to a decision this

[84] *Gutierrez*, 112 Cal. App. 4th at 1475.

[85] Kyles v. Whitley, 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 ("As one retired prosecutor explained, his colleagues were not eager to dig into officers' backgrounds—even though the risks of not doing so were obvious.").

[86] *See* Brief of Amicus Curiae Ventura County District Attorney's Office, at ii, People v. Superior Court (*Johnson*), Case No. A140767 (Cal. Ct. App. Jan. 21, 2014) (listing counties with notification system). Brief of Peace Officers' Research Association of California, at iii, People v. Superior Court (*Johnson*), Case No. A140767 (Cal. Ct. App. Jan. 21, 2014) (listing counties where prosecutors must file *Pitchess* motions).

[87] SFPD Bureau Order, *Procedure for Disclosure of Materials from Law Enforcement Personnel Records in Compliance with Brady and Evidence Codes § 1043 et seq*, at 7 (Aug. 13, 2010); San Francisco Police Department, Memorandum of Points and Authorities, at 16—17, People v. Superior Court (*Johnson*), Case No. A140767 (Cal. Ct. App. Jan. 17, 2014) [*hereinafter* SFPD Brief]. The possibility that the file might have more idiosyncratic impeachment material is ignored. *See* San Francisco District Attorney, Petition for Writ of Mandate, People v. Superior Court (*Johnson*), Case No. A140767, at 45 (Cal. Ct. App. Jan. 17, 2014) ("[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.").

[88] *Id*.

[89] *Id*.

August by the California Court of Appeal.[90] The recent appellate decision holds that the statutory protections for personnel files do *not* prevent prosecutors from looking into the files for *Brady* purposes.[91] This case arose from a San Francisco judge's decision last year not to conduct in camera review of personnel files for *Brady* material unless prosecutors could be more specific about the contents of the files than just to say they potentially contain *Brady* material.[92] The trouble is that the systems used in San Francisco and elsewhere intentionally keep prosecutors in the dark about the specifics of the misconduct in order to protect the confidentiality of the records. As a result, prosecutors are not able to be any more specific about why the files should be reviewed. Instead of agreeing to review the files on the mere say-so of these notification letters, the San Francisco judge ordered police to give prosecutors direct access to the files, and he held the *Pitchess* statute "unconstitutional as it is being applied to bar the District Attorney from access to peace officer personnel files in order to comply with *Brady*."[93] The appellate panel avoided the constitutional question. It instead construed the *Pitchess* statutes not to apply to prosecutors' searches of the files for *Brady* material, reasoning that the prosecutor and the police form a single prosecution team, so the prosecutor's search of the files does not constitute the disclosure that the statute prohibits.[94]

This recent decision creates conflict within California appellate caselaw on the questions of whether prosecutors have constructive knowledge of information in police personnel files[95] and whether *Pitchess* limits prosecutors' ability to search the files for *Brady* material.[96] It also threatens to upend the delicate compromise between prosecutors and police officers over access to the files. In the wake of this decision, the question of *Pitchess*'s interactions with *Brady* seems poised for review by the California Supreme Court, with statewide consequences for *Brady* compliance.

Nor is California the only state to face such a conflict. In New Hampshire, state statute long protected the personnel files at the expense of *Brady* and its

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[90] People v. Superior Court (*Johnson*), No. A140767, slip op. (Cal. Ct. App. Aug. 11, 2014), *available at* http://www.courts.ca.gov/opinions/documents/A140767.PDF.
[91] *Id*. at 3.
[92] Order at 11, People v. Johnson, No. 12029482 (Cal. Super. Ct., Jan. 7, 2014) [*hereinafter* Ulmer Order]; SFPD Brief, *supra* note 87, at 18, 30.
[93] Ulmer Order, *supra* note 92, at 14.
[94] *Johnson*, slip op., at 10, 17, 21; *id*. at 15 ("[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.")
[95] *Compare Johnson*, slip op. at 27 *with* People v. Gutierrez, 12 Cal. App. 4th 1463, 1474—75 (2003).
[96] *Compare Johnson*, slip op. at 26 *with* Gutierrez, 12 Cal. App. 4th at 1474—75 *and* Abatti v. Superior Court, 112 Cal. App. 4th at 56, 58 (2003).

New Hampshire analogue, *State* v. *Laurie*.[97] 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.[98] 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.[99] This notification was not to contain any "information regarding the underlying disciplinary matter, as that information is confidential by statute," the attorney general explained.[100] If one of these problem-officers was slated to testify, the prosecutor would ask for an in camera review of the officer's file and a protective order placing "all matters relating to the motion" under seal.[101] The judge would then decide whether the information in the file had to be released under *Brady*.

Unlike in California, however, New Hampshire courts 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."[102] 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."[103] However, the amendment did not make clear who "shall" search for the *Brady* material: prosecutor or police.

To this day, however, 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."[104] Defense attempts to get prosecutors to re-

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

[98] Memorandum, Peter W. Heed, Attorney General, New Hampshire, to All County Attorneys and All Law Enforcement Agencies, Feb. 20, 2004, *available at* http://www.gcglaw.com/resources/police-litigation/pdf/NH-Laurie.pdf [hereinafter *Heed Memo*] ("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.").

[99] *Id*.

[100] Heed Memo, *supra* note 98.

[101] *Id*.

[102] *In re* Petition of State, 893 A.2d 712, 714 (N.H. 2006).

[103] N.H. Rev. Stat. Ann. 105:13-b (amended June 27, 2012). The amendment has yet to be interpreted in a reported decision.

[104] Telephone Interview with Stacey Coughlin, Assistant Attorney General, New Hampshire, April 1, 2014. Of the amendment, Coughlin said: "I don't think it has really changed anything. . . . We still have the same duty." Telephone Interview with Jeffery Strelzin, Senior Assistant Attorney General, New Hampshire, 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 pros-

view 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."[105] Meanwhile, police officers continue to lobby for increased confidentiality protections. This spring, the legislature took up—and rejected—a bill that would have made it harder for prosecutors to declare personnel-file information exculpatory.[106] As it drags on, the conflict over the personnel files continues to risk suppressing *Brady* information.

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.[107] 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.[108] The high court later adopted that same test for criminal cases.[109] Anyone seeking access to the records—including the prosecutor—must subpoena them, thus forcing an in camera review of all factors for and against disclosure of the material.[110] Among those factors are the importance of the information to the case, the extent disclosure would discourage future cooperation with investigators, and the effect disclosure would have on the government's ability to engage in honest self-evaluation.[111]

The Colorado Court of Appeals added one more hurdle, however, to any attempt to gain access to the records: a threshold requirement for in camera re-

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ecutor's office, said her prosecutors generally rely on the police to flag misconduct, but occasionally review the files directly. "Technically we are still operating under former AG Heed's memorandum," she added. E-mail correspondence with Patricia LaFrance, Hillsborough County Attorney, Mar. 31, 2014 (on file with author).

[105] Nancy West, *Court's denial of police record review raises broader question*, UNION-LEADER, July 15, 2013, at 1A. The Attorney General's Office is reexamining its policy. *Id*.; LaFrance correspondence, supra note 104.

[106] N.H. H.B. 1315, 2014 Reg. Sess.

[107] Telephone Interview with Ken Kupfner, Chief Deputy District Attorney, Boulder, Colorado, Mar. 28, 2014 (records considered "privileged" and confidential"; "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*, DENVER POST, July 10, 2011. COLO. ASS'N OF CHIEFS OF POLICE, CNTY SHERIFFS OF COLO., & COLO. DIST. ATT'YS' COUNCIL, SITUATIONAL EXAMPLES IN SUPPORT OF "BEST PRACTICES," 2014 (on file with author) (describing subpoena process defendant *and* prosecutor must use for personnel records).

[108] Martinelli v. Dist. Court, 171, 612 P.2d 1083, 1089 (Colo. 1980).

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

[110] Walker, 666 P.2d at 122.

[111] *Id*.

view. To trigger 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."[112] This threshold was necessary, the court explained, lest demands for in camera review become "unnecessarily burdensome to the courts and the police," allowing defendants "in virtually every criminal case" to "obtain in camera review of all documents concerning the prior conduct of arresting officers."[113] The effect of this threshold requirement is to prevent prosecutors from routinely checking the files, given that they must know something about what the files contain before they can get the court to even consider granting access.[114] 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.[115]

This spring, the associations representing Colorado prosecutors, police chiefs, and sheriffs—but not police officers—drafted a "best practices" protocol, which 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."[116] 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."[117] The notification is not supposed to say anything about the officer's file except that it contains material that "may affect his/her credibility in court."[118]

Other states have also brushed with this issue. In Vermont, where state troopers' personnel files are made confidential by statute, the state supreme

[112] 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*.

[113] *Id*.

[114] Some prosecutors apparently can access the files. Osher, *supra* note 107

[115] *See infra* Part IV.C.2. *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 . . . ."); *see also*, *supra* note 30.

[116] COLO. ASS'N OF CHIEFS OF POLICE, CNTY SHERIFFS OF COLO., & COLO. DIST. ATT'YS' COUNCIL, *BRADY*/RULE 16 "BEST PRACTICES," 2014 (on file with author).

[117] *Id*. at 1.

[118] *Id*. at 4; i*d*. at 2 ("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. Osher, *supra* note 107.

court denied a defendant's *Brady* claim that he should have received material from them.[119] In Maine, the legislature last year amended its personnel-file statute to create a *Brady* exception. The confidentiality of the files, 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 defendant in a criminal case."[120] The amendment was supported by the Maine Association of Criminal Defense Lawyers and by the Maine Attorney General.[121]

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.[122] 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: Prosecutors Need Not Search the Files

Jurisdictions in this second group of *Brady* regimes make reports of police misconduct accessible to the public. That these records are public removes the obligation on the prosecutor to discover and disclose them under *Brady*. That is because, under the reasonable diligence doctrine, the prosecutor does not have to learn of or disclose any information that a reasonably diligent defendant could have accessed on his own.[123] Nonetheless, some prosecutors in these jurisdictions do seek out and disclose this information.

