

Article

Brady Lists

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INTRODUCTION

Brady lists, named after the Supreme Court decision *Brady v. Maryland*,¹ are lists some prosecutors maintain of law enforcement officers with histories of misconduct that could impact the officers' credibility in criminal cases.² *Brady* and its progeny require prosecutors to disclose exculpatory evidence within the government's possession or control to defendants in criminal cases.³ This includes evidence that could impeach a witness's credibility.⁴ Evidence that a police officer involved in a criminal case has, for example, previously written a false police report, lied in court, or used racial slurs during an arrest may be excul-

1. *Brady v. Maryland*, 373 U.S. 83 (1963); *see also* MODEL RULES OF PRO. CONDUCT r. 3.8(d) (AM. BAR ASS'N 2004).

2. These lists are also sometimes referred to as *Brady* indices, *Giglio* lists, "no call lists," "do not call lists," "no fly lists," "liars lists," "bad cop lists," "damaged goods lists," "naughty lists," "exculpatory evidence schedules," "law enforcement integrity databases," "law enforcement automatic discovery databases," "potential impeachment disclosure" lists, "police disclosure lists," "credibility disclosure notification lists," "law enforcement employee disclosure lists," "law enforcement activity disclosures," "witness review flowsheets," "impeachment databases," or other state-specific titles. This Article uses the term *Brady* lists to encompass all the above.

3. *See Brady*, 373 U.S. at 87 (holding that a prosecutor's suppression of exculpatory evidence violates due process if the evidence is material to guilt or punishment); *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (finding that a prosecutor's duty to provide exculpatory evidence extends to information held by other agencies acting on prosecutor's behalf).

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

patory because it casts doubt on the officer's truthfulness, credibility, and impartiality.⁵ *Brady* lists originated from this disclosure obligation: the lists ostensibly allow prosecutors to keep track of, and disclose to defense counsel when necessary, information that negatively impacts officers' credibility.⁶

Brady lists are simple in concept and complicated in practice. Prosecutorial practices around maintaining and using *Brady* lists vary widely and are almost completely unregulated.⁷

5. See, e.g., Rachel Moran, *Contesting Police Credibility*, 93 WASH. L. REV. 1339, 1340–42, 1382–83 (2018) (explaining scenarios in which a police officer's history of misconduct could be a key factor in establishing the credibility of the officer's testimony).

6. See, e.g., RACHEL HARMON, *THE LAW OF THE POLICE* 228 (2021) ("To avoid putting forward incredible witnesses and to maintain the integrity of trials, some prosecutors maintain lists of officers they consider too tainted to testify."); Mary Ellen Reimund, *Are Brady Lists (aka Liar's Lists) the Scarlet Letter for Law Enforcement Officers? A Need for Expansion and Uniformity*, 3 INT'L J. HUMANS. & SOC. SCI. 1, 1–2 (2013), https://www.ijhssnet.com/journals/Vol_3_No_17_September_2013/1.pdf [<https://perma.cc/84TW-R4RB>] (explaining that *Brady* lists originated from a prosecutorial effort to comply with *Brady*).

7. See HARMON, *supra* note 6, at 228 ("*Brady* lists are an informal means for shaping officer conduct. There are no legal standards for putting officers on such lists."); Somil Trivedi & Nicole Gonzalez Van Cleve, *To Serve and Protect Each Other: How Police-Prosecutor Codependence Enables Police Misconduct*, 100 B.U. L. REV. 895, 923–24 (2020) ("[T]here is little to no uniformity across the country as to how law enforcement decides who gets on the list, for what conduct, for how long, etc."); Reimund, *supra* note 6, at 4 (describing how *Brady* lists vary from agency to agency, suggesting that "some prosecutors are in compliance with *Brady* while others are not"); 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) ("[I]n over fifty years since the Supreme Court's landmark 1963 decision, very little regulation or enforcement of the *Brady* disclosure duty has occurred."); Wendy Halloran, *The Secret List? Some Prosecutors, Police Departments Conceal Officer Misconduct*, KUTV (Jan. 4, 2021), <https://kutv.com/news/2news-investigates/some-prosecutors-police-departments-fail-to-keep-brady-lists-to-track-officer-conduct-utah> [<https://perma.cc/CB73-7C9V>] ("Utah doesn't have a system in place to ensure prosecutors are fulfilling their constitutional obligation to disclose *Brady* information."); Elise Schmelzer, *Uneven Approach to Colorado Police Officers with Questionable Credibility Leaves Public in the Dark*, DENVER POST (Dec. 6, 2020), <https://www.denverpost.com/2020/12/06/colorado-police-credibility-brady-lists> [<https://perma.cc/3PFN-PND7>] (highlighting a Colorado district attorney describing *Brady* material as "a moving target" and "not well defined"); Mark Brodie, *Investigation Shows Uneven Compliance with Brady List*, KJZZ (Aug. 11, 2020), <https://kjzz.org/content/1608611/investigation-shows-uneven-compliance-brady-list> [<https://perma.cc/H2UJ-WMVP>] (illustrating the lack of uniformity in "compiling and maintaining" *Brady* lists); Michael Casey, *Criminal Justice Reform Turns to List of Problem Officers*, AP NEWS (Sept. 1, 2019), <https://apnews.com/article/criminal-justice-reform-turns-to-list-of-problem-officers>

Neither federal nor most state laws require prosecutors to maintain *Brady* lists, and recent journalist investigations suggest that most prosecutor offices do not maintain such lists.⁸ The lists that do exist are not all equal. Some prosecutor agencies maintain expansive lists of police officers who are accused of or found to have committed misconduct of nearly any kind,⁹ while others limit their *Brady* lists to officers with histories of dishonesty or

apnews.com/article/d31040184fb24eb599e8d581aeb5bd49 [https://perma.cc/TB56-H8W2] (noting “no clear guidance” from courts on how prosecutors should use or share *Brady* lists); Jennifer Edwards Baker, *Have Officers Patrolling Your Neighborhood Been Convicted of Crimes, Lied on Job?*, FOX 19 (Oct. 10, 2019), <https://www.fox19.com/2019/10/10/tracking-police-have-officers-patrolling-your-neighborhood-been-convicted-crimes-lied-job> [https://perma.cc/89YL-XMTA] (noting that a member of the Ohio state prosecutor’s executive board acknowledged that “the way *Brady* is handled varies county to county and state to state”); Melody Gutierrez & Kim Minugh, *California Police Unions Fight Discipline of Officers Under Prosecutors’ Lists*, MERCED SUN-STAR (Sept. 12, 2013), <http://www.mercedsunstar.com/news/state/article3278731.html> [https://perma.cc/6CDZ-U99J] (quoting numerous officials bemoaning the lack of uniformity or regulation in use of *Brady* lists); Val Van Brocklin, *Brady Lists Ignite Conflicts Between Police and Prosecutors, Management and the Front-Line*, POLICE 1 (Feb. 25, 2019), <https://www.police1.com/legal/articles/brady-lists-ignite-conflicts-between-police-and-prosecutors-management-and-the-front-line-jaBRldmLu8wSdPnN> [https://perma.cc/Y5Z4-U88U] (“There are no formal, nationally agreed upon guidelines for what conduct will result in an officer being *Brady* listed or to what standard the conduct must be proven.”).

8. See Steve Reilly & Mark Nichols, *Hundreds of Police Officers Have Been Labeled Liars. Some Still Help Send People to Prison*, USA TODAY (Oct. 14, 2019), <https://www.usatoday.com/in-depth/news/investigations/2019/10/14/brady-lists-police-officers-dishonest-corrupt-still-testify-investigation-database/2233386001> [https://perma.cc/S86M-HFQM] (citing the finding in a large survey of more than 1000 prosecutor offices that seventy-one percent of respondents said that they do not maintain *Brady* lists); see also *Tracking Police Misconduct: How Prosecutors Can Fulfill Their Ethical Obligations and Hold the Police Accountable*, INST. FOR INNOVATION IN PROSECUTION 2 (July 2021) [hereinafter *Tracking Police Misconduct*], <https://www.prosecution.org/s/FINAL-Tracking-Police-Misconduct-Guide.pdf> [https://perma.cc/KT2N-M994] (“Traditionally, prosecutors do not track police misconduct in an organized, systematic way.”); Halloran, *supra* note 7 (investigating the lack of *Brady* lists in Utah); Baker, *supra* note 7 (investigating lack of *Brady* lists in Ohio); Terrence P. Dwyer, *Don’t Destroy Your Career: The Brady List and the Ruinous Impact of a Lie*, POLICE 1 (Nov. 3, 2016), <https://www.policeone.com/legal/articles/don't-destroy-your-career-the-brady-list-and-the-ruinous-impact-of-a-lie-N8hzrj6qsZxZZPbe> [https://perma.cc/278M-ZQSK] (offering commentary from an attorney who handles police disciplinary appeals that many prosecutor offices “are either still trying to formulate some policy on how to deal with [disclosing police misconduct evidence] or are just not strictly adhering to the requirements” of *Brady*).

9. See *infra* Part II.C.2.

criminal convictions.¹⁰ Disclosure practices are similarly inconsistent: some prosecutors maintain *Brady* lists as internal mechanisms for assessing credibility concerns about their own officer-witnesses and refuse to provide their lists to people outside the office.¹¹ Others affirmatively disclose their lists to defendants in criminal cases.¹² Some make the lists available to the public.¹³

In part because of their unregulated nature, *Brady* lists are highly controversial. Police officers complain it is too easy to get on such lists and too hard to get off, and say the lists unfairly jeopardize officers' careers by labeling them as "bad cops" or unreliable witnesses.¹⁴ Politicians and unions fight over whether *Brady* lists hamper criminal prosecutions.¹⁵ Defense attorneys demand more access to these lists, saying they are critical to protecting clients' rights to fair trials.¹⁶ Journalists, advocates, politicians, and concerned civilians also claim a right to view such

10. See *infra* Parts II.C.2.a–b.

11. See *infra* Part II.C.3.

12. See *infra* Part II.C.3.

13. See *infra* Part II.C.3.

14. See Jaxon Van Derbeken, *Police with Problems Are a Problem for D.A.*, SFGATE (May 16, 2010), <https://www.sfgate.com/bayarea/article/Police-with-problems-are-a-problem-for-D-A-3264681.php> [<https://perma.cc/PM99-PVVT>] ("[L]anding on a *Brady* list could be a career killer."); Emily Gillespie, *Legal System, Law Enforcement at Odds over Brady List*, COLUMBIAN (Nov. 15, 2015), <https://www.columbian.com/news/2015/nov/15/legal-system-law-enforcement-at-odds-over-the-brady-list> [<https://perma.cc/K2RV-NAL6>] ("Officers say that inappropriately placing someone on the list unjustly tarnishes reputation."); Van Brocklin, *supra* note 7; Tim White, *Does the Brady Issue Impact You?*, ALADS DISPATCHER 20 (Nov. 2016), https://alads.blob.core.windows.net/wfiles/dispatcher/pdf/pdf_XXXIII_11.pdf [<https://perma.cc/HNR4-RSHW>] (recounting a sheriff department's efforts in trying to remove potential *Brady* list cops).

15. See Christine Byers & Joel Currier, *St. Louis Prosecutor Says She Will No Longer Accept Cases from 28 City Police Officers*, ST. LOUIS POST DISPATCH (Aug. 31, 2018), https://www.stltoday.com/news/local/crime-and-courts/st-louis-prosecutor-says-she-will-no-longer-accept-cases/article_6d8def16-d08d-5e9a-80ba-f5f5446b7b6a.html [<https://perma.cc/L475-FRET>] (quoting then-Missouri Attorney General Josh Hawley complaining that *Brady* lists would result in "criminals going free"); Tess Sheets, *Orange-Osceola State Attorney's Plan to Ban Unreliable Cops from Testifying Drags*, ORLANDO SENTINEL (Feb. 21, 2020), <https://www.orlandosentinel.com/news/breaking-news/os-ne-brady-policy-aramis-ayala-20200221-g2uqycb3dnd6pmnsq6c6rwmsym-story.html> [<https://perma.cc/C6YX-JGU9>] (quoting law enforcement officials complaining that *Brady* lists "risk[] prosecutors losing provable cases by not allowing them to testify").

16. Tracee Wilkins, 'Brady List' Keeps Track of Police with Credibility Issues, NBC4 WASH. (Apr. 14, 2021), <https://www.nbcwashington.com/news/local/prince-georges-county/brady-list-keeps-track-of-police-with-credibility>

lists.¹⁷ Courts and legislatures rarely articulate any consistent regulatory principles.¹⁸

While *Brady* lists themselves are controversial, so is failure to use such lists. Scholars and practitioners have critiqued prosecutors for both intentional and accidental non-compliance with *Brady*'s disclosure requirements, and rightly so. Police misconduct, and prosecutors' failure to identify and disclose that misconduct, is one of the most frequent bases for wrongful convictions.¹⁹ Prosecutors who do not maintain *Brady* lists disregard a

-issues/2640740 [https://perma.cc/R7FN-RVPJ] (showing Maryland ACLU and Prince George's County public defender calling for public release of *Brady* list); Schmelzer, *supra* note 7 (noting a member of the Colorado Criminal Defense Bar expressing concern for expectation that defense counsel should trust police to disclose *Brady* information); George Joseph, *Bronx Prosecutors Release Secret Records on Dishonest Cops*, GOTHAMIST (Oct. 7, 2019), <https://gothamist.com/news/bronx-prosecutors-release-secret-records-dishonest-cops> [https://perma.cc/BNE3-A6MP].

17. Beryl Lipton, *FOI FYI: What Is a Brady List?*, MUCKROCK (Nov. 3, 2020), <https://www.muckrock.com/news/archives/2020/nov/03/foia-fyi-what-is-a-brady-list> [https://perma.cc/4MVF-6WMS]; George Joseph & WNYC Staff, *New York City's DAs Keep Secret Lists of Cops with Questionable Credibility*, GOTHAMIST (Apr. 22, 2019), <https://gothamist.com/news/new-york-citys-das-keep-secret-lists-of-cops-with-questionable-credibility> [https://perma.cc/Z7GV-JVG5] (describing civil-liberties advocates calling on prosecutors to release *Brady* databases); Joseph, *supra* note 16.

18. See *infra* Part II.A. (discussing the lack of consistent caselaw or statutory authority governing creation or use of *Brady* lists).

19. Press Release, N.Y. State Unified Ct. Sys., Chief Judge DiFiore Announces Implementation of New Measure Aimed at Enhancing the Delivery of Justice in Criminal Cases 2 (Nov. 8, 2017), http://www.nycourts.gov/PRESS/PDFs/PR17_17.pdf [https://perma.cc/96D9-X7W7] (describing *Brady* violations as "serious concerns that undermine the fairness and reliability of the criminal justice process"); *Breakiron v. Horn*, 642 F.3d 126, 133 n.8 (3d Cir. 2011) (expressing dismay over the frequency with which prosecutors withhold exculpatory evidence); Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 279 (2007) (describing failure to disclose exculpatory evidence as "[o]ne of the most common forms of prosecutorial misconduct"); Samuel R. Gross, Maurice J. Possley, Kaitlin Jackson Roll, & Klara Huber Stephens, *Government Misconduct and Convicting the Innocent*, THE NAT'L REGISTRY OF EXONERATIONS 1, 32 (Sept. 1, 2020), https://www.scribd.com/document/489568010/Government-Misconduct-and-Convicting-the-Innocent#fullscreen&from_embed [https://perma.cc/42SE-P66Z] (naming concealment of exculpatory evidence as the most frequent form of misconduct in wrongful conviction cases); see *Percentage Exonerations by Contributing Factors*, THE NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx> [https://perma.cc/X6YA-BB7L]; see also *infra* Part III.E (discussing numerous cases in which police misconduct resulted in wrongful convictions).

tool for identifying problematic officers and protecting against wrongful convictions.

This Article explores the startling absence of legal authority regulating *Brady* lists and resulting inconsistent prosecutorial practices around maintaining and using such lists. The Article also reports the many controversies that—nearly sixty years after the Supreme Court decided *Brady v. Maryland*—continue to arise from use, misuse, and non-use of *Brady* lists. The Article provides a more thorough assessment of laws and practices around maintenance and use of *Brady* lists than scholars, advocates, or journalists have previously gathered.

The Article begins in Part I with a brief explanation of the *Brady* doctrine and its application to information that can impact law enforcement officers' credibility in criminal cases. Part I goes on to describe the types of law enforcement misconduct records that prosecutors may have an obligation to disclose. Part II details the striking lack of law governing *Brady* lists and the sporadic development of *Brady* lists within some prosecutors' offices. Part II then transitions into an examination of inconsistent *Brady* list practices, including the variety of prosecutorial approaches to questions like whether to maintain such lists, who and what information to include in the lists, and whether and how to disclose the lists.

Part III narrates some of the many controversies that have arisen and continue to arise around use or non-use of *Brady* lists. These controversies include political pushback from police unions or politicians against self-described progressive prosecutors who create *Brady* lists; lawsuits by police officers who believe they were placed on *Brady* lists without due process; and disclosure-related controversies when prosecutors inadvertently or purposely withhold information related to police misconduct.

Part IV begins by recognizing that *Brady* lists are no simple panacea to the existing dysfunction in prosecutorial practices for obtaining and disclosing exculpatory evidence. Part IV also acknowledges that reasonable readers could disagree on whether *Brady* lists are a meaningful tool for reform, or a band-aid providing cover to a dysfunctional disclosure process that neither courts nor prosecutors show any consistent commitment to reforming. Part IV then explains why *Brady* lists, though not a stand-alone solution, should be a minimum practice in every prosecutors' office. Part IV ends by providing prescriptions for appropriate creation, maintenance, and use of *Brady* lists.

I. BRADY'S APPLICATION TO LAW ENFORCEMENT MISCONDUCT INFORMATION

A. THE BRADY RULE

In 1963, the Supreme Court announced the now-famous *Brady* rule that prosecutors may violate due process if they suppress “evidence favorable to the accused” from defendants in criminal cases.²⁰ The Court’s holding came with two caveats. First, prosecutors’ failure to disclose favorable evidence only violates due process when the evidence is “material” to guilt or punishment.²¹ Second, *Brady* only addressed whether prosecutors may withhold evidence, and not whether prosecutors have an obligation to obtain exculpatory evidence.²² *Brady* did, however, indicate its rule applies regardless of whether prosecutors withhold evidence in good or bad faith.²³

Eight years after *Brady*, the Court in *Giglio v. United States* clarified that *Brady*’s holding extends to evidence that affects a government witness’s credibility, often referred to as impeachment evidence.²⁴ The *Giglio* Court also affirmed *Brady*’s rule that withholding evidence violates due process even if nondisclosure occurs by negligence or design.²⁵

In three later cases—*United States v. Agurs*, *United States v. Bagley*, and *Kyles v. Whitley*—the Court addressed questions about what triggers prosecutors’ *Brady* obligations and what *Brady*’s materiality standard means.²⁶ A *Bagley* concurrence concluded that, whether or not defense counsel specifically requests exculpatory evidence, prosecutors have an affirmative obligation to disclose it, and their failure to do so is material if the court finds a “reasonable probability” that disclosure would have

20. *Brady v. Maryland*, 373 U.S. 83, 86–87 (1963).

21. *Id.* at 87; *see also Giglio v. United States*, 405 U.S. 150, 154 (1972) (defining *Brady*’s materiality standard as evidence that has a reasonable likelihood of changing the verdict, rather than evidence that is “possibly useful to the defense”); *United States v. Bagley*, 473 U.S. 667, 678 (1985) (finding evidence is material if “its suppression undermines confidence in the outcome of the trial”).

22. *See Brady*, 473 U.S. at 84–87.

23. *Id.* at 87; *see also Giglio*, 405 U.S. at 153 (“[S]uppression of material evidence justifies a new trial irrespective of the good faith or bad faith of the prosecution.”).

24. *Giglio*, 405 U.S. at 154.

25. *Id.*

26. *United States v. Agurs*, 427 U.S. 97 (1976); *Bagley*, 473 U.S. at 678–84; *Kyles v. Whitley*, 514 U.S. 419, 433 (1995).

changed the outcome of the case.²⁷ In *Kyles*, the Court adopted the *Bagley* concurrence and held that, regardless of the specificity of defense counsel's request, failure to disclose exculpatory evidence violates due process if the evidence is material to guilt or punishment.²⁸ *Kyles* also reaffirmed that exculpatory evidence includes evidence casting doubt on witnesses' credibility.²⁹

Most importantly, the *Kyles* Court also addressed whether prosecutors have a duty to disclose evidence in the possession of other government actors.³⁰ *Kyles* said yes, holding that prosecutors have a duty "to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."³¹ *Kyles* specifically rejected the government's argument that it "should not be held accountable . . . for evidence known only to police investigators and not to the prosecutor," and said that accommodating prosecutors in this manner would violate *Brady* and its progeny.³² The *Kyles* Court also noted that prosecutors are responsible for developing "procedures and regulations" to ensure they comply with their *Brady* obligations.³³ The Court has reaffirmed this holding at least twice in the years since *Kyles*, stating that the *Brady* rule "encompasses evidence known only to police investigators and not to the prosecutor."³⁴

Although *Brady* and its progeny reference disclosure of "material" evidence—that is, evidence having a reasonable likelihood of affecting the outcome of the case—all fifty states, plus the District of Columbia have adopted ethics rules requiring

27. *Bagley*, 473 U.S. at 681–82 (Blackmun, J. & O'Connor, J., concurring).

28. *Kyles*, 514 U.S. at 433.

29. *See id.* at 433–34.

30. *Id.* at 437.

31. *Id.*

32. *Id.* at 438.

33. *See id.* at 438 ("[P]rocedures and regulations can be established to carry the prosecutor's burden.").

34. *Strickler v. Greene*, 527 U.S. 263, 280–81 (1999) (quoting *Kyles*, 514 U.S. at 438); *Youngblood v. West Virginia*, 547 U.S. 867, 869–70 (2006) (quoting *Kyles*, 514 U.S. at 438) ("Brady suppression occurs when the government fails to turn over even evidence that is 'known only to police investigators and not to the prosecutor.'"); *see also* Daniel S. Medwed, *Brady's Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1537–38 (2010) (noting the *Brady* rule obligates prosecutors to disclose exculpatory evidence within law enforcement's possession "regardless of whether the specific prosecutor in charge of the case has actual knowledge of its existence").

prosecutors to disclose favorable evidence regardless of materiality.³⁵ Many states also have discovery rules requiring prosecutors to disclose all exculpatory evidence, with no caveat that the evidence be “material” to guilt or punishment.³⁶ In its 2009 decision *Cone v. Bell*, the United States Supreme Court acknowledged that a prosecutor’s obligation to disclose exculpatory evidence “may arise more broadly under . . . ethical or statutory obligations.”³⁷

The Supreme Court has never resolved whether the *Brady* rule applies to information readily accessible to defense counsel by means other than prosecutorial disclosure. While the *Agurs* Court noted in passing that *Brady* applies to information “which had been known to the prosecution but unknown to the defense,”³⁸ a later decision in *Banks v. Dretke* reasoned that a rule saying “‘prosecutor may hide, defendant must seek,’ is not tenable in a system constitutionally bound to accord defendants due

35. See MODEL RULES OF PRO. CONDUCT r. 3.8(d) (AM. BAR ASS’N 2004) (requiring prosecutors to “make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense”); Laurie L. Levenson, *The Politics of Ethics*, 69 MERCER L. REV. 753, 758–59 (2018) (describing California’s process as the last jurisdiction in the country to adopt some version of ABA Model Rule 3.8(d)); Justin Murray, *Prejudice-Based Rights in Criminal Procedure*, 168 U. PA. L. REV. 277, 300–01 (2020) (“[A]ll or nearly all jurisdictions now have ethics rules that, if interpreted according to their plain meaning, appear to require disclosure of all evidence that favors the defense irrespective of materiality.”); Justin Murray & John Greabe, *Disentangling the Ethical and Constitutional Regulation of Criminal Discovery*, HARV. L. REV. BLOG (June 15, 2018), <https://blog.harvardlawreview.org/disentangling-the-ethical-and-constitutional-regulation-of-criminal-discovery> [<https://perma.cc/3UQ9-8LKG>] (noting that rule 3.8(d) has been adopted in “some form” in every state).

36. See, e.g., TEX. CODE CRIM. PROC. ANN. art. 39.14(h) (West 2021) (“[T]he state shall disclose to the defendant any exculpatory, impeachment, or mitigating document, item, or information . . . that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged.”); MINN. R. CRIM. P. 9.01 (West 2022) (displaying no requirement that exculpatory information must be material); CAL. PENAL CODE § 1054.1 (West 2022) (exhibiting no materiality requirement).

37. 556 U.S. 449, 470 n.15 (2009); see also Jennifer E. Laurin, *Quasi-Inquisitorialism: Accounting for Deference in Pretrial Criminal Procedure*, 90 NOTRE DAME L. REV. 783, 830–32 (2014) (discussing Supreme Court cases hinting that prosecutors’ ethical obligation to disclose exculpatory evidence is separate from and broader than the due process obligation to disclose materially exculpatory evidence).

38. *United States v. Agurs*, 427 U.S. 97, 103 (1976).

process.”³⁹ Federal circuit courts are inconsistent on this issue. The Ninth Circuit has held that the government is obligated to disclose publicly available information, or at least “enough information” that a defendant can “ascertain the supposed *Brady* material on his own.”⁴⁰ Most other circuits, in contrast, have held that readily available public information generally does not fall under *Brady*’s purview.⁴¹

Prosecutors’ disclosure responsibilities can thus be summarized as follows: (1) Prosecutors are required to disclose exculpatory evidence to defendants in criminal cases. (2) The disclosure requirement encompasses evidence known to other government actors in the case, including law enforcement, and prosecutors therefore have a duty to obtain exculpatory evidence from law enforcement. (3) The duty applies even if defense counsel does not specifically ask for the evidence. (4) The duty may apply to publicly available evidence. (5) Failure to disclose exculpatory evidence violates due process if the evidence has a reasonable probability of affecting the outcome of the case, and may violate a prosecutor’s ethical or statutory responsibilities even if the evidence is not material to the outcome.

