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Police Officers, Policy, and Personnel Files: Prosecutorial Disclosure Obligations Above and Beyond *Brady*

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POLICE OFFICERS, POLICY, AND PERSONNEL FILES: PROSECUTORIAL DISCLOSURE OBLIGATIONS ABOVE AND BEYOND *BRADY*

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Police officers play a significant role in the criminal trial process and are unlike any other witness who will take the stand. They are trained to testify, and jurors find them more credible than other witnesses, even though officers may have more incentive to lie than the ordinary witness. Despite the role of police officers in criminal proceedings, state statutes say virtually nothing about evidence used to impeach police officers, often contained in the officer's personnel file. Worse still, the standard for disclosing information in an officer's personnel file varies among and within states, resulting in inconsistent Brady *disclosures. This Note addresses this legislative gap by supplying a uniform legislative approach that considers the interests of the police, the prosecution, and the defense.*

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INTRODUCTION

"For every case that supports the interpretation that unfounded or exonerated disciplinary claims against police officers are not required to be produced, as they lack impeachment value, there is another case that disagrees or declines to follow it."[1]

In 1963, the U.S. Supreme Court recognized that criminal defendants have a constitutional right to request and receive evidence from the prosecution that is favorable to their defense and material to their guilt or punishment.[2] Following *Brady v. Maryland*[3] and its progeny,[4] each state codified the

1. Hudson Police Loc. 3979 v. Bower, 158 N.Y.S.3d 787, 791 (Sup. Ct. 2021).
2. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963); *see also infra* Part I.B.
3. 373 U.S. 83 (1963).
4. *See infra* Part I.B.

obligation to disclose favorable information to criminal defendants,[5] but with widely disparate results.[6] In shaping these laws and their subsequent amendments over time, legislatures—and courts interpreting their statutory enactments—take myriad factors into consideration.[7] An increasingly relevant and contentious topic of disclosure—and the focus of this Note—is the disclosure of police officer personnel files.[8]

According to the U.S. Bureau of Labor Statistics, there were approximately 655,890 police officers employed throughout the United States in 2022.[9] California alone employed 70,090 police officers.[10] Texas and New York closely followed with 59,290 and 50,600 employed officers, respectively.[11] Although police officers only account for approximately 0.2 percent of the United States population,[12] they have a significant impact. In 2016, an arrest occurred every *three seconds*.[13] One 2012 study estimated that by the age of twenty-three, one in every three Americans will experience an arrest.[14]

Police officers correspondingly play a significant role in criminal proceedings.[15] Police officers are often called upon to testify at trial,[16] and criminal trials "often amount to credibility contests" between the defense's

5. LAURAL L. HOOPER, JENNIFER E. MARSH & BRIAN YEH, FED. JUD. CTR., TREATMENT OF *BRADY V. MARYLAND* MATERIAL IN UNITED STATES DISTRICT AND STATE COURTS' RULES, ORDERS, AND POLICIES: REPORT TO THE ADVISORY COMMITTEE ON CRIMINAL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 17–28 (2004), https://www.uscourts.gov/sites/default/files/bradymat_1.pdf [https://perma.cc/KYZ8-PTZX].

6. *See infra* Part II.

7. *See infra* Part I.E.

8. *See infra* Part II. For the purposes of this Note, "police officer" means all law enforcement officers, including, but not limited to, peace officers and sheriff's patrol officers.

9. *See Occupational Employment and Wage Statistics*, U.S. BUREAU LAB. STAT., https://www.bls.gov/oes/current/oes333051.htm [https://perma.cc/2GX7-TWFA] (Apr. 25, 2023).

10. *See id.*

11. *See id.*

12. *See id.* In 2022, the U.S. Census Bureau estimated that the United States population was approximately 333,287,557. *See* U.S. CENSUS BUREAU (July 1, 2022), https://www.census.gov/quickfacts/fact/table/US/PST045221 [https://perma.cc/VGG2-W6NR]. The percentage of police officers was calculated accordingly.

13. *See Emerging Findings*, VERA, https://www.vera.org/publications/arrest-trends-every-three-seconds-landing/arrest-trends-every-three-seconds/findings [https://perma.cc/4Y7X-3FEV] (last visited Oct. 6, 2023).

14. *See* Robert Brame, Michael G. Turner, Raymond Paternoster & Shawn D. Bushway, *Cumulative Prevalence of Arrest from Ages 8 to 23 in a National Sample*, 129 PEDIATRICS 21 (2012); *see also* Matthew Friedman, *Just Facts: As Many Americans Have Criminal Records as College Diplomas*, BRENNAN CTR. FOR JUST. (Nov. 17, 2015), https://www.brennancenter.org/our-work/analysis-opinion/just-facts-many-americans-have-criminal-records-college-diplomas [https://perma.cc/G983-BE67].

15. *Cf.* Anne Moses Stratton, *Courtroom Narrative and Findings of Fact: Reconstructing the Past One (Cinder) Block at a Time*, 22 QUINNIPIAC L. REV. 923, 933–34 (2004) (highlighting that police officers fall within the category of professional witnesses); *see* Rachel Moran, *Contesting Police Credibility*, 93 WASH. L. REV. 1339, 1340 (2018) ("Police officers testify frequently in criminal cases."); Melanie D. Wilson, *An Exclusionary Rule for Police Lies*, 47 AM. CRIM. L. REV. 1, 2 (2010) (noting that police officers play a "key investigative component in our criminal justice system").

16. *See* Moran, *supra* note 15, at 1340–41.

and the government's witnesses.[17] Only recently, however, have the credibility and practices of police officers and their departments been meaningfully called into question, due to largely publicized cases of police misconduct.[18] In 2014, Eric Garner was killed by a New York City police officer who used an illegal chokehold.[19] His death sparked protests across New York City and the country as a whole.[20] On May 25, 2020, a Minneapolis police officer pressed his knee against George Floyd's neck for more than eight minutes during his arrest, which resulted in Mr. Floyd's death.[21] Protests followed, and a year and a half after Floyd's death, the Minneapolis state government asked voters whether the Minneapolis Police Department should be disbanded and replaced by a new Department of Public Safety.[22] On March 13, 2020, Breonna Taylor—a twenty-six year old emergency room technician—was shot and killed by police officers in Louisville, Kentucky in her own home.[23] Racial justice protests and police brutality debates followed her death.[24] The government ultimately charged the four officers involved in her shooting with federal crimes.[25]

In all three cases, the police officers' personnel records contained allegations of officer misconduct.[26] The officer convicted for Mr. Floyd's

17. *See id.* at 1340; *see also infra* Part I.D.2.

18. *See* Al Baker, J. David Goodman & Benjamin Mueller, *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (June 13, 2022), https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html [https://perma.cc/V89A-AEFW]; Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (Jan. 24, 2022), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html [https://perma.cc/CE4K-4224]; Richard A. Oppel Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Aug. 23, 2022), https://www.nytimes.com/article/breonna-taylor-police.html [https://perma.cc/VGB5-9JU4].

19. *See* Baker et al., *supra* note 18.

20. *See* Ashley Southall, *Daniel Pantaleo, Officer Who Held Eric Garner in Chokehold, Is Fired*, N.Y. TIMES (Aug. 19, 2019), https://www.nytimes.com/2019/08/19/nyregion/eric-garner-daniel-pantaleo-fired.html [https://perma.cc/K9JB-YQYK].

21. *See* Dalton Bennett, Joyce Sohyun Lee & Sarah Cahlan, *The Death of George Floyd: What Video and Other Records Show About His Final Minutes*, WASH. POST (May 30, 2020), https://www.washingtonpost.com/nation/2020/05/30/video-timeline-george-floyd-death/ [https://perma.cc/4U3A-B93L].

22. *See* Mitch Smith & Tim Arango, *Keep or Replace?: The Fate of the Minneapolis Police Is in Voters' Hands*, N.Y. TIMES (Oct. 29, 2021), https://www.nytimes.com/2021/10/29/us/minneapolis-police-ballot-measure.html [https://perma.cc/N3YE-BJDR]. The Minneapolis voters did not vote to abolish the existing police department. *See* Gloria Oladipo, *Minneapolis Voters Reject Bid to Replace Police with Public Safety Department*, GUARDIAN (Nov. 2, 2021, 10:23 PM), https://www.theguardian.com/us-news/2021/nov/02/minneapolis-police-department-vote-result [https://perma.cc/T4MB-FFUP].

23. *See* Oppel Jr. et al., *supra* note 18.

24. *See* Emma Bowman, *4 Current and Former Officers Federally Charged in Raid That Killed Breonna Taylor*, NPR (Aug. 4, 2022, 7:18 PM), https://www.npr.org/2022/08/04/1115659537/breonna-taylor-police-charges-ky [https://perma.cc/S3J9-NRXR].

25. *See id.* The charging documents stated that the officers lied in order to obtain the warrant that they used to search Ms. Taylor's apartment. *See id.*

26. *See* Al Baker & Benjamin Mueller, *Records Leak in Eric Garner Case Renews Debate on Police Discipline*, N.Y. TIMES (Mar. 22, 2017), https://www.nytimes.com/2017/03/22/nyregion/nypd-eric-garner-daniel-pantaleo-disciplinary-records.html [https://perma.cc/

death had eighteen conduct complaints against him;[27] the officer involved in Mr. Garner's death had more complaints on average than other members of the New York City Police Department, two of which were substantiated; several of the officers involved in Ms. Taylor's shooting had records of misconduct allegations, as well as department reprimands.[28] Following these cases, the defense bar and the public called for greater police accountability, leading to changes in several states.[29]

In New York, for example, the Manhattan District Attorney's Office dismissed 188 convictions because they were connected to one or more of eight police officers convicted of official misconduct.[30] Following suit, the Bronx, Brooklyn, and Queens District Attorney's Offices requested the dismissal of convictions tied to additional police officers convicted of official misconduct.[31] New York State also enacted a new discovery law—Article 245[32]—in response to calls for reform by prosecutors, the defense bar, and the public.[33] Article 245 requires that prosecutors turn over most of their

9K3Q-FQHU]; Richard Read, *Derek Chauvin, Officer Arrested in George Floyd's Death, Has a Record of Shootings and Complaints*, L.A. TIMES (May 29, 2020, 7:45 PM), https://www.latimes.com/world-nation/story/2020-05-29/chauvin-shootings-complaints-minneapolis-floyd [https://perma.cc/UH3G-J4FN]; John P. Wise & Kaitlin Rust, *Here's What's in the Personnel Files of 3 LMPD Officers Involved in Breonna Taylor Shooting*, WAVE (May 16, 2020, 12:31 AM), https://www.wave3.com/2020/05/15/heres-whats-personnel-files-lmpd-officers-involved-breonna-taylor-shooting/ [https://perma.cc/2F9H-FG8F].

27. *See* Read, *supra* note 26; *see also* Jay Senter & Shaila Dewan, *Killer of George Floyd Sentenced to 21 Years for Violating Civil Rights*, N.Y. TIMES (July 7, 2022), https://www.nytimes.com/2022/07/07/us/derek-chauvin-george-floyd-sentence.html [https://perma.cc/28G6-MJLD].

28. *See* Baker & Mueller, *supra* note 26; Wise & Rust, *supra* note 26; Tessa Duvall & Darcy Costello, *LMPD Releases Disciplinary Records for Breonna Taylor Cops. Large Parts Are Blacked Out*, LOUISVILLE COURIER J. (Oct. 19, 2020, 9:36 AM), https://www.courier-journal.com/story/news/local/breonna-taylor/2020/10/19/breonna-taylor-case-what-louisville-cops-disciplinary-records-say/3677041001/ [https://perma.cc/PKF6-ZGMG].

29. *See, e.g.*, Christopher T. Kurtz & Jacqueline A. Giordano, *Repeal of Civil Rights Law Section 50-a: What This Means for the Disclosure of Police Disciplinary Records*, BOND SCHOENECK & KING ATT'YS: N.Y. LAB. & EMP. L. REP. (Jun. 12, 2020), https://www.bsk.com/new-york-labor-and-employment-law-report/repeal-of-civil-rights-law-section-50-a-what-this-means-for-the-disclosure-of-police-disciplinary-records [https://perma.cc/W4W4-QQ3C] ("[I]n response to a nationwide outcry for police reform, the New York Legislature repealed Civil Rights Law § 50-a . . . ."); David Loy, *The Ongoing Push For Police Transparency*, FIRST AMEND. COAL. (May 17, 2022), https://firstamendmentcoalition.org/2022/05/the-ongoing-push-for-police-transparency/ [https://perma.cc/2RQ2-3PRY] ("After sustained public outcry over police brutality and biased policing, the state began piercing this veil of secrecy [over police misconduct.]"); Nikhel Sus, *States Must Lift the Veil of Secrecy over Police Misconduct*, CITIZENS FOR RESP. & ETHICS WASH. (June 19, 2020), https://www.citizensforethics.org/reports-investigations/crew-investigations/states-secrecy-police-misconduct-reform/ [https://perma.cc/35DL-28K5].

30. *See* Hurubie Meko, *188 Convictions Tied to Discredited N.Y.P.D. Officers Are Tossed Out*, N.Y. TIMES (Nov. 17, 2022), https://www.nytimes.com/2022/11/17/nyregion/manhattan-da-convictions-nypd-officers.html [https://perma.cc/VGJ3-W3PP].

31. *See id.*

32. N.Y. CRIM. PROC. LAW §§ 245.10–245.85 (McKinney 2023).

33. *See, e.g.*, James C. McKinley Jr., *Manhattan District Attorney Demands Access to Police Records*, N.Y. TIMES (July 8, 2018), https://www.nytimes.com/2018/07/08/nyregion/manhattan-district-attorney-police-records.html?searchResultPosition=16

evidence to the defense team, a shift from New York's prior limited disclosure discovery law.[34] Subsequently, New York City repealed Civil Rights Law section 50-a,[35] a statute that largely prohibited the disclosure of police officer personnel records.[36]

Several states have made similar changes.[37] Virginia amended its discovery laws in September 2018 to provide for greater pretrial disclosure, including the inspection of police reports and certain witness information.[38] Louisiana, Ohio, and North Carolina have also amended their discovery statutes to allow for more extensive disclosure.[39] Despite this movement toward more open discovery laws, current state laws and procedures are unclear about if and when police personnel files may be disclosed. Consequently, disclosure of the information contained in police personnel files varies among[40]—and sometimes even within—states.[41]

This Note discusses how states have shaped criminal disclosure statutes to balance the competing interests of prosecutors, defendants, and police officers, resulting in different approaches to police personnel file disclosures.[42] This Note also addresses the extent to which state criminal procedure laws and statutes should command prosecutors to go beyond the constitutionally mandated disclosure requirements, specifically with regard to police personnel files. Ultimately, this Note argues that states should explicitly define the scope of what constitutes disclosable evidence for impeaching police officer witnesses in state criminal laws.