Florida is the flagship for this group, which includes Texas, Minnesota, Arizona, Tennessee, Kentucky, Louisiana, and South Carolina.[124] In Florida, dis-

[119] State v. Roy, 557 A.2d 884, 893 (Vt. 1989) *overruled on other grounds by* State v. Brillon, 955 A.2d 1108 (Vt. 2008). ("There is no exception in the statute for use of the records in court proceedings," the court held. "It is clear that the intent of the statute is that the records not be subject to disclosure except for the statutory purposes."). 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.

[120] Me. Rev. Stat. Tit. 30-A, § 503 (2013). Courts have yet to interpret the amendment.

[121] Letter from Walter F. McKee, Maine Association of Criminal Defense Lawyers, to Chairs of Joint Standing Committee on Judiciary, May 6, 2013 ("[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."); Prepared Testimony of Deputy Attorney General William R. Stokes in Support of L.D. 900, May 10, 2013 (*Brady* compliance could 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."*)*.

[122] *See infra* Part IV.C.

[123] *See supra* note 45.

[124] REPORTERS COMM. FOR FREEDOM OF THE PRESS, INTERNAL INVESTIGATION RECORDS, http://www.rcfp.org/private-eyes/internal-investigation-records (Tennessee makes records public with minor exceptions); E-mail correspondence with Sharon Ruiz, Public Defender,

ciplinary 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 personnel files.[125] 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."[126]

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," Kevin Petroff, felony division chief of the Galveston County District Attorney's Office, wrote in an e-mail. "That arguably takes them out of traditional notions of '*Brady*' evidence."[127] 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. "If 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 office.[128]

However, some prosecutors still do review the personnel files for *Brady* material, even though it is publicly available. In Ramsey County, Minnesota, prosecutors maintain one of the nation's most aggressive *Brady* policies, 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

Nashville, Tenn., Mar. 12, 2014 ("Yes, personnel files are public record. We generally ask our investigators to pull them. Officers are notified when their files are pulled, so it sometimes causes some political ill will."); Steven D. Zansberg & Pamela Campos, *Sunshine on the Thin Blue Line: Public Access to Police Internal Affairs Files*, COMM. LAWYER 34, 35 (Fall 2004) (Kentucky's Attorney General declared: "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."); Baton Rouge v. Capital City Press, 7 So.3d 21 (La. App. 1 Cir. 2/13/09) (Louisiana records public); Burton v. York Cnty. Sheriff's Dep't, 594 S.E.2d 888, 895 (S.C. Ct. App. 2004) (South Carolina Supreme Court: "[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.").

[125] Fla. Stat. Ann. § 119.071(2)(k)(1) (only open investigations are confidential; exemption set to expire in 2018); Telephone Interview with Bob Dillinger, Public Defender, Sixth Judicial Circuit, Florida, Feb. 11, 2014.

[126] Telephone Interview with Timothy Donnelly, Chief of Special Prosecutions Unit, Broward State Attorney's Office, Mar. 31, 2014.

[127] E-mail correspondence with Kevin Petroff, Felony Division Chief, Galveston County District Attorney's Office, Apr. 7, 2014.

[128] Telephone Interview with Scott Durfee, General Counsel, Harris County District Attorney's Office, Apr. 8, 2014.

its personnel files for any of eleven categories of "potential" *Brady* information covering dishonesty, bias, and excessive force.[129] Once the files had been pulled, prosecutors personally reviewed them to decide which officers to put on the *Brady* list, and the update this list monthly based on new misconduct findings from the police.[130] Prosecutor Rick Dusterhoft, 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.[131]

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.[132] 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. "If I get screwed on this," he said, "I'm taking my finger and I'm pointing it directly at you. . . . [Y]ou guys now have some skin in the game."[133] Within weeks, the police agencies dumped so many personnel records on Amato that he had to get a second office for the overflow.[134] Under the Maricopa prosecutors' 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."[135] Prosecutors even used tips from police officers and the defense bar to ask about misconduct the police agencies did not initially disclose.[136] Once he receives

[129] Telephone Interview with Rick Dusterhoft, Prosecutor, Ramsey County District Attorney's Office, Feb. 26, 2014.
[130] *Id*.
[131] *Id*. Minn. Stat. Ann. § 13.43; *see also*, Wiehl, *supra* note 58, at 118.
[132] Ariz. Rev. Stat. § 39—121; Telephone Interview with Jeremy Mussman, Deputy Director, Maricopa County Public Defender, Feb. 27, 2014; PHOENIX POLICE DEP'T, OPERATIONS ORDERS, Order 2.9.8 (rev. June 2013), *available at* http://phoenix.gov/webcms/groups/internet/@inter/@dept/@police/documents/web_content/066268.pdf. *But see* Telephone Interview with Daisy Flores, former Gila County Attorney, Mar. 3, 2014 (public records rule "doesn't necessarily mean agencies are very forthcoming about internal investigations"); *see also* State v. Robles, 895 P.2d 1031 (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*.").
[133] Telephone Interview with Bill Amato, Police Legal Advisor, Tempe Police Department, former Maricopa County prosecutor, Mar. 28, 2014.
[134] *Id*.
[135] MARICOPA CNTY. ATTORNEY'S OFFICE, PROSECUTION POLICES & PROCEDURES 6.4 (rev. Oct. 3, 2011) (on file with author).
[136] Letter from Bill Amato, to Karl Auerbach, Acting Chief, Salt River Police Department, 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.").

the records, the prosecutor can disclose them on his own or provide them to the trial judge, who will decide what to release.[137] Why did prosecutors establish such a system, given the information's public-record status? Amato said that, under his reading of *Brady* caselaw, "there is an affirmative obligation on the part of the prosecution to have that information," regardless of whether the defendant could get it on her own.[138]

This description of *Brady*'s application in public-record states helps show the diversity of approaches to this issue. It also provides a retort to the frequent 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.[139]

C. Group 3: Prosecutors Can and Do Search the Files

In the third group of jurisdictions, prosecutors have access to the personnel files, while defendants do not, and prosecutors use this access to search for and disclose information from the files. 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 the state of Washington 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."[140] 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.[141] Prosecutors in King County, home to Seattle, employ

[137] *Id*.; Bill Amato, "*BRADY* and Officer Integrity," PowerPoint presentation, at 23. In pursuit of this misconduct, prosecutors used tips from the defense bar to ask agencies about misconduct they had failed to disclose initially.

[138] Telephone Interview with Bill Amato, *supra* note 133. Kyle Daly, *Pinal County Attorney's Office compiling list of cops with questionable integrity*, INMARICOPA.COM, Aug. 12, 2013, 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 *Brady* list).

[139] *See infra* notes 164—167 and accompanying text.

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

[141] *Id*.

Brady lists to track misconduct across the 3,000 law enforcement agents in the county, as do prosecutors in other Washington counties.[142]

In North Carolina, police personnel files are confidential by statute, and caselaw prevents defendants from subpoenaing them without showing some likelihood of finding relevant material inside.[143] 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 North Carolina Conference of District Attorneys, implemented a "heightened *Giglio* screening process" for New Hanover and Pender counties.[144] The policy requires every officer to self-report *Giglio*—i.e., *Brady*—issues in their background and requires every agency to search officers' personnel records for credibility issues going back ten years.[145] "Our duty in North Carolina is nearly absolute," said Tom Olds, the prosecutor directing the project. "To disclose what we know and what we should know. . . . What we should know is what is contained in internal affairs files."[146] In Olds'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."[147]

Elsewhere in North Carolina, disclosure is less formal and forthcoming. Prosecutors in Buncombe County, home to Asheville, have no policy for checking personnel files for *Brady*.[148] 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 police department's policy in that county, the city attorney can disclose the information to the prosecution only on the condition that prosecutors agree not to disclose it to the defense without in camera review.[149]

In the District of Columbia, prosecutors maintain a list of officers with credibility issues.[150] Upon disciplining a police officer, the Metropolitan Police 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

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[142] Reimund, *supra* note 140, at 2.
[143] N.C. Gen. Stat. 126—24.
[144] Memorandum on *Giglio* Policy of the Fifth Prosecutorial District, at 3 (on file with author).
[145] *Id*. at 1.
[146] Telephone Interview with Tom Olds, Assistant Prosecutor, Fifth Prosecutorial District, North Carolina, Mar. 31, 2014.
[147] *Id*.
[148] Telephone Interview with Megan Apple, Assistant District Attorney, Buncombe County, Mar. 31, 2014.
[149] GREENVILLE POLICE DEP'T, POLICIES & PROCEDURES (rev. Aug. 15, 2013).
[150] Testimony of Roy McCleese, Chief, Appellate Division, U.S. Attorney's Office, District of Columbia, *in* Barker v. Metropolitan Police Department, at 8, 10, 13, OEA No. 1601-0143-10, (D.C. Office of Employee Appeals, Nov. 28, 2012) [hereinafter *Barker Arbitration*]; CONVICTION INTEGRITY PROJECT, *Establishing Conviction Integrity Programs In Prosecutors' Offices* 26 n.16 (2012).

should be included on the *Brady* list.[151] 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.[152]

D. Group 4: Prosecutors Can But Do Not Search the Files

In some jurisdictions, even though prosecutors can search the personnel files, they do not. This failure is sometimes attributable to ignorance of or disregard for the law. Other prosecutors' decisions not to search the files are driven, or at least abetted, by police departments and courts, who treat 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 scrounge from the file via subpoena.