B. TYPES OF INFORMATION ABOUT LAW ENFORCEMENT OFFICERS THAT MAY FALL UNDER *BRADY*

Although the *Brady* rule requires prosecutors to disclose exculpatory information about anyone involved in the government’s case, this Article focuses on information about law enforcement officers. The following are non-exhaustive categories of information that could cast doubt on a law enforcement agent’s credibility, and therefore may fall under *Brady*’s purview.

39. 540 U.S. 668, 696 (2004).

40. See *Milke v. Ryan*, 711 F.3d 998, 1017 (9th Cir. 2013).

41. See, e.g., *United States v. Wilson*, 901 F.2d 378, 380 (4th Cir. 1990); *Bell v. Bell*, 512 F.3d 223, 235 (6th Cir. 2008); *United States v. Johnson*, 911 F.3d 849, 852 (7th Cir. 2018) (“*Brady* does not apply when information is available for the asking.”); *United States v. Davis*, 787 F.2d 1501, 1505 (11th Cir. 1986) (holding that *Brady* does not apply when defense counsel can readily access evidence “from other sources”); see also *People v. Superior Ct.*, 337 P.3d 847, 858 (Cal. 2015) (“[T]he prosecution has no *Brady* obligation to do what the defense can do just as well for itself.”).

1. Criminal Charges or Convictions

Certain criminal convictions, particularly those involving dishonesty, can be used to impeach a witness's credibility.⁴² Many police departments have current and former officers with criminal convictions, which includes at least twenty-two New York Police Department officers with convictions for activities like planting drugs on a criminal suspect, making false statements to support criminal charges, and bribing people for sex in exchange for favorable treatment in criminal cases.⁴³ While the admissibility of those convictions may depend on rules in applicable jurisdictions, they qualify as potentially exculpatory evidence that prosecutors should disclose to defense counsel.

Pending criminal charges may also be a source of *Brady* material, particularly if they involve charges for job-related misconduct.⁴⁴ The fact that an officer has a pending charge for possessing narcotics or stealing from an evidence locker, for example, could be appropriate impeachment in a case where the officer claims to have found drugs on a criminal defendant.⁴⁵

42. See FED. R. EVID. 609(a).

43. See, e.g., Grace Toohey, *District Attorney Shares List with Defense Attorneys of 30 Cops with Questioned Credibility*, ADVOCATE (Oct. 28, 2018), https://www.theadvocate.com/baton_rouge/news/crime_police/article_08a30492-d92c-11e8-a19e-dbc407f21b8c.html [<https://perma.cc/G3JZ-54P8>] (identifying numerous current and former East Baton Rouge police officers with criminal convictions); Giglio-Brady List, WAYNE CNTY. PROSECUTOR'S OFF. [hereinafter *Wayne Cnty. Brady List*], <https://www.documentcloud.org/documents/6989344-Giglio-Brady-List> [<https://perma.cc/X656-QKT8>] (listing multiple officers with criminal convictions); Seattle Times Staff, *Problem Officers: What They Did to End Up on List*, SEATTLE TIMES (June 24, 2007), <https://www.seattletimes.com/seattle-news/problem-officers-what-they-did-to-end-up-on-list> [<https://perma.cc/F63N-BWTP>] (referencing officers with criminal convictions); George Joseph, *22 NYPD Officers Were Convicted of Dishonesty, Corruption, and Other Misconduct. Should Convictions They Helped Secure Stand?*, GOTHAMIST (May 4, 2021), <https://gothamist.com/news/22-nypd-officers-convicted-dishonesty-corruption-misconduct-convictions> [<https://perma.cc/8RNJ-YGMA>].

44. See FED. R. EVID. 404(a)(3), 404(b)(2), 608 (allowing evidence of other acts that did not or have not yet resulted in criminal convictions to impeach witness's credibility).

45. Thadeus Greenson, *Kalis Arrest Shines Spotlight on DA's Brady Policy; DA's Office Has Written Policy for Dealing with Officers with Character Issues*, TIMES-STANDARD (Apr. 22, 2011), <https://www.times-standard.com/2011/04/22/kalis-arrest-shines-spotlight-on-das-brady-policy-das-office-has-written-policy-for-dealing-with-officers-with-character-issues> [<https://perma.cc/4NNU-XSD4>] (reporting on a district attorney adding a police officer to a *Brady* list after the officer was charged with theft, false imprisonment, and drug possession).

2. Judicial Findings of Dishonesty or Other Misconduct

Law enforcement officers testify routinely in criminal cases, and not always truthfully. The problem of police officers lying in police reports or during testimony is so common that it has its own well-known euphemism, “testilying.”⁴⁶ Occasionally judges dismiss cases, suppress evidence, or otherwise find officers’ testimony unbelievable. In one Arizona murder prosecution, prosecutors relied on testimony from a police officer who judges in at least four previous cases had found to be incredible based on lies the officer told under oath.⁴⁷ An Arapahoe County, Colorado judge found two Aurora police officers “not credible” after they testified about an arrest in a manner inconsistent with body camera footage.⁴⁸ A municipal court judge in Montana issued an order advising local officials that an officer gave contradictory testimony that the judge determined “to not be credible.”⁴⁹

This type of evidence—that an officer has previously lied in court or has a pattern of illegal arrests or searches—may well be impeachment evidence to attack the officer’s credibility in other cases.⁵⁰

46. I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835, 836–37, 870 (2008); Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 COLO. L. REV. 1037, 1040 (1996) (arguing police lying “is so common and so accepted in some jurisdictions that the police themselves have come up with a name for it: ‘testilying.’”); Moran, *supra* note 5, at 1342.

47. See *Milke v. Ryan*, 711 F.3d 998, 1004 (9th Cir. 2013).

48. See Schmelzer, *supra* note 7.

49. Letter from J. Lori A. Adams, Kalispell Mun. Ct. J., to Brian Heino, Flathead Cnty. Sheriff (Aug. 11, 2020), <https://www.scribd.com/document/508533162/Kelvin-Pandina> [<https://perma.cc/LW79-5DSQ>]; NBC Mont. Staff, *Attorneys Question Montana’s Compliance with Brady List*, NBC MONT. (May 19, 2021), <https://nbcmontana.com/news/working-for-you/attorneys-question-montanas-compliance-with-brady-list> [<https://perma.cc/XBP2-22CZ>]; see generally Elizabeth Weill-Greenberg, *These Cops Lied in Court. But Since the D.A. Isn’t Keeping a Brady List, They Could Testify Again*, APPEAL (Dec. 18, 2020), <https://theappeal.org/brockton-police-plymouth-county-brady-list> [<https://perma.cc/49V5-8RYP>] (describing a Plymouth County, Massachusetts case in which the court suppressed evidence based on its belief that police officers’ testimony about a vehicle stop was not credible).

50. See FED. R. EVID. 404(a)(3), 404(b)(2), 608; Andrew Guthrie Ferguson, *Big Data Prosecution and Brady*, 67 UCLA L. REV. 180, 230–31 (2020) (“[I]ssues of police misconduct (failure to follow regulations, constitutional violations, avoidance of disciplinary consequences) can be introduced to impeach the credibility of officers and might be relevant to particular cases.”).

3. Internal Personnel Files of Officers

Law enforcement personnel files documenting misconduct complaints or investigations against officers can be a source of impeachment evidence.⁵¹ In one of the earlier cases addressing this issue, New Hampshire's Supreme Court handled an appeal from a murder conviction where the prosecutor's office failed to disclose personnel files of a police officer responsible for the investigation.⁵² The files contained notes indicating that the officer had amassed many complaints, had a history of aggressive behavior, had been suspended multiple times, and had been described by his coworkers as an untrustworthy "liar."⁵³ The court held that the prosecution's failure to disclose this evidence violated *Brady*.⁵⁴

In a Baltimore criminal case, personnel files of two officers involved in an investigation showed that the internal affairs unit had found both officers committed theft by overtime fraud.⁵⁵ Maryland's highest court held this was potentially exculpatory information that defense counsel had a right to access.⁵⁶ Similarly, prosecutors in Arizona erred when they failed to disclose that the officer on whose testimony a murder case rested had a personnel record documenting that the officer's supervisors had suspended him for lying and "concluded that his credibility was compromised."⁵⁷

Although the *Brady* rule makes prosecutors responsible for disclosing misconduct records in the possession of law enforcement agents,⁵⁸ occasionally law enforcement personnel records are, by law, confidential and unavailable to prosecutors.⁵⁹ The

51. Ferguson, *supra* note 50, at 231–32.

52. State v. Laurie, 653 A.2d 549, 554 (N.H. 1995).

53. *Id.* at 552–53.

54. *Id.* at 550, 554.

55. Fields v. State, 69 A.3d 1104, 1109–11 (Md. 2013).

56. *Id.* at 1115–16.

57. Milke v. Ryan, 711 F.3d 998, 1006 (9th Cir. 2013).

58. See *supra* Part I.A.; Kyles v. Whitley, 514 U.S. 419, 437–38 (1995).

59. See Jonathan Abel, *Brady's Blind Spot: Impeachment Evidence in Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 747 (2015) (discussing complications that arise when prosecutors are required to disclose misconduct records but cannot access those records). For additional discussion of how far a prosecutor must go to search files for *Brady* evidence, see Mark D. Villaverde, Note, *Structuring the Prosecutor's Duty to Search the Intelligence Community for Brady Material*, 88 CORNELL L. REV. 1471, 1487–1511 (2003); ALEXANDER J. WILLSCHER, N.Y. CITY BAR ASS'N, EVOLVING *BRADY* OBLIGATIONS AND THE POTENTIAL IMPACT ON PROSECUTORS,

Supreme Court has never explicitly addressed how prosecutors should satisfy their disclosure obligations when state law restricts prosecutorial access to potentially exculpatory information. Its closest decision is *Pennsylvania v. Ritchie*, which dealt with prosecutor's *Brady* obligations in the context of confidential information held by a state youth services agency about an alleged sexual assault victim.⁶⁰ The plurality in *Ritchie* concluded that the alleged victim's interest in confidentiality did not "necessarily prevent[] disclosure" because the state statute permitted disclosure by court order.⁶¹ Some states have made similar adaptations to the confidentiality of law enforcement personnel records. In New Hampshire, for example, prosecutors have access to police personnel files for the limited purpose of determining whether they contain exculpatory evidence.⁶² The California Supreme Court also recently approved narrow prosecutorial access to otherwise confidential law enforcement personnel records.⁶³

Many states have recently expanded or are considering expanding access to law enforcement personnel records.⁶⁴ While

COMPANY COUNSEL, AND COUNSEL FOR INDIVIDUAL DEFENDANTS (2018), 2018 WL 6434531; *People v. Garrett*, 18 N.E.3d 722, 730–32 (N.Y. 2014) (placing limits on the extent to which exculpatory evidence known to police can be imputed to the prosecution).

60. *Pennsylvania v. Ritchie*, 480 U.S. 39, 42–43 (1987).

61. *Id.* at 57–58.

62. See N.H. REV. STAT. ANN. § 105:13-b (West 2022) ("No personnel file of a police officer who is service as a witness or prosecutor in a criminal case shall be opened for the purposes of obtaining or reviewing non-exculpatory evidence in that criminal case"); *In re* Petition of State, 893 A.2d 712, 714 (N.H. 2006) (citing N.H. REV. STAT. ANN. § 105:13-b (West 2001) with similar language to N.H. REV. STAT. ANN. § 105:13-b (West 2022)); cf. Memorandum from Peter W. Heed, Att'y Gen. of New Hampshire, to All Cnty. Att'ys & All L. Enf't Agencies, Identification and Disclosure of *Laurie* Materials 1–2 (Feb. 20, 2004), https://courts-state-nh-us.libguides.com/ld.php?content_id=58773032 [<https://perma.cc/G6MY-5RGP>] (instructing county attorneys, before the statute was amended in 2012, that they must rely on police departments to provide exculpatory evidence in police personnel files).

63. See *Ass'n for L.A. Deputy Sheriffs v. Superior Ct.*, 447 P.3d 234, 239 (Cal. 2019) (holding that law enforcement agencies can send prosecutors limited information about law enforcement misconduct records for purposes of satisfying *Brady* obligations).

64. See Rachel Moran, *Police Privacy*, 10 U.C. IRVINE L. REV. 153, 157–65 (2019) (discussing different approaches states take in determining when to disclose police misconduct records); Rachel Moran & Jessica Hodge, *Law Enforcement Perspectives on Public Access to Misconduct Records*, 42 CARDOZO L. REV. 1237, 1245–46 (2021) (discussing the relative breakdown of state policies about

prosecutorial access to law enforcement misconduct records may remain a concern in some jurisdictions, this Article accepts the rule announced in *Kyles* that prosecutors are obligated to disclose exculpatory information within the possession of the law enforcement team, and focuses on how prosecutors implement that rule.⁶⁵

4. Information from Other Government Sources

Prosecutors may obtain misconduct information from government sources external to law enforcement. In Middlesex, Massachusetts, for example, the district attorney placed twenty-seven officers from a local police department on its *Brady* list after an outside investigator concluded that the officers had falsified time sheets to receive unearned overtime pay.⁶⁶

disclosure with respect to confidentiality versus public access); CAL. PENAL CODE § 832.7 (West 2022) (effective June 30, 2022) (stating that, subject to certain exceptions, “personnel records of peace officers . . . are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery”); N.Y. CIV. RIGHTS LAW § 50-a (McKinney 2019) (repealed June 12, 2020) (“All personnel records . . . under the control of any police agency or department . . . shall be considered confidential and not subject to inspection or review with the express written consent of such police officer”); Brian Witte, *Maryland House OKs More Access to Police Misconduct Records*, AP NEWS (Apr. 6, 2021), <https://apnews.com/article/maryland-bills-police-police-reform-bc465e84eaecd6896d814cfd2c90b239> [<https://perma.cc/EZR7-J8HL>] (“The Maryland House of Delegates voted . . . to expand public access records relating to police misconduct cases”); Maxine Bernstein, *Public Access to Police Discipline Records Gets Hearing in Oregon Legislature*, OR. LIVE (Feb. 26, 2021), <https://www.oregonlive.com/politics/2021/02/public-access-to-police-discipline-records-gets-hearing-in-oregon-legislature.html> [<https://perma.cc/Z9NP-HVD7>]; Randall Chase, Associated Press, *Bill Opening up Police Internal Records Clears Committee*, US NEWS (June 16, 2021), <https://www.usnews.com/news/best-states/delaware/articles/2021-06-16/bill-opening-up-police-internal-records-clears-committee> [<https://perma.cc/2ZXG-G8DA>]. Two other media outlets have attempted to summarize police misconduct record laws in all fifty states. See Robert Lewis, Noah Veltman & Xander Landen, *Is Police Misconduct a Secret In Your State?*, WNYC NEWS (Oct. 15, 2015), <https://project.wnyc.org/disciplinary-records> [<https://perma.cc/3YCA-V8QA>]; Kallie Cox & William Freivogel, *Police Misconduct Records Secret, Difficult to Access*, ASSOCIATED PRESS (Jan. 24, 2022), <https://pulitzercenter.org/stories/police-misconduct-records-secret-difficult-access> [<https://perma.cc/N3XT-HRFX>].

65. *Kyles v. Whitley*, 514 U.S. 419, 437–38 (1995).

66. Letter from Jack D. Buckley, Chief of Police, Medford Police Department, to Mayor Breanna Lungo-Koehn (July 2, 2020), https://www.medfordma.org/wp-content/uploads/2020/11/MPD-Moving-Forward-Response_.pdf [<https://perma.cc/79S9-ZDNB>]; Letter from Breanna Lungo-Koehn, Mayor, City of Medford, Massachusetts, Update: Moving Forward in Light of “Brady” List (Nov. 6,

5. Publicly Available Information

Publicly available information, ranging from documents filed in civil lawsuits to law enforcement social media posts, can also be a source of *Brady* information.⁶⁷ Prosecutors in Seattle began maintaining a *Brady* list in 2006 after defense attorneys surprised them in court multiple times with misconduct records defense counsel had obtained through their own public records requests.⁶⁸

Recent investigations by journalists and watchdog groups have revealed many law enforcement officers involved in racist behavior, including posting racist, violent, or otherwise biased content on social media platforms.⁶⁹ In St. Louis, Circuit Attorney Kim Gardner added twenty-two police officers to her *Brady* list after the watchdog group Plain View Project found racist Facebook posts the officers had made.⁷⁰ That information—suggesting, for example, that an officer is biased against a specific

2020), <http://www.medfordma.org/2020/11/06/update-moving-forward-in-light-of-brady-list> [<https://perma.cc/7YBX-AFQD>].

67. *Tracking Police Misconduct*, *supra* note 8, at 4. As noted in Part I.A., the Supreme Court has not resolved the question of whether prosecutors have a due process responsibility to disclose exculpatory evidence that is otherwise readily available to the defense. Even if publicly available information does not fall under *Brady*, however, state ethics rules still require prosecutors to disclose exculpatory evidence “known to” the prosecutor. See MODEL RULES OF PROFESSIONAL CONDUCT r. 3.8(d) (AM. BAR ASS’N 2004) (stating that prosecutors must “make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense . . .”).

68. Mike Carter, *Prosecutors Keep List of Problem Officers*, SEATTLE TIMES (June 24, 2007), <https://www.seattletimes.com/seattle-news/prosecutors-keep-list-of-problem-officers> [<https://perma.cc/KP5C-E49U>].

69. See, e.g., Vaidya Gullapalli, *Spotlight: In a Study of Cops’ Facebook Accounts, 1 in 5 Had Posted Racist, Violent Content*, APPEAL (June 3, 2019), <https://theappeal.org/spotlight-in-a-study-of-cops-facebook-accounts-1-in-5-had-posted-racist-violent-content> [<https://perma.cc/5W4F-SVM3>]; see also Wendy Halloran, *The Funhouse: Mesa Police Department*, 12 NEWS (Sept. 18, 2008), <https://vimeo.com/292222124> (discussing the media investigation revealing then-Mesa, Arizona police chief George Gascón’s effort to cover up photos and evidence documenting racially and ethnically biased behavior by officers in his department, including an officer posing as a Nazi storm trooper).

70. *Prosecutor Adds 22 St. Louis Officers to “Exclusion List” over Racist Facebook Posts*, CBS NEWS (June 19, 2019), <https://www.cbsnews.com/news/prosecutor-adds-22-st-louis-officers-to-exclusion-list-over-racist-facebook-posts> [<https://perma.cc/E47E-Q39A>]; Henry Gass, *When DA Doesn’t Consider an Officer Reliable, Should Public Know?*, CHRISTIAN SCI. MONITOR (Sep. 3, 2019), <https://www.csmonitor.com/USA/Justice/2019/0903/When-DA-doesn-t-consider>

racial or religious group—could serve as exculpatory evidence in a case where the defendant is a member of the group against whom the officer is biased.⁷¹

While potential *Brady* material can come from a wide variety of sources, prosecutors have not created—nor have courts or legislatures imposed—consistent policies or practices for tracking and disclosing this information. The following section explores the lack of law regulating *Brady* lists and the resulting enormous variety in prosecutorial practices for obtaining, tracking, and disclosing impeachment information about law enforcement officers.

II. *BRADY* LISTS IN PRACTICE

Nearly sixty years after the Supreme Court decided *Brady v. Maryland*, tremendously little law governs the creation, maintenance, and use of *Brady* lists.⁷² This Part begins by describing the absence of law regulating *Brady* lists, the eventual development of *Brady* lists in some offices, and reasons for that development. Part II then segues into a discussion of the widely varied and unregulated nature of *Brady* lists.

A. ABSENCE OF LAW REGULATING *BRADY* LISTS

Although prosecutors' *Brady* obligations apply regardless of whether their witnesses are ordinary civilians or law enforcement agents, obtaining and disclosing exculpatory evidence about law enforcement witnesses involves unique hurdles for at least three reasons. First, because many prosecutors work with large numbers of law enforcement officers across multiple law

-an-officer-reliable-should-public-know [https://perma.cc/E47E-Q39A]; see also Letter from the Exec. Comm. of the Florida Council of Churches to State Att'y Brad King (July 24, 2019), https://www.aclufl.org/sites/default/files/nocall_signonletter.pdf [https://perma.cc/7D8P-G9CN] (releasing an open letter from coalition of Florida faith and community leaders urging local prosecutor to create *Brady* list after Plain View Project published troubling social media posts of officers in that jurisdiction); Elizabeth Weill-Greenberg, *When Cops Lie, Should Prosecutors Rely upon Their Testimony at Trial?*, APPEAL (July 29, 2019), <https://theappeal.org/advocates-demand-da-do-not-call-lists-dishonest-biased-police> [https://perma.cc/6JWH-NB6S] (describing similar letters community leaders in other cities sent to local prosecutors).

71. For a deeper discussion of *Brady* evidence as it pertains to social media posts, see Jonathan Abel, *Cop-“Like” (“👍”): The First Amendment, Criminal Procedure, and the Regulation of Police Social Media Speech*, 74 STAN. L. REV. 1199 (2022).

72. See generally *Brady v. Maryland*, 373 U.S. 83 (1963).

enforcement agencies, tracking all potential impeachment about each officer can be a logistical challenge. Second, some exculpatory evidence—for example, a personnel record showing that an officer has been disciplined for filing a false police report—is likely in the law enforcement agency’s possession rather than the prosecutor’s office, and law enforcement officers may be reluctant to share damning information about themselves or their fellow officers. Third, as discussed in Part I.B.3. above, some information contained in police personnel records is confidential by law, and thus difficult for prosecutors to access.⁷³

Despite these disclosure obstacles, the Supreme Court has never clarified how prosecutors should learn of and record exculpatory information about law enforcement witnesses. The *Kyles* Court noted in passing that prosecutors are responsible for developing “procedures and regulations” to ensure compliance with their *Brady* obligations, but did not describe what those procedures and regulations should entail.⁷⁴ Neither have federal courts established consistent guidelines regarding how prosecutors should obtain and record information about law enforcement witnesses.⁷⁵ While all fifty states and federal courts have rules governing disclosure of exculpatory evidence generally, they are almost entirely silent about how to gather and record exculpatory information about law enforcement witnesses.⁷⁶

1. Federal Law

No federal cases or statutes directly address the use or regulation of *Brady* lists, and federal courts have not reached con-

73. See *supra* Part I.B.3.

74. *Kyles v. Whitley*, 514 U.S. 419, 438 (1995).

75. See Lis Wiehl, *Keeping Files on the File Keepers: When Prosecutors Are Forced to Turn Over the Personnel Files of Federal Agents to Defense Lawyers*, 72 WASH. L. REV. 73, 90 (1997) (discussing lack of consistent guidelines from federal courts regarding prosecutors’ obligations to review police personnel files, and describing the question of who is responsible for reviewing federal agents’ personnel files as one that has “plagued prosecutors and agents alike”).

76. See Loral L. Hooper, Jennifer E. Marsh & Brian Yeh, *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*, FED. JUD. CTR. (Oct. 2004), http://www.uscourts.gov/sites/default/files/bradymat_1.pdf [<https://perma.cc/A96V-G6KM>] (studying federal and all fifty state courts’ varied rules for disclosing exculpatory evidence and containing little mention of *Brady* lists or processes for disclosing information about law enforcement witnesses).

sensus about how prosecutors should carry out their *Brady* obligations as they apply to law enforcement officers. When it comes to reviewing personnel files for potential impeachment evidence, some federal courts say prosecutors or their agents must personally review personnel files if the defense so requests.⁷⁷ Other courts say prosecutors satisfy their *Brady* obligations by directing law enforcement agencies to inspect personnel files for exculpatory evidence, but prosecutors remain responsible for disclosing the appropriate files.⁷⁸ Others still have held that a prosecutor's failure to review personnel files for exculpatory evidence is presumptively harmless error unless the defense can show that the unreviewed files contained exculpatory information.⁷⁹ Some courts simply acknowledge the lack of legal authority on this issue.⁸⁰

Questions of whether and how prosecutors should be held accountable for undisclosed exculpatory evidence within law enforcement's possession also remain largely unanswered. The Fourth Circuit Court of Appeals has declined to impute to prosecutors knowledge of all alleged misconduct by individual law enforcement officers.⁸¹ The court reasoned that a rule imputing

77. Compare *United States v. Henthorn*, 931 F.2d 29, 31 (9th Cir. 1991) (finding error in the government's failure to review law enforcement personnel files, and remanding to the district court for an in camera review of the files), with *United States v. Jennings*, 960 F.2d 1488, 1491–92, 1492 n.3 (9th Cir. 1992), and *United States v. Herring*, 83 F.3d 1120, 1122 (9th Cir. 1996) (deciding that a court cannot mandate that a prosecutor personally review all personnel files, and a prosecutor can delegate that responsibility to the law enforcement agency in possession of the files, but the prosecutor remains ultimately responsible for production of the appropriate files).

78. *United States v. Dent*, 149 F.3d 180, 191 (3d Cir. 1998); see also Response to the Defendant's Omnibus Pretrial Motions at 3, *United States v. Ramos*, No. 12-CR-103-S (W.D.N.Y. May 31, 2013), 2013 WL 12094368 at *3 (asserting that federal prosecutors in Buffalo, New York comply with *Brady* by searching the personnel files of testifying federal agents and disclosing information to defense counsel or the court where appropriate).

79. *United States v. Driscoll*, 970 F.2d 1472, 1482 (6th Cir. 1992), *abrogated on other grounds*, *Hampton v. United States*, 191 F.3d 695 (6th Cir. 1999); *United States v. Andrus*, 775 F.2d 825, 843 (7th Cir. 1985) (finding no reversible error in the government's failure to review law enforcement personnel files, where the defense could not show that the files contained exculpatory information).

