

PREFACE

THE INTEGRITY OF OUR CONVICTIONS: HOLDING STAKEHOLDERS ACCOUNTABLE IN AN ERA OF CRIMINAL JUSTICE REFORM

BARRY SCHECK*

INTRODUCTION

Over the last twenty-seven years, I've been privileged to work with colleagues on hundreds of cases where the innocent are exonerated and, with surprising frequency, the guilty are identified. This work inevitably raises the perennial National Transportation Safety Board question the “innocence movement” has asked from the beginning: What went wrong and how do we fix it so it doesn't happen again?¹

By its very nature, this is a “system” question involving multiple stakeholders that intersects with complex ethical, legal, and scientific issues. In the last decade, drawing from a rich “safety” literature in the high-risk fields of medicine and aviation, an interdisciplinary cadre of researchers and reformers have been seeking to translate some of the successful models from aviation and medicine to the criminal justice arena.² A rich interdisciplinary “sentinel event” literature has developed³ involving “safety experts,” psychologists, and criminal justice stakeholders from practice and academia. These experts have explored everything from how to develop effective “checklists” for specific tasks to all stakeholder reviews of “near misses” and total system failures like wrongful convictions.⁴ The goal is to create mechanisms that help multiple stakeholders continually learn from error, investigate root causes, and develop a “non-blaming,” “just culture,” with “forward-looking accountability.”⁵ At the same time, however, there is no real dispute that deliberate rule breakers must be

* I am a Professor of Law, Benjamin N. Cardozo School of Law, a Co-Founder of the Innocence Project, a past president of the National Association of Criminal Defense Lawyers, and a Trustee of the NACDL Foundation. I list these affiliations to make it clear that the views expressed here are entirely my own and should not be attributed to these organizations. Importantly, I got all the good ideas from colleagues at those institutions and the bad ideas are entirely mine. A special thanks to Clyde Rastetter, Tim Pellegrino, Gabriela Figueras, and Alexandra Skinnion for their research, patience, and good editing; Ellen Yaroshefsky, Jeff Fagan, Cynthia Conti-Cook, Julie Ciccolini, Nina Morrison, Rebecca Brown, Vanessa Potkin, Meryl Schwartz, Norman Reimer, and Jim Doyle for their insight and encouragement; and Dmitriy Tishyevich, Jay Lefkowitz, Jackie Haberfeld, and their colleagues at Kirkland & Ellis for their support on the police misconduct database project. © 2019, Barry Scheck.

1. See JIM DWYER ET AL., ACTUAL INNOCENCE xx–xxi, 361 (2003).

2. See James M. Doyle, *Essay: A “Safety Model” Perspective Can Aid Diagnosis, Prevention, and Restoration After Criminal Justice Harms*, 59 SANTA CLARA L. REV. (forthcoming 2019) (manuscript at 5–7). See generally Symposium, *Voices from the Field: An Inter-Professional Approach to Managing Critical Information*, 31 CARDOZO L. REV. 2037 (2010) [hereinafter *Voices from the Field*].

3. For the latest compilation of citations, see Doyle, *supra* note 2 (manuscript at 6 n.20). The National Institute of Justice also has a continually updated bibliography of “sentinel event” literature. See *Sentinel Events Initiative: A Compiled Bibliography*, NAT'L INST. OF JUSTICE, <https://www.nij.gov/topics/justice-system/Pages/sentinel-events-bibliography.aspx> [<https://perma.cc/8T5S-3NQM>] (last updated Mar. 13, 2019).

4. See Doyle, *supra* note 2 (manuscript at 3–25); see also *New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961, 1972–77, 2005–06, 2011–13, 2018–22, 2033 (2010) [hereinafter *New Perspectives on Brady: Report of Working Groups*]; *Voices from the Field*, *supra* note 2, at 2038–56, 2061–74; see also Ellen Yaroshefsky, *Foreword: New Perspectives on Brady and Other Disclosure Obligations: What Really Works*, 31 CARDOZO L. REV. 1943, 1943–46 (2010).

5. See Doyle, *supra* note 2 (manuscript at 2, 14, 29–33); see also Yaroshefsky, *supra* note 4, at 1943–46.

identified and appropriately sanctioned.⁶

This is no easy task. Even in medicine, a “non-blaming” culture that helps increase the reporting of errors often conflicts with sanctioning “errors committed by incompetent, intoxicated or habitually careless clinicians, or by those unwilling to follow reasonable safety rules and standards.”⁷ In the criminal justice realm, efforts to obtain transparency and consensus about sanctioning reckless or deliberate rule breaking by prosecutors, police, defense counsel, and even judges—the sworn stakeholders in our system we count on the most to act with integrity, follow the law, and uphold justice—routinely encounter deep-seated institutional resistance.⁸

Nonetheless, this is an especially exciting time to address these system integrity issues. We have extraordinarily powerful tools to collect, assess, and analyze criminal justice data as never before so that the actions of all the stakeholders in our system can become more transparent. And we are unquestionably in an era of criminal justice reform where there is a determination to make fundamental changes. There is agreement on the left and the right that misconduct by prosecutors and police must be addressed more systematically and transparently to ensure public respect and trust.⁹ There is agreement on the left and the right that all criminal justice stakeholders have an ethical obligation to ensure that only validated and reliable forensic science is used in courts and that multiple stakeholders have a duty to correct and notify litigants who could have been adversely affected by unreliable scientific tests or testimony.¹⁰ There is agreement on the left and the right that strong measures must be taken to redress the problem of mass incarceration on the “front end” (bail reform, diversion, decriminalization) as well as the “back end” (reform of mandatory minimum sentencing, parole, and probation)¹¹ such that redressing prior excessive, unfair, or racially biased sentences ought to be seen as a “conviction integrity” issue by prosecutors, defense attorneys, courts, and governors.

What follows is a discussion about a series of related initiatives that have emerged organically from the trenches to hold different criminal justice stakeholders accountable to ethical rules and constitutional norms. I will discuss (1) *Brady* orders; (2) the need for the public, prosecution, and defense to each maintain databases of police misconduct; (3) the

6. See Doyle, *supra* note 2 (manuscript at 14); see also Cynthia E. Jones, *Here Comes the Judge: A Model for Judicial Oversight and Regulation of the Brady Disclosure Duty*, 46 HOFSTRA L. REV. 87, 109 (2017); Yaroshefsky, *supra* note 4, at 1943–46.