Police departments in some jurisdictions show no recognition that internal affairs findings have implications for *Brady*, and this lack of awareness means they do not notify prosecutors of the relevant misconduct. 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 commander asked. "You mean the gun law?"[153] 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,

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[151] Testimony of Robert Hildum, Deputy Chief of the Criminal Division, Office of the Attorney General, District of Columbia, *in* Lindsey v. D.C. Metropolitan Police Department, at 7, OEA No. 1601-0081-09 (D.C. Office of Employee Appeals, Oct. 28, 2011) [hereinafter *Lindsey Arbitration*] (office reviews violations and decide 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).

[152] *Barker Arbitration*, *supra* note 150, at 8; *Lindsey Arbitration*, *supra* note 150, 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 . . . for example, prior bad acts that relate to veracity, that relate to truth telling." *Lindsey Arbitration*, at 4. Other jurisdictions around the country employ similar systems of tracking officer misconduct. *E.g.*, Donnie Johnston, *Culpeper Officer Pleads Not Guilty*, FREE LANCE-STAR, June 9, 2012 (Fredericksburg, Virginia); CONVICTION INTEGRITY PROJECT, *supra* note 150, at 26 (Jefferson Parish, Louisiana); Callahan v. Unified Government of Wyandotte County and Kansas City, Kansas, No. 2:11-cv-02621-KHV-KMH (D. Kan. Mar. 20, 2013) (Kansas City, Kansas).

[153] Richard Lisko, *Agency Policies Imperative to Disclose Brady v. Maryland Material to Prosecutors*, 78 THE POLICE CHIEF (March 2011), at 12 (apparently a reference to the Brady Handgun Violence Prevention Act of 1993). Telephone Interview with Daisy Flores, *supra* note 132 ("Law enforcement agencies don't understand. You say *Brady* to them, and they think it has to do with gun control.").

and then we challenge it in court."[154]

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."[155] 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 states," 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."[156]

Even where prosecutors acknowledge *Brady*'s application to personnel files, some have been slow to institute search-and-disclosure practices. New York, for example, protects the confidentiality of police personnel files, but permits prosecutors to look in the files.[157] 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.[158] The lack of procedure for learning of police misconduct was, in fact, the subject of a civil rights suit brought by a police officer in Tompkins County who claimed his misconduct was arbitrarily and improperly disclosed to the prosecution.[159] For her part, Wilkinson predicated that the "requirements of *Giglio* are going to be much more stringent" going forward.[160]

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*" in personnel files.[161] 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."[162] Not all his colleagues in the state

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[154] Lisko, *supra* note 153.

[155] MEETING MINUTES, MICH. COMM. ON LAW ENFORCEMENT STANDARDS, Mar. 14, 2007, https://www.michigan.gov/documents/mcoles/2_Minutes_3-14-2007_193332_7.pdf.

[156] *Id*.

[157] N.Y. CIV. RIGHTS LAW § 50-a (2014) ("The provisions of this section shall not apply to any district attorney or his assistants . . . which requires the records . . . in the furtherance of their official functions.").

[158] Telephone Interview with Gwen Wilkinson, District Attorney, Tompkins County, New York, April 2, 2014.

[159] Deposition of Gwen Wilkinson, at 30, Miller v. Ithaca, No. 3:10-cv-00597-GLS-DEP, Doc. 273 (N.D.N.Y. Apr. 30, 2012) (district attorney says no formal or informal protocol exists for informing prosecutor of police misconduct).

[160] *Id*.

[161] Telephone Interview with Charles Miller, *supra* note 65.

[162] *Id*.

do the same, he said.[163]

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 the other 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."[164] 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."[165] Still another district attorney insisted: "How far do we have to delve into witnesses' lives, victims' lives, you know, law enforcement's lives?"[166] 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."[167] Notwithstanding these statements, a task force of Oregon prosecutors and law enforcement leaders is now drafting guidelines on *Brady*'s application to these files.[168]

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 *prosecutor* 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. "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."[169] Unfortunately, instead of considering the prosecutor's duty to-

[163] *Id*.

[164] Oregon Judiciary Committee, Mar. 18, April 11, May 16, 2013 (testimony of Lane County District Attorney Alex Gardner), *available at http://oregon.granicus.com/MediaPlayer.php?clip_id=2020, http://oregon.granicus.com/MediaPlayer.php?clip_id=1717, http://oregon.granicus.com/MediaPlayer.php?clip_id=1348*.

[165] *Id*. (testimony of Jeff Howes, First Assistant, Multnomah County District Attorney's Office).

[166] *Id*. (testimony of Clackamus County District Attorney Scott Healy).

[167] Doug Harcleroad, Oregon District Attorneys Association, Inc., Opposition to Senate Bill 492—The "Brady" Bill, May 16, 2013 (recounting what "one experienced" district attorney said).

[168] E-mail correspondence with Eriks Gabliks, Director, Oregon Dept. of Public Safety Standards and Training, Mar. 23, 2014 (on file with author).

[169] Snowden v. State, 672 A.2d 1017, 1023 (Del. 1996). But some courts do not agree. This summer, New York's high court said, in dicta: "While prosecutors should not be discour-

ward 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 makes 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."[170] 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.[171]

The demotion of the personnel files from *Brady*'s constitutional status to that of mere discovery has several problematic implications. First, it shifts the burden onto the defendant of justifying why the file's confidentiality should be pierced. Second, it ignores the fact that *Brady*'s concern is only with significant evidence—evidence material enough to create a "reasonable probability" of a different outcome—whereas discovery requests seek merely relevant evidence. While there may be good reasons to maintain the file's confidentiality against a request for relevant evidence, it is much harder to justify upholding the confidentiality of the file against requests for evidence significant enough to satisfy *Brady*'s materiality standards. Finally, the discovery approach to these files creates a Catch-22 by insisting on a threshold showing before the court will review the file or allow the defendants to review it. Paradoxically, the defendant must know something about what is in the file before he can get the file inspected. If he knows nothing about the file, as one might expect of such a confidential source, the defendant will get no help from the court in learning more. Were this treated as a *Brady* problem rather than a discovery problem, it would be the prosecutor's responsibility to grapple with this Catch-22, and prosecutors have shown a greater capacity for doing so.[172]

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aged 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, 2014 WL 2921398 (N.Y. June 30, 2014) (evidence concerned civil rights suit known to the officer, but not to the prosecutor).

[170] 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) (good-faith basis is enough to trigger review).

[171] *Snowden*, 672 A.2d at 1023 (citing State v. Kaszubinski, 425 A.2d 711, 714 (N.J. Super. 1980)). Rodgers v. State, 547 S.W.2d 419 (Ark. 1977) ("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."); Patterson v. State, 381 S.E.2d 755 (Ga. App. 1989) ("When the defense seeks to discover the personnel files of an investigating law enforcement officer, some showing of need must be made.") (internal quotation marks omitted); Dempsey v. State, 615 S.E.2d 522, 525 (Ga. 2005) ("burden of showing that the personnel files were not the subject of a fishing expedition, but were relevant to . . . guilt, innocence or appropriate penalty"). *See generally*, Jeffrey D. Ghent, *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 (2014).

[172] *See supra* Part II.A.

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 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

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 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 team. Indeed, the Supreme Court's *Brady* caselaw 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 any *Brady* material known to any member of the prosecution team, including the police.[173] But the conflict within the prosecution team undermines that assumption and places hard constraints on the prosecutor's ability to fulfill his constitutional obligations.

The battle over *Brady*'s application to the personnel files has also divided police departments. Police suspect management of using *Brady* designations to punish officers outside of the departments' official disciplinary proceedings. For officers, *Brady* has become an issue not just of defendants' due process rights, but of their own, 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.

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

The specter of *Brady*'s application to personnel files has received the full attention of the police. "[O]ne of the most important issues facing law enforcement is the one surrounding the *Brady* List," declared Jim Parks, 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 deci-

[173] Kyles v. Whitley, 514 U.S. 419, 438 (1995).

sions."[174] 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."[175] Still another officer derided it is a "black list" that violates due process and goes beyond any "obligation of law."[176] Prosecutors have also acknowledged the gravity of the *Brady* designation, ominously referring to a *Brady*-list placement as "the kiss of death."[177]

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, all describe the mechanism by which prosecutors within an office alert each other to an officer's credibility problems.[178] There is a wide range in who maintains these lists—police or prosecutors—and 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* designation puts a question mark on the officer's ability to testify, and that has immediate employment consequences. 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 thus find themselves fast-tracked for termination and hard-pressed to find future work.[179]

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[174] Jim Parks, *President's Message: Brady ("Liar's") List a Most Important Issue*, AZCOPS SPEAKS (Spring 2004), at 2.

[175] Complaint, Tillotson, v. Dumanis, 3:10-cv-01346/QH-AJB (S.D. Cal. Jun. 25, 2010); *see also* Parks, *supra* note 174, 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.'").

[176] Complaint, at 7, Nazir v. Los Angeles, 2:10-cv-06546-SVW -AGR (C.D. Cal. Sept. 1, 2010).

[177] Telephone Interview with Brian Kramer, Executive Director, Office of the State Attorney for the 8th Judicial District, Fla., Mar. 31, 2014.

[178] *See* CAL. GOV'T CODE § 3305.5 ("*Brady* list" is "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*.").

[179] Melody Gutierrez, *California police unions fight discipline of officers under prosecutors' lists*, SAC. BEE, Sept. 12, 2013 (president of the California Police Chiefs Association 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."); Telephone Interview with Richard Lisko, International Association of Chiefs of Police, Feb. 21, 2014 ("[The] challenge for many po-

Considering the grave employment consequences, one might expect strong substantive and procedural protections against the possibility that an officer would be mistakenly or unfairly placed on the *Brady* list. But that is not the case. Unlike police departments' formal disciplinary systems, which provide many procedural protections to accused officers, the prosecutor's decision to place an officer on the *Brady* list is a form of punishment that is completely unreviewable and may be based on scant evidence or even a hunch, without any opportunity for the officer to provide his side of the story.[180] Even if, through the administrative appeals process, 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.[181] And forget whatever progressive discipline system might govern the traditional punishment of police misconduct.[182] 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 labor. Not without justification, officers suspect prosecutors of using the *Brady* designation to aid police chiefs in punishing disfavored officers. In the District of Columbia, for example, the police department asked the prosecutor's office to make *Brady*-cop determinations, apparently, to facilitate the firing of officers who were otherwise protected from termination by the statute of limitations on their misconduct.[183] 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.[184] His federal civil rights suit re-

lice chiefs and sheriffs: 'I have a guy who is now prevented from testifying . . . . What do I do with him?'").