This Note proceeds in three parts. Part I begins with a brief overview of the criminal trial process and examines the disclosure requirements established by *Brady v. Maryland* and its progeny. Part I next addresses and further defines impeachment evidence and explores the unique role police officers play in criminal proceedings, including a discussion of the evidence in police personnel files that could be useful to the defense. Part I concludes with a brief examination of the competing interests of the prosecution, the defense, and the police officers that legislatures and courts often consider

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[https://perma.cc/56B2-LJQ8]; Ashley Southall & Jan Ransom, *Once as Pro-prosecution as Any Red State, New York Makes a Big Shift on Trials*, N.Y. TIMES (May 2, 2019), https://www.nytimes.com/2019/05/02/nyregion/prosecutors-evidence-turned-over.html [https://perma.cc/9WMB-QWZS].

34. *See* Southall & Ransom, *supra* note 33.

35. N.Y. CIV. RIGHTS LAW § 50-a (McKinney 2023) (repealed 2020).

36. *See* Kurtz & Giordano, *supra* note 29.

37. *See Discovery Reform Legislative Victories*, NAT'L ASS'N CRIM. DEF. LAWS. (May 21, 2020), https://www.nacdl.org/Content/DiscoveryReformLegislativeVictories [https://perma.cc/CZZ3-VFBU].

38. *See id.*

39. *See id.*

40. *See infra* Part II.

41. *See, e.g.*, People v. Florez, 162 N.Y.S.3d 920 (Sup. Ct. 2022) (unpublished table decision) (holding that files must be related to the "subject matter of the case" to be released pursuant to Article 245). *But see, e.g.*, People v. Alvia, No. CR-003225-22BX, 2022 WL 3023372, at *3 (N.Y. Crim. Ct. Aug. 1, 2022) (holding that prosecutors must turn over unsubstantiated police misconduct records to the defense); *see also infra* Part II.

42. *See infra* Parts I.E–II.

when formulating rules and laws in this area. Part II sets forth three broad models of disclosure laws and analyzes how inconsistencies and ambiguities in these laws are currently impeding their application. Part III recommends a legislative solution to the disclosure of police personnel files, advocating that states enact a uniform and stand-alone subsection of each discovery statute to address the issue of police officer personnel records explicitly.

I. CRIMINAL PROCEEDINGS, DISCLOSURE OBLIGATIONS, AND EVERYTHING IN BETWEEN

Police officers play a vital and sometimes contentious role in the criminal justice system of the United States. Disclosure of police personnel files is one mechanism by which states and the public have sought to hold police officers accountable for misconduct.[43] Disclosure of police personnel files can also be an important tool in the criminal trial process.[44] Understanding the interaction between statutory disclosure obligations and police personnel files requires consideration of the constitutional doctrine that lays the groundwork for disclosure obligations and the varying interests that legislatures and courts consider when shaping these laws.

Part I.A supplies a general overview of criminal proceedings and highlights how criminal discovery laws vary from their civil counterparts.[45] Then, Part I.B addresses the constitutional disclosure requirements established by *Brady v. Maryland* and subsequent decisions. Part I.C defines impeachment evidence, the type of *Brady* evidence on which this Note focuses. Next, Part I.D introduces the unique role police officers play in criminal proceedings and how their personnel files potentially contain vital impeachment evidence.[46] Finally, Part I.E discusses the competing considerations that legislatures and courts often consider when shaping their discovery laws—the interests of the defense, the prosecution, and the police.[47]

A. Criminal Proceedings 101

Most criminal proceedings vary in structure, and state courts each have their own procedures and processes in criminal proceedings.[48] Nevertheless, the criminal process usually begins before an arrest at the investigatory stage.[49] During the investigatory stage, criminal investigators—including police officers—collect and provide evidence to help the prosecution

43. *See supra* note 29 and accompanying text.
44. *See infra* Parts I.D–I.E.
45. *See Justice 101: Steps in the Federal Criminal Process*, U.S. DEP'T JUST., https://www.justice.gov/usao/justice-101/steps-federal-criminal-process [https://perma.cc/EL6G-QM5J]; Bruce A. Green, *Federal Criminal Discovery Reform: A Legislative Approach*, 64 MERCER L. REV. 639, 642–49 (2013).
46. *See infra* Part I.D.
47. *See infra* Part I.E.
48. *See Justice 101: Steps in the Federal Criminal Process*, *supra* note 45.
49. *See id.*

understand and develop the case.[50] If the prosecutor believes that the information indicates that a particular individual committed the crime, they will charge that individual.[51]

The next step in the process is the arraignment—the procedure in which the defendant is formally charged and alerted of the charges brought against them.[52] There will also be an initial hearing, in which the presiding judge will decide whether or not to release the defendant until trial.[53]

After the judge makes this decision, discovery and plea bargaining typically follow.[54] Plea bargaining occurs when the prosecutor offers to lower a defendant's sentence in exchange for a guilty plea.[55] Plea bargaining is quite common: in 2017, approximately 97 percent of federal criminal defendants opted to plead guilty in exchange for lower sentences.[56]

Lawyers debate the precise moment in the criminal process at which discovery begins.[57] There is no general constitutional right to discovery,[58] and every state handles the timing and disclosure of discovery materials differently.[59] Pretrial discovery is conducted before a trial to "reveal facts and develop evidence" in the case[60] and is the process by which the defense and the prosecution exchange information about the witnesses and evidence they will present at trial.[61]

Although discovery in civil cases is quite liberal, the breadth of discovery in federal—and many state[62]—criminal cases is quite limited.[63] Federal civil procedure, for example, allows for various avenues of discovery and affords

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50. *See id.*

51. *See id.* In felony cases, the prosecutor will present the evidence to a grand jury, which will decide whether to charge the person with the crime, i.e., indict the person. *See id.* This process, however, is beyond the scope of this Note.

52. *See id.*; *see also* State v. Griffin, 525 S.E.2d 793, 807–08 (N.C. Ct. App. 2000).

53. *See Justice 101: Steps in the Federal Criminal Process*, *supra* note 45.

54. *See id.*; *see also* Sophia Waldstein, *Open-File Discovery: A Plea for Transparent Plea-Bargaining*, 92 TEMP. L. REV. 517, 519 (2020).

55. *See* Waldstein, *supra* note 54, at 519.

56. NAT'L ASS'N CRIM. DEF. LAWS., THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 14 (2018), http://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixthamendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf [https://perma.cc/B2HY-ZTY9]. One scholar suggests that most jurisdictions do not provide defendants with discovery prior to plea bargaining. *See* Waldstein, *supra* note 54, at 517.

57. *See* Waldstein, *supra* note 54, at 517 ("Before a criminal trial, prosecutors have a duty to provide some . . . information to the defendant during the discovery process . . . [a]nd yet, in the majority of jurisdictions—including Pennsylvania—defendants do not have a right to discovery before a plea bargain."); *see also* United States v. Ruiz, 536 U.S. 622, 630 (2002) (holding that the Constitution does not require the disclosure of impeachment evidence prior to entering a plea).

58. *See* Church v. State, 189 N.E.3d 580, 592 (Ind. 2022).

59. *See* HOOPER ET AL., *supra* note 5, at 23.

60. *Pretrial Discovery*, BLACK'S LAW DICTIONARY (11th ed. 2019).

61. *See How Courts Work*, AM. BAR ASS'N (Nov. 28, 2021), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/discovery/ [https://perma.cc/ACR2-HPZQ].

62. *See infra* Part II.

63. *See* Green, *supra* note 45, at 642.

litigants relatively easy access to the other side's favorable information.[64] By contrast, federal criminal procedure lacks the openness and ease afforded to litigants in civil proceedings.[65] This difference has been attributed to a fear that criminal defendants will use sensitive information to scare or harm potential witnesses.[66] Although state laws are generally more liberal than their federal counterparts when it comes to discovery,[67] some states largely adopted the federal rules,[68] mandating that prosecutors turn over only constitutionally required evidence.[69] The next section analyzes these constitutional requirements.[70]

B. Brady *and its Progeny*

Although there is no constitutional right to discovery in a criminal case,[71] *Brady v. Maryland* and its progeny created a constitutional obligation that requires prosecutors to disclose "all exculpatory evidence in their possession" to satisfy a criminal defendant's due process rights under the Fifth and Fourteenth Amendments to the Constitution.[72] This section analyzes the federal disclosure obligations established by these foundational cases.

In *Brady*, the defendant, John L. Brady, was convicted of murder and sentenced to death.[73] After his trial and sentencing, Brady learned that the state had withheld evidence that would have been favorable to his defense: that another individual had admitted to committing the homicide.[74] The

64. *See id.* at 642–43 ("Parties can obtain relevant information from opposing parties and witnesses through interrogatories, depositions, document requests, and subpoenas, resulting in parties having relatively liberal access to each other's facts, witnesses, and documents.").

65. *See id.* at 644.

66. *See, e.g.*, Edward S.G. Dennis, Jr., *The Discovery Process in Criminal Prosecutions: Toward Fair Trials and Just Verdicts*, 68 WASH. U. L.Q. 63, 63–68 (1990); Linda S. Eads, *Separating Crime from Punishment: The Constitutional Implications of* United States v. Halper, 68 WASH. U. L.Q. 929, 979–80 (1990) (citing *Proposed Amendments to Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Crim. Just. of the H. Comm. on the Judiciary*, 93d Cong. 38–52, 146–50 (1974) (statements of W. Vincent Rakestraw and Richard L. Thornburgh)); V. Noah Gimbel, *Body Cameras and Criminal Discovery*, 104 GEO. L.J. 1581, 1584–85 (2016) (stating that prosecutors have an interest in keeping body-worn camera videos to themselves out of a concern for victim safety).

67. *See* Green, *supra* note 45, at 644.

68. FED. R. CRIM. P. 16.

69. *See, e.g.*, ALA. R. CRIM. P. 16.1 (2023); S.C. R. CRIM. P. 5 (2023); WYO. R. CRIM. P. 16 (2023).

70. There are several additional steps in the criminal process, such as the criminal trial, jury deliberations, and sentencing. *See How Courts Work*, *supra* note 61. However, the scope of this Note is limited to the pretrial discovery process.

71. *See* Weatherford v. Bursey, 429 U.S. 545, 559 (1977). In *Weatherford*, the Court held that *Brady* did not create a constitutional right to discovery. *See id.* The Court partially based its opinion on *Wardius v. Oregon*, in which the Court explained that the Due Process Clause, found in both the Fifth and Fourteenth Amendments to the Constitution, says scarcely anything about the scope of disclosure for discovery. *See id.* (citing Wardius v. Oregon, 412 U.S. 470, 474 (1973)).

72. *See* HOOPER ET AL., *supra* note 5, at 1.

73. *See* Brady v. State, 174 A.2d 167, 168 (Md. 1961), *aff'd*, 373 U.S. 83 (1963).

74. *See* Brady v. Maryland, 373 U.S. 83, 84 (1963).

defendant petitioned the trial court for a new trial based on this new evidence but was denied.[75] On appeal, the Maryland Court of Appeals held that the suppression of the evidence was a Fourteenth Amendment due process violation and remanded the case for a retrial—but only for the question of punishment, *not* guilt.[76] The U.S. Supreme Court granted certiorari to address whether the Maryland Court of Appeals denied the defendant's due process right by restricting the new trial to the question of punishment only.[77] The Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[78] Essentially, *Brady* created what this Note will refer to as the constitutional floor for disclosure obligations in criminal proceedings, requiring prosecutors to disclose evidence that is both "(1) favorable to the accused, and (2) material to guilt or punishment."[79] Several subsequent U.S. Supreme Court decisions clarified these obligations.[80]

In *Giglio v. United States*,[81] the defense uncovered new evidence that the government had failed to disclose while a conviction appeal was pending.[82] A key witness in the trial had testified that the prosecutors made him no promises regarding the prosecution of his own case in return for his testimony.[83] However, during the grand jury proceeding, the prosecutor who presented the case to the grand jury had allegedly promised the witness "that he would not be prosecuted if he testified for the [g]overnment."[84] The prosecution did not provide this evidence to the defense.[85] The Court held that impeachment evidence—or evidence that affects the credibility of a witness[86]—falls squarely within the requirements established under *Brady* if the evidence is material.[87] Since the government's case depended entirely on the witness who received a promise from the grand jury prosecutor, the

75. *See id.*

76. *See id.* at 84–85; *Brady*, 174 A.2d at 171–72.

77. *See Brady*, 373 U.S. at 85.

78. *Id.* at 87.

79. Thomas P. Hogan, *An Unfinished Symphony:* Giglio v. United States *and Disclosing Impeachment Material About Law Enforcement Officers*, 30 CORNELL J.L. & PUB. POL'Y 715, 721 (2021). States are free to create greater protections under their own state constitutions, but *Brady* created the minimum disclosure requirements under the Fourteenth Amendment Due Process Clause. *See Brady*, 373 U.S. at 87.

80. Giglio v. United States, 405 U.S. 150, 154 (1972); United States v. Bagley, 473 U.S. 667, 674–76 (1985); Kyles v. Whitley, 514 U.S. 419, 434, 438 (1995).

81. 405 U.S. 150 (1972).

82. *See id.* at 150–51.

83. *See id.* at 151–52.

84. *See id.* at 152. Two separate prosecutors handled the grand jury and trial proceedings. *See id.*

85. *See id.* at 150–51.

86. *See infra* Part I.C.