80. E.g., *United States v. Leonard*, 817 F. Supp. 286, 302 (E.D.N.Y. 1992) (“[T]here is no binding authority in this circuit requiring the government . . . to undertake a particular method of determining the existence of *Brady* material . . .”).

81. *United States v. Robinson*, 627 F.3d 941, 951–52 (4th Cir. 2010).

knowledge of law enforcement misconduct to prosecutors would “impose unacceptable burdens on prosecutors and the police,” because it “would require prosecutors to do full interviews and background checks on everyone who touched the case.”⁸²

One unpublished civil case from a federal district court in Washington addressed whether a prosecutor can share information about law enforcement officers’ misconduct with prosecutors in other agencies.⁸³ The court began by noting that the neither the complaining officer nor the court, in its own research, had identified “any law . . . prohibiting a prosecutor from transmitting a *Brady* determination to another jurisdiction.”⁸⁴ The court concluded that prohibitions on prosecutors sharing exculpatory information with each other are “antithetical to a prosecutor’s duty of disclosure mandated by *Brady v. Maryland*.”⁸⁵ Another federal court has reasoned that the decision of whether to place an officer on a *Brady* list is one for which a prosecutor is entitled to absolute immunity.⁸⁶ These courts have not, however, addressed whether prosecutors must keep *Brady* lists and what information those lists should contain.

2. State Statutes

In 2021 Colorado became the first state in the country to pass a law that appears to mandate *Brady* lists.⁸⁷ The new statute requires all district attorney’s offices to publish their policies for receiving *Brady* disclosures from law enforcement agencies, maintaining records of those disclosures, providing notice to defense counsel of credibility disclosures regarding law enforcement witnesses, and removing officers from *Brady* lists when appropriate.⁸⁸ The statute also created a statewide “peace officer

82. *Id.*

83. *Lackey v. Lewis County*, No. C09–5145RJB, 2009 WL 3294848, at *1 (W.D. Wash. Oct. 9, 2009).

84. *Id.* at *11.

85. *Id.*

86. *Pendell v. Spokane County*, No. 2:19-CV-00426-SAB, 2020 WL 3270150 at *1, *3 (E.D. Wash. June 17, 2020).

87. See COLO. REV. STAT. § 16-2.5-502 (2022) (effective Sept. 7, 2021). I use the phrase “appears to mandate” because, while the statute requires all prosecutor offices to publish their policies for receiving and recording *Brady* information about law enforcement officers, it may not prevent a prosecutor’s office from responding that they have no formal policies.

88. *Id.* at subdiv. 3; see also *The Denver District Attorney’s Brady Committee and Credibility Disclosure Notifications Procedures*, DENVER DIST. ATT’Y (Jan. 1, 2022), <https://www.denverda.org/wp-content/uploads/2022/01/012122-Brady>

credibility disclosure notification committee” tasked with developing a statewide model for *Brady* disclosures pertaining to law enforcement witnesses.⁸⁹ The model must include policies for law enforcement agencies to notify prosecutors when felony charges have been filed against an officer, or when the agencies have sustained findings against officers for dishonesty involving material facts, bias against any protected class, tampering with evidence, or crimes or policy violations involving dishonesty.⁹⁰ The model must also contain policies for district attorneys to remove officers from *Brady* lists “if appropriate and lawful.”⁹¹

While Colorado is the only state to legislatively mandate *Brady* lists, a few others have passed laws aimed at protecting law enforcement officers from *Brady* list misuse. In 2021, Arizona legislators—including a former law enforcement officer who himself is on a *Brady* list—passed a law requiring prosecutors to notify police officers at least ten days before placing the officers on a *Brady* list, and to provide officers an opportunity to object to or appeal their placement on the list.⁹² The law also requires prosecutor offices to specify what criteria they use for placing officers on *Brady* lists, and prohibits law enforcement agencies from considering *Brady* lists in hiring or firing decisions.⁹³ Police unions supported the bill, while several prosecutor offices lamented that it would infringe on their ability to timely disclose exculpatory evidence.⁹⁴ A staff attorney for the American Civil Liberties Union of Arizona criticized the bill as gutting

-Policy-January-2022-Final.pdf [https://perma.cc/9AGM-XMFU] (announcing the Denver District Attorney’s Office’s new *Brady* list policies in compliance with Colorado statute).

89. COLO. REV. STAT. § 16-2.5-502, subdiv. 2 (2022).

90. *Id.* at subdiv. 2(c)(I).

91. *Id.* at subdiv. 2(c)(IV).

92. H.B. 2295, 55th Leg., 1st Reg. Sess. (Ariz. 2021); *see also* Jerod MacDonald-Evoy, *Bill to Let Dishonest Cops Appeal Placement on Brady List Advances*, ARIZ. MIRROR (Mar. 18, 2021), <https://www.azmirror.com/blog/bill-to-let-dishonest-cops-appeal-placement-on-brady-list-advances> [https://perma.cc/YLG9-AZ4B].

93. H.B. 2295, 55th Leg., 1st Reg. Sess. (Ariz. 2021), subdiv. (E)(1), subdiv. (H); ARIZ. REV. STAT. ANN. § 38-1117 (2021) (effective Sept. 24, 2022); Piper Hansen, *New Requirements for Public on Police Review Boards, Changes to Brady List Headed to Gov. Ducey*, ARIZ. REPUBLIC (May 3, 2021), <https://www.azcentral.com/story/news/politics/arizona/2021/05/03/bills-on-training-for-police-oversight-boards-brady-list-changes-head-gov-ducey/4930135001> [https://perma.cc/A327-7AUQ].

94. MacDonald-Evoy, *supra* note 92 (“[T]he legislative liaison for the Maricopa County Attorney’s Office[] said that the 10-day mandatory notice that a

the state's already-poor efforts at holding police accountable for misconduct.⁹⁵

California also has a statute prohibiting punitive action against an officer solely because of their placement on a *Brady* list.⁹⁶ The statute defines *Brady* lists as “any system, index, list, or other record containing the names of peace officers whose personnel files are likely to contain evidence of dishonesty or bias, which is maintained by a prosecutorial agency or office in accordance with the holding in *Brady v. Maryland*.”⁹⁷ The statute does not require prosecutors to maintain *Brady* lists.⁹⁸

In 2014 Maryland legislators passed a law stating that prosecutor offices “may” maintain *Brady* lists “solely for the purpose of satisfying the disclosure requirement” in criminal cases.⁹⁹ The statute, like California's and Arizona's, prevented law enforcement agencies from taking adverse action against their officers based solely on the officers' inclusion on a *Brady* list.¹⁰⁰ Maryland repealed this law in 2021 as part of a larger repeal of the state's Law Enforcement Officer Bill of Rights.¹⁰¹ After Maryland's repeal, only three states have statutes addressing *Brady* lists, and two of those three focus on protecting officers from adverse employment actions as a result of their presence on such lists. State caselaw is almost equally sparse.

3. State Caselaw

No state courts have ever mandated *Brady* lists, and few have spoken more than tangentially on the topic. The decisions that do address *Brady* lists largely mention them in the context of addressing state-specific public records laws. In *Association for Los Angeles Deputy Sheriffs v. Superior Court of Los Angeles*

prosecuting agency would have to send could create issues in due process for defendants, as it would prohibit their office from sending Brady List information out until that 10-day period is over.”).

95. Josh Kelety, *Activists Say Bills Signed by Ducey ‘Gut’ Police Accountability in Arizona*, PHX. NEW TIMES (May 13, 2021), <https://www.phoenixnewtimes.com/news/activists-say-police-oversight-bills-signed-by-ducey-gut-accountability-in-arizona-11553987> [<https://perma.cc/U74D-N4SW>].

96. CAL. GOV'T CODE § 3305.5(a) (West 2022).

97. *Id.* at subdiv. (e).

98. *Id.*; see also *Ass'n for L.A. Deputy Sheriffs v. Superior Ct.*, 447 P.3d 234, 250 (Cal. 2019) (noting that not all California law enforcement agencies maintain *Brady* lists).

99. 2014 Md. Laws 1473, 1474 (repealed 2021).

100. *Id.*

101. 2021 Md. Laws ch. 59 (effective July 1, 2022).

County (ALADS), the California Supreme Court was asked to address the tension between prosecutors' *Brady* obligations and a state statute prohibiting prosecutors from accessing certain law enforcement personnel records that may contain exculpatory evidence.¹⁰² The Los Angeles sheriff's union had sued to prevent the sheriff's department from disclosing the names of officers on the sheriff's *Brady* list to prosecutors in criminal cases.¹⁰³ The court began by noting that *Brady* lists arose as an attempt to track law enforcement officers with potential misconduct that might qualify as exculpatory evidence.¹⁰⁴ The court then held that the contents of the *Brady* list were largely confidential by state statute, but that statute did not prevent the sheriff's department from alerting prosecutors about law enforcement officers on its *Brady* list.¹⁰⁵ The court also ruled that, to the extent the *Brady* list contained law enforcement records that state law did not deem confidential, those records could be disclosed to anyone.¹⁰⁶

In 2020, New Hampshire's Supreme Court addressed a media coalition's efforts to obtain the New Hampshire Department of Justice's equivalent of a *Brady* list, which the DOJ refers to as an "Exculpatory Evidence Schedule."¹⁰⁷ Journalists sued for an unredacted version of the list.¹⁰⁸ The Supreme Court concluded that the list was not a personnel file under state law but remanded for further litigation on whether public disclosure would be appropriate.¹⁰⁹

Shortly after Minneapolis police murdered George Floyd in May 2020, New Jersey's Attorney General ordered all law enforcement agencies in the state to release the names of officers who had committed misconduct resulting in "major discipline," as well as a summary of the misconduct and the discipline imposed.¹¹⁰ Law enforcement officers sued to prevent release of this

102. 447 P.3d 234 (Cal. 2019).

103. *Id.* at 239.

104. *Id.* (quoting *People v. Superior Ct. (Johnson)*, 377 P.3d 847, 862 (Cal. 2015)).

105. *Id.* at 244, 248–49 (citing CAL. PENAL CODE § 832.7 (West 2022)).

106. *Id.* at 244–45.

107. N.H. Ctr. for Pub. Int. Journalism v. N.H. Dep't of Just., 247 A.3d 383, 386 (N.H. 2020).

108. *Id.* at 651–52.

109. *Id.* at 656–60.

110. *Attorney General Law Enforcement Directive No. 2020-5*, N.J. ATT'Y GEN. (June 15, 2020), <https://www.nj.gov/oag/dcj/agguide/directives/ag>

information, and the New Jersey Supreme Court held that state law did not prohibit release of the information.¹¹¹ While the court did not explicitly address *Brady* lists, amici argued that publishing *Brady* lists “promote[s] discovery of prior police misconduct in criminal cases.”¹¹²

Very few courts have weighed in on the propriety or usefulness of *Brady* lists. The California Supreme Court in *ALADS* briefly referred to the practice of maintaining *Brady* lists as “laudabl[e].”¹¹³ The Supreme Judicial Court of Massachusetts issued an order in September 2020 urging district attorneys to establish clearer procedures for tracking and disclosing impeachment information of law enforcement witnesses, including potentially maintaining *Brady* lists.¹¹⁴ An appellate court in Oregon could find “no evident procedural requirements” prosecutors must follow in adding or removing law enforcement officers from *Brady* lists.¹¹⁵

Jonathan Abel has noted that the lack of legal guidance on *Brady* disclosures both federally and at the state level has created “dramatic variations” in *Brady* disclosure practices with respect to law enforcement agents.¹¹⁶ Part II.B. explores these variations.

B. HISTORICAL DEVELOPMENT OF *BRADY* LISTS

Without law expressly mandating *Brady* lists, these lists have developed sporadically, inconsistently, and often at the behest of prosecutors responding to credibility crises within local law enforcement. At the federal level, the first hint of protocols

-Directive-2020-5_Major-Discipline.pdf [https://perma.cc/63GZ-YAFP] (requiring public disclosure of the identities of police officers who commit serious disciplinary violations); *Attorney General Administrative Executive Directive No. 2020-6*, N.J. ATT’Y GEN. (June 19, 2020), https://www.nj.gov/oag/dcj/agguide/directives/ag-Directive-2020-6_LPS-Disclosure-of-Major-Discipline.pdf [https://perma.cc/V4KL-RBTZ] (requiring public disclosure of the identities of police officers who committed serious disciplinary violations since 2000).

111. *In re* Att’y Gen. L. Enf’t Directive Nos. 2020-5 and 2020-6, 252 A.3d 135, 141 (N.J. 2021).

112. *Id.* at 482.

113. *Ass’n for L.A. Deputy Sheriffs v. Superior Ct.*, 447 P.3d 234, 239 (Cal. 2019) (alteration in original) (quoting *People v. Superior Ct. (Johnson)*, 377 P.3d 847, 862 (Cal. 2015)).

114. *In re* Grand Jury Investigation, 152 N.E.3d 65, 83 (Mass. 2020).

115. *Lane v. Marion Cnty. Dist. Att’y’s Off.*, 486 P.3d 38, 45–46 (Or. App. Ct. 2021).

116. Abel, *supra* note 59, at 761–62.

that would eventually resemble a *Brady* list appeared in 1991, when then-Assistant Attorney General Robert Mueller sent a memorandum to U.S. Attorneys in response to a Ninth Circuit decision called *United States v. Henthorn*.¹¹⁷ The *Henthorn* court held that prosecutors have a duty to examine law enforcement personnel files for potential exculpatory evidence if the defense so requests.¹¹⁸ Defense counsel in the Ninth Circuit suddenly began making requests for exculpatory evidence in law enforcement personnel files, and in response the Department of Justice advised federal prosecutors to work with law enforcement to fulfill their *Brady* obligations.¹¹⁹

In the years following *Henthorn* some U.S. Attorney's offices developed protocols for reviewing personnel files in individual cases, but these protocols did not require maintenance of an ongoing *Brady* list.¹²⁰ Then, in 1995, the Supreme Court decided *Kyles v. Whitley*, making clear that prosecutors are responsible for disclosing information known to law enforcement agents as well as prosecutors.¹²¹ One year later, then-Attorney General Janet Reno issued a new memo placing the responsibility for informing federal prosecutors of potential impeachment material primarily on law enforcement agents themselves.¹²² While the

117. *United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991); Wiehl, *supra* note 75, at 106 (citing U.S. DEPT OF JUST., MEMORANDUM FROM ROBERT S. MUELLER, III, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE, TO ALL U.S. ATTORNEYS WITHIN THE NINTH CIRCUIT (1991)).

118. *Henthorn*, 931 F.2d at 30–31; *see also* Wiehl, *supra* note 75, at 85–89 (discussing *Henthorn* and the immediate aftermath).

119. Wiehl, *supra* note 75, at 88–89, 106.

120. *Id.* at 106–10 (describing various procedures different federal agencies implemented for reviewing personnel files); Brief for the United States at 5–8, 23–24, *United States v. Herring*, 83 F.3d 1120 (9th Cir. 1996) (No. 95-10521) (describing the process the U.S. Attorney's Office uses to gather *Brady* evidence from law enforcement agencies, which involves relying on law enforcement agencies to review their own personnel files and report any potentially exculpatory information to U.S. Attorney's Office).

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

122. *See* Off. of the Att'y Gen., *Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses ("Giglio Policy")*, U.S. DEPT OF JUST. Para. 1 (Dec. 9, 1996), <https://www.justice.gov/archives/ag/policy-regarding-disclosure-prosecutors-potential-impeachment-information-concerning-law> [https://perma.cc/Q5U7-2B4K] ("It is expected that a prosecutor generally will be able to obtain all potential impeachment information directly from potential agency witnesses and/or affiants.").

memo did not use the term “*Brady* list” or explicitly dictate that federal prosecutors employ such lists, it did say prosecutors could retain impeachment material about law enforcement witnesses “in a system of records” that includes names of the federal agents whose misconduct was at issue.¹²³

In 2010, then-Deputy Attorney General David Ogden issued a memorandum to DOJ prosecutors providing additional guidance for discovery disclosures in criminal cases.¹²⁴ This memo reminded prosecutors of their affirmative duty to seek out exculpatory evidence from members of the investigative team, and encouraged prosecutors to have “candid conversations” with law enforcement agents about potential impeachment issues.¹²⁵ The memo did not mention *Brady* lists, but simply reminded prosecutors to “be familiar with circuit and district court precedent and local practice regarding obtaining [impeachment] information from state and local law enforcement officers.”¹²⁶

The DOJ still does not require federal prosecutors to maintain *Brady* lists. As of 2020, the DOJ’s manual for criminal cases instructed prosecutors to “seek all exculpatory and impeachment information from all the members of the prosecution team,” and again encouraged prosecutors to have “a candid conversation with each potential investigative agency witness.”¹²⁷ The manual also tells prosecutors to submit requests for potential impeachment information to the agency with which any law enforcement witness is associated.¹²⁸ The manual says that prosecutor offices “may,” but need not, maintain a “*Giglio* system of records.”¹²⁹ This records system may include a list of potential impeachment information against law enforcement agents, as

123. *Id.* at para. 9; see also *Justice Manual, 9-5.000 – Issues Related to Discovery, Trial, and Other Proceedings*, U.S. DEPT OF JUST. § 9-5.100 (2020) [hereinafter *Justice Manual*], <https://www.justice.gov/jm/jm-9-5000-issues-related-trials-and-other-court-proceedings> [<https://perma.cc/7UE8-GZD9>] (describing revisions to the *Giglio* Policy in 2006 and again in 2014).

124. David W. Ogden, *Memorandum for Department Prosecutors: Guidance for Prosecutors Regarding Criminal Discovery*, U.S. DEPT OF JUST. (Jan. 4, 2010), <https://www.justice.gov/archives/dag/memorandum-department-prosecutors> [<https://perma.cc/RH3C-LEJT>].

125. *Id.* at Parts A, B.6.

126. *Id.* at Part B.6.

127. *Justice Manual*, *supra* note 123, at §§ 9-5.001, 9-5.100.

128. *Id.* at § 9-5.100.

129. *Id.*; see also *Giglio v. United States*, 405 U.S. 150, 154 (1972) (holding evidence that impeaches the credibility of a witness falls under *Brady*).

well as written analysis or communications regarding that information and any related pleadings or court orders.¹³⁰

Because *Brady* lists are not public record in many states, there is no way to say definitively when the first *Brady* list was created. Law enforcement agencies in New Hampshire began developing some of the earliest known *Brady* lists in the mid-late 1990s, after the New Hampshire Supreme Court reversed a murder conviction based on the prosecution's failure to disclose impeachment evidence about the chief police investigator.¹³¹ In 2004 New Hampshire's Attorney General ordered local county attorneys to begin compiling comprehensive *Brady* lists,¹³² and in 2017 the Attorney General created New Hampshire's first statewide list.¹³³

In 2002 the Los Angeles County District Attorney's Office created California's first *Brady* list, again motivated by a disclosure crisis: in this case, the 1999 Rampart Scandal in which Los Angeles courts overturned more than 100 criminal convictions based on the District Attorney's failure to disclose impeachment evidence about law enforcement witnesses.¹³⁴ The office had

130. *Justice Manual*, *supra* note 123.

131. *N.H. Ctr. for Pub. Int. Journalism v. N.H. Dep't of Just.*, 247 A.3d 383, 388–89 (N.H. 2020); *State v. Laurie*, 653 A.2d 549, 554 (N.H. 1995); *see also* Jason Moon, *Inside New Hampshire's Secret List of Troubled Cops*, N.H. PUB. RADIO (Oct. 23, 2020), <https://www.nhpr.org/post/inside-new-hampshires-secret-list-troubled-cops> [<https://perma.cc/4BMZ-EC22>] (describing development of “Laurie Lists” in New Hampshire). At least one journalist has reported that an Arizona county attorney's office also created a *Brady* list as early as “the late 1990s.” Dave Biscobing, *Database Shows Every Arizona Law Enforcement Official Tracked for ‘Integrity’ Concerns*, ABC 15 (Aug. 6, 2020), <https://www.abc15.com/news/local-news/investigations/database-shows-every-arizona-law-enforcement-official-tracked-for-integrity-concerns> [<https://perma.cc/CD8V-HDB7>].

132. *N.H. Ctr. for Pub. Int. Journalism*, 247 A.3d at 388–89; Memorandum from Peter W. Heed, *supra* note 62.

133. *N.H. Ctr. for Pub. Int. Journalism*, 247 A.3d at 389; *see also* Jordan Cuddemi, *N.H. Attorney General Adds 89 Names to Laurie List*, VALLEY NEWS (Dec. 6, 2018), <https://www.vnews.com/More-Names-Added-to-Laurie-List-21986704> [<https://perma.cc/9JNC-E94C>] (reporting that the list included more than 250 officers by the end of 2018).

134. Van Derbeken, *supra* note 14 (explaining that the Rampart scandal involved Los Angeles police officers “framing innocent people, stealing drugs, beating and shooting suspects, and other crimes”); *see also* Gary C. Williams, *Incubating Monsters?: Prosecutorial Responsibility for the Rampart Scandal*, 34 LOY. L.A. L. REV. 829 (2001) (discussing the Rampart scandal and prosecutorial responsibility); *Harper v. City of Los Angeles*, 533 F.3d 1010, 1015 (9th Cir. 2008) (discussing the Rampart scandal and resulting overturned convictions).

failed to disclose the information because it had no system for tracking officer misconduct.¹³⁵ A Los Angeles Bar Association task force recommended in 2003 that all state prosecutor offices create *Brady* lists, but the recommendation was met with widespread reluctance from prosecutors who did not want to damage their relationship with police.¹³⁶ As of 2010, the Los Angeles County District Attorney's Office had a "*Brady* Compliance Unit" that served as a "central repository of known *Brady* information" and advised trial attorneys on their *Brady* disclosure responsibilities in individual cases.¹³⁷ The Los Angeles Sheriff's Department also began maintaining its own *Brady* list in 2010.¹³⁸

Other California counties were slow to follow Los Angeles's lead. A new Santa Clara County District Attorney inherited an incomplete, disorganized *Brady* list in 2006 and spent approximately one year updating it;¹³⁹ that office continues to maintain a *Brady* list today.¹⁴⁰ In 2008, another California statewide commission recommended that all state prosecutor officers maintain

135. Van Derbeken, *supra* note 14 ("It turned out the district attorney didn't know either, because his office wasn't tracking the problem officers.").

136. *Id.* ("Elected prosecutors were loath to cross police associations that they relied on for campaign support and cash.").

137. *Brady Compliance Unit Operations Manual*, L.A. CNTY. DIST. ATT'Y'S OFF. (2010) [hereinafter *L.A. Brady Compliance Manual*], https://da.lacounty.gov/sites/default/files/policies/Brady_Compliance_Unit_Operations_Manual.pdf [<https://perma.cc/2QEV-WHXF>].

138. Maya Lau, Ben Poston & Corina Knoll, *Inside a Secret 2014 List of Hundreds of L.A. Deputies with Histories of Misconduct*, L.A. TIMES (Dec. 8, 2017), <https://www.latimes.com/local/la-me-sheriff-brady-list-20171208-htmstory.html> [<https://perma.cc/R8F2-2AYV>].

139. Van Derbeken, *supra* note 14.

140. Adam F. Hutton, *Santa Clara County DA Applauds High Court Ruling Giving Prosecutors Access to Police Misconduct Records*, SAN JOSE SPOTLIGHT (Sept. 5, 2019), <https://sanjosespotlight.com/santa-clara-county-da-applauds-high-court-ruling-giving-prosecutors-access-to-police-misconduct-records> [<https://perma.cc/PY58-UF8B>] (discussing a California Supreme Court case that imposed a duty on law enforcement agencies to comply with the Santa Clara County District Attorney's *Brady* procedures). The San Diego District Attorney's office also created a *Brady* list sometime before 2010. See Jeff McDonald, *DA Keeps Secret List of Bad Cops*, SAN DIEGO UNION TRIB. (July 26, 2014), <http://www.sandiegouniontribune.com/news/watchdog/sdut-da-secret-brady-list-bad-cops-2014jul26-htmstory.html> [<https://perma.cc/F9D7-9W6Y>] (explaining that a 2010 federal lawsuit referenced *Brady* materials).

Brady lists, and prosecutors again rejected the recommendation.¹⁴¹

The King County Attorney's Office, which encompasses Seattle, became the first county attorney's office in Washington to create a *Brady* list in 2007.¹⁴² The chief prosecutor said he created the list out of concerns for access to justice and a desire to avoid disclosure failures that could result in reversal of convictions.¹⁴³ According to a local news article at the time, Seattle prosecutors often found out about misconduct shortly before trial when a defense attorney surprised them by obtaining records; the article quoted one prosecutor as saying that local police had "never" independently disclosed misconduct to the prosecutors.¹⁴⁴

The Baltimore City State's Attorney's Office created an early iteration of a *Brady* list in 2008, "banning 15 current or former officers from testifying."¹⁴⁵ By 2019, State's Attorney Marilyn Mosby had added more than 530 Baltimore police officers to the list.¹⁴⁶

Brady lists became slightly more common as the twenty-first century rolled on. The San Francisco District Attorney's Office created its first policy "track[ing] officers whose credibility could be challenged" in 2010, after George Gascón was appointed chief of the San Francisco Police Department and realized the San Francisco District Attorney's Office had no policy for tracking or disclosing evidence of police misconduct.¹⁴⁷ Vice President Kamala Harris was the District Attorney at the time and acknowledged that her office "did not have a formal, written policy" for tracking officers with histories of misconduct.¹⁴⁸ Harris

141. Van Derbeken, *supra* note 14 ("[P]rosecutors bristled. 'We ran into this again and again and again,' [the commission's executive director Gerald] Uelmen said. 'This resistance to having an outside agency looking over our shoulder. They said, 'You can trust us, we know what the law is. Don't tell us how to run our shop.'").