[180] 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*."); Mike Carter, *Prosecutors keep list of problem officers*, SEATTLE TIMES, June 24, 2007 (Seattle union president says only "rare disciplinary finding of dishonesty against an officer" should be turned over, but prosecutor turning over information about cops not yet disciplined); Parks, *supra* note 175, at 2 (Arizona union fighting *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.").

[181] Complaint, at 4—5, Neri v. Stanislaus District Attorney's Office, No. 1:10-cv-00823-AWI-GSA (E.D. Cal. May 11, 2010) (allegations found unsustained but nonetheless disclosed as *Brady* material); Complaint, Garza v. Yakima, No.2:13-cv-03031-LRS (E.D. Wash, Mar. 22, 2013) (officer lands on *Brady* list while challenging disciplinary findings); s*ee also* Complaint, Riley v. Richmond, 3:13-cv-04752 (N.D. Cal. Oct. 11, 2013) (officer remains on *Brady* list even though acquitted of crime).

[182] *E.g.*, N.J. Att'y Gen'l, Internal Affairs Policy & Procedures (2014), at 8, *available at* http://www.nj.gov/oag/dcj/agguide.

[183] Lindsey Arbitration, *supra* note 150, at 11; *Barker Arbitration*, *supra* note 150, at 13—14.

[184] Wender v. Snohomish County, 2007 WL 3165481 (W.D. Wash., Oct. 24, 2007).

sulted in reinstatement and a $812,500 settlement.[185] 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.[186] They claimed the *Brady* label rendered the officer "unfit for duty" and, thus, outside the labor protections he would otherwise have received.[187] Patrick Wilson, the district attorney, denied the allegations and called them irrelevant: "Even 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]."[188]

The alignment between prosecutors and police chiefs may also be seen in police management organizations' endorsements of applying *Brady* 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.[189] Another example comes from the Idaho Peace Officer Standards and Training group, led by governor-appointed sheriffs and prosecutors. This group 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."[190] Similarly, a panel of prosecutors, police chiefs, and academics convened to discuss wrongful convictions recommended more robust *Brady* policies, including those pertaining to police misconduct records.[191] Other groups representing police management have also endorsed such lists.[192] These examples suggest that prosecutors and police managers often share common interests in *Brady*'s application to these files—interests that oppose those of police officers.

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[185] Press Release, *Fired Mountlake Terrace police sergeant who criticized drug war reaches $812,500 settlement with municipalities*, Jan. 12, 2009.

[186] Telephone Interview with Patrick M. Wilson, County & District Attorney, Ellis County, Texas, April 8, 2014.

[187] *Id*.

[188] *Id*.; *see also* Interview with Timothy Donnelly, *supra* note 126 ("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].").

[189] NATIONAL LAW ENFORCEMENT POLICY CENTER, INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, *Brady Disclosure Requirements* 4, April 2009.

[190] IDAHO PEACE OFFICER STANDARDS AND TRAINING, INTEGRITY BULLETIN, *The Need For Truth: Behind Brady & Giglio*, May 2012.

[191] Conviction Integrity Project, *supra* note 150, 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.").

[192] *See supra* notes 116, 140.

B. Police Officer Pushback

While officers can neither prevent prosecutors from labeling them as *Brady* cops, nor force prosecutors to reverse their *Brady* decisions, officers can pressure the 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.

1. Litigation

Police officers have employed a range of causes of action to fight back against the *Brady* designation. One claim is defamation, which alleges that the prosecutors and their police-chief collaborators damaged the officer's reputation by placing him on the *Brady* list.[193] Defamation claims are sometimes paired with claims of breach of contract and tortious interference with contract. In one case, an officer resigned from his department on the condition that his *Brady* problems not be revealed to prospective employers.[194] But, on the verge of landing a new job, the officer learned that the prosecutor in his old jurisdiction was planning to share this *Brady* status with the prosecutor in the officer's new jurisdiction.[195] This prompted a suit for defamation, breach of contract, invasion of privacy, false light, and tortious interference with contract, which the officer promptly lost on summary judgment.[196] Some officers have even sought—unsuccessfully—to enjoin prosecutors and police departments from disseminating *Brady* information about them.[197] These suits are frivolous to begin with, and made doubly and triply so by the courts' reluctance to stunt *Brady* compliance and by the protections of absolute and qualified immunity, but they illustrate the intensity of this internecine conflict.

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.[198] Officers claim to have been placed on *Brady* lists for criticiz-

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[193] Giana Magnoli, *Ex-Santa Maria Police Officer Files Lawsuit Claiming Wrongful Termination*, NOOZHAWK, Aug. 19, 2012, 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; Walters v. Cnty. of Maricopa, CV 04-1920-PHX NVW, 2006 WL 2456173 (D. Ariz. Aug. 22, 2006);

[194] Lackey v. Lewis Cnty., C09-5145RJB, 2009 WL 3294848 (W.D. Wash. Oct. 9, 2009).

[195] *Id*.

[196] *Id*. at 11—13. These suits illustrates 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*. The sheriff office's chose the former, while the prosecutor chose the latter. *Id*. at *5.

[197] Doyle v. Lee, 272 P.3d 256, 258—59 (Wash. Ct. App. 2012).

[198] Robert Roy, Right to jury trial in action for retaliatory discharge from employment, 52 A.L.R.4th 1141, § 1[a].

ing the district attorney's policies in the local newspaper,[199] failing to support the prosecutor's reelection campaign,[200] providing testimony that was truthful but unhelpful to the prosecution,[201] and complaining to city officials about corruption in the police department.[202] 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.[203] 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 he apologized and was transferred out of the narcotics unit.[204] The case settled soon thereafter.[205] The detective's lawyer called "the *Brady* listing . . . an abuse of the prosecutor's power,"[206] and it certainly is troubling to think that placement on the list could hinge on an apology or a transfer, neither of which seems connected to credibility. Indeed, some *Brady* lists sweep in so much content that a judge was placed on the list for his handling of a search warrant application—a designation that raises questions about the lists' drift from their original purpose.[207]

In addition to these damages suits, litigation has aimed at the mechanics of *Brady* tracking. In one case, a police department succeed in overturning a trial court's order that three officers provide their birthdates so the prosecution could run criminal histories on the officers.[208] Other litigation has targeted public defenders who assemble databases of police-officer credibility problems, which they draw not only from criminal matters and internal investigations, but also from newspapers, social media, civil suits, and divorce proceedings.[209]

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[199] First Amended Complaint at 5, Barnett v. Marquis, 3:13-cv-01588-HZ, (D. Or. Feb. 3, 2014).

[200] *Doyle*, 272 P.3d at 258.

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

[202] Monico v. Cornelius, Ore., Complaint, 3:13-cv-02129-HZ (Dist. Or., Dec. 2, 2013). Rodriguez v. District of Columbia, Superior Court of D.C., 2011 CA 7096 B (Feb. 1, 2012) (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 AND TRAINING BOARD, MINUTES OF SPECIAL COMPLAINT SUBCOMMITTEE, Nov. 20, 2013, at 2.

[203] Walters v. Cnty. of Maricopa, CV 04-1920-PHX NVW, 2006 WL 2456173 (D. Ariz. Aug. 22, 2006).

[204] *Id*.

[205] Notice of Settlement, Doc. 91, CV 04-1920-PHX NVW, (D. Ariz. Oct. 10, 2006).

[206] E-mail correspondence with Robert Kavanagh, Attorney, Mar. 6, 2014.

[207] Gary Grado, *Tempe judge's credibility questioned*, EAST VALLEY TRIBUNE, Oct. 6, 2011 (judge's comments about the warrant application caused prosecutor to question judge's credibility).

[208] Garden Grove Police Dep't v. Superior Court, 89 Cal. App. 4th 430 (2001).

[209] Coronado Police Officers Ass'n v. Carroll, 106 Cal. App. 4th 1001 (2003); *see* Business Wire, *San Diego Public Defender's Office "Police Practices Program" to Receive Defender*

Still another strand of this litigation campaign targets the employment consequences of the *Brady* designation, rather than the 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 him, but who also cannot be terminated because a arbitrator will not allow it.[210] In Washington, for example, a deputy fired for twenty-nine instances of misconduct, including some involving dishonesty, appealed his termination.[211] The arbitrator declared the termination excessive, and reversed it. The trial court affirmed the arbitrator, but the court of appeals reversed on the grounds that it was against public policy to force a department to employ a dishonest cop.[212] 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.[213] A year later, the legislature fixed that, but the episode reveals the breadth and complexity of *Brady*'s employment-law implications, even when all parties act in good faith.[214]

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.[215] Effective the first of this year, California statutes state that an adverse employment action "shall not be undertaken by any public agency against any public safety officer solely be-

Program of the Year Award, 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 Los Angeles Public Defender's database).

[210] Telephone Interview with Robert W. Hood, Director, Community Prosecution & Violent Crime Division, Association of Prosecuting Attorneys, 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.").

[211] 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 (2009); Kitsap Cnty. Deputy Sheriff's Guild v. Kitsap Cnty., 219 P.3d 675, 676 (Wash. 2009); *see* Elliot Spector, *Chief's Counsel: Should Police Officers Who Lie Be Terminated as a Matter of Public Policy?,* 75 THE POLICE CHIEF (April 2008), at 10.

