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### Exposing Police Misconduct in Pre-Trial Criminal Proceedings

Anjelica Hendricks

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# EXPOSING POLICE MISCONDUCT IN PRE-TRIAL CRIMINAL PROCEEDINGS

*Anjelica Hendricks\**

*This Article presents a unique argument: police misconduct records should be accessible and applicable for pre-trial criminal proceedings. Unfortunately, the existing narrative on the value of police misconduct records is narrow because it exclusively considers how these records can be used to impeach officer credibility at trial. This focus is limiting for several reasons. First, it addresses too few defendants, since fewer than 3% of criminal cases make it to trial. Second, it overlooks misconduct records not directly addressing credibility—such as records demonstrating paperwork deficiencies, failures to appear in court, and “mistakes” that upon examination are patterns of abuse. Finally, the narrative fails to consider pre-trial criminal proceedings, which have the potential to be case dispositive. Exposing Police Misconduct in Pre-Trial Criminal Proceedings seeks to fill that gap.*

*Alarming,ly, no state bail statute specifically addresses police misconduct as a factor judges may consider for pre-trial detention, a problematic rubric since many charges are based on an officer’s affidavit of criminal activity. Other pre-trial matters, such as line-up requests, motions to suppress, and motions to dismiss that bear upon law enforcement conduct, should also examine misconduct records. Unfortunately, the supporting evidence for some pre-trial matters is in the most inaccessible location—the officer’s personnel file.*

*These examinations largely do not occur because police misconduct records are widely inaccessible; this Article scrutinizes two roadblocks for full disclosure. This includes a critique of (a) prosecutorial Brady-Giglio policies; even though advanced by progressive prosecutors, the policies continue to prevent defendants from accessing records for timely pre-trial matters, and (b) state disclosure laws, which nearly universally preclude the release of valuable disciplinary records. Unfortunately, even the repeal of New York’s Act 50a—widely lauded by reformers—continues to shield a great percentage of misconduct records from disclosure. This Article concludes by offering suggestions on how we can dismantle these barriers and begin examining police misconduct at the several stages of a criminal case, not simply trial.*

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## INTRODUCTION

Minneapolis Police Officer Derrick Chauvin had eighteen complaints against him before he killed George Floyd.<sup>1</sup> NYPD Officer Daniel Pantaleo was the subject of seven misconduct complaints prior to Eric Garner’s death.<sup>2</sup> Texas State Trooper Brian Encinia received an unprofessional conduct warning by his supervisor<sup>3</sup> a year before he jailed Sandra Bland for three days for an alleged traffic stop; she was later found hanging in her cell. Overall, officers who engage in brutal force often have prior histories of misconduct, including subtler forms.<sup>4</sup>

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1. Dakin Andone, *The Minneapolis Police Officer Who Knelt on George Floyd’s Neck Had 18 Previous Complaints Against Him, Police Department Says*, CNN (May 29, 2020, 5:39 PM), <https://www.cnn.com/2020/05/28/us/minneapolis-officer-complaints-george-floyd/index.html>.

2. Jonathan Dienst, *New Law Reveals Complaint History for NYPD Cop Fired for Eric Garner’s Chokehold Death*, NBC N.Y. (June 23, 2020, 8:17 AM), <https://www.nbcnewyork.com/news/local/new-law-reveals-complaint-history-for-nypd-officer-fired-for-eric-garners-chokehold-death/2479606/>.

3. Terri Langford, *DPS Trooper Warned in 2014 of “Unprofessional Conduct,”* TEX. TRIB. (Aug. 1, 2015, 9:00 AM), <https://www.texastribune.org/2015/08/01/dps-trooper-warned-2014-unprofessional-conduct/>.

4. Jill McCorkel, *Police Officers Accused of Brutal Violence Often Have a History of Complaints by Citizens*, CONVERSATION (May 31, 2020, 4:01 PM), <https://www.conversation.com/news/police-officers-accused-of-brutal-violence-often-have-a-history-of-complaints-by-citizens>.

However, reform efforts focus primarily on these violent police interactions to the exclusion of others.<sup>5</sup> This narrow focus often overlooks subtler forms of misconduct such as paperwork deficiencies, failures to appear in court, and “mistakes” that—upon closer examination—are a part of patterns of abuse where the victims of the misconduct are largely criminal defendants. The growing evidence of wrongful convictions caused by these forms of police misconduct<sup>6</sup> shows us that officer misconduct records should be timely evaluated at key moments during criminal prosecutions to prevent future harms; not simply buried in administrative files to only arise at a defendant’s trial or after the occurrence of a gruesome incident. Currently, decisive criminal justice proceedings are often devoid of discussions surrounding police misconduct.

Recent calls for reform at the national<sup>7</sup> and state<sup>8</sup> levels overlook this crucial error. Prosecutors have attempted to address officer misconduct by creating lists of problematic officers that touch on the prosecutor’s duty to disclose exculpatory evidence, known as *Brady* material,<sup>9</sup> and material that raises doubt on a witness’s credibility,

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theconversation.com/police-officers-accused-of-brutal-violence-often-have-a-history-of-complaints-by-citizens-139709. (“Officers who are the subject of previous civilian complaints—regardless of whether those complaints are for excessive force, verbal abuse or unlawful searches—pose a higher risk of engaging in serious misconduct in the future”).

5. See generally, #SCANTWAIT, CAMPAIGN ZERO (June 2020), <https://scantwait.org/> (explaining eight reforms police departments should focus on).

6. Cf. Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 WASH. U. L. REV. 1133, 1134–55 (2013) (explaining that “[P]olice misconduct generally, and perjury in particular, was the primary cause of wrongful convictions in every Rampart and Tulia case resulting in exonerations. Witness misidentifications played virtually no role in any of the cases. . . . [T]he profile of persons exonerated following revelations of major police misconduct varies dramatically from that of the typical capital murder or DNA exoneree. The defendants in the mass exoneration cases were convicted of different types of crimes, faced less severe punishments, and were far more likely to plead guilty than other exonerated defendants.”).

7. See, e.g., George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. (2020) (requiring federal, state, and local law enforcement departments to end qualified immunity, ban chokeholds, end racial and discriminatory profiling, and enhance reporting of use of force). Notably, this measure did not address access and use of misconduct records in criminal proceedings.

8. See Weihua Li, *Which States are Taking on Police Reform After George Floyd?*, MARSHALL PROJECT (June 18, 2020, 3:00 PM), <https://www.themarshallproject.org/2020/06/18/which-states-are-taking-on-police-reform-after-george-floyd> (“[A]n analysis of the conference’s database shows that the majority of the reform bills introduced since Floyd’s death focus on police oversight and regulating use of force, like banning chokeholds, building public databases of traffic stops and establishing an independent agency to investigate misconduct.”).

9. *Brady v. Maryland*, 373 U.S. 83, 85 (1963).

known as *Giglio* material.<sup>10</sup> However, these *Brady-Giglio* lists are usually informal<sup>11</sup> and incomplete.<sup>12</sup> Furthermore, some are based solely on adverse in-court credibility findings and excludes misconduct records found only in personnel files.<sup>13</sup> Efforts to reform cash bail do not address officer credibility, and emerging open-file discovery<sup>14</sup> laws, which require prosecutors to disclose certain evidence, do not explicitly reference officer personnel records.<sup>15</sup>

Moreover, the limited scholarly literature on the use of police disciplinary records in criminal proceedings focuses solely on officer credibility at the trial phase for its ability to impeach officers with verified accounts of dishonesty.<sup>16</sup> This conversation is limiting in two ways. First, it fails to acknowledge that only a fraction of cases proceed to trial.<sup>17</sup> Second, it overlooks other realms of the criminal justice

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10. *Giglio v. United States*, 405 U.S. 150, 154 (1972).

11. See State of New Jersey Attorney General Law Enforcement Directive No. 2019-6, Directive Establishing County Policies to Comply with *Brady v. Maryland* and *Giglio v. United States*, (Dec. 4, 2019) (finding that across New Jersey, County Prosecutors' Offices have varying degrees of protocol, "[s]ome have written policies, others employ a more informal approach.").

12. See Phila. DAO, *DA Krasner Asks Court to Hold Philadelphia Police in Contempt for Failure to Provide Officer Misconduct Information*, MEDIUM (Aug. 11, 2021), <https://medium.com/philadelphia-justice/da-krasner-asks-court-to-hold-philadelphia-police-in-contempt-for-failure-to-provide-officer-3e8980e659db>.

13. See Jonathan Abel, *Brady's Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution*, 67 STAN. L. REV. 743, 780.

14. See Ben Grunwald, *The Fragile Promise of Open-File Discovery*, 49 CONN. L. REV. 771, 771 (2017) (explaining that "[i]n an effort to expand defendants' discovery rights, a number of states have recently enacted open file statutes, which require the government to share the fruits of its investigation with the defense.").

15. Compare N.C. GEN. STAT. ANN. § 15A-903 (West 2011) (providing an exhaustive list of discoverable information, which does not include law enforcement personnel file) with N.C. GEN. STAT. ANN. § 153A-98 (West 2018) (explaining that information included in North Carolina's public disclosure is a county employee's "[d]ate and type of each dismissal, suspension, or demotion for disciplinary reasons taken by the county," which does not authorize the release of the factual information related to a suspension, only the existence of a suspension).

16. *But cf.* Abel, *supra* note 13, at 748 ("[M]aking police misconduct more accessible would benefit not only defendants, but also society, ensuring fairer trials and forcing dirty cops off the job.").

17. Compare John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RSCH. CTR. (June 11, 2019), <https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/> ("[N]early 80,000 people were defendants in federal criminal cases in fiscal 2018, but just 2% of them went to trial.") with INNOCENCE PROJECT, *Report: Guilty Pleas on the Rise, Criminal Trials on the Decline* (Aug. 7, 2018), <https://www.innocenceproject.org/guilty-pleas-on-the-rise-criminal-trials-on-the-decline/> (concluding that "[O]ver the last 50 years, defendants chose trial in less than three percent of state and federal criminal cases . . . [t]he remaining 97 percent of cases were resolved through plea deals.").

system that rely upon an officer's credibility. At the charging stage, prosecutors may bring charges supported by officers who would not be credible witnesses at trial in the hope that the case will end in a guilty plea before the defense counsel is aware of this weakness. At the bail stage, a judge or magistrate may detain someone pre-trial with never becoming aware that the officer that alleged criminal activity has a pattern of wrongful arrests. At the pre-trial stage, where defense counsel attempts to advocate for their client's due process rights where the evidence for certain violations remains hidden within police departmental files.

One explanation for why the existing literature on officer credibility fails to address pre-trial stages where credibility may be relevant is the holding of *United States v. Ruiz*, where the Supreme Court held that the Constitution does not require the government to disclose impeachment information prior to a plea agreement.<sup>18</sup> However, there is a legitimate argument that certain impeachment evidence rises to the level of *Brady* material—evidence that must always be disclosed regardless of *Ruiz*.<sup>19</sup> Additionally, while *Ruiz* sets a constitutional floor for disclosure, it does not *preclude* federal, state, or local policies from requiring that law enforcement personnel files be thoroughly searched for impeachment material and delivered to defendants in discovery.<sup>20</sup>

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18. *United States v. Ruiz*, 536 U.S. 622, 623 (2002).

19. Abel, *supra* note 13, at 750 (explaining that “[e]xculpatory evidence may also appear in the files when a police department launches an internal affairs investigation in parallel to a criminal investigation and comes across witness statements that are favorable to the defense, or when an officer’s history of excessive force allows a defendant to argue that the officer was the aggressor and, thus, that the defendant acted in self-defense.”).

20. See JUSTICE MANUAL, 9-5.001(B)(2) (2020) (explaining that the policy regarding disclosure of exculpatory and impeachment information, “[i]t is the obligation of federal prosecutors, in preparing for trial, to seek all exculpatory and impeachment information from all the members of the prosecution team” . . . including “[f]ederal, state, and local law enforcement officers”); see also JUSTICE MANUAL, 9-5.100(5)(C) (2020) (defining potential impeachment information relating to agency employees as “[a]ny finding of misconduct that reflects upon the truthfulness or possible bias of the employee,” “any allegation of misconduct bearing upon truthfulness, bias, or integrity that is the subject of a pending investigation,” “any misconduct finding or pending misconduct allegation that either casts a substantial doubt upon the accuracy of any evidence . . . or might have a significant bearing on the admissibility of prosecution evidence,” and “information that may be used to suggest that the agency employee is biased for or against a defendant”); Allison Steele, *N.J. Police Departments Ordered to Identify Officers Who Have Been Fired, Suspended, or Demoted for Misconduct*, PHILA. INQUIRER (June 15, 2020), <https://www.inquirer.com/news/new-jersey-attorney-general-gurbir-grewal-police-violations-misconduct-reform-transparency-george-floyd-20200615.html> (existing policies that require law enforcement personnel

Existing policies are inadequate to ensure that defendants are given the presumption of innocence to which they are entitled unless and until they are convicted. Preventing the disclosure and utilization of these records in pre-trial criminal proceedings works against that presumption. When confronted with the argument that they are not innocent, defendants should be given access to an officer's character and history, much of which is only available in misconduct records. These records can contain detailed information regarding allegations that an officer violated departmental policies or constitutional protections. For example, the Philadelphia Police Department requires that misconduct records include statements from civilian witnesses, police witnesses, the accused officer's attendance reports, radio logs, patrol logs, and all pertinent information related to an allegation of misconduct.<sup>21</sup> Overall, each individual allegation of misconduct can contain hundreds of pages of investigatory reports.<sup>22</sup>

However, relying on prosecutors to collect and disclose this information has not been successful, even in jurisdictions with the most progressive prosecutors.<sup>23</sup> I argue that recent calls for police reform overlook a critical blind spot: the numerous pre-trial contexts in which police misconduct should be examined but currently is not due to limitations related to the disclosure of these records and criminal procedure rules that may preclude its admission.

Part I of this article will explore state statutes to determine if evidence of police misconduct can be introduced at bail proceedings. Currently, no state bail statute specifically addresses officer credibility, despite the fact that many criminal charges are based solely on an

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records to be disclosed at the federal, state and local levels show that *Ruiz* does not preclude disclosure, but merely requires policy changes to mandate it).

21. PHILA. POLICE DEP'T, DIRECTIVE NO. 8.6, DISCIPLINARY PROCEDURE (2010).

22. PHILA. POLICE ADVISORY COMM'N, Collaborative Review and Reform of the PPD Police Board of Inquiry 165 (2021) (explaining that when over 3,000 complaints against police were reviewed by the Philadelphia Police Advisory Commission (PAC), some investigations detailed information that spanned hundreds of pages of information).

23. See, e.g., Phila. DAO, *DA Krasner Asks Court to Hold Philadelphia Police in Contempt for Failure to Provide Officer Misconduct Information*, MEDIUM (Aug. 11, 2021), <https://medium.com/philadelphia-justice/da-krasner-asks-court-to-hold-philadelphia-police-in-contempt-for-failure-to-provide-officer-3e8980e659db>.

officer's affidavit of alleged criminal conduct<sup>24</sup> and many wrongful convictions are due to police misconduct.<sup>25</sup>

There is also limited literature regarding the access and use of these records for pre-trial motions, which are procedural protections afforded to defendants to litigate constitutional violations and argue for certain due process protections. Part II will discuss several pre-trial proceedings that could benefit from an examination of police misconduct but currently do not.

The proximate reason why police misconduct is not examined during these proceedings is the limited knowledge of and access to police misconduct records, partly due to defense counsel being reliant upon district attorneys to disclose this information. Part III reviews policies of prosecutors' offices with respect to *Brady-Giglio* lists and reveals how these policies continue to shield police misconduct from disclosure.<sup>26</sup> Overall, Part III will review prosecutorial policies to highlight their insufficiency in bringing misconduct records to light for prosecutors and defense attorneys alike.

After the discussion on the numerous ways existing prosecutorial policies work to prevent prosecutors and defense attorneys from accessing police misconduct records, Part IV will review state laws to

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24. See Rachel Moran, *Contesting Police Credibility*, 93 WASH. L. REV. 1339, 1341 (2018) (“[P]olice officers testify frequently in criminal cases. In a surprising number of these cases, the police officer is not the investigator or person who responded to a report of crime—what many might conceive of as typical witness roles for police officers—but instead the complainant or accuser. Consider, for example, a case where the defendant is accused of resisting arrest, or assaulting a police officer, or even a simple drug possession charge where a police officer claims to have patted down the defendant and found a controlled substance on the defendant’s person. In any of these all-too-common scenarios, the defendant will have virtually no chance of winning at trial unless the defendant can cast doubt on the credibility of the police officer witness.”).

25. See Covey, *supra* note 6, at 1134.

26. See Katherine Bles, *Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct*, 28 STAN. L. & POL’Y REV. 109, 128 (2017) (examining the California procedure of seeking access to officer misconduct records, “the Pitchess Law . . . established a formal procedure for discovering police officer personnel records via a ‘Pitchess motion.’ Officer disciplinary records can no longer be requested through the [California Public Records Act] or through other criminal discovery motions like *Brady* or *Giglio* motions. Instead, a Pitchess motion requires a showing of good cause setting forth the materiality of the information sought to the subject matter involved in the pending litigation. The Pitchess motion must be served on the law-enforcement agency sixteen court days before the motion hearing date. The agency must also notify the targeted police officer and provide an opportunity to seek a protective order. If good cause is shown, the judge conducts an *in camera* review outside the presence of the litigating parties or the accused in a criminal case. The judge then determines what files, if any, will be disclosed to the moving party”).

assess the extent to which misconduct records might be publicly accessible, permitting defense attorneys to access them without relying on prosecutors to disclose this information.

These records are largely unavailable to the public, and for the states that do allow public disclosure, there are several barriers to accessing them. Jurisdictions that allow disclosure usually require a lengthy freedom of information request process<sup>27</sup> that may result in legal action and a court engaging in a balancing test of the officer's privacy interests against the public's interest in disclosure.<sup>28</sup> Overall, this section will evaluate the public's ability to access these records.

Part V discusses the possible consequences of broader disclosure and reveals that there is little evidence to support the conclusion that mass disclosure will negatively impact officers. Part VI concludes with a description of how we can statutorily and administratively ensure that these records are publicly accessible. Overall, this Article seeks to shed light on the several areas of pre-trial criminal procedure that would benefit from an examination of police misconduct which currently does not occur due to existing state laws and jurisdictional policies which preclude its disclosure.

## PART I.

### USE OF POLICE MISCONDUCT RECORDS AT BAIL HEARINGS

#### A. *Current Law Governing Use of Police Misconduct Records at Bail Hearings*

After being charged with a crime, accused individuals are afforded a bail hearing to determine whether they will be released from custody pending trial.<sup>29</sup> Although there has been a movement to end

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27. See *City of Hartford v. Freedom of Info. Comm'n*, 518 A.2d 49, 50 (Conn. 1986) (explaining that after an initial freedom of information commission complaint filed on December 2, 1981, the Supreme Court of Connecticut in 1986 affirmed the commission's act of denying the plaintiff's privacy protections and ordered the police department to turn over records).

28. Compare John C. Brinkerhoff Jr., *FOIA's Common Law*, 36 YALE J. REG. 575, 577 (2019) (finding that "[P]laintiffs who sue recalcitrant agencies under FOIA face a stark reality: Courts almost instinctively side with the government, ninety percent of the time according to some estimates") with INVISIBLE INST., *An Introduction to the Citizen Police Data Project*, <https://invisible.institute/police-data> (showing a dataset of complaints against Chicago Police Department between 1988-2020 gathered in one centralized location after lengthy FOIA requests and litigation).

29. See Shima Baradaran Baughman, *The History of Misdemeanor Bail*, 98 B.U. L. REV. 837, 861-62 (2018) (finding that "[r]easonable bail has also been required historically. The warning that reasonable bail must be honored has been codified since the Magna Carta.").

the cash bail system whereby individuals must deposit money with the court—often more than they can afford—in order to secure pre-trial release, most states continue to use this system of requiring the accused to put up varying amounts of cash.<sup>30</sup> To guide judicial officers in making these determinations, states have enacted bail statutes which list the factors a judicial officer may consider.<sup>31</sup> However, none of these statutes specifically address police misconduct or credibility.<sup>32</sup>

Many bail statutes explicitly require judicial officers to consider (1) information regarding the specific crime with which the accused is charged, (2) the prior criminal history of the accused, (3) the accused's connection with the community, and (4) the accused's ability to pay. For example, California allows a judge or magistrate to consider the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of the accused appearing at trial but leaves the examination of an officer's credibility absent from that decision.<sup>33</sup> Some bail statutes permit judicial officers to consider additional information but give a specific list of those additional factors. In Alabama, a judicial officer has 14 factors it may consider, but none address the credibility of an affiant such as the arresting officer.<sup>34</sup>

Even though Florida allows for the public inspection of many police misconduct records,<sup>35</sup> judicial officers are not required to consider them for bail hearings since they are not listed as factors a judicial officer shall consider. Instead, the statute only authorizes judicial officers to consider the information at their discretion.<sup>36</sup> North Dakota,

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30. ACLU OF PA., *Smart Justice-Ending Cash Bail*, <https://aclupa.org/en/smart-justice-ending-cash-bail> (2021) (finding that only the jurisdictions of “Washington, D.C., Illinois, New Jersey, New Mexico, Arizona, Alaska, Colorado, Kentucky, and Maryland have moved to eradicate cash bail”).

31. See ALA. R. CRIM. P. 7.2 (listing fourteen factors “the court may take into account”); FLA. STAT. ANN. § 903.046 (West 2021).

32. Ariana K. Connelly & Nadin R. Linthorst, *The Constitutionality of Setting Bail Without Regard to Income: Securing Justice or Social Injustice?*, ALA. C.R. & C.L. L. REV. 115, 123 (2019) (“Ultimately, several states enacted legislation to reflect the 1984 [Bail Reform] Act. . . . Over the years, courts expanded the factors used to justify pretrial detention, which now include: (1) the weight of the evidence against the defendant, (2) protection of the court’s own processes, and (3) community safety.”).

33. CAL. PENAL CODE § 1275 (West 2015).

34. ALA. R. CRIM. P. 7.2 (listing fourteen factors “the court may take into account”).

35. FLA. STAT. ANN. § 112.533 (West 2020).

36. FLA. STAT. ANN. § 903.046 (West 2021) (“When determining whether to release a defendant on bail or other conditions, and what that bail or those conditions may be, the court shall consider . . . any other facts that the court considers relevant.”).

which is the most lenient U.S. state in releasing police misconduct records to the public,<sup>37</sup> allows a judicial officer to consider seven factors in determining conditions of release—none of which explicitly include an examination of involved officers' credibility.<sup>38</sup> New York, which recently amended its code to allow for the disclosure of several police misconduct complaints,<sup>39</sup> does not mandate that information to be considered by judicial officers at a subsequent bail hearing.<sup>40</sup> A defense counsel advocating for a judicial officer to consider these records must be successful on several fronts: (a) a prosecutorial objection that this information is not permissible at bail, (b) a judicial officer who may be less inclined to consider this information since it is not expressly listed as a factor for consideration, and (c) a prosecutorial appeal on the bail determination if the judicial officer did consider information that was not expressly authorized by law.

Only three U.S. states explicitly require judicial officers to consider any information presented at a bail hearing. Idaho and Pennsylvania allow judicial officers to consider “any mitigating or aggravating factors that may bear on the likelihood of conviction and the possible penalty,”<sup>41</sup> and Maryland requires a judicial officer to consider “any information presented by the accused and their attorney.”<sup>42</sup> However, as Part IV will address, neither Idaho<sup>43</sup> nor Maryland<sup>44</sup> releases police misconduct records, and Pennsylvania<sup>45</sup> only releases the existence of a demotion with no additional factors. Thus,

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37. N.D. CENT. CODE ANN. § 44-04-18.1 (WEST 2021) (“Records relating to a public entity’s internal investigation of a complaint against a public entity or employee for misconduct are exempt until the investigation of the complaint is complete, but no longer than seventy-five calendar days from the date of the complaint.”).