87. *Giglio*, 405 U.S. at 154 ("When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule.") (quoting Napue v. Illinois, 360 U.S. 264, 269 (1959)).

Court held that the evidence was material and reversed the previous decision.[88]

In *United States v. Bagley*,[89] the Court interpreted the materiality component of *Brady*'s disclosure requirement, holding that evidence is material if it can affect the outcome of a trial.[90] In *Bagley*, the defendant was charged with federal firearms and narcotics offenses.[91] The defendant filed a pretrial motion requesting "any deals, promises or inducements made to [government] witnesses in exchange for their testimony," among other things.[92] The government's response did not indicate that any such deals had been made.[93] Two primary government witnesses testified about both charges, and a jury convicted the defendant of the narcotics charges.[94] Following the conviction, the defendant received copies of signed contracts by the primary witnesses indicating that the government had promised to pay the witnesses money "commensurate with [the] services and information rendered" in their undercover investigation of the defendant.[95] The defendant moved to have his sentence overturned, arguing that withholding this information violated his *Brady* rights because he could have used this information to impeach the witnesses at trial.[96]

In addressing the defendant's claims, the Court reiterated *Brady*'s standard that evidence must be disclosed if it is both material to issues of guilt or punishment and favorable to the defense.[97] For the favorability prong, the Court highlighted its decision in *Giglio* that "[i]mpeachment evidence, . . . as well as exculpatory evidence, falls within the *Brady* rule."[98] For the materiality prong, the Court held that evidence is material when there is a reasonable probability that the outcome of the case would be different if the evidence were disclosed.[99]

Kyles v. Whitley,[100] the final case in this series of decisions, further clarified what came to be known as the *Brady*/*Giglio* materiality standard.[101]

88. *See id.* at 154–55.
89. 473 U.S. 667 (1985).
90. *See id.* at 713; *see also* Hogan, *supra* note 79, at 723.
91. *See Bagley*, 473 U.S. at 669.
92. *See id.* at 669–70.
93. *See id.* at 670.
94. *See id.* at 670–71.
95. *See id.* at 671.
96. *See id.* at 671–72.
97. *See id.* at 674; *see also* Hogan, *supra* note 79, at 723.
98. *Bagley*, 473 U.S. at 676. Exculpatory evidence is any evidence that helps to establish a criminal defendant's innocence. *Exculpatory Evidence*, BLACK'S LAW DICTIONARY (11th ed. 2019). Evidence is usually exculpatory if it "tends to negate guilt, diminish culpability, support an affirmative defense . . . or if the evidence could potentially reduce the severity of the sentence imposed." Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 423–25 (2010).
99. *Bagley*, 473 U.S. at 682. The Court defined a "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." *Id.* The Court remanded the case to the Ninth Circuit for a materiality determination. *See id.* at 684.
100. 514 U.S. 419 (1995).
101. Hogan, *supra* note 79, at 724 ("*Kyles v. Whitley* is the final United States Supreme Court case attempting to address the *Brady*/*Giglio* definitional standard.").

In *Kyles*, the defendant was convicted of murder and sentenced to death.[102] On appeal to the Supreme Court of Louisiana, the defense presented evidence that the prosecution had failed to disclose favorable evidence that was in the possession of the police—such as conflicting eyewitness statements and inconsistent statements[103]—before or during the trial proceedings. Nevertheless, the court refused to overturn the trial results.[104] After several appeals and petitions, the U.S. Supreme Court granted certiorari.[105]

The Court in *Kyles* expounded on the materiality component of *Brady* by holding that a showing of materiality does not require that the material evidence would have led to an acquittal, only that confidence in the verdict would be undermined with its introduction.[106] The Court further noted that, although there is not a *Brady* violation every time the prosecutor fails to turn over a favorable item to the defense, the prosecutor has the responsibility to "gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached."[107] The Court thus held that although the police and not the prosecutors held the favorable evidence in this case, an "individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."[108] In other words, the Court will impute the knowledge of police officers to the prosecution, even if the prosecutors do not have actual knowledge of certain evidence.[109]

The *Brady* cases accordingly set the constitutional floor for disclosure obligations for evidence that is favorable to the defense and material to either guilt or punishment. The next section in this part expounds on one critical area of *Brady*: impeachment evidence.

C. What Is Impeachment Evidence?

Impeachment evidence is any evidence that can attack or undermine the credibility of a witness.[110] Impeachment evidence is unique from exculpatory evidence because it does not directly help prove a defendant's innocence.[111] Instead, impeachment evidence indirectly supports a

102. *Kyles*, 514 U.S. at 421–22.

103. *See id.* at 430–31, 453–54. Most of the new evidence was held by the police and was never turned over to the prosecution. *See id.* at 442 n.13; *Hogan*, *supra* note 79, at 725.

104. *See Kyles*, 514 U.S. at 422.

105. *See id.*

106. *See id.* at 434 ("The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.").

107. *See id.* at 437.

108. *See id.*

109. *See id.*; *see also* Hogan, *supra* note 79, at 725.

110. *See, e.g.*, Giglio v. United States, 405 U.S. 150, 154–55 (1972) (explaining that, because the "case depended almost entirely on [the witness's] testimony[,]" information that the defense could use to undermine the witness's credibility was important); *see also* ROGER PARK & TOM LININGER, 5 THE NEW WIGMORE: A TREATISE ON EVIDENCE: IMPEACHMENT AND REHABILITATION § 2.1 (2022).

111. *See* R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 VAND. L. REV. 1429, 1437 (2011).

defendant's innocence by calling into question a witness's credibility and, thus, the believability of the witness's statements regarding a defendant's guilt.[112] In *Giglio*, for example, the defendant sought to introduce new evidence demonstrating that a key witness was promised prosecutorial leniency in exchange for his testimony.[113] The defendant sought to use this evidence to undermine the witness's credibility, as the promise by the prosecutor potentially made the witness's testimony untrustworthy.[114] If the witness is involved in criminal activities, the witness could be lying to avoid criminal punishment and prosecution.[115] Because it is unclear whether the witness's statements are the truth or lies, their testimony is undermined.[116] This section introduces several different forms of impeachment evidence and discusses how such evidence can be vital to the defense team.

Impeachment evidence can include "any information regarding a witness's prior convictions, biases, prejudices, self-interests, or any motive to fabricate or curry favor with the government."[117] It is introduced for several reasons,[118] including as evidence of bias, defects in perception or recall, prior inconsistent statements, contradiction, or *bad character for truthfulness*.[119] This Note will limit the analysis of impeachment evidence to evidence of bad character for truthfulness.

A bad character for truthfulness means that the witness has a reputation for being dishonest or deceptive.[120] Because a dishonest person is less likely to testify truthfully,[121] proof of a bad character for truthfulness can undermine a witness's credibility. A party can demonstrate a bad character for truthfulness in three ways.[122] First, the defense counsel may use a witness's previous conviction of a crime involving dishonesty to question the witness's truthfulness.[123] Second, the defense can introduce evidence of unconvicted acts that bear on the witness's truthfulness—but with limitations.[124] This rule typically does not allow the defense to introduce extrinsic evidence to prove the unconvicted acts if the witness denies the allegations.[125] Some

112. *See id.*
113. *Giglio*, 405 U.S. at 151.
114. *See id.* at 155.
115. *See* STEPHEN S. TROTT, THE USE OF A CRIMINAL AS A WITNESS: A SPECIAL PROBLEM, LECTURE SUPPLEMENT 29–30, 35 (2007), https://www.aclu.org/sites/default/files/field_document/informant_trott_outline.pdf [https://perma.cc/UUS4-7KEG].
116. *See id.*
117. Jones, *supra* note 98, at 425.
118. *See* PARK & LININGER, *supra* note 110.
119. *See id.*
120. *See, e.g.*, 4. FINAL INSTRUCTIONS: CONSIDERATION OF PARTICULAR TYPES OF EVIDENCE § 4.23 (2022) (model criminal jury instructions for the U.S. Court of Appeals for the Third Circuit); ROBERT A. BARKER & VINCENT C. ALEXANDER, EVIDENCE IN NEW YORK STATE AND FEDERAL COURTS § 6:56 (2d ed. 2011).
121. *See* BARKER & ALEXANDER, *supra* note 120.
122. PARK & LININGER, *supra* note 110.
123. *See id.*
124. *See id.*
125. *See id.*; *id.* § 3.3.

jurisdictions even ban these inquiries entirely.[126] Finally, a third-party character witness can opine on the character of the target witness.[127]

Since many cases come down to the credibility of witnesses, impeachment evidence can be an invaluable tool for the defense.[128] Police officers testify frequently in criminal trials, for purposes ranging from providing information regarding their role in the criminal investigation to testifying as the complainant or accuser.[129] The next section delves into the importance of police officer credibility and how impeachment evidence for this class of witnesses may be vital to a defense team's case.

D. Police Officers, Their Credibility, and the Relevance to the Conversation About Disclosure Obligations

The jury judges the credibility of a police officer, like any other witness, the second the officer steps into a courtroom to testify.[130] However, police officers are unlike other witnesses in the following ways: (1) they operate as professional witnesses[131] and (2) their testimony is usually credited as more trustworthy than any other form of witness testimony.[132] This section discusses each of these differences in turn, then concludes with a discussion of police personnel files and the significant role that they play in the realm of disclosure obligations.

1. Police Officers and Their Role as "Professional Witnesses"

Most witnesses will only testify in a criminal trial once in their lifetimes, due to the unlucky happenstance of being in the wrong place at the wrong time.[133] Police officers, conversely, play a "key investigative component in our criminal justice system,"[134] and because of this role, they operate as professional witnesses.[135] Prosecutors may call on police officers to testify to specific facts regarding an investigation or to tell their story regarding how

126. *See id.* § 2.1; *see, e.g.*, ALA. R. EVID. 608(b) (2023); IDAHO R. EVID. 608(b) (2023).
127. *See* PARK & LININGER, *supra* note 110.
128. *See* Moran, *supra* note 15, at 1341.
129. *See id.*
130. *See* Jennifer Sellitti, *Breaking Blue: Challenging Police Officer Credibility at Motions to Suppress*, NAT'L ASS'N CRIM. DEF. LAWS. (Aug. 31, 2022), https://www.nacdl.org/Content/Breaking-Blue-Challenging-Police-Officer-Credibili [https://perma.cc/K8G8-FLY2] ("Every time a police officer puts [their] left hand on the Bible, raises [their] right hand in the air, and swears to tell the truth and nothing but the truth, [they are] inviting the factfinder to judge [their] credibility.").
131. *See* Stratton, *supra* note 15, at 933; *see also* Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 245 (1998).
132. *See* Jonathan M. Warren, *Hidden in Plain View: Juries and the Implicit Credibility Given to Police Testimony*, 11 DEPAUL J. SOC. JUST. 1, 6–7 (2018); *see also* Chin & Wells, *supra* note 131, at 245.
133. *See* Warren, *supra* note 132, at 8.
134. *See* Wilson, *supra* note 15, at 2.
135. *See* Stratton, *supra* note 15, at 933; *see also* Warren, *supra* note 132, at 8 (stating that police officers operate as "'expert' fact witnesses").

the defendant's arrest unfolded.[136] Most of the prosecution's evidence consists of police reports and statements regarding the defendant's alleged crimes.[137] In the course of their career, a police officer may testify "hundreds, if not thousands, of times."[138] As a result, they are more familiar with how the court system operates.[139] They are as comfortable as a witness can be on cross-examination,[140] and this translates to a more "polished and composed air" throughout their testimony.[141]

Police officers' demeanors are also due in part to the training they may receive from their departments or outside agencies on how to testify.[142] In New York, for example, police officer recruit training includes a workshop on courtroom testimony.[143] The Federal Law Enforcement Training Center offers working police officers instruction on preparing to testify in court.[144] Because of this experience and training, officers may appear genuine and honest to jurors when testifying to facts that they know are not true.[145] Accordingly, the next section explores the current research regarding police officer courtroom credibility and further examines why challenging this credibility may be so important.

2. Police Officers and Courtroom Credibility

Research shows that lying by police officers is a common occurrence in courtroom practice.[146] Judges, defense attorneys, and prosecutors alike report that police prevarication is a common occurrence in the courtroom, "and even police officers themselves concede that lying is a regular feature

136. *See* MICHELLE M. HELDMYER, THE ART OF LAW ENFORCEMENT TESTIMONY: FINE TUNING YOUR SKILLS AS A WITNESS 9, 12 (2018), https://www.fletc.gov/sites/default/files/the_art_of_testimony_4.20.18.pdf [https://perma.cc/2DB4-TZT8].

137. *See* Lauren M. Ouziel, *Beyond Law and Fact: Jury Evaluation of Law Enforcement*, 92 NOTRE DAME L. REV. 691, 703 (2016).

138. *See* Benjamin E. Rosenberg, *A Statutory Solution to the Problem of Police* Giglio, 53 CRIM. L. BULL. 263 (2017).

139. *See* Warren, *supra* note 132, at 8.

140. *See* Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311, 1322 (1994).

141. *See* MICHAEL AVERY, DAVID RUDOVSKY, KAREN M. BLUM & JENNIFER LAURIN, POLICE MISCONDUCT: LAW AND LITIGATION § 11:12 (3d ed. 2022); *see also* John Burton, *Up Against a Blue Wall*, TRIAL, July 2010, at 36.

142. *See supra* note 141 and accompanying text; N.Y. POLICE DEP'T, ADMINISTRATIVE GUIDE: BOROUGH COMMANDER (2021), https://www.nyc.gov/assets/nypd/downloads/pdf/public_information/public-adminguide1.pdf [https://perma.cc/8KWU-8PHB]; *Recruit Training Section: Academic Instructor Unit*, N.Y. POLICE DEP'T, https://www.nyc.gov/site/nypd/bureaus/administrative/training-recruit.page#academics [https://perma.cc/FY5S-SVAN].

143. *See Recruit Training Section: Academic Instructor Unit*, *supra* note 142.

144. *See generally* HELDMYER, *supra* note 136.