142. Reimund, *supra* note 6, at 2; *see also* Carter, *supra* note 68 (reporting on the development of King County's *Brady* list).

143. Reimund, *supra* note 6, at 5.

144. Carter, *supra* note 68.

145. Melissa Harris, *Jessamy Pushes on Lying by Police*, BALT. SUN (July 11, 2008), <https://www.baltimoresun.com/news/bs-xpm-2008-07-11-0807100285-story.html> [<https://perma.cc/7MPJ-RXTK>].

146. Reilly & Nichols, *supra* note 8.

147. Van Derbeken, *supra* note 14.

148. *Id.*

agreed to create a plan for her office to start its first *Brady* list and said she would limit disclosures to defense counsel only.¹⁴⁹

Between 2010 and 2020, prosecutors in cities both large and small—including New York City, Jacksonville, the District of Columbia, and Minneapolis—also developed *Brady* lists.¹⁵⁰ Some prosecutors created their lists as a result of statewide working groups studying *Brady* compliance issues.¹⁵¹ Some learned about

149. *Id.*

150. See Joseph & WNYC Staff, *supra* note 17; George Joseph, *Exclusive: Brooklyn DA Releases Secret Lists of Cops They Don't Trust*, GOTHAMIST (Nov. 6, 2019), <https://gothamist.com/news/exclusive-brooklyn-da-releases-secret-lists-cops-they-dont-trust> [<https://perma.cc/SYS5-8XRH>] (dating development of first *Brady* list in Brooklyn District Attorney's office to approximately 2014); Joseph, *supra* note 16 (noting that by 2019, all five N.Y.C. District Attorneys' offices had *Brady* lists); *DA Adverse Credibility Lists*, CCRB COMPLAINT DATABASE, <https://www.scribd.com/document/433767233/List-of-NYPD-Officers-With-Alleged-Credibility-Issues> [<https://perma.cc/R6CA-57UZ>] (on file with N.Y.C. Civilian Complaint Review Board) (providing an example of a N.Y.C. *Brady* list); Ben Conarck, *State Attorney's Office Keeping Tabs on Problematic Cops in Jacksonville, Across First Coast*, FLA. TIMES-UNION (July 13, 2017), <https://www.jacksonville.com/news/public-safety/florida/2017-07-13/state-attorney-s-office-keeping-tabs-problematic-cops> [<https://perma.cc/2ADW-FNYJ>] (announcing that the Jacksonville State's Attorney's Office had begun maintaining a *Brady* list in 2017 and had dismissed multiple criminal cases involving discredited officers as a result); Memorandum from Ronald C. Manchen, Jr., U.S. Att'y for D.C., *Allegations of Misconduct Involving Members of Law Enforcement Agencies 2* (Aug. 20, 2014), <https://propertyofthepeople.org/document-detail/?doc-id=6954450> [<https://perma.cc/Y89Y-2MEW>] (on file with Property of the People) (describing the existence of a Lewis database for flagging potentially disclosable information on Metropolitan Police officers in Washington, D.C., as of at least 2014); Memorandum of Understanding Between Hennepin Cnty. Att'y's Office, Minneapolis City Att'y's Office, & Minneapolis Police Dep't on *Brady* Protocols (Nov. 18, 2018) (on file with author), [<https://perma.cc/GFH5-E3E2>] (noting that both prosecutors' offices have established "a secure database for use in accessing identified *Brady* information"). Some smaller prosecutors' offices also announced the creation of *Brady* lists during this period. See, e.g., Gillespie, *supra* note 14 ("[I]t wasn't until 2010 that the Clark County [Washington] Prosecuting Attorney's Office formalized its own procedure for deciding which officers' testimonies could be brought into question."); Walter Wuthmann, *Few Mass. DAs Keep Police Watch Lists. Constitutional Questions Exist for Those Who Don't*, WBUR (Aug. 18, 2020), <https://www.wbur.org/news/2020/08/18/police-brady-lists-middlesex-district-attorney> [<https://perma.cc/V65T-JDDY>] ("Records requests sent by WBUR to all 11 district attorney offices in Massachusetts reveal a patchwork of *Brady* policies.").

151. See, e.g., *Policy Review: Portland Police Bureau Compliance with Brady v. Maryland*, INDEP. POLICE REV., CITY OF PORTLAND, OR. 4 (Apr. 2017) [hereinafter *Portland Police Compliance*], <https://www.portlandoregon.gov/ipr/>

the practice from prosecutors in other jurisdictions and incorporated *Brady* lists as a means of tracking information they needed to disclose to defense attorneys.¹⁵² Other lists were born out of scandal.¹⁵³

The so-called “progressive prosecutor” movement has also served as a driver of *Brady* lists in recent years. Philadelphia’s District Attorney Larry Krasner, a former public defender who ran for the chief prosecutor job on a reform platform, reported that when he took office in 2018, his staff found a folder labeled “damaged goods,” containing a list of “officers with histories of misconduct that could render them problematic as witnesses.”¹⁵⁴ He described the list as containing “a sliver of the information that [it] actually should” about officers with histories of misconduct,¹⁵⁵ and began working with staff to create a more comprehensive list.¹⁵⁶

article/637168 [https://perma.cc/C5AV-UBFN] (on file with City of Portland, Oregon) (“Recommendations from a state wide [sic] *Brady* workgroup and police policy organizations form a solid foundation for drafting a Police Bureau *Brady* policy.”); Whitney Woodworth & Hannah Kanik, ‘*Brady Lists*’ of Problem Oregon Police Inconsistent County to County, REG. GUARD (July 13, 2020), <https://www.registerguard.com/story/news/2020/07/13/brady-lists-of-problem-oregon-police-inconsistent-county-to-county/42032123> [https://perma.cc/R2NY-SLDM] (“[A] work group of police officers, prosecutors and attorneys met to establish best practices for navigating *Brady*-related issues.”).

152. See, e.g., Toohey, *supra* note 43 (“Baton Rouge’s prosecutors have begun reviewing dozens of cases involving a former police officer found untruthful in a high-profile case in which he shot at a fleeing motorist, landing Yuseff Hamedeh on a list of 30 local law enforcement officers with compromising pasts that could affect their credibility during a trial.”).

153. See, e.g., Greenson, *supra* note 45 (“Former Eureka Police Department detective Daniel Kalis is facing a felony criminal complaint The allegations against Kalis come as the Humboldt County [California] District Attorney’s Office, as well as others throughout the state and the country, is revising its policy on how to deal with credibility and honesty issues that come up around officers.”); NBC Mont. Staff, *supra* note 49 (“In Flathead County, [Montana,] Travis Ahner told us his office hasn’t had a list until a Kalispell municipal judge called out one deputy’s testimony in a misdemeanor traffic case.”); Letter from J. Lori A. Adams, Kalispell Mun. Ct. J., to Brian Heino, Flathead Cnty. Sheriff, *supra* note 49 (“The three statements contradict each other and the Court is unable to reconcile the statements. Therefore, the Court deemed Deputy Vander Ark’s testimony to not be credible in this case.”).

154. Gass, *supra* note 70.

155. Jennifer Gonnerman, *Larry Krasner’s Campaign to End Mass Incarceration*, NEW YORKER (Oct. 22, 2018), <https://www.newyorker.com/magazine/2018/10/29/larry-krasners-campaign-to-end-mass-incarceration> [https://perma.cc/4Y8A-Z8YL].

156. *Id.*

Other self-styled progressive prosecutors have followed Krasner's lead. Rachael Rollins, the first Black woman elected District Attorney of Suffolk County, Massachusetts, released her office's first *Brady* list in 2019.¹⁵⁷ Aramis Ayala, the State Attorney for the Ninth Judicial Circuit, encompassing Orange and Osceola Counties in Florida, also announced in 2019 that her office would create its first *Brady* list.¹⁵⁸ Orleans Parish's newly elected district attorney, Jason Williams, announced in late 2020 that he planned to create the Louisiana office's first *Brady* list once he took office.¹⁵⁹ And in January 2021, Prince George's County State's Attorney Aisha Braveboy announced that she was creating a *Brady* list of twenty-eight officers, more than half of whom her office would no longer to call as witnesses in criminal cases.¹⁶⁰

C. BRADY LISTS TODAY

Although it is impossible to say precisely how many prosecutors' offices use *Brady* lists today, many media outlets have tried to gather *Brady* list data on both a national and local scale. In 2019, a joint project by USA Today and partners including the

157. Walter Wuthmann & Ally Jarmaning, *Suffolk DA Releases List of 136 Police Officers with Possible Credibility Issues*, WBUR (Sept. 27, 2020), <https://www.wbur.org/news/2020/09/25/rollins-suffolk-da-police-credibility-brady> [<https://perma.cc/G6YH-92WS>]; see also Suffolk Cnty. LEAD Database, *Law Enforcement Automatic Discovery List*, SUFFOLK CNTY. DIST. ATT'Y'S OFF (Sept. 25, 2020), https://docs.google.com/spreadsheets/d/1FzZNmbWDfH_qjvQpACU3oS5PeEfHXW0uhTkNpHV3T1g/edit#gid=1556619442 [<https://perma.cc/7ZXQ-LVVH>].

158. See Adrienne Cutway, *Ayala Announces New Level of Scrutiny for Recurring State Witnesses*, CLICKORLANDO: NEWS 6 (July 25, 2019), <https://www.clickorlando.com/news/2019/07/25/ayala-announces-new-level-of-scrutiny-for-recurring-state-witnesses> [<https://perma.cc/3GWK-68M8>]; Sheets, *supra* note 15.

159. Nicholas Chrastil, *As DA, Jason Williams Plans to Keep a List of Police Officers with Credibility Issues He Won't Take Cases From*, LENS (Dec. 18, 2020), <https://thelensnola.org/2020/12/18/as-da-jason-williams-plans-to-keep-a-list-of-police-officers-with-credibility-issues-he-wont-take-cases-from> [<https://perma.cc/U498-L72S>] ("Orleans Parish District Attorney-elect Jason Williams said he plans to create a list of police officers with credibility issues and histories of misconduct—such as racial profiling, lying during testimony, or brutality—who he won't take cases from.").

160. Wilkins, *supra* note 16.

Invisible Institute sought *Brady* list-related records from approximately 1,400 prosecutors' offices across the country.¹⁶¹ More than 1,000 prosecutors' offices failed to respond to the request for information.¹⁶² Of the 443 offices that did respond, 316 (seventy-one percent) said they did not maintain *Brady* lists.¹⁶³ This group "include[d] offices in large cities such as Chicago and Little Rock, [as well as many] smaller agencies."¹⁶⁴ Of the remaining 127 responding agencies, twenty-seven denied USA Today's request for records, forty-eight said they had no officers with histories of misconduct to report, and only fifty-two agencies—a little less than four percent of the original group USA Today sought records from—provided a *Brady* list.¹⁶⁵

Many other media outlets have tried to gather *Brady* list data on a smaller scale. In a small minority of states, *Brady* lists are quite common: a Denver Post investigation in 2020 found that all twenty-two district attorneys' offices in Colorado maintain *Brady* lists, although only nine were willing to provide their lists in response to the Post's request.¹⁶⁶ As of 2020, all but two Arizona counties provided *Brady* lists upon request.¹⁶⁷

Results are mixed in many other states. A 2020 investigation into *Brady* lists in Oregon revealed that, of Oregon's thirty-six county prosecutors' offices, nineteen had such lists and seventeen did not.¹⁶⁸ A 2020 news investigation found that at least five of the eleven district attorneys' offices in Massachusetts did not maintain *Brady* lists.¹⁶⁹ Another 2020 survey requesting

161. Reilly & Nichols, *supra* note 8. The Institute for Innovation in Prosecution also gathered *Brady* information for a 2021 report about use of *Brady* lists in prosecutor offices across the country, but did not attempt to create an exhaustive compilation. See *Tracking Police Misconduct*, *supra* note 8.

162. Reilly & Nichols, *supra* note 8.

163. *Id.*

164. *Id.* The article includes an interactive database allowing readers to search for specific responses from each of the 443 agencies surveyed. *Id.*

165. *Id.*

166. Schmelzer, *supra* note 7.

167. Biscobing, *supra* note 131 ("Every county attorney's office, except two, provided *Brady* lists to ABC15.").

168. Woodworth & Kanik, *supra* note 151; see also Whitney Woodworth, *How We Reported on the Use of Brady Lists by Oregon Prosecutors*, STATESMAN J. (July 13, 2020), <https://www.statesmanjournal.com/story/news/2020/07/13/brady-list-oregon-prosecutors-statesman-journal/5355576002> [<https://perma.cc/X9YU-MAEZ>].

169. Wuthmann, *supra* note 150.

Brady lists from all twenty-nine prosecutors' offices in Utah revealed that only eight reported having *Brady* lists, while eight said they did not, twelve said they had no officers to include on such a list, and one office declined to respond.¹⁷⁰ A local news investigation into prosecutors' offices in Western Michigan similarly found a mix of offices that did and did not maintain *Brady* lists.¹⁷¹ A 2020 investigation into Vermont prosecutors showed they take a wide variety of approaches: at least a few maintain *Brady* lists, while others provide individualized *Brady* letters to defense counsel, and others have not made any *Brady* disclosures about law enforcement in many years.¹⁷² The state has "no centralized database for *Brady*" information about law enforcement, and prosecutors do not share information with each other about law enforcement officers who may testify in multiple jurisdictions.¹⁷³

In more than a few states, *Brady* lists are still decidedly uncommon or even nonexistent. As of 2017, the Florida Times-Union reported that most Florida prosecutors did not have *Brady* lists, and "that it has long been 'standard practice' for state attorneys to operate without [one]."¹⁷⁴ A 2019 survey of all ninety-

170. Halloran, *supra* note 7.

171. See Ken Kolker, *Target 8: Documented Lies Land Cops on Career-Long List*, WOODTV: TARGET 8 (Oct. 12, 2020), <https://www.woodtv.com/news/target-8/documented-lies-land-cops-on-career-long-list> [<https://perma.cc/JHX2-L37B>]. Although outdated, the minutes from a 2007 meeting of a joint commission on law enforcement standards in Michigan, comprised of both criminal attorneys and law enforcement administrators, suggest that many commissioners believed at the time that *Giglio's* requirement to disclose impeachment evidence did not apply in Michigan, and that law enforcement had no affirmative duty to disclose exculpatory information about their officers to prosecutors. MICH. COMM'N ON L. ENF'T STANDARDS, COMMISSION MEETING MINUTES 11 (2007), https://www.michigan.gov/documents/mcoles/2_Minutes_3-14-2007_193332_7.pdf [<https://perma.cc/SG77-FFDF>] ("[A]t the last Commission meeting a question was raised as to what duties exist on the part of law enforcement agencies to provide personnel files of police officers in pending criminal cases under the *Giglio* rule The *Giglio* case in Federal practice has not been extended to the state. There is not an immediate question that police or law enforcement officials need to be concerned with at this point in time relative to an affirmative duty to turn over personnel records.").

172. Alan J. Keays, *Tarnished Badge: Dishonest Cops Are Treated Differently County to County*, VTDIGGER (Dec. 17, 2020), <https://vtdigger.org/2020/12/17/brady-letters-vary-vermont-counties> [<https://perma.cc/A44Z-LMGZ>].

173. *Id.*

174. Conarck, *supra* note 150. A more recent 2021 news story about Tampa-area Thirteenth Judicial Circuit's prosecutors' offices reported that at least one

nine county attorney offices in Iowa revealed that only nine maintained *Brady* lists, with a collective “total of at least 22 officers” on the lists across those nine counties.¹⁷⁵ A 2019 report into three prosecutors’ offices in Idaho, including the state’s largest office in Boise, revealed that none had *Brady* lists.¹⁷⁶ Similarly, a 2021 news investigation into Montana *Brady* lists concluded that no statewide list existed and many county prosecutors did not maintain their own.¹⁷⁷ Separate media investigations in 2019 and 2020 across portions of Ohio, Kentucky, and Indiana revealed that “most” prosecutors’ offices did not maintain *Brady* lists.¹⁷⁸ As late as October 2020, the District Attorney of Bernalillo County, New Mexico, became the first prosecutor in the state to announce plans for a *Brady* list.¹⁷⁹

county office maintained a *Brady* list, but many others did not. Emerald Morrow, ‘*Brady List*’: How Hillsborough County Monitors Police Considered Not Credible for Certain Testimony, WTSP: 10 TAMPA (Apr. 26, 2021), <https://www.wtsp.com/article/news/local/hillsboroughcounty/hillsborough-county-brady-list-police-testimony/67-6c15876b-d5eb-4718-9ce4-fa0f52a50be0> [<https://perma.cc/B4QF-PJUN>] (“However, not all counties in the Tampa Bay area maintain such a list.”).

175. Jason Clayworth & Luke Nozicka, *Police Credibility: Confusion About “Liars List” May Be Depriving Suspects of Fair Trials*, DES MOINES REG. (May 15, 2019), <https://www.desmoinesregister.com/story/news/investigations/2019/05/15/iowa-police-credibility-liars-depriving-suspects-of-fair-trials-investigation-corruption-report/2864105002> [<https://perma.cc/8YVE-94US>]. The report also noted that many Iowa prosecutors’ offices demonstrated a “rudimentary” understanding about their obligations to uncover or disclose information about police officer credibility. *Id.*

176. Tommy Simmons, *2C Prosecutors Know How Many Police Officers May Have Made False Statements in the Past Year. Ada’s Don’t.*, IDAHO PRESS (July 26, 2019), https://www.idahopress.com/news/local/2c-prosecutors-know-how-many-police-officers-may-have-made-false-statements-in-the-past/article_d4a1468f-3758-5d51-a5e5-75014c2ef4b0.html [<https://perma.cc/2GED-43JH>] (“[N]either the Canyon County nor the Ada County prosecutors’ offices keeps a list of officers who have committed *Brady* violations in the past. Neither does the Boise City Prosecutor’s Office.”).

177. NBC Mont. Staff, *supra* note 49 (“Washington is working to develop a statewide list so each jurisdiction knows if the cop comes with a warning label. In Montana each county decides its own policies and who gets to see what.”).

178. Baker, *supra* note 7; see also Ed Balint, *Stark County and Area Prosecutors Don’t Keep ‘Brady List,’ ALL. REV.* (Oct. 19, 2020), <https://www.the-review.com/story/news/2020/10/19/stark-county-and-surrounding-prosecutors-dont-maintain-brady-list/3704743001> [<https://perma.cc/6JE3-E65C>].

179. See Letter from Raúl Torrez, Dist. Att’y, Bernalillo Cnty., to Manuel Gonzales III, Sheriff, Bernalillo Cnty., Implementation of *Giglio* Policy (Oct. 14, 2020), <https://www.scribd.com/document/486871468/Letters-about-the-District>

In 2020, the ACLU of Connecticut sought information about *Brady* policies and lists from all thirteen state's attorney's offices.¹⁸⁰ The state's Division of Criminal Justice confirmed that "only three prosecutorial offices in Connecticut . . . have any *Brady* policy" and no actual *Brady* lists.¹⁸¹ In 2021, a group called the North Carolina Watchdog Reporting Network sent requests to all forty-two district attorneys' offices in their state, asking for information about officers with documented credibility problems.¹⁸² Ten offices responded to say that "their office [sic] did not have any responsive records, or weren't aware of any such letters"; one said they had three such records on file since 2016; and the remaining offices declined to respond.¹⁸³

Prosecutors who do not maintain *Brady* lists offer a variety of explanations for that decision. Some are uncomfortable with the lack of clear legal guidance and fear *Brady* lists could be used against officers or the prosecutor's office itself. The Worcester County, Massachusetts, District Attorney has taken the position that *Brady* lists are "impractical" because Massachusetts law has no "procedural or substantive standards" for including officers on a *Brady* list.¹⁸⁴ The District Attorney opined that, absent

-Attorney-s-Giglio-questionnaire#download [https://perma.cc/NJD7-33TM]; Analisa Pardo, *Bernalillo County District Attorney Rolls Out New System to Hold Officers Accountable*, KRQE NEWS (Oct. 23, 2020), <https://www.krqe.com/news/politics-government/bernalillo-county-district-attorney-rolls-out-new-system-to-hold-officers-accountable> [https://perma.cc/Y8LQ-XHX9].

180. See Dan Barrett, *Connecticut Prosecutors Aren't Keeping Track of Untrustworthy Cops*, ACLU OF CONN. (Nov. 7, 2020), <https://www.acluct.org/en/news/connecticut-prosecutors-arent-keeping-track-untrustworthy-cops> [https://perma.cc/UC53-QRPK].

181. *Id.*; see also Letter from Richard J. Colangelo, Jr., Chief State's Att'y, Div. Crim. Just., to Dan Barrett, ACLU of Conn., FOIA Request Received September 3, 2020 (Sept. 25, 2020), https://www.acluct.org/sites/default/files/2020-09-25_response_letter_from_chief_states_attorney.pdf [https://perma.cc/GMK6-STMZ] (providing materials in response to the ACLU's request "related to how *Brady-Giglio* material is handled" but making no mention of *Brady* lists).

182. See Nick Ochsner, *Some Cops Are Too Untrustworthy to Testify. But Local Prosecutors Won't Reveal Who They Are*, WBTB (June 4, 2021), <https://www.wbtv.com/2021/06/03/some-cops-are-too-untrustworthy-testify-local-prosecutors-wont-reveal-who-they-are> [https://perma.cc/3AAR-LMWE].

183. *Id.*

184. *Frequently Asked Questions: Brady List*, OFF. OF WORCESTER CNTY. DIST. ATT'Y JOSEPH D. EARLY, JR. (2022), <https://worcesterda.com/prosecution/frequently-asked-questions-brady-list> [https://perma.cc/KJS2-C3BK] ("Creation of such a list implicates constitutional protection for the accused officer.

clear standards, inclusion on a *Brady* list could injure an officer's employment status or mislead people about whether the officer had committed serious misconduct without proper standards in place for determining their culpability for alleged offenses.¹⁸⁵ A prosecutor in Florida expressed uncertainty about "the threshold" for placing an officer on a *Brady* list, noting that "unless someone comes up with specific guidelines, I don't know how I'd go about putting people on that list."¹⁸⁶ A prosecutor in Butler County, Ohio, theorized that *Brady* lists could "weaponize *Brady*" by revealing information the media or others might use against listed officers.¹⁸⁷

Other prosecutors believe that they can keep track of their *Brady* disclosure obligations without a list.¹⁸⁸ The county prosecutor in Carroll County, Ohio, does not maintain a *Brady* list because the community is small enough that "most likely, if [*Brady*] issues came up, we would know about it anyway."¹⁸⁹ The Ada County, Idaho, prosecutor's office has no *Brady* list but says it is "well aware of our ethical, legal and discovery obligations pursuant to *Brady v. Maryland* and *Giglio v. U.S.*"¹⁹⁰ (When asked, Ada County could not say how many *Brady* notices it had provided to defense counsel in the last year.)¹⁹¹ The chief of the

Before creating a list that would impair an officer's employment status, a government agency must provide the officer with an opportunity to be heard and apply identifiable standards for determination.").

185. *Id.*

186. Ray McNulty, *Do We Need a Brady List Here to Track Problem Officers?*, VERO NEWS (Feb. 25, 2021), <http://veronews.com/2021/02/25/do-we-need-a-brady-list-here-to-track-problem-officers> [<https://perma.cc/P86Z-MDHP>].

187. Baker, *supra* note 7 (internal quotation marks omitted).

188. See Balint, *supra* note 178 ("Prosecutors . . . say the [*Brady*] list . . . is not necessary locally because they would disclose such evidence favorable to defense attorneys anyway.").

189. *Id.* (internal quotation marks omitted).

190. Simmons, *supra* note 176 (internal quotation marks omitted).

191. *Id.* ("After researching this, we have determined that the only way to calculate the information you are requesting is for an employee to spend hours reviewing and hand counting actual files or attempting to compile the same information from an electronic review,' reads a letter sent Thursday to the Idaho Press from the Ada County Prosecutor's Office."). By contrast, the prosecutor in Clallam County, Washington, does not have a list but was able to provide examples of law enforcement records it disclosed pursuant to *Brady*. See Letter from Sarah Sawyer, Legal Assistant to Kristina Nelson-Gross, Civ. Deputy Prosecuting Att'y, Clallam Cnty. Prosecuting Att'y, Public Records Act Request 14-117 (Dec. 10, 2014), <http://bradycops.org/states/washington/bradylists/clallam2014.pdf> [<https://perma.cc/4A4Q-VS24>].

Talladega County, Alabama, prosecutor's office says that he does not have a "so-called *Brady* list" because "I do not need one to follow the law."¹⁹²

Some prosecutors' justifications for lack of *Brady* lists reveal potentially serious systemic flaws in how their offices disclose exculpatory information. A prosecutor in Montgomery County, Iowa, responded to a request for a *Brady* list by saying that, in his thirty-two years in the office, no one had ever asked him to disclose exculpatory information about a police officer.¹⁹³ The prosecutor in Portage County, Ohio responded that law enforcement agencies in the area were not required to provide *Brady* evidence to prosecutors, so the process for prosecutors to obtain exculpatory evidence from law enforcement was "kind of an honor system."¹⁹⁴ In Bullitt County, Kentucky, a chief who fired a police officer for lying under oath about a sexual relationship with a teenager told a local news station that the county had no *Brady* list but "[t]here probably should be one."¹⁹⁵

Given the lack of laws or consistent prosecutorial practices for *Brady* lists, some defense attorneys or civilian organizations have attempted to create their own lists of law enforcement officers with histories of misconduct. The Legal Aid Society of New York maintains a database tracking federal civil rights lawsuits against New York City police officers, and in 2022 debuted the Law Enforcement Lookup project, which allows people to access individual disciplinary information about certain officers.¹⁹⁶ A company called The Level Playing Field Solution has a website that serves as a for-profit searchable database for officers on

192. Reilly & Nichols, *supra* note 8 (internal quotation marks omitted).

193. Clayworth & Nozicka, *supra* note 175.

194. Balint, *supra* note 178.

195. *Some Call for Brady List in Bullitt County After Officer Lied Under Oath*, WDRB (Nov. 2, 2018), https://www.wdrb.com/news/some-call-for-brady-list-in-bullitt-county-after-officer-lied-under-oath/article_c0b2305d-7e25-5df6-af92-9fbbf16fc6ec.html [<https://perma.cc/4XXR-GLLG>].