[212] *Id*.

[213] *Kitsap Cnty*, 219 P.3d at 680—81.

[214] Wash. Rev. Code Ann. § 43.101.021; *see* Reimund, *supra* note 140; NAT'L LAW ENFORCEMENT POL'Y CTR., *supra* note 189, at 5, n.22.

[215] *See supra* Part II.A.

cause 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*."[216] The legislation allows police departments to discipline officers for the underlying misconduct, but the mere fact that the prosecutor or the police chief said the officer has a *Brady* problem is not grounds to support any adverse action.

California's new law makes *Brady* less useful as a tool to punish officers outside the formal disciplinary process. It also shifts the costs of overusing the *Brady* designation. If the prosecutor brands an officer as a *Brady* cop without a sufficient factual basis, police management will now find itself in the uncomfortable position of having to employ an officer who can neither testify nor be terminated.[217] The burden will no longer fall as heavily on the officer, because he will be able to keep his job. Not surprisingly, lobbying associations representing local government and police management fought against this legislation, describing it as a "dangerous public safety precedent"[218] that would place "unnecessary restrictions on a public agency's ability to discipline a public safety officer."[219]

In Maryland, a similar law goes into effect this October.[220] 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."[221] But police management agreed to support a revised version of the bill that explicitly permitted the use of such *Brady* lists, but prohibited agencies from taking punitive action based solely on the officer's inclusion on the list.[222] 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 exert much influence over officers'

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[216] CAL. GOV'T CODE § 3305.5.
[217] *See supra* notes 210—214 and accompanying text.
[218] Press Release, LEAGUE OF CALIFORNIA CITIES, *Brady List Bill Now on Governor's Desk, Veto Request Letters Needed Bill Poses Threat to Local Public Safety and Autonomy*, Aug. 30, 2013.
[219] Letter to Loni Hancock, Chair, California Senate Public Safety Committee, from Eraina Ortega, California State Association of Counties & Natasha Karl, League of California Cities, Mar. 27, 2013.
[220] Disclosures—Punitive Action, 2014 MD. LAWS, ch. 234, April 14, 2014.
[221] MD. ASS'N OF COUNTIES, S.B 686: LAW ENFORCEMENT OFFICERS' BILL OF RIGHTS – PROSECUTORIAL DISCLOSURES – PUNITIVE ACTION, Feb. 18, 2014.
[222] MD. ASS'N OF COUNTIES, *2014 End of Session Wrap-Up: Public Safety & Corrections*, http://conduitstreet.mdcounties.org/2014/04/09/2014-end-of-session-wrap-up-public-safety-corrections/.

careers, thanks to their control over the *Brady* lists, prosecutors are also dependent on these officers to bring in new cases, conduct follow-up investigations, and carry out various other tasks required for successful prosecutions.[223] For elected prosecutors, the reliance on the police is even greater because officers make up an important constituency on election day. 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*.

The signs of officers' influence over the *Brady* system can be seen in the willingness of some prosecutors to inject due process protections into the *Brady* process. These due process concessions by prosecutors include giving officers an opportunity to provide their side of the story before a *Brady* decision is made, allowing them a chance to appeal the *Brady* decision within the district attorney's office, offering to reconsider the *Brady* designation if the disciplinary action upon which it is based is reversed on appeal, and even providing for a sun-setting of the officer's *Brady* status pegged to the police department's records retention schedule.[224] In other cases, due process may consist of the prosecutor's pledge to rely only on sustained complains, rather than mere speculation, or to limit *what* information the prosecutor discloses—summaries of the misconduct versus the underlying documents themselves.[225] (This final concession allows the officer to fight off defense subpoenas for the more de-

[223] Telephone Interview with Joshua Marquis, District Attorney, Clatsop County, Oregon, 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."); Telephone Interview with Rick Dusterhoft, *supra* note 131 (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 Jerry Coleman, *supra* note 17.

[224] LEAGUE OF CALIFORNIA 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-Reque#sthash.RO9YT8IM.dpuf; *see also* Gutierrez, *supra* note 179; Telephone Interview with Bill Amato, *supra* note 138; MARICOPA CNTY. ATT'Y'S OFFICE, *supra* note 135, at 2; Andrew Scott and Nuno Tavares, *How the Placer County DSA Negotiated Brady Protocol*, May 1, 2011 ("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 our [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."); *Heed Memo*, *supra* note 98.

[225] WASH. ASS'N OF PROSECUTING ATT'YS, *supra* note 140, at 5; Thadeus Greenson, *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, *available at* http://www.times-standard.com/ci_17907205 (Humboldt County, California, policy states "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."); Parks, *supra* note 177 (candidate for district attorney pledges to work with officers to create statewide standards for *Brady* lists: "This would not be the County Attorney's decision alone. A panel, upon hearing all the evidence, would make that decision."); FIFTH PROSECUTORIAL DISTRICT OF NORTH CAROLINA, *supra* note 144, at 4.

tailed, raw documentation.) 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.[226] 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.[227] He recalled a debate with an attorney at one such department, where prosecutors were not allowed access to the personnel files. "Her entire defense was, 'My chief would not survive this,'" Amato said.[228] David O'Neil, a captain with Tennessee's Brentwood Police Department 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."[229] Such observations suggest the influence police officers and unions can have, not just on the employment consequences of *Brady*, but on the application of the doctrine itself.

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The *Brady* battle within the prosecution team is not something cases or scholarship has taken into account, perhaps because it simmers below the level of reported decisions. But the many competing interests driving this struggle among prosecutors, police chiefs, and police officers—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 these 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? These factors suggest why officers might think the best way to protect themselves is on the front end: by denying prosecutors access to the files.

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[226] "The police chief is between a rock and a hard place. Totally. I don't envy him in that spot," said Scott Durfee. Telephone Interview with Scott Durfee, *supra* note 128.

[227] Telephone Interview with Bill Amato, *supra* note 138.

[228] *Id*.

[229] Interview in Tempe, Arizona, with David O'Neil, Captain, Brentwood Police Department, Tennessee, April 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, AUG. 12, 2009 THROUGH DEC. 31, 2011, at 33—36, http://www.spo.state.nm.us/NMMTEA_contract_2009final.pdf.

IV. PROTECTIONS FOR POLICE PERSONNEL FILES VIOLATE *BRADY*

In the tug-of-war between *Brady* and police confidentiality, it is tempting to seek some sort of balance between the two. Instead of throwing the files wide open to prosecutors in the name of *Brady* or keeping them completely closed in the name of confidentiality, many jurisdictions purport to balance the competing interests by allowing limited access to the impeachment material in these records, often after in camera review. These balancing arrangements are particularly prominent where prosecutors cannot access the personnel files directly,[230] and where the files are treated as a matter of defense discovery,[231] but balancing also occurs where prosecutors can access and disclose information on their own, but elect for in camera review instead.[232]

This Part argues that such balancing regimes not only make bad policy, but also violate core tenets of *Brady*. As a normative matter, police misconduct does not deserve the confidentiality protections afforded such sensitive materials as child-abuse records, regardless of courts' comparisons between the two. Officers are public officials serving in positions of great public trust. Official documentation of their misconduct should be accessible to the public, or, at the very least, to prosecutors carrying out their *Brady* duties. But, even if police misconduct deserved some privileged status, the traditional methods of balancing *Brady* against evidentiary privileges wind up violating *Brady* in the personnel-file context. That is because of problems posed by the officer's special status as witness *and* prosecution-team member, and, because of problems with the specific procedures employed by these systems to screen the files.

A. Brady *Versus Other Evidentiary Privileges*

In a variety of criminal cases, state courts have struggled 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.[233] In striking the balance be-

[230] Part II.A.

[231] Part II.D.

[232] *E.g.*, Amato, *supra* note 137, at 23.

[233] Dayton v. Turner, 471 N.E.2d 162, 163 (1984); State v. Robertson, 134 So. 3d 610, 611 (La. App. 1 Cir. 9/9/13); People v. Davis, 637 N.Y.S.2d 297, 301 (Co. Ct. 1995); State v. Peseti, 65 P.3d 119, 134 (Hawaii 2003); State v. Paradee, 403 N.W.2d 640, 642 (Minn. 1987); People v. Foggy, 521 N.E.2d 86, 91 (Ill. 1988); People v. Stanaway, 521 N.W.2d 557, 561 (Mich. 1994); Zaal v. State, 602 A.2d 1247 (Md. 1992); 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."). Cf. *In re* Crisis Connection, Inc., 949 N.E.2d 789, 800 (Ind. 2011); Berry v. State, 581 So. 2d 1269, 1275 (Ala. Crim. App. 1991); Goldsmith v. State, 651 A.2d 866, 873 (Md. 1995); Thornton v.

tween the disclosure mandated by *Brady* and the protections provided by these evidentiary privileges, courts frequently turn to the U.S. Supreme Court's 1987 decision in *Pennsylvania* v. *Ritchie*.[234] In that case, a defendant charged with sexually abusing his daughter subpoenaed records from the state's Department of Children and Youth Services.[235] The state refused to release the records because they were made confidential by statute.[236] When the case made it to the U.S. Supreme Court, the defendant said he was entitled, under *Brady*, to exculpatory and impeachment evidence in the files, regardless of any statutory protections.[237] The Supreme Court agreed that *Brady* reached information in these files, and remanded the case for the trial court to look for *Brady* material.[238] Significantly, the Court noted that the defendant could not force in camera review simply by request, but would have to "establish[] a basis for his claim that it contains material evidence."[239]

This issue of the threshold showing required for in camera review turns out to be quite important in *Brady*-balancing regimes, and courts have not reached consensus on how high to set the threshold. 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."[240] Proponents of demanding threshold requirements say they are

State, 231 S.E.2d 729, 733 (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."); NEW WIGMORE: EVIDENTIARY PRIVILEGES, § 8.5.1, Procedural Variations (rev. 2d ed. 2014) ("[T]he almost unanimous view is that the government must either disclose the information or dismiss the civil count or criminal charges to which the information relates.").