145. *See* AVERY ET AL., *supra* note 141; David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 457 (1999); Joseph Goldstein, *Police 'Testilying' Remains a Problem. Here Is How the Criminal Justice System Could Reduce It*, N.Y. TIMES (Mar. 22, 2018), https://www.nytimes.com/2018/03/22/nyregion/police-lying-new-york.html [https://perma.cc/Y5ES-PLFQ]; Moran, *supra* note 15, at 1399.

146. *See supra* note 145 and accompanying text.

of the life of a cop."[147] This phenomenon is so common that it has brazenly been dubbed "testilying."[148] Yet, when a trial boils down to the credibility of either a defendant or a police officer, "jurors may well bend over backwards to believe the person in blue."[149]

When it comes to the credibility of a police officer, jurors are more likely to "take an officer at [their] word without the necessary analysis, reasoning, and ultimate weighing of credibility."[150] The perception of police officers varies drastically throughout the United States.[151] Research and scholarship demonstrate that juries in urban communities are far more accurate in determining and questioning police officer credibility than their rural counterparts.[152] The vast majority of jurors, however, are "white, upper-middle class individuals" who view the police favorably and who are less likely to question their credibility.[153] These jurors are also more likely to identify and sympathize with the prosecutor and their police witness.[154] Taken together, juries tend to perceive a police officer's testimony as more credible than an ordinary witness's testimony.[155]

Courts also instruct juries to credit police officer testimony as they would credit any other witness's testimony.[156] Police officers, however, are often not "disinterested parties" in criminal proceedings—and their stake in the proceeding creates an incentive to lie.[157] An officer may devote hours, days, and even weeks of work to a case before it culminates in a trial.[158] Additionally, an officer's success may be gauged by the number of arrests that they make that result in convictions.[159] Police officers may also be incentivized to lie to cover up coworker misconduct, to hide their own lack of productivity, or "to aggrandize themselves for recognition and promotion."[160] Thus, although jurors often consider police officers to be

147. *See* Dorfman, *supra* note 145, at 457.

148. *See* Goldstein, *supra* note 145.

149. *See* Chin & Wells, *supra* note 131, at 245; Warren, *supra* note 132, at 6. *But see* Dorfman, *supra* note 145, at 457 ("Juries, particularly in . . . urban criminal courts, are thoroughly capable of discounting police testimony as unbelievable, unreliable, and even mendacious.").

150. *See* Warren, *supra* note 132, at 7.

151. *See id.* at 6.

152. *See* Dorfman, *supra* note 145, at 457; David N. Dorfman & Chris K. Iijima, *Fictions, Fault and Forgiveness: Jury Nullification in a New Context*, 28 U. MICH. J.L. REFORM 861, 886 (1995); Joe Sexton, *Jurors Question Honesty of Police*, N.Y. TIMES, Sept. 25, 1995, at B3, https://www.nytimes.com/1995/09/25/nyregion/jurors-question-honesty-of-police.html [https://perma.cc/Y5BC-Z5SV].

153. *See* Warren, *supra* note 132, at 6; *see also* Ashish S. Joshi & Christine T. Cline, *Lack of Jury Diversity: A National Problem with Individual Consequences*, AM. BAR ASS'N (Sept. 1, 2015), https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2015/lack-of-jury-diversity-national-problem-individual-consequences.html [https://perma.cc/277A-6HG7].

154. *See* Warren, *supra* note 132, at 6.

155. *See id.* at 6–7; *see also* Chin & Wells, *supra* note 131, at 245.

156. *See* Vida B. Johnson, *Silenced by Instruction*, 70 EMORY L.J. 309, 312, 331 (2020).

157. *See id.* at 332.

158. *See id.*

159. *See id.* at 333.

160. *See* Dorfman, *supra* note 145, at 461.

more credible than the average witness,[161] and courts instruct juries to treat them as they would any other witness who takes the stand,[162] police officers may have more of an incentive to lie than any other party who finds themselves testifying in court.[163] The next section explores the interconnection between disclosure obligations, impeachment evidence, and a police officer's personnel file.

3. Police Personnel Files and Their Relationship to Impeachment Evidence and Disclosure Obligations

Since police officers frequently serve as witnesses in criminal trials, police departments often must disclose information regarding their officers for impeachment purposes.[164] As discussed, evidence that is critical to impeaching the prosecution's witnesses falls squarely under the constitutionally required disclosure obligations outlined in *Brady* and its progeny.[165] In other words, the defense has a right to any evidence that may undermine a police officer's testimony regarding the defendant's guilt. This section considers how information in a police officer's personnel file may be crucial for undermining a police officer's credibility at trial.

Investigative reports and commissions have found that police misconduct—and subsequent lying to cover up wrongdoing—is recurring and prevalent.[166] Police departments across the United States have internal mechanisms that allow individuals to lodge formal complaints against officers.[167] These complaints, if documented, will be found in the officer's personnel file.[168] Personnel files may also contain information regarding

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161. *See* Chin & Wells, *supra* note 131, at 245.

162. *See* Johnson, *supra* note 156, at 331.

163. *See id.* at 333 ("[W]hile police have any number of interests in a case, judges are instructing jurors to assume that the officer is just like an unbiased witness.").

164. *See supra* Part I.D.1.

165. *See supra* Part I.B.

166. *See* Dorfman, *supra* note 145, at 458; Harold Baer, Jr. & Joseph P. Armao, *The Mollen Commission Report: An Overview*, 40 N.Y.L. SCH. L. REV. 73, 73 (1995). *See generally* COMM'N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCS. OF THE POLICE DEP'T, COMMISSION REPORT (1994), https://www.scribd.com/document/248581606/1994-07-07-Mollen-Commission-NYPD-Report# [https://perma.cc/NY5Y-2V99]; COMM'N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE CITY'S ANTI-CORRUPTION PROCS., THE KNAPP COMMISSION REPORT ON POLICE CORRUPTION (1972), https://iwpchi.files.wordpress.com/2019/12/knapp-commission-report-part-1.pdf [https://perma.cc/3GRD-LEXQ].

167. *See, e.g.*, *How to File a Complaint with the CCRB*, N.Y.C. CIVILIAN COMPLAINT REV. BD., https://www.nyc.gov/site/ccrb/complaints/file-complaint.page [https://perma.cc/SM6S-R65E] (last visited Oct. 6, 2023); *Complaint Procedures*, TEX. COMM'N ON L. ENF'T, https://www.tcole.texas.gov/content/complaint-procedures [https://perma.cc/G5ME-AGLK] (last visited Oct. 6, 2023); THE CITY OF OKLA. CITY POLICE DEP'T, FORMAL CITIZEN COMPLAINT FORM (2020), https://www.okc.gov/home/showpublisheddocument/19559/637346353055430000 [https://perma.cc/UUJ3-KJWC].

168. *See, e.g.*, CITY OF GALVESTON POLICE DEP'T, POLICY 1013: PERSONNEL RECORDS (2020), https://www.galvestontx.gov/DocumentCenter/View/11305/1013-Personnel_Records [https://perma.cc/HN7Y-3FP3]; NEW ORLEANS POLICE DEPARTMENT OPERATIONS MANUAL: CHAPTER 13.03, PERSONNEL FILES (2018),

internal department business, such as "performance evaluations, disciplinary write-ups, and internal affairs investigations that show an officer has lied."[169] These files will also contain personal information, such as the officer's name, date of birth, address, marital status, employee benefit elections, photograph, payroll records, phone number, and emergency contact.[170]

Although not everything in an officer's personnel file will constitute impeachment evidence, it is a potential goldmine for *Brady* material.[171] For example, a police officer's personnel file might include evidence that the officer "falsified reports, provided false testimony, stole money, or otherwise lied on the job."[172] This type of evidence is invaluable to the defense team because it could potentially use these findings to undermine the credibility of a testifying police officer at trial.[173] Prosecutors, police departments, and state legislatures, however, have had difficulty defining the scope of what constitutes disclosable impeachment evidence for police officer witnesses.[174]

This is further complicated by the classification system police departments often use to rate the veracity of an allegation.[175] Typically, allegations of misconduct are categorized in one of four ways: substantiated, unsubstantiated, exonerated, or unfounded.[176] If a claim is substantiated, it means that there is sufficient evidence that the officer committed the acts alleged and that the actions constituted misconduct.[177] When a claim is unsubstantiated, it means that there was insufficient evidence and information to establish whether the officer committed the misconduct alleged.[178] If an officer is exonerated from a claim, it means that there was sufficient evidence that the acts alleged actually occurred, but that the

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https://nola.gov/getattachment/NOPD/Policies/Chapter-13-03-Personnel-Files-EFFECTIVE-4-8-18.pdf/ [https://perma.cc/U6RV-ACCM].

169. Jonathan Abel, Brady*'s Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 750 (2015).

170. *See, e.g.*, CITY OF GALVESTON POLICE DEP'T, *supra* note 168; NEW ORLEANS POLICE DEPARTMENT OPERATIONS MANUAL: CHAPTER 13.03, PERSONNEL FILES, *supra* note 168.

171. *See* CITY OF GALVESTON POLICE DEP'T, *supra* note 168; NEW ORLEANS POLICE DEPARTMENT OPERATIONS MANUAL: CHAPTER 13.03, PERSONNEL FILES, *supra* note 168.

172. *See* CITY OF GALVESTON POLICE DEP'T, *supra* note 168; NEW ORLEANS POLICE DEPARTMENT OPERATIONS MANUAL: CHAPTER 13.03, PERSONNEL FILES, *supra* note 168.

173. *See supra* Parts I.C, I.D.2; Abel, *supra* note 169, at 751 ("In cases that hinge on an officer's testimony, the value of these various forms of impeachment evidence cannot be overstated.").

174. *See* Hogan, *supra* note 79, at 731; *see also infra* Part II.C. *Brady*'s materiality standard is difficult to apply. *See infra* Part II.A.

175. *See* CITY OF GALVESTON POLICE DEP'T, *supra* note 168; NEW ORLEANS POLICE DEPARTMENT OPERATIONS MANUAL: CHAPTER 13.03, PERSONNEL FILES, *supra* note 168.

176. *See* CITY OF GALVESTON POLICE DEP'T, *supra* note 168; NEW ORLEANS POLICE DEPARTMENT OPERATIONS MANUAL: CHAPTER 13.03, PERSONNEL FILES, *supra* note 168.; *see also* People v. Montgomery, 159 N.Y.S.3d 655, 656 (Sup. Ct. 2022); COLO. STATE UNIV. POLICE DEP'T, POLICY 1013: PERSONNEL RECORDS (2019), https://police.colostate.edu/wp-content/uploads/sites/85/2020/03/1013-Personnel-Records.pdf [https://perma.cc/X2AT-63CW].

177. *See Case Outcomes*, N.Y.C. CIVILIAN COMPLAINT REV. BD., https://www.nyc.gov/site/ccrb/investigations/case-outcomes.page [https://perma.cc/R5D4-Q3VU] (last visited Oct. 6, 2023); *Montgomery*, 159 N.Y.S.3d at 656.

178. *See Case Outcomes*, *supra* note 177; *Montgomery*, 159 N.Y.S.3d at 656.

officer's actions did not constitute misconduct.[179] Finally, when a claim against an officer is unfounded, it means that there was sufficient evidence to determine that the officer did not commit the acts alleged.[180]

This classification system complicates the jobs of prosecutors, police departments, and state legislatures when determining proper disclosure because—depending on the classification of the allegation—the personnel file may not contain the alleged misconduct.[181] For example, the Policy Manual for the City of Galveston Police Department in Texas states that a police officer's primary personnel file will not contain complaints that result in unsubstantiated, unfounded, or exonerated findings.[182]

In sum, police personnel files may contain vital information for the defense team, and prosecutors may be required to disclose such information under *Brady*. Complications arise when prosecutors and state legislatures must decide what particular information in a police officer's personnel file to disclose.[183] Accordingly, the next section explores the competing interests that legislatures consider when shaping their disclosure laws. Legislatures often consider the competing interests of the prosecution, the defense, and the police.

E. Policy and the Police: Three Competing Considerations for the Disclosure of Police Personnel Files

Brady and its progeny set the constitutional floor for disclosure requirements, but they in no way limit the potential increase in the scope of disclosure obligations at the state level.[184] Thus, state legislatures can implement disclosure obligations above and beyond the requirements of *Brady*. This section introduces the competing interests with which legislatures must contend in shaping such disclosure obligations. Specifically, this section focuses on the interests of three chief stakeholders: (1) the interests of police officers—and police departments—in the privacy and confidentiality of personnel files; (2) the interests of defense attorneys in obtaining relevant impeachment materials for trial; and (3) the interests of prosecutors in administratively feasible disclosure obligations.

1. Interests of the Police in Privacy

From the police officer's perspective, disclosing misconduct can affect their very livelihood.[185] For most witnesses, the defense's use of

179. *See Montgomery*, 159 N.Y.S.3d at 656.

180. *See Case Outcomes*, *supra* note 177; *Montgomery*, 159 N.Y.S.3d at 656.

181. *See, e.g.*, CITY OF GALVESTON POLICE DEP'T, *supra* note 168 (stating that personnel records—other than the officer's internal affairs file—will not contain complaints that are unsubstantiated, unfounded, or exonerated).

182. *See id.* The police department's policy is to maintain these categories of claims in the internal affairs file of the police officer. *See id.*

183. *See infra* Part II.

184. *See supra* Part I.B.

185. *See* Katherine J. Bies, *Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct*, 28 STAN. L. & POL'Y REV. 109, 117 (2017).

impeachment evidence only undermines the witness's credibility in relation to the specific case, but access to police personnel files and potential impeachment material therein can be career-ending for police officers, given the level of officer involvement in criminal proceedings.[186] As highlighted above, prosecutors often call upon police officers to testify at trial, and police officers can testify hundreds or thousands of times throughout their careers.[187] When an officer's credibility is called into question, it "immediately puts a question mark on the officer's ability to testify, and that question mark has severe employment consequences."[188] Officers who are flagged by prosecutors and placed on a list as having a possible credibility problem—so called *Brady* lists[189]—cannot make arrests, work on cases, or do any other police work that could potentially result in them having to testify at trial.[190]

Many police unions also claim that disclosing officers' personnel files to defendants poses risks to their safety.[191] Defendants may be inclined to use personnel files to "escape criminal liability" by fabricating misconduct allegations against officers to undermine the officer's credibility and avoid criminal charges.[192] Further, unions argue that disclosing police officers' personnel files may undermine officers' credibility and safety on the streets.[193] Finally, proponents of nondisclosure argue that more open disclosure will disincentivize individuals to come forward with allegations of misconduct.[194]

Overall, many officers strongly oppose the disclosure of their personnel files for the purposes of their impeachment as witnesses during criminal trials.