196. See *NYC Federal Civil Rights Lawsuit Data, 2015 to June 2018*, CAP-STAT, <https://www.capstat.nyc> [<https://perma.cc/577K-C282>] (recording instances of police misconduct in New York City from 2015 to June 2018); *The Cop Accountability Project*, THE LEGAL AID SOC'Y, <https://legalaidnyc.org/programs-projects-units/the-cop-accountability-project> [<https://perma.cc/PY56-VM52>] (discussing the Cop Accountability Project database); Law Enforcement Lookup, Legal Aid NYC, <https://legalaidnyc.org/law-enforcement-look-up> [<https://perma.cc/79ZS-DL3K>] (providing links to information about New York Police Department officers with histories of misconduct).

Brady lists across the country.¹⁹⁷ The Citizens Police Data Project tracks misconduct complaints against Chicago police officers.¹⁹⁸ A few other databases provide geographically limited, outdated, and often incomplete information.¹⁹⁹

1. Mechanics of How Officers Get on *Brady* Lists

In offices that do maintain *Brady* lists, the process for placing officers on a *Brady* list usually involves creating a screening committee within the prosecutor's office to review potential *Brady* evidence, relying on law enforcement to notify them of *Brady* information regarding law enforcement, or some combination of the two. In Clark County, Washington, for example, prosecutors can place officers on a *Brady* list through one of two avenues: either (1) a local law enforcement agency notifies the prosecutor's office when the internal affairs process sustains a claim involving dishonesty, or (2) if information concerning *Brady* issues comes directly to the prosecuting attorney or questions of credibility arise during proceedings, a *Brady* committee decides whether the information warrants adding an officer to the list.²⁰⁰

Several large prosecutor offices have created *Brady* committees responsible for reviewing law enforcement misconduct information and determining which officers belong on a *Brady* list. The Los Angeles County District Attorney relies on a "*Brady* compliance unit" to review potential exculpatory material and

197. See *BRADY LIST*, <https://www.giglio-bradylist.com> [<https://perma.cc/GF4B-CASX>] (collecting information related to *Brady* lists nationwide). Although the site bills itself as a "public-facing database of information about police misconduct," it markets itself primarily toward law enforcement agencies and requires a subscription plan to access. *Id.*; see *Pricing, BRADY LIST*, <https://giglio-bradylist.com/pricing> [<https://perma.cc/UY34-RQXF>] (listing subscription prices for user accounts targeted towards law enforcement, prosecutors, and officer training departments).

198. See *CHICAGO 1988–2018, CITIZENS POLICE DATA PROJECT*, <https://cpdp.co> [<https://perma.cc/C5UA-PEWC>] (tracking police misconduct in Chicago).

199. See, e.g., *BradyCops.Org: A Nation-Wide Data Base of Questionable Police Officers, BRADY COPS*, <http://bradycops.org> [<https://perma.cc/66VX-U87P>] (attempting to track *Brady* officers and presence of *Brady* lists across all fifty states, but is very incomplete); *Requests: Brady List, MUCKROCK*, https://www.muckrock.com/foi/list/?q=%22Brady+List%22&status=done&has_embargo=&has_crowdfund=&minimum_pages=&date_range_min=&daerange_max=&file_types=&search_title= [<https://perma.cc/4RDZ-XXKG>] (containing a spreadsheet with *Brady* lists for only a limited number of jurisdictions).

200. Gillespie, *supra* note 14.

decide whether the alleged misconduct was proven by clear and convincing evidence, the standard Los Angeles prosecutors require for including an officer on their *Brady* list.²⁰¹ The U.S. Attorney for the District of Columbia has a *Brady* committee that meets monthly to assess new evidence about law enforcement officers, as does the San Diego County District Attorney's Office.²⁰² The Sacramento County District Attorney's Office has a committee of "longtime prosecutors" who determine which officers to include on the *Brady* list.²⁰³ The Brooklyn District Attorney's Office also has a committee responsible for flagging officers with credibility problems.²⁰⁴

Many prosecutors do not proactively search for or record *Brady* information about law enforcement, and instead rely on law enforcement agencies to share misconduct information about their own officers.²⁰⁵ When law enforcement agencies do

201. *L.A. Brady Compliance Manual*, *supra* note 137, at 2–3. Until at least 2019, the Los Angeles Sheriff's Department did not share its list with the District Attorney's Office, and the District Attorney's Office had no policies in place to receive notices about potential *Brady* material from any local law enforcement agency. See Declaration of Jason Lustig at 3, *Ass'n for L.A. Deputy Sheriffs v. Superior Ct.*, 447 P.3d 234 (Cal. 2019) (No. S243855). That practice may have changed since the California Supreme Court's 2019 decision in *Ass'n for Los Angeles Deputy Sheriffs v. Superior Court of Los Angeles County*.

202. Channing D. Phillips, *Memorandum: Allegations of Misconduct Involving Members of Law Enforcement Agencies*, U.S. DIST. ATT'Y'S OFF. 3 (May 25, 2016), <https://propertyofthepeople.org/document-detail/?doc-id=6954450> [https://perma.cc/7YT2-8B6X]; Pauline Repard, *The Secret List That Police Officers Don't Want You to See*, SAN DIEGO UNION-TRIB. (Aug. 23, 2017), <https://www.sandiegouniontribune.com/news/public-safety/sd-me-brady-notebook-20170823-story.html> [https://perma.cc/ED6R-ML8G].

203. Gutierrez & Minugh, *supra* note 7.

204. Joseph, *Exclusive: Brooklyn DA Releases Secret List of Cops They Don't Trust*, *supra* note 150.

205. See, e.g., *Doyle v. Lee*, 272 P.3d 256, 258 (Wash. Ct. App. 2012) (describing a case in which a police department learned of an officer's previous employment history, which included a finding that the officer was dishonest, and passed this on to the local prosecutor as potential *Brady* material); Cornelius Frolik, *Officers Dispute List Meant to Keep Cops Honest*, DAYTON DAILY NEWS (Jan. 9, 2021), <https://www.daytondailynews.com/news/officers-dispute-list-meant-to-keep-cops-honest/TN65OCYXHFX5FTPO4FMHFUHOQ> [https://perma.cc/M9PS-BUAS] (describing the process by which the Dayton Police Department notifies local prosecutor's office of officers disciplined for dishonesty); Memorandum from Marc Bennett, *Brady/Giglio Policy*, Off. of the Kan. Dist. Att'y, Eighteenth Jud. Dist. 10–11 (Aug. 2014), https://media.ksn.com/nxs-ksnwtv-media-us-east-1/document_dev/2018/06/07/bradygigliopolicy-aug-2014_1528398850062_44776359_ver1.0.pdf [https://perma.cc/AXP6-HJGD] (emphasizing that the District Attorney relies on and requires law enforcement

not understand what constitutes *Brady* material or otherwise appropriately share information, this can—and regularly does—result in prosecutors violating their *Brady* obligations.²⁰⁶ In

agencies to provide its *Brady* committee with updated impeachment information about law enforcement agents); Memorandum from Peter W. Heed, *supra* note 62, at 2 (“[P]rosecutors must rely on the police officer or police department to inform them if [relevant police misconduct] material exists”); Greenson, *supra* note 45 (describing the Humboldt County District Attorney’s policy of requiring disclosure from law enforcement); Biscobing, *supra* note 131 (“The *Brady* system in Arizona relies on police departments to investigate and self-report problematic officers to county attorney’s offices.”); Baker, *supra* note 7 (quoting the Hamilton County Prosecutor’s Office spokesperson in Ohio saying they “rely on law enforcement agencies” to send them *Brady* information); Schmelzer, *supra* note 7 (quoting the Sixth Judicial District Attorney in Colorado saying he relies on law enforcement to notify him about *Brady* concerns); George Hunter, *Wayne County Prosecutor to Release List of Untruthful Cops*, DETROIT NEWS (July 15, 2020), <https://www.detroitnews.com/story/news/local/wayne-county/2020/07/15/wayne-county-prosecutors-to-release-list-of-untruthful-cops/5443444002> [<https://perma.cc/2Y68-WTCH>] (reporting on the Wayne County prosecutor in Michigan who implied that she relies entirely on police departments to submit names of officers who belong on the office’s *Brady* list, and that she “know[s] nothing about how individual departments determined someone should be on the list”); *Tracking Police Misconduct: How Prosecutors Can Fulfill Their Ethical Obligations and Hold the Police Accountable*, Appendix, INST. FOR INNOVATION IN PROSECUTION at Philadelphia District Attorney’s Office Policy 3–4 (July 2021) [hereinafter *Tracking Police Misconduct Appendix*], <https://www.prosecution.org/s/FINAL-Tracking-Police-Misconduct-Appendix.pdf> [<https://perma.cc/9UNE-T9SV>] (outlining protocols for police departments to provide *Brady* information to the District Attorney’s office).

206. See, e.g., Symposium, *New Perspectives on Brady and Other Disclosure Obligations: What Really Works?*, 31 CARDOZO L. REV. 1961, 1973 (2010) (reporting on the prosecutor working group that noted the frequency with which police fail to provide investigation-related information to prosecutors); *United States v. Cummings*, No. 3:09-cr-271, 2011 WL 1547002, at *4–5 (D. Conn. Apr. 21, 2011) (vacating conviction based on police department’s failure to provide prosecution or defense with impeachment information about a key police officer witness); Jones, *supra* note 7, at 108–09 (discussing the frequency of *Brady* violations caused by law enforcement not understanding *Brady* requirements or otherwise failing to provide *Brady* material to prosecutors); Brodie, *supra* note 7 (critiquing Arizona prosecutors’ *Brady* lists for relying on “trust and voluntary reporting” from police departments); Andrew Case, Meena Oberdick & Tayler Szabo, *Shielded From Accountability: How NYPD Officers Get Away with Lying to the CCRB*, LATINOJUSTICE 16 (Apr. 2022), https://www.latinojjustice.org/sites/default/files/ccrb_report/CCRB%20Report_v4_4-9.pdf [<https://perma.cc/AP4K-JHHU>] (concluding that the NYPD routinely “[f]ails to [r]eport [o]fficer [h]istories [a]dequately to [c]riminal [d]efendants,” and that New York “district attorneys’ *Brady* lists do not typically include officers who lied to the Civilian Complaint Review Board); see also BRANDON GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 168 (2011) (“Prosecutors

2012, the Texas District Attorney's Association released a report blaming law enforcement for a "significant" percentage of documented *Brady* violations.²⁰⁷ In 2019 a civilian oversight arm of Denver's public safety department announced that the Denver Sheriff's Department had failed to disclose a list of approximately forty to seventy deputies with histories of misconduct, and as a result those deputies may not have been included in prosecutors' *Brady* disclosures.²⁰⁸ An Iowa officer with a disciplinary history that included allegedly filing inaccurate reports and conducting an illegal search worked for at least ten years, and testified in multiple cases, before the local prosecutor's office learned of that history.²⁰⁹ Investigations in Oregon, Utah, and Ohio similarly revealed major failures in process—or complete lack of process—for disclosing law enforcement misconduct information to local prosecutors.²¹⁰

While prosecutors bear the legal responsibility to detect and disclose *Brady* information, even diligent offices struggle to do so without cooperation from law enforcement. The Salt Lake County District Attorney has admitted that his office has likely failed to disclose *Brady* material it did not know about, commenting "[w]e can only turn over the information that is turned

cannot fulfill their duty to provide the defense with evidence of innocence if police never give that evidence to the prosecutors.”).

207. *Setting the Record Straight on Prosecutorial Misconduct*, TEX. DIST. & CNTY. ATT'YS ASS'N 15 (Sept. 10, 2012), https://www.tdcaa.com/wp-content/uploads/Brady_Resources/Reports_&_Articles/Setting-the-Record-Straight.pdf [<https://perma.cc/97WN-L6YS>] (claiming that twenty-six percent of *Brady* violation cases a subcommittee studied “involved errors by law enforcement agencies or officers, not prosecutors”).

208. Crystal Bedoya, *Civilian Oversight Group Finds Denver Sheriff Deputies Not on Required ‘Brady’ List*, 9NEWS (Dec. 10, 2019), <https://www.9news.com/article/news/local/denver-sheriff-deputies-brady-disclosure-requirement/73-5806e35f-68b5-4f5b-88c2-f1acfe55be69> [<https://perma.cc/PW48-Y6A6>].

209. See Clayworth & Nozicka, *supra* note 175 (“Hamilton had worked for Johnston [Police Department] for roughly a decade and had testified in multiple cases before Polk County [Attorney’s Office] became aware of the Boone issue that Hamilton believes landed him on the [*Brady*] list . . .”).

210. See *Portland Police Compliance*, *supra* note 151 (detailing findings from an independent auditor that the Portland Police Department had no *Brady* policies, had never provided *Brady* training to its officers, and had no consistent process for disclosing *Brady* information to prosecutors); Halloran, *supra* note 7 (reporting on a Utah investigation that found some police departments failed to investigate police misconduct or disclose *Brady* information to local prosecutors); Balint, *supra* note 178 (quoting a Wayne County, Ohio prosecutor who stated that “failure of law enforcement agencies to provide [*Brady*] information to prosecutors is becoming a real problem”).

over to us, otherwise we don't know what's going on out there.”²¹¹ When newly elected Los Angeles County District Attorney George Gascon took office in early 2021, he sent a letter to all law enforcement agencies in the county, asking them to provide his office information about all officers with histories of dishonesty or other “moral turpitude” within thirty days.²¹² As of June 2021, more than forty law enforcement agencies had failed to respond to the request.²¹³

2. Types of Information *Brady* Lists Contain

Because *Brady* lists are almost completely unregulated, the information they contain varies dramatically among different offices.²¹⁴ A media investigation in Arizona found that, although Arizona is one of very few states where nearly all prosecutor offices maintain *Brady* lists, the offices have “no set standard” for what kinds of information belongs in a *Brady* list, and “[a]ll 15 counties keep their own lists in their own ways.”²¹⁵ Colorado also has no uniform policy for what misconduct qualifies for inclusion on a *Brady* list.²¹⁶ An Oregon investigation revealed “significant differences” in prosecutors’ understanding of what information belongs in a *Brady* list.²¹⁷ A 2020 report on *Brady* lists in Vermont revealed that the standard for determining when to include law enforcement misconduct in a *Brady* list or disclose to

211. Halloran, *supra* note 7.

212. Josh Cain, *Gascon Requests Names of LA County Officers Accused of Misconduct*, L.A. DAILY NEWS (Feb. 24, 2021), <https://www.dailynews.com/2021/02/24/d-a-gascon-requests-brady-list-of-officers-accused-of-misconduct-from-every-l-a-county-law-enforcement-agency> [<https://perma.cc/D5RR-B4YE>].

213. Ben Poston, *Few Police Agencies Have Given L.A. Prosecutors the Names of Dishonest Cops*, L.A. TIMES (June 20, 2021), <https://www.latimes.com/california/story/2021-06-20/few-la-police-agencies-have-given-gascon-dishonest-cop-names> [<https://perma.cc/RTY5-LX3V>].

214. See Martha Bellisle, *Tool for Police Reform Rarely Used by Local Prosecutors*, AP NEWS (Oct. 21, 2021), <https://apnews.com/article/death-of-george-floyd-police-george-floyd-seattle-police-reform-2ed7823cddc106507234f29704dc8086> [<https://perma.cc/94U9-528N>] (quoting an attorney who represents police officers describing a “huge continuum” of what gets included on *Brady* lists, resulting in different procedures from state to state and even within individual states); Clayworth & Nozicka, *supra* note 175 (noting the lack of clear standards in Iowa for what information belongs on *Brady* lists).

215. Brodie, *supra* note 7.

216. Schmelzer, *supra* note 7.

217. Woodworth & Kanik, *supra* note 151.

defense counsel “varies greatly” between counties, and that prosecutors “unevenly draw the line” in making those decisions.²¹⁸ One Vermont prosecutor, for example, implied she cares less about what misconduct the officers engaged in than whether they were truthful in admitting the misconduct, so she questioning whether to include an officer on her *Brady* list who had sexual relations with an informant because the officer was honest when confronted about the incident.²¹⁹

USA Today’s *Brady* list investigation found “wide variation in the level of documentation or investigation underlying officers’ inclusion on the list,” noting that some officers had been flagged for dishonesty, others for criminal convictions, and others for reasons the lists did not specify.²²⁰ The following are categories of misconduct that some prosecutors include in *Brady* lists.

a. Dishonesty

Dishonesty is the only type of misconduct included in nearly every *Brady* list.²²¹ But dishonesty can come in multiple forms,

218. Keays, *supra* note 172.

219. *Id.* (“He didn’t lie about it when he was confronted, so is that a [*Brady* issue]?”).

220. Reilly & Nichols, *supra* note 8.

221. For examples of such lists, see *Tracking Police Misconduct Appendix*, *supra* note 205, at Franklin County District Attorney’s Office Police, 2 (identifying “dishonesty in the line of duty” as conduct for inclusion on a *Brady* list); Joseph, *Exclusive: Brooklyn DA Releases Secret List of Cops They Don’t Trust*, *supra* note 150 (reporting on the Brooklyn District Attorney’s *Brady* list identifying police officers against whom judges or prosecutors had made adverse credibility findings, but not specifying the basis for those findings); N.H. Ctr. for Pub. Int. Journalism v. N.H. Dep’t of Just., 247 A.3d 383, 387 (N.H. 2020) (“The [New Hampshire] DOJ currently maintains a list of police officers who have engaged in misconduct reflecting negatively on their credibility or trustworthiness.”); Greenson, *supra* note 45 (listing a lack of honesty or veracity as a trait worthy of qualifying as *Brady* information); *Portland Police Compliance*, *supra* note 151, at 4–5 (discussing the Multnomah County District Attorney’s *Brady* list that consists of officers with histories of dishonesty, false testimony, or criminal convictions); Melissa Santos, *Nearly 200 Cops with Credibility Issues Still Working in Washington State*, CROSSCUT (Apr. 8, 2021), <https://crosscut.com/news/2021/04/nearly-200-cops-credibility-issues-still-working-washington-state> [<https://perma.cc/JM37-3TKX>] (citing dishonesty as the most common reason for officers appearing on a *Brady* list); Toohey, *supra* note 43 (noting that approximately one-third of officers on East Baton Rouge District Attorney’s *Brady* list are on the list for reasons related to untruthfulness); Lau, Poston, & Knoll, *supra* note 138 (finding that, in 2014, sixty-nine percent of officers on the

and the type of conduct qualifying as dishonest can still vary significantly between offices. Some offices include only dishonesty allegations sustained by an internal investigator.²²² The Brooklyn District Attorney's Office includes officers about whom judges have made adverse credibility findings.²²³ In Massachusetts, the Suffolk County District Attorney's Office's list is broader, including sustained findings as well as investigations into officers' truthfulness or integrity.²²⁴ A Kansas district attorney's office advises law enforcement agencies that potential *Brady* information includes convictions for dishonesty, reputation evidence involving credibility or honesty, specific instances of conduct that could be used to attack honesty or credibility, and prior inconsistent statements.²²⁵

b. Criminal Convictions, Charges, and Arrests

Prosecutors take inconsistent approaches to including evidence of criminal activity by police officers. Some only include convictions on *Brady* lists, and disregard charges or arrests that do not result in conviction.²²⁶ Others include pending criminal

Los Angeles Sheriff's Department's *Brady* list were on for some form of dishonesty); News 4 Tucson KVOA-TV, *N4T Investigators: The List No Cop Wants to Be On*, YOUTUBE (Apr. 25, 2019), https://www.youtube.com/watch?v=9xUMawDBG_U (interviewing the Pima County Sheriff in Arizona describing the *Brady* list as mostly comprised of officers who committed "administrative untruthfulness"); Keays, *supra* note 172 (providing original examples of *Brady* letters sent regarding law enforcement officers with histories of dishonesty); Frolik, *supra* note 205 (reporting on the Montgomery County Prosecutor's Office's *Brady* list that contains multiple officers disciplined or terminated for dishonesty).

222. See Memorandum from Peter W. Heed, *supra* note 62, at 2 (advising New Hampshire prosecutors and law enforcement agencies that *Brady* lists should include *sustained* instances of lying, falsifying records or evidence, or fraud); Reimund, *supra* note 6, at 2–3 (describing the procedure of the King County Prosecuting Attorney's Office's procedure for placing officers on the *Brady* list, which requires a finding of misconduct to be sustained).

223. Joseph, *Brooklyn DA Releases Secret List of Cops They Don't Trust*, *supra* note 150; see also Joseph, *supra* note 16 (describing Bronx District Attorney's list as including adverse credibility findings by judges or police misconduct review bodies).

224. Wuthmann & Jarmaning, *supra* note 157; see also Suffolk Cnty. LEAD Database, *supra* note 157.

225. Bennett, *supra* note 205, at 4–7.

226. See, e.g., Wayne Cnty. *Brady List*, *supra* note 43 (listing only officers with convictions rather than including those previously charged or arrested); Reimund, *supra* note 6, at 2–3 (discussing the *Brady* list in King County, Wash-

charges, or arrests that do not result in convictions.²²⁷ Some include suspicious encounters with law enforcement: the Boulder County, Colorado District Attorney's Office in Colorado placed a drug task force officer on its *Brady* list after he was stopped by federal agents while traveling with a suspected drug trafficker and carrying \$70,000 in a suitcase.²²⁸ The officer was never charged criminally, but resigned from the police department.²²⁹

Prosecutors also take disparate approaches to the types of criminal behavior they include on *Brady* lists. Some prosecutors only include convictions or charges related to dishonesty or "moral turpitude,"²³⁰ while others track officers' criminal convictions or charges unrelated to dishonesty.²³¹

ington that notes that an officer can be placed on the list for a criminal conviction, but does not give a prior arrest or charge as a reason to include an officer on the list); Seattle Times Staff, *supra* note 43 (listing officers on the King County including one convicted of trespass in a domestic violence case, but no officers who had only been previously arrested or charged).

227. See, e.g., Toohey, *supra* note 43 ("[T]he [other officers included on the *Brady* list] have been arrested or convicted of a crime."); Greenson, *supra* note 45 (noting "pending criminal charges" as criteria for inclusion on the list); Conarck, *supra* note 150 (describing the new *Brady* list policy as one requiring disclosures of recently arrested police officers); Wuthmann & Jarmanning, *supra* note 157 ("[N]ames of officers can be added after being subject to criminal charges or investigation . . ."); Letter from Raúl Torrez, Dist. Att'y, Bernalillo Cnty., to Manuel Gonzales III, Sheriff, Bernalillo Cnty., *supra* note 179, at 3 (including "[a] pending criminal charge" as criteria for inclusion); Lea Skene, *BRPD Officer Could Land on DA's 'Brady List' of Questionable Officers After Alleged Racist Rants*, ADVOCATE, (Sept. 29, 2020), https://www.theadvocate.com/baton_rouge/news/crime_police/article_72ced37a-0290-11eb-a695-2fa07dfd2c6b.html [<https://perma.cc/MJ2G-V9MK>] ("[Officers'] indiscretions range from findings of untruthfulness to arrests and convictions . . .").

228. Sam Lounsberry, *Brady-Listed Police Officer Ismael Aldana Resigns from Mead Police Department*, LONGMONT TIMES-CALL (June 25, 2018), <https://www.timescall.com/2018/06/25/brady-listed-police-officer-ismael-aldana-resigns-from-mead-police-department> [<https://perma.cc/5P83-HBHA>].

229. See *id.*

230. Greenson, *supra* note 45.

231. See, e.g., *Tracking Police Misconduct Appendix*, *supra* note 205, at Bernalillo County District Attorney's Office Policy 3 (stating the prosecutor's office policy that impeachment material could include "pending criminal charge or conviction of any crime, including misdemeanors and driving while impaired by drugs or alcohol"); *id.* at Bexar County Criminal District Attorney's Office Policy 3 (describing the prosecutor's office's policy of including all pending or final felony or misdemeanor charges, other than misdemeanor traffic charges); Joseph & WNYC Staff, *supra* note 17 (quoting a former Manhattan prosecutor who said her office's internal list included everything from video evidence of officer dis-

c. *Bias, Prejudice, and Discrimination*

Many, though not all, *Brady* lists identify officers who have engaged in bias, prejudice, or discrimination.²³² Some of these instances involve use of racial slurs, while others include evidence of religious bias.²³³ Some offices do not specify what type of bias qualifies for inclusion on a *Brady* list.²³⁴

honesty to notations that an officer had been convicted of driving while intoxicated); Seattle Times Staff, *supra* note 43 (including an officer convicted of trespass in a domestic violence case on the list); Toohey, *supra* note 43 (noting that approximately two-thirds of officers on East Baton Rouge DA's *Brady* list have been arrested or convicted of crimes); Memorandum from Ronald C. Manchen Jr., *supra* note 150, at 3 (requiring the U.S. Attorney for District of Columbia's list to include all prior criminal convictions, pending criminal charges, or arrests); *Middlesex DA's Brady List*, WBUR DIGITAL (Aug. 17, 2020), https://public.flourish.studio/visualisation/3454842/?utm_source=showcase&utm_campaign=visualisation/3454842 [<https://perma.cc/3BJS-QHZL>] (including offenses ranging from driving while intoxicated to falsifying police reports or intimidating witnesses).