7. ROBERT M. WACHTER, PERSONAL ACCOUNTABILITY IN HEALTHCARE: SEARCHING FOR THE RIGHT BALANCE 1 (2012), <http://www.ajustnhs.com/wp-content/uploads/2012/06/accountability-and-patient-safety-2012.pdf> [<https://perma.cc/36MU-DVWK>]; see Robert M. Wachter & Peter J. Pronovost, *Balancing “No Blame” with Accountability in Patient Safety*, 361 NEW ENG. J. MED. 1401, 1402 (2009); see also *Voices from the Field*, *supra* note 2, at 2038–56.

8. See Bruce A. Green, *Prosecutors and Professional Regulation*, 25 GEO. J. LEGAL ETHICS 873, 879 (2012); Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 79–80 (2016); see also *infra* note 44 and accompanying text.

9. See Green & Yaroshefsky, *supra* note 8, at 66–85.

10. See PRESIDENT’S COUNCIL OF ADVISORS ON SCIENCE AND TECHNOLOGY, FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS 124–45 (2016), <https://bit.ly/2xKHnW5> [<https://perma.cc/3ZUL-3FLK>]; see also TEX. CODE CRIM. PROC. ANN. art. 38.01 (West 2019); *Ex parte* Robbins, 478 S.W.3d 678, 695–706 (Tex. Crim. App. 2014) (Cochran, J., concurring); Brandi Grissom, *Forensic Science Panel Calls for Review of Past Arson Cases*, TEX. TRIBUNE (Sept. 9, 2011, 2:00 PM), <https://www.texastribune.org/2011/09/09/science-panel-agrees-review-past-arson-evidence> [<https://perma.cc/VDA5-RD53>].

11. See Nicholas Fandos, *Senate Passes Bipartisan Criminal Justice Bill*, N.Y. TIMES (Dec. 18, 2018), <https://www.nytimes.com/2018/12/18/us/politics/senate-criminal-justice-bill.html> [<https://nyti.ms/2GqmNnb>]; Osita Nwanevu, *The Improbable Success of a Criminal-Justice-Reform Bill Under Trump*, NEW YORKER (Dec. 17, 2018), <https://www.newyorker.com/news/news-desk/the-improbable-success-of-a-criminal-justice-reform-bill-under-trump> [<https://perma.cc/5JHH-Q7XJ>].

importance of Police Standards and Training (POST) Decertification Statutes; (4) New York's newly established Prosecutorial Conduct Commission; (5) the need to establish ethical rules for prosecutors, defense lawyers, and judges to help forensic science providers correct errors and protect the integrity of forensic science testimony; and (6) three new developments in the work of Conviction Integrity Units. Each of these initiatives requires transparency, ongoing collection of data, and cooperative action by multiple stakeholders. If expanded and undertaken together, they would be synergistic, help stakeholders do their jobs, and promote public confidence in the integrity of our system.

I. BRADY ORDERS

The *Brady* order initiative arose in 2011 as a direct result of two high-profile cases involving prosecutorial misconduct that had dramatically different outcomes: the Michael Morton exoneration in Williamson County, Texas, and the trial of U.S. Senator Ted Stevens in Washington, D.C.¹²

The Innocence Project had been representing Michael Morton for decades in an effort to obtain DNA testing on probative biological evidence to prove he did not murder his wife Christine.¹³ Michael's defense at trial was that after he left home to go to work at 6 A.M., someone entered his home from a wooded area behind the house, bludgeoned Christine to death while she was sleeping in her bed (their three-and-a-half-year-old son Eric was in the house), and left after stealing some property.¹⁴ On a Friday before a Monday trial, Michael's defense lawyers asked that the trial court examine *in camera* the lead investigator's report because they believed it contained "*Brady* material."¹⁵ The trial court asked prosecutor Ken Anderson whether he had any favorable information to disclose to the defense, to which Anderson said he did not. The trial court ordered the report produced, prosecutor Ken Anderson delivered it in a sealed manila envelope, and on Monday the court ruled the report contained no *Brady* information.¹⁶ The prosecution proceeded to trial without the lead investigator testifying so that the defense, under Texas rules at the time, never saw the investigator's complete report.¹⁷ Morton was convicted and sentenced to life in prison.¹⁸

Twenty-five years later, DNA testing was conducted on a blue bandana found outside the Morton home in a wooded area.¹⁹ Blood on the bandana was determined to be from Christine Morton.²⁰ Male epithelial cells, a CODIS hit revealed, came from a convicted felon, Mark Alan Norwood.²¹ Around the same time, the Innocence Project defense team,²² through an open record act request, obtained the lead investigator's file that contained indisputable exculpatory information, such as a report from a neighbor that he saw a green van suspiciously parked behind the Morton home around the time of the murder

12. See Green & Yaroshefsky, *supra* note 8, at 75–77, 100; Barry Scheck, *Four Reforms for the Twenty-First Century*, 96 JUDICATURE 323, 330–33 (2013).

13. See Pamela Colloff, *The Innocent Man, Part Two*, TEX. MONTHLY (Dec. 2012), <http://www.texasmonthly.com/articles/the-innocent-man-part-two> [https://perma.cc/CD78-6BPG] [hereinafter Colloff, *Innocent Man, Part Two*].

14. See Pamela Colloff, *The Innocent Man, Part One*, TEX. MONTHLY (Nov. 2012), <http://www.texasmonthly.com/politics/the-innocent-man-part-one> [https://perma.cc/NX8U-ZVY5] [hereinafter Colloff, *Innocent Man, Part One*].

15. See Scheck, *supra* note 12, at 331; Colloff, *Innocent Man, Part Two, supra* note 13.

16. See Scheck, *supra* note 12, at 330–31; Colloff, *Innocent Man, Part Two, supra* note 13.

17. See Colloff, *Innocent Man, Part One, supra* note 14.

18. See Colloff, *Innocent Man, Part Two, supra* note 13.

19. See *id.*

20. See *id.*

21. See *id.*

22. To name just a few members, Nina Morrison, countless pro bono lawyers from Weil, Gotschal in New York, Texas counsel John Raley, Gerry Goldstein, Cynthia Orr, Patricia Cummings, and myself.

and “had observed its driver walking into the overgrown area that extended up to his privacy fence” as if planning a break-in.²³ When the sealed manila envelope prosecutor Ken Anderson submitted to the trial court was opened, the exculpatory information in the lead investigator’s report was not present, plainly removed by Anderson.²⁴ Although Anderson’s conduct arguably violated a number of Texas criminal statutes, the safest course to avoid statute of limitations problems was to charge him with continuing contempt of court, a misdemeanor, for deliberately misrepresenting that he had disclosed all favorable *Brady* information.²⁵ Utilizing a rarely invoked Texas procedure known as a Court of Inquiry, which allows criminal charges to be brought against public officials upon a showing of probable cause, the Innocence Project team was able to get former prosecutor Anderson, then a sitting felony court judge, charged with contempt for this *Brady* violation.²⁶ He entered a plea, was sentenced to ten days in jail (served five), was disbarred, and resigned from the bench.²⁷