2. Interests of the Defense in Obtaining Potential Impeachment Evidence

Impeachment materials found in a police officer's personnel file can "mean the difference between life and death" for criminal defendants,[195] especially in scenarios in which a case is based solely on the testimony of a

186. *See* Abel, *supra* note 169, at 780.
187. *See* Rosenberg, *supra* note 138.
188. *See* Abel, *supra* note 169, at 780.
189. *See id.* ("*Brady* lists, *Giglio* lists, liars lists, asterisk lists, potential impeachment disclosure databases, and law enforcement integrity databases are all terms used to describe the mechanism by which prosecutors within an office alert each other to an officer's credibility problems.").
190. *See id.* at 746. Police officers placed on *Brady* lists are often designated as "*Brady* cops." *See id.*
191. *See* Bies, *supra* note 185, at 116.
192. *See* S. COMM. ON PUB. SAFETY, BILL ANALYSIS, S.B. 1286, 2015–2016 Sess., at W (Cal. 2016), http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_1251-1300/sb_1286_cfa_20160412_170041_sen_comm.html [https://perma.cc/8EM5-8J9Q].
193. *See id.* at W–X; Bies, *supra* note 185, at 116.
194. *See* S. COMM. ON PUB. SAFETY, BILL ANALYSIS, S.B. 1286, 2015–2016 Sess., at X (Cal. 2016), http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_1251-1300/sb_1286_cfa_20160412_170041_sen_comm.html [https://perma.cc/8EM5-8J9Q].
195. *See* Abel, *supra* note 169, at 746.

police officer witness.[196] In *Milke v. Ryan*,[197] for example, the U.S. Court of Appeals for the Ninth Circuit overturned a death sentence conviction because the prosecution withheld material evidence that a key testifying police officer had a history of lying under oath.[198] In many cases, undermining the credibility of a police witness may be the defendant's only chance at winning their trial.[199] One scholar has gone as far as to claim that the reality of courtroom dynamics is that the *police officer* is the one who is actually on trial;[200] the outcome of the case is so tied to the police officer's credibility that prosecutors will go out of their way to preserve the integrity of the officer witness.[201]

Further still, the government has virtually unlimited access to the defendant's criminal history, and if they are missing any information, they have myriad ways of obtaining such information.[202] By contrast, the defense often faces obstacles in receiving information, due to fear of harm to witnesses or laws that protect the confidentiality of police personnel records.[203] Scholars also argue that, by allowing greater confidentiality of police personnel files, legislatures and courts may inadvertently deprive defendants of their *Brady* rights to impeachment evidence contained in an officer's personnel file.[204] The defense is entitled to any material evidence that could undermine a witness's credibility;[205] this obligation, according to several scholars, does not stop at the cover of a police officer's personnel file.[206]

3. Interests of Prosecutors in Administrability

Prosecutors play a unique role in the criminal justice system.[207] The prosecutor has the "dual responsibility to ensure that the guilty shall not escape and the innocent shall not suffer."[208] But this role can become muddled with ambiguity. Although prosecutors are constitutionally required to turn over certain minimal exculpatory evidence pursuant to *Brady* and its

196. *See id.* at 751; *see also supra* Part I.D.2.
197. 711 F.3d 998 (9th Cir. 2013).
198. *See id.* at 1001, 1018–19.
199. *See* Moran, *supra* note 15, at 1341.
200. *See* Ouziel, *supra* note 137, at 701.
201. *See id.*
202. *See* Moran, *supra* note 15, at 1342, 1345–47.
203. *See id.* at 1368 ("[T]he vast majority of jurisdictions have laws that protect the confidentiality of police personnel records, and many of these states either prohibit or make it extremely difficult for defense counsel to access these confidential records."); *supra* note 66 and accompanying text.
204. *See* Carina Miller, *The Paradox of S.B. 1421: A New Tool to Shed Light on Police Misconduct and a Perverse Incentive to Cover It Up*, 49 SW. L. REV. 537, 538–39 (2021); Hogan, *supra* note 79, at 717–19.
205. *See supra* Part I.B.
206. *See* Hogan, *supra* note 79, at 789; Abel, *supra* note 169, at 746.
207. *See* Nathan A. Frazier, *Amending for Justice's Sake: Codified Disclosure Rule Needed to Provide Guidance to Prosecutor's Duty to Disclose*, 63 FLA. L. REV. 771, 776 (2011).
208. *See id.*

progeny,[209] a lack of clear guidelines can make it difficult for prosecutors to play this role effectively.[210] In fact, even though many states limit disclosure obligations to the constitutional floor,[211] scholars have found that prosecutors do not currently comply with their existing obligations, "whether because of the vagueness, inconsistency, or complexity of the discovery law or because of the failings of individual prosecutors or their offices."[212] As Justice Thurgood Marshall emphasized in *Bagley*, even the U.S. Supreme Court has struggled to define and clarify *Brady* rights.[213]

Some commentators have argued that open-file discovery—turning over everything in the prosecutor's possession—will lead to more prosecutorial compliance.[214] However, increased disclosure obligations can create an additional administrative hurdle for the prosecution.[215] For example, in the final hearing of the New York Senate on Article 245, it was estimated that New York County alone would need "an increase in personnel and technology resources, amounting to well over $20 million each year," to comply with the new law.[216] Prior to the discovery reforms, New York district attorneys were only required to turn over their trial evidence, witness materials, and *Brady* materials.[217] New York's new discovery law provides

209. *See supra* Part I.B.

210. *See* Frazier, *supra* note 207, at 773–74; *see also* Green, *supra* note 45, at 639–40 ("[P]rosecutors do not universally comply even with their existing obligations . . . ."); *see also infra* Part II.A.

211. *See infra* Part II.B.

212. *See* Green, *supra* note 45, at 639–40; *see also* Cynthia E. Jones, *Here Comes the Judge: A Model for Judicial Oversight and Regulation of the* Brady *Disclosure Duty*, 46 HOFSTRA L. REV. 87, 88 (2017); Jason Kreag, *Disclosing Prosecutorial Misconduct*, 72 VAND. L. REV. 297, 307 (2019) ("Despite being settled law for over fifty years, noncompliance with *Brady*'s constitutional protections persists.").

213. *See* United States v. Bagley, 473 U.S. 667, 695–97 (1985) (Marshall, J., dissenting); *see also infra* Part II.A.

214. *See* Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257, 262, 307–08 (2008); Janet Moore, *Democracy and Criminal Discovery Reform After Connick and Garcetti*, 77 BROOK. L. REV. 1329, 1330 (2012); Vida B. Johnson, *Federal Criminal Defendants Out of the Frying Pan and into the Fire?:* Brady *and the United States Attorney's Office*, 67 CATH. U. L. REV. 321, 358–59 (2018). *But see* Brian P. Fox, *An Argument Against Open-File Discovery in Criminal Cases*, 89 NOTRE DAME L. REV. 425, 427–28 (2013) (arguing that open-file discovery can harm the defense's case).

215. *See, e.g.*, Shawn Magrath, *County DA Seeks More Staff as Workload Swells*, EVENING SUN (Aug. 19, 2022), https://www.evesun.com/news/stories/2022-08-19/36886/County-DA-seeks-more-staff-as-workload-swells [https://perma.cc/TX8X-J2Q8] (claiming there has been a "mounting workload" in the wake of new discovery mandates); Jonah E. Bromwich, *Why Hundreds of New York City Prosecutors Are Leaving Their Jobs*, N.Y. TIMES (Apr. 4, 2022), https://www.nytimes.com/2022/04/03/nyregion/nyc-prosecutors-jobs.html [https://perma.cc/37YZ-HEEA] (highlighting the administrative difficulties, challenges, and frustrations New York prosecutors have experienced in light of new discovery obligations).

216. *See Public Hearing on the Implementation of Discovery Reform: Hearing Before the N.Y. S. Standing Comm. on Codes*, S.1509, 2019–2020 Sess. (N.Y. 2019) (statement of Sen. Thomas F. O'Mara); N.Y. CRIM. PROC. LAW §§ 245.10–245.85 (McKinney 2023).

217. *See* W. Dyer Halpern, *Restarting the Wheel of Justice*, CITY J. (Mar. 23, 2022), https://www.city-journal.org/new-york-discovery-reform-is-crushing-prosecutors [https://perma.cc/ZW75-UETK].

for twenty-one separate categories of discovery and requires prosecutors to turn over all relevant information in an abridged period.[218] At the beginning of the law's enactment, prosecutors only had fifteen days to "review, redact, and provide materials to the defense."[219] Following the implementation of Article 245, some New York counties sought more staff to deal with these administrative hardships.[220]

In summary, the prosecution's dual role is further complicated when increased disclosure obligations create administrative and interpretive difficulties. The next part delves into how state courts have interpreted their state disclosure laws against the backdrop of these competing considerations.

II. STATE LEGISLATIVE APPROACHES TO *BRADY* DISCLOSURES

Each state has addressed and codified *Brady*'s obligation to disclose favorable information to criminal defendants, but with widely disparate results.[221] When it comes to the disclosure of police officer personnel files, which has recently become a contentious point of debate,[222] the results are even more varied.[223] The current state statutory disclosure laws do not deal specifically with the disclosure of police personnel files, which leaves ambiguity for the prosecution, the defense, and courts.[224] Further still, statutory ambiguities are leading courts in some jurisdictions to hold in favor of nondisclosure of police personnel files, withholding potentially vital impeachment evidence from the defense that may be constitutionally required.[225]

This part analyzes state legislative approaches to *Brady* disclosures and looks at how courts have been grappling specifically with the disclosure of police officer impeachment evidence. Part II.A looks more closely at the

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218. *See id.*

219. *See id.* The law was amended after extensive prosecutor pushback to allow for disclosure up to twenty days after arraignment for defendants in custody or thirty-five days after arraignment for defendants not in custody during the pendency of the case. *See id.*; N.Y. CRIM. PROC. LAW § 245.10 (McKinney 2023).

220. *See* Magrath, *supra* note 215.

221. *See* HOOPER ET AL., *supra* note 5, at 17–18.

222. *See, e.g.*, Kurtz & Giordano, *supra* note 29; Bies, *supra* note 185, at 116.

223. *See infra* Part II.C; Directive of Gubrir S. Grewal, Att'y Gen., State of N.J. Off. of the Att'y Gen. Dep't of L. & Pub. Safety, Attorney General Law Enforcement Directive No. 2019-6 (Dec. 4, 2019), https://www.nj.gov/oag/dcj/agguide/directives/ag-Directive-2019-6.pdf [https://perma.cc/2UHK-XUDN] ("[T]here is a great deal of variation among the County Prosecutors' Offices regarding specific *Brady-Giglio* policies.").

224. *See, e.g.*, ALA. R. CRIM. P. 16.1 (2023); WYO. R. CRIM. P. 16 (2023); S.C. R. CRIM. P. 5 (2023); OHIO R. CRIM. P. 16 (2023); N.Y. CRIM. PROC. LAW § 245.20 (McKinney 2022); CAL. PENAL CODE § 1054.1 (West 2023); MONT. CODE ANN. § 46-15-322 (2023); PA. R. CRIM. P. 573 (2023); ARIZ. R. CRIM. P. 15.1 (2023); *see also infra* Part II.C.

225. *See, e.g.*, State v. Curlee-Jones, No. 98233, 2013 WL 1279741, at *5 (Ohio Ct. App. Mar. 28, 2013) ("[A]llowing cross-examination on issues of prior allegations . . . would put the officers on trial."); State v. Harris, No. 44029, 1982 WL 5221, at *5 (Ohio Ct. App. Mar. 11, 1982) (holding that the officer's "alleged abusive conduct would not be probative of his veracity"); State v. Briggs, 429 P.3d 275, at ¶ 30 (Mont. 2018) (unpublished table decision) (holding that, after a balancing of the defendant's need for the evidence and the privacy interests of the officer, the defendant was not entitled to disclosure).

materiality component of *Brady* and analyzes why scholars and courts think that this might be a difficult standard for courts and prosecutors to apply. Part II.B next provides three broad models of current state disclosure obligations to provide examples of the types of disclosure statutes available today. Part II.C delves deeper into a state representative of each model to provide specific examples of the varying disclosure obligations under each framework.

A. Materiality and Why It Might Be a Difficult Standard

Brady and the subsequent cases clarifying its holding created a materiality standard for the disclosure of evidence in a criminal trial.[226] At a minimum, the prosecution must disclose all material evidence to the defense.[227] Material evidence, as discussed in Part I.B, is any evidence that has a reasonable probability of affecting—or undermining the confidence in—the outcome of a trial.[228] This section considers why courts and prosecutors have traditionally had difficulty applying the *Brady* materiality standard and helps to lay the groundwork and provide context for the disparate disclosure obligations analyzed in Part II.B and Part II.C below.

Because prosecutors must provide the defense with all material evidence, they must assess the likelihood that any given evidence will impact the outcome of a trial before the trial.[229] Scholars and courts have noted, however, that *Brady*'s materiality standard is difficult to apply.[230] In his dissent in *Bagley*, Justice Marshall highlighted the dual and "unharmonious role" prosecutors must fulfill to comply with *Brady* disclosures.[231] Prosecutors act as a "zealous advocate" for the public and an objective factfinder.[232] In their latter role, prosecutors must turn over information that has the potential to undermine their own case.[233] Justice Marshall noted that,

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226. *See supra* Part I.B.

227. *See* Green, *supra* note 45, at 644; *see also supra* Part I.B.