232. See, e.g., Toohey, *supra* note 43 (describing a *Brady* list with no reference to bias, prejudice, or discrimination); Hutton, *supra* note 140 (stating that the *Brady* list includes incidents of misconduct related to "dishonesty, bias, excessive force and incompetence"); Wuthmann & Jarmaning, *supra* note 157 (including allegations of discrimination as a reason to be placed on the *Brady* list); Letter from Raúl Torrez, Dist. Att'y, Bernalillo Cnty., to Manuel Gonzales III, Sheriff, Bernalillo Cnty., *supra* note 179, at 2 (listing "misconduct that reflects bias" as required disclosure information); Skene, *supra* note 227 (including evidence of bias or prejudice as a reason an officer could end up on the *Brady* list).

233. See, e.g., *Mandatory Disclosure of Impeaching Evidence to Prosecutors*, HAMILTON CNTY. PROSECUTOR'S OFF. (May 22, 2019) [hereinafter *Hamilton Cnty. Mandatory Disclosure*], <https://www.documentcloud.org/documents/6466312-Latest-Brady-List-for-Hamilton-County> [<https://perma.cc/J3NM-7RGS>] (identifying racial slurs among misconduct on *Brady* list); Greenson, *supra* note 45 (including racial and religious bias as categories on *Brady* list); Carter, *supra* note 68 (including an officer who used racial slurs against a child on the *Brady* list).

234. See, e.g., Sheets, *supra* note 15 (describing "accusation against an officer of bias" as grounds for including officer on a *Brady* list, without further detail); Grace Toohey, *A Dozen New Names Added to State Attorney's List of Law Enforcement with Questionable Credibility*, ORLANDO SENTINEL (Dec. 4, 2020), <https://www.orlandosentinel.com/news/crime/os-ne-orange-osceola-state-attorney-adds-officers-brady-list-20201204-xfphwogurjh3tfarf2tocur7kq-story.html> [<https://perma.cc/T46W-TDTY>] (failing to clarify what type of bias warrants inclusion on the list).

d. *Misuse of Force or Other Constitutional Violations*

Surprisingly few *Brady* lists track constitutional violations, even though evidence that an officer has previously violated someone else's constitutional rights might be pertinent impeachment in a case where a defendant is alleging that same officer violated their constitutional rights.²³⁵ Some do, however. The Orange-Osceola County Attorney's list includes officers who have been accused of corruption or abuse of authority, including those disciplined for inappropriate use of force.²³⁶ New Hampshire's Attorney General has directed prosecutors to include sustained complaints of excessive force in their *Brady* lists.²³⁷ The only *Brady* list in New Mexico includes misuse of force and "other misconduct in investigations."²³⁸

e. *Mishandling of Evidence*

In addition to constitutional violations like excessive force, some *Brady* lists track misconduct related to misuse of or tampering with evidence. A 2021 investigation into police officers on *Brady* lists across twenty-six Washington counties revealed that, while dishonesty was the most common basis for placement on a *Brady* list, the lists also included incidents involving, among other things, improper evidence handling or other sloppy police work.²³⁹ George Gascón, the Los Angeles County District Attorney, has requested information about officers with sustained findings for "tampering with evidence" and "misappropriating property," among others.²⁴⁰

235. See Matthew Ashton, Note, *The Milke Way: Milke v. Ryan and the Vast Galaxy of Uncharted Exculpatory Evidence It Revealed*, 59 ARIZ. L. REV. 1061, 1072 (2017) ("[F]ew [prosecutor's offices] if any appear to keep records of constitutional violations where the violations do not correlate to a recorded false statement."); see also *Tracking Police Misconduct Appendix*, *supra* note 205 (providing examples of multiple *Brady* policies, few of which require prosecutors to track or disclose constitutional violations).

236. Sheets, *supra* note 15; Toohey, *supra* note 234.

237. Memorandum from Peter W. Heed, *supra* note 62, at 2.

238. Letter from Raúl Torrez, Dist. Att'y, Bernalillo Cnty., to Manuel Gonzales III, Sheriff, Bernalillo Cnty., *supra* note 179, at 3.

239. See Santos, *supra* note 221 ("Other reasons officers were placed on their county's *Brady* lists involved . . . failing to properly handle evidence . . ."); *Currently Working Officers on Brady Lists in Washington State*, CROSSCUT, <https://crosscut.com/sites/default/files/files/officers-on-brady-lists-in-wa-by-county-pdf-version.pdf> [<https://perma.cc/87YM-FK5X>] (including "improper evidence handling" as a reason for appearing on the list).

240. Poston, *supra* note 213.

f. Catchall Lists

Some *Brady* lists operate as catchalls for any manner of misconduct. An early version of the King County Prosecutor Office's list included officers who had engaged in misconduct as wide-ranging as assaulting a suspect, encouraging a gang beating, taking an intoxicated teenage suspect out for breakfast, using racial slurs against a child, threatening to kill the husband of a woman with whom the officer was having an affair, intentionally reading privileged emails between a suspect and attorney, kissing a sex worker while in uniform, being sexually involved with prostitutes during a criminal investigation, and being convicted of trespass.²⁴¹

The policies that guide what misconduct belongs on a *Brady* list are, for some agencies, as broad as the lists themselves. The United States Attorney for the District of Columbia has said that a *Brady* list should include "[a]ny information that reasonably may be used in any case to cast serious doubt upon the general credibility of the officer."²⁴² A spokesperson for the Hamilton County, Ohio prosecutor's office said their *Brady* list includes "anything that a defense attorney might be able to use to impeach an officer's testimony," including dishonesty, excessive force, racial bias, and more.²⁴³ The Phoenix Police Department's manual advises officers that *Brady* list information "may deal with issues of honesty, integrity, bias, and/or moral turpitude."²⁴⁴ Other counties also use "moral turpitude" as the deciding factor for whether misconduct belongs on a *Brady* list.²⁴⁵

241. Seattle Times Staff, *supra* note 43; Carter, *supra* note 68; *see also* Brady Worksheet, DALL. POLICE DEP'T, <https://www.documentcloud.org/documents/6208187-Brady-List-Dallas-PD.html> [<https://perma.cc/5JEL-EJBW>] (listing officers alleged to have committed misconduct involving dishonesty, drug or alcohol abuse, illegal searches or other failures to follow police procedure, criminal convictions, and sexual misconduct); Julie Shaw & Chris Palmer, *Here Are the 29 Philly Cops on the DA's 'Do Not Call' List*, PHILA. INQUIRER (Mar. 6, 2018), <https://www.inquirer.com/philly/news/crime/29-philly-officers-do-not-call-list-krasner-20180306.html> [<https://perma.cc/599X-UEZ2>] (noting that the Philadelphia District Attorney's list includes officers accused of dishonesty, assault, sexual impropriety, accepting bribes, corruption, and DUI).

242. Memorandum from Ronald C. Manchen Jr., *supra* note 150, at 4.

243. Baker, *supra* note 7; *see also* Hamilton Cnty. Mandatory Disclosure, *supra* note 233 (listing findings of officer misconduct in Hamilton County, Ohio).

244. Operations Order 2.9(8)(A), PHX. POLICE DEP'T (June 2013), https://media.kjzz.org/s3fs-public/11-14-17PhoenixPDoperations_orders.pdf [<https://perma.cc/MJJ3-PXFD>].

245. *See* Greenson, *supra* note 45 (discussing how facts establishing "crimi-

While the United States Department of Justice doesn't require its prosecutors to use *Brady* lists, it does permit them—and has an expansive definition of what constitutes “potential impeachment information.”²⁴⁶ The Department of Justice's definition of potential impeachment evidence includes: findings of misconduct that reflect lack of truthfulness, lack of candor, or possible bias; past or pending criminal charges; allegations of misconduct involving untruthfulness, bias, or lack of integrity that are the subject of pending investigations; judicial findings regarding untruthful testimony or false statements; unlawful searches, seizures, or confessions, or other similar misconduct; misconduct findings or pending allegations that cast doubt on accuracy or admissibility of evidence; findings or pending allegations of failure to follow requirements or protocols for collection, handling, or analysis of evidence; information suggesting the officer is biased against a defendant; and information casting doubt on the officer's ability to perceive or recall truth.²⁴⁷

Brady lists vary substantially, not only in the types of misconduct prosecutors include, but also in the standards of proof prosecutors require. Some prosecutors put officers on *Brady* lists only if the alleged misconduct is proven by clear and convincing evidence, while others use lower standards like “substantial information” to support the allegation.²⁴⁸ The Hennepin County Attorney's Office, which covers Minneapolis among other areas, will review an officer's personnel file for potential inclusion in its *Brady* database only if the police department imposed discipline on the officer.²⁴⁹ The Minneapolis Police Department, however, very rarely imposes discipline: between 2013 and 2019,

nal moral turpitude” belong on *Brady* list); see also Hutton, *supra* note 140 (noting that Santa Clara County Attorney's *Brady* list consists of misconducting amounting to moral turpitude, which could include “dishonesty, bias, excessive force and incompetence”).

246. *Justice Manual*, *supra* note 123, at § 9-5.100(5)(c).

247. *Id.*

248. See *Tracking Police Misconduct Appendix*, *supra* note 205, at Buncombe County 2 (using “substantial information” standard); see also *id.*, at San Francisco 6 (utilizing the “substantial information” standard). See generally Greenson, *supra* note 45 (discussing how some prosecutors use different standards).

249. See Hennepin Cnty. Att'y's Off., *Brady Procedures* para. 1 (2021) (on file with author) (declaring that the office reviews internal affairs files “with final decisions in which discipline has been imposed”); see also *Investigation into the City of Minneapolis and the Minneapolis Police Department*, MINN. DEPT OF HUM. RTS. 66 (Apr. 27, 2022) [hereinafter *Minneapolis Police Investigation*], https://mn.gov/mdhr/assets/Investigation%20into%20the%20City%20of%20Minneapolis%20and%20the%20Minneapolis%20Police%20Department_

only about two percent of complaints of misconduct by Minneapolis police officers resulted in discipline.²⁵⁰ The County Attorney's policy excludes large numbers of valid misconduct allegations, simply because the police department did not discipline the officer.²⁵¹

The Hennepin County Attorney is not the only prosecutor's office with an incomplete and inadequate *Brady* list. New Hampshire police departments are supposed to certify every year that they provided updated *Brady* information to local county attorneys; in 2019 only seventeen percent of departments provided that certification.²⁵² USA Today's investigation found "at least 1,200 officers with proven histories of lying and other serious misconduct" who were not included in relevant *Brady* lists, including 261 who were disciplined for work-related dishonesty.²⁵³

tcm1061-526417.pdf [https://perma.cc/5BUH-EW7A] ("[A]s of fall 2021, the City only treated matters of police misconduct that resulted in discipline as impeachment information that warranted disclosure to an individual accused of a crime."); Ryan Raiche, *Prosecutors Must Disclose Evidence That Could Discredit Police Officers. Hennepin County is Relying on a 'Failing' System*, KSTP NEWS (June 23, 2022), <https://kstp.com/5-investigates/prosecutors-must-disclose-evidence-that-could-discredit-police-officers-hennepin-county-is-accused-of-protecting-them> [https://perma.cc/2CXA-48PE] (discussing examples of lack of formal discipline among officers who engaged in misconduct in Hennepin County).

250. See Curt Devine, Drew Griffin, Scott Bronstein, & Collette Richards, *Minneapolis Police Are Rarely Disciplined for Complaints, Records Show*, CNN (June 12, 2020), <https://www.cnn.com/2020/06/11/us/minneapolis-police-discipline-invs/index.html> [https://perma.cc/B5P9-PJR2] ("Only about 1.5% of complaints filed against Minneapolis police have resulted in suspensions, terminations or demotions between 2013 and 2019 . . ."); see also Max Nesterak & Tony Webster, *The Bad Cops: How Minneapolis Protects Its Worst Police Officers Until It's Too Late*, MINN. REFORMER (Dec. 15, 2020), <https://minnesotareformer.com/2020/12/15/the-bad-cops-how-minneapolis-protects-its-worst-police-officers-until-its-too-late> [https://perma.cc/2SD4-H4Y7] (discussing how officers repeatedly fail to report misconduct by their colleagues as a way to protect one another).

251. See *Minneapolis Police Investigation*, *supra* note 249, at 64–65 (labeling Minneapolis and Hennepin County's policies for tracking and disclosing impeachment evidence about police officers a "systemic failure," and noting that the police often fail "to produce impeachment information appropriately" and that City and County prosecutors fail to disclose information to defense counsel because their disclosure system relies entirely on a police department that is not appropriately disciplining its officers).

252. Moon, *supra* note 131.

253. Reilly & Nichols, *supra* note 8.

3. *Brady* List Disclosure Practices

Many—perhaps most—prosecutors refuse to disclose their *Brady* lists to the public.²⁵⁴ The New Hampshire Department of Justice’s *Brady* list “functions solely as a reference point” to alert prosecutors to the possibility of exculpatory evidence in an officer’s personnel.²⁵⁵ The office will disclose a redacted version to the public that contains no identifying officer information, but will not provide the actual list.²⁵⁶ Similarly, many prosecutors in California withhold both the name and number of officers on their *Brady* lists.²⁵⁷ In 2021, the Salt Lake County District Attorney’s Office acknowledged that it has a *Brady* list, but declined to divulge the names of officers or contents of the list.²⁵⁸ The U.S. Attorney’s Office in Washington, D.C. has been embroiled in a lawsuit against a government transparency group for years over its unwillingness to disclose its *Brady* list.²⁵⁹

254. *Id.*; see Bellisle, *supra* note 214 (concluding that “many prosecutors and police unions have gone to great lengths to keep *Brady* List information from becoming public”); see also *Tracking Police Misconduct*, *supra* note 8, at 12 (“Most offices that have a police disclosure list have not made their list public.”).

255. N.H. Ctr. for Pub. Int. Journalism v. N.H. Dep’t of Just., 247 A.3d 383, 387 (N.H. 2020); see also Memorandum from Peter W. Heed, *supra* note 62, at 4 (instructing county attorneys to disclose to prosecutors as needed, and otherwise keep list confidential).

256. Moon, *supra* note 131 (discussing how the redacted versions “cover almost half of what’s on every page”).

257. Gutierrez & Minugh, *supra* note 7 (“[Assistant District Attorney in Sacramento County] declined to disclose the number of officers on the countywide list.”); Greenson, *supra* note 45 (“[Humboldt County District Attorney] declined to disclose the names on his office’s *Brady* list . . .”); McDonald, *supra* note 140 (referring to San Diego DA’s *Brady* list as a “closely guarded secret”); Repard, *supra* note 202 (discussing how neither names nor number of people on the list are public).

258. Halloran, *supra* note 7.

259. See Anna Merlan, *D.C.’s Bad Cops List Is Shrouded in Secrecy—and Could Be Impacting Criminal Cases*, VICE NEWS (June 24, 2020), <https://www.vice.com/en/article/k7qzma/dcs-bad-cops-list-is-shrouded-in-secrecyand-could-be-impacting-criminal-cases> [https://perma.cc/KC8L-FAQC] (discussing the FOIA lawsuit uncovering documents related to police misconduct); see also Mitch Ryals, *How the D.C. Police Department, DOJ, and D.C. Attorney General’s Office Shield Cops’ Bad Acts*, WASH. CITY PAPER (June 25, 2020), <https://washingtoncitypaper.com/article/304093/how-the-dc-police-department-doj-and-dc-attorney-generals-office-shield-the-bad-actions-of-cops> [https://perma.cc/A9BG-3NA4] (discussing various lawsuit surrounding *Brady* list disclosure issues).

Some prosecutors face legal restrictions in what they can disclose if their *Brady* lists contain information from police personnel files that state laws label as private data.²⁶⁰ But legal barriers do not fully explain the wide variety of prosecutorial approaches to disclosure, where prosecutors in the same states, governed by the same laws, embrace different disclose practices. The Dallas and Houston District Attorney's Offices both maintain *Brady* lists; Dallas makes its list available to the public but Houston does not.²⁶¹ When the Denver Post sought *Brady* lists from all twenty-two district attorney offices in Colorado, approximately half of the district attorneys provided copies of their lists and half did not.²⁶² Reasons for refusal vary; some of the district attorneys who declined to make their *Brady* lists public said they did not want to discourage police departments from reporting misconduct or damage officers' reputations by publicizing the misconduct information.²⁶³ A prosecutor in Gallatin County, Montana cited "confidentiality" as his reason for refusing to disclose his *Brady* list to a media outlet.²⁶⁴ Some prosecutors treat misconduct information as highly sensitive, limiting access to employees within the prosecutor's office on a "case-related, need-to-know basis."²⁶⁵

260. Moran, *Police Privacy*, *supra* note 64, at 157–65 (discussing various state laws restricting or permitting access to law enforcement personnel records); *see, e.g.*, MD. CODE ANN., PUB. SAFETY § 3-106.1(a) (West 2014) (demonstrating that Maryland authorized *Brady* lists only for disclosure in criminal cases); *see also* Wilkins, *supra* note 16 (investigating that, in April 2021, Prince George's County Attorney told media she was not allowed to publicly release her *Brady* list because personnel records are protected in Maryland). *But see* MD. CODE ANN., PUB. SAFETY § 3-106.1(a) (West 2022) (showing that Maryland repealed § 3-106.1(a) in 2021, effective in July 2022).

261. *Dallas Police Department Brady List*, BRADY LIST, <https://giglio-bradylist.com/index.php/texas/dallas-police-department> [https://perma.cc/T52A-2DXL] (providing a public-facing *Brady* list from the Dallas Police Department); *Houston Police Department Brady List*, BRADY LIST, <https://giglio-bradylist.com/index.php/texas/houston-police-department> [https://perma.cc/YG5X-XFJG] (showing a *Brady* list with no names on it, implying that the list is not available to the public).

262. Schmelzer, *supra* note 7.

263. *Id.* (discussing the various reasons district attorneys would not want to make the lists public).

264. NBC Mont. Staff, *supra* note 49.

265. *Justice Manual*, *supra* note 123, at § 9-5.100.7(b); *see also Tracking Police Misconduct Appendix*, *supra* note 205, at Bexar County 5 ("General access to the database is only accessible to employees of the Bexar County Criminal District Attorney's Office."); *id.* at King County 5 (stating that employee access

Other prosecutors make their *Brady* lists publicly accessible, at times reluctantly in response to lawsuits or open records requests.²⁶⁶ In 2019, the Bronx District Attorney's Office became the first of the five New York City boroughs to make its *Brady* list publicly available, in response to a Freedom of Information Act (FOIA) request from a media outlet.²⁶⁷ The Suffolk County, Massachusetts District Attorney's Office originally declined to make its list public citing the attorney work product exemption, but disclosed the list in 2020 after the state supervisor of records ordered disclosure.²⁶⁸

Still others release their *Brady* lists proactively as a policy choice. The Middlesex, Massachusetts District Attorney's Office is one of just a few in Massachusetts with a publicly available list; although some police chiefs have criticized the head prosecutor for making the list public, she said she does so to earn public trust in the integrity of their criminal prosecutions.²⁶⁹ Wayne County, Michigan prosecutor Kym Worthy also announced in

to *Brady* list "will be monitored"); *id.* at San Francisco 15 ("*Brady* list is accessible only to attorneys using a shared computer drive on a read-only basis . . .").

266. See Verified Petition, *Stengel v. Vance*, No. 159740/2018 (N.Y. Sup. Ct. 2018), <https://drive.google.com/file/d/1vuUsuz-NaBk8pHTX8ONHB1PepnBUwDfC/view> [<https://perma.cc/B5XK-3YCT>] (arguing that the respondent must comply and disclose officer records pursuant to the FOIL request); see also George Joseph & Emma Whitford, *Lawsuit: Manhattan D.A.'s Office Tracks Cops With 'Credibility' Problems, But Refuses to Release Its List*, APPEAL (Oct. 22, 2018), <https://theappeal.org/lawsuit-manhattan-d-a-s-office-tracks-cops-with-credibility-problems-but-refuses-to-release-its-list> [<https://perma.cc/U6NN-V5NL>] (discussing how defense attorneys push for prosecutors to release the lists they keep); Mark Fazlollah, Craig McCoy, & Julie Shaw, *Under Court Order, District Attorney Krasner Releases List of Tainted Police*, PHILA. INQUIRER (Mar. 6, 2018), <https://www.inquirer.com/philly/news/larry-krasner-philadelphia-police-tainted-misconduct-secret-list-20180306.html> [<https://perma.cc/QE9J-B4EP>] (reviewing the court order that the Philadelphia District Attorney's Office had to release their list of officers who engaged and engage in misconduct).

267. Joseph, *supra* note 16 (noting, however, that the list was heavily redacted and removed most officers' names).

268. Wuthmann & Jarmaning, *supra* note 157 (describing the hope that release of the list will lead to more fairness, justice, and transparency in the criminal system).

269. WBUR DIGITAL, *supra* note 231 (showing a public-facing list); Julia Taliesin, *What It Means When Officers End Up on the 'Brady List'*, SOMERVILLE J. (Nov. 13, 2020), <https://www.wickedlocal.com/story/archive/2020/11/09/what-it-means-when-somerville-officers-end-up-on-brady-list/43061811> [<https://perma.cc/CNZ6-52WM>] ("One of the things the list really does is it allows whatever it is that's the allegation here to play itself out [in court].").

2020 that she would start releasing her office's *Brady* list to the public.²⁷⁰

III. CONTROVERSIES SURROUNDING *BRADY* LISTS

A. POLITICAL CONTROVERSIES

Brady lists are unpopular among police unions, which frequently donate to and support prosecutors in elections.²⁷¹ In Baltimore, the police union's opposition to an early iteration of a *Brady* list in 2008 was so vociferous that a new district attorney elected just two years later abolished the list.²⁷² More recently, *Brady* lists have surfaced as a hot topic in electoral campaigns, particularly among candidates campaigning as "progressive prosecutors" who make the creation, expansion, or publicization

270. See Hunter, *supra* note 205; see also George Hunter, *Worthy Releases List of 51 Untruthful Police Officers*, DETROIT NEWS (Dec. 8, 2020), <https://www.detroitnews.com/story/news/local/wayne-county/2020/12/07/wayne-county-prosecutor-releases-list-51-untruthful-police-officers/6477986002> [https://perma.cc/3B64-NLTS] (discussing the release of Wayne County's list). Other offices that make their lists available to the public include most Arizona counties and several offices in New Mexico, Ohio, and Washington, among others. See Biscobing, *supra* note 131 (discussing Arizona counties' *Brady* lists); *Tracking Police Misconduct Appendix*, *supra* note 205, at Bernallilo County, 5 (showing that Bernallilo County, New Mexico makes its *Brady* list "available for public inspection"); *Hamilton Cnty. Mandatory Disclosure*, *supra* note 233 (showing an Ohio county's public *Brady* list); *Brady/Giglio Material*, WARREN CNTY. PROSECUTOR'S OFF., (Apr. 9, 2019), <https://www.documentcloud.org/documents/6466313-Warren-Co-Brady-List> [https://perma.cc/KCF9-BRVL] (listing officers on a public 2019, Ohio county's *Brady* list); Memorandum from Richard Green, Assistant City Att'y, to Crim. Div. Att'ys at Seattle City Att'y's Off. on the Seattle City Att'y's Off. *Brady* List (Feb. 21, 2020), <https://www.muckrock.com/foi/seattle-69/brady-list-seattle-city-attorney-99748> [https://perma.cc/AHU8-JWWJ]; *Potential Impeachment Disclosure List*, SPOKANE CNTY. DIST. ATT'Y'S OFF. (July 19, 2021), https://cdn.muckrock.com/foia_files/2021/07/20/Brady_List.pdf [https://perma.cc/7B2H-DQQ3]; *Master Brady List*, HUMBOLDT CNTY. DIST. ATT'Y'S OFF. (Jan. 18, 2021), <https://www.muckrock.com/foi/eureka-3206/brady-list-humboldt-county-106911> [https://perma.cc/E9WG-VSL4].

271. Reimund, *supra* note 6, at 5.

272. See Eli Hager & Justin George, *One Way To Deal With Cops Who Lie? Blacklist Them, Some DAs Say*, MARSHALL PROJECT (Jan. 17, 2019), <https://www.themarshallproject.org/2019/01/17/one-way-to-deal-with-cops-who-lie-blacklist-them-some-das-say> [https://perma.cc/Q89U-6NXD] ("Due to the bad blood the policy created between cops and prosecutors, it was abolished in 2010 by Jessamy's elected successor.").

of *Brady* lists part of their campaign platform.²⁷³ These announcements are often met with fierce opposition from police or politicians. When Aramis Ayala, a Black woman elected as prosecutor in Orlando, Florida, announced in 2019 that her office would create its first *Brady* list, she encountered quick backlash.²⁷⁴ The local police chiefs' association representing fifteen law enforcement agencies publicly opposed the list, arguing that it would label officers as untrustworthy without due process.²⁷⁵ Seven months later Ayala had still not finalized the list, and when she decided not to run for reelection, two of the four candidates campaigning for her office stated they would eliminate the list if elected.²⁷⁶

In St. Louis, Circuit Attorney Kim Gardner—another Black woman who campaigned on a platform including stricter oversight of police—announced in 2018 a list of twenty-eight police officers who she would no longer accept cases from because of their prior misconduct.²⁷⁷ A representative for the local police union called Gardner's list “dangerous,” and then-Attorney General Josh Hawley, who was campaigning for a U.S. Senate seat, released a statement saying he was “deeply concerned that this action will result in criminals going free (and) [sic] being held unaccountable.”²⁷⁸ A few months later Gardner partially backed

273. Reilly & Nichols, *supra* note 8 (noting that arguments about maintaining or publicizing *Brady* lists have “led to political battles, especially in cities where newly elected prosecutors have made fighting police misconduct part of their platform”); David Brand, *Three Queens DA Candidates Would Release Database of Cops with Credibility Issues*, QUEENS DAILY EAGLE (Apr. 25, 2019), <https://queenseagle.com/all/queens-da-candidates-release-cop-database-cb69j> [<https://perma.cc/AK5X-VERM>] (discussing Queens DA race and multiple candidates' pledges to disclose the office's *Brady* list).