38. N.D. R. CRIM. P. 46.

39. N.Y. PUB. OFF. LAW § 87 (McKinney 2021).

40. N.Y. CRIM. P. LAW § 510.30 (McKinney 2020).

41. *See* I.C.R. 46 (stating that a court may set conditions of bail after considering “the nature of the current charge and any mitigating or aggravating factors that may bear on the likelihood of conviction and the possible penalty.”); *see also* PA. R. CRIM. P. 523 (stating that the bail authority shall consider “the nature of the offense charges and any mitigating or aggravating factors that may bear upon the likelihood of conviction and possible penalty.”).

42. MD. R. 4-216.1 (stating that a judicial officer shall consider “any information presented by the defendant or defendant’s attorney”).

43. IDAHO CODE ANN. § 74-106 (West 2020) (excluding from disclosure “records of a current or former employee other than the employee’s duration of employment with the association, position held and location of employment”).

44. MD. CODE ANN. § 4-311 (West 2021) (requiring that custodians “deny inspection of a personnel record of an individual”).

45. 65 PA. STAT. AND CONS. STAT. ANN. § 67.708 (West 2009) (stating that exceptions for public records include “information regarding discipline, demotion or discharge contained in a personnel file, however, it does not provide an exception for final action of an agency that results in demotion or discharge”).

there are no states that both release police misconduct records *and* require judicial officers to consider that information during bail proceedings. While there are a few states that allow judicial officers to consider additional information, that information must first be found to be relevant;<sup>46</sup> a test police misconduct records may not pass depending on the judicial officer since some may simply deny access to an affordable bail nevertheless.

Providing defendants information related to police misconduct, and requiring judicial officers to consider that information at bail hearings, is pertinent since many criminal charges are based solely on allegations from sworn law enforcement.<sup>47</sup>

Some, however, may rightfully examine the traditional role of bail—to ensure that accused individuals will appear for trial and all hearings that relate to their charges<sup>48</sup>—and argue that the examination of law enforcement misconduct is not relevant to the determination. To respond to that criticism, this section addresses (a) the role of monetary bail, (b) the movement to dismantle that bail system and replace it with something new, and (c) why police misconduct matters in both systems. This analysis will show that considering police misconduct records may allow judicial officers an opportunity to gauge the veracity of the allegation—a relevant discussion since the accused is presumed innocent at every criminal proceeding, and this presumption should be at its strongest at the bail stage, where there is no evidence against the accused to combat that presumption, only speculation that may include hearsay, untested forensics, and irrelevant information.<sup>49</sup>

Overall, judicial officers considering this information may enable the accused to be released pre-trial by providing less cash collateral or outright release defendants altogether pre-trial if the misconduct infor-

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46. OHIO R. CRIM. P. 46(C) (“[T]he court shall consider all relevant information”). FLA. STAT. ANN. § 903.046(2) (West 2021) (allowing the judge to account for “[a]ny other factors that the court considers relevant”); GA. CODE ANN. § 17-6-1(2) (2021) (telling a judge to consider “any other factor the court deems appropriate”).

47. See Moran, *supra* note 24, at 1341 (“In a surprising number of these cases, the police officer is not the investigator or person who responded to a report of crime—what many might conceive of as typical witness roles for police officers—but instead the complainant or accuser.”).

48. Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 731–32 (2011) (“Bail historically served the sole purpose of returning the defendant to court for trial, not preventing her from committing additional crimes. Indeed, English judges set bail with only one purpose: to ensure the defendant’s appearance in court.”).

49. Joseph Lester, *Presumed Innocent, Feared Dangerous: The Eighth Amendment’s Right to Bail*, 32 N. KY. L. REV. 1, 2 n.12 (2005).

mation suggests that the allegations could be falsified, the evidence may be tainted, or the defendant may be the victim of official abuse.

*B. Role of Monetary Bail and Movement Towards Non-Monetary Systems*

Judicial officers are tasked with making decisions that may restrict an individual's liberty before trial. Those options include releasing the defendant on their recognizance, releasing them on the condition that they post a monetary bail, or keeping them in custody due to the seriousness of the offense. Traditionally, financial incentives were thought to be the most effective means of achieving the primary objective of the bail system, which is to ensure that accused individuals appear for future court dates.<sup>50</sup> To make this determination, a judicial officer holds a bail hearing where the prosecutor presents limited evidence to argue whether the individual should be released or held pending trial; such a hearing may last only one or two minutes.<sup>51</sup> During the hearing, the judicial officer must review brief facts of the case, determine whether the accused is dangerous to society, and—if they decide to release the accused—determine what type of collateral is necessary to guarantee the accused's appearance at future proceedings.<sup>52</sup>

Many states have amended their legislation to provide for a new bail approach. In 2017, New Jersey replaced its monetary bail system with a system that uses information related to the current charge, criminal history, court appearance history, and current status<sup>53</sup> to determine if an accused should be released or held pending trial.<sup>54</sup> These factors are used to calculate a New Criminal Activity (NCA) score designed to determine the likelihood that a defendant will commit a

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50. See Insha Rahman, *Undoing the Bail Myth: Pretrial Reforms to End Mass Incarceration*, 46 *FORDHAM URB. L.J.* 845, 855 (2019) (“The rise of the money bail system and bail bondsmen was justified by the specter of failure to appear and the need to incentivize court appearance, otherwise the judicial process would grind to a halt.”).

51. *Id.*; Aurelie Ouss & Megan T. Stevenson, *Bail, Jail, and Pretrial Misconduct: The Influence of Prosecutors*, SSRN (Apr. 9, 2021) at 1, 7 (finding that the bail hearings in Philadelphia “typically lasts only a minute or two, during which the magistrate reads the charges, schedules the next court date, determines eligibility for public defense, and decides the conditions of release”).

52. Ouss & Stevenson, *supra* note 51, at 1, 7.

53. EXECUTIVE ORDER No.211 STUDY (2016), <https://www.nj.gov/oag/library/Executive-Order-211—FINAL-REPORT—11.30.16.pdf>.

54. N.J. STAT. ANN. § 2A:162-18 (West 2017).

crime while released pending further proceedings.<sup>55</sup> Illinois adopted a similar approach that will go into effect in 2023.<sup>56</sup>

In addition to state legislatures, state courts have also moved to change the traditional monetary bail system. In 2021, the California Supreme Court held that judicial officers must consider an accused person's ability to pay bail and that it is unconstitutional for a judicial officer to set bail in an amount that the person cannot afford unless there is no other less-restrictive alternative to assure the person's appearance.<sup>57</sup> The Nevada Supreme Court in 2020 ruled that judicial officers must consider less restrictive conditions before determining whether bail is necessary.<sup>58</sup> However, bail reform advocates have criticized these changes as not fully addressing the concerns about bail, suggesting that risk assessment tools and electronic monitoring schemes suffer the same problems as traditional cash bail in that they continue to perpetuate structural racism, bias, and other discriminatory practices.<sup>59</sup>

### C. *Relevance of Police Misconduct Records in Monetary and Non-Monetary Systems*

The bail hearing is the first opportunity an accused may raise doubts about the charges against them, and police misconduct at this phase may shed light on the strength of the prosecution's case. However, judicial officers are only required to consider those arguments in

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55. David J. Reimel III, Comment, *Algorithms & Instruments: The Effective Elimination of New Jersey's Cash Bail System and Its Replacement*, 124 PENN. ST. L. REV. 193, 203 (2019) ("The NCA score is calculated by measuring a variety of static factors that determine the likelihood that a defendant will commit a crime while on pretrial release.").

56. 725 ILL. COMP. STAT. ANN. 5/110-5 (West 2021) ("The Court may use a regularly validated risk assessment tool to aid its determination of appropriate conditions of release.").

57. *In re Humphrey*, 482 P.3d 1008, 1013 (2021) ("What we hold is that where a financial condition is nonetheless necessary, the court must consider the arrestee's ability to pay the stated amount of bail—and may not effectively detain the arrestee solely because the arrestee lacked the resources to post bail.").

58. *Valdez-Jimenez v. Eighth Jud. Dist. Ct.*, 460 P.3d 976, 988 (Nev. 2020) ("[W]e hold that a defendant who remains in custody after arrest is entitled to an individualized hearing at which the State must prove by clear and convincing evidence that bail, rather than less restrictive conditions, is necessary to ensure the defendant's appearance at future court proceedings or to protect the safety of the community, and the district court must state its findings and reasons for the bail decision on the record.").

59. See Muhammad B. Sardar, *Give Me Liberty or Give Me . . . Alternatives? Ending Cash Bail and Its Impact on Pretrial Incarceration*, 84 BROOK. L. REV. 1421, 1444 (2019) ("Risk assessment algorithms can serve as poor indicators of future risk, and a jurisdiction utilizing such algorithms can potentially perpetuate the same disparate treatment of minorities that cash bail presently does.").

jurisdictions that have affirmatively enacted a mandate requiring that they do so.

If officers who are critical to the prosecution's case have questionable character and history, defense attorneys may be able to question the officers' integrity, raising doubts that the alleged criminal act occurred, that it was the accused who committed it, and that pre-trial detention is necessary to ensure the accused presence in court. Some jurisdictions have already started introducing this information during bail hearings, without a state law requiring judicial officers to consider the information.<sup>60</sup> Although New York's bail statute does not *require* bail officers to consider police misconduct records,<sup>61</sup> some bail officers have done so, and in some cases this information has led directly to a defendant's release from detention.<sup>62</sup> Philadelphia has a process whereby prosecutors may share certain police misconduct records with the defense at the bail hearing, allowing the defense the opportunity to utilize these records during the proceeding.<sup>63</sup>

Misconduct records are relevant to bail determinations despite the fact that they may be inadmissible at trial. Judicial officers routinely consider several factors in making bail determinations that are normally inadmissible at trial. Facts that relate to a person's danger to

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60. *The Cop Accountability Project*, THE LEGAL AID SOC'Y, <https://legalaidnyc.org/programs-projects-units/the-cop-accountability-project/> ("Responding to decades of secrecy regarding officer misconduct and the NYPD's systemic failures to hold officers to account, the project launched a database that tracks police misconduct in New York City.").

61. N.Y. Crim. Proc. Law § 510.30 (McKinney 2020) (stating that bail consideration includes "the weight of the evidence against him in the pending criminal action and any other factor indicating probability or improbability of conviction").

62. *See generally* Alice Speri, *Open Data Projects are Fueling the Fight Against Police Misconduct*, INTERCEPT (Oct. 25, 2016, 8:31 AM) <https://theintercept.com/2016/10/25/open-data-projects-are-fueling-the-fight-against-police-misconduct/> (describing case in which a sixteen-year-old with no criminal history was arrested for gun possession and a judge set bail at \$100,000, Legal Aid attorney discovered arresting officers had previously been accused of planting evidence, the attorney "[t]ook her findings to a judge and argued that they undermined the credibility of the officers in question-and he [the judge] promptly dropped her client's bail and released him until trial").

63. INST. FOR INNOVATION IN PROSECUTION, TRACKING POLICE MISCONDUCT: HOW PROSECUTORS CAN FULFILL THEIR ETHICAL OBLIGATIONS AND HOLD THE POLICE ACCOUNTABLE 69, APP., July 2021, <https://www.prosecution.org/s/FINAL-Tracking-Police-Misconduct-Appendix.pdf> [<https://perma.cc/T7CJ-K6HX>] [hereinafter IIP REPORT APP.] (explaining that the Philadelphia District Attorney policy requires District Attorneys to "notify defense counsel" of inclusions in their police misconduct database).

the community would be inadmissible character evidence,<sup>64</sup> unless the defendant opens the door to their own character.<sup>65</sup> A defendant's "ties to the community," which judicial officers use to assess flight risk, would almost never pass a court's relevancy test.<sup>66</sup> And even some facts directly relevant to the case that are shared with judicial officers at the bail stage may never be admitted at trial for the fact-finder's examination due to pre-trial motions that may preclude its admission.<sup>67</sup> Thus, much of the evidence already considered at bail hearings may be inadmissible at trial. Adding an examination of law enforcement misconduct, then, fits into that pattern. These records have tremendous pre-trial value, even though these records may be inadmissible at trial.<sup>68</sup>

Finally, due to the several harms that are directly related to pre-trial detention, we should provide more opportunities for individuals to contest pre-trial detention, not fewer. Several studies show the relationship between pre-trial detention and its impact on people,<sup>69</sup> includ-

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64. See FED. R. EVID. 404 ("Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait").

65. *Id.* at (a)(2) ("A defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it.").

66. See FED. R. EVID. 401 ("Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."). The prosecutor would need to offer a witness to attempt to elicit testimony regarding the defendant's ties to the community, however, that evidence would need to pass a 401 relevancy test. If the defendant's ties to the community have no tendency to make a fact more or less probable, then the evidence will not be admissible.

67. See OHIO R. CRIM. P. 46(F) (stating that information used during bail hearings "need not conform to the rules pertaining to the admissibility of evidence in a court of law").

68. IIP REPORT APP, *supra* note 63, at 70 (indicating that Philadelphia police-the decision as to whether an officer in the database will be called as a witness will be made on a case-by-case basis. Disclosure does not equal admissibility, where appropriate, the ADA will object to the admissibility of the disclosed evidence).

69. See Will Dobbie & Crystal S. Yang. 2021, *The Economic Costs of Pretrial Detention*, BROOKINGS (Mar. 24, 2021). <https://www.brookings.edu/bpea-articles/the-economic-costs-of-pretrial-detention/> (looking at employment and income of people arrested in Miami and Philadelphia, economists find that "pretrial detention decreases the probability of employment three to four years after the bail hearing by 9.4 percentage points and [ . . . ] they estimate that defendants detained pre-trial lost \$29,001 in income on average over a lifetime compared with defendants who weren't detained pre-trial."); see also Will Dobbie, Jacob Goldin, & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, AM. ECON. REV. 108 (2): 201, 204 (2018) (suggesting that pretrial release may decrease future crime through the channel of increased labor market attachment).

ing an increase in the likelihood that a defendant will be convicted.<sup>70</sup> Pre-trial detention also results in collateral consequences, such as “deportation, loss of child custody, ineligibility for public service, and barriers to finding employment and housing.”<sup>71</sup>

## PART II.

### USE OF POLICE MISCONDUCT RECORDS AT OTHER PRE-TRIAL PROCEEDINGS

After the bail stage, a defendant faces several additional pre-trial proceedings where police misconduct records should be considered. These proceedings include hearings to ensure their due process rights are enforced, hearings to request a remedy for governmental constitutional violations, and hearings to litigate which pieces of evidence will be presented to the factfinder.

This Part will examine a few of the many pre-trial hearings where the examination of an officer’s misconduct history may have a substantial impact on the proceedings. Distinct from post-conviction litigation, where the goal is to cure a past wrong, pre-trial litigation allows the trial court the opportunity to *prevent* errors in the system.<sup>72</sup> Post-conviction litigation brings the possibility of a reversed conviction,<sup>73</sup> a new trial with different evidence presented to the factfinder,<sup>74</sup> and compensation for the wrongly convicted.<sup>75</sup> However, it

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70. Paul Heaton, Sandra Mayson, & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 715 (2017) (explaining that a study that finds “compelling evidence that pretrial detention causally increases the likelihood of conviction, the likelihood of receiving a carceral sentence, the length of a carceral sentence, and the likelihood of future arrest for new crimes.”).

71. *Id.* (“Collateral consequences that include deportation, loss of child custody, ineligibility for public services, and barriers to finding employment and housing.”).

72. Jordan Gross, *An Ounce of Pretrial Prevention is Worth More Than a Pound of Post-Conviction Cure*, 18 BERKELEY J. CRIM. L. 317, 324 (2013).

73. See Samantha Melamed, *The Case That Collapsed*, PHILA. INQUIRER (Oct. 15, 2021), <https://www.inquirer.com/news/a/anthony-wright-philadelphia-homicide-detective-murder-convictions-20211014.html> (detailing allegations that Philadelphia detectives coerced a confession by threatening to rip the eyes out of the wrongful accused, his conviction was overturned in 2014).

74. Mensah M. Dean, *He Represented Himself in a Murder Retrial, and Won. A Year Later, He’s Helping Others With Criminal Cases.*, PHILA. INQUIRER (May 6, 2020), <https://www.inquirer.com/news/hassan-bennett-pro-se-philadelphia-murder-conviction-not-guilty—20200506.html>.

75. Christina Carrega, *More Than 2,800 Have Been Wrongly Convicted in the US. Lawmakers and Advocates Want to Make Sure They’re Paid Their Dues.*, CNN (July 7, 2021, 4:28 PM), <https://www.cnn.com/2021/07/07/politics/wrongful-conviction-compensation-bill/index.html> (“Thirty-six states and Washington, DC, have laws on the books that offer compensation for exonerees, according to the Innocence Project”).

cannot turn back the clock to prevent the injustice from occurring and the harms imposed on the defendant. Pre-trial litigation, therefore, provides opportunities to prevent wrongful convictions.

These errors can be prevented by suppressing illegally obtained statements and evidence and outright barring the delayed prosecution of cases if it has been found that law enforcement was not duly diligent.<sup>76</sup> In this way, one purpose of pre-trial practice is to enforce constitutional and procedural protections for the accused. If successfully litigated, the outcome of these motions can even be case-dispositive.<sup>77</sup> This section will describe a few of these motions and how examining police misconduct during these procedures may impact the disposition of the motion.

#### A. *Pre-Preliminary Hearing Motions*

At the outset of a criminal case, the prosecutor must make a showing to either a judge or a grand jury that there is probable cause to believe that an offense has been committed and that the defendant committed it.<sup>78</sup> The majority of states have reserved the preliminary hearing for the most serious of offenses—felony charges.<sup>79</sup> At a preliminary hearing, the prosecutor must establish a prima facie case that the accused committed the alleged crime.<sup>80</sup> Usually, these hearings offer very limited information,<sup>81</sup> and judges are required to make all inferences in favor of the prosecution.<sup>82</sup> For example, in Pennsylvania, preliminary hearings serve a limited function of establishing a prima

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76. *People v. Marrin*, 187 A.D.2d 284, 286 (N.Y. App. Div. 1992) (implying that due diligence means police “exhausted all investigative leads.” In this case, the prosecution was able to show that the police exhausted all investigative leads in locating the defendant). *Cf. People v. Devore*, 885 N.Y.S.2d 497, 500 (N.Y. App. Div. 2009) (finding that police were not duly diligent in locating the defendant).

77. Daniel McConkie, *Structuring Pre-Plea Criminal Discovery*, 107 J. CRIM. L. & CRIMINOLOGY 1, 38 (2017).

78. FED. R. CRIM. P. 5.1.

79. Paul Cassell, *Protecting Taxpayers and Crime Victims: The Case for Restricting Utah’s Preliminary Hearing*, 2011 UTAH L. REV. 1377, 1377 (2011).

80. Drew Sheldon, *Unjust Incarceration: Problems Facing Pennsylvania’s Preliminary Hearing and How to Reform It*, 56 DUQ L. REV. 169, 178 (2018); PA. R. CRIM. P. 543 (“If the issuing authority finds that the Commonwealth has established a prima facie case that an offense has been committed and the defendant has committed it, the issuing authority shall hold the defendant for court on the offense(s) on which the Commonwealth established a prima facie case. If there is no offense for which a prima facie case has been established, the issuing authority shall discharge the defendant”).

81. See Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541, 549 (2006).

82. See *State v. Ramirez*, 289 P.3d 444, 447 (Utah 2012) (explaining that “at the preliminary hearing, the magistrate is tasked only with assuring that there is evidence

facie case, and the credibility of the witness is not usually considered.<sup>83</sup> In Utah, the evaluation of a witness's credibility at a preliminary hearing is limited to determining whether that evidence is "wholly lacking and incapable of reasonable inference."<sup>84</sup>

Although these records may not sway a determination of probable cause, these records may prove useful during defense requests for a pre-preliminary lineup.<sup>85</sup> For the second prong of the preliminary hearing—a showing that the defendant committed the alleged crime—the identity of the suspect is crucial. Although prosecutors sometimes make this showing by using DNA or video evidence, in many cases, they rely on the statement of a witness who alleges the defendant is the person who committed the crime. In these cases, police often show witnesses a photo array of individuals that match the witness's description of the suspect. If the suspect is selected, police can arrest the suspect and initiate the criminal justice process.

The live lineup—a procedure in which a group of people is displayed to an eyewitness for the purpose of determining if the eyewitness is able to identify the perpetrator of a crime—is another means of obtaining (or disproving) witness identification of the defendant.<sup>86</sup> A line-up motion can serve multiple purposes, including weighing the prosecution evidence and also locking a witness into a statement during the identification process. If the defense strategy is that the accused is not the person who committed the offense, defense counsel may request a line-up prior to the witness observing the accused in court to avoid the taint caused by identification in court, when the identity of the defendant is usually obvious to those present. The U.S. Supreme Court has held that since there is "grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial [. . .] there can be little doubt that [the] post-indictment lineup is a critical stage of the prosecution at which [the defendant is] entitled" to the aid of counsel.<sup>87</sup>

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that could sustain a reasonable inference in the prosecution's favor on each element of the crime(s) in question").

83. *Com. v. Fox*, 619 A.2d 327, 332 (Pa. Super. Ct. 1993) ("Since the Commonwealth merely bears the burden of establishing a prima facie case against the defendant, credibility is not an issue at [a] preliminary hearing").

84. *State v. Virgin*, 137 P.3d 787 (Utah 2006).

85. *See generally* PHILA. MUN. CT. R. OF CIV. P. 553.

86. *State v. Rawls*, 700 S.E. 2d 112, 116 (N.C. Ct. App. 2010) (citing N.C. GEN. STAT. § 15A-284.52(a)(6) (2009)).

87. *United States v. Wade*, 388 U.S. 218 (1967).

However, not all lineup requests are granted. In Philadelphia, a Municipal Court Judge determines if a lineup is appropriate.<sup>88</sup> Pennsylvania courts have rejected a bright line rule that pre-preliminary hearing line ups are mandatory but have suggested that during cases where there is a legitimate issue of misidentification, a timely request for a pre-hearing identification should be granted.<sup>89</sup> During these hearings, judges must weigh several factors to determine if there is a legitimate issue of identification, including:

The prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification. It is also relevant to consider those facts which, despite the absence of counsel, are disclosed concerning the conduct of the lineup.<sup>90</sup>

The possibility of taint—which may render identifications unreliable<sup>91</sup>—occurring during field confrontations is high.<sup>92</sup> A taint can occur if officers inform the witness that they have the perpetrator in custody before the witness is able to make an identification<sup>93</sup> or if officers inform a witness that they made the right choice after an identification,<sup>94</sup> destroying the possibility that the witness may change their mind. Therefore, it is crucial that patrol officers who have stopped a suspect matching a witness's description of the suspect take care to ensure that they do not influence the identification process. The Philadelphia Police Department has attempted to reduce the risk of taint by (1) directing officers to avoid any unnecessary conversa-

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88. PHILA. MUN. CT. R. OF CIV. P. 553.

89. *Com. v. Sexton*, 400 A.2d 1289, 1293 (Pa. 1979).

90. *Com. v. Taylor*, 370 A.2d 1197, 1206-07 (Pa. 1977).

91. *Perry v. New Hampshire*, 565 U.S. 228, 238-39 (2012).