228. *See* Green, *supra* note 45, at 644–45; Hogan, *supra* note 79, at 725–26; United States v. Bagley, 473 U.S. 667, 682 (1985). In *Giglio*, for example, the prosecution's entire case rested on the testimony of a witness whose credibility was called into question by the grand jury prosecutor's promises. *See* Giglio v. United States, 405 U.S. 150, 150–52 (1972). Given the importance of the witness to the case, the Court held that the evidence of the prosecutor's promise was material and that the defendant's due process rights were violated by the withholding of such evidence. *See id.*

229. *See* Hogan, *supra* note 79, at 726–27; *see also* Green, *supra* note 45, at 646; *Bagley*, 473 U.S. at 696 (Marshall, J., dissenting) ("At the trial level, the duty of the state to effectuate *Brady* devolves into the duty of the prosecutor; the dual role that the prosecutor must play poses a serious obstacle to implementing *Brady*."); United States ex rel. Annunziato v. Manson, 425 F. Supp. 1272, 1280 (D. Conn. 1977), *aff'd sub nom.* Annunziato v. Manson, 566 F.2d 410 (2d Cir. 1977) ("The standard is difficult to apply because it requires the reviewing court to subjectively weigh the evidence and assess its possible effect on the jury.").

230. *See* Hogan, *supra* note 79, at 727; Green, *supra* note 45, at 647; Lissa Griffin, *Pretrial Procedures for Innocent People: Reforming* Brady, 56 N.Y.L. SCH. L. REV. 969, 970 (2012).

231. *Bagley*, 473 U.S. at 696–97.

232. *See id.*

233. *See id.*

due to this dual role, "these advocates oftentimes overlook or downplay potentially favorable evidence."[234]

Additionally, the materiality component of *Brady* as a pretrial standard requires the prosecutor to *predict* what evidence the jury will find important.[235] Professor Thomas P. Hogan describes this standard as "convoluted and unworkable."[236] Professor Bruce A. Green describes it as "inherently imprecise."[237] According to Justice Marshall, in the best case scenario, the prosecutor will have to subjectively guess what evidence may be important to the defense team; at worst, the prosecutor will use the materiality standard to "gamble, to play the odds, and to take a chance" by withholding evidence damaging to the prosecution's case that the court may later determine is material.[238]

Some judges have held that the standard is difficult for courts to apply for several of the same reasons.[239] Although courts often analyze materiality after a trial, *Brady* still requires them to assess how the jury would have weighed the evidence to determine whether such evidence would have been material to the defendant's case.[240] As already noted, this forces the court to put themselves in the jury's shoes and guess what evidence they would have thought was material.[241] Additionally, the analysis is subjective, and courts may arrive at vastly different conclusions regarding materiality after analyzing virtually the same facts.[242]

Thus, due to the unique and perhaps odd nature of the materiality standard, scholars and judges state that courts and prosecutors often have difficultly determining which evidence is material to the defense's case.[243] The next section provides three models of disclosure obligations today, two of which still use the *Brady* materiality standard discussed in this section.

B. Three Models of State Disclosure Obligations

Although states vary drastically in their codification of *Brady*'s requirements,[244] there are three broad categories that these disclosure laws

234. *Id.* at 697.
235. *See id.* at 701; Green, *supra* note 45, at 646; *see also* Hogan, *supra* note 79, at 727.
236. *See* Hogan, *supra* note 79, at 727.
237. *See* Green, *supra* note 45, at 647.
238. *See Bagley*, 473 U.S. at 695, 700–01.
239. United States ex rel. Annunziato v. Manson, 425 F. Supp. 1272, 1280 (D. Conn. 1977), *aff'd sub nom.* Annunziato v. Manson, 566 F.2d 410 (2d Cir. 1977); Moynahan v. Manson, 419 F. Supp. 1139, 1149 (D. Conn. 1976), *aff'd*, 559 F.2d 1204 (2d Cir. 1977).
240. *United States ex rel. Annunziato*, 425 F. Supp. at 1280.
241. *See id.*; *see also Moynahan*, 419 F. Supp. at 1149.
242. *Moynahan*, 419 F. Supp. at 1149 ("Because it requires a subjective weighing of the evidence submitted by the prosecution . . . and the likely overall effect on the jury; it is not unusual that the decided cases offer no clear guideline, and in some cases appear to come to different conclusions on nearly identical facts."); *see also United States ex rel. Annunziato*, 425 F. Supp. at 1280.
243. *See, e.g.*, *supra* Part I.E.3; *see also infra* Parts II.C.1, II.C.3.
244. *See* HOOPER ET AL., *supra* note 5, at 17–28. This Note underscores that disclosure obligations vary significantly, and no state fits neatly into any one of these models, which is why reform is recommended in Part III.

may fall within: (1) laws aligned with the constitutional floor established by *Brady*; (2) laws that opt for virtually open-file discovery; and (3) laws that fall somewhere in between.

States whose laws fall within the first category have criminal disclosure obligations that mimic the federal *Brady* requirements.[245] In these states, the prosecution need not provide evidence to the defense if failing to turn over that evidence would not result in a constitutional violation of *Brady*.[246] In other words, as long as the prosecution turns over all material evidence favorable to the defense, they will satisfy their disclosure obligations.[247] Most states that fall within this category also require the defense to first provide a written demand for such evidence.[248] States in this category include Alabama, Ohio, South Carolina, and Wyoming.[249]

States whose laws fall within the second category provide the defense with essentially all evidence in the prosecutor's possession, regardless of the likelihood of its introduction at trial or its materiality.[250] These states require automatic disclosure by the prosecution, meaning that the defense need not make any formal request for the prosecution's evidence.[251] They also allow for generally broader disclosure of information.[252] States whose laws fall within this category include California and New York, although California allows for more limited disclosure than New York.[253]

The final category of state laws reflects a balancing by courts of the interests of the defense, the prosecution, and police officers.[254] Each state whose laws fall within this category maintains *Brady*'s materiality component but gives the trial court discretion to allow additional disclosure in cases in which there is a "substantial need" for evidence not otherwise

245. *See* ALA. R. CRIM. P. 16.1 (2023); WYO. R. CRIM. P. 16 (2023); OHIO R. CRIM. P. 16 (2023); S.C. R. CRIM. P. 5 (2023).

246. *See supra* Part I.B; ALA. R. CRIM. P. 16.1 (2023); OHIO R. CRIM. P. 16 (2023); WYO. R. CRIM. P. 16 (2023); S.C. R. CRIM. P. 5 (2023).

247. *See supra* Part I.B.

248. *See* ALA. R. CRIM. P. 16.1 (2023); WYO. R. CRIM. P. 16 (2023); OHIO R. CRIM. P. 16 (2023); S.C. R. CRIM. P. 5 (2023).

249. *See* ALA. R. CRIM. P. 16.1 (2023); WYO. R. CRIM. P. 16 (2023); OHIO R. CRIM. P. 16 (2023); S.C. R. CRIM. P. 5 (2023).

250. *See* Fox, *supra* note 214, at 426; N.Y. CRIM. PROC. LAW § 245.20 (McKinney 2023); CAL. PENAL CODE § 1054.1 (West 2023).

251. *See* N.Y. CRIM. PROC. LAW § 245.20 (McKinney 2023); CAL. PENAL CODE § 1054.1 (West 2023).

252. *See, e.g.*, N.Y. CRIM. PROC. LAW § 245.20(k) (McKinney 2023) (requiring the disclosure of "[a]ll evidence and information, including that which is known to police or other law enforcement agencies acting on the government's behalf in the case, that tends to . . . impeach the credibility of a testifying prosecution witness").

253. *See* N.Y. CRIM. PROC. LAW § 245.20 (McKinney 2023); CAL. PENAL CODE § 1054.1 (West 2023). California Penal Code § 832.7 allows for public inspection of four categories of information contained in a police officer's personnel file, including incidents related to the discharge of a firearm by the officer, any incident involving use of force by an officer that resulted in death or serious injury, any sustained findings against the officer for the use of "unreasonable or excessive force," or any sustained findings that the officer failed to intervene when a fellow officer used excessive force. *See* CAL. PENAL CODE § 832.7 (West 2023).

254. *See supra* Part I.E; MONT. CODE ANN. § 46-15-322 (2023); PA. R. CRIM. P. 573 (2023); ARIZ. R. CRIM. P. 15.1 (2023).

provided for or in which its disclosure would be "in the interests of justice."[255] States whose laws fit into this category include Arizona, Montana, and Pennsylvania.[256]

The next section highlights a representative state from each model to analyze how courts grapple with the intersection of statutory disclosure obligations and police personnel files.

C. Ambiguities Abound Within All Three Models of Disclosure Obligations

As previously noted, all fifty states have in some way codified the disclosure requirements of *Brady*,[257] but states vary drastically in their interpretation of what constitutes disclosable impeachment evidence.[258] This section considers how a state from each of the three models of disclosure obligations interprets its laws when it comes to the disclosure of police officer personnel files. Accordingly, this section will proceed in three parts, focusing on Ohio, New York, and Montana as case studies for the "constitutional floor", the "open-file," and the "balancing interests" models, respectively.

1. "Constitutional Floor" State: Ohio

Ohio's criminal discovery rule, Rule 16,[259] lives in the Ohio Rules of Criminal Procedure.[260] The rule provides that, upon written demand by the defendant, the prosecuting attorney shall provide certain materials to the defense team.[261] Pertinent to this Note's discussion is section (B)(5) of the statute, which states that the prosecution will provide "[a]ny evidence favorable to the defendant and *material* to guilt or punishment."[262] This language is almost identical to the standard created under *Brady*.[263]

As noted in Part II.A, courts and prosecutors have traditionally been ill-equipped to define what evidence may be material to the defense, either because of conflicting interests on the part of the prosecution or the unusual

255. *See, e.g.*, PA. R. CRIM. P. 573 (2023); *see also* MONT. CODE ANN. § 46-15-322 (2023).
256. MONT. CODE ANN. § 46-15-322 (2023); PA. R. CRIM. P. 573 (2023); ARIZ. R. CRIM. P. 15.1 (2023).
257. *See* HOOPER ET AL., *supra* note 5, at 17–18.
258. *See id. Compare* People v. Carter, No. 000948-22KN, 2022 WL 3971927, at *6 (N.Y. Crim. Ct. Aug. 15, 2022) (holding that the prosecution must turn over all documentation relating to both unsubstantiated and substantiated complaints against a testifying officer), *with* People v. Zweifach, No. 000606-22RI, 2022 WL 3697566, at *3 (N.Y. Crim. Ct. Aug. 16, 2022) (holding that defendants are not entitled to evidence of unrelated prior bad acts), Commonwealth v. Mucci, 143 A.3d 399, 412 (Pa. Super. Ct. 2016) (holding that criminal defendants are not allowed to have unfettered access to police personnel files without articulating a reasonable basis for such a request), *and* City of Bozeman v. McCarthy, 447 P.3d 1048, 1056 (Mont. 2019) (holding that defendants are not entitled to wholesale inspection of police officer personnel files without first providing and supporting a substantial need for the information).
259. OHIO R. CRIM. P. 16 (2023).
260. *See id.*
261. *Id.*
262. *Id.* (emphasis added).
263. *See supra* Part I.B.

nature of predicting how the jury may weigh certain information.[264] In *State v. Widmer*,[265] the Ohio Court of Appeals emphasized that *Brady*'s materiality component is a difficult standard to meet.[266] In that case, the trial jury found the defendant, Ryan K. Widmer, guilty for the murder of his wife.[267] Widmer appealed the conviction after evidence came to light that one of the lead investigators on his case had a history of fraud and misconduct.[268] Although the officer was a lead investigator on Widmer's case, the Ohio Court of Appeals held that the evidence of misconduct was not material to the defendant's case because the defendant had the opportunity to cross-examine other witnesses and the officer in question was not a key witness.[269] The court emphasized that—even assuming that the information regarding the officer's conduct *should* have been disclosed—the information did not constitute material information under *Brady*.[270]

In *City of Columbus v. Robinson*,[271] the defendant, Franklin Robinson, appealed his conviction for criminal trespass and resisting arrest on the premise that the trial court erred in squashing Robinson's subpoena for access to the arresting officer's personnel file.[272] Before trial, the defense team asked the trial judge to review the officer's records to determine if any information in the documents could undermine the officer's credibility.[273] The trial court squashed the subpoena without reviewing the records, holding that the defendant had no reason to believe that there was any evidence of misconduct in the files.[274] The trial court further stated that there was "a greater need to protect the confidentiality of" the officer's personnel file.[275] The Ohio Court of Appeals, relying on the lower court's reasoning, affirmed the trial court's findings.[276]

Accordingly, if a defendant does not provide the court with a sufficiently demonstrated need to review a testifying officer's personnel file—i.e., that the information contained in the file is material under *Brady*—courts in "constitutional floor" jurisdictions are more likely to hold that the government is not required to disclose an officer's personnel file due to the privacy interests of the officer.[277] As the above opinions demonstrate, courts

264. *See supra* Part II.A; *see also supra* Parts I.B, I.E.3.
265. No. CA2012-02-008, 2013 WL 142041 (Ohio Ct. App. Jan. 14, 2013).
266. *See id.* at *19.
267. *See id.* at *1.
268. *See id.* at *1–5.
269. *See id.* at *19–20. The importance of the witness's testimony is vital in the court's decision to disclose police officer personnel information in other jurisdictions as well. *See* State v. Salaman-Garcia, 481 P.3d 846, at ¶ 9 (Mont. 2021) (unpublished table decision); People v. Carter, No. 000948-22KN, 2022 WL 3971927, at *6 (N.Y. Crim. Ct. Aug. 15, 2022).
270. *Widmer*, 2013 WL 142041 at *20.
271. 514 N.E.2d 919 (Ohio Ct. App. 1986).
272. *See id.* at 920.
273. *See id.*
274. *See id.*
275. *See id.*
276. *See id.* at 921–22.
277. *See id.*; State v. Christian, No. 11421, 1990 WL 125726, at *5 (Ohio Ct. App. Aug. 27, 1990) (no disclosure allowed); State v. Eisermann, No. 100967, 2015 WL 758989, at *14

are unlikely to find that a defendant has satisfied this burden.[278] As a result, the government typically does not need to turn over police personnel files in these "constitutional floor" jurisdictions.[279]

2. "Open-File" State: New York

New York is an interesting case study for the "open-file" model of disclosure obligations. Although New York's laws fall within the broadest category of discovery obligations, the lower courts in New York have split regarding what information is actually disclosable under Article 245.[280] As Judge Henry F. Zwack stated in *Hudson Police Loc. 3979 v. Bower*,[281] "[f]or every case that supports the interpretation that unfounded or exonerated disciplinary claims against police officers are not required to be produced, as they lack impeachment value, there is another case that disagrees or declines to follow it."[282] Specifically, there has been great debate over the interpretation of the newly enacted Article 245 and the impact of the subsequent repeal of protections afforded to police personnel under Civil Rights Law Section 50-a.[283]

Article 245, enacted in 2020, is New York's new criminal discovery law.[284] The law significantly transformed discovery obligations in New York, changing the state from one of the most restrictive discovery states to one of the most permissive.[285] The new statute allows for automatic disclosure of twenty-one categories of evidence and requires a very quick turnaround of disclosure by the prosecution after the defendant's

(Ohio Ct. App. Feb. 19, 2015) (no disclosure allowed); State v. Jones, No. 98175, 2013 WL 871332, at *9 (Ohio Ct. App. Mar. 7, 2013) (denying request for access to officer's personnel file).