274. Sheets, *supra* note 15 (describing law enforcement officers' general dislike for *Brady* lists and how the lists have become a major talking point during elections).

275. *Id.*

276. *Id.*

277. See Byers & Currier, *supra* note 15; see also Nicholas Phillips, *Will St. Louis Circuit Attorney Kim Gardner Get Four More Years to Upend the Criminal Justice System?*, ST. LOUIS MAG. (July 5, 2020), <https://www.stlmag.com/news/circuit-attorney-kim-gardner-longform-profile-2020-primary> [<https://perma.cc/MJ3N-FWFB>] (detailing Gardner's approach to officers on the exclusion lists).

278. Byers & Currier, *supra* note 15; see also *Prosecutor Adds 22 St. Louis Officers to “Exclusion List” Over Racist Facebook Posts*, CBS NEWS (June 19, 2019), <https://www.cbsnews.com/news/prosecutor-adds-22-st-louis-officers-to-exclusion-list-over-racist-facebook-posts> [<https://perma.cc/563J-QZYG>] (discussing a police union representative criticizing Gardner's decision to add

away from her list, saying that moving forward she would refer concerns about officers to the police department's internal affairs unit for review.²⁷⁹ In response, an attorney for the police union said she was pleased Gardner was shutting down her "police officer exclusion list star chamber."²⁸⁰

B. POLICE-PROSECUTOR CONTROVERSIES

Police unions' opposition to *Brady* lists surfaces in far more than political campaigns. When the Los Angeles Sheriff's Department created a *Brady* list to track officers with histories of misconduct, the union treasurer labeled the list "a diabolical plan" that was "detrimental, career and morale killing."²⁸¹ New York City's largest police union has criticized *Brady* lists as "often flawed and inaccurate."²⁸² A union president in Washington worried that *Brady* lists unfairly stigmatize officers for past mistakes.²⁸³

Unions often take their dislike of *Brady* lists out on local prosecutors. When the Brooklyn District Attorney's Office released its *Brady* list, the president of the Sergeants Benevolent Association immediately called the office "hypocritical" because it did not have a similar list for prosecutors who had committed misconduct.²⁸⁴ The Police Benevolent Association president claimed that the district attorney had "abandoned his prosecutorial role" by siding "with the criminals, not crime victims," and complained that publicizing the *Brady* list would "destroy the careers of honest police officers and torpedo the cases against violent, gun-toting criminals. . ."²⁸⁵

Others voice their criticisms on social media. After a prosecutor in Ohio warned a sheriff about possible inclusion on a

twenty-two more officers to the list based on racist Facebook posts as "panic at the disco").

279. Robert Patrick, *St. Louis Prosecutor Announces Changes in Investigations of Police Shootings and 'Exclusion List' Officers*, ST. LOUIS POST DISPATCH (Feb. 9, 2019), https://www.stltoday.com/news/local/crime-and-courts/st-louis-prosecutor-announces-changes-in-investigations-of-police-shootings/article_22f7a7dc-d901-59f3-8b22-611ba295cbac.html [<https://perma.cc/7NFV-4B93>].

280. *Id.*

281. White, *supra* note 14, at 20.

282. Joseph & WNYC Staff, *supra* note 17.

283. Gillespie, *supra* note 14 ("[O]fficers on the Brady List are stigmatized and continually haunted by one past incident.").

284. Joseph, *Exclusive: Brooklyn DA Releases Secret Lists of Cops They Don't Trust*, *supra* note 150.

285. *Id.*

Brady list, the sheriff took to Facebook in response.²⁸⁶ The sheriff posted that the prosecutor was trying to “ruin the reputation of someone that has already took the discipline,” and warned the prosecutor to “[p]ut your seatbelt on buddy . . . no one else may stand up to you and your crooked a— connections, but I will so help me God!!!”²⁸⁷

The Philadelphia police union has gone so far as to sue District Attorney Larry Krasner, calling his *Brady* list a “witch hunt” and asking for an injunction preventing the District Attorney’s Office from adding police officers to its *Brady* list.²⁸⁸ Similarly, after New Jersey’s Attorney General ordered law enforcement agencies to release names of officers with histories of major disciplinary violations, several groups representing law enforcement officers sued the Attorney General.²⁸⁹ When the New Jersey Supreme Court ruled in favor of the Attorney General, the president of the state’s largest police union argued that the decision placed the “99.9% of good men and women serving in law enforcement . . . under attack.”²⁹⁰

Some law enforcement agencies have attempted to influence prosecutors through less combative means, negotiating with prosecutors to limit what misconduct appears on *Brady* lists and how prosecutors use their lists. When California district attorneys began embracing *Brady* lists, one sheriff’s office in Placer County worked with the local district attorney to create protocols limiting *Brady* lists to sustained complaints (rather than allegations of misconduct), and giving officers a right to appeal their

286. See Jennifer Edwards Baker, *Pike County Sheriff, Prosecutor Feud After Prosecutor Asks Sheriff to Avoid Criminal Investigations*, FOX 19 (May 13, 2019), <https://www.fox19.com/2019/05/13/pike-county-sheriff-prosecutor-trade-accusations-facebook> [<https://perma.cc/Q8EY-HMCZ>] (showing original Facebook posts and letter embedded in the article).

287. *Id.*

288. See Reilly & Nichols, *supra* note 8; see also Mensah M. Dean & Mark Fazlollah, *FOP Sues Kenney, Krasner, Ross Over Police ‘Do-Not-Call’ List*, PHILA. INQUIRER (Nov. 13, 2018), <https://www.inquirer.com/philly/news/breaking/fop-lawsuit-kenney-krasner-ross-police-do-not-call-list-philadelphia-20181113.html> [<https://perma.cc/Z3PE-PXQY>] (discussing the police union president’s quote).

289. *In re Att’y Gen. L. Enf’t Directive Nos. 2020-5 & 2020-6*, 252 A.3d 135, 141 (N.J. 2021).

290. *Id.*; see also Blake Nelson, *N.J. Cops Can No Longer Hide Serious Misconduct from Public After Supreme Court Ruling*, NJ.COM (June 7, 2021), <https://www.nj.com/news/2021/06/nj-will-identify-cops-punished-for-major-misconduct-after-supreme-court-ruling.html> [<https://perma.cc/8P56-V67A>] (discussing the police union president’s quote).

inclusion on lists and request removal by petition or after a period of years.²⁹¹ After the Los Angeles Sheriff's Department attempted to provide its own *Brady* list to the Los Angeles District Attorney, the sheriff's union temporarily convinced the district attorney to refuse to accept the sheriff's list.²⁹²

Some law enforcement administrators have voiced tentative support for *Brady* lists, but say they worry about entrusting prosecutors with too much discretion to decide which officers belong on the lists.²⁹³ Occasionally, administrators embrace the notion that *Brady* lists can improve public trust in law enforcement.²⁹⁴ When the Middlesex, Massachusetts District Attorney announced she was creating a *Brady* list, one of the local police chiefs said he looked forward to complying with the prosecutor, noting that his office was "dedicated to ensuring the highest standards" in its officers.²⁹⁵

C. CONTROVERSIES RELATED TO LACK OF LEGAL STANDARDS FOR *BRADY* LISTS

As Part II discussed, most states have no legal standards regulating prosecutors' use of *Brady* lists.²⁹⁶ This lack of standards can lead to doubts over whether prosecutors' decisions to place officers on *Brady* lists "are fair, accurate, or unbiased."²⁹⁷

Law enforcement officers have seized on this doubt. A 2019 blog post from Police1, a website marketed to law enforcement

291. Andrew Scott & Nuno Tavares, *How the Placer County DSA Negotiated a Brady Protocol*, PORAC LEGAL DEF. FUND (May 1, 2011), <http://poracldf.org/news/detail/29> [<https://perma.cc/8B82-JYZZ>].

292. White, *supra* note 14, at 20.

293. See Greenon, *supra* note 45 (quoting multiple law enforcement administrators who said they supported *Brady* lists but expressed "anxiety about a policy that leaves a tremendous amount of power and discretion in the district attorney's hands").

294. See Taliesin, *supra* note 269 (describing how district attorneys use *Brady* lists in prosecution to ensure fair trials).

295. *Id.*

296. See discussion *supra* Part II; see also Abel, *supra* note 59, at 761–62 (bemoaning lack of legal standards for *Brady* lists); Moon, *supra* note 131 (noting that New Hampshire police often complain about the lack of standards for inclusion on *Brady* lists, characterizing them as having "no clear rules on which cops get added and for what"); Frolik, *supra* note 205 (describing Dayton police officers expressing concern over the lack of standards for inclusion on *Brady* lists).

297. Harmon, *supra* note 6, at 228.

officers, noted police officers have alleged that prosecutors improperly placed them on *Brady* lists for conduct like publicly criticizing the district attorney, supporting a different prosecutorial candidate in an election, investigating prosecutorial corruption, and providing truthful but unhelpful testimony in criminal cases.²⁹⁸ The post encouraged police unions to “bring political pressure on elected prosecutors” and law enforcement administrators to ensure fair *Brady* policies.²⁹⁹

Numerous officers have claimed that their inclusion on *Brady* lists was the result of retaliation for whistleblowing or disagreeing with department policies.³⁰⁰ After a Phoenix, Arizona police sergeant reported his own department for falsifying statistics about kidnappings to procure federal grant money, the city attorney and former police chief investigated him for whistleblowing and ultimately fired him.³⁰¹ The sergeant eventually got his job back, but was unsuccessful in his requests to remove his name from the *Brady* list.³⁰² In Lansing, Michigan, a Black police chief says he was unfairly placed on a *Brady* list twenty years ago for an allegedly false statement he did not make.³⁰³ He believes the allegation was “related to . . . racial issues” because he had been vocal about the hostile environment within the department.³⁰⁴ An Oregon police officer sued the city of Cornelius after city attorneys placed him on a *Brady* list.³⁰⁵ City attorneys claimed they recommended the officer be added to the *Brady* list after a judge found that he had lied about at least two matters

298. Van Brocklin, *supra* note 7.

299. *Id.*

300. See, e.g., Dave Biscobing, *How Police Can Use Brady Lists to Discredit Whistleblowers*, ABC15 (Nov. 19, 2020), <https://www.abc15.com/news/local-news/investigations/how-police-can-use-brady-lists-to-discredit-whistleblowers> [<https://perma.cc/9QWR-THGF>] (recounting the story of a sergeant who was added to a *Brady* list for reporting departmental fraud); Hunter, *supra* note 205 (recounting a situation in which a former police chief was added to a *Brady* list based on different interpretations of procedural standards within the department).

301. Biscobing, *supra* note 300.

302. *Id.*

303. Hunter, *supra* note 205.

304. *Id.*

305. Rebecca Woolington, *Cornelius Officer Files Tort Against City, Claims Officials Recommended His Placement on List Questioning Credibility*, OREGONIAN (Aug. 20, 2013), http://www.oregonlive.com/forest-grove/index.ssf/2013/08/cornelius_officer_files_tort_a.html [<https://perma.cc/4ZJN-D8DJ>].

relating to a police investigation.³⁰⁶ The officer, in contrast, alleged that his placement on the *Brady* list was retaliation for a whistleblower letter he had sent about misconduct in the police department.³⁰⁷

Officers have also objected to prosecutors including unproven misconduct on *Brady* lists. After a Los Angeles County task force recommended that California prosecutors maintain *Brady* lists, police unions objected on grounds that such lists could unfairly damage officers' careers based on misconduct allegations that were never sustained.³⁰⁸ Similarly, a controversy arose in Washington after a Ninth Circuit Court of Appeals decision held that pending allegations of dishonesty, rather than sustained allegations, could be used to impeach law enforcement witnesses.³⁰⁹

Law enforcement officers have found many other grounds for objecting to *Brady* lists. Police unions in Arizona have criticized the lack of opportunity for officers to appeal their inclusion on *Brady* lists, calling the lists a "scarlet letter" reserved for officers who lack political connections.³¹⁰ Vermont officers have also complained that prosecutors work too closely with the police to objectively decide which officers belong on *Brady* lists.³¹¹ Police officers in St. Louis claimed they were put on a *Brady* list after invoking their Fifth Amendment right against self-incrimination.³¹² A police union in Chester County, Pennsylvania sued the local district attorney when he included an officer on a *Brady* list, and the officer's attorney characterized the list as "arbitrary and capricious."³¹³

306. *Id.*

307. *Id.*; see also Woodworth & Kanik, *supra* note 151 (describing several lawsuits by Oregon police officers alleging retaliatory inclusion on *Brady* lists).

308. Van Derbeken, *supra* note 14; see also Lau et al., *supra* note 138 (describing police union opposition to the publication of *Brady* lists).

309. Olsen v. United States, 704 F.3d 1172, 1180–82 (9th Cir. 2013); see also Gillespie, *supra* note 14 (discussing effects of case and concerns among law enforcement officials about the potential impact on their profession).

310. Biscobing, *supra* note 131.

311. Keays, *supra* note 172 (describing widely varied practices for placing officers on *Brady* lists).

312. Patrick, *supra* note 279.

313. Vinny Vella, *Chester County DA Calls for Dismissal of State Police Union's Lawsuit over 'Do Not Call' List*, PHILA. INQUIRER (Oct. 25, 2018), <https://www.inquirer.com/philly/news/pennsylvania/chester-county-thomas-hogan-state-police-union-lawsuit-20181025.html> [https://perma.cc/VH5B-82JP].

D. EMPLOYMENT-RELATED CONTROVERSIES

Many law enforcement officers have voiced concerns about the impact of *Brady* lists on their employability. In 2010, a blog post on the website Officer.com warned officers, “[f]ind yourself *Brady*-listed and you may just find yourself out of police work.”³¹⁴ An International Association of Chiefs of Police training cautions that inclusion on a *Brady* list can limit job or advancement opportunities and even result in termination.³¹⁵ Police officers frequently complain that they could be terminated or assigned to “desk duty” if prosecutors are unwilling to call them as witnesses due to credibility problems.³¹⁶ Prosecutors have also expressed fear of “unfairly jeopardizing law enforcement officers’ jobs by placing them on a list based on minor or unfounded accusations.”³¹⁷

Some of these concerns have led to lawsuits. In one case, a Snohomish, Washington officer who had been fired and placed on a *Brady* list successfully sued for reinstatement on grounds that the termination and placement on a *Brady* list involved retaliation for his exercise of free speech.³¹⁸ Others involved officers who were fired for dishonesty, but alleged that placement on a *Brady* list violated due process or their right to pursue employment as officers.³¹⁹

314. Val Van Brocklin, *Brady v. MD Can Get You Fired*, OFFICER.COM (Aug. 16, 2010), <https://www.officer.com/training-careers/article/10232477/brady-v-md-can-get-you-fired> [<https://perma.cc/7S6X-EZR7>].

315. Bill Amato & Aaron Jones, *Brady/Giglio and Officer Integrity*, INT’L ASS’N OF CHIEFS OF POLICE 53, <https://www.theiacp.org/sites/default/files/Brady-Giglio.pdf> [<https://perma.cc/X52M-FV8K>].

316. *E.g.*, *Miller v. City of Ithaca*, 914 F. Supp. 2d 242, 247 (N.D.N.Y. 2012) (describing a police officer who was placed on “permanent desk duty” after district attorney informed department that officer’s credibility was irreparably damaged due to “significant *Brady* and *Giglio* issues” including concerns about veracity of his reports); Harmon, *supra* note 6, at 229 (suggesting that if an officer is put on a *Brady* list, “command staff might feel pressure to move him to an administrative assignment to avoid undermining cases”); Reimund, *supra* note 6, at 3 (describing that some officers on *Brady* lists may be terminated or assigned to positions that reduce the likelihood of them being called to testify); Van Brocklin, *supra* note 7 (discussing risk that *Brady* list inclusion would result in tarnished job prospects); Gillespie, *supra* note 14 (reporting on officers’ complaints of inappropriate placement on *Brady* lists affecting their jobs).

317. Reilly & Nichols, *supra* note 8.

318. Reimund, *supra* note 6, at 4.

319. *See Lane v. Marion Cnty. Dist. Att’y’s Off.*, 486 P.3d 38, 45–46 (Or. App. Ct. 2021) (assessing a former law enforcement officer’s claim that the district attorney’s office violated his rights by categorically barring him from testifying);

Law enforcement complaints about adverse employment effects or insufficient legal standards for *Brady* lists are, with very few exceptions, the only aspect of *Brady* lists that have caught lawmakers' attention. As Part II.A details, only three states—Colorado, Arizona, and California—regulate *Brady* lists by statute.³²⁰ Arizona's and California's statutes do not require *Brady* lists; instead they prohibit law enforcement agencies from making adverse employment decisions based on an officers' presence on a *Brady* list.³²¹ Arizona's law also requires prosecutors to establish criteria for placing officers on *Brady* lists, and allows officer to appeal their placement on such lists.³²² Law enforcement officers and supporters were instrumental in passing both bills.³²³

E. DISCLOSURE-RELATED CONTROVERSIES IN CRIMINAL CASES

Brady list controversies in criminal cases tend to arise in two related ways. The first is when prosecutors fail to disclose impeachment information about law enforcement officers because they lack an effective system for tracking that information. The second, related controversy occurs when new prosecutors arrive in an office, create *Brady* lists, and disclose those lists to

Frolik, *supra* note 205 (describing a situation where a Dayton police officer fired for lying filed a lawsuit alleging that placement on *Brady* list without opportunity to contest the action violated due process); Shawn Vestal, *Dismissal of Detective Sheds Light on 'Brady Officer,'* SPOKESMAN REV. (July 23, 2011), <https://www.spokesman.com/stories/2011/jul/23/shawn-vestal-dismissal-of-detective-sheds-light> [<https://perma.cc/Q4MU-TD3L>] (describing a lawsuit commenced by a police officer who claimed that his termination from work violated his due process rights); McDonald, *supra* note 140 (describing the experience of an officer who was included on *Brady* list after lying about a firearms exercise and later sued, alleging that placing him on the *Brady* list violated his right to pursue employment as an officer).

320. See discussion *supra* Part II.A.2. Maryland has a similar law prohibiting adverse employment actions based on presence on a *Brady* list, but that statute was repealed in 2021; the repeal will go into effect in July 2022. MD CODE ANN. PUB. SAFETY § 3-106.1(b) (West 2014) (repealed July 1, 2022).

321. H.B. 2295(H), 55th Leg., 1st Reg. Sess. (Ariz. 2021); ARIZ. REV. STAT. ANN. § 38-1117 (West 2022); CAL. GOV'T CODE § 3305.5(e) (West 2022).

322. H.B. 2295(E)(1), 55th Leg., 1st Reg. Sess. (Ariz. 2021).

323. See Gutierrez & Minugh, *supra* note 7 (describing police union support for a bill that would forbid punishing officers based solely on their placement on a *Brady* list); MacDonald-Evoy, *supra* note 92 (describing police union support for a bill that would add an appeal process for officers prior to being put on a *Brady* list); Hansen, *supra* note 93 (explaining that members of the Arizona Police Association supported a bill recommending alterations to the *Brady* list process).

defense counsel or the public, only for defense counsel to realize that the lists contain impeachment information that prosecutors failed to disclose in previous cases.

Wrongful convictions stemming from prosecutors' failure to effectively track or disclose *Brady* information about law enforcement officers are unconscionably common. The Rampart Scandal of 1999 led courts to reverse more than one hundred criminal convictions based on Los Angeles prosecutors' failure to disclose impeachment evidence about police officers to defense attorneys.³²⁴ The Philadelphia District Attorney's office acknowledged in 2013 that it had "failed to properly review" or disclose to defense counsel a 2008 finding that a Philadelphia police officer had falsified at least sixty-three arrest reports.³²⁵ The officer had been involved in hundreds of arrests since that finding, and the District Attorney's Office had not disclosed any information about the previous false reports.³²⁶

In Boston, Sean Ellis was wrongly convicted of murdering a police detective and spent twenty-two years in prison before learning that the State had withheld information about criminal activity by several of the officers who investigated the murder; Suffolk County prosecutors did not have a *Brady* list at the time.³²⁷ In Iowa, a court vacated multiple convictions dependent on one officer's testimony after the county attorney's office inadvertently failed to disclose the officer's history of inappropriate sexual contact with teenagers.³²⁸ In Oregon, a new prosecutor in Wasco County dismissed at least eight cases after finding a letter in his predecessor's desk describing serious misconduct by a police officer that the former prosecutor had not disclosed to defense counsel.³²⁹

These scandals have been going on for years and persist today. A 2020 Arizona investigation uncovered hundreds or even thousands of criminal cases in which prosecutors failed to notify

324. See sources cited *supra* note 134 (discussing the Rampart scandal).

325. Mark Fazlollah, *Prolific Officer's Credibility at Issue*, PHILA. INQUIRER (Apr. 14, 2013), https://www.inquirer.com/philly/news/20130414_Prolific_officer_s_credibility_at_issue.html [<https://perma.cc/8532-WT4T>].

326. *Id.*

327. Casey, *supra* note 7.

328. Clayworth & Nozicka, *supra* note 175.

329. Staff Report, *The Dalles Police Officer Kienlen Placed on Brady List*, COLUMBIA GORGE NEWS (Mar. 3, 2021), https://www.columbiagorgenews.com/news/the-dalles-police-officer-kienlen-placed-on-brady-list/article_d135bf6c-7bb9-11eb-b224-87444509c608.html [<https://perma.cc/92ZD-BE6Y>].

defendants of *Brady* material regarding officers involved in those cases.³³⁰ One involved a Phoenix grandmother, Frances Salazar, who spent nearly two years in prison based on the testimony of an officer who the Phoenix Police Department had previously suspended for lying.³³¹ The prosecutor's office did not disclose this misconduct history to defense counsel until well after the trial.³³²

After former Minneapolis police officer Derek Chauvin murdered George Floyd, an investigation revealed that Chauvin had been accused of misconduct in at least seventeen other situations, including seven previous allegations of improper use of force.³³³ Despite these allegations, a local news investigation concluded that Chauvin had testified at least thirty-six times in other trials, with no indication that prosecutors had disclosed *Brady* evidence related to Chauvin—most likely because Hennepin County prosecutors do not include allegations of misconduct on their *Brady* list unless the police department has first disciplined the officer.³³⁴ Similarly, an Associated Press investigation in 2021 revealed that a police officer in Auburn, Washington had

330. Brodie, *supra* note 7.

331. Dave Biscobing, *Grandmother Convicted as a Phoenix Officer's Lies Are Kept Secret*, ABC15 (Nov. 19, 2020), <https://www.abc15.com/news/local-news/investigations/a-grandmother-convicted-as-a-phoenix-officers-lies-are-kept-secret> [https://perma.cc/P7CN-F76U].

332. *Id.*; see also Petition for Post-Conviction Relief at 11–16, *State v. Salazar*, No. CR 2013-462384-001 DT (Maricopa Cnty. Super. Ct. Mar. 30, 2018) (“The petitioner should have been given exculpatory evidence . . . and the jury should have been made aware of the same.”).

333. State's Notice of Intent to Offer Other Evidence at 1–2, *State v. Chauvin*, No. 27-CR-20-12646 (Hennepin Cnty. Dist. Ct. Sept. 10, 2020), https://mncourts.gov/mncourtsgov/media/High-Profile-Cases/27-CR-20-12646/27-CR-20-12646_States-Notice-of-Intent-to-Officer-Other-Evidence.pdf [https://perma.cc/DES5-ULP9]; see also Tom Lyden, *Secret Discipline: Does 'Coaching' Allow Officers to Slip Through Cracks?*, FOX 9 (May 16, 2021), <https://www.fox9.com/news/secret-discipline-does-coaching-allow-officers-to-slip-through-cracks> [https://perma.cc/J2JH-L2DE] (describing how the alternative disciplinary action of “coaching” may allow officers with potential misconduct to remain on the police force). Chauvin later pled guilty in federal court to crimes associated with choking a teenager, an offense for which Minneapolis police had previously declined to discipline him. Plea Agreement and Sentencing Stipulations at 6–8, *United States v. Chauvin*, Crim. No. 21-CR-108 (D. Minn. Dec. 15, 2021), <https://www.justice.gov/opa/press-release/file/1456711/download> [https://perma.cc/FQ63-3XZM].

334. Lyden, *supra* note 333; see also sources cited *supra* note 249 (describing Hennepin County's *Brady* list policy).

been the subject of approximately sixty investigations into improper use of force, including one in which he shot and killed a man, but the King County Prosecutor's Office did not add him to their *Brady* list until he was charged with murdering a man during a disorderly conduct arrest.³³⁵

In 2020 the ACLU of Connecticut filed a FOIA request seeking *Brady* lists from all state's attorneys in Connecticut, and pointing out that failure to disclose impeachment information about law enforcement officers had contributed to multiple wrongful convictions in Connecticut.³³⁶ The ACLU called *Brady* lists "vital public information," noting that criminal defendants, crime victims, and juries share a mutual interest in knowing whether law enforcement officers handling criminal investigations have histories of misconduct.³³⁷ The ACLU also argued that prosecutors who fail to maintain accurate *Brady* lists prioritize "sparing police embarrassment above the integrity of cases."³³⁸ Professor Jonathan Abel has similarly noted the danger of prosecutors' "special solicitude" in assuming that police officers are credible witnesses, and advocated that "[e]ach discredited officer must be treated as a systemic problem."³³⁹

The defense bar also has repeatedly sounded the alarm about prosecutors' lax *Brady* policies, and has argued that access to *Brady* lists is crucial to assessing whether prosecutors are properly disclosing *Brady* information.³⁴⁰

After Baltimore City State's Attorney Marilyn Mosby announced in 2019 that she had added hundreds of officers to her *Brady* list, defense attorneys filed motions asking the court to

335. Bellisle, *supra* note 214.

336. Dan Barrett, *Brady Lists Track Police with Credibility Issues. We're Requesting the Lists*, ACLU OF CONN. (Sept. 18, 2020), <https://www.acluct.org/en/news/brady-lists-track-police-credibility-issues-were-requesting-lists> [https://perma.cc/ZE22-2D3N].