92. Jessica Lee, *No Exigency, No Consent: Protecting Innocent Suspects from the Consequences of Non-Exigent Show-Ups*, 36 COLUM. HUM. RTS. L. REV. 755, 797 (2005) ("Like fabricated evidence or serious conflicts of interest, non-exigent show-ups fatally taint the justice process such that the right to a fair trial is compromised before the defendant has a change to enter the courtroom. Non-exigent show-ups increase the chances that the innocent are imprisoned for crimes they did not commit while the guilty go free, able to commit other crimes. The procedure strongly suggests to the eyewitness which person the police believe is guilty and provides no safeguards against guessing or following the suggestions of the police").

93. *State v. Anderson*, 657 N.W.2d 846, 852 (Minn. Ct. App. 2002) (holding that the show-up identification procedure employed by the police was impermissibly suggestive and gave rise to a substantial likelihood of misidentification).

94. *Sims v. State*, 537 S.E.2d 133, 137 (Ga. Ct. App. 2000).

tions with witnesses during this time,<sup>95</sup> (2) mandating that suspects not be moved from the location where they are stopped (unless they are under arrest or the move is otherwise provided by law),<sup>96</sup> and (3) requiring officers to record all pertinent information, including any statement made by the witness as a result of the confrontation.<sup>97</sup> The Department also requires that personnel record these suspect confrontations on their body-worn cameras whenever possible as an additional layer of protection.<sup>98</sup>

Apart from patrol officer identification procedures, the Philadelphia Police Department also maintains procedural safeguards against impermissibly suggestive identifications during the photographic identification process in which a victim or witness is asked to identify a suspect from a photo array. These safeguards include (1) requiring a double-blind photo array in which neither the administrator nor the victim or witness knows the identity of the suspect, (2) using filler photographs in which the other individuals shown are similar in race, age, complexion, and appearance, and (3) using different fillers for subsequent photo arrays.<sup>99</sup>

Records that may reflect whether an officer previously has violated any of these protocols may assist judges in their determination of whether a tainted identification occurred. For example, in *Commonwealth v. Ali*, the appellant argued that the police improperly conducted a photo array in which appellant was identified.<sup>100</sup> In affirming appellant's conviction, part of the appellate court's calculus included a review of the involved officer's misconduct history. It reasoned that even though appellant "challenge[d] the character of the detective based on the fact he was dismissed from the force, his dismissal re-

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95. *Directive 5.16: Suspect Confrontations, Lineups, and Removal of Persons*, PHILA. POLICE DEP'T (Jan. 18, 2019), <http://www.phillypolice.com/assets/directives/D5.16-SuspectConfrontationsLineupsAndRemovalOfPersons.pdf> ("Conversation or other actions made by police or other individuals who suggest to the victim/witness that the suspect is the actual offender must be avoided").

96. *Id.*

97. *Id.*

98. *Directive 4.21: Body-Worn Cameras*, PHILA. POLICE DEP'T (Nov. 23, 2018), [https://www.valorforblue.org/Documents/Clearinghouse/PPD-Body\\_Worn\\_Cameras.pdf](https://www.valorforblue.org/Documents/Clearinghouse/PPD-Body_Worn_Cameras.pdf) (mandating for officers to activate their body-worn camera "when conducting a suspect confrontation (i.e., show-up identification of a suspect by a victim or witness)").

99. *Directive 5.10: Police and Suspect Photographs*, PHILA. POLICE DEP'T (Nov. 23, 2018), <http://www.phillypolice.com/assets/directives/D5.10-PoliceAndSuspectPhotographs.pdf>.

100. *Commonwealth v. Ali*, No. 859 EDA 2017, 2018 WL 3099666, at \*6 (Pa. Super. Ct. June 25, 2018).

sulted from falsification of overtime records and was irrelevant.”<sup>101</sup> Had this detective had misconduct related to identification procedures, the court’s holding might have been different since there would have been reason to question the reliability of the identification.

## B. *Motions to Dismiss*

### 1. *Speedy Trial*

Police misconduct records can also be used to show that officers unduly delayed the prosecution of a case, in violation of the accused’s Sixth Amendment right. The Sixth Amendment affords criminal defendants the right to a speedy trial,<sup>102</sup> a requirement that has been applied to state prosecution through the Due Process Clause of the Fourteenth Amendment.<sup>103</sup> Forty-four states have also enacted a speedy trial statute or rule,<sup>104</sup> which define specific timeframes within which criminal trials must commence and, most importantly, what time periods are excludable from that calculation—known as tolling periods. Many of these tolling periods include the period during which the prosecuting authority was unable to procure evidence despite exercising due diligence. Due diligence requires a showing that reasonable efforts were made to bring the defendant to trial, and some factors considered to make this determination include the length of the delay, the reason for the delay, the defendant’s assertion of their right, and the prejudice to the defendant because of the delay.<sup>105</sup> The New York statute exempts from the speedy trial calculation any time during which the prosecutor exercises due diligence in prosecuting the case but during which material evidence was unavailable.<sup>106</sup> In Pennsylvania, as long as the prosecutor shows they used reasonable efforts to bring the defendant to trial,<sup>107</sup> the period will likewise be excluded from the speedy trial calculation.<sup>108</sup> In Colorado, if the time limitation

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101. *Id.*

102. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial”).

103. *See* Klopfer v. State of N.C., 386 U.S. 213, 222–23 (1967) (“We hold here that the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment”).

104. Daniel Hamburg, *A Broken Clock: Fixing New York’s Speedy Trial Statute*, 48 COLUM. J. L. & SOC. PROBS. 223, 242 (2015) (“Beyond the federal and state constitutional speedy trial rights, Congress and forty-four states have enacted some version of a speedy trial statute or court rule. These statutes and rules vary widely in their particulars, but share many common features”).

105. *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

106. N.Y. CRIM. PROC. LAW § 30.30 (McKinney 2020).

107. *Com. v. Colon*, 87 A.3d 352, 359 (Pa. 2014).

108. PA. STAT. AND CONS. STAT. § 600 (WEST 2021).

nears, prosecutors may simply dismiss the charges and refile the same criminal charges to start the clock again.<sup>109</sup>

When speedy trial time limits have lapsed, it is necessary for defense attorneys to litigate the speedy trial issue, which in many states requires a successful argument that the prosecutor has not been duly diligent in bringing the case to trial. In many cases, the district attorney may not be ready for trial due to the unavailability of necessary police officers. Officers might fail to appear for several reasons, such as being ill or injured, busy attending a training, not receiving a court notice in time, or testifying in another proceeding.

Although prosecutors frequently cite these reasons to explain why necessary officers are unavailable, police department policies often instruct officers to appear in court regardless of these circumstances. The Philadelphia Police Department directive mandating officers to respond to court notices states:

The mere fact that personnel may be in sick or IOD status, attending training, or requesting a vacation/holiday day does not relieve them of their responsibility to appear in court when subpoenaed, notices to attend court will take precedence over all other responsibilities on that date.<sup>110</sup>

If personnel do not respond to their court dates, the disciplinary code specifically lists disciplinary penalties for failure to attend court.<sup>111</sup> In one example, a Philadelphia District Attorney filed a complaint against an officer who refused to participate in a court proceeding. As an expert witness, the officer was tasked with assisting the District Attorney by testifying as to whether a certain quantity of narcotics was consistent with personal use or distribution.<sup>112</sup> When subpoenaed to testify, the officer refused to cooperate, believing that his time would be better spent on the street than in the courtroom.<sup>113</sup> If the

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109. Marie Zoglo, *Statutory Speedy Trial Period Calculations for Dismissed and Refiled Charges: A Case Study of Colorado's Approach*, 97 WASH. U. L. REV. 903, 908 (2020) ("Speedy trial right does not apply when the prosecution dismisses the charges in good faith, because then, no charges are pending").

110. *Directive 6.2: Court Notices and Subpoenas*, PHILA. POLICE DEP'T (Feb. 7, 2017), <http://www.phillypolice.com/assets/directives/D6.2-CourtNoticesAndSubpoenas.pdf>.

111. PHILA. POLICE DEP'T, DISCIPLINARY CODE (July 2014), <https://www.phillypolice.com/assets/accountability/PPD-Disciplinary-Code-July-2014.pdf> (stating that failure to comply with a court notice or subpoena, first offense is a reprimand to 5 days suspension, second offense is 5 to 10 days suspension, third offense is 15 to 20 days suspension).

112. *City of Phila. v. F.O.P. Lodge No. 5*, Docket No. 1439001264-09 (Aug. 17, 2011), <https://www.documentcloud.org/documents/6174059-Phila126409Award-Redacted.html>.

113. *Id.*

criminal matter on which the officer was asked to testify subsequently had a speedy trial issue, the misconduct record might have been useful to combat the prosecutor's argument that they were duly diligent during this timeframe.

Some states also require that the government be duly diligent in *locating* accused defendants and bringing them to justice after a criminal complaint has been filed against them.<sup>114</sup> In *Commonwealth v. Colon*, the Pennsylvania Superior Court held that since the Commonwealth's witness, a state trooper, presented no evidence of any efforts to locate the defendant after the filing of the criminal complaint, the Commonwealth was not duly diligent.<sup>115</sup> In *People v. Devore*, The New York Supreme Court, Appellate Division, found that the prosecution had not been conducted with due diligence because the police officer tasked with serving the arrest warrant failed to check with either the Social Security Office, the Department of Motor Vehicles, the Department of Taxation, or any other agency to obtain a current address, which resulted in 429 days of delay unexcused by the court between the issuance of the warrant and the defendant's arraignment.<sup>116</sup> Although many police departments categorize these incidents as minor or technical, misconduct records containing this kind of information about an officer's role in the case may be crucial for a due diligence determination in litigating a speedy trial motion.

## 2. *Untimely Filing of Information*

While the "speedy trial" issue concerns the time between formal charging and trial, *Ross* motions concern the time between the offense and the filing of a criminal complaint. In *Ross v. United States*, the appellant argued that there was a deliberate and purposeful delay between the offense and the filing of the complaint, which violated his

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114. PA. STAT. AND CONS. STAT. § 600 (WEST 2021) (stating that the period of time between the filing of the written complaint and the defendant's arrest is excludable time if the defendant's whereabouts were unknown and could not be determined by due diligence); *see also* *Serna v. Superior Court*, 707 P.2d 793, 796 (Cal. 1985) (explaining that misdemeanor speedy trial attaches with the filing of the accusatory pleading or arrest, whichever is first); *see also* *State v. Wright*, 404 P.3d 166, 168 (Alaska 2017) (holding that speedy trial time begins to run with the filing of an information).

115. *Com. v. Colon*, 87 A.3d 352, 359 (Pa. 2014) (holding that "while due diligence does not require punctilious care, it does require some reasonable effort by the Commonwealth, which has the burden of demonstrating by a preponderance of the evidence that it exercised due diligence" after the State Trooper did not present evidence of attempts to locate the defendant after the complaint had been filed).

116. *People v. Devore*, 885 N.Y.S.2d 497, 499 (N.Y. App. Div. 2009).

Fifth and Sixth Amendment rights.<sup>117</sup> Although the appellant was available for arrest, seven months elapsed between the allegation that appellant sold narcotics and the official swearing of the complaint.<sup>118</sup> Most important in *Ross*, the government's case rested solely on the testimony of a police officer, who attempted to explain the delay by citing a departmental policy to delay arrests when the involved officer is undercover at the time of the incident, and by blaming budgetary limitations that precluded the officer from completing the criminal complaint sooner.<sup>119</sup> However, the Court held that appellant was prejudiced by the government's delay<sup>120</sup> and that it was not convinced that the police operations were reasonable, rendering the delay unreasonable.<sup>121</sup> These two prongs—prejudice to the defendant and unreasonable delay—became the necessary elements for a successful *Ross* argument.<sup>122</sup> In *Ross*, the trial court disagreed with appellant and allowed the prosecution to proceed to trial, where appellant was convicted. On appeal, the court agreed with appellant, reversing the trial court's ruling and overturning appellant's conviction.<sup>123</sup>

Police misconduct records can shed light on the *Ross* question of whether a delay between the offense and the complaint was justifiable. In one case, for example, the complainant alleged that her son was robbed and knew the identity of the robber, but the assigned detective failed to follow up with the investigation by filing a criminal complaint or seeking an arrest warrant for the suspect.<sup>124</sup> Nearly five months passed between the criminal incident and the mother filing the complaint against police.<sup>125</sup> Subsequent to that filing, the investigation was reassigned to another detective who immediately issued an arrest warrant.<sup>126</sup> Although the detective was exonerated by the disciplinary panel, hearing documents reflect that the arrest warrant was not issued until later because the detective went on vacation and subsequently

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117. *Ross v. United States*, 349 F.2d 210, 211 (D.C. Cir. 1965).

118. *Id.* at 212.

119. *Id.* at 212-13.

120. *Id.* at 215.

121. *Id.* at 215-16.

122. *Harrison v. United States*, 528 A.2d 1238, 1239 (D.C. Cir. 1987) (explaining that to prevail on the claim of pre-arrest delay, appellants must show that they suffered actual prejudice as a result of the delay, and that the government had no justifiable reason for the delay).

123. *Ross v. United States*, 349 F.2d 210, 216 (D.C. Cir. 1965).

124. PHILA. POLICE ADVISORY COMM'N, COLLABORATIVE REVIEW AND REFORM OF THE PPD POLICE BOARD OF INQUIRY: POLICY, PRACTICE, AND CUSTOM REPORT 174 (2021), <https://www.phila.gov/media/20210521150500/Collaborative-Review-and-Reform-of-the-PPD-Police-Board-of-Inquiry.pdf> [<https://perma.cc/VMX9-86JP>]

125. *Id.*

126. *Id.*

separated from the department without ensuring that the investigation was reassigned.<sup>127</sup>

Although this misconduct record may appear to be a minor technical infraction, and was not originally released to the public, the individual accused of committing the alleged robbery could have found this misconduct record useful in litigating a *Ross* motion. By arguing that the detective's actions of going on vacation and separating from the department without adequately reassigning the investigation infringed on their due process rights, a court might have found that these actions were not a justifiable reason to delay arresting the accused. These records can therefore be relevant to determine the exact reason for the delay and if that reason was justified.

### C. *Motions for Pretrial Discovery and Inspection of Documents*

Motions for discovery and inspection of evidence are a common and critical pre-trial tool that defense attorneys use to build their cases for their clients and another area where police misconduct records can inform the proceedings. For federal criminal cases, Federal Rule of Criminal Procedure 16 permits the defense to inspect and copy documents in the government's possession that are material to preparing the defense or that the government intends to use at trial.<sup>128</sup> However, if the government disputes materiality, defendants may need to litigate this in court.<sup>129</sup> A document is material under Rule 16 only if it could be used to counter the government's case or to bolster a defense.<sup>130</sup> The defense has the burden of establishing a *prima facie* case of materiality.<sup>131</sup>

Each state has imposed its own discovery rules, with many requiring the defense to litigate the materiality of certain types of docu-

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127. *Id.*

128. FED. R. CRIM. P. 16 ("Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and: (i) the item is material to preparing the defense; (ii) the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant").

129. *See* United States v. Dossman, 293 F. App'x 457, 459 (9th Cir. 2008) (affirming the district court's holding after the defendant made a Rule 16 request for police records where the police accused the defendant of engaging in a narcotic interaction with motorist. The defendant requested police records related to the stop of that motorist to use for his motion to suppress, however, the court found that the defendant failed to show "materiality").

130. *See* United States v. Finnerty, 411 F. Supp. 2d 428, 431 (S.D.N.Y. 2006).

131. *Id.*

ments. The prosecution must disclose any evidence favorable to the accused that is material either to guilt or to punishment and is within possession or control of the attorney for the prosecution.<sup>132</sup> One obstacle the defense must overcome is being able to specifically identify the evidence it is requesting,<sup>133</sup> a task that may be nearly impossible since defense attorneys are unaware of the extent of the Commonwealth files. This problem has led to a movement advocating open-file discovery in which states grant the defense complete access to prosecutorial files.<sup>134</sup> A 2016 examination of all states discovered that 17 states have open-discovery releasing all witness names, witness statements, and police reports but found that these rules did not enhance the disclosure of impeachment evidence.<sup>135</sup> New York's open-file discovery took effect in 2020;<sup>136</sup> however, the discovery legislation does not explicitly cite to all police misconduct and only specifically mentions information that could impeach the credibility of a government witness.<sup>137</sup> For the states that do not have open-file discovery, defense counsel must request individual documents from the prosecution, with no guarantee that the prosecution will disclose the information, or be timely. Furthermore, as Part III will explore, even prosecutors may not be aware of the full extent of relevant government records.

For the non-open-file discovery states, having accessible police misconduct records may determine the likelihood of a successful discovery litigation. Misconduct records can assist defense counsel in establishing that certain officers may have relevant patterns and routines to their behavior. Rule 406 of the Federal Rules of Evidence allows the introduction of evidence of a witness's past behavior to show that this witness most likely acted in accordance with their past behavior

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132. See PA. R. CRIM. P. 573; see also ARK. R. CRIM. P. 17.1 (stating that there is a duty to disclose to the defense counsel any material which tends to "negate the guilt of the defendant as to the offense charged or would tend to reduce the punishment thereof").

133. ARK. R. CRIM. P. 17.1 (explaining that the Commonwealth must disclose "any other evidence specifically identified by the defendant, provided the defendant can additionally establish that its disclosure would be in the interests of justice").

134. See Andrew Smith, *Brady Obligations, Criminal Sanctions, and Solutions in A New Era of Scrutiny*, 61 VAND. L. REV. 1935, 1960 (2008) ("A number of state and federal prosecutors already employ so-called "open-file" policies, allowing defendants and their attorneys to examine all evidence to be used against them before trial").

135. Jenia I. Turner & Allison D. Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 WASH. & LEE L. REV. 285, 286 (2016).

136. N.Y. CRIM. PROC. LAW § 245.20.

137. *Id.*

during the instant issue.<sup>138</sup> In a motion for discovery, defense counsel may introduce specific instances of past misconduct and request the criminal discovery file on those cases. In Philadelphia, after it became public that the District Attorney was dismissing more than 125 cases involving specific narcotics agents<sup>139</sup> due to their falsifying search warrants, a defense attorney filed a subpoena to inspect all of the past affidavits and investigatory files involving the agents, arguing that the other investigatory files contained “the names of witnesses who could testify as to the officers’ pattern or practice of lying in order to obtain search warrants.”<sup>140</sup> The court held that defense counsel was entitled to review the officer’s personnel file “regarding complaints and/or investigations into the officers’ purported past malfeasance in swearing out affidavits of probable cause.”<sup>141</sup> As this example from Philadelphia demonstrates, the availability of police misconduct records can play a vital role in discovery litigation. If defense counsel has access to misconduct records, during a discovery hearing, these records may lead to defense receiving access to more records—which has the potential of discovering further defense witnesses and evidence showing that the officer has a habit or routine of misconduct.

#### D. Motions to Suppress Evidence

Lastly, defense counsel can use misconduct records to argue that evidence obtained unconstitutionally should be suppressed. When law enforcement personnel obtain evidence through a violation of an individual’s constitutional rights, the defendant can move to suppress that evidence from admission at trial, pursuant to what is known as the “exclusionary rule.” This rule, announced by the United States Supreme Court in *Weeks v. United States*,<sup>142</sup> and later made applicable to state prosecutions in *Mapp v. Ohio*,<sup>143</sup> was intended to deter police officers from violating constitutional rights in order to obtain evidence by rendering the fruits of the violation—including physical evidence,<sup>144</sup> statements,<sup>145</sup> and the indirect fruits of those items<sup>146</sup>—use-

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138. FED. R. EVID. 406.

139. *Commonwealth v. Mejia-Arias*, 1999 PA Super 147, ¶ 3.

140. *Id.* at ¶ 9.

141. *Id.* at ¶ 26.

142. *See Weeks v. United States*, 232 U.S. 383, 392 (1914), *overruled by Mapp v. Ohio*, 367 U.S. 643 (1961); *Elkins v. United States*, 364 U.S. 206 (1960).

143. *See Mapp v. Ohio*, 367 U.S. 643, 660 (1961).

144. *See id.* at 643.

145. *See Brown v. Illinois*, 422 U.S. 590, 604–05 (1975).

146. *Wong Sun v. United States*, 371 U.S. 471, 487–88 (1963).

less to the prosecution.<sup>147</sup> “To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. . . . [T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systematic negligence.”<sup>148</sup>

However, in *United States v. Leon*, the United States Supreme Court created a “good-faith” exception to the exclusionary rule.<sup>149</sup> This exception prevents the application of the exclusionary rule where “evidence is seized in reasonable, good-faith reliance on a search warrant.”<sup>150</sup> While *Leon* pertained to police officers’ good-faith reliance on a defective warrant,<sup>151</sup> the holding was subsequently applied to instances in which there is a change in the law between the government action and the litigation of the alleged criminal episode.<sup>152</sup> Several states now apply the *Leon* good-faith exception to their state constitution by judicial opinion or adopted by statute.<sup>153</sup> However, over the years, the exception has applied to cases neither involving defective warrants nor changes in law but rather to what the court deems are good-faith “mistakes,”<sup>154</sup> a category that courts have expanded over time.

A California court has held that a law enforcement agency’s own mistake in interpreting the law warranted a good faith exception.<sup>155</sup> Colorado’s legislature has defined a good faith mistake to include “a

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147. See generally John Deters, *The Exclusionary Rule*, 89 GEO. L.J. 1216 (2001).

148. *Herring v. United States*, 555 U.S. 135, 144 (2009).

149. *United States v. Leon*, 468 U.S. 897, 919–20 (1984).

150. *Id.* at 897.

151. *Id.* at 919–20.

152. *Davis v. United States*, 564 U.S. 229, 232 (2011) (holding that “searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule”).

153. *State v. Eason*, 629 N.W.2d 625, 660 n.40 (Wis. 2001) (Prosser, J., dissenting) (“Eleven states, as well as the District of Columbia, have adopted a good faith exception under their state constitution through judicial opinion. Five states have adopted a good faith exception by statute. Fourteen states have rejected a good faith exception under their state constitution”).

154. *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990) (“Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability”).

155. *People v. Robinson*, 224 P.3d 55, 69 (2010) (explaining that a California act provided that convicted offenders of qualifying offenses must submit blood specimens, even though Robinson did not have a qualifying offense, his blood was taken nevertheless by state law enforcement officials, the court finding that the errors made did not trigger the exclusionary rule).

reasonable judgmental error concerning the existence of facts or law which if true would be sufficient to constitute probable cause.”<sup>156</sup> Kansas has found that a good faith mistake is made when a law enforcement dispatcher provides wrong information about a driver’s license status.<sup>157</sup>

Conversely, the United States Supreme Court has identified several situations in which the good-faith exception will not be applied, including systemic abuses,<sup>158</sup> and respective state courts have engaged in the same practice. For instance, Tennessee has held that the exception will not be applied to reckless or grossly negligent behavior that is not a simple error.<sup>159</sup> Overall, good-faith states appear to draw the line at systemic abuses—repeated violations. The difficult task, however, is uncovering the evidence that may show these “mistakes” are more aligned with systemic issues.

Access to police misconduct records would allow defense counsel to determine if a “good-faith” law enforcement mistake was truly made in good faith by revealing past instances in which the same officer was disciplined for a similar error, thereby putting them on notice. For example, in a Kansas case where the court found that a radio dispatcher’s transmission of erroneous information that led to the stop and arrest of the defendant was a good-faith mistake, a review of misconduct records might have shed light on whether that dispatcher or agency had made similar errors in the past. Such evidence would have refuted the government’s claim that what had happened was neither routine nor a widespread systemic problem.<sup>160</sup> In a California case,<sup>161</sup> the court held a prison’s erroneous determination that the defendant was eligible for DNA collection was made in good faith. In that case, a review of misconduct records would have revealed whether there was a pattern of similar mistakes at that prison, a finding that would have disproven the government’s argument that the DNA confiscation was a “mistake.”<sup>162</sup>

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156. COLO. REV. STAT. ANN. § 16-3-308 (West).