In the midst of those tumultuous and widely publicized proceedings, the Innocence Project team discovered a similar unsolved break-in murder in Austin, Texas: Debra Baker had been killed two years after Christine Morton’s murder. At the Innocence Project’s request, the Austin police reinvestigated the Baker homicide, found probative biological evidence at the crime scene, and conducted DNA tests that matched Norwood.²⁸ He was ultimately convicted of both homicides.²⁹

The *Morton* case, and Michael Morton’s powerful personal advocacy³⁰ shook the Texas criminal justice system, and especially prosecutors, to the core.³¹ A proud “Tea Party” red legislature passed the Michael Morton Act, which instituted open file discovery and contains an explicit order and acknowledgment before a plea or trial that prosecutors “shall disclose” and itemize all “information in the possession, custody, or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged”³²—tracking the language of ABA Rule 3.8(d) and the same longstanding Texas ethical rule.³³ The Morton Act also amended the State’s ethical rules to start the statute of limitation for grievances

23. Colloff, *Innocent Man, Part Two*, *supra* note 13.

24. *See id.*

25. *See id.*; Scheck, *supra* note 12, at 332 n.50.

26. *See* Scheck, *supra* note 12, at 331–32.

27. Chuck Lindell, *Ken Anderson Gets 10-Day Sentence, Surrenders Law License*, STATESMAN (Nov. 9, 2013, 12:01 AM), <https://www.statesman.com/news/20131109/ken-anderson-gets-10-day-sentence-surrenders-law-license> [<https://perma.cc/7AW7-T8V9>]; Claire Osborn, *How Ken Anderson Was Released After Only Five Days in Jail*, STATESMAN (Nov. 16, 2013, 12:01 AM), <https://www.statesman.com/NEWS/20131116/How-Ken-Anderson-was-released-after-only-five-days-in-jail> [<https://perma.cc/AB37-U24Q>].

28. *See* Colloff, *Innocent Man, Part Two*, *supra* note 13.

29. Ryan Autullo, *Another Life Sentence for Norwood, and Some Comfort for Victim’s Family*, STATESMAN (Sept. 24, 2016, 12:01 AM), <https://www.statesman.com/news/20160924/another-life-sentence-for-norwood-and-some-comfort-for-victims-family> [<https://perma.cc/2UVR-XC3F>].

30. A television advertisement featuring Michael Morton also ran in New York during a successful “Remove the Blindfold” campaign to reform New York’s discovery statute. *See* New Yorkers United for Justice, *It’s Time to Fix New York’s Outdated Discovery Laws*, YOUTUBE (Feb. 19, 2019), https://youtu.be/G7xUmHv-U_k; Dan M. Clark, *Cuomo, Lawmakers Announce Deal on State Budget, Criminal Justice Reforms*, N.Y.L.J. (Mar. 31, 2019, 8:14 AM), <https://www.law.com/newyorklawjournal/2019/03/31/cuomo-lawmakers-announce-deal-on-state-budget-criminal-justice-reforms> [<https://perma.cc/R6UX-SRX4>].

31. *See* Gerald S. Reamey, *The Truth Might Set You Free: How the Michael Morton Act Could Fundamentally Change Texas Criminal Discovery, or Not*, 48 TEX. TECH. L. REV. 893, 899–901 (2016).

32. TEX. CODE CRIM. PROC. ANN. art. 39.14(h), (j) (West 2019); *see also* Reamey, *supra* note 31, at 903–29; Brandi Grissom, *From the Tea Party, a Softer Line in Criminal Justice Discussions*, TEX. TRIBUNE (July 10, 2013, 6:00 AM), <https://www.texastribune.org/2013/07/10/tea-party-influence-felt-criminal-justice> [<https://perma.cc/4K38-FNHL>].

33. MODEL RULES OF PROF’L CONDUCT r. 3.8(d) (AM. BAR ASS’N 2019); TEX. DISCIPLINARY RULES OF PROF’L CONDUCT r. 3.09(d) (2019).

related to a prosecutor's misconduct that leads to a wrongful conviction at the time of a wrongfully imprisoned person's release from prison, not the time of the act.³⁴

The result in the *Morton* case stood in "stark contrast" to the resolution of an investigation into prosecutorial misconduct in the case of Senator Ted Stevens that unfolded during this same period.³⁵ In that high stakes federal prosecution, Judge Emmett Sullivan became so upset at what he believed were serious *Brady* violations by Assistant United States Attorneys (AUSAs) that he appointed a special prosecutor to investigate.³⁶ The special prosecutor's report concluded that the *Brady* violations were "deliberate" and "systematic" but that Judge Sullivan could not hold the AUSAs in contempt because he never issued a direct written or oral order.³⁷ Instead, whenever the defense raised the alarm about a possible failure to disclose favorable evidence, he only intoned, as so many judges have understandably done for years, that the government is mindful of its *Brady* obligations.³⁸ Now, it must be emphasized, Judge Sullivan has become the leading and most influential judicial proponent of standing *Brady* orders to be enforced by courts.³⁹

In response to expressions of outrage from the left and right over the *Morton* and *Stevens* cases, former federal district court judge Nancy Gertner and I naively proclaimed that if defense lawyers continually filed pretrial motions for an order that tracked their jurisdiction's version of ABA Rule 3.8(d), judges and prosecutors would welcome the clarity provided by the rule—an "Occam's razor" which would cut through the "vexing problems that have hamstrung meaningful compliance with *Brady*."⁴⁰ At the very least, we believed, it would be difficult for anyone to insist on the record that prosecutors were not bound by the jurisdiction's ethical rules, which are often authorized by statute.⁴¹

We were wrong. Many defense lawyers were afraid to ask for the order fearing that prosecutors and judges would think, just by requesting it, they were accusing their adversaries of unethical conduct. Nor did prosecutors or judges have much trouble ignoring the ethical rule mandating timely pre-trial disclosure of "favorable information" (information that tends to negate guilt or mitigate the offense). They just assumed that the *post-conviction* *Brady* standard for vacating a conviction, "materiality,"⁴² must be regarded as the *pre-trial* *Brady* standard for disclosure.⁴³

Even more troubling, Judge Sullivan, the American Bar Association (ABA), the National Association of Criminal Defense Lawyers (NACDL), and scores of distinguished former prosecutors have encountered implacable resistance from the U.S.