[234] State v. Peseti, 65 P.3d 119, 134 (Hawaii 2003); State v. Brossette, 634 So. 2d 1309, 1317 (La. Ct. App. 1994); Foggy, 521 N.E.2d at 91; Kirby v. State, 581 So. 2d 1136, 1140 (Ala. Crim. App. 1990); State v. Little, 861 P.2d 154 (Mont. 1993).

[235] Pennsylvania v. Ritchie, 480 U.S. 39 (1987).

[236] *Id*.

[237] *Id*. at 43. He also raised Confrontation and Compulsory Process claims.

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

[239] *Id*. at 58 n.15.

[240] March v. State, 859 P.2d 714, 717 (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.); 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."); Los Angeles 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 showing that "access . . . may be necessary for the determination of any issue before [the court]"); Mont. Code Ann. § 41-3-205 ("in camera inspection if relevant to an issue be-

necessary because, without them, "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."[241] The downside of these threshold showings is that they prevent review of the files from being routine, despite the fact that *Brady* applies to all material impeachment and exculpatory information, in every criminal case.[242] With these thresholds, review cannot be routine because the party must know something about the file before it can trigger the review.

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 sub-Part presents several distinctions that counsel against special protections for police misconduct.

1. Justifications for the Privilege

By their nature, evidentiary privileges exclude truthful, relevant information that might otherwise aid the court. The reason for excluding this information is to protect some interest society has recognized as justifying an intrusion on the truth-seeking function of the trial system. The leading justifications for the privileges protecting the confidential information of crime victims and witnesses are a desire to prevent the particular victim or witness from being harmed in the trial process by, say, a humiliating inquest into sensitive details of his life, and a desire to encourage future victims and witnesses to participate in the reporting, investigation, and prosecution of crime.[243] These twin ration-

fore it."); Romley v. Superior Court of Maricopa Cnty., 172 Ariz. 232, 239, 836 P.2d 445, 452 (Ct. App. 1992) (victim medical records' statutory privilege pierced if trial court finds 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.").

[241] Foggy, 521 N.E.2d at 92.

[242] *See infra* Part IV.C.2.

[243] *E.g.*, *Ritchie*, 480 U.S. at 60 (disclose of records "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) ("[T]he 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.").

ales are often trotted out to justify confidential treatment of police disciplinary records, but they are unpersuasive in the personnel-file context, especially when used to justify why *prosecutors* should not have access to the personnel files.[244]

It takes little effort to explain why a crime victim has a greater interest in protecting sensitive aspects of his past than a police officer has in concealing his misconduct. The police officer is invested with great trust by the public, and that trust comes with the expectation that the officer will obey the law. If an officer is disciplined, he has no justification in demanding that this discipline remain private. Indeed, there is a strong societal interest in allowing members of the public to stay informed of official misconduct, and that interest is even stronger when propelled by a defendant's constitutional due process rights. Of course police officers will be embarrassed by disclosure of their misconduct. That is part of the point. Unlike victims or witnesses who are thrust into the spotlight of the criminal justice system, police officers voluntarily enter this arena. Their misconduct, documented by their public employers, deserves nowhere near the protection accorded to child-abuse records, rape-crisis counseling communications, or any of the other sensitive matters that victims and witnesses fear disclosing.

The second rationale for the police officer's privilege 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

[244] *E.g.*, State v. Kaszubinski, 425 A.2d 711, 712-13 (N.J. Super L. 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."); State v. Renneke, 563 N.W.2d 335, 339 (Minn. Ct. App. 1997) *abrogated on other grounds by* State v. Underdahl, 767 N.W.2d 677 (Minn. 2009) ("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. Over time, it could become a considerable deterrent to an officer's vigorous enforcement of the law."); State v. Block, 622 S.W.2d 367, 370 (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."); People v. Gissendanner, 399 N.E.2d 924, 927 (N.Y. Ct. App. 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."); Martinelli v. Dist. Court, 612 P.2d 1083, 1090 (Colo. 1980) ("[T]he 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 . . . [K]nowledge 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."). *Cf.* NEW WIGMORE: EVIDENTIARY PRIVILEGES, § 7.4, Statutes Privileging Information Confidentially Transmitted to Government (rev. 2d ed. 2014).

of internal affairs investigations were disclosed.[245] 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.[246] And there is no evidence that internal affairs investigations in those jurisdictions have suffered as a result.[247] Second, *Ritchie* made clear that, even in confidential child-abuse files, *Brady* material must be disclosed if it is located.[248] So, 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 personnel files for *Brady* material without first making some showing of what the files will contain. It is difficult to see why preventing such routine searches of the files would be significant in encouraging participation in an internal affairs investigation, given that the misconduct will be disclosed to and by the prosecutor if it happens to be located (or if it leads to criminal charges).

Two additional arguments about disclosure's effects on internal affairs are worth addressing. First, there is 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, if the complaints are truly frivolous, they will not result in misconduct findings, and will have vanishingly little effect on an officer's reputation or ability to testify. After all, internal affairs findings are valuable precisely because the government looked into the allegations and found them to be true. If this avalanche of complaints includes some that are not frivolous, that would be an added benefit of increased openness.

The second argument is that more liberal disclosure of misconduct will cause departments to pull back on their internal affairs investigations or tamper with the investigations' findings to avoid implicating officers' credibility.[249] For example, falsifying a police report might instead be characterized as failing 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 to protect the integrity of the police force and to pursue the more Machiavellian management strategies suggested in Part III.[250] Thus, while some departments might rein in their internal affairs investigations, others would resist doing so, and the possible

[245] *See supra* note 244.
[246] *See supra* Part II.B.
[247] *E.g.*, Telephone Interview with Darrel Stephens, Executive Director, Major Cities Chiefs Association, Feb. 27, 2014.
[248] *See supra* notes 237—238 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.
[249] Telephone Interview with Richard Lisko, *supra* note 179; Telephone Interview with Darrel Stephens, *supra* note 247.
[250] *See, e.g.*, *supra* notes 183—188 and accompanying text.

marginal effect does not seem significant enough to justify the privilege for police misconduct.[251]

Put simply, the above rationales do not justify sacrificing *Brady*'s constitutional mandate at the altar of police confidentiality.

2. The Police Officer's Special Status

The privilege for police personnel files is further complicated by the police officer's special status as a witness. Unlike more typical privilege holders, police officers are both witnesses and prosecution-team members. As noted earlier, the Supreme Court has held 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."[252] The police officer and his department are clearly part of the prosecution team, and their knowledge of the misconduct in these files should be imputed to the prosecutor in the same way that the officer's knowledge of any other government 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.

The officer is also different from the archetypal privilege holder because of his 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 benefit of the disclosure accrues only to the particular defendant in the case. But police officers, as serial witnesses, may testify in hundreds of cases. If their privileged personnel records are revealed in one case, the disclosure may 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, as a result, usher these officers out of the profession.

The final characteristic that makes the police-officer witness different from other privilege-holding witnesses is the most basic: Judges and juries are likely to trust an officer by dint of his position.[253] Because the officer takes the stand with an enhanced reputation for truthfulness, it is particularly perverse to give his credibility an additional boost by providing him a privilege to hide the

[251] 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.

[252] Kyles v. Whitley, 514 U.S. 419, 437 (1995).

[253] *E.g.*, *Why does Kopf believe cops most of the time?*, HERCULES AND THE UMPIRE, (Apr. 18, 2014), http://herculesandtheumpire.com/2014/04/18/why-does-kopf-believe-cops-most-of-the-time/; David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 472 (1999).

type of misconduct that would be used to impeach other witnesses. Indeed, one California Supreme Court justice complained about this double-standard for officers. "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 in dissent. "Yet the Legislature has enacted a scheme . . . that exalts police officers over all other witnesses who have committed misconduct."[254]

The special status of the police-officer witness thus makes it even more troubling to protect police misconduct from disclosure.

C. Procedural Problems with Balancing

Even if police misconduct deserves the confidentiality that many jurisdictions currently afford it, the procedures these jurisdictions use to balance the privilege against the demands of *Brady* are deeply flawed. There are four particularly disturbing doctrinal problems with the procedures these systems use: (1) *Brady* decisions are made in the abstract, by people who lack sufficient knowledge of the facts and theories of the case to know whether evidence is favorable and material—*Brady*'s two requirements. (2) The threshold showings required to trigger in camera review prevent *Brady*'s routine application to police personnel files by requiring prosecutors (or defendants) to know something about what the files contain before the court will review them. (3) The process of in camera review exacerbates the conflict of interest within the prosecution team, in some cases even allowing ex parte communications between officers and judges. The in camera process, thus, undermines the prosecutor's ability to carry out his disclosure obligations. (4) Even when in camera review discloses *Brady* information, the *Brady* material is often subject to strict protective orders that prevent prosecutors from sharing the information with each other or using it in their own future cases involving the officer. This undermines *Brady*'s doctrinal assumption that prosecutors have constructive knowledge of information known by any member of the prosecution team.

In the end, any balancing systems that fails to account for these procedural challenges winds up shortchanging *Brady* in favor of police confidentiality, rather than honoring the two.

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 doctrinal problem is that *Brady* determinations require case-specific knowledge, otherwise it is not possible to tell

[254] Los Angeles v. Superior Court (*Brandon*), 52 P.3d 129, 149 (Cal. 2002) (Moreno, J., dissenting).

what information is *favorable* and *material*—*Brady*'s two requirements.[255] The favorability determination requires knowledge of how the defendant would use the evidence; the materiality determination requires knowledge of the weight of the evidence.[256] What is both favorable and material in one case, may be neither in another.[257]

The *Brady*-in-the-abstract problem occurs in regimes where prosecutors are not allowed to view the personnel records.[258] 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.[259] 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 before there is any case at all.[260] This raises questions about how the police reviewer can know what qualifies as *Brady* material.