157. *State v. Gilliland*, 490 P.3d 66, 77 (Kan. Ct. App. 2021) (finding no evidence that errors in the system the department used are routine or widespread, to the contrary, the 21-year veteran dispatch testified that errors do not happen very often).

158. *See Deters*, *supra* note 147, at 1220–22.

159. *State v. McElrath*, 569 S.W.3d 565, 579 (Tenn. 2019) (“A good-faith mistake does not include conduct that is deliberate, reckless, or grossly negligent, nor does it include multiple careless errors.”).

160. *See Gilliland*, 490 P.3d at 77.

161. *See People v. Robinson*, 224 P.3d 55, 69 (2010).

162. *See id.* at 68 (explaining that the defense did not challenge the nature of the mistake as something of a systemic nature, to the contrary, the defense agreed with the State. The court found that the “parties before [them] agree[d] the violations of the

Lastly, in *Herring v. United States*, the Supreme Court’s case finding that a state recordkeeping error that led to the appellant’s arrest was made in good faith might have been decided differently if appellant’s counsel had access to law enforcement misconduct records showing that the recordkeeping errors were previously known to the relevant agency, thereby undermining the government’s argument that the false warrant alert was a mere “police recordkeeping error.”<sup>163</sup>

Widespread recordkeeping errors, if not immediately corrected, are examples of systemic negligence that can cause unlawful stops, frisks, searches, and arrests. For example, the Philadelphia Police Department has frequently been criticized for falsely detaining drivers due to the Department’s faulty recordkeeping practices.<sup>164</sup> City officials have refused to remedy the widely known systemic problem.<sup>165</sup> Federal law enforcement databases have been the target of similar criticism as well.<sup>166</sup> Overall, access to police misconduct records will be able to shed light on and identify the root cause of law enforcement “errors” and other behaviors that have value during pre-trial motions. However, these examinations are not widely in use currently due to two main barriers: (1) the reliance on district attorneys to collect and disclose this information and (2) existing disclosure laws that limit the release of this information to the public. Part III and IV will examine these areas.

### PART III.

#### BARRIERS TO ATTORNEY ACCESS TO POLICE MISCONDUCT RECORDS

The current body of literature on the use of police personnel records in criminal proceedings is vast and has focused on such diverse topics as *Brady* and its implication for prosecutors searching police personnel records for impeachment evidence in the files;<sup>167</sup> the

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Act in defendant’s case were unintentional mistakes made during the early implementation of the Act.”).

163. See *Herring v. United States*, 555 U.S. 135, 146 (2009).

164. William Bender, *Another Botched ‘Courtesy’ Tow: Philly Woman Pulled Over in Virginia for Driving Her ‘Stolen’ Car*, PHILA. INQUIRER (Apr. 14, 2021), <https://www.inquirer.com/news/philadelphia-courtesy-tow-stolen-vehicle-virginia-20210414.html> (highlighting the nature of systematic recordkeeping errors even though Pennsylvania does not have a good-faith exception).

165. *Id.*

166. See Alex R. Hess, *Herring v. United States: Are Errors in Government Databases Preventing Defendants from Receiving Fair Trials?*, 11 K. HIGH TECH. L. 129, 131 (2010).

167. Abel, *supra* note 13, at 750 (“The Article focuses mostly on impeachment evidence in the files—performance evaluations, disciplinary write-ups, and internal af-

fallout of *Kyles v. Whitley* and its expressed holding that prosecutors have a duty to search for *Brady* material neither known nor possessed by them and to disclose that evidence to the defense;<sup>168</sup> American Bar Association Model Rule of Professional Conduct 3.8(d) and its requirement that prosecutors make timely disclosure to the defense;<sup>169</sup> and the increasingly common practice of prosecutors creating *Brady-Giglio* lists of police officers who will not be called to testify due to credibility issues ranging from a history of lying in court and falsifying evidence<sup>170</sup> to evidence of racial bias.<sup>171</sup>

A recent national examination of prosecutor relationships with their respective law enforcement agencies, conducted by the Institute for Innovation in Prosecution, is the first collection to shed light on the specific details of *Brady-Giglio* policies.<sup>172</sup> That report, *Tracking Police Misconduct* (hereinafter, “IIP report”), explains why it is crucial for prosecutors to have a *Brady-Giglio* list and outlines how prosecutorial offices can start collecting, or better maintain, this information.<sup>173</sup> The examination found that prosecutors traditionally do not track this information in any “organized, systematic way.”<sup>174</sup> The analysis of prosecutors’ *Brady-Giglio* policies<sup>175</sup> reveals that (1) the mission statements of several policies are underinclusive, which leads to fewer records being captured by the focus of the policy, (2) the scope of misconduct that triggers inclusion on the list is narrow, (3)

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fairs investigations that show an officer has lied. This information can be critical to a defendant in attacking the officer’s credibility on the stand.”).

168. See Mark D. Villaverde, *Structuring the Prosecutor’s Duty to Search the Intelligence Community for Brady Material*, 88 CORNELL L. REV. 1471, 1493 (2003).

169. See Daniel S. Medwed, *Brady’s Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1538–39 (2010).

170. Steve Reilly & Mark Nichols, *Hundreds of Police Officers Have Been Labeled Liars. Some Still Help Send People to Prison*, USA TODAY (Oct. 14, 2019), <https://www.usatoday.com/in-depth/news/investigations/2019/10/14/brady-lists-police-of-ficers-dishonest-corrupt-still-testify-investigation-database/2233386001/>.

171. See Mark Fazlollah, Craig R. McCoy & Julie Shaw, *Under Court Order, District Attorney Krasner Releases List of Tainted Police*, PHILA. INQUIRER (Mar. 6, 2018), <https://www.inquirer.com/philly/news/larry-krasner-philadelphia-police-tainted-misconduct-secret-list-20180306.html>.

172. INST. FOR INNOVATION IN PROSECUTION, TRACKING POLICE MISCONDUCT: HOW PROSECUTORS CAN FULFILL THEIR ETHICAL OBLIGATIONS AND HOLD THE POLICE ACCOUNTABLE 5, July 2021, <https://www.prosecution.org/s/FINAL-Tracking-Police-Misconduct-Guide.pdf> [<https://perma.cc/KG3B-SPPA>] [hereinafter IIP REPORT] (The guide “explains why it is crucial for prosecutors to have a police disclosure list and describes the most important issues to consider when creating one”).

173. IIP REPORT APP, *supra* note 63, at 5 (“Our hope is that upon reviewing this guide, prosecutors will develop or improve upon their own mechanisms for tracking police misconduct.”).

174. *Id.*

175. *Id.* at 3 (Appendix contains policies for eleven prosecutorial offices).

the policies allow law enforcement agencies to play a gatekeeping role and decide which records will be shared, (4) the policies give wide discretion to law enforcement agencies on when they will share this information, even after they have been explicitly informed to share the record, and (5) the policies unduly limit defense attorney access to this information. This section will explore how the existing landscape of prosecutorial *Brady-Giglio* policies provide insufficient access to defendants, thereby hampering their ability to access and utilize these records in pre-trial litigation.

#### A. *Underinclusive Mission Statements*

A review of individual prosecutorial *Brady-Giglio* policies indicates that many offices established their policies to address the need to provide potential impeachable material,<sup>176</sup> while others drafted their policies to pursue the slightly broader goal of ascertaining information that may be “exculpatory, impeachment, or mitigating information in a particular criminal case.”<sup>177</sup> Although they appear similar, policies that merely attempt to uncover impeachment material fall short of what is needed by the defense and what the constitution requires. Impeachment material is any evidence having the potential to alter the jury’s assessment of the credibility of a significant prosecution witness.<sup>178</sup> However, several types of evidence that are favorable to defendants may not fall under this limited definition of “impeachment” information, such as exculpatory evidence, material evidence, and other evidence that is relevant for pre-trial matters. Furthermore, the federal constitution does not require prosecutors to disclose exculpatory and impeachment material to the defense prior to entering into plea bargaining.<sup>179</sup> Because 97% of federal criminal cases,<sup>180</sup> and 94% of state criminal cases,<sup>181</sup> result in a guilty plea, most defendants

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176. *Id.* at 7, 12.

177. *Id.* at 66.

178. R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 *VAND. L. REV.* 1429, 1431 (2011).

179. *United States v. Ruiz*, 536 U.S. 622 (2002). *But see* *State v. Harris*, 667 N.W.2d 813, 821–22 (Wis. Ct. App. 2003), *aff’d*, 680 N.W.2d 737 (Wis. 2004) (holding that *Ruiz* is distinguishable because it only applies to federal plea negotiations, and “in *Ruiz*, the defendant did not make a written discovery demand for all ‘exculpatory’ evidence.”).

180. Glenn R. Schmitt & Amanda Russell, *Fiscal Year 2020: Overview of Federal Criminal Cases*, U.S. SENT’G COMM’N (Apr. 2021), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/FY20_Overview_Federal_Criminal_Cases.pdf)

FY20\_Overview\_Federal\_Criminal\_Cases.pdf [<https://perma.cc/8VWT-H3GC>].

181. Emily Yoffe, *Innocence is Irrelevant*, *ATLANTIC*, Sept. 2017, at 67, 69.

never have the opportunity to access this potentially case-dispositive material.

Even where prosecutorial policies include mitigating evidence in their *Brady-Giglio* misconduct inquiry, the defense still may not have adequate access to that material. Mitigating evidence is that which “tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.”<sup>182</sup> Mitigating evidence is usually predetermined by state statute, and usually if the defense wants to argue for an additional means of mitigating evidence, the fact-finder must agree with that assertion.<sup>183</sup> Since mitigating evidence is largely a trial and sentencing issue, *Brady-Giglio* policies that cover this type of evidence generally require only that the prosecution disclose the evidence some time before trial—leaving litigants unaware of this information during pre-trial matters.

Even the disclosure policies that define their coverage broadly as evidence that is “favorable” to the accused often use a narrow definition of “favorable.”<sup>184</sup> For example, the Bexar County District Attorney’s office policy states:

“Information or evidence is favorable to the accused when it is: 1) exculpatory—tending to justify, excuse, or clear the defendant from guilt; 2) useful for impeachment—anything offered to dispute, disparage, deny, or contradict; or 3) mitigating—useful to the defense during punishment proceedings.”<sup>185</sup>

This definition of “favorable” evidence is not consistent with caselaw. The United States Supreme Court has construed evidence as “material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the *proceeding* would have been different.”<sup>186</sup> By contrast to the prosecutorial disclosure policies reflected in the IIP report, which refer only to trial and

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182. *Tennard v. Dretke*, 542 U.S. 274, 284 (2004) (quoting *McKoy v. North Carolina*, 494 U.S. 433, 440–41 (1990)).

183. *See State v. Duke*, 623 S.E.2d 11, 27 (N.C. 2005) (“Statutory mitigating circumstances have mitigating value as a matter of law, while nonstatutory mitigating circumstances require a finding of mitigating value.”).

184. *See Thomas v. State*, 841 S.W.2d 399, 404 (Tex. Crim. App. 1992) (“Due Process Clause of the Fourteenth Amendment is violated when a prosecutor fails to disclose evidence which is favorable to the accused that creates a probability sufficient to undermine the confidence in the outcome of the *proceeding*.”) (emphasis added).

185. IIP REPORT APP., *supra* note 63, at 16. Similarly, the memorandum of agreement between the Buncombe County Office of the District Attorney and the Asheville Police Department in North Carolina defines favorable evidence as “evidence that is exculpatory (Brady) as well as information that could be used to impeach the testimony of a prosecution witness (Giglio). *Id.* at 43.

186. *United States v. Bagley*, 473 U.S. 667, 682 (1985) (emphasis added).

sentencing,<sup>187</sup> this definition uses the broader term “proceeding,” which covers pre-trial stages as well.

In addition to defining the purpose of these policies, many agencies add additional limitations to the coverage of their disclosure policies. The King County Prosecuting Attorney’s Office in Washington State shared that they do not have an obligation to disclose preliminary, challenged or speculative information,<sup>188</sup> and San Francisco made clear that its impeachment evidence must be more than “minor inaccuracies.”<sup>189</sup> Thus, by failing to include how favorable evidence is relevant for “proceedings,” and not simply trial and sentencing, policies preclude the search for and disclosure of these records for pre-trial litigation.

### B. Limited Misconduct Category

Prosecuting agency policies vary as to what they consider to be police misconduct for the purposes of their disclosure policies. However, most prosecutors want police departments to inform their prosecutors of substantiated findings of misconduct.<sup>190</sup> Many offices do not require police departments to inform them of unsubstantiated allegations and make the *sua-sponte* determination for defense attorneys that these allegations of misconduct “do not qualify as being favorable to the accused.”<sup>191</sup> Some agencies go so far as to explicitly state that “substantial information excludes allegations that have been found to be unsubstantiated after due investigation.”<sup>192</sup> However, as this article will explore in Part IV, police misconduct complaints may be unsubstantiated for any of several reasons that do not amount to an exoneration of the officer. Thus, policies that limit disclosure of “unsubstantiated” allegations keep valuable information about real and relevant instances of police misconduct away from defense attorneys.

Once allegations are found to be sustained, many prosecutorial agencies further limit the scope of inquiry to a specific category of behavior. For example, the Buncombe County Office of the District Attorney limits automatic sharing to the following three categories:

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187. IIP REPORT APP., *supra* note 63, at 56.

188. *Id.* at 56.

189. *Id.* at 73.

190. *Id.* at 6, 7.

191. *Id.* at 6–7 (Bernalillo county policy states that “[a]s a general but not universal rule, unsubstantiated allegations, matters for which a police officer has been exonerated, and allegations that are not credible do not qualify as being favorable to the accused and are therefore not considered to be potential impeachment information.”).

192. *Id.* at 43.

- (1) Substantial information that the officer employed deadly or excessive force as defined by the law enforcement agency's Use of Force policy regardless of whether the use of such deadly force resulted in injury or death to any person;
- (2) Substantial information that an officer or employee committed a felony or non-traffic misdemeanor criminal offense or was charged with such an offense while employed with the agency;
- (3) A sustained administrative finding of misconduct that comes within the definition of *Brady/Giglio* material set forth in this policy, regardless of any discipline imposed.<sup>193</sup>

These categories exclude policy violations that do not directly address the credibility of a law enforcement officer. The policy also excludes pending investigations, stating that, "preliminary investigations are often required to establish the existence of substantial information and agrees that the law enforcement agency should not make any disclosure pursuant to this MOU until any such preliminary investigation is complete."<sup>194</sup>

The exclusion of pending investigations is significant because departments have a lengthy period of internal investigation.<sup>195</sup> For the Asheville Police Department in North Carolina, which agreed to Buncombe County's policy, the relevant directive merely states that "the department will make every effort to fully investigate all complaints within sixty (60) calendar days of reception of the complaint,"<sup>196</sup> but if it is not completed within that time frame, the "Professional Standards Commander will notify the complainant concerning the status of the complaint against the department or employee(s) every sixty (60) calendar days."<sup>197</sup>

Buncombe County's disclosure policy also excludes allegations that relate to officer bias, body-worn camera violations, social media misconduct, and violations of U.S. and state constitutional procedures. Since a North Carolina court has held that body-worn camera violations have merely speculative exculpatory value, defense counsel can neither depend on their prosecutor nor the court to mandate the disclosure of these records.<sup>198</sup> Even though this policy received praise for its

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193. *Id.*

194. *Id.*

195. *See infra* Part IV(B).

196. ASHEVILLE POLICE DEP'T, POLICY 2301: ADMINISTRATIVE INVESTIGATIONS 5, (May 6, 2020), <https://public.powerdms.com/ASHV/list/documents/8> [<https://perma.cc/Y3ZT-DFDT>].

197. *Id.*

198. *State v. Sikorski*, 847 S.E.2d 85 (2020).

“unique” officer misconduct agreement,<sup>199</sup> it fails to capture many instances of misconduct.

By contrast, the disclosure policy of the Philadelphia District Attorney office covers more material, including pending investigations.<sup>200</sup> Specifically, the policy covers misconduct ranging from reports of misrepresentations and untruthfulness to allegations of bias or prejudice and “conduct that would be a violation of an individual’s constitutional rights.”<sup>201</sup> In Philadelphia, the average initial Internal Affairs investigation into a civilian complaint takes about six months to determine whether the allegation is substantiated.<sup>202</sup> After the Internal Affairs substantiation, it takes an average of 197 days for final adjudication in an official administrative hearing.<sup>203</sup>

### C. Law Enforcement Agencies as Gatekeepers

Consistent with all policies contained in the IIP report is providing law enforcement with the authority to determine which records are consistent with the *Brady-Giglio* policy—no prosecutorial policy listed in the IIP report provides the prosecutor with direct access to law enforcement records so that the prosecutor can decide for themselves which records are relevant according to their *Brady-Giglio* policy. For example, even though the Philadelphia District Attorney seeks information on several types of misconduct, the prosecutor continues to have difficulty accessing that information. Recently, the Philadelphia District Attorney publicly shared its displeasure with the Philadelphia Police Department for failing to comply with its obligation to disclose these records.<sup>204</sup> In a press release which elaborated on the

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199. Joel Burgess, ‘Unique’ Officer Misconduct Agreement: All Buncombe Law Enforcement Agencies Sign, ASHEVILLE CITIZEN TIMES (Aug. 1, 2020), <https://www.citizen-times.com/story/news/local/2020/08/01/officer-misconduct-asheville-buncombe-police-agencies-sign-unique-agreement/5549574002/>.

200. IIP REPORT APP., *supra* note 63, at 68, 69.

201. *Id.* at 68.

202. BOCAR BA, DEAN KNOX, RACHEL MARIMAN, JONATHAN MUMMOLO, & MARIA ARANZAZU RODREIGUEZ URIBE, ANALYSIS OF PHILADELPHIA POLICE DEPARTMENT CIVILIAN COMPLAINT PROCESS 1, 5 (2021), [https://www.dropbox.com/s/p1uu0g7hn7i9x42/pac\\_report.pdf?dl=0l](https://www.dropbox.com/s/p1uu0g7hn7i9x42/pac_report.pdf?dl=0l) [<https://perma.cc/7VJX-SA2Y>] (finding that the “[a]verage investigation length is twice as long as the legally mandated maximum time limit.”).

203. *Id.* at 6.

204. Phila. Dist. Att’y’s Off., *DA Krasner Asks Court to Hold Philadelphia Police in Contempt for Failure to Provide Officer Misconduct Information*, MEDIUM (Aug. 11, 2021), <https://medium.com/philadelphia-justice/da-krasner-asks-court-to-hold-philadelphia-police-in-contempt-for-failure-to-provide-officer-3e8980e659db> [<https://perma.cc/2YUJ-68HF>].

ongoing multi-year noncompliance, District Attorney Larry Kraser stated:

“After three and a half years of good-faith efforts to obtain the Philadelphia Police Department’s cooperation in transmitting potential *Giglio* information to the DAO [District Attorney’s Office], and after taking the unusual step of subpoenaing records from the PPD [Philadelphia Police Department], my office is requesting judicial intervention and monitoring of our partner in law enforcement, so that we may fulfill our oaths as prosecutors and meet our obligations under the U.S. Constitution.”<sup>205</sup>

In its request for the Philadelphia Police Department to be found in contempt, the Philadelphia District Attorney alleged that the Department has been deliberately withholding information. Their suit claims that “the PPD responded to the subpoenas with legally inadequate information.”<sup>206</sup> In one example, the District Attorney cited, “a PPD officer whose disciplinary record include[d] sustained charges of falsification of documents that were not disclosed to the DAO.”<sup>207</sup> Overall, these lessons from Philadelphia inform the larger community that no matter how broad a prosecutorial policy has set its search for records, many remain undisclosed.

For most of the prosecutorial policies appended to the IIP report, the law enforcement agency itself is the first gatekeeper to determine if specific allegations should be disclosed to the District Attorney. The Bernalillo County District Attorney Office in New Mexico must request that individual officers complete a questionnaire that informs the District Attorney if they have any qualifying history of misconduct. The District Attorney’s only way to verify these responses is to ask the officer’s employer if the questionnaire responses are correct,<sup>208</sup> a problematic reliance since reliability issues can be found throughout the chain of command in law enforcement agencies. The Franklin County District Attorney has a similar policy requiring that “each law enforcement agency in Franklin County shall report to the DA’s Office if they discover any potential *Giglio* issues for a law enforcement officer.”<sup>209</sup> The Maricopa County Attorney’s Office has charged a committee to review possible law enforcement misconduct, with the review beginning when “the chair receive[s] [a] referral from law enforcement” regarding an officer.<sup>210</sup> Even the Philadelphia District at-

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205. *Id.*

206. *Id.*

207. IIP REPORT APP., *supra* note 63, at 8–9.

208. *Id.* at 52.

209. *Id.* at 61.

210. *Id.* at 67.

torney, with its expansive misconduct list, must direct “the custodian of records in each law enforcement agency to examine current and future officers’ personnel files and current and future officers’ conduct and notify the DAO” when relevant records have been identified.<sup>211</sup>

No prosecutorial policy contained in this report has a provision whereby prosecutors maintain direct access to law enforcement disciplinary investigations or records. In other words, they all depend upon the good faith of law enforcement agencies to investigate themselves and comply with disclosure requirements. The Institute for Innovation in Prosecution, which collected these policies to build a resource guide, did not address the possible negative consequences of having law enforcement agencies act as gatekeepers in the *Brady-Giglio* analysis.

The fact that law enforcement agencies are gatekeepers to their own misconduct records means that prosecutors may ask law enforcement to disclose all exculpatory evidence in a criminal case, only to later learn that the agency withheld material information,<sup>212</sup> either in a bad faith effort to prevent the required disclosure or out of a failure to understand the materiality of the information. For example, even though the Philadelphia District Attorney’s office has participated in overturning several convictions due to officer misconduct,<sup>213</sup> the office continues to rely on the Philadelphia Police Department’s internal affairs process of investigating misconduct. Their disclosure policy states that “the DAO will rely on the professional policing practices of our partners in law enforcement to notify us of any potentially qualifying misconduct by officers that should be disclosed to the defense.”<sup>214</sup>

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211. *Id.*

212. Chris Palmer, *Philly’s Wrongful Convictions Have Frequently Involved Official Misconduct. A Report Says it’s a National Problem*, PHILA. INQUIRER (Sept. 15, 2020), <https://www.inquirer.com/news/pennsylvania/wrongful-conviction-national-registry-of-exonerations-district-attorney-larry-krasner-20200915.html> (“Police conducting shoddy or secret investigations of alternate theories and quietly burying those records in the case file.”).

213. *Id.*

214. IIP REPORT APP., *supra* note 63, at 6 (“When in doubt about information relating to police officer witnesses, you should alert the *Giglio* Panel to any potential impeachment information. The *Giglio* Panel will make a final determination about the duty to disclose in light of the role of the police officer witness, the facts of the case, any known or anticipated defenses, and the law governing discovery.”). *See also* IIP REPORT APP., *supra* note 63, at 24 (Bexar County Criminal District Attorney’s Office policy stating that the Ethical Disclosure Unit has a mission to decide “whether any particular issue should be disclosed to the defense, the mandate of EDU is to err on the side of disclosure.”); IIP REPORT APP., *supra* note 63, at 57 (King County Prosecuting Attorney’s Office policy stating that “[l]aw enforcement agencies will be asked to provide the *Brady* Committee with information on sustained findings of misconduct involving officer dishonesty.”); IIP REPORT APP., *supra* note 63, at 61 (Maricopa

The District Attorney policy does not request or demand direct access to law enforcement investigative records.