34. TEX. GOV'T CODE ANN. § 81.072(b-1) (West 2019); see also Grissom, *supra* note 32.

35. Scheck, *supra* note 12, at 330.

36. See Emmet G. Sullivan, *How New York Courts Are Keeping Prosecutors in Line*, WALL ST. J. (Nov. 17, 2017, 6:09 PM), <https://www.wsj.com/articles/how-new-york-courts-are-keeping-prosecutors-in-line-1510953911> [<https://perma.cc/CA2U-Z5U5>].

37. See *id.*

38. See ROB CARY, NOT GUILTY: THE UNLAWFUL PROSECUTION OF U.S. SENATOR TED STEVENS 94 (2014).

39. See Sullivan, *supra* note 36; Hon. Emmet G. Sullivan, *Enforcing Compliance with Constitutionally-Required Disclosures: A Proposed Rule*, 2016 CARDOZO L. REV. DE NOVO 138, 138–39 (2016). For a thoughtful and edifying deep dive into the *Stevens* case, see CARY, *supra* note 38.

40. Barry Scheck & Nancy Gertner, *Combatting Brady Violations with an 'Ethical Rule' Order for the Disclosure of Favorable Evidence*, 37 CHAMPION 40, 40 (2013).

41. *Id.* at 41.

42. Information is considered "material" for purposes of vacating a conviction "when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Smith v. Cain*, 565 U.S. 73, 75 (2012) (quoting *Cone v. Bell*, 556 U.S. 449, 469–70 (2009)). "A reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with the evidence,' only that the likelihood of a different result is great enough to 'undermine[] confidence in the outcome of the trial.'" *Id.* (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)).

43. See Jones, *supra* note 6, at 99–102.

Department of Justice (DOJ) over the last decade in their unsuccessful efforts to get agreement on a *Brady* order for the District of Columbia, an amendment to Federal Rule of Criminal Procedure 16, or even a revision of the DOJ's Justice Manual that tracks ABA Rule 3.8(d).⁴⁴ Outside of the Michael Morton Act in Texas, proponents of a *Brady* order have met with sporadic success from individual state and federal judges.⁴⁵ But in 2017, there was a significant breakthrough in the State of New York that will hopefully be emulated by state judiciaries and legislatures across the country⁴⁶:

Based on a recommendation from the Justice Task Force (JTF)—a multi-stakeholder group selected by the Chief Judge of the New York Court of Appeals—New York adopted a model *Brady* order that is distributed to prosecutors and the defense at first appearance when the defense makes a discovery demand.⁴⁷ The order directs prosecutors to make “timely” disclosure of all “[f]avorable information,” and lays out five specific, but non-exhaustive, categories of such information.⁴⁸ Two of these categories—“[i]nformation that tends to exculpate, reduce the degree of an offense, or support a potential defense to a charged offense,” and “[i]nformation that tends to mitigate the degree of the defendant’s culpability as to a charged offense, or to mitigate punishment”—track New York’s version of ABA Rule 3.8(d).⁴⁹ A third category focuses on information that could be used to impeach the credibility of a government witness and offers five specific examples.⁵⁰ A fourth category addresses “[i]nformation that tends to undermine evidence of the defendant’s identity as [the] perpetrator” of a crime and information that tends to show third-party guilt.⁵¹ And a fifth category provides the useful reminder that “[i]nformation that could affect in the defendant’s

44. See Bruce A. Green, *Federal Criminal Discovery Reform: A Legislative Approach*, 64 MERCER L. REV. 639, 652–55, 660–61 (2013); Green, *supra* note 8, at 879–82; Jones, *supra* note 6, at 88–89, 124; Sullivan, *supra* note 39, at 141–47. Another example of DOJ’s intransigence is illustrated by its vigorous opposition to the creation of additional state rules of professional conduct derived from ABA Model Rules 3.8(g) and (h)—intended to “codify judicial pronouncements regarding prosecutors’ post-conviction obligations”—which were adopted in 2008. Green, *supra* note 8, at 889–93. Ironically, these provisions had been adopted “without controversy [and] after extensive participation by prosecutors,” some of whom had expressed strong support and praised them for providing a coherent standard for prosecutors to follow. *Id.* at 890.

45. See Green & Yaroshesky, *supra* note 8, at 73–77.

46. See Sullivan, *supra* note 36.

47. See *id.*; N.Y. STATE JUSTICE TASK FORCE, REPORT ON ATTORNEY RESPONSIBILITY IN CRIMINAL CASES 1, 15–17 (2017), <http://www.nyjusticetaskforce.com/pdfs/2017JTF-AttorneyDisciplineReport.pdf> [<https://perma.cc/W7C2-ME26>].

48. N.Y. STATE JUSTICE TASK FORCE, *supra* note 47, at 15–16.

49. *Id.* at 15 (categories (b) and (c)); see also N.Y. RULES OF PROF’L CONDUCT r. 3.8(b) (N.Y. STATE BAR ASS’N, amended 2018).

50. N.Y. STATE JUSTICE TASK FORCE, *supra* note 47, at 15 (category (a)):

Information that impeaches the credibility of a testifying prosecution witness, including (i) benefits, promises, or inducements, express or tacit, made to a witness by a law enforcement official or law enforcement victim services agency in connection with giving testimony or cooperating in the case; (ii) a witness’s prior inconsistent statements, written or oral; (iii) a witness’s prior convictions and uncharged criminal conduct; (iv) information that tends to show that a witness has a motive to lie to inculcate the defendant, or a bias against the defendant or in favor of the complainant or the prosecution; and (v) information that tends to show impairment of a witness’s ability to perceive, recall, or recount relevant events, including impairment resulting from mental or physical illness or substance abuse.

51. *Id.* at 16 (category (d)):

Information that tends to undermine evidence of the defendant’s identity as a perpetrator of a charged crime, such as a non-identification of the defendant by a witness to a charged crime or an identification or other evidence implicating another person in a manner that tends to cast doubt on the defendant’s guilt.

favor the ultimate decision on a suppression motion” must be disclosed in a timely fashion before the hearing.⁵²

Most importantly, each category of favorable information is directly based on cases from the New York Court of Appeals, the State’s highest court,⁵³ and the order explicitly warns prosecutors that “[f]avorable information shall be disclosed whether or not it is recorded in tangible form, and *irrespective of whether the prosecutor credits the information.*”⁵⁴

The order was carefully designed to serve at least four different, but related, objectives simultaneously: compliance alone helps stakeholders do their jobs; it trains lawyers and judges; its “duty to learn” requirement gets stakeholders to search together for what they do not know individually; and it sets up a “just culture” approach to enforcement, encouraging remediation and reserving serious sanctions only for deliberate rule breakers.