The problem also arises when judges make the *Brady* determinations, albeit in an attenuated form because judges have a particular case in front of them. While 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*. That is because these in camera reviews are conducted significantly before the trial, and thus the specific theories of the case, and the weight of the evidence, may not be apparent to the judge. Indeed, in some jurisdictions, the judge making the *Brady* decision is a motions judge who is not assigned to try the case.[261] The *Brady*-in-the-abstract issue also rears up in jurisdictions where prosecutors can access the misconduct directly, but instead ask the police to make the first pass through the files to narrow the search.[262]

All of these types of *Brady*-in-the-abstract reviews raise questions about

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[255] *See supra* Part I.A.

[256] United States v. Agurs, 427 U.S. 97, 112 n.21 (1976).

[257] 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." *In re* Special Proceedings, 2012 WL 858523 (D.D.C., Mar. 15, 2012).

[258] *See supra* Part II.A.

[259] *See generally*, *supra* Parts II.A, II.C.

[260] Deputy Chief Clark Kimerer of the Seattle Police Department said in 2007 that "nobody in law enforcement knows what sort of misconduct should trigger the addition of an officer's name to the prosecutor's list." Carter, *supra* note 180. Telephone Interview with Daisy Flores, *supra* note 132 ("Police agencies aren't typically having an attorney look at the file. It's some clerk . . . ."); Ulmer Order, *supra* note 92, at 11 ("[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.'").

[261] *E.g.*, Ulmer Order, *supra* note 92.

[262] *E.g.*, *supra* notes 135, 140, 144.

whether balancing systems that rely on these judgments can comply with Supreme Court doctrine. Granted, the abstract nature of these determinations is not an insurmountable problem. On the favorability prong of the analysis, anything that undermines the officer's credibility might be deemed favorable.[263] And, on the materiality prong, the police- or court-reviewer could decide to disclose anything even marginally favorable, thus embracing the Supreme Court's command that prosecutors err on the side of disclosure.[264] But that is not the route these reviewers have taken, nor would we expect such an approach to disclosure in jurisdictions where 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 she is the one the Supreme Court charged with the duty of *Brady* compliance.[265] While the prosecutor may lack knowledge of some defense evidence or defense legal theories, she is at least familiar enough with the state's case to make the *Brady* determination.[266] But the politics implicated by these personnel files have caused jurisdictions to sideline the prosecutor and look for some other way to comply with *Brady*. As we will see throughout this sub-Part, sidelining the prosecutor tampers with the internal logic of *Brady* and gives rise to serious doctrinal problem.[267]

2. *Threshold Requirements for Triggering In Camera Review*

In camera review is an element of three disclosure systems: those where prosecutors have no access to personnel files,[268] those where prosecutors have access but prefer to get a court ruling before making disclosure,[269] and those where defendants must seek out *Brady* information on their own via subpoena.[270] The question of what threshold showing is required to trigger in camera review is critically important because it threatens to prevent *Brady* from being routinely applied. In California, prosecutors cannot trigger in camera review of the files "'without first establishing a basis for [the] claim that it contains mate-

[263] This determination would not be easy exculpatory information, however.

[264] 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.").

[265] *Id*.

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

[267] There is also the fear that the police might not do the review conscientiously.

[268] *See* Part II.A.

[269] *E.g*., MARICOPA CNTY. ATT'Y'S OFFICE, PROSECUTION POLICES & PROCEDURES 6.13, AT 1 (rev. Sept. 24, 2004) ("On occasion, they will be submitted to the Judge for an in camera inspection.") WASH. ASS'N OF PROSECUTING ATT'YS, *supra* note 140 (prosecutors can reveal information at their discretion, but will generally opt for in camera review first).

[270] *See, e.g*., *supra* notes 170—171 and accompanying text.

rial evidence,' . . . that is evidence that could determine the trial's outcome, thus satisfying the materiality standard of *Brady*."[271] In Colorado, they must "show 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."[272] These threshold requirements mean the person asking the court to look for *Brady* material must already know something about what the file contains.[273] The higher the showing, the less routine the search, and the farther *Brady* drifts from the Supreme Court's vision of a self-executing, affirmative obligation that governs all criminal cases.[274]

The threshold requirements also create a scaling problem for in camera review. Police officer testimony is a ubiquitous feature of criminal prosecutions, and any time an officer provides significant testimony, his credibility can become a critical issue. That means courts potentially face an enormous demand for in camera review of these files. Given that the threshold requirements for triggering in camera review are defined rather vaguely, there is some wiggle room for a court to raise or lower the bar. But, while the courts can show flexibility in applying the thresholds for some privileges—like those protecting the child-abuse records in *Pennsylvania* v. *Ritchie*—they are under significant institutional pressure not to lower the bar when it comes to police personnel files. A modest lowering of the threshold could lead to a dramatic increase in the number of reviews the courts are required to do, at least according to the California Judges Association, which estimated that relaxing the standards for reviewing police personnel files would cost "tens of thousands of judicial hours" each year in Los Angeles alone.[275]

And it is not just the increased workload that appears to irk the judiciary. There is an institutional resentment to carrying out a duty that should be the prosecutor's. 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."[276] Indeed, in the recent case where a San Francisco judge held the personnel-file statute unconstitutional, the 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

[271] Los Angeles v. Superior Court (*Brandon*), 52 P.3d 129, 138 (Cal. 2002) (quoting Pennsylvania v. Ritchie, 480 U.S. 39, 58 n.15 (1987)).
[272] People v. Blackmon, 20 P.3d 1215, 1220 (Colo. Ct. App. 2000).
[273] *See supra* notes 114, 115, 172 and accompanying text.
[274] *See supra* notes 30, 115.
[275] Letter from California Judges Association, to Barbara J.R. Jones, Presiding Justice, California Court of Appeal, Feb. 26, 2014 (on file with author).
[276] *Id*.

'determine the trial's outcome.'"[277]

In sum, these threshold requirements, which are a staple of the *Brady* balancing systems, pose significant problem for *Brady* compliance because they prevent the files from being searched in the run-of-the-mill cases. To the extent these thresholds can be lowered or eliminated, that would ease the doctrinal problems they pose. At the same time, these threshold requirements are an essential safeguard against the court system'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 either spend inordinate amounts of energy reviewing the files or carry out the review in such a perfunctory manner as to be worthless. In that sense, the preceding discussion is not so much an argument for lowering or eliminating the threshold requirements as it is for not using in camera review to search police personnel files.[278] This concern about in camera review is amplified below.

3. Conflicts of Interest and Ex Parte Communication

In camera review creates further problems by exacerbating the conflicts of interest within the prosecution team. This issue potentially arises in any of the *Brady* regimes that employ in camera review. While the prosecutor's constitutional duty, under *Brady*, is to disclose material impeachment evidence, the police officer's duty is somewhat more complicated. As a member of the prosecution team, the officer has a duty to help the prosecutor comply with *Brady*, but the officer also has an obvious personal interest in not exposing misconduct from his personnel file. In camera review legitimizes and empowers this personal interest by giving the officer an opportunity to tell the court why in camera review is inappropriate and why anything the review turns up should not be disclosed. By making the officer a party to the case, the in camera encourages the officer to pursue his own interests in non-disclosure, even as they may cut against the duty to disclose under *Brady*. Moreover, the officer will typically be represented in these proceedings by a city attorney whose ethical duty is to

[277] Ulmer Order, *supra* note 92, at 11 (quoting the *Brady* materiality standard); *see also* Hearing Transcript, at 19, People v. Johnson, No. 12029482 (Cal. Super. Ct., Jan. 6, 2014) (Judge Richard B. Ulmer: "[T]hey 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."). 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 of San Francisco (*Johnson*), No. A140767, slip op. (Cal. Ct. App. Aug. 11, 2014) ("That allocation of responsibility has long been a fundamental aspect of modern constitutional criminal procedure, and it is not to be altered lightly.").

[278] *See* Telephone Interview with Scott Durfee, *supra* note 128 ("[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.").

pursue the confidentiality interests of the officer, rather than to ensure *Brady* compliance.[279]

This conflict of interest is even more unseemly in light of some of the special prerogatives it affords officers and their attorneys. In California, after 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.[280] This means that the judge does not review the entire file to make sure *Brady* information has not been overlooked or suppressed. Moreover, California statute permits the officer and her designee to attend the in camera review, while it prevents prosecutor, defense counsel, and defendant from attending.[281] The in camera process also allows for ex parte communication. A practice advisory published by the League of California Cities, entitled *Pitchess Motions and Brady Disclosures: How Hard Can You/Should You Push Back?*, even urges police attorneys, "during the in camera review," to "argue the relevance of certain complaints and investigation materials contained in the officer's file," despite the fact that the other affected parties are not present to dispute the points.[282]

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

4. Protective Orders Interfere with Constructive Knowledge

Perhaps these balancing systems' biggest affront to *Brady* 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

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[279] Juli Christine Scott, Chief Assistant City Attorney, Burbank, *Pitchess Motions and Brady Disclosures: How Hard Can You/Should You Push Back?*, at 12, *published in* LEAGUE OF CALIFORNIA CITIES CONFERENCE—2005 SPRING CITY ATTORNEY SPRING CONFERENCE. *Id*. at 12 ("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.").

[280] People v. Guevara, 55 Cal. Rptr. 3d 581, 584—85 (Ct. App. 2007); Scott, *supra* note 279, at 9—10 ("Defense attorneys would of course like a general fishing expedition. Limit the Catch!").

[281] Scott, *supra* note 279, at 7 ("Practice Note: *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.").