Although many prosecutorial offices examined in the IIP report have several panels assessing the materiality of documents,<sup>215</sup> the report does not address the concern of allowing law enforcement agencies to take charge of the first and most important stage in the analysis of whether records should be disclosed to the defense. Overall, these policies perpetuate, instead of remedy, the problem whereby law enforcement shield their misconduct from disclosure by creating a false impression of transparency when, instead, law enforcement may be sitting on material and potentially case-dispositive records.

#### D. Discretion on When to Disclose Information

There was no broad consensus between the agencies included in the IIP report on how much time law enforcement agencies should have to respond with the information. Some agencies ask for this information to be shared without discussing when the information must be turned in,<sup>216</sup> while others ask that it be shared within a *reasonable time*.<sup>217</sup> No policy included in the IIP report contains language that gives a specific timeframe for when these misconduct records must be shared with the prosecutor's office.

An example of policies lacking this information include Bernalillo County District Attorney in New Mexico. Within ten days of being assigned a criminal case, Bernalillo County District Attorneys are instructed to submit a "Giglio Questionnaire" to officers assigned to the criminal case<sup>218</sup> While the survey informs officers that "it is estimated that you will be able to complete this questionnaire in less than five minutes,"<sup>219</sup> the policy does not instruct the officer on when specifi-

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County Attorney's Office Policy stating that the Chair [of the Discovery Database Committee] will receive all referrals from law enforcement regarding negative administrative determinations regarding a law enforcement employee's truthfulness, bias, moral turpitude, a court ruling or order implicating a *Brady* finding or any other information determined to constitute *Brady* material.").

215. See IIP REPORT APP., *supra* note 63, at 9, 57, 61, 98.

216. *Id.* at 52, 57 (Franklin County District Attorney policy states "each law enforcement agency in Franklin County shall report to the DA's Office if they discover any potential Giglio issues for a law enforcement officer" and the King County District Attorney policy merely states "law enforcement agencies will be asked to provide the Brady Committee with information on sustained findings of misconduct involving officer dishonesty" without explaining when that disclosure will happen).

217. *Id.* at 44 (Buncombe County Office of the District Attorney policy stating that "the agency will disclose the matter to the DA within a reasonable time.").

218. *Id.* at 11, 8.

219. *Id.* at 11.

cally the questionnaire must be returned to the District Attorney's office.

Similarly, the Buncombe County Office of the District Attorney in North Carolina requires the law enforcement agency to "disclose the matter to the DA within a reasonable time," though they attempt to enforce this request by requiring officers to complete the disclosure before they are permitted to testify in a criminal matter.<sup>220</sup> In North Carolina, and across the nation, however, "few criminal cases go to trial, [and] many cases are resolved through plea or deferral agreements."<sup>221</sup> It is possible, therefore, for many cases to resolve without officer testimony or consideration of potential officer misconduct; thus making it possible for the police department to keep misconduct records hidden without violating the disclosure policy. Similarly, the Philadelphia District Attorney asks agencies to "update the DAO of any changes" to relevant misconduct investigations but does not provide a timeframe within which the update must be given.<sup>222</sup> The Snohomish County Prosecuting Attorney in Washington merely asks for law enforcement agencies to share misconduct documents by providing a "timely notification," but does not clarify what is considered timely.<sup>223</sup>

The IIP report did not address the concept of asking law enforcement agencies to disclose misconduct information as soon as it becomes known to the agency. As Parts I and II discussed, the timely accessibility of these records can be valuable for many pre-trial criminal matters.<sup>224</sup> Without a requirement that these records are disclosed as soon possible, prosecutors may be unable to make informed charging decisions, comply with their own disclosure obligations, and ensure that their prosecutions are deemed appropriate.

### *E. Deciding Not to Disclose to the Defense*

After the law enforcement agency has provided *Brady-Giglio* records to the prosecutor's office, the prosecutor must determine

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220. *Id.* at 44.

221. *Help Topics: Criminal Cases*, N.C. JUD. BRANCH, <https://www.nccourts.gov/help-topics/criminal-law/criminal-cases#the-criminal-courts-5631> [<https://perma.cc/TPD6-HGNK>].

222. IIP REPORT APP., *supra* note 63, at 68.

223. *Id.* at 78.

224. Kirsten M. Schimpff, *Rule 3.8, the Jencks Act, and How the ABA Created a Conflict Between Ethics and the Law on Prosecutorial Disclosure*, 61 AM. U. L. REV. 1729, 1733 (2012) ("The ABA Ethics Committee chose to interpret 'timely' to mean as soon as reasonably practical once the information becomes known, essentially, right away.").

whether that information should be disclosed to defense. Many offices, such as the Bernalillo County District Attorney, have created “*Giglio* panels” whereby a committee of senior prosecutors “will make a final determination about the duty to disclose in light of the role of the police officer witness.”<sup>225</sup> These panels exercise enormous power in a case. They may elect that the information is *Giglio* material and discoverable, that it is not *Giglio* material, that it is *Giglio* material but “not discoverable, due to the specific facts of the case and the witness’s anticipated testimony,”<sup>226</sup> or they may refuse to answer the *Giglio* question altogether and instead pass that responsibility on to a judge by seeking an in-camera review.<sup>227</sup>

Even if the prosecutor or judge decides to disclose material to the defense, many policies are silent with regard to *when* the disclosure must occur or may only direct disclosure once a subpoena has been issued to the officer for their testimony.<sup>228</sup> Only one policy reviewed in the IIP report—Philadelphia—requires disclosure to the defense as soon as practicable.<sup>229</sup> However, not even this policy guarantees that material information will be timely disclosed to the defense because the policy also allows for prosecutors to submit the disclosure decision for judicial review if the prosecutor believes “there is reason to believe that disclosure may unfairly prejudice the Commonwealth or the individual officer,”<sup>230</sup> thereby further delaying the accessibility of this information for use in pre-trial proceedings.

This section highlights the dangers of relying on prosecutorial *Giglio* policies for the disclosure of misconduct records to the exclusion of making these records accessible to the public. Although prosecutors collect this information in order to comply with their legal<sup>231</sup> and ethical<sup>232</sup> duties to disclose this information to defendants, the numerous layers of filter and sanitization that these records pass

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225. See IIP REPORT APP., *supra* note 63, at 6.

226. *Id.* at 59.

227. See generally 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, 316–17 (2012).

228. See IIP REPORT APP., *supra* note 63, at 59.

229. *Id.* at 69 (“The DAO will require assistant District Attorneys (ADAs) to check the database as soon as practicable (at charging and when officer subpoenas are issued) and notify defense counsel of inclusions.”).

230. *Id.*

231. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (the withholding of evidence exculpatory to an accused is a violation of due process); see also *Giglio v. United States*, 405 U.S. 150, 152–54 (1972) (finding that when the reliability of a given witness may be determinative of guilt or innocence, nondisclosure of evidence affecting credibility is a violation of due process).

232. See MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR ASS’N 2021).

through can dilute the full range of material to which defense attorneys and their clients have access. Police departments filter through their records and decide amongst themselves which records will be disclosed to the prosecutor; prosecutors then sanitize those records and further decide which records in their possession should be disclose to the defense—thereby perpetuating the cycle shielding information from the defense. Defense Attorneys are in the best position to know which records are favorable and when to utilize them. However, because state laws usually exclude police misconduct records from public disclosure, defense attorneys are at the mercy of prosecutorial *Brady-Giglio* policies.

#### PART IV.

#### BARRIERS TO PUBLIC ACCESS TO POLICE MISCONDUCT RECORDS

While prosecutorial policies are restrictive in many ways, policies governing public access to misconduct records are even more limiting. Public access to law enforcement disciplinary records depends on state laws governing the types of records that will be released. These laws vary widely between states though nearly every state allows some categories of misconduct records to remain nonpublic. Each state's approach falls into one or more of the following categories: (1) release all complaints that allege misconduct; (2) allow technical infractions to remain hidden; (3) allow pending investigations to remain hidden; (4) allow unsubstantiated allegations to remain hidden; (5) allow undisciplined allegations to remain hidden; (6) allow allegations to remain hidden after a balancing of interests test; (7) allow facts of all complaints to remain hidden with only specific forms of discipline released; and (8) allow all records to remain hidden. Furthermore, even when states allow for the public disclosure of records, systemic barriers, such as lengthy administrative processes that relate to the request for the information, may preclude the accessibility of them. Part B will share some of the roadblocks to accessing this publicly accessible information.

##### *A. Policy Approaches to Limiting Public Access*

There is little consensus across the states on which form of records should be disclosed to the public upon request. Many outright deny the disclosure. However, for the states that do allow disclosure, they vary regarding which types of records. Except for releasing all complaints, every other category that will be discussed in this section allows many types of records to remain nonpublic—denying individu-

als an opportunity to inspect them and ensure that defense counsel has knowledge of them.

### *1. Release All Complaints Alleging Misconduct*

Full disclosure of law enforcement misconduct records would require the release of *all* alleged complaints, including those that are wholly unsubstantiated. Unsubstantiated complaints can include unfounded allegations (meaning an investigation determined the alleged act did not occur), exonerated allegations (meaning an investigation determined the alleged act *did* occur but was lawful), and cases where an investigation was inconclusive as to whether the alleged act did or did not occur.<sup>233</sup>

North Dakota is the only state that fully discloses all these types of records, including pending investigations,<sup>234</sup> pursuant to its constitution.<sup>235</sup> All law enforcement misconduct records in the state are accessible to the public at their completion or, if not completed, seventy days after the initiation of the investigation.<sup>236</sup> Unlike many states that preclude disclosure of records that may be related to an active criminal investigation,<sup>237</sup> North Dakota allows for the release of these records if they have been in existence for more than one year.<sup>238</sup> The only information that may be withheld is personal information such as medical and financial records.<sup>239</sup> This withholding, however, does not

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233. PHILA. POLICE ADVISORY COMM'N, *Collaborative Review and Reform of the PPD Police Board of Inquiry: Policy, Practice, and Custom Report 6* (2021), <https://www.phila.gov/media/20210521150500/Collaborative-Review-and-Reform-of-the-PPD-Police-Board-of-Inquiry.pdf> (displaying investigative findings for the Philadelphia Police Department and the definition of each finding).

234. N.D. CENT. CODE ANN. § 44-04-18.1 (West 2021) (“Records relating to a public entity’s internal investigation of a complaint against a public entity or employee for misconduct are exempt until the investigation of the complaint is complete, but no longer than seventy-five calendar days from the date of the complaint.”).

235. N.D. CONST. art. XI, § 6 (mandating that “[a]ll records of public or governmental bodies, boards, bureaus, commissions, or agencies of the state or any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be public records, open and accessible for inspection during reasonable office hours”).

236. N.D. CENT. CODE ANN. § 44-04-18.1 (West 2021).

237. *See, e.g.,* Barfield v. City of Fort Lauderdale Police Dep’t, 639 So. 2d 1012, 1017 (Fla. Dist. Ct. App. 1994) (“[E]ven though there [was] no immediate anticipation of an arrest, so long as the investigation is proceeding in good faith, and the state attorney or grand jury will reach a determination in the foreseeable future, the requested information is not subject to disclosure.”).

238. N.D. CENT. CODE § 44-04-18.7 (2021) (clarifying that active criminal intelligence information is confidential. However, when records have existed for more than one year, non-personal information from that record is disclosable).

239. *Id.*

prevent the disclosure of an officer's name, a chronological list of incidents, and a summary of the allegation.<sup>240</sup> The North Dakota Attorney General also affirmed the right to access this information by recently releasing an Open Records Guide which declared that public entities must disclose misconduct records to members of the public upon request.<sup>241</sup> No other state mirrors North Dakota's transparency as it relates to the accessibility of misconduct records.

## 2. *Withhold Records of Technical Infractions*

In the wake of the murder of George Floyd,<sup>242</sup> the New York legislature repealed section 50(a) of its public records law, which shielded police misconduct from disclosure.<sup>243</sup> The law that replaced §50(a), however, precludes the release of investigations deemed "technical infractions"<sup>244</sup> and gives law enforcement agencies a gatekeeping role in determining whether a record concerns a "technical infraction."<sup>245</sup> This could include offenses related to domestic violence incidents<sup>246</sup> (5% of all guilty allegations),<sup>247</sup> allegations of crim-

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240. *Id.* at § 44-04-18.7(6) ("Personal information' means a person's medical records or medical information obtained from the medical records; motor vehicle operator's identification number; social security number; any credit, debit, or electronic fund transfer card number; month and date of birth; height; weight; home street address; home telephone number or personal cell phone number; and any financial account numbers.").

241. N.D. OFF. ATT'Y GEN., OPEN RECORDS MANUAL (Aug. 2019), <https://attorneygeneral.nd.gov/sites/ag/files/documents/OpenRecordsManual.pdf> [<https://perma.cc/L3P3-2FS2>] (quoting state law by stating, "[i]f a public entity receives a complaint against it or a public employee for misconduct, and initiates an internal investigation, records relating to the investigation are exempt until the investigation is close or seventy-five days have passed from the date of the complaint.").

242. Olivia Rubin & Luke Barr, *Amid Protests, Effort to Repeal Controversial Police Law Makes Headway*, ABC NEWS (Jun. 5, 2020, 2:15PM), <https://abcnews.go.com/US/amid-protests-effort-repeal-controversial-police-law-makes/story?id=71089266> ("As protests over the killing of George Floyd continue across the country, momentum in New York to repeal a decades-old police transparency law appears to be gaining steam.").

243. N.Y. CIV. RIGHTS LAW § 50-a (McKinney 2020), *repealed by* N.Y. PUB. OFF. LAW § 96 (McKinney 2021).

244. N.Y. PUB. OFF. LAW § 86 (McKinney 2021) ("Technical infraction' means a minor rule violation by a person employed by a law enforcement agency solely related to the enforcement of administrative departmental rules that (a) do not involve interactions with members of the public, (b) are not of public concern, and (c) are not otherwise connected to such person's investigative, enforcement, training, supervision, or reporting responsibilities."); *see also* N.Y. PUB. OFF. LAW § 87 (McKinney) (New York's Freedom of Information Law).

245. N.Y. PUB. OFF. LAW § 87 (McKinney) (New York's Freedom of Information Law).

246. *NYPD Misconduct Complaint Database*, N.Y. C.L. UNION, <https://www.nyclu.org/en/campaigns/nypd-misconduct-database> [<https://perma.cc/2HM2->

inal conduct<sup>248</sup> (6% of all guilty allegations),<sup>249</sup> and violations of department rules and regulations, which cover a vast array of misconduct,<sup>250</sup> (58% of all guilty allegations).<sup>251</sup> The existing public database of disclosable records does not contain records related to violations of departmental rules and regulations.<sup>252</sup> Thus, although New York now has one of the most liberal disclosure laws in the United States,<sup>253</sup> it still allows many records of serious misconduct to stay hidden. Because technical infractions are the largest category of offenses appealed for arbitration by law enforcement officers,<sup>254</sup> New York's policy of withholding these records may be hiding systemic abuses and patterns of violations.

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D83E] (domestic violence incidents are not contained in the NYPD misconduct database. It can be argued that allegations of domestic violence meet the qualification of a technical infraction since it does not involve interactions with the public, are not of public concern, and may not be connected with a person's investigative, enforcement, training, supervision, or reporting responsibilities).

247. *Reforms to the NYPD Disciplinary System*, N.Y.C. POLICE DEP'T, <https://www1.nyc.gov/site/nypd/about/about-nypd/policy/nypd-disciplinary-system-reforms.page> [<https://perma.cc/7JCH-DSZQ>] (finding that domestic incidents were 5.3% of all cases in which uniformed service members were guilty).

248. *NYPD Misconduct Complaint Database*, *supra* note 246 (criminal conduct incidents are not contained in the NYPD misconduct database. It can be argued that allegations of off-duty criminal conduct meet the qualification of a technical infraction since it does not involve interactions with the public, are not of public concern, and may not be connected with a person's investigative, enforcement, training, supervision, or reporting responsibilities.).

249. *Reforms to the NYPD Disciplinary System*, *supra* note 247 (finding that criminal conduct was 6% of all cases in which uniformed service members were guilty).

250. *New York City Police Department Disciplinary System Penalty Guidelines*, N.Y.C. POLICE DEP'T (Jan. 15, 2021), [https://www1.nyc.gov/assets/nypd/downloads/pdf/public\\_information/disciplinary-system-penalty-guidelines-effective-01-15-2021-compet-.pdf](https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/disciplinary-system-penalty-guidelines-effective-01-15-2021-compet-.pdf) [<https://perma.cc/X7NL-C4SU>] (stating Schedule A and Schedule B misconducts are considered "minor" misconducts and include the failure to comply with proper driving rules and regulations, the failure to perform duties in connection with court appearances, obvious neglect or care of firearms, omitted entries departmental records, forms, or reports, and loss of departmental property).

251. *Reforms to the NYPD Disciplinary System*, *supra* note 247 (finding that Department rule violations were 58.1% of all cases in which uniformed service members were guilty).

252. *NYPD Misconduct Complaint Database*, *supra* note 246 (explaining that rules and regulations violation incidents are not contained in the NYPD misconduct database. It can be argued that allegations of departmental violations meet the qualification of a technical infraction since it may not involve interactions with the public, are not of public concern, and may not be connected with a person's investigative, enforcement, training, supervision, or reporting responsibilities).

253. N.Y. PUB. OFF. LAW § 87 (McKinney).

254. See Stephen Rushin, *Police Arbitration*, 74 VAND. L.REV. 1023, 1054 (2021) ("[I]t is important to recognize that the largest segment of cases (54.5%) involves technical violations of departmental policy. These can range from relatively serious violations of departmental policy [. . .] to relatively minor offenses.").

Allowing offenses related to technical infractions to be shielded from public disclosure enables law enforcement departments to hide their largest subcategory of misconduct that is disputed in arbitration.<sup>255</sup> These offenses would be barred from disclosure according to the law’s definition of a technical infraction: an offense solely related to the enforcement of administrative departmental rules that “(a) do not involve interactions with members of the public, (b) are not of public concern, and (c) are not otherwise connected to such person’s investigative, enforcement, training, supervision, or reporting responsibilities.”<sup>256</sup>

### 3. *Withhold Records of Pending Investigations*

Six states—Arizona,<sup>257</sup> Colorado,<sup>258</sup> Florida,<sup>259</sup> Georgia,<sup>260</sup> Tennessee,<sup>261</sup> and Wisconsin<sup>262</sup>—preclude the release of these documents pending disposition of the investigation. Investigations can vary in du-

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255. *Id.* (explaining that the largest segment of arbitration cases involves technical violations).

256. N.Y. PUB. OFF. LAW § 86 (McKinney 2021).

257. ARIZ. REV. STAT. ANN. § 38-1109 (2021) (“An employer shall not include in that portion of the personnel file of a law enforcement officer that is available for public inspection and copying about an investigation until the investigation is complete or the employer has discontinued the investigation.”).

258. COLO. REV. STAT. ANN. § 24-72-303 (West 2021) (“Upon completion of an internal investigation, including any appeals process, that examines the in-uniform or on-duty conduct of a peace officer, as described in part 1 of article 2.5 of title 16, related to an incident of alleged misconduct involving a member of the public, the entire investigation file, including the witness interviews, video and audio recordings, transcripts, documentary evidence, investigative notes, and final departmental decision is open for public inspection upon request.”).

259. FLA. STAT. ANN. § 112.533 (West 2020) (“A complaint filed against a law enforcement officer or correctional officer with a law enforcement agency or correctional agency and all information obtained pursuant to the investigation by the agency of the complaint is confidential and exempt until [. . .] the agency has either (1) concluded the investigation with a finding not to proceed with disciplinary action or to file charges, or (2) concluded the investigating with a finding to proceed with disciplinary action or to file charges.”).

260. GA. CODE ANN. § 50-18-72 (2021) (“Records consisting of material obtained in investigations related to the suspensions, firing, or investigation of complaints against public officers or employees until ten days after the same has been presented to the agency or an officer for action or the investigation is otherwise concluded or termination.”).

261. *See Schneider v. City of Jackson*, 226 S.W.3d 332, (Tenn. 2007) (Upon requesting police investigatory files, the court held for the issue to be remanded to determine “whether any of the police department records at issue are part of a pending, open, or ongoing criminal investigation.”).

262. WIS. STAT. ANN. § 19.36 (West 2021) (excluding from disclosure “information relating to the current investigation of a possible criminal offense or possible misconduct connected with employment by an employee prior to disposition of the investigation.”).

ration from a few days, to a few months, to several years.<sup>263</sup> Even with intervening legislation or department directives guiding the length of an investigation, some investigations may remain open indefinitely; the longest investigation in Philadelphia, PA was recorded lasting 1118 days.<sup>264</sup> Arizona attempts to limit this timeframe by mandating that misconduct investigations be concluded within 180 calendar days.<sup>265</sup> However, an exception in the policy allows agencies to extend the investigation if there is a criminal investigation involved, if the officer is unavailable, or if the accused officer waives the 180-day requirement.<sup>266</sup> Florida investigations are presumed to be inactive if no finding is made within 45 days after the complaint is filed.<sup>267</sup> Neither Georgia nor Wisconsin place time constraints on misconduct investigations. Georgia only allows the disclosure of material related to complaints against an officer ten days after the investigation has concluded or terminated,<sup>268</sup> and Wisconsin similarly excludes information related to a current investigation from public disclosure.<sup>269</sup>

#### 4. *Withhold Records of Unsubstantiated Allegations*

Only two states, Louisiana and Missouri, release all complaints that result in a sustained finding. Louisiana courts have held that law enforcement officers do not have an individual privacy interest in

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263. BA et al., *supra* note 202, at 6 (finding that the “[a]verage investigation length is twice as long as the legally mandated maximum time limit.”).

264. *Id.* at 7 (showing that the maximum days between IA filing to IA report was 1118 days). See also William Bender & Barbara Laker, *Philadelphia Detective, Under Investigation for Racial Incident, Busted for DUI and Threatening an Officer*, PHILA. INQUIRER (Jul. 27, 2020), <https://www.inquirer.com/news/philadelphia/philadelphia-police-dui-komorowski-racial-slur-20200727.html> (stating that in 2020, a Philadelphia homicide detective, with an open 2018 allegation for using a racial slur, was arrested for a DUI. Even though the detective was caught on video using a racial slur, “the 2018 incident [was] still under investigation by Internal Affairs” when the detective was arraigned on charges of DUI).

265. ARIZ. REV. STAT. ANN. § 38-1110 (2021) (“An employer shall make a good faith effort to complete any investigation of employee misconduct within one hundred eighty calendar days after the employer receives notice of the allegation by a person authorized by the employer to initiate an investigation of the misconduct.”).

266. *Id.*

267. FLA. STAT. ANN. § 112.533 (West 2020).

268. GA. CODE ANN. § 50-18-72 (2021) (“Records consisting of material obtained in investigations related to the suspension, firing, or investigation of complaints against public officers or employees until ten days after [ . . . ] the investigation is otherwise concluded or terminated.”).

269. WIS. STAT. ANN. § 19.36 (West 2021) (excluding “information relating to the current investigation of a possible criminal offense or possible misconduct connected with employment by an employee prior to disposition of the investigation.”).

complaint files.<sup>270</sup> Similarly, Missouri courts have also held that police officers lack a protectable privacy interest in substantiated on-the-job misconduct.<sup>271</sup> However, these states prevent the disclosure of unsubstantiated complaints.