337. *Id.*

338. *Id.*

339. Jonathan Abel, *Cop Tracing*, 107 CORNELL L. REV. 927, 993 (2022).

340. See Wilkins, *supra* note 16 (quoting Maryland ACLU and Prince George's County Public Defender's Office calling for public release of the *Brady* list maintained by the Prince George's County State's Attorney); Schmelzer, *supra* note 7 (member of Colorado Criminal Defense Bar expressing concern for expectation that defense counsel should just trust that police will disclose *Brady* information).

compel her to disclose the list.³⁴¹ In response, the State's Attorney's office argued that the list was internal work product.³⁴² Lawsuits over Baltimore City's *Brady* list were still ongoing as of late 2021.³⁴³

Public defenders in Massachusetts have also raised concerns that officers with histories of dishonesty "routinely" testify unimpeached because prosecutors do not appropriately track or disclose impeachment evidence.³⁴⁴ A public defender in Montana, when interviewed for an article about *Brady* disclosure practices, noted that he has never seen a *Brady* list, opining that "the story with *Brady* in Montana is what we don't know."³⁴⁵

Prosecutors even fail to share *Brady* information with each other. Because most *Brady* lists are not publicly available, prosecutors do not always have easy access to impeachment information other jurisdictions have collected.³⁴⁶ A television station in Arizona did an investigative report on *Brady* lists, and found that many officers on *Brady* lists in jurisdictions they had previously worked were not on *Brady* lists in jurisdictions where the officers currently worked.³⁴⁷ One police department in Superior, Arizona, hired multiple officers who had been fired from other Arizona departments for on-the-job misconduct including lying and having sex while on duty, and who went on to commit additional misconduct in their new posts.³⁴⁸ Some prosecutors' poli-

341. Justin Fenton, *Baltimore's State's Attorney Says She Has a List of 300 Officers with Credibility Issues. Public Defenders Are Demanding to See It.*, BALT. SUN (Feb. 11, 2020), <https://www.baltimoresun.com/news/crime/bs-md-ci-cr-do-not-call-list-compel-20200211-xsjzrh2we5df7etqreyxgu2e4y-story.html> [https://perma.cc/A34G-CSRK].

342. *Id.* ("[T]he assistant state's attorney, wrote to defense attorneys that they are entitled to view materials of individual officers if they are pertinent to a defendant's case. They aren't entitled to a list of all flagged officers . . .").

343. See Mike Hellgren, *See the List: Public Defender's Office Says Mosby's Release of 91 Baltimore Officers with Credibility Issues Affects 800 Open Cases*, CBS BALT. (Nov. 1, 2021), <https://www.cbsnews.com/baltimore/news/do-not-call-list-baltimore-states-attorney-office> [https://perma.cc/K9UZ-2RJ4].

344. Wuthmann, *supra* note 150.

345. NBC Mont. Staff, *supra* note 49.

346. See *supra* Part II.C.3.

347. Dave Biscobing, *Full Disclosure: Investigating Arizona's Broken "Brady List" System (part 2)*, YOUTUBE, at 4:15 (Aug. 13, 2020), <https://www.youtube.com/watch?v=iwwm122-h5A>.

348. *Id.*; see also Ben Grunwald & John Rappaport, *The Wandering Officer*, 129 YALE L.J. 1676 (2020) (describing the widespread problem of police officers

cies for tracking *Brady* information are so opaque that they cannot consult a list to see if an officer is on it. When the chief prosecutor in Hennepin County’s criminal division was asked whether his office had flagged a certain officer with a history of dishonesty in its database, the chief responded that his office did not keep a *Brady* list and could not identify how many officers with histories of misconduct were involved in their cases.³⁴⁹ Offices that do not reliably track *Brady* officers in their own cases cannot be trusted to share accurate information with other prosecutors.

IV. LESSONS LEARNED FROM *BRADY* LISTS

A. CHAOS OF *BRADY* PRACTICES AND LIMITATIONS OF *BRADY* LISTS

Fifty-nine years have passed since the Supreme Court in *Brady* held that prosecutors are constitutionally obligated to disclose exculpatory evidence to defense counsel.³⁵⁰ Twenty-eight years have passed since the same Court in *Kyles* clarified that *Brady*’s obligations extend to information about and within the possession of law enforcement officials, and that prosecutors must develop “procedures and regulations” to comply with *Brady*.³⁵¹ Yet *Brady* disclosure practices—at least with respect to exculpatory information about law enforcement officers—are still in chaos. Without consistent laws specifying how prosecutors must comply with their obligation to disclose exculpatory information about law enforcement, some have chosen to develop *Brady* lists, while others have not.³⁵² The *Brady* lists that do exist are wildly disparate.³⁵³ Some prosecutors disclose their *Brady* lists to the public for inspection; others refuse to say whether they even maintain *Brady* lists.³⁵⁴ Wrongful convictions based on prosecutors’ failure to track or disclose *Brady* information about law enforcement witnesses continue.³⁵⁵

with histories of misconduct finding work in new departments that did not properly track their previous misconduct).

349. See Raiche, *supra* note 249.

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

351. *Kyles v. Whitley*, 514 U.S. 419, 438 (1995) (quoting *Giglio v. United States*, 405 U.S. 150, 154 (1972)).

352. See *supra* Parts II.A–C.

353. See *supra* Part II.C.2.

354. See *supra* Part II.C.3.

355. See *supra* Part III.E.

While *Brady* lists are important tools for prosecutors to execute their disclosure responsibilities—and, when more broadly accessible, instruments for defense counsel and the public to hold law enforcement accountable for misconduct—they cannot serve as a stand-alone solution to widespread problems with prosecutors’ disclosure practices. Scholars and judges have critiqued the *Brady* doctrine for its failure to protect criminal defendants, and criticized prosecutors for dereliction in their duty to comply with *Brady*.³⁵⁶ Angela J. Davis has described prosecutors’ failure to disclose exculpatory evidence as “[o]ne of the most common forms of prosecutorial misconduct.”³⁵⁷ For many, expecting prosecutors to track and disclose exculpatory information about law enforcement officers is inherently absurd, since prosecutors rely on officers to prove their cases.³⁵⁸ Yet that

356. For a few of the many authors who have written about problems with the *Brady* doctrine and prosecutors’ execution of that doctrine, see Jones, *supra* note 7, at 88 (“[S]uppression of favorable information by the prosecution causes wrongful convictions and compromises the integrity of the entire criminal adjudication process.”); Laurin, *supra* note 37, at 842–43 (describing how resistance from the prosecutorial bar is a “key political barrier” to “expanding and accelerating defense access to information adduced in the state’s investigation”); Jason Kreag, *Disclosing Prosecutorial Misconduct*, 72 VAND. L. REV. 297 (2019) (proposing sending “concise letter[s] documenting [prosecutorial] misconduct” to stakeholders in trials tainted by a *Brady* violation); Jason Kreag, *The Brady Colloquy*, 67 STAN. L. REV. ONLINE 47 (2014) (arguing that the problem of ensuring that prosecutors comply with their disclosure requirements “stems from the shortcomings of the *Brady* doctrine”); Symposium, *supra* note 206; Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833 (1997) (examining “applications of the *Brady* Doctrine in Oklahoma”); see also *Breakiron v. Horn*, 642 F.3d 126, 133 (3d Cir. 2011) (expressing dismay over the frequency with which prosecutors withhold exculpatory evidence); Gass, *supra* note 70 (quoting Kate Levine saying that the “criminal legal system is fundamentally broken in ways that [interventions like *Brady* lists] will not fix”).

357. Davis, *supra* note 19, at 279.

358. See, e.g., Kate Levine, *Who Shouldn’t Prosecute the Police*, 101 IOWA L. REV. 1447, 1452 (2016) (arguing that prosecutors’ close working relationship with police creates an inherent conflict when investigating police misconduct or prosecuting police); Paul Butler, Opinion, *The System Must Counteract Prosecutors’ Natural Sympathies for Cops*, N.Y. TIMES (Apr. 28, 2015), <http://www.nytimes.com/roomfordebate/2014/12/04/do-cases-like-eric-garner-require-a-special-prosecutor/the-system-must-counteract-prosecutors-natural-sympathies-for-cops> [https://perma.cc/TN2W-XJFF]; Paul Cassell, *Who Prosecutes the Police? Perceptions of Bias in Police Misconduct Investigations and a Possible Remedy*, WASH. POST (Dec. 5, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/05/who-prosecutes-the-police-perceptions>

is what courts and legislators across the country continue to do. The almost complete lack of law requiring or regulating *Brady* lists reveals most lawyers' lack of interest in holding prosecutors accountable for satisfying their *Brady* obligations or preventing wrongful convictions. Prosecutors have had almost sixty years to develop rigorous practices for complying with *Brady*; the fact that many have not—and that legislators and courts have largely declined to intervene—speaks volumes about what our legal system prioritizes.

Brady lists are also not a self-contained solution to the pervasive police misconduct that plagues our country. Rather, they reveal the stunning number of officers with histories of misconduct who remain in law enforcement and continue to testify in criminal cases.³⁵⁹ Anita Khandelwal, the chief public defender in King County, Washington, recently argued that *Brady* lists should have no place in the criminal system because “there should be no such thing as a police agency that keeps cops with histories of lying, or false arrests, or brutality, or fabricating reports, or other misconduct.”³⁶⁰ In 2020, her office joined community organizations to demand that prosecutors “[i]nterrupt[] a long history of racist and dishonest police practices” by refusing to prosecute cases dependent on evidence from officers with histories of racism or dishonesty.³⁶¹

A 2021 ProPublica report investigating NYPD officers with histories of dishonesty revealed that New York City prosecutors still regularly rely on these officers in criminal cases.³⁶² Several of the cases ProPublica featured involved officers with known histories of dishonesty who had gone on to testify falsely in other

-of-bias-in-police-misconduct-investigations-and-a-possible-remedy [https://perma.cc/V6YS-WH4B].

359. See, e.g., Paul Kiefer, *The City and County Keep Lists of Cops with Credibility Issues. Many of Them Remain on Patrol*, PUBLICOLA (Aug. 31, 2020), <https://publicola.com/2020/08/31/the-city-and-county-keep-lists-of-cops-with-credibility-issues-many-of-them-remain-on-patrol> [https://perma.cc/3VUX-5FNW] (describing numerous police officers with extensive histories of misconduct who remain on police forces).

360. See Santos, *supra* note 221.

361. Letter from Anita Khandelwal, King Cnty. Pub. Def., King Cnty. Dep't of Pub. Def. (Aug. 3, 2020), <https://crosscut.com/sites/default/files/files/letter-to-kcpao.pdf> [https://perma.cc/VC8R-25DH].

362. Jake Pearson, *A Union Scandal Landed Hundreds of NYPD Officers on a Secret Watchlist. That Hasn't Stopped Some from Jeopardizing Cases.*, PROPUBLICA (Oct. 22, 2021), <https://www.propublica.org/article/a-union-scandal-landed-hundreds-of-nypd-officers-on-a-secret-watchlist-that-hasnt-stopped-some-from-jeopardizing-cases> [https://perma.cc/73Z5-ZEWC].

criminal cases.³⁶³ Many other police departments continue to retain officers with lengthy histories of misconduct.³⁶⁴ *Brady* lists—even those that accurately track officer misconduct—are no substitute for practices that root out and rid the criminal system of law enforcement misconduct.

B. *BRADY* LISTS AS A UNIVERSAL EXPECTATION

Brady lists are not a panacea to all the problems of police and prosecutorial misconduct, but they should be a minimal requirement for all prosecutor offices. Somil Trivedi and Nicole Gonzalez Van Cleave have argued that *Brady* lists “are not reforms at all, given that they simply collect information that the Constitution requires to be disclosed anyway.”³⁶⁵ Professor Jeffrey Bellin, a former prosecutor, similarly considers *Brady* lists a basic requirement of constitutional practice.³⁶⁶ As Bellin explained, his former office had a *Brady* list out of necessity: if they didn’t have a list, they ran an unacceptable risk of inadvertently failing to disclose impeachment information about the hundreds of law enforcement agents they dealt with in criminal cases.³⁶⁷

Even as prosecutors have improved their organization and gathering of data that helps them prosecute crimes, they have not consistently done so with exculpatory evidence.³⁶⁸ As of 2019, the State’s Attorney’s Office in Cook County, Illinois—one of the largest prosecutor offices in the country, headed by reformist prosecutor Kim Foxx³⁶⁹—still did not have an organized *Brady*

363. *Id.*

364. *E.g.*, *Kitsap Cnty. Deputy Sheriff’s Guild v. Kitsap County*, 219 P.3d 675, 676 (Wash. 2009) (upholding an arbitrator’s decision that overturned a law enforcement agency’s effort to fire officer with twenty-nine documented instances of misconduct, including dishonesty).

365. Trivedi & Gonzalez Van Cleave, *supra* note 7, at 924.

366. Jeffrey Bellin, *The Changing Role of the American Prosecutor*, 18 OHIO ST. J. CRIM. L. 329, 338 (2020).

367. *Id.*; see also Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2088 (2016) (noting that “information gaps within the prosecution team can generate *Brady* violations . . . because the prosecutor primarily responsible for one case might not know about information that ought to be disclosed to the defense . . .”).

368. Ferguson, *supra* note 50, at 185–209, 233 (describing prosecutors’ increasing reliance on collecting information and data about possible offenders but critiquing those same offices for failing to collect and organize information about police misconduct).

369. Kimberly M. Foxx, COOK CNTY. STATE’S ATT’Y, <https://www.cookcountystatesattorney.org/about/kimberly-foxx> [https://perma.cc/G2PF

list, and instead sent out individual memoranda to supervisors when police officers were convicted of crimes or found to have lied in court.³⁷⁰ This type of inefficient practice relies on prosecutors to create their own systems for tracking exculpatory evidence about police officers, and leaves the office vulnerable to individual disorganization resulting in failure to disclose required exculpatory information. Andrew Guthrie Ferguson has observed that prosecutors who create data-collection systems without incorporating misconduct records do so as “a policy choice, not a technological choice.”³⁷¹ As Ferguson points out, current technology easily allows prosecutors to build databases incorporating names of law enforcement officers with links to documented misconduct.³⁷²

Even setting aside prosecutors’ legal obligations to disclose exculpatory evidence, *Brady* lists also further the institutional interest prosecutors should have in both transparency and accountability.³⁷³ Prosecutors have historically played a central role in enabling and hiding police misconduct.³⁷⁴ That role has contributed to untold wrongful convictions, including thousands

-PDMK] (“As Cook County’s State’s Attorney, Kim has undertaken substantial criminal justice reforms focused on public safety and equity.”).

370. Reilly & Nichols, *supra* note 8; *see also* John Kelly, *Cook County Prosecutor Brady Memos*, USA TODAY, <https://www.usatoday.com/documents/6470127-Cook-County-prosecutor-Brady-Memos> [https://perma.cc/RN6K-ZGH6] (containing memos obtained from the Cook County prosecutor’s office concerning “officers who might have to be disclosed to defense attorneys under the Supreme Court’s *Brady* ruling”).

371. Ferguson, *supra* note 50, at 233.

372. *Id.* (“As a technical matter, incorporating links of each officer in the investigation system to perjury or credibility concerns would not be difficult.”).

373. Murray, *supra* note 35, at 314 (arguing that failing to disclose exculpatory evidence “threatens the public’s interest in a transparent criminal process that has the capacity to hold executive power in check”); Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 161–67 (2008) (arguing that prosecutors have an institutional interest in internal regulations that make the criminal system more fair); Adam M. Gershowitz, *Prosecutorial Dismissals As Teachable Moments (and Databases) for the Police*, 86 GEO. WASH. L. REV. 1525, 1549 (2018) (“[P]rosecutors’ offices should want to identify ‘*Brady* cops’ . . . as early as possible so that those officers do not taint future cases . . .”).

374. *See, e.g.*, Trivedi & Gonzalez Van Cleve, *supra* note 7, at 920–24 (describing ways prosecutors systemically enable police misconduct, including by failing to disclose *Brady* material); Tyler Yeagain, *Prosecutorial Disassociation*, 47 AM. J. CRIM. L. 85, 101 (2020) (providing examples of ways prosecutors have “taken an interesting, somewhat internally inconsistent, position on police misconduct,” including opposing access to information about police misconduct).

of people who have faced criminal charges or been incarcerated based on reports or testimony from law enforcement agents with histories of dishonesty.³⁷⁵ In Little Rock, Arkansas alone—with a prosecutor’s office that does not maintain a *Brady* list—USA Today’s investigation found that “officers who the department determined lied or committed crimes were witnesses in at least 4,000 cases.”³⁷⁶ A report from The National Registry of Exonerations examined 2,400 exonerations in the past thirty years, and concluded that in nearly half of wrongful convictions prosecutors “withheld evidence that could’ve helped the accused.”³⁷⁷ Prosecutors who disregard feasible processes for tracking and disclosing law enforcement misconduct risk irreparable harm to innocent people, as well as their own offices.³⁷⁸

A growing group of legal professionals, including current and former prosecutors, have urged *Brady* lists as a prosecutorial best practice. In 2019, sixty current and former prosecutors, as well as DOJ officials and law enforcement administrators, signed a public letter asserting that *Brady* lists are a “necessary and recognized way to meet the prosecutor’s important role and ethical obligations as a minister of justice.”³⁷⁹ In 2020, the City Attorney of San Diego co-authored an op-ed with the chief of the San Diego Public Defender’s Office, agreeing that *Brady* lists are “a powerful tool for protecting the rights of people accused of

375. Reilly & Nichols, *supra* note 8; *see also* Medwed, *supra* note 34, at 1540 (“*Brady* violations frequently contribute to the conviction of the innocent.”); *United States v. Brooks*, 966 F.2d 1500, 1502–04 (D.C. Cir. 1992) (reversing conviction based on prosecutor’s failure to search internal police affairs files for possible impeachment information); *Nuckols v. Gibson*, 233 F.3d 1261, 1265–67 (10th Cir. 2000) (overturning murder conviction based on government’s failure to disclose impeachment evidence about law enforcement witness).

376. Reilly & Nichols, *supra* note 8.

377. Moon, *supra* note 131; *see also* Gross et al., *supra* note 19, at iv (concealing exculpatory evidence was the most frequent form of misconduct in wrongful conviction cases).

378. Carina Miller, Note, *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, 546 (2020) (“Prosecutors who fail to learn about prior misconduct by officers whose testimony they rely on to obtain convictions risk doing irreparable damage both to defendants and to their own cases.”).

379. *See Protecting the Integrity of the Justice System: The Importance of Brady Lists as a Recognized Best Practice*, FAIR & JUST PROSECUTION (Jan. 14, 2019), <https://fairandjustprosecution.org/wp-content/uploads/2019/01/St.-Louis-Brady-Sign-On-Statement.01.08.19-9.04.44-PM.pdf> [<https://perma.cc/4LGG-MTLP>].

crimes.”³⁸⁰ In July 2021, the Institute for Innovation in Prosecution released a report recommending that all prosecutors maintain *Brady* lists and have clear procedures for assessing who belongs on the list and what types of information merit disclosure.³⁸¹ The report noted that offices without “a formal system to track police misconduct risk[] . . . fail[ing] to comply with their legal obligations.”³⁸²

It is long past time for all prosecutors to develop thorough and accurate methods of tracking and disclosing information about law enforcement misconduct. *Brady* lists are far from a radical suggestion; instead they are a basic tool for prosecutors to comply with their constitutional and ethical obligations to disclose information that could impeach the credibility of their investigators and witnesses. *Brady* lists also present an opportunity for prosecutors to enhance the credibility and fairness of their own decisions about which charges to pursue and what officers to rely on. The following section describes the type of information prosecutors should include in *Brady* lists and how they should use such lists.

C. RECOMMENDED CONTENTS OF *BRADY* LISTS

Because *Brady* lists function primarily as a device for prosecutors to track misconduct, their contents should be expansive. Prosecutors may decide in the context of an individual case whether material in the *Brady* list must be disclosed to defense counsel, but they cannot make that decision if they do not know about the misconduct.

Rather than focusing narrowly on familiar categories like dishonesty, *Brady* lists should incorporate any credible allegations of misconduct that could impact officers’ credibility. The DOJ’s definition of potential impeachment evidence is appropriately broad, including but not limited to pending and sustained allegations of misconduct reflecting dishonesty, lack of candor, or bias; pending and past criminal charges; judicial findings of untruthfulness; constitutional violations such as unlawful

380. Randy Mize & Mara W. Elliott, *Opinion, The Truth About ‘Brady Lists’ Is They Protect the Public*, TIMES OF SAN DIEGO (June 25, 2020), <https://timesofsandiego.com/opinion/2020/06/25/the-truth-about-brady-lists-is-they-protect-the-public> [<https://perma.cc/62V4-9J5M>].

381. See *Tracking Police Misconduct*, *supra* note 8.

382. *Id.* at 2; see also *id.* (“Every prosecutor’s office should maintain a list in some form so that prosecutors can fulfill their ethical duties and meet the public’s growing demand for police accountability.”).

searches and seizures; misconduct casting doubt on the accuracy or admissibility of evidence; misconduct involving collection, handling, or analysis of evidence; and information casting doubt on the officer's ability to perceive or recall truth.³⁸³ Although the admissibility of this evidence may depend on the context of a given case, it all could impeach an officer's credibility, and thus must be carefully tracked.³⁸⁴

While some *Brady* lists only include allegations of misconduct that an internal affairs division has reviewed and sustained, internal affairs units are often biased in favor of law enforcement and historically sustain extremely low rates of complaints.³⁸⁵ Because the standard of whether an allegation has been sustained is not a reliable metric for evaluating misconduct, *Brady* lists should not be so limited. *Brady* lists should err on the side of caution and include the allegation if it is plausible or credible.³⁸⁶

Prosecutors should use *Brady* lists internally as early as their charging decision: if a case coming to the prosecutor relies heavily on a report or allegation from an officer with a documented history of serious credibility problems, it may be inappropriate to charge that case. Whether prosecutors also make

383. *Justice Manual*, *supra* note 123, at § 9-5.1005(c).

384. See, e.g., *Milke v. Ryan*, 711 F.3d 998, 1007 (9th Cir. 2013) (finding that evidence that an officer was “disciplined for lying on the job obviously bears on his credibility and qualifies as *Giglio* evidence”); *id.* (finding that evidence that an officer abused his authority by accepting sexual favors from a civilian was *Brady* material); *id.* at 1009–10 (finding that evidence that an officer had previously violated suspects’ *Miranda* rights was “highly probative” *Brady* evidence, where prosecution’s case rested on officer’s claim that suspect confessed to him); *United States v. Veras*, 51 F.3d 1365, 1374 (7th Cir. 1995) (finding evidence that an officer was under investigation for stealing money and lying on search warrant applications should have been disclosed under *Brady*); Vida Johnson, *KKK in the PD: White Supremacist Police and What to Do About It*, 23 LEWIS & CLARK L. REV. 205, 234–38 (2019) (explaining why evidence of racial or other biases is *Brady* material); *Tracking Police Misconduct Appendix*, *supra* note 205, at Snohomish County 2 (agreeing that *Brady* and *Giglio* obligate prosecutors to disclose, among other things, information about law enforcement bias).

385. See *supra* notes 248–50 (describing various standards of proof for misconduct on *Brady* lists); Rachel Moran, *Ending the Internal Affairs Farce*, 64 BUFF. L. REV. 837, 853–68 (2016) (detailing biases and flaws in internal affairs review).

386. See sources cited *supra* note 248 (providing examples of offices that use similar standards).

the list externally accessible—and particularly whether they disclose their lists to the public—will depend largely on public records laws in each state. But to the extent many prosecutors and law enforcement agencies lack credibility with the public, releasing their *Brady* lists, and showing the public what information those lists contain, is a very small step toward answering those credibility concerns.³⁸⁷

To the extent prosecutors do make their *Brady* lists accessible to the public, it would also be appropriate to allow officers a process for appealing their placement on *Brady* list or requesting removal from the list. However, that process cannot interfere with the prosecutors' constitutional and ethical obligation to disclose exculpatory information to defense counsel.³⁸⁸ Appeals therefore cannot delay the process of placing officers on a list or disclosing information to defense counsel.

CONCLUSION

This Article provides the first thorough scholarly assessment of federal and state laws and practices regarding creation and use of *Brady* lists. The results are sobering; they reveal that in the nearly sixty years since *Brady*, lawyers and law enforcement still largely fail to comply with the disclosure obligations *Brady* created. The legal system's failure to create or mandate effective policies for tracking and disclosing information about law enforcement misconduct suggests that addressing misconduct and preventing wrongful convictions are not serious priorities for many agencies. If lawyers care about preventing wrongful convictions and enhancing public trust in law enforcement, *Brady* lists should be a basic requirement for every prosecutor office.

387. See Moon, *supra* note 131 (“If the question on the minds of many people is ‘can I trust the cops?’ . . . [*Brady*] lists would be a good place to start looking for answers.”); see also Moran, *supra* note 64, at 185 (describing why increased transparency of misconduct records can aid public trust).

388. See *supra* Part I.A.