First, the order serves as the sort of real-time checklist that cognitive scientists and safety experts recommend. By routinely reviewing all the categories of information required to be disclosed at each court appearance, the order induces the prosecutor, the court, and the defense to communicate and make sure critical information is not missed,⁵⁵ much in the way flight crews go through their checklists before an airplane takes off or an Intensive Care Unit team goes through a checklist in an emergency room.⁵⁶ This construct is based on the belief that compliance alone helps stakeholders do their jobs.

Secondly, since the requirements laid out in New York’s model *Brady* order embody black letter state and federal constitutional decisions, the order serves an important educational function not just for the *prosecutor* but for the judge and the defense.⁵⁷ Take, for example, the reminder that objectively favorable information must be disclosed even if the prosecutor genuinely believes the information is false.⁵⁸ I distinctly remember during our JTF *Brady* Order discussions when a judge cited the cases supporting this rule. I had forgotten them, if I even knew them in the first place! But I was by no means alone in my ignorance in a room full of distinguished prosecutors, judges, and defense counsel. This was quite significant because such disclosure is, by its nature, counterintuitive and very hard for a prosecutor to make in close cases where he or she strongly believes in a defendant’s guilt.⁵⁹ Similarly, the rule that favorable oral information must be disclosed whether or not it is recorded in tangible form is surprising and counterintuitive to some prosecutors who were taught during long witness interviews not to write anything down until the end to avoid documenting too many evolving and inconsistent statements.⁶⁰

Notwithstanding the fact that the New York State District Attorneys Association’s Ethics Handbook instructed prosecutors to use the State’s version of ABA Model

52. *Id.* (category (e)).

53. *See id.* at 3, 7–8, 12–13, 15–16.

54. *Id.* at 16 (emphasis added).

55. *See* Jones, *supra* note 6, at 113–15; *see also* *New Perspectives on Brady: Report of Working Groups*, *supra* note 4, at 1972–77, 2005–06, 2011–13, 2018–22, 2033.

56. *See* ATUL GAWANDE, *THE CHECKLIST MANIFESTO* 32–37 (2009).

57. *See* Jones, *supra* note 6, at 128–29; *New Perspectives on Brady: Report of Working Groups*, *supra* note 4, at 1972–77, 2005–06, 2018–22; N.Y. STATE JUSTICE TASK FORCE, *supra* note 47, at 15–16.

58. *See* N.Y. STATE JUSTICE TASK FORCE, *supra* note 47, at 16; *see also* DiSimone v. Phillips, 461 F.3d 181, 195 (2d Cir. 2006) (noting that “[t]o allow otherwise would be to appoint the fox as henhouse guard”); *People v. Baxley*, 639 N.E.2d 746, 749 (N.Y. 1994) (“[N]ondisclosure cannot be excused merely because the trial prosecutor genuinely disbelieved [the *Brady* information].”).

59. *See* Alafair S. Burke, *Talking About Prosecutors*, 31 CARDOZO L. REV. 2119, 2133–35 (2010).

60. *See* N.Y. STATE JUSTICE TASK FORCE, *supra* note 47, at 16; *United States v. Rodriguez*, 496 F.3d 221, 226 (2d Cir. 2007) (“The obligation to disclose information covered by the *Brady* and *Giglio* rules exists without regard to whether that information has been recorded in tangible form.”); *see, e.g.,* *People v. Bond*, 735 N.E.2d 1279, 1281 (N.Y. 2000).

Rule 3.8(d) as the disclosure rule,⁶¹ and that Formal Opinion 2016-3 of the New York City Bar Association’s Ethics Committee made plain in an extensive opinion that disclosure of favorable information was required “as soon as reasonably practicable” without regard to “materiality,”⁶² there was still confusion as to whether an ethical rule should be incorporated into a “*Brady*” order. Probably the pivotal persuasive argument, the crucial framing of the issue, was the need to clarify for the bench and bar that “*Brady*” is evaluated differently in the pre-trial context than in the post-trial context: The *pre-trial Brady* disclosure rule is whether information is “*favorable*,” whereas the *post-conviction Brady* rule is whether the undisclosed information was material to the outcome of the case.⁶³ It was important to say explicitly that the favorable information test is not just a longstanding ethical rule, but is the clear, easily understood intent of *Brady*, a prophylactic standard designed to ensure fair trials and prevent post-conviction *Brady* violations.⁶⁴ This point is perhaps best illustrated by the memorable oral argument in *Smith v. Cain* where the attorney for the Orleans Parish District Attorney kept arguing, to the evident distress of Justices Scalia, Kennedy, and Sotomayor, that *Brady* didn’t require the disclosure of a prior inconsistent statement because it was not material to the outcome of the case:

Justice Scalia: . . . [S]top fighting as to whether it should be turned over[.] Of course, it should have been turned over. I think the case you’re making [here] is that it wouldn’t have made a difference. . . . [B]ut surely it should have been turned over.

Justice Kennedy: . . . [Y]ou were asked what is—what is the test for when *Brady* material must be turned over. And you said whether or not there’s a reasonable probability . . . that the result would have been different. That’s the test for when there has been a *Brady* violation. You don’t determine your *Brady* obligation by the test for the *Brady* violation. You’re transposing two very different things

Justice Sotomayor: I said there were two prongs to *Brady*. Do you have to turn it over, and, second, does it cause harm. And the first one you said not. That—it is somewhat disconcerting that your office is still answering equivocally on a basic obligation as one that requires you to have turned these materials over . . . whether it caused harm or not.⁶⁵

Third, the *Brady* order notes the following:

The District Attorney and the Assistant responsible for the case have a duty to learn of such favorable information that is known to others acting on the government’s behalf in the case, including the police, and should therefore confer with investigative and prosecutorial personnel who acted in this case and review their and their agencies’ files directly related to the prosecution or investigation of th[e] case.⁶⁶

Eventually, the “duty to learn” and “confer” requirement will become the most important provision of the *Brady* order. It is intentionally constructed to be, as much as possible, a cooperative, multi-stakeholder enterprise. Defense lawyers should be making specific requests all the time: Have you examined the homicide, drug, or

61. See DIST. ATTORNEYS ASS’N OF THE STATE OF N.Y., “THE RIGHT THING”: ETHICAL GUIDELINES FOR PROSECUTORS 12 (2016), <http://www.daasny.com/wp-content/uploads/2016/02/2016-Ethics-Handbook.pdf> [<https://perma.cc/LA4J-8WLU>].

62. N.Y. City Bar Ass’n Comm. on Prof’l Ethics, Formal Op. 2016-3 (2016); accord ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 09-454 (2009).