### 5. *Withhold Records of Undisciplined Allegations*

Seven states restrict disclosure even further to complaints where the allegation was sustained *and* specific discipline was imposed on the offending officer. Indiana only releases information if the officer receives a suspension, demotion, or is terminated from the department.<sup>272</sup> Iowa releases this information if an officer was demoted, was discharged, or resigned in lieu of termination.<sup>273</sup> Oklahoma releases these records if the disciplinary action resulted in loss of pay, suspension, demotion, or termination.<sup>274</sup> Texas allows for a public inspection of the records only if the disciplinary action resulted in suspension or loss of pay.<sup>275</sup> Illinois allows disclosure for those investigations in which the final outcome resulted in imposed discipline.<sup>276</sup> Maine allows for disclosure if disciplinary action is taken; what must be disclosed is the final written decision which “must state the conduct or other facts on the basis of which disciplinary action is being imposed

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270. *City of Baton Rouge v. Cap. City Press, L.L.C.*, 4 So.3d 807, 821 (La. Ct. App. 2008) (not finding “[a]ny legitimate reasonable expectations of privacy on behalf of any of the police officers who were investigated.”).

271. *Chasoff v. Mokwa*, 466 S.W.3d 571, 581 (Mo. Ct. App. 2015) (holding that “[p]olice officers have no right under the Sunshine Law, the U.S. or Missouri Constitutions, common law, or Missouri statutes to compel closure of public records regarding the officers’ substantiated misconduct in the performance of their official duties.”).

272. IND. CODE ANN. § 5-14-3-4 (West 2021) (exemption from disclosure except for “the factual basis for a disciplinary action in which final action has been taken and that resulted in the employee being suspended, demoted, or discharged.”).

273. IOWA CODE ANN. § 22.7 (West 2021) (“The fact that the individual resigned in lieu of termination, was discharged, or was demoted as the result of a disciplinary action, and the documented reasons and rationale for the resignation in lieu of termination, the discharge, or the demotion” shall be public records).

274. OKLA. STAT. ANN. tit. 51, § 22.7 (West 2021) (Records available for public inspection and copying include “any final disciplinary action resulting in loss of pay, suspension, demotion of position, or termination.”).

275. *See* TEX. LOC. GOV’T CODE ANN. § 143.089 (West 2021) (Personnel file on a police officer must contain any document “relating to alleged misconduct [. . .] from the employing department and if the misconduct resulted in disciplinary action by the employing department.”); *see also* TEX. LOC. GOV’T CODE ANN. § 143.057 (West 2021) (“[P]ublic information means information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business.”); *id.* (Notice of disciplinary action includes “indefinite suspension, a suspension, a promotional bypass, or a recommended demotion.”).

276. 5 ILL. COMP. STAT. ANN. 140/7.

and the conclusions of the acting authority as to the reasons for that action.”<sup>277</sup> Finally, Minnesota only allows disclosure for the final disposition of any disciplinary action.<sup>278</sup>

#### 6. *Apply a Balancing Test for Disclosure*

Some states only release misconduct information after a balancing test that weighs the public interest in disclosure against the officer’s privacy interest in nondisclosure.<sup>279</sup> However, few of these states specifically define what information is private. Michigan exempts from disclosure information of a “personal nature”<sup>280</sup> while New Hampshire exempts personnel files whose disclosure would constitute an “invasion of privacy.”<sup>281</sup> Oregon exempts from disclosure personnel disciplinary actions, or materials or documents supporting such actions, unless the “public interest requires disclosure in the particular instance.”<sup>282</sup> South Carolina allows public bodies to exempt from disclosure information “of a personal nature where the public disclosure thereof would constitute an unreasonable invasion of personal privacy,”<sup>283</sup> and West Virginia exempts disclosure unless there is a “public interest by clear and convincing evidence” that disclosure is wanted in the particular instance.<sup>284</sup>

Some state courts have preempted legislatures by creating a judicial balancing test that does not exist otherwise under state law. For example, the Vermont legislature excludes from disclosure documents related to discipline of any employee of a public agency,<sup>285</sup> but, the Vermont Supreme Court has found an interest in disclosure and re-

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277. ME. REV. STAT. ANN. tit. 30-A, § 2702 (2021).

278. MINN. STAT. ANN. § 13.43 (West 2021).

279. See Kate Levine, *Discipline and Policing*, 68 DUKE L.J. 839, 902 (2019) (describing how the balancing occurs and how transparency is rare since “judges can seal records, impose gag orders, close the courtroom, and make other rulings that protect information against broad dissemination.”).

280. MICH. COMP. LAWS ANN. § 15.243 (West 2021).

281. N.H. REV. STAT. ANN. § 91-A:5 (2021).

282. OR. REV. STAT. ANN. § 192.345 (West 2021) (listing public records that are exempt from disclosure “unless the public interest requires disclosure in the particular instance”).

283. S.C. CODE ANN. § 30-4-40 (2017) (providing examples of information of a personal nature but clarifying that the list is not all inclusive of information that can be considered personal).

284. W. VA. CODE ANN. § 29B-1-4 (West 2021).

285. VT. STAT. ANN. tit. 1, § 317 (West 2021) (“Personal documents relating to an individual, including information in any files maintained to hire, evaluate, promote, or discipline any employee of a public agency” are exempt from public inspection and copying).

quires courts to conduct a balancing test that balances the public interest in disclosure against the harm to the individual employee.<sup>286</sup>

### 7. *Withhold Incident Details*

North Carolina<sup>287</sup> and Pennsylvania<sup>288</sup> only release the *fact* of a discharge or demotion but not the investigative file that led to those decisions.

### 8. *Prohibit Disclosure of All Records*

Lastly, many states do not disclose records regarding officer misconduct to the public altogether. Alabama,<sup>289</sup> Alaska,<sup>290</sup> Delaware,<sup>291</sup> Idaho,<sup>292</sup> Kansas,<sup>293</sup> Maryland,<sup>294</sup> Mississippi,<sup>295</sup> Montana,<sup>296</sup> Ne-

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286. *Rutland Herald v. City of Rutland*, 84 A.3d 821, 825 (Vt. 2013) (finding that “there is a significant public interest in knowing how the police department supervises its employees and responds to allegations of misconduct” and holding that records should be reviewed “in camera before it could determine if their disclosure would advance the asserted public interest”).

287. N.C. GEN. STAT. ANN. § 153A-98 (2018) (Matters of public record include the “date and type of each promotion, demotion, transfer, suspension, separation or other change in position classification with that county” such information is only disclosed if it relates to a dismissal.).

288. 65 PA. STAT. AND CONS. STAT. ANN. § 67.708 (West 2009) (stating that exceptions to public access include “information regarding discipline, demotion or discharge contained in a personnel file.” However, it does not exempt access to “the final action of an agency that results in demotion or discharge.”).

289. ALA. CODE § 12-21-3.1 (2021) (“Law enforcement investigative reports and related investigative material are not public records.”).

290. *See* ALASKA STAT. ANN. § 40.25.120 (West 2019) (excluding records or information compiled for law enforcement purposes); *see also* ALASKA STAT. ANN. § 39.25.080 (West 2021) (allowing the inspection of personnel records only if the “state employee has been dismissed or disciplined for a violation of interference or failure to cooperate with the Legislative Budget and Audit Committee.”).

291. DEL. CODE ANN. tit. 29, § 10002 (2021).

292. IDAHO CODE § 74-106 (2021) (excluding from disclosure “records of a current or former employee other than the employee’s duration of employment with the association, position held and location of employment.”).

293. KAN. STAT. ANN. § 45-221 (West 2021) (excluding “personnel records, performance ratings or individually identifiable records pertaining to employees or applicants for employment”).

294. MD. CODE ANN. § 4-311 (West 2021) (requiring that custodians “deny inspection of a personnel record of an individual”).

295. MISS. CODE ANN. § 25-1-100 (West 2015) (explaining that exemption from public disclosure includes “personnel records and applications for employment in the possession of a public body.”).

296. *Billings Gazette v. City of Billings*, 313 P.3d 129, 141 (2013) (holding that there is a “reasonable expectation of privacy in [employees’] identities with regards to internal disciplinary proceedings clearly outweighs the limited merits of public disclosure.”).

braska,<sup>297</sup> Nevada,<sup>298</sup> New Jersey,<sup>299</sup> South Dakota,<sup>300</sup> Virginia,<sup>301</sup> and Wyoming<sup>302</sup> prohibit the release of any police disciplinary records, including citizen complaints filed against police.

### B. *Administrative Barriers to Disclosure*

Even for the states that do allow some level of disclosure, there are difficulties in physically reviewing these records due to lengthy disciplinary procedures that may wrongly discontinue investigations or overturn investigations that have been sustained. From the initiation of an investigation, to the internal misconduct hearing, to the grievance filed demanding an arbitration on the issue—several complaints that contain valuable information may be hidden.

The process of investigating alleged instances of misconduct is lengthy and bureaucratic. This process includes receiving and processing internal and external complaints, investigating allegations, and affording the accused officer due process before any final action is

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297. NEB. REV. STAT. ANN. § 84-712.05 (West 2021) (explaining that records that may be withheld from the public includes “records developed or received by law enforcement agencies and other public bodies charges with duties of investigative or examination of persons, institutions, or businesses, when the records constitute a part of the examination, investigation, intelligence information, citizen complaints or inquires [ . . . ]”).

298. NEV. ADMIN. CODE § 284.718 (2021) (stating that confidential records include records that relate to “the employee’s conduct, including any disciplinary actions taken against the employee.”).

299. See N.J. STAT. ANN. § 47:1A-10 (West 2002) (“[R]ecords relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access”); see also State of New Jersey Office of the Attorney General, *Attorney General Law Enforcement Directive No. 2020-5*, Jun. 15, 2020, [https://www.nj.gov/oag/dcj/agguide/directives/ag-Directive-2020-5\\_Major-Discipline.pdf](https://www.nj.gov/oag/dcj/agguide/directives/ag-Directive-2020-5_Major-Discipline.pdf) (quoting the Attorney General of New Jersey stating that “it is time to end the practice of protecting the few to the detriment of the many” and creating a prospective directive which would require “on an annual basis, every law enforcement agency shall publish on its public website a report summarizing the types of complaints received and the dispositions of those complaints [ . . . ] statistical in nature.”).

300. S.D. CODIFIED LAWS § 1-27-1.5 (2021).

301. VA. CODE ANN. § 2.2-3706 (West 2021) (explaining that files excluded from mandatory disclosure includes “records of (i) background investigations of applicants for law-enforcement agency employment, (ii) administrative investigations relating to allegations of wrongdoing by employees of a law-enforcement agency, and (iii) other administrative investigations conducted by law-enforcement agencies that are made confidential by law.”).

302. WYO. STAT. ANN. § 16-4-203 (West 2020) (stating that custodians shall deny the right to inspect “records or information compiled solely for purposes of investigating violations of, and enforcing, internal personnel rules or personnel policies the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”).

taken. Even though this process varies by the agency, many follow the disciplinary procedure, referred to as the “Employee Misconduct-Model Policy” that is advocated by the International Association of Chiefs of Police.<sup>303</sup> For example, the disciplinary procedure at the Philadelphia Police Department’s internal affairs section involves investigating allegations to determine if there is sufficient evidence to sustain claims.<sup>304</sup> Once an allegation is sustained, the case goes through several additional procedures that could include diversionary practices, where the department offers the officer training instead of discipline,<sup>305</sup> or imposing official charges of misconduct.<sup>306</sup> If charged with misconduct, an officer may plead guilty or elect to contest the charges in an official administrative hearing.<sup>307</sup> Each of these pathways provides an additional occasion for misconduct to go unrecorded and to become physically inaccessible, as noted in the following subsections.

### *1. Applying an Incorrect Standard of Proof at Administrative Hearings*

Administrative police disciplinary hearings utilize varying standards of proof depending on the jurisdiction.<sup>308</sup> However, even with

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303. See *Investigation of Allegations of Employee Misconduct*, IACP LAW ENFORCEMENT POL’Y CTR. (Apr. 2019), <https://www.theiacp.org/sites/default/files/2019-04/Employee%20Misconduct%20Policy%20-%202019.pdf> (Describing the law enforcement process of “accepting, processing, and investigating complaints concerning allegations of employee misconduct”).

304. *Id.* at 6. (showing the four different Internal Affairs findings: Unfounded is when “the investigation determined the alleged act did not occur.” Exonerated is when “the investigation determined the alleged act did occur, but the act was lawful and within PPD policy.” Not sustained is when “the investigation could not determine, based on the evidence, whether the alleged act did or did not occur.” Sustained is when “the investigation determined the alleged act occurred and was not within PPD policy.”)

305. *Id.* at 10 (“The Charging Unit ‘will either (a) authorize the officer to receive formal training and counseling to address the misconduct or (b) authorize formal disciplinary charges.’”).

306. *Id.*

307. *Id.* at 8 (“Life of a PPD misconduct allegation” flowchart showing that once formal discipline charges are delivered to an officer, the officer may either plead not guilty or guilty).

308. *Compare Police Discipline*, CHI. POLICE BD., [https://www.chicago.gov/city/en/depts/cpb/provdrs/police\\_discipline.html](https://www.chicago.gov/city/en/depts/cpb/provdrs/police_discipline.html) (explaining that accused officers are “presumed innocent and [are] entitled to a fair hearing at which the Superintendent has the burden of proving guilt by a preponderance of the evidence.”), *with* *Schinkel v. Bd. of Fire and Police Comm’n of the Village of Algonquin*, 634 N.E.2d 1212, 1220 (Ill. App. Ct. 1994) (finding that even though “the preponderance of the evidence standard of proof generally applies to police board disciplinary proceedings [. . .] a properly enacted police board rule may provide greater protections for employees.” The case

established standards, it is common for investigators and fact-finding bodies to inappropriately apply a higher standard of proof.<sup>309</sup> A survey of the Philadelphia Police Board of Inquiry panelists (department personnel who determine whether or not officers are guilty) found that only 42.4% of panelists selected the correct standard of proof for their administrative hearings (“a preponderance of the evidence”)<sup>310</sup> while 50.9% selected an incorrect higher standard (either “clear and convincing evidence” or “beyond a reasonable doubt”).<sup>311</sup> Overall, 57.6% of panelists selected the wrong standard.<sup>312</sup> The inappropriate applications of higher standards of proof is but one way how police misconduct records rarely become accessible.

## 2. *Applying a Higher Standard of Proof at Arbitration*

When officers are found guilty at administrative disciplinary hearings, most departments allow them to appeal the decision to an arbitrator.<sup>313</sup> Those arbitration proceedings generally use a different standard than the original administrative hearing—typically a “just cause” standard, which means that the arbitrator can determine themselves the appropriate standard to apply.<sup>314</sup> For example, in the Phila-

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was remanded to determine if it was proper for the board to adopt a clear and convincing evidence standard).

309. *Investigation of the Cleveland Division of Police*, U.S. DEP’T OF JUST. C.R. Div. (Dec. 4, 2014), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland\\_division\\_of\\_police\\_findings\\_letter.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland_division_of_police_findings_letter.pdf) (explaining that in reviewing the Cleveland Police Internal Affairs process, the Department of Justice discovered that the “CPD’s Internal Affairs Unit [. . .] will only find that an officer violated Division policy if the evidence against the officer proves, beyond a reasonable doubt, that an officer engaged in misconduct—an unreasonably high standard reserved for criminal prosecutions and inappropriate in this context.”).

310. PHILA. POLICE ADVISORY COMM’N, *COLLABORATIVE REVIEW AND REFORM OF THE PPD POLICE BOARD OF INQUIRY: POLICY, PRACTICE, AND CUSTOM REPORT 31* (2021), <https://www.phila.gov/media/20210521150500/Collaborative-Review-and-Reform-of-the-PPD-Police-Board-of-Inquiry.pdf> (showing that out of 59 responses, 42.4% selected preponderance of the evidence as the standard).

311. *Id.* (showing that out of 59 responses, 37.3% selected “clear and convincing evidence” and 13.6% selected “beyond a reasonable doubt.”).

312. *Id.*

313. See Stephen Rushin, *Police Arbitration*, 74 VAND. L. REV. 1023, 1023 (2021) (“Before punishing an officer for professional misconduct, police departments often provide the officer with an opportunity to file an appeal. In many police departments, this appeals process culminates in a hearing before an arbitrator.”).

314. *Id.* (“[J]ust cause standards generally provide arbitrators with broad authority to review the sufficiency of the evidence presented against the officer, the procedural due process protections afforded to the officer during the investigation and earlier adjudication, the proportionality of the punishment to the alleged offense, and the consistency of the punishment with that given to other officers accused of similar wrongdoing.”).

delphia Police Board of Inquiry, the panel tasked with deciding whether an officer is guilty of a misconduct charge, must make its determination based on a preponderance of evidence.<sup>315</sup> However, at the arbitration hearing, some arbitrators may decide to hold the City of Philadelphia to a higher standard of proof for its disciplinary decisions: either beyond a reasonable doubt, a just cause standard, or a clear and convincing evidence standard.<sup>316</sup> In many cases, this allows the arbitrator to reverse the discipline originally imposed without a change in evidence.<sup>317</sup> The City of Philadelphia has proposed changes to the Collective Bargaining Agreement that would universally set the standard of proof at the preponderance level for both the original administrative hearing and the subsequent arbitration hearing.<sup>318</sup> This procedural change could possibly have an enormous impact on the decisions rendered by arbitrators, which currently have a reinstatement rate of almost 62% for terminated Philadelphia officers.<sup>319</sup> A review of arbitration cases across major metropolitan areas found that police termination incidents are upheld 64.3% of the time when the arbitrator uses a preponderance of the evidence standard, compared to only 57.9% when they use a clear and convincing evidence standard, and only 50.9% when using no standard.<sup>320</sup> Overall, the misalignment of

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315. PHILA. POLICE DEP'T, POLICE BOARD OF INQUIRY DEPARTMENT ADVOCATE: BOARD MEMBER TRAINING 11, <https://www.dropbox.com/s/cznheppbml52vq4/PBI-LessonPlan.docx?dl=0> [<https://perma.cc/GH8M-6T4Z>] (“Verdict by a preponderance of the evidence 51%, more likely than not, the accused committed the offense.”).

316. Fraternal Order of Police, Lodge No. 5 v. The City of Philadelphia, AAA Case No. 01-16-002-3863, CITY OF PHILADELPHIA (Jan. 22, 2019) (stating that in reaching their decision, the arbitrator describes that “the burden of proof in discharge cases is the subject of considerable debate. Typically, and certainly under the terms of the labor agreement between the Fraternal Order of Police and the City of Philadelphia, the employer is required to prove the elements of the offense for which the employee has been discharged by a preponderance of the evidence.” However, the arbitrator parts from that history and admits to “utilize[ing] [a] reasonable doubt standard” and in this particular case, decided to use a clear and convincing standard in deciding that “termination [was] too extreme.”).

317. William Bender & David Gambacorta, *Fired, Then Rehired*, PHILA. INQUIRER (Sept. 12, 2019), <https://www.inquirer.com/news/a/philadelphia-police-problem-union-misconduct-secret-20190912.html> (listing several police arbitration grievances that include cases whereby arbitrators overturned or reduced discipline).

318. *Initial Bargaining Proposals for Successor Agreement to Begin on July 1, 2021 with Fraternal Order of Police Lodge 5*, CITY OF PHILA. (Dec. 30, 2020), [https://fop5testems.velarium.com/UploadedDocuments/CMS\\_doc/City-Initial-Bargaining-Proposals-to-FOP-12-30-2020.pdf](https://fop5testems.velarium.com/UploadedDocuments/CMS_doc/City-Initial-Bargaining-Proposals-to-FOP-12-30-2020.pdf).

319. Stephen Rushin, *Police Disciplinary Appeals*, 167 U. PA. L. REV. 545, 580 (2019) (showing that out of 71 Philadelphia Police officers that were fired, 44 were rehired, a total of 61.97% are rehired).

320. Tyler Adams, *Factors in Police Misconduct Arbitration Outcomes: What Does It Take to Fire a Bad Cop?*, 32 ABA J. LAB. & EMP. L. 133, 140-41 (2016) (showing the quantum of proof used by arbitrators in police discharge cases).

standards of proof between disciplinary hearings and the arbitration stage allows for decisions in many cases to be overturned.

### 3. *Lack of Standards for Penalizing Misconduct*

Public access to records of police misconduct is further limited by a lack of default penalties in many police departments for sustained misconduct, which allows agencies to impose a varying range of penalties for a particular type of offense.<sup>321</sup> For example, the overwhelming majority of misconduct classifications of the Philadelphia Police Department allow for discipline as mild as a reprimand and as severe as termination,<sup>322</sup> which allows the Police Board of Inquiry, the Police Commissioner, and arbitrators the ability to select any penalty within the approved range. Out of all sustained allegations, 76% result in no disciplinary action at all.<sup>323</sup> Only 0.5% of all civilian allegations result in any recorded consequence for officers beyond a reprimand, and among those, 84% were suspensions of less than one week.<sup>324</sup> This range of discipline is common in many departments, meaning that the availability of misconduct records can vary widely in states that base disclosure on whether discipline was imposed.<sup>325</sup>

### 4. *Police Contracts Allowing Records to be Expunged*

If a requestor can overcome the many hurdles discussed above, their attempt to access this information may be futile if the records have been expunged. Many states and law enforcement agencies, including 16 of the 25 largest departments in the United States,<sup>326</sup> ex-

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321. Darrel W. Stephens, *Police Discipline: A Case for Change*, NAT'L INST. OF JUST. (June 2011), <https://www.ojp.gov/pdffiles1/nij/234052.pdf> (“[A] number of departments have developed matrices that spell out the options for sanctions when there is a sustained violation of the rules of conduct or other policies.”).

322. *Disciplinary Code*, PHILA. POLICE DEP'T (Jul. 2014), <https://www.phillypolice.com/assets/accountability/PPD-Disciplinary-Code-July-2014.pdf> (allowing for a reprimand to dismissal for many charges, including first and second offenses).

323. BA et al., *supra* note 202, at 2 (finding that 76% of sustained allegations result only in training and counseling).

324. *Id.* (“[O]nly 0.5% of civilian allegations result in any recorded consequences for officers beyond a reprimand”).

325. See 65 PA. STAT. AND CONS. STAT. ANN. § 67.708 (West 2009) (stating that exceptions for public records include “information regarding discipline, demotion or discharge contained in a personnel file, however, it does not provide an exception for final action of an agency that results in demotion or discharge”); see also OKLA. STAT. ANN. tit. 51, § 22.7 (West 2021) (records available for public inspection and copying include “any final disciplinary action resulting in loss of pay, suspension, demotion of position, or termination”).

326. Stephen Rushin, *Police Union Contracts*, 68 DUKE L.J. 1191, 1208-11 (2017).

punge misconduct records if a predetermined timeframe has elapsed since the record was made.<sup>327</sup> In Florida, for instance, it is common for law enforcement union contracts to contain provisions allowing for the expungement of misconduct records;<sup>328</sup> the Cities of Coral Gables<sup>329</sup> and Miami<sup>330</sup> have provisions in their labor agreements with their police unions that allow for the destruction of these records after a period of time has passed. And New York City, home to the largest law enforcement agency in the country, allows for the destruction of misconduct records if specified either in a union contract—which it currently is<sup>331</sup>—or in a settlement agreement between the NYPD and the officer.<sup>332</sup>

Until just recently, the second largest police department in the country, the Chicago Police Department (CPD), allowed for the destruction of all disciplinary investigative files and records five or seven years after the date of the incident, pursuant to its contract with the police union.<sup>333</sup> That contract was changed in August 2021 to en-

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327. *See id.* at 1228–29 (finding that “many police union contracts mandate the destruction of disciplinary records from officer personnel files after a set period”).

328. Dhammika Dharmapala, Richard McAdams & John Rappaport, *Collective Bargaining Rights and Police Misconduct: Evidence from Florida*, 38 J. OF L., ECON., AND ORG. 1 at 32 (2022) (discussing how common Florida Law Enforcement Officer Bill of Rights (LEOBOR) includes “a tightened time limit on internal affairs investigations and expungement of old records.”).