[282] JULI CHRISTINE SCOTT, CHIEF ASSISTANT CITY ATTORNEY, BURBANK, FUNDAMENTALS OF OPPOSING MOTIONS FOR DISCOVERY OF PEACE OFFICER PERSONNEL RECORDS (*PITCHESS* MOTIONS), at 12 (2012) ("[B]e prepared to argue the relevance of the materials you do bring at the in camera," though "some judges are uncomfortable with this.").

courts release from the personnel files.[283] Even after the court has gone through the in camera process and disclosed misconduct pursuant to *Brady*, it will often subject that disclosure to a protective order that prevents prosecutor and defense counsel from telling colleagues about the misconduct or using their own knowledge of the misconduct in future cases involving that 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 their office or on the prosecution team.[284]

The information sharing demanded by *Brady* is precisely what the protective orders prevent. The problem is pointed enough when a protective order prevents one prosecutor from telling another about an officer's credibility problems, but it borders on the absurd when the protective order prevents a prosecutor who learns about an officer's credibility problems from disclosing that information in future cases involving the same officer. In such a situation, the prosecutor has knowledge of misconduct that the constitution requires him to disclose but that the protective requires him to keep secret. This is not just a matter of requiring the prosecutor to jump through a few hoops to get the information re-disclosed. As noted above, the threshold showing for in camera review can be quite challenging, and the prosecutor is not permitted to use any information covered by the protective order to meet that threshold.[285] 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 is qualifies as *Brady*, but no ability to alert the defense.[286]

Nor is this just a hypothetical problem.[287] In the San Francisco *Brady* case

[283] SFPD Reply Brief of San Francisco Police Department, at 14, People v. Superior Court (*Johnson*), No. A140768 (Cal. Ct. App. Jan. 28, 2014) ("[T]he protective order should specify that disclosure is limited to the present case . . . "); Scott, *supra* note 282, at 11 ("Your protective order should of course . . . require the destruction of any copies and return of originals upon conclusion of the case, etc."); Telephone Interview with Edie Cimino, *infra* note 291; Heed Memo, *supra* note 98; Kevin Heade, *Are Brady Materials Limited by Protective Orders?*, FOR THE DEFENSE, at 4 (Nov. 2011 to Jan. 2012) (quoting protective order).

[284] "[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.'" Kyles v. Whitley, 514 U.S. 419, 438 (1995) (quoting Giglio v. United States, 405 U.S. 150, 154 (1972)) (alterations in original).

[285] *See supra* Part IV.B.

[286] Of course, the prosecutor could avoid the problem by dropping the charges.

[287] *See supra* notes 92—94, 277 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. "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, Baltimore City, Office of the Public Defender, May 19, 2014. *See also* Wiehl, *supra* note 58, at 118 (quoting feder-

discussed above, prosecutors had actual knowledge that the two "key" police-officer witnesses had more than 500 pages of *Brady* material in their personnel files.[288] They knew this, according to their appellate brief, "because they received that material after in camera review in prior cases. But they were forbidden by protective orders in those cases from using that information in any subsequent case."[289] 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 give any specifics about how the information in the personnel files would satisfy *Brady*'s materiality standard.[290]

This San Francisco case, with prosecutors who knew of the misconduct but were bound to silence, pointedly illustrates the problem caused by these protective orders. 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.[291]

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Beyond the particular procedural faults, the overarching problem with these balancing systems is the negligence they endorse toward *Brady*'s application to the personnel files. Prosecutors, judges, and defendants remain in the dark about what these files contain, and the balancing systems are all too happy to let the ignorance persist, despite the great potential for these files to contain *Brady* material. It is only if the prosecutor or the defendant knows something about what the file contains that the justice system will help ensure *Brady* material is not being suppressed. But that is 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 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. As this Part has ar-

al prosecutor: "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? 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.").

[288] Brief of SFPD, *supra* note 87, at 36 n.4.

[289] *Id*.

[290] Ulmer Order, *supra* note 92, at 6—7; *see supra* notes 92—93 and accompanying text.

[291] *See supra* note 284 and accompanying text.

gued, police officers do not deserve confidentiality protections for their misconduct, and even if they did, the systems used to balance these protections against the demands of *Brady* are incompatible with core tenets of the *Brady* doctrine.

V. SOLUTIONS

The root causes of *Brady* violations stretch far beyond prosecutors, at least in the context of police personnel files. In jurisdictions where police departments withhold information from prosecutors, where courts refuse to look in the files, where prosecutors have access to impeachment material but cannot or do not disclose it—in all these jurisdictions, *Brady* failures result from an undeserved solicitude for police-officer 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 misconduct to do so, not as rogue actors, but with the imprimatur of the state. This broad responsibility for *Brady* violations undermines the standard account of prosecutorial cheating and suggests that the standard *Brady* solutions—increasing punishment for prosecutors, increasing court oversight of the *Brady*-disclosure process, and mandating "open file" policies—will have little effect on the suppression of personnel-file evidence, because prosecutors are often not the ones in control.[292]

Because the causes of *Brady* violations go beyond prosecutors, so must the solutions. The aim of reforms should not just be to deter prosecutorial cheating, but rather to change the protocols used for searching the personnel files. First, and most importantly, personnel files should be searched in every case where an officer's testimony could prove significant to the trial's outcome, regardless of a defendant's request or lack thereof. *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 police-officer members of the team certainly know about the misconduct contained in these files.[293] Officers' knowledge of this misconduct must be imputed to the prosecutor, just like officers' knowledge of an informant's credibility problems would be imputed to the prosecutor, even if the knowledge came from unrelated cases. While there is debate about how far this constructive knowledge extends—whether it goes as far as misconduct that has yet to be detected by anyone other than the officer or that occurred off-the-job and is unknown to the police department—it is not necessary to establish the outer bounds of such

[292] *See supra* note 16; *see also* Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 531 (2007); CONVICTION INTEGRITY PROJECT, *supra* note 150, at 23.

[293] *See supra* notes 30, 115.

constructive knowledge to see that the personnel files fall within them.[294] 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.

But, 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 himself. The systems that create such impediments wind up undermining the *Brady* doctrine. As argued throughout the Article, the 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 push the prosecutor to sidelines 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 large scale required to 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 include all favorable credibility evidence, regardless of its materiality, given that the materiality determinations cannot be made in the abstract.[295] 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 in this regard, 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 disclose *Brady*-worthy material on their own, without requiring a new in camera review each time a *Brady* officer appears as a witness. In general, a court should also be leery of issuing a protective order for misconduct that will likely be significant in future cases involving the officer. Where courts insist on protective orders, they should at least allow 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 could attack this problem on a case-by-

[294] 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, 2014 WL 2921398 (N.Y. June 30, 2014) (majority and concurrence).

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

case basis. Defendants could file motions asking courts to require prosecutors to certify that they have checked police-witnesses' personnel files for *Brady* material.[296] Prosecutors who were so inclined could refuse to use the testimony of any officer who does not make his personnel file available, thus pressuring the officer into waiving any privilege he has over the records.[297] Similarly, a trial judge who is frustrated with routinely reviewing personnel files could instead opt for a jury instruction explaining that the officer would not provide the prosecutor access to the personnel file and that the jury is free to draw whatever inferences it chooses from that refusal.[298] Many other incremental approaches are also possible.

The most elegant solution might well be to make police misconduct information accessible as a public record. This would deliver the coup de grâce to the issue of balancing *Brady*'s disclosure obligations against officers' confidentiality interests. Indeed, as a public record, the misconduct evidence would be neither *Brady* nor confidential. This solution, however, would not only face enormous political resistance, but would also go beyond what is needed to address the *Brady* problem. As far as *Brady* is concerned, police officers can continue to keep their files secret from the public, so long as this confidentiality does not impede prosecutors' *Brady* searches. Nonetheless, as this Article has shown, there are many reasons police are likely to continue their resistance to *Brady*'s application to these files. And there is little reason to think there will be a lessening in the forces that have created this tension between *Brady* and police-officer confidentiality.

CONCLUSION

Ultimately, systems that balance officers' confidentiality interests against *Brady*'s constitutional requirements get it completely wrong. These protections benefit dirty cops by allowing them to testify and, thereby, hold onto their jobs.

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[296] 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. Sample Mot. to Disclose Results of Certification Exam, North Carolina Super. Ct. (on file with author).

[297] 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) ("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."); California District Attorneys Association Amicus Brief, at 9, People v. Superior Court (*Johnson*), Case No. A140767 (Cal. Ct. App. Feb. 10, 2014).

[298] Cf. Jones, *supra* note 16, at 450—52 (urging *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 jury instruction when privilege invoked against potentially impeaching evidence).

Meanwhile, they harm defendants, who are denied material impeachment evidence to which they are entitled under *Brady*. And they harm society, by undermining due process and allowing dishonest officers to stay on the job. More liberal rules for disclosing this misconduct, including treating it as a public record, would align with good law and good policy by improving *Brady* compliance and helping to cleanse police departments of problem officers.

This Article has sought to explain how *Brady* developed a blind spot toward evidence in police personnel files. The story involves a combination of decisions at all levels of government and the courts. The Supreme Court's *Brady* doctrine set up a far-ranging but ill-defined obligation to seek out and disclose impeachment 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. The lower federal courts have not clearly articulated how *Brady* should apply to police personnel files, largely because they have not been required to, in light of the Justice Department's *Brady* policy and the effects of the Antiterrorism and Effective Death Penalty Act. In this vacuum of federal caselaw, states have been left alone to navigate between the statutes, policies, and institutional pressures opposing disclosure, on the one hand, and *Brady*'s disclosure demands, on the other. This has led to a wide variety of *Brady* practices around the country, and resulted in 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 the 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. Instead, the systems that purport to balance officers' privacy rights with defendants' *Brady* rights wind up giving short shrift to *Brady*. The latent division within the prosecution team has only added to the difficultly in applying *Brady* to these files, as officers see *Brady* as a threat to 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.