63. See N.Y. STATE BAR ASS’N, REPORT OF THE TASK FORCE ON CRIMINAL DISCOVERY 58–59 (2015), <http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=54572> [<https://perma.cc/9E4J-VBVQ>].

64. See, e.g., *United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1198–99 (C.D. Cal. 1999); see also Jones, *supra* note 6, at 99–104.

65. Jones, *supra* note 6, at 103 (quoting Transcript of Oral Argument at 49, 51–53, *Smith v. Cain*, 565 U.S. 73 (2012) (No. 10-8145)).

66. N.Y. STATE JUSTICE TASK FORCE, *supra* note 47, at 15.

other agency’s file yet? Have you checked with Victim Services? Have you talked to Officer Jones yet about any favorable evidence? In far too many wrongful conviction cases, the undisclosed *Brady* material was in a police file the prosecutors didn’t examine.⁶⁷

Significantly, in an era where law enforcement is continually employing powerful investigative technologies and collecting huge amounts of data about people, their associations, their social media communications, their proximity to criminal incidents, their movements, their DNA, and their biometric characteristics,⁶⁸ the defense must be very aggressive: Does the prosecution know if the police conducted facial recognition database searches of videos of the incident, whether it be from surveillance cameras or body cameras, to assist in finding witnesses who could provide favorable information, or alternative suspects? Would the prosecution consent, or the judge order, facial recognition database searches of crucial videos,⁶⁹ or information from Automated License Plate Readers (ALPRs) in the area of the criminal offense for this purpose?⁷⁰ Would the prosecution or police consent, or the court order, running probative unidentified fingerprints through the latest version of the national fingerprint database,⁷¹ or running a DNA profile obtained from items law enforcement neglected to test through state or federal DNA databases?⁷² All of these searches could yield decisive exculpatory evidence and they each involve databases and sophisticated technology exclusively in the possession of the state. Pursuant to a *Brady* order, courts should have the power to order such searches, subject to appropriate protective safeguards that avoid inappropriate disclosure of private information or information that could endanger law enforcement officers.⁷³

Similarly, the neighborhood intelligence databases kept by prosecutors or police are likely repositories of favorable information: Does law enforcement have in its database information about “crime drivers” (people suspected of being involved in criminal activity) who could be alternate suspects? Are there people in the area where the offense was committed who arguably have a motive, or a history of committing similar crimes?⁷⁴ Such inquiries, Andrew Ferguson correctly warns, highlight the most difficult *Brady* problem posed by “big data prosecution systems”—they have not been engineered to “flag” *Brady* information for the defense. Consequently, as the use of these systems spreads, law enforcement is increasingly in *constructive* possession of an unstructured trove of favorable information with no robust way to search, find, and retrieve it.⁷⁵

67. See *Causes of Wrongful Convictions*, MID-ATL. INNOCENCE PROJECT, <https://exonerate.org/causes-wrongful-convictions/#Government%20Misconduct> [<https://perma.cc/GM3L-TZN9>] (last visited May 17, 2019).

68. See Andrew Guthrie Ferguson, *Big Data Prosecution & Brady*, 67 UCLA L. REV. (forthcoming 2020) (manuscript at 3) (on file with the author).

69. See *id.* (manuscript at 29–32).

70. See Sarah Brayne, *The Criminal Law and Law Enforcement Implications of Big Data*, 14 ANN. REV. L. & SOC. SCI. 293, 299–301 (2018).

71. See generally Simon A. Cole & Barry C. Scheck, *Fingerprints and Miscarriages of Justice: “Other” Types of Error and a Post-Conviction Right to Database Searching*, 81 ALB. L. REV. 807 (2018) (noting the need for criminal defendants to have access to fingerprint testing both pre- and post-trial).

72. See generally Jason Kreag, *Letting Innocence Suffer: The Need for Defense Access to the Law Enforcement DNA Database*, 36 CARDOZO L. REV. 805, 810 (2015) (arguing “that there is a constitutional right to post-conviction defense-initiated DNA database searches [under] the Due Process Clause”).

73. New York just recently passed a discovery reform bill that tracks the categories of favorable information outlined in the *Brady* order and specifically authorizes judges to issue discovery orders for favorable information. See 2019 N.Y. Sess. Laws Ch. 59 (McKinney); see also Clark, *supra* note 30.

74. See Ferguson, *supra* note 68 (manuscript at 9) (noting offices across the country that utilize these neighborhood intelligence databases).

75. See *id.* (manuscript at 56–69).

Finally, the New York *Brady* order ends by warning that “[o]nly willful and deliberate conduct will constitute a violation of this order or be eligible to result in personal sanctions against a prosecutor.”⁷⁶ In keeping with a “just culture” orientation, the objective of the order is to engage judges in finding out what went wrong with the *Brady* disclosure process, encourage judges to find practical ways to fix it involving multiple stakeholders, and punish only deliberate rule breakers.⁷⁷ One hopes and expects that judges would encourage prosecutors who make untimely disclosure of favorable information covered by the order to inquire into why the problem occurred. Was it a bureaucratic issue involving a law enforcement entity? The district attorney’s office? Or simply human error? Even if the line prosecutor was blameless, the prosecutor’s supervisor should be notified and a written record made of what occurred for the benefit of other judges, the district attorney’s office, police officials, and judicial administrators, so as to avoid future problems.⁷⁸ The defense, of course, should get adjournments (or other requested relief) and should be informed of the court’s views as to why the untimely disclosure occurred and what other action, if any, the judge took. But the most critical part of this process is that judges make inquiries and systematically record what they discover.⁷⁹ Without routine judicial recordkeeping of *Brady* order violations, systemic bottlenecks will not be identified and prosecutors who deliberately break the rules will not be identified or sanctioned.⁸⁰ Defense counsel, of course, must zealously call out all failures to make timely disclosure of favorable information. But it’s the judiciary, in the final analysis, that can get all the stakeholders working together and, when appropriate, sanction bad actors.⁸¹

New York just passed a comprehensive discovery reform statute that will go into effect in January 2020.⁸² The statute is not a substitute for the *Brady* order, but instead contemplates working within the *Brady* order framework.⁸³ Indeed, having the *Brady* order in place undoubtedly helped criminal justice stakeholders in New York finally work out this discovery bill, if only because the absence of an “open file” statute put enormous pressure on individual prosecutors to produce favorable information in a timely fashion without a full-fledged commitment from the entire law enforcement bureaucracy to assist. Importantly, the *Brady* order, working in conjunction with an open file discovery statute, will focus the attention of judges, prosecutors, and defense counsel where it belongs in an era of big data: on all the favorable information in the constructive possession of law enforcement that no one has been able to identify, locate, or retrieve. Statutes that require discovery and *Brady* disclosure are not self-executing. The best way to ensure that all stakeholders work together to make sure favorable information is disclosed, and to avoid the intentional suppression of exculpatory evidence that caused so much damage to so many people in the Michael Morton and Ted Stevens cases, is to have a court system where a *Brady* order is fairly and systematically enforced by judges.⁸⁴

76. N.Y. STATE JUSTICE TASK FORCE, *supra* note 47, at 16.

77. *Id.* at 7–8.