329. *Id.* (discussing the process whereby Florida law enforcement agencies expunge older disciplinary records “even when the officer is found to have engaged in misconduct”).

330. Walter E. Headley, Jr. *Agreement Between City of Miami, Miami, Florida and Fraternal Order of Police*, MIAMI LODGE NO. 20 (Sept. 30, 2015), <http://egov.ci.miami.fl.us/Legistarweb/Attachments/73969.pdf> (“Records retained by Internal Affairs shall be destroyed after a period of five (5) years beyond either the bargaining unit member’s termination date, retirement date or unless otherwise directed by state law.”).

331. James F. Hanley, *Executed Contract: Police Officers*, N.Y.C OFF. OF LAB. REL. 19 (Sept. 3, 2010), <https://www1.nyc.gov/assets/olr/downloads/pdf/collectivebargaining/cbu79-police-patrolmens-benevolent-association-080106-to-073110.pdf> (“Where an employee has been charged with a Schedule A violation . . . and such case is heard in the trial room and disposition of the charge at trial or on review or appeal therefrom is other than guilty, the employee concerned may, after 2 years from such disposition, petition the Police Commissioner for a review for the purpose of expunging the record of the case.”).

332. *Id.* (“Records covered by this item may be destroyed before this retention period has been reached, if specified either in a union contract or settlement between the employer and employee.”).

333. AGREEMENT BETWEEN THE CITY OF CHICAGO DEP’T OF POLICE AND THE FRATERNAL ORDER OF POLICE CHICAGO LODGE NO. 7, (July 1, 2012) <https://static1.squarespace.com/static/559fbf2be4b08ef197467542/t/55a26d14e4b02ee06b2a8625/1436708116462/Chicagopolicecontract.pdf> (“All disciplinary investigation files, disciplinary [. . .] IAD disciplinary records, and any other disciplinary record or summary of such record other than records related to Police

sure that all disciplinary records will be retained indefinitely.<sup>334</sup> In Philadelphia, which employs over 6,000 police officers, the PPD's contract with the Philadelphia Fraternal Order of Police allows for the removal of records after 2 years if the officer received a reprimand, or less, for the misconduct.<sup>335</sup> These records constitute an overwhelming majority of all PPD misconduct records.<sup>336</sup>

### 5. *Freedom of Information Law Roadblocks*

Obtaining records pursuant to the federal Freedom of Information Act,<sup>337</sup> or equivalent state laws (collectively, hereinafter, "FOI laws"),<sup>338</sup> can be tedious, frustrating, and often unsuccessful; applicants frequently experience long processing delays and unsatisfactory responses.<sup>339</sup> FOI laws can be an alternative avenue for those seeking police misconduct records when neither the police department nor the prosecutor releases the information otherwise.<sup>340</sup> With respect to police misconduct records, typically the custodian of these records is the law enforcement agency itself,<sup>341</sup> though in some cases the custodian

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Board cases, will be destroyed five (5) years after the date of the incident or the date upon which the violation is discovered, whichever is longer, except that not sustained filed alleging criminal conduct or excessive force shall be retained for a period of seven (7) years after the date of the incident or the date upon which the violation is discovered, which is longer.").

334. Chicago, Ill., Ordinance (Aug. 19, 2021), <https://www.civicfed.org/sites/default/files/o2021-3449.pdf>.

335. FRATERNAL ORDER OF POLICE LODGE NO. 5, CONTRACT BETWEEN THE CITY OF PHILADELPHIA AND FRATERNAL ORDER OF POLICE LODGE NO. 5 FOR THE TERM JULY 1, 2009 THROUGH JUNE 30, 2014, at 74 (2010), [https://static1.squarespace.com/static/559fbf2be4b08ef197467542/t/5ab198e988251b8f85cbb1fa/1521588458037/2010\\_Master\\_FOP\\_Contract\\_-\\_Police\\_booklet.pdf](https://static1.squarespace.com/static/559fbf2be4b08ef197467542/t/5ab198e988251b8f85cbb1fa/1521588458037/2010_Master_FOP_Contract_-_Police_booklet.pdf) [<https://perma.cc/DV35-V5JS>].

336. BA et al., *supra* note 202, at 2 ("[O]nly 0.5% of civilian allegations [against PPD officers] result in any recorded consequences for officers beyond a reprimand.").

337. 5 U.S.C.A. § 552.

338. Joseph Wenner, *Who Watches the Watchmen's Tape? FOIA's Categorical Exemptions and Police Body-Worn Cameras*, 2016 U. CHI. LEGAL F. 873, 875 (2016) ("Although state statutes vary in their details and procedures, most follow the broad contours of the federal Freedom of Information Act.").

339. Justin Cox, *Maximizing Information's Freedom: The Nuts, Bolts, and Levers of FOIA*, 13 N.Y. CITY L. REV. 387, 389 (2010).

340. See *The Contractor's Secret Weapon: Using FOIA When Asserting a Claim*, THE PROCUREMENT LAWYER (A.B.A., CHI., ILL.), at 14, 14. ("FOIA is such a formidable weapon, in part, because there are relatively few restrictions on who can submit requests, to whom those requests can be directed, what can be requested, and where the requests must be directed.").

341. See, e.g., *FOIL Requests*, NYPD, <https://www1.nyc.gov/site/nypd/bureaus/administrative/document-production-foil-requests.page> [<https://perma.cc/BY2P-SA7U>] (explaining that initial request for NYPD records must be delivered to the Legal Bureau at One Police Plaza, and if there is a denial of the request, an appeal may be submitted to the NYPD appeals officer).

may be a civilian review board, which may not have direct access to these records.<sup>342</sup> Once a request is submitted to a custodian, state statutes vary on the time within which the custodian is required to reply. In one request for information to the Chicago Civilian Office of Police Accountability, the oversight agency for the Chicago Police Department, it took roughly five months to receive a response with data.<sup>343</sup> In another instance, it took the Chicago Reporter 14 months of requests, delays, and appeals to receive information from the Chicago Police Department.<sup>344</sup>

FOI laws detail several reasons how law enforcement agencies may reject a FOI request,<sup>345</sup> and there are examples highlighting how FOI laws permit law enforcement agencies to deny requests if the disclosure could reasonably interfere with enforcement proceedings.<sup>346</sup> There are also accounts of law enforcement departments that rubber stamp FOI rejection letters.<sup>347</sup> Due to the current landscape of FOI practice as it relates to law enforcement records, FOI laws and procedures cannot be relied upon to adequately disclose police misconduct records and in a timely fashion.

Overall, Part III highlights the existing landscape of accessing police disciplinary records. States have varying degrees of disclosure, and even the states that do allow some form of disclosure, internal processes and systems make it difficult to obtain necessary docu-

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342. Letter from Tyra Sherese Peterson, Paralegal/FOIA Officer, Chicago Civilian Office of Police Accountability, to Sam Stecklow, Reporter, Invisible Inst. (Aug. 28, 2018), <https://www.dropbox.com/sh/341tgxidhxgiqv/AACqQvj50X21-nNGbfQeyhMSa?dl=0&preview=425+Response.pdf> [https://perma.cc/JTV9-RHFG] (stating that COPA has limited datasets, has only been granted partial access to the database, and the Chicago Police Department has not provided COPA with the relationships between tables in CLEAR database, thereby limiting search capabilities).

343. For original request, see Letter from Sam Stecklow, Reporter, Invisible Institute, to Chicago Civilian Office of Police Accountability (Mar. 7, 2018), <https://www.dropbox.com/sh/341tgxidhxgiqv/AACqQvj50X21-nNGbfQeyhMSa?dl=0&preview=FOIA+Request+Letter+2018-03-07.pdf> [https://perma.cc/Y3FV-6RHU]. For return request, see Letter from Tyra Sherese Peterson to Sam Stecklow, *supra* note 342.

344. Matt Kiefer, *How the Chicago Police Department Fought—and Ultimately Lost—Its FOIA Battle to Keep Cop Names from the Public*, CHI. REP. (Aug. 28, 2019), <https://www.chicagoreporter.com/how-the-chicago-police-department-fought-and-ultimately-lost-its-foia-battle-to-keep-cop-names-from-the-public/>.

345. Evan G. Hebert, *To Protect, Serve, and Inform: Freedom of Information Act Requests and Police Accountability*, 19 TEX. TECH ADMIN. L.J. 271, 285 (2018) (“Police frequently rely on four arguments when refusing to release information about police personnel files.”).

346. See Wenner, *supra* note 338, at 881–82.

347. Mary M. Cheh, *Making Freedom of Information Laws Actually Work: The Case of the District of Columbia*, 13 UDC L. REV. 335, 346 n.66 (2010).

ments. Reform is needed to shed light on instances of misconduct. Legislation to accomplish this must not exclude certain categories of allegations from disclosure if the law enforcement agencies are left to make these determinations. Part III shows that even minor, unsubstantiated, undisciplined, and overturned misconduct records may carry tremendous value for defendants. As Part I and II have described, these records can be essential to litigants during pre-trial criminal proceedings. A complete overhaul is required. The reforms that have been executed thus far are helpful, but more is needed. Part VI will discuss what reforms are specifically needed and the possible consequences if they are enacted.

## PART V.

### POSSIBLE RISKS OF BROADER DISCLOSURE

When considering police reform, many legislators and regulators frequently consider how the reforms may negatively impact police officers. For example, former Attorney General Jeff Sessions precluded the DOJ from interfering with the oversight of criticized police departments, ostensibly out of fear that the safety of police officers may be put in jeopardy,<sup>348</sup> and Senator Cory Booker has stated that he will continue to fight for police reform that keeps “communities *and police officers* safe.”<sup>349</sup> These officer safety concerns include threats to physical safety, mental health, job security and reputation, and the collateral consequences of the exposure of records, including loss of income, family separation, and ostracization. This section will briefly address a few of these concerns and provide evidence that these concerns are largely unsupported.

#### A. *Threats to Physical Safety of Police Officers*

One theoretical consequence of releasing police misconduct information is the potential for creating threats to the physical safety of police officers.<sup>350</sup> Some may worry that once records are released, and

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348. Roger Michalski & Stephen Rushin, *Police Executive Opinions of Legal Regulation*, 2018 U. ILL. L. REV. 1841, 1843.

349. Press Release, Sen. Cory Booker, Booker Statement on Bipartisan Policing Reform Negotiations (Sept. 22, 2021), <https://www.booker.senate.gov/news/press/booker-statement-on-bipartisan-policing-reform-negotiations>.

350. See Nate Jones, *Public Records Laws Shield Police from Scrutiny — and Accountability*, WASH. POST (July 30, 2021), [https://www.washingtonpost.com/investigations/public-records-laws-shield-police-from-scrutiny—and-accountability/2021/07/29/be401388-a794-11eb-bca5-048b2759a489\\_story.html](https://www.washingtonpost.com/investigations/public-records-laws-shield-police-from-scrutiny—and-accountability/2021/07/29/be401388-a794-11eb-bca5-048b2759a489_story.html) (“The rationale for the [disclosure] exemptions includes ensuring officer safety.”).

the identity of officers accused of misconduct is known, those officers and their families may face harassment, threats, or physical harm.

This concern, however, is mainly articulated by the police unions and the law enforcement members of those respective unions.<sup>351</sup> However, when law enforcement administrators were asked to weigh in on this issue, their responses did not overwhelmingly indicate that their officers' physical safety was at risk.<sup>352</sup> Out of 344 survey respondents, only one "indicated that an officer had experienced physical harm as a result of disclosure, and it was unclear from the response whether the incident involved actual or threatened physical harm."<sup>353</sup>

Most recently, since the death of George Floyd, there have been more state and national datasets containing information on identifiable use of force misconduct,<sup>354</sup> with no accompanying allegation that the databases threatened an officer's safety. There have also been databases created to highlight officers who have allegedly expressed racist, sexist, and other biased comments,<sup>355</sup> one of which resulted in Philadelphia Police Department personnel filing a defamation lawsuit regarding their inclusion in the database.<sup>356</sup> An attorney in the PPD who was included in the database filed a writ of certiorari to the Supreme Court of the United States, which was devoid of any reference to officer safety.<sup>357</sup>

Even when officers have been accused of committing egregious conduct, there has been little evidence to support the claim that their physical safety was put in jeopardy once their identities were released. After Ryan Pownall was identified as being the officer who killed Philadelphia David Jones, residents appeared at Pownall's home protesting his actions and demanding accountability, but no arrests were

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351. Rachel Moran, *Police Privacy*, 10 U.C. IRVINE L. REV. 153, 196 (2019).

352. Rachel Moran & Jessica Hodge, *Law Enforcement Perspectives on Public Access to Misconduct Records*, 42 CARDOZO L. REV. 1237, 1241 (2021).

353. *Id.*

354. *See, e.g.*, Zipporah Osei, Mollie Simon, Moiz Syed, and Lucas Waldron, *We Tracked What Happens to Police After They Use Force on Protestors*, PROPUBLICA, <https://projects.propublica.org/protest-police-videos/> [<https://perma.cc/6LRJ-RJ7C>].

355. *See, e.g.*, PLAIN VIEW PROJECT, <https://www.plainviewproject.org/> [<https://perma.cc/L5AT-YHPF>].

356. Jonah Newman, *Federal Circuit Court Dismisses Defamation Lawsuit Against Injustice Watch, Plain View Project*, INJUSTICE WATCH (Mar. 16, 2021), <https://www.injusticewatch.org/news/2021/defamation-lawsuit-plain-view-project-dismissed/>.

357. Petition for a Writ of Certiorari, *Pace v. Baker-White*, No. 21-394, 2021 WL 4150416 (U.S. 2021), *cert. denied*, 2021 WL 5043632 (U.S. Nov. 1, 2021).

made related to the protest.<sup>358</sup> After the death of Sandra Bland, dozens protested outside the home of the state trooper who detained her to demand justice, but the protest was peaceful.<sup>359</sup> And even after the murder of George Floyd, the 12-hour demonstration that took place outside of Derek Chauvin's home was nonviolent.<sup>360</sup> Thus, there is little support to show that officer safety will be significantly impacted by the release of misconduct records.

### *B. Negative Impacts on Mental Health of Police Officers*

One area of potential harm that has not been as widely discussed as physical safety is the impact of misconduct record disclosure on the mental health of police officers.

A recent study found that 239 officers committed suicide in 2019 and concluded that “suicide claims more law enforcement lives than felonious killings or accidental deaths in the line of duty.”<sup>361</sup> In fact, police officers are at the highest risk for suicide of any profession.<sup>362</sup> Existing research on the prevalence of officer suicides indicates that 21.6% of suicides were precipitated by legal troubles or work-related stress.<sup>363</sup>

In general, further research and examination is needed to determine the relationship between the accessibility of misconduct records and officer mental health. Ways to conduct this examination include reviewing departments' Employee Assistance Programs for changes in the request of their services. These units provide counselors who “listen and refer” officers to resources that can assist in stress reduc-

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358. Claire Sasko, *Activists Protest at Home of Cop Who Shot David Jones*, PHILA. MAG. (Aug. 25, 2017), <https://www.phillymag.com/news/2017/08/25/protest-home-cop-david-jones/>.

359. *Protest Held Against DPS Trooper who arrested Sandra Bland*, ABC (July 26, 2015) <https://abc13.com/state-trooper-protest-sandra-bland-katy/884063/>.

360. Megan Cruz, Adam Poulisse & Sarah Wilson, *Protesters Show Up Outside Orange County Home of Former Minneapolis Police Officer Charged in George Floyd's Death*, WFTV (May 29, 2020), <https://www.wftv.com/news/local/orange-county/protesters-gather-outside-orange-county-home-minneapolis-police-officer-involved-george-floyd-case-deputies-say/UY2HKGAMHFYBJPTWBCK5RUS4/>.

361. Tara Perine, *The Law Enforcement Suicide Data Collection: The FBI's New Data Collection on Officer Suicide and Attempted Suicide*, POLICE CHIEF ONLINE (May 26, 2021), <https://www.policechiefmagazine.org/the-le-suicide-data-collection/>.

362. Jena Hilliard, *New Study Shows Police At Highest Risk For Suicide Of Any Profession*, ADDICTION CTR. (Sept. 14, 2019), <https://www.addictioncenter.com/news/2019/09/police-at-highest-risk-for-suicide-than-any-profession/>.

363. April James McCommon, *Law Enforcement Officer Performance, Education, and Risk for Suicide*, 36 (2015) (Ph.D. dissertation, Walden University), <https://scholarworks.waldenu.edu/cgi/viewcontent.cgi?article=1520&context=dissertations>.

tion.<sup>364</sup> Therefore, if these records do impact officer mental health, departments should be prepared to offer services such as these that help address those needs.

### C. *Reputational Damage to Police Officers*

A third possible consequence is that since the vast majority of complaints filed against officers are not sustained, the disclosure of potentially false allegations unfairly damages the reputations and careers of police officers who may have been subject to these false complaints.<sup>365</sup> Some officers believe this reason alone is sufficient to preclude the release of this information.<sup>366</sup> However, the foundation of this argument is dependent upon the notion that a department's internal affairs division engages in sound investigative methods and adjudicative findings. As stated in Part III section B, departments have differing standards of proof to sustain allegations, and, at times, investigators apply an inappropriately higher standard of proof to sustain an allegation. A recent examination of over 9,000 allegations from more than 3,500 civilian complaints filed against the Philadelphia Police Department found that 86% of allegations were not sustained.<sup>367</sup> Most important for this section, the researchers found that common reasons for eliminating allegations were:

- (1) the accused officer denied wrongdoing,
- (2) investigators could not corroborate the civilian's claims, and
- (3) investigators gave more weight to officer accounts than to civilian accounts.<sup>368</sup>

This creates a classic "swearing contest," but with a bias in favor of police officers over civilian complainants. Where such records show a pattern, they should take on more relevance when pre-trial determinations are being made that may significantly impact the life of an accused.

From this analysis, it is apparent that there is significant value in police misconduct records that are not substantiated. Additionally,

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364. See, e.g., *Employee Assistance Unit*, N.Y.C. POLICE DEP'T, <https://www1.nyc.gov/site/nypd/careers/human-resources-info/employee-assistance-unit.page> [<https://perma.cc/224H-6FTY>]; PHILA. POLICE DEP'T, DIRECTIVE 6.14: EMPLOYEE ASSISTANCE PROGRAM (July 20, 2021), <https://www.phillypolice.com/assets/directives/D6.14-EmployeeAssistanceProgram.pdf> [<https://perma.cc/59UW-NBG3>].

365. Moran, *supra* note 351, at 193.

366. Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 752 (2017).

367. BA et al., *supra* note 202, at 1.

368. *Id.*

some researchers suggest that increasing transparency around misconduct records may *improve* the collective reputation of those officers who do not accumulate misconduct records.<sup>369</sup> For example, only 1% of the Philadelphia Police Department averaged more than one complaint per year.<sup>370</sup> Lastly, due to the difficulty of terminating an officer, even after sustained allegations of misconduct,<sup>371</sup> and the binding arbitration process that frequently limits or prevents accountability,<sup>372</sup> the materiality of the reputation damage is marginal. Overall, evidence does not support the belief that the release of these records will greatly harm the reputation of personnel.

## PART VI.

### AVENUES FOR ADMINISTRATIVE AND STATUTORY REFORM

Cases of wrongful arrests, convictions, and other harms that relate to police misconduct may be avoided by: (1) mandating law enforcement agencies to immediately share all investigations of misconduct to a central repository, (2) enacting a system that make these records easily accessible to the public by a searchable database, and (3) amending bail statutes and other relevant rules of criminal procedure that may preclude the use of this information during bail and subsequent hearings. This section will explain why each measure is necessary and why, if enacted collectively, they can ensure that police misconduct records are timely accessible to those who need them most.

#### A. *Creating a Central Repository for Misconduct Records*

As explained in Part III, it can be nearly impossible to access police misconduct records in some states. Some access barriers in-

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369. Cynthia Conti-Cook, *A New Balance: Weighing Harms of Hiding Police Misconduct Information from the Public*, 22 CUNY L. REV. 148, 185 (2019) (“More transparency around police misconduct information may actually improve the collective reputation of the majority of officers who do not accumulate misconduct records.”).

370. Ryan Briggs & Max Marin, *Police Misconduct in Philadelphia: Unsealed Records Name the City’s Most Cited Cops*, WHYY (July 30, 2020), <https://whyy.org/articles/police-misconduct-in-philadelphia-unsealed-records-name-the-citys-most-cited-cops/>.

371. Ben Grunwald & John Rappaport, *The Wandering Officer*, 129 YALE L.J. 1676, 1707 (2020) (“The types of agency policy violations that warrant termination are serious or represent the culmination of a pattern of misconduct. It is, after all, notoriously difficult to fire a police officer. The agencies we studied experienced an average of 0.54 firings for misconduct per year, accounting for roughly 10.8% of all separations.”).

372. See Stephen Rushin, *Police Disciplinary Appeals*, 167 U. PA. L. REV. 545, 564–65 (2019).

clude statutory exemptions to disclosure, collective bargaining agreements allowing or requiring the destruction of records, and FOI request procedures that delay or outright deny meaningful disclosure. To overcome these access barriers, states should require that all investigations and complaints against law enforcement be classified as public information and immediately shared in a central repository that rests outside of the control of law enforcement agencies. Allowing this information to be housed in a central repository also ensures that requestors will receive information from all jurisdictions in the state in which a police officer may have worked throughout their career.

Some states have some variation of this repository but either fail to make the records accessible, fail to require that agencies submit all records to the repository, or both. For example, after the murder of George Floyd, Pennsylvania Governor Tom Wolf signed a bipartisan law creating a central repository with a statewide police misconduct database.<sup>373</sup> However, the database is not publicly available, nor does it contain information on active officers; its documents only reflect separation records.<sup>374</sup>

#### *B. Creating a Searchable Public Database of Misconduct Records*

States have created publicly searchable databases for pending criminal and civil matters<sup>375</sup> and have maintained databases of misconduct records for other professions regulated by state certification or licensure requirements. Individuals can search to see if an attorney has a complaint of misconduct<sup>376</sup> or if their medical professional has a disciplinary history.<sup>377</sup> Overall, creating a publicly searchable database allows individuals to access the questionable background of professionals. States should create a database that can be searched by officer names, badge number, form of misconduct, and location of occurrence. These databases should also be accessible in a downloadable spreadsheet format such that both researchers and laypersons can per-

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373. Vinny Vella, *With Bipartisan and Union Support, Gov. Tom Wolf Signs a Law Creating a Statewide Police Misconduct Database*, PHILA. INQUIRER (July 15, 2020), <https://www.inquirer.com/news/pennsylvania-police-misconduct-statewide-database-fop-20200714.html>.

374. H.B. 1841, 2019 Sess. (Pa. 2019).

375. *See, e.g., Case Search*, UNIFIED JUD. SYS. OF PENN., <https://ujportal.pacourts.us/CaseSearch> (last visited Nov. 13, 2021) (searching civil and criminal records of individuals by simply their first and last name).

376. *See, e.g., Look Up Attorney*, DISCIPLINARY BD. OF THE SUP. CT. OF PENN., <https://www.padisiplinaryboard.org/for-the-public/find-attorney> (last visited Nov. 13, 2021).

377. *See, e.g., National Practitioner Data Bank*, U.S. DEP'T OF HEALTH & HUM. SERVS., <https://www.npdb.hrsa.gov/analysisistool/> [<https://perma.cc/KFH6-DCQP>].

form additional analysis that may not be possible without the raw data. Ideally, because investigatory files contain valuable information, the databases would include *all* complaints that allege misconduct, including those that are unfounded and exonerated. In addition to providing transparency, a publicly accessible database will overcome the procedural limitations that both attorneys and members of the public face in accessing misconduct records.