278. *See* City of Columbus v. Robinson, 514 N.E.2d 919, 921–22 (Ohio Ct. App. 1986); State v. Widmer, No. CA2012-02-008, 2013 WL 142041, at *20 (Ohio Ct. App. Jan. 14, 2013); *Christian*, 1990 WL 125726 at *5; *Eisermann*, 2015 WL 758989 at *14; *Jones*, 2013 WL 871332 at *9.

279. *See, e.g.*, *Robinson*, 514 N.E.2d at 921–22; *Widmer*, 2013 WL 142041 at *20; *Christian*, 1990 WL 125726 at *5; *Eisermann*, 2015 WL 758989 at *14; *Jones*, 2013 WL 871332 at *9.

280. *See* N.Y. CRIM. PROC. LAW § 245.10–245.85 (McKinney 2023). *Compare* People v. Zweifach, No. 000606-22RI, 2022 WL 3697566, at *3 (N.Y. Crim. Ct. Aug. 16, 2022) (holding that prosecutors do not need to disclose all favorable records, such as disciplinary investigations into prior bad acts, if the evidence is unrelated to the case), *with* People v. Alvia, No. 003225-22BX, 2022 WL 3023372, at *3 (N.Y. Crim. Ct. Aug. 1, 2022) (holding that the statute commands the release of police personnel records for unsubstantiated allegations), *and* People v. Soto, 152 N.Y.S.3d 274, 281 (Crim. Ct. 2021) (holding that impeachment evidence is not limited to the subject matter of the underlying case).

281. 158 N.Y.S.3d 787 (Sup. Ct. 2021).

282. *Id.* at 791.

283. *See* N.Y. CIV. RIGHTS LAW § 50-a (McKinney 1976) (repealed 2020); *see also supra* note 36 and accompanying text. As discussed above, New York Civil Rights Law section 50-a largely prohibited the disclosure of a police officer's personnel file in New York. *See* Kurtz & Giordano, *supra* note 29.

284. *See* Southall & Ransom, *supra* note 33.

285. *See id.*

arraignment.[286] The relevant statutory section for the purposes of this Note is subsection (k), which requires the prosecution to provide "[a]ll evidence and information, including that which is known to police or other law enforcement agencies acting on the government's behalf in the case, that tends to . . . impeach the credibility of a testifying prosecution witness."[287] The statute makes no reference to the materiality of the evidence.[288]

Although the legislature intended Article 245 to be expansive—potentially in an effort to resolve the confusion surrounding the *Brady* materiality standard—the lower courts in New York are still split regarding what information in a police officer's personnel file is disclosable under Article 245.[289] In *People v. Williams*,[290] for example, the Queens County Supreme Court held that the repeal of Section 50-a does not define the scope of Article 245.[291] Article 245 was not amended after the repeal, nor was Section 50-a in any way integrated into Article 245 before the repeal.[292] In *Williams*, the defendant, James Williams, filed a motion to compel production of the disciplinary records of thirteen officers.[293] The prosecution had provided Williams with letters detailing each officer's misconduct history, but they did not provide the actual personnel files, nor did they include any details or substance about the allegations.[294] The court concluded that Williams was only entitled to evidence related to the subject matter of the case and barred the disclosure of the officers' underlying misconduct records.[295]

On the opposite end of the spectrum, there are cases like *People v. Soto*,[296] in which the New York County Criminal Court read Article 245's language as much more expansive.[297] In *Soto*, the defendant, Eliezer Soto, was charged with forcible touching and sexual abuse.[298] Soto claimed that the prosecutor's disclosure was incomplete because they had failed to disclose information in a testifying officer's personnel file concerning records of past convictions and substantiated misconduct.[299] The prosecutors argued that they were not required to disclose the information because it was unrelated to the subject matter of the case.[300] The New York County Criminal Court held that the purpose and express language of Article 245 was to allow for disclosure of *all* evidence and information that tends to impeach a witness,

286. *See* Halpern, *supra* note 217.
287. *See* N.Y. CRIM. PROC. LAW § 245.20(1)(k) (McKinney 2023).
288. *See id.*
289. People v. Randolph, 132 N.Y.S.3d 726, 727 (Sup. Ct. 2020).
290. No. 869/2020, 2022 WL 3350631 (N.Y. Sup. Ct. Aug. 1, 2022).
291. *See id.* at *3.
292. *See id.*
293. *See id.* at *1.
294. *See id.*
295. *See id.* at *2.
296. 152 N.Y.S.3d 274 (Crim. Ct. 2021).
297. *See id.* at 280–81.
298. *See id.* at 277, 283.
299. *See id.*
300. *See id.* at 279.

and thus the defendant had a right to obtain evidence unrelated to the subject matter of the case.[301]

The Criminal Court of the City of New York, Bronx County took this one step further in *People v. Alvia*,[302] holding that even unsubstantiated allegations, in which no factual determinations are made as to the officer's guilt, can be useful for the purposes of impeachment, and thus prosecutors are required to disclose such evidence to the defense.[303]

In summary, even in "open-file" jurisdictions, in which prosecutors must disclose virtually all evidence in their possession, there can be confusion and disparate outcomes regarding the disclosure of police officer personnel files.

3. "Balancing Interests" State: Montana

In the "balancing interests" category, disclosure of information above and beyond *Brady* is largely left to judicial discretion.[304] The courts in these jurisdictions typically balance the privacy interests of the police officers with the necessity of the evidence for the defense.[305] Montana's criminal discovery law looks very similar to the "constitutional floor" category states.[306] The law provides that, upon written request by the defendant, the prosecution will provide the defendant with all material evidence.[307] However, the Montana discovery statute also allows for defendants to petition the judge for extraordinary discovery—evidence above and beyond *Brady*'s requirements—which the judge has discretion to grant or deny.[308]

In *City of Bozeman v. McCarthy*,[309] the Montana Supreme Court underscored the importance of in camera review to allow trial judges to confidentially balance the defendant's interest in obtaining the relevant information with the "other compelling government interests including, e.g.,

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301. *See id.* at 277.

302. CR-003225-22BX, 2022 WL 3023372 (N.Y. Crim. Ct. Aug. 1, 2022).

303. *See id.* at *3; *see also* People v. Carter, No. 000948-22KN, 2022 WL 3971927, at *5–6 (N.Y. Crim. Ct. Aug. 15, 2022) ("[A]ny underlying documentation in the possession of the NYPD and relating to the substantiated and unsubstantiated claims against a testifying officer must be turned over to the defendant . . . .").

304. *See* Commonwealth v. Santos, 176 A.3d 877, 882 (Pa. 2017) ("'Decisions involving discovery matters are within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion.'" (quoting Commonwealth v. Smith, 955 A.2d 391, 394 (Pa. 2008))); State v. Davis, 884 S.E.2d 185, 191 (S.C. Ct. App. 2022) (explaining that determining the relevancy of evidence is within the judge's discretion).

305. *See, e.g.*, City of Bozeman v. McCarthy, 447 P.3d 1048, 1055–56 (Mont. 2019); City of Bozeman v. Howard, 495 P.3d 72, 77–79 (Mont. 2021); State v. Briggs, 429 P.3d 275, at ¶ 29 (Mont. 2018) (unpublished table decision).

306. *Compare* MONT. CODE ANN. § 46-15-322 (2023) (allowing disclosure upon request of information that is material to guilt or punishment), *with* OHIO R. CRIM. P. 16 (2023) (allowing disclosure upon written request of "[a]ny evidence favorable to the defendant and material to guilt or punishment").

307. *See* MONT. CODE ANN. § 46-15-322 (2023).

308. *See McCarthy*, 447 P.3d at 1056; MONT. CODE ANN. § 46-15-322(5) (2023).

309. 447 P.3d 1048 (Mont. 2019).

privacy rights of government agents and third parties."[310] In *McCarthy*, the defendant, Scott Reegan McCarthy, appealed convictions of criminal trespass, assault, resisting arrest, and obstructing a police officer.[311] McCarthy claimed that the trial court was incorrect in denying him access to a testifying officer's file under section 46-15-322(5) of Montana's criminal discovery law—the provision allowing for extraordinary discovery.[312] The Montana Supreme Court held that defendants are not indiscriminately entitled to a police officer's entire personnel file, and without more than "naked assertion[s]" on the part of the defendant, the defendant does not have a right to access the files.[313] The court ultimately ruled against McCarthy, stating that, although police officers have reduced expectations to privacy due to their public role, police officers still have privacy expectations and rights that would be violated by disclosure in this case.[314]

The court came to a similar conclusion in *State v. Salaman-Garcia*.[315] In *Salaman-Garcia*, after the trial concluded, the prosecution learned that an officer who had testified in the trial was under investigation for making false statements on an insurance claim.[316] The prosecution disclosed this information to the defense, who, in turn, filed a motion for a new trial, arguing that the defense could have used this evidence to impeach the officer during the trial.[317] The trial court concluded that this officer witness was essentially an "extra" in the case and "no more than a bit player in the trial."[318] The court also noted that the case might have turned out differently if the primary witness's personnel file was at issue.[319] As a result, the court concluded that there was no *Brady* violation and that the ruling would stand.[320] The Montana Supreme Court agreed with this conclusion and affirmed the lower court's denial of the defendant's motion for a new trial.[321]

Although "balancing interests" states provide defendants with a mechanism for obtaining potential evidence beyond the requirements of *Brady*, application of their laws will vary among judges because courts have discretion over the disclosure of additional information.[322] As demonstrated by the cases above, obtaining additional information is not automatic, and

310. *See id.* at 1056. In camera review is the process by which judges can confidentially review information to determine if any evidence can be used at trial. *In Camera Inspection*, BLACK'S LAW DICTIONARY (11th ed. 2019).
311. *See McCarthy*, 447 P.3d at 1053.
312. *See id.*
313. *See id.* at 1056, 1059.
314. *See id.* at 1057.
315. 481 P.3d 846 (Mont. 2021) (unpublished table decision).
316. *See id.* at ¶ 9.
317. *See id.*
318. *See id.*
319. *See id.*
320. *See id.*
321. *See id.* at ¶¶ 9, 12.
322. *See* MONT. CODE ANN. § 46-15-322 (2023); PA. R. CRIM. P. 573 (2023); ARIZ. R. CRIM. P. 15.1 (2023).

this mechanism is difficult for defendants to use.[323] Additionally, "balancing interests" states face the same problem as "constitutional floor" states[324]—prosecutors and courts are unable to accurately assess the materiality of evidence.[325]

In short, ambiguous state statutes and divergent judicial interpretations have led to varied results in the disclosure of police personnel files across all three models of disclosure obligations. The next part addresses this problem by recommending a uniform legislative approach.

III. A RECOMMENDATION FOR A UNIFORM LEGISLATIVE APPROACH TO THE PROBLEM OF INCONSISTENT RESULTS

As Part II indicates, state disclosure laws as they currently stand are varied and inconsistent.[326] Ambiguities in statutes and subsequent repeals or amendments lead to disparate judicial interpretations.[327] As the analysis of New York's disclosure laws and court decisions demonstrates, even under the most liberal of disclosure laws, a defendant may receive a different outcome depending on which judge is hearing their case.[328] This Note thus proposes a uniform legislative approach that states may adopt to remove the ambiguity from current laws and balance the competing interests of relevant stakeholders. This part first recommends that certain impeachment evidence found in the personnel file of any testifying officer—regardless of the officer's importance to the trial—be turned over to the defense. This Note further recommends that states explicitly identify the type of information that prosecutors must disclose in their state statutes and provides examples of information that should be disclosed, accounting for stakeholders' competing interests.