78. See Jones, *supra* note 6, at 129–38.

79. See *id.*

80. See *id.*

81. See *id.* at 87–89. The defense bar in New York is collecting data about the impact of the *Brady* order and one expects an assessment by the Office of Court Administration will also be forthcoming.

82. See 2019 N.Y. Sess. Laws Ch. 59 (McKinney); Clark, *supra* note 30.

83. See 2019 N.Y. Sess. Laws Ch. 59 (McKinney).

84. See Jones, *supra* note 6, at 110–38.

II. POLICE MISCONDUCT DATABASES FOR THE PUBLIC, DEFENDERS, AND THE PROSECUTION

The inability of litigants to see adjudicated findings of misconduct against police officers handed down internally by police departments based on complaints by police personnel or a citizen has long been, in Jonathan Abel’s memorable phrase, “*Brady’s blind spot*.”⁸⁵ In twenty-two states and the District of Columbia, internal findings of misconduct are treated as “confidential” employment information beyond the reach of freedom of information law requests and generally only made available to prosecutors or defense lawyers when a case is about to go to trial.⁸⁶ In fifteen states, police disciplinary records are available on a limited basis, usually arising from suspension, termination, or designated categories of conduct.⁸⁷ Only thirteen states generally make police disciplinary records public, like other public employees, subject only to protections against unnecessary privacy violations that are standard provisions of freedom of information act statutes.⁸⁸

Because ninety-seven percent of cases don’t go to trial,⁸⁹ the full extent of adjudicated findings of police misconduct, as well as the history of civilian complaints against an officer, remains an invisible and dangerous iceberg created by strong police unions.⁹⁰ Tragically, there have been recent shipwrecks, a series of notorious cases where officers with serious hidden histories of misconduct engaged in problematic behavior that resulted in the death of civilians—frequently members of minority communities—or were personally engaged in corruption that led to wrongful convictions.⁹¹ The secrecy that initially enveloped the police misconduct information in

85. Jonathan Abel, *Brady’s Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 779 (2015).

86. See Robert Lewis et al., *Is Police Misconduct a Secret in Your State?*, WNYC NEWS (Oct. 15, 2015), <https://www.wnyc.org/story/police-misconduct-records> [<https://perma.cc/4Q6S-EDDD>] (collecting relevant authority from Alaska, Colorado, Delaware, the District of Columbia, Idaho, Iowa, Kansas, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, South Dakota, Virginia, and Wyoming). See generally *People v. Gissendanner*, 399 N.E.2d 924 (N.Y. 1979) and *Pitchess v. Superior Court*, 522 P.2d 305 (Cal. 1974), for the typical balancing tests judges use in deciding whether to disclose confidential misconduct information when a case is about to go to trial.

87. See Lewis et al., *supra* note 86 (collecting relevant authority from Arkansas, Hawaii, Indiana, Kentucky, Louisiana, Massachusetts, Michigan, New Mexico, Oklahoma, South Carolina, Tennessee, Texas, Vermont, and West Virginia). Given the passage of California Senate Bill 1421, discussed *infra* notes 130–40, California now falls into this “limited basis” category.

88. See Lewis et al., *supra* note 86 (collecting relevant authority from Alabama, Arizona, Connecticut, Florida, Georgia, Maine, Minnesota, North Dakota, Ohio, Utah, Washington, and Wisconsin); *Massive Expansion of Police Misconduct Data Tool in Chicago*, INVISIBLE INST., <http://invisible.institute/press-release/massive-expansion-of-police-misconduct-data-tool-in-chicago> [<https://perma.cc/7TT8-VM7H>] (last visited June 14, 2019) (noting that police disciplinary records in Illinois are public records).

89. NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 14 (2018), <https://www.nacdl.org/trialpenaltyreport> [<https://perma.cc/6R3C-Z6EZ>].

90. See Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 747–59 (2017).

91. Take just three cases, the deaths of Laquan McDonald, Eric Garner, and Tamir Rice. Officer Jason Van Dyke of the Chicago Police Department, who was convicted of second-degree murder in 2018 for shooting McDonald sixteen times without justification, had a long history of misconduct that included both excessive force allegations and racially insensitive conduct. See Rachel Moran, *Police Privacy*, 10 U.C. IRVINE L. REV. (forthcoming 2019) (manuscript at 10). NYPD officer Daniel Pantaleo, who used an improper chokehold that was part of the police activity in 2014 that led to the suffocation and death of Eric Garner in Staten Island, New York, had a history of fourteen prior complaints involving excessive force and abusive behavior, including an adjudicated finding of an improper stop. See Carimah Townes & Jack Jenkins, *EXCLUSIVE DOCUMENTS: The Disturbing Secret History of the NYPD Officer Who Killed Eric Garner*, THINK PROGRESS (Mar. 21, 2017,

these cases—the “deflections, delays, and denials”—exacerbated volatile situations.⁹² It intensified the trauma experienced by families of victims, the public, and other members of law enforcement who felt stereotyped and unfairly under suspicion; it distracted from reasoned public discourse about what are invariably hard cases; and it undermined belief in the legitimacy of the courts.⁹³

But the case for developing police misconduct databases for the primary stakeholders at the beginning of a case, not at the end, does not rest on minimizing the prejudicial impact secrecy can have in volatile cases. On the contrary, the case for developing these databases is that controlled and coordinated disclosure of police misconduct information at the commencement of a prosecution will greatly improve the assessment, investigation, and fair adjudication of cases that pass through the justice system every day. Indeed, the very creation of these databases has generated a “virtuous cycle” of change and cooperation in the jurisdictions where they have developed. Ultimately, the impact of developing public, defense, and prosecution police misconduct databases in tandem will be a major step forward in improving the professionalism of policing in America.