*C. Amending Bail Statutes and Rules of Criminal Procedure*

Lastly, bail statutes should be amended to require judicial officers to consider relevant misconduct of related officers. As stated in Part I, no state explicitly includes police misconduct in its bail considerations. Maryland, by far the most inclusive, requires judicial officers to consider any information presented by the state's attorney and any information presented by the defendant.<sup>378</sup> For states where this approach will be considered overinclusive of information, merely adding a factor to require the consideration of police misconduct will suffice to ensure the character of related officers is being adequately evaluated in relation to the alleged criminal activity. However, this recommendation alone will not adequately address the issue due to the prevalence of judicial officers who may rubber stamp bail decisions without due consideration of information presented to them.

In addition to bail statutes, some states may need to amend their rules of criminal procedure to emphasize a duty to disclose the information for pre-trial litigation. Many criminal pre-trial discovery rules place a duty on the prosecution to disclose certain information that may exonerate the defendant at trial or reduce punishment at sentencing but fail to require such disclosure for pre-trial matters.<sup>379</sup> The amendment must specifically require the timely—at the initial appearance—disclosure of all police misconduct records, not simply ones that address credibility. As discussed in several parts of this article, there are other occurrences of police misconduct that do not address credibility but may shed light on the officer's character, habit, and routine.

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378. See MD. R. 4-216.1.

379. See 2021 Me. Laws 16 (requiring the prosecution to provide automatic discovery at the initial appearance but the documents required to be disclosed do not include evidence favorable to the defense).

## CONCLUSION

This article aims to add to the growing literature on the value of police misconduct records, specifically by advocating for public availability and their use in several stages of criminal pre-trial procedure. Part I addressed the several benefits to considering police misconduct records at the bail stage. The bail hearing, a defendant's first criminal hearing in a given case, may be drastically impacted by examining the officer's misconduct records and weighing them against the criminal allegations. Even though these records have the potential to trigger the pre-trial release of defendants, no state specifically addresses police misconduct records in the list of factors judicial officers can consider while making their bail determinations. Part II addressed the several other pre-trial matters where the past and present conduct of the officer should be examined. Motions to suppress, which look to see if evidence was obtained illegally, may be fully litigated by reviewing the officer's history of investigatory practices and evidence collection. Even when the prosecution concedes that evidence was obtained illegally, in some states, a "good-faith" exception may permit the admission of the tainted evidence. Reviewing police misconduct records may shed light on whether these "good-faith mistakes" are actually part of patterns of abuse or carelessness, which may overcome the good faith exception.

However, while misconduct records would be valuable at pre-trial stages, they are often unavailable, largely due to prosecutorial *Brady-Giglio* policies. Part III explored a collection of *Brady-Giglio* policies to uncover how prosecutors often determine themselves which records are eligible for disclosure. Part III laid out how these policies are underinclusive by not capturing the vast array of police misconduct records that may be favorable to the defense and provide too much discretion to police departments on when they should disclose information to prosecutors. Lastly, these policies highlight how even if the prosecution obtains defense-favorable information related to police misconduct, they may decide not to share that information with the defense for several reasons. Overall, Part III describes the insufficient landscape of *Brady-Giglio* policies and how they overlook what matters most—that the defense is better-equipped than the police or the prosecutor to decide which information is favorable to their clients.

Part IV addressed another barrier to the access of these records: state laws that preclude their public disclosure. All states (except North Dakota) statutorily preclude the release of at least some types of misconduct records such as pending investigations, unsustained inves-

tigations, and investigations that did not result in discipline; furthermore, many states preclude the release of *all* misconduct records. In addition, for the states that do allow disclosure, they do so by allowing the public to request this information by FOI laws—a process that can be lengthy, costly, and often ends in denial of the request. Overall, Part IV demonstrated how state statutes impede transparency with respect to the availability of police misconduct records. Part V addressed possible consequences to broader disclosure, which included impacts on officer physical safety, mental health, and reputation and showed that overall evidence does not support a contention that disclosure will greatly impact officers.

Complaints that allege police misconduct should be readily accessible to the public and admissible at bail proceedings to contest pre-trial detention and for pre-trial motions. Part VI provides a roadmap for how policy makers can ensure that these records are accessible for all. Policymakers should require police misconduct records to be shared with a central repository that will maintain the information in a publicly accessible database. An accessible database that also provides access to the raw data will not only provide those criminal justice stakeholders access to the information but also provide researchers with the ability to identify misconduct patterns, providing policymakers with tools to timely address police harms. As it relates to alleged crimes, allowing prosecutors to review completed and pending police misconduct investigations will expand prosecutors' understanding of officer credibility, which could result in the non-prosecution of cases that involve officers with credibility issues, saving substantial resources and reducing the potential for wrongful convictions.

The current system has been ineffective at preventing wrongful convictions and other errors within the criminal justice system. As of late 2021, there have been more than 2,891 exonerations since 1989,<sup>380</sup> which rightfully brings doubt to the legitimacy of the system and calls for abolition. Until now, the only widely discussed policy envisioned to prevent wrongful convictions by police misconduct is to expand the defense's access to police misconduct records at trial. As this Article has demonstrated, that strategy does not go far enough. In order to reduce the collateral harms of the criminal legal system and promote justice for all, policymakers should fully empower defense

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380. NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited Nov. 24, 2021) [<https://perma.cc/A8XZ-X8WN>].

attorneys, prosecutors, and courts with this information from the very inception of an alleged criminal incident.

Reforms that were meant to cure and eliminate policing harms have taken several forms, but problems persist. We must continue to strive for freedom and justice for the victims of police misconduct who are largely society's most marginalized—the criminally accused. In the words of Fannie Lou Hamer “Nobody’s Free Until Everybody’s Free.”<sup>381</sup>

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381. Fannie Lou Hamer, *Nobody’s Free Until Everybody’s Free*, Speech Delivered at the Founding of the National Women’s Political Caucus, Washington, D.C. (July 10, 1971).

APPENDIX<sup>382</sup>

Jurisdiction	Bail statute requires consideration of all potential evidence	Bail statute permits consideration of officer history specifically	Are misconduct records disclosed?
Alabama <sup>383</sup>	No	No	No <sup>384</sup>
Alaska <sup>385</sup>	No	No	No <sup>386</sup>
Arizona <sup>387</sup>	No	No	Pending investigations not disclosed <sup>388</sup>
Arkansas <sup>389</sup>	No	No	Balancing test by court <sup>390</sup>
California <sup>391</sup>	No	No	Limited <sup>392</sup>
Colorado <sup>393</sup>	No	No	Pending investigations not disclosed <sup>394</sup>

382. This Appendix was created by examining state bail statutes to ascertain if judicial officers are *required* to consider all potential evidence during a bail proceeding. For this collection, statutes that merely allow the consideration of any information but do not require judicial officers to consider it are deemed “no”. Statutes that require judicial officers to consider all information are deemed “yes”. The third column reveals a state’s disclosure level for police misconduct records. States that do not release any form of misconduct are deemed “no”.

383. ALA. R. CRIM. P. 7.2.

384. ALA. CODE § 12-21-3.1 (2021).

385. ALASKA STAT. § 12.30.011 (2021).

386. ALASKA STAT. § 40.25.120 (2021).

387. ARIZ. R. CRIM. P. 7.2.

388. ARIZ. REV. STAT. ANN. § 38-1109 (2021).

389. ARK. R. CRIM. P. 9.2(c) (taking into account “the nature of the current charge, the apparent probability of conviction and the likely sentence, in so far as these factors are relevant to the risk of nonappearance . . . ”).

390. ARK. CODE ANN. § 25-19-105 (2021).

391. CAL. PENAL CODE § 1275(a) (West 2021).

392. CAL. PENAL CODE § 832.7 (West 2021) (explaining that only records relating to discharge of a firearm, incident in which use of force resulted in death or in great bodily injury, sustained finding of sexual assault, record regarding dishonesty. Record can be redacted if it poses a significant danger to the physical safety of the peace officer. Agency may withhold when there is an active criminal or administrative investigation, at 180 day intervals, no later than 18 months after original incident. Complaints that are unfounded are not released, and complaints that are frivolous.).

393. COLO. REV. STAT. § 16-4-103(3)(b) (2021); COLO. REV. STAT. § 16-4-103(5) (2021).

394. COLO. REV. STAT. ANN. § 24-72-303 (West 2021).

Jurisdiction	Bail statute requires consideration of all potential evidence	Bail statute permits consideration of officer history specifically	Are misconduct records disclosed?
Connecticut <sup>395</sup>	No	No	Balancing test by court <sup>396</sup>
Delaware <sup>397</sup>	No	No	No <sup>398</sup>
District of Columbia <sup>399</sup>	No	No	No <sup>400</sup>
Florida <sup>401</sup>	No	No	Pending investigations not disclosed <sup>402</sup>
Georgia <sup>403</sup>	No	No	Pending investigations not disclosed <sup>404</sup>
Hawaii <sup>405</sup>	No	No	Balancing test by court <sup>406</sup>
Idaho <sup>407</sup>	Yes	No	No <sup>408</sup>
Illinois <sup>409</sup>	No	No	Only disciplined cases <sup>410</sup>

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395. CONN. GEN. STAT. ANN. § 54-65a(a)(3) (West 2021).

396. CONN. GEN. STAT. ANN. § 1-210 (West 2021).

397. DEL. CODE ANN. tit. 11, § 2105(b) (2021).

398. DEL. CODE ANN. tit. 29 § 10002 (2021).

399. D.C. CODE § 23-1322 (2021).

400. D.C. CODE § 2-534 (2021).

401. FLA. STAT. ANN. § 903.046(2) (West 2021) (allowing the judge to account for “[a]ny other factors that the court considers relevant”).

402. FLA. STAT. ANN. § 112.533 (West 2020).

403. GA. CODE ANN. § 17-6-1(2) (2021) (telling a judge to consider “any other factor the court deems appropriate”).

404. GA. CODE ANN. § 50-18-72 (2021).

405. HAW. REV. STAT. ANN. § 804-9.5(c) (LexisNexis 2021) (“In granting or denying unsecured bail, the court may consider: . . . any other facts the court finds relevant to the defendant’s likelihood to appear in court and satisfy the conditions of release.”).

406. HAW. REV. STAT. ANN. § 92F-14 (West 2021).

407. IDAHO R. CRIM. P. 46(c) (“[T]he determination of the amount and conditions of bail, if any, may be made after considering. . . : the nature of the current charge and any mitigating or aggravating factors that may bear on the likelihood of conviction and the possible penalty.”).

408. IDAHO CODE § 74-106 (1) (2021).

409. 725 ILL. COMP. STAT. ANN. 5/110-5(a) (West 2021).

410. 5 ILL. COMP. STAT. ANN. 140/7 (West 2021).

Jurisdiction	Bail statute requires consideration of all potential evidence	Bail statute permits consideration of officer history specifically	Are misconduct records disclosed?
Indiana <sup>411</sup>	No	No	Only disciplined cases <sup>412</sup>
Iowa <sup>413</sup>	No	No	Only disciplined cases <sup>414</sup>
Kansas <sup>415</sup>	No	No	No <sup>416</sup>
Kentucky <sup>417</sup>	No	No	Balancing test by court <sup>418</sup>
Louisiana <sup>419</sup>	No	No	Only sustained investigations <sup>420</sup>
Maine <sup>421</sup>	No	No	Only disciplined cases <sup>422</sup>
Maryland <sup>423</sup>	Yes	No	No <sup>424</sup>
Massachusetts <sup>425</sup>	No	No	Balancing test by court <sup>426</sup>

411. IND. CODE ANN. § 35-33-8-4(b) (West 2021).

412. IND. CODE ANN. § 5-14-3-4 (West 2021).

413. IOWA CODE § 811.2(2) (2021).

414. IOWA CODE ANN. § 22.7 (West 2021).

415. KAN. STAT. ANN. § 22-2802(8) (West 2021).

416. KAN. STAT. ANN. § 45-221 (West 2021).

417. KY. R. CRIM. P. 4.16(1).

418. KY. REV. STAT. ANN. § 61.878 (West 2021).

419. LA. CODE CRIM. PROC. ANN. Art. 313(3) (2021); LA. CODE CRIM. PROC. ANN. Art. 316 (2021).

420. *City of Baton Rouge v. Cap. City Press*, 4 So.3d 807, 821 (La. Ct. App. 2008) (concluding that there were not “[a]ny legitimate reasonable expectations of privacy on behalf of any of the police officers who were investigated.”).

421. ME. REV. STAT. ANN. tit. 15 § 1026(4) (2021).

422. ME. REV. STAT. ANN. tit. 30-A § 2702 (2021).

423. MD. R. CRIM. P. 4-216(f) (allowing for consideration of “any information presented by the defendant or defendant’s attorney”).

424. MD. CODE ANN., GEN. PROV. § 4-311 (Westlaw). Case law on what constitutes a personnel file is mixed, with courts alternating on whether the record in question is subject to disclosure under this section of the code. *Compare* Md. Dep’t of State Police v. Dashiell, 443 Md. 435 (2015) (finding a record relating to a discipline of an officer was exempt from disclosure), *with* Md. Dep’t of State Police v. Md. State Conf. of NAACP Branches, 190 Md. App. 359 (2010) (allowing for disclosure of records that “did not involve private matters concerning intimate details of a trooper’s private life, but, instead. . . events occurring when a trooper was on duty and engaged in public service . . .”).

425. MASS. GEN. LAWS ANN. ch. 2 § 58 (West 2021).

426. MASS. GEN. LAWS ANN. ch. 2 § 7 (West 2021).

Jurisdiction	Bail statute requires consideration of all potential evidence	Bail statute permits consideration of officer history specifically	Are misconduct records disclosed?
Michigan <sup>427</sup>	No	No	Balancing test by court <sup>428</sup>
Minnesota <sup>429</sup>	No	No	Only disciplined cases <sup>430</sup>
Mississippi <sup>431</sup>	No	No	No <sup>432</sup>
Missouri <sup>433</sup>	No	No	Only sustained investigations <sup>434</sup>
Montana <sup>435</sup>	No	No	No <sup>436</sup>
Nebraska <sup>437</sup>	No	No	No <sup>438</sup>
Nevada <sup>439</sup>	No	No	No <sup>440</sup>
New Hampshire <sup>441</sup>	No	No	Balancing test by court <sup>442</sup>

427. MICH. COMP. LAWS ANN. § 765.6(1) (West 2021).

428. MICH. COMP. LAWS ANN. § 15.243 (West 2021).

429. MINN. R. CRIM. P. 6.02 (SUBD. 2).

430. MINN. STAT. ANN. § 13.43 (West 2021).

431. MISS. R. CRIM. P. 8.2(a).

432. MISS. CODE ANN. § 25-1-100 (West 2015).

433. *See* MO. ANN. STAT. § 544.457 (West 2021); *see also* MO ANN. STAT. § 544.676(2) (West 2021) (Showing that even though the bail statute allows for the court to consider “all relevant evidence”, defense must first persuade the court that their evidence is “relevant”: a standard that is up to the judge’s discretion. Since the statute does not require all evidence to be considered, the response is recorded as “no”).

434. *Chasnoff v. Mokwa*, 466 S.W.3d 571, 581 (Mo. Ct. App. 2015) (holding that “[p]olice officers have no right under the Sunshine Law, the U.S. or Missouri Constitutions, common law, or Missouri statutes to compel closure of public records regarding the officers’ substantiated misconduct in the performance of their official duties.”).

435. MONT. CODE ANN. § 46-9-301 (West 2021).

436. *Billings Gazette v. City of Billings*, 313 P.3d 129, 141 (Mont. 2013) (holding that there is a “reasonable expectation of privacy in [employees’] identities with regards to internal disciplinary proceedings clearly outweighs the limited merits of public disclosure.”).

437. NEB. REV. STAT. ANN. § 29-901.01 (LexisNexis 2021).

438. NEB. REV. STAT. ANN. § 84-712.05 (West 2021).

439. NEV. REV. STAT. ANN. § 178.4853 (West 2021).

440. NEV. ADMIN. CODE § 284.718 (2021).

441. N.H. REV. STAT. ANN. § 597:2(III) (2021) (directing courts to consider all relevant factors bearing on whether the release will endanger the safety of that person or the public when determining whether bail is appropriate).

442. N.H. REV. STAT. ANN. § 91-A:5 (2021).

Jurisdiction	Bail statute requires consideration of all potential evidence	Bail statute permits consideration of officer history specifically	Are misconduct records disclosed?
New Jersey <sup>443</sup>	No	No	No <sup>444</sup>
New Mexico <sup>445</sup>	No	No	No <sup>446</sup>
New York <sup>447</sup>	No	No	All but technical infractions <sup>448</sup>
North Carolina <sup>449</sup>	No	No	Only fact of specific discipline <sup>450</sup>
North Dakota <sup>451</sup>	No	No	Yes <sup>452</sup>
Ohio <sup>453</sup>	No	No	Balancing test by court <sup>454</sup>

443. N.J. STAT. ANN. § 2A:162-20 (West 2021) (directing courts to consider “the weight of the evidence against the eligible defendant, except that the court may consider the admissibility of any evidence sought to be excluded”).

444. See N.J. STAT. ANN. § 47:1A-10 (West 2002) (“[R]ecords relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access”); see also State of New Jersey Office of the Attorney General, *Attorney General Law Enforcement Directive No. 2020-5*, Jun. 15, 2020, [https://www.nj.gov/oag/dcj/agguide/directives/ag-Directive-2020-5\\_Major-Discipline.pdf](https://www.nj.gov/oag/dcj/agguide/directives/ag-Directive-2020-5_Major-Discipline.pdf) (stating that “it is time to end the practice of protecting the few to the detriment of the many” and creating a prospective directive which would require “on an annual basis, every law enforcement agency shall publish on its public website a report summarizing the types of complaints received and the dispositions of those complaints [. . .] statistical in nature.”).

445. N.M. R. CRIM. P. 5-401(c).

446. See N.M. STAT. ANN. § 14-2-1 (West 2021).

447. N.Y. CRIM. PROC. LAW § 510.30(1) (LexisNexis 2021).

448. N.Y. Pub. Off. Law § 86 (McKinney 2021).

449. N.C. GEN. STAT. § 15A-534(c) (2021) (having judges consider “the weight of evidence against the defendant. . . and any other evidence relevant to the issue of pretrial release.”).

450. N.C. GEN. STAT. ANN. § 153A-98 (2018) (stating that matters of public record include the “date and type of each promotion, demotion, transfer, suspension, separation or other change in position classification with that county” such information is only disclosed if it relates to a dismissal.).

451. N.D. R. CRIM. P. 46(3).

452. N.D. CENT. CODE ANN. § 44-04-18.1 (West 2021).

453. Because Ohio imposes a relevance standard for evidence submitted at bail, it allows the court the discretion in determining what evidence is relevant. See OHIO R. CRIM. P. 46(C) (“[T]he court shall consider all relevant information . . .”).

454. See OHIO REV. CODE ANN. § 149.43; see also State ex rel. Multimedia v. Snowden, 72 Ohio St. 3d 141 (Ohio 1995) (describing a two step analysis to determine if records are exempted from disclosure, which includes determining if the record is confidential and whether the release of the record creates a high probability of disclosure of one of the four types of information specified in the law).

Jurisdiction	Bail statute requires consideration of all potential evidence	Bail statute permits consideration of officer history specifically	Are misconduct records disclosed?
Oklahoma <sup>455</sup>	No	No	Only disciplined cases <sup>456</sup>
Oregon <sup>457</sup>	No	No	Balancing test by court <sup>458</sup>
Pennsylvania <sup>459</sup>	Yes	No	Only fact of specific discipline <sup>460</sup>
Rhode Island <sup>461</sup>	No	No	Balancing test by court <sup>462</sup>
South Carolina <sup>463</sup>	No	No	Balancing test by court <sup>464</sup>
South Dakota <sup>465</sup>	No	No	No <sup>466</sup>
Tennessee <sup>467</sup>	No	No	Pending investigations not disclosed <sup>468</sup>
Texas <sup>469</sup>	No	No	Only disciplined cases <sup>470</sup>

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455. Brill v. Gurich, 1998 OK CR 49, 965 P.2d 404.

456. OKLA. STAT. ANN. tit. 51, § 22.7 (West 2021).

457. OR. REV. STAT. ANN. § 135.230(7); OR. REV. STAT. ANN. § 135.230(11) (West 2021).

458. OR. REV. STAT. ANN. § 192.345 (West 2021).

459. PA. R. CRIM. P. 523(A)(“[T]he bail authority shall consider . . . information about: the nature of the offense charged and any mitigating or aggravating factors that may bear upon the likelihood of conviction and possible penalty.”).

460. 65 PA. STAT. AND CONS. STAT. ANN. § 67.708 (West 2021).

461. R.I. R. CRIM. P. I; R.I. RULE CRIM. P. V.

462. 38 R.I. GEN. LAWS § 38-2-2 (2021).

463. S.C. CODE ANN. § 22-5-510(C) (2021); S.C. CODE ANN. § 22-5-510(D) (2021).

464. S.C. CODE ANN. § 30-4-40 (2017).

465. S.D. CODIFIED LAWS § 23A-43-4 (2021) (stating that courts must consider “the weight of evidence against the defendant”).

466. S.D. CODIFIED LAWS § 1-27-1.5 (2021).

467. TENN. CODE ANN. § 40-11-118(b) (2021).

468. See Schneider v. City of Jackson, 226 S.W.3d 332, 334 (Tenn. 2007) (holding that the issue be remanded to determine “whether any of the police department records at issue are part of a pending, open, or ongoing criminal investigation” upon requesting police investigatory files).

469. TEX. CODE CRIM. PROC. ANN. art. 17.15 (2021 West).

470. TEX. LOC. GOV’T CODE ANN. § 143.089 (West 2021).

Jurisdiction	Bail statute requires consideration of all potential evidence	Bail statute permits consideration of officer history specifically	Are misconduct records disclosed?
Utah <sup>471</sup>	No	No	No <sup>472</sup>
Vermont <sup>473</sup>	No	No	Balancing test by court <sup>474</sup>
Virginia <sup>475</sup>	No	No	No <sup>476</sup>
Washington <sup>477</sup>	No	No	No <sup>478</sup>
West Virginia <sup>479</sup>	No	No	Balancing test by court <sup>480</sup>
Wisconsin <sup>481</sup>	No	No	Pending investigations not disclosed <sup>482</sup>
Wyoming <sup>483</sup>	No	No	No <sup>484</sup>

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471. UTAH CODE ANN. § 77-20-1(5) (LexisNexis 2021).

472. UTAH CODE ANN. § 63G-2-305 (West 2021).

473. VT. STAT. ANN. tit. 13, § 7554 (2021).

474. *Rutland Herald v. City of Rutland*, 84 A.3d 821, 825 (Vt. 2013) (finding that “there is a significant public interest in knowing how the police department supervises its employees and responds to allegations of misconduct” and holding that records should be reviewed “in camera before it could determine if their disclosure would advance the asserted public interest”).

475. VA. CODE ANN. § 19.2-120(B) (2021).

476. VA. CODE ANN. § 2.2-3706 (West 2021)

477. WASH. R. CRIM. P. 3.2(c).

478. WASH. REV. CODE § 42.56.240 (2021).

479. W. VA. CODE ANN. § 62-1C-3 (LexisNexis 2021).

480. W. VA. CODE ANN. § 29B-1-4 (West 2021).

481. WIS. STAT. ANN. § 969.01 (West 2021) (“Proper consideration in determining . . . conditions of release are: . . . the character and strength of the evidence which has been presented to the judge . . .”).

482. WIS. STAT. ANN. § 19.36 (West 2021).

483. WYO. R. CRIM. P. 46.1(d) (“The judicial officer shall, in determining whether there are conditions of release . . . take into account the available information concerning . . . [t]he weight of evidence against the person . . .”).

484. WYO. STAT. ANN. § 16-4-203 (West 2020).