A. Certain Personnel File Information Should Be Disclosed Whenever an Officer Is Testifying

Prosecutors should automatically disclose the information identified in Part III.B from an officer's personnel file to the defense whenever the officer will be a witness at trial—regardless of the officer's material importance to the case. Although police officers and police unions may push back against such an obligation, the defendant's interests in impeachment evidence outweigh the police officer's privacy interests for several reasons.[329] First, officers are trained in providing testimony and understand that testifying is an important part of their job.[330] Because many officers will testify in

323. *See, e.g.*, City of Bozeman v. McCarthy, 447 P.3d 1048, 1056 (Mont. 2019); *Salaman-Garcia*, 481 P.3d at ¶¶ 9–12.
324. *See supra* Parts II.A, II.C.
325. *See supra* Parts II.A, II.C.
326. *See supra* Part II.C.
327. *See supra* Part II.C.
328. *See supra* Part II.C.2; *see also supra* Part II.B.
329. *See supra* Part I.E.
330. *See supra* Part I.D.1.

countless criminal trials over the course of their careers, and because officers have a public role, they should be held to a higher standard and have more limited privacy rights than the average witness.[331]

Additionally, a piece of impeachment evidence in an officer's personnel file can mean the difference between life and death for a defendant.[332] This is especially true when a trial comes down to the believability of a defendant versus that of a police officer. In these cases, which are very common, jury pools are more likely to credit police officer testimony.[333] Being designated as a "*Brady* cop" can be career-ending, but when analyzed in light of the possibility of ending a defendant's life, the defense's interest in impeachment evidence should prevail.[334] Further still, although evidence constituting *Brady* material should be turned over as is constitutionally required, the three models of state disclosure obligations also demonstrate that potentially important impeachment evidence may be buried by current practices.[335] When a defendant's life and liberty is on the line, legislatures should err on the side of more open disclosure.[336]

The alternative to automatic disclosure of the information in an officer's personnel file identified in Part III.B would be to base disclosure on the relative importance of the witness and their testimony. Under this approach, for example, a testifying officer who played a small role in the case—such as picking up an unimportant piece of evidence on the scene—would have to turn over little from their file, if anything at all. In contrast, a testifying officer whose testimony is the sole evidence would be considered more important and would thus be required to turn over more information from their file. Although this approach allows for a more nuanced balancing of the interests of the police officers and the defense—and would likely lead to lighter administrative burdens because it would result in case-specific disclosures—it would ultimately result in the same ambiguities and disparate outcomes that we have seen under the current models.[337]

Under many current disclosure statutes, courts weigh the importance of the officer's testimony to a case to determine if the officer's personnel files would have impacted or undermined the outcome of the defendant's trial.[338] In other words, courts use the materiality standard under *Brady* to determine if the officer witness is important enough to warrant disclosure of their personnel file.[339] However, materiality is a confusing standard, and its boundaries are ill-defined.[340] Courts and prosecutors are not accurate at

331. *See supra* Parts I.D.1, II.C.3; *see also* City of Bozeman v. McCarthy, 447 P.3d 1048, 1057 (Mont. 2019).
332. *See supra* Part I.E.2.
333. *See supra* Part I.D.2.
334. *See supra* Part I.E; *see also supra* notes 188–90 and accompanying text.
335. *See supra* Parts I.B, II.
336. *See supra* Part I.E.2.
337. *See supra* Parts I.D, II.
338. *See supra* Parts I.B, II.C.1, II.C.3.
339. *See supra* Parts II.A, II.C.
340. *See supra* Parts II.A, II.C, I.E.3.

determining what evidence is actually material.[341] On top of this, requiring a balancing of the interests would place prosecutors back in what Justice Marshall described as their "unharmonious role."[342] Prosecutors would once again be obligated to make a determination that could potentially harm their case, creating a conflict of interest.[343] By requiring the disclosure of police officer personnel files whenever the officer is a witness, state legislatures can remove the complications of the *Brady* materiality component while simultaneously ensuring that a defendant's constitutional rights to due process are secured.

The next section argues that state statutes should also explicitly state the type of evidence that should be disclosed from a police officer's personnel file and recommends enacting disclosure laws above and beyond *Brady* in the interest of a fairer trial process.

B. Information in the Personnel File Should Be Disclosed If Specifically Referenced in the State's Disclosure Law

State disclosure obligations should explicitly identify the types of evidence that prosecutors must disclose under their criminal discovery laws. This section proceeds in three parts. First, this section argues that identifying types of disclosable evidence will help to alleviate many of the problems identified in Part II regarding ambiguities and inconsistency in application.[344] Second, this section analyzes the contents of an officer's personnel file and recommends items that state discovery laws should explicitly account for. Finally, this section recommends that these laws include a timing component and that officers be able to request protective orders in certain exceptional circumstances.

1. The Importance of Specifying the Evidence Included

As Part II demonstrates, ambiguous statutes lead to uneven application.[345] Specifying the exact type of information that prosecutors must disclose will help alleviate the administrative burdens on the prosecution. Prosecutors will not have to spend as much time mulling over the potential materiality of a piece of evidence, thus rectifying the prosecutor's "unharmonious role" under the constitutional *Brady* requirements.[346] Additionally, if states were to adopt statutes that dealt with a prosecutor's disclosure obligations regarding police personnel files in criminal trials, many of the ambiguities and inconsistencies demonstrated in Part II would be eliminated.[347]

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341. *See supra* Parts II.A, I.E.3.
342. *See supra* Parts I.E.3, II.A; *see also* United States v. Bagley, 473 U.S. 667, 695, 697 (1985) (Marshall, J., dissenting).
343. *See supra* Part I.E.3.
344. *See supra* Part II.
345. *See supra* Part II.
346. *See supra* Parts I.C, I.E.3.
347. *See supra* Part II.

New York offers an excellent example.[348] New York's discovery law allows for virtually open-file discovery, yet lower courts in the jurisdiction vary in what type of evidence they disclose.[349] If New York adopted a stand-alone subsection under its discovery law that specified what information in a police officer witness's personnel files should be disclosed—for example, any history of substantiated misconduct, of making false statements, or of excessive force—the explicit language of such a statute would resolve the ambiguity problem currently plaguing the lower courts.[350] There would be no question, for example, of whether or not material unrelated to the subject matter of the case could be disclosed because the provision in the statute would provide for the type of evidence that the prosecutor is required to deliver.[351] The next section delves into what types of evidence states should be required to include in their disclosure laws.

2. Types of Evidence That Should Be Explicitly Addressed in State Statutes

This section delves into the types of evidence within police officer personnel files that prosecutors should disclose under this uniform approach. This Note is not recommending that prosecutors turn over everything between the front and back cover of a police officer's personnel file. Rather, this Note seeks to balance the interests of the prosecution, the defense, and the police in offering its recommendations.

First, the prosecution should not be required to turn over anything in the officer's personnel file pertaining to the officer's medical history, home address, marital status, payroll records, or emergency contact information. With respect to this information, the privacy interests of the police officer clearly prevail; there is very little—if anything—in this information that a defense attorney could use to undermine the credibility of a police officer witness at trial.[352] Additionally, disclosing this information is not a contentious point of debate.[353] In all three models of disclosure obligations, defendants are rarely seeking this information, if at all.[354]

The more complicated analysis concerns the disclosure of misconduct information contained in an officer's file. Such information can include: performance evaluations that reflect negatively on the officer, disciplinary write-ups, internal affairs records indicating that an officer lied, evidence of falsified reports, prior convictions with a dishonesty component of the crime, lying under oath or other evidence that the officer provided false testimony, evidence of use of excessive force, or any other evidence that the officer lied

348. *See supra* Part II.C.2.
349. *See supra* Part II.C.2.
350. *See supra* Part II.C.2.
351. *See supra* Part II.C.2.
352. *See supra* Parts I.D.3, I.E.1.
353. *See supra* Part II.
354. *See supra* Part II.

or acted dishonestly while working.[355] This Note recommends that disclosure statutes explicitly require prosecutors to disclose all such evidence when the allegations are substantiated or unsubstantiated.[356] On the other hand, trial courts should have discretion in determining whether to disclose exonerated or unfounded allegations.

In cases in which the officer has a substantiated or unsubstantiated claim in their personnel file, the defendant's interest in impeachment evidence outweighs the privacy interests of the officer witness.[357] When an officer has a file that includes a substantiated allegation, the officer's own department has a record stating that the police officer was involved in certain acts and that those acts constituted bad and dishonest behavior.[358] This type of evidence is invaluable to a defendant; it speaks directly to the dishonesty and credibility of the officer witness.[359] If a police officer has a history of misconduct, the defense could use this information to indicate that the officer has a propensity to lie.[360] Presenting such evidence to juries—who tend to over-credit police officer testimony—may balance the scales between the prosecution and the defense, allowing for a more fair and equitable trial.[361]

Many of the same arguments apply to disclosing unsubstantiated police officer misconduct allegations.[362] Although unsubstantiated complaints lack sufficient evidence to say definitively whether the police officer engaged in misconduct, the defense team can still use the evidence to question the officer's credibility at trial.[363] Consider, for example, that the defense could question a police officer witness on a prior unsubstantiated allegation of falsifying a police report. There is not sufficient evidence available to say that the police officer falsified the report, but there is also insufficient evidence to say that the officer did not falsify the report. Although unsubstantiated allegations are not as clear cut, it is up to the jury to decide whether to credit the defense's evidence, and prosecutors are not equipped to determine what evidence the defense or the jury will deem material.[364] Thus, when evidence is unsubstantiated, the defense's interest in the evidence for impeachment purposes still outweighs the privacy interests of police officers.

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355. *See supra* Part I.D.3.

356. It is also important to note that the materiality component of *Brady* is missing from this recommendation as well, as the evidence enumerated is turned over whenever an officer will be a witness at trial—regardless of the evidence's materiality to the case or the importance of the officer's testimony. *See supra* Part III.A.

357. *See supra* Part I.E.

358. *See supra* Part I.D.3.

359. *See supra* Part I.E.2.

360. *See supra* Parts I.C–I.D.

361. *See supra* Parts I.C, I.D.2, I.E.2.

362. *See supra* notes 357–61 and accompanying text.

363. *See supra* notes 357–61 and accompanying text; *supra* Part I.E.2; *see also* People v. Carter, No. 000948-22KN, 2022 WL 3971927, at *6 (N.Y. Crim. Ct. Aug. 15, 2022) ("'[T]he underlying facts of substantiated and unsubstantiated findings may provide a good faith basis for cross-examination'" (quoting People v. Castellanos, 148 N.Y.S.3d 652, 655 (Sup. Ct. 2021))); People v. Best, No. 020333-21QN, 2022 WL 4231146, at *6 (N.Y. Crim. Ct. Sept. 13, 2022).

364. *See supra* Parts I.E.3, II.A.

The same rationales do not apply, however, in the case of exonerated and unfounded allegations. In those cases, either the officer acted as alleged but the actions did not constitute misconduct, or there was no evidence that such actions occurred.[365] As previously discussed, impeachment evidence found in police officer personnel files is used to undermine an officer's character for truthfulness—to demonstrate that they have a propensity to lie.[366] Personnel file information stating that an officer acted properly or that there was no evidence of the alleged action does not further these goals. Thus, in cases in which the officer was accused of police misconduct and exonerated or the allegations were deemed unfounded, trial courts should have discretion over the disclosure of such information. Alternatively, states may bar the release of such information altogether. In these cases, the privacy interests of police officers will more likely than not outweigh the interests of the defense, as the evidence cannot be used to demonstrate the officer's dishonesty or to undermine their credibility.[367]

In summary, states should adopt a uniform legislative approach that addresses the disclosure of police personnel file information. This approach should require disclosure in any case in which an officer will testify, regardless of whether the misconduct allegations are substantiated or unsubstantiated. The next and final section looks at two additional components of state disclosure laws that could help the prosecution by facilitating administrability and protecting officer personnel files in unique circumstances.

3. Further Recommendations: Timing and Protective Orders

Police officers and prosecutors may push back against the recommendations provided in this Note. For one, prosecutors may claim that, even with the clarification provided by the uniform statute regarding the disclosure of information, the amount of information that they must disclose could become unwieldy. Officers may argue that there could be exceptional circumstances under which prosecutors should not disclose an officer's records. This section looks to address each of these concerns in turn.

Regarding the prosecutor's interest in administrability, only approximately *3 percent* of cases go to trial; virtually all defendants take a plea bargain before ever reaching the courtroom.[368] The problem with New York's new disclosure law, for example, is that it requires prosecutors to disclose all evidence in a limited period following the defendant's arraignment.[369] Thus, the statute reaches defendants who may never make it to trial. However, there is no constitutional right to receive *Brady* material before entering a

365. *See supra* Part I.D.3.
366. *See supra* Parts I.C–I.D.
367. *See supra* notes 364–66 and accompanying text; *see also supra* Part I.E.
368. *See* NAT'L ASS'N CRIM. DEF. LAWS., *supra* note 56, at 14; *see also supra* Part I.A.
369. *See supra* Part I.E.3; N.Y. CRIM. PROC. LAW § 245.10 (McKinney 2023).

plea.[370] Accordingly, states should adopt timing provisions that allow for the disclosure of impeachment evidence before trial, but after the plea bargaining stage.[371] This time component would substantially reduce the prosecutor's disclosure obligations and serve officers by limiting the disclosure of personnel files.[372]

Finally, regarding potential officer concerns about extenuating circumstances in which they may need to limit access to their files, most—if not all—state disclosure obligations include provisions that allow for officers to petition the court for protective orders, meaning that the court can stipulate to who gets to see their records and what they must turn over to the defense.[373] This Note recommends that courts only issue protective orders to the extent that they disallow disclosure of evidence directly to the defendant. However, the defense should still be privy to the information. If the protective orders could completely remove evidence from the defense's hands, it would create a loophole that police officers could take to avoid disclosure under this uniform model. Additionally, officers often request protective orders because they fear that the defendant's access to their personal information puts their safety at risk.[374] Restricting disclosure to defense counsel alleviates this concern.

In sum, the uniform legislative approach proposed in this part will help to resolve the current ambiguities and inconsistencies in state disclosure laws regarding the release of police officer personnel files, while balancing the privacy interests of the police, the administrability interests of the prosecutors, and the evidentiary interests of the defense.

CONCLUSION

Police officers are vital to and ever-present in the lives of the American people.[375] Officers arrest them, write reports on them, and testify against them.[376] Yet, state disclosure laws currently say very little about police officers and their role in the criminal trial.[377] These laws say even less about how prosecutors should manage the impeachment evidence in police officer personnel files.[378] States should pass a uniform law that eliminates the ambiguities seen in state statutes today while balancing the interests of the prosecution, the defense, and the police.

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370. *See* United States v. Ruiz, 536 U.S. 622, 630 (2002) (holding that the Constitution does not require the disclosure of impeachment evidence prior to entering a plea); *see also supra* Part I.A.

371. *See supra* Part I.A.

372. *See supra* Parts I.A, I.E.1.

373. *See, e.g.*, N.Y. CRIM. PROC. LAW § 245.70 (McKinney 2023); ARIZ. R. CRIM. P. 15.1 (2023); MONT. CODE ANN. § 46-15-322 (2023); OHIO R. CRIM. P. 16 (2023).

374. *See supra* Part I.E.1.

375. *See supra* notes 9–16 and accompanying text.

376. *See supra* notes 136–37 and accompanying text.

377. *See supra* Part II.

378. *See supra* Part II.