The “Virtuous Cycle” in New York. The “virtuous cycle” is best illustrated by the history of Legal Aid’s “Cop Accountability” database in New York.⁹⁴ The project began in 2015, led brilliantly by Cynthia Conti-Cook (a lawyer with a background in civil rights litigation) and Julie Ciccolini (a data analyst).⁹⁵ By 2016, they had created a database that Legal Aid attorneys could interrogate on their smart phones at first appearance upon learning of the officer who had arrested their clients.⁹⁶ Every day, the following “public” data is collected: any state or federal judicial decision that finds the officer did not tell the truth or engaged in an act of misconduct; all federal

2:09 PM), <https://thinkprogress.org/daniel-pantaleo-records-75833e6168f3> [<https://perma.cc/W7CK-SGKN>]; see also Cynthia H. Conti-Cook, *A New Balance: Weighing Harms of Hiding Police Misconduct Information from the Public*, 22 CUNY L. REV. 148, 171–75 (2019) (arguing that disclosure of the prior misconduct would have focused public attention on systemic issues rather than personalizing blame). And the two police officers involved in the fatal shooting of Tamir Rice, a 12-year-old who was playing with a toy gun at a playground, both had significant histories of misconduct—the shooter, Timothy Loehman, had concealed in his application for employment to the Cleveland Police Department that he had been deemed emotionally unstable and unfit for duty by a department in the Cleveland suburb of Independence, and his more experienced partner, Frank Garmback, was the defendant in a civil rights lawsuit (settled for \$100,000) that was not in his personnel file. See John Caniglia, *Cleveland Paid Out \$100,000 to Woman Involving Excessive Force Lawsuit Against Officer in Tamir Rice Shooting*, CLEV. PLAIN DEALER (Dec. 4, 2014), <http://s.cleveland.com/qZ0pEGF> [<https://perma.cc/76TP-8B8F>]; Christine Mai-Duc, *Cleveland Officer Who Killed Tamir Rice Had Been Deemed Unfit for Duty*, L.A. TIMES (Dec. 3, 2014, 5:38 PM), <https://www.latimes.com/nation/nationnow/la-na-nn-cleveland-tamir-rice-timothy-loehmann-20141203-story.html> [<https://perma.cc/629D-S29P>]; James F. McCarty, *Justice Department Wants Sweeping Changes in Cleveland Police Department; Report Finds “Systemic Deficiencies”*, CLEV. PLAIN DEALER (Dec. 4, 2014), <http://s.cleveland.com/m55mGBR> [<https://perma.cc/GYP8-X8N9>]. These infamous cases are by no means isolated events. For a more expansive list of recent incidents across the country where the officers involved in fatal shootings or police scandals had prior hidden histories of misconduct, see Moran, *supra* (manuscript at 9–13).

92. See Conti-Cook, *supra* note 91, at 158; see also *id.* at 153–75.

93. See generally *id.*

94. See Robert Lewis, *More Defenders Get Access to ‘Bad Cops’ Database*, WNYC NEWS (Nov. 9, 2017), <https://www.wnyc.org/story/more-defenders-get-access-bad-cops-database> [<https://perma.cc/BE57-ZBNS>]; Ali Winston, *Looking for Details on Rogue N.Y. Police Officers? This Database Might Help*, N.Y. TIMES (Mar. 6, 2019), <https://www.nytimes.com/2019/03/06/nyregion/nypd-capstat-legal-aid-society.html> [<https://nyti.ms/2HhR5XV>].

95. See Lewis, *supra* note 94; Winston, *supra* note 94.

96. See Jason Tashea, *Databases Create Access to Police Misconduct Cases and Offer a Handy Tool for Defense Lawyers*, AM. BAR ASS’N J. (Feb. 1, 2016, 3:00 AM), http://www.abajournal.com/magazine/article/databases_create_access_to_police_misconduct_cases_and_offer_a_handy_tool_f [<https://perma.cc/VJ2H-6R9J>]; see also Lewis, *supra* note 94; Winston, *supra* note 94.

civil rights settlements or judgments as posted on PACER; and all newspaper articles mentioning the officer.⁹⁷ Even public information on officer overtime can serve as a valuable source of monitoring information.⁹⁸ In addition to this impressive trove of “public” data, Legal Aid lawyers can access “work product” information about the officers obtained from clients, lawyers, and investigations of the social media sites of the officers.⁹⁹ By 2019, Legal Aid launched a “public” misconduct website using some of the public data from its database.¹⁰⁰

Prosecutors across New York City were stunned by the impact of the Legal Aid database. Legal Aid lawyers, and other defender offices given access to the database, knew much more about the police who arrested their clients than the prosecutors. Accordingly, counsel to New York County District Attorney Cyrus Vance wrote an angry letter to the NYPD, citing the “frustrations” of all four district attorney offices and demanding that all police misconduct data be shared online with prosecutors at the beginning of the case when charges are being determined and bail is being set.¹⁰¹ The letter makes clear that “[t]his is especially important in an age when media outlets and defense providers are creating their own databases of information about police officer discipline: data that, ironically, is often denied to our office by the NYPD itself.”¹⁰²

Even more promising, the campaign to repeal Civil Rights Law 50-a (CRL 50-a), and have police rely, like other public servants, on the privacy protections afforded by New York’s freedom of information law, is gaining momentum.¹⁰³ NYPD

97. See Leon Neyfakh, *The Bad Cop Database*, SLATE (Feb. 13, 2015, 11:43 AM), <https://slate.com/news-and-politics/2015/02/bad-cops-a-new-database-collects-information-about-cop-misconduct-and-provides-it-to-defense-lawyers.html#correction> [<https://perma.cc/6E3T-82LH>]; Tashea, *supra* note 96.

98. See Esha Ray & Graham Rayman, *NYPD Cop Lied About Working Overtime, Got Promotion While Under Investigation: ‘The Disciplinary System is Dysfunctional’*, N.Y. DAILY NEWS (Mar. 16, 2018, 4:00 AM), <https://www.nydailynews.com/new-york/bilks-nypd-uneared-overtime-promoted-article-1.3877314> [<https://perma.cc/4A2P-E55W>] (profiling Sgt. Ruben Duque, whose movement log contradicted his cell phone records that showed calls from his home in Staten Island; all told, Sgt. Duque stole over 130 hours of straight time and approximately \$15,000 of overtime); see also Sarah Ryley & Dareh Gregorian, *EXCLUSIVE: NYPD’s Most-Sued Cop Also Among Top Overtime Earners for Past Two Years*, N.Y. DAILY NEWS (Feb. 17, 2014, 2:30 AM), <https://www.nydailynews.com/new-york/exclusive-nypd-most-sued-top-overtime-earners-article-1.1616649> [<https://perma.cc/74AZ-SDEW>] (profiling Detective Peter Valentin, and noting that nine other officers, who had each been sued seventeen or more times during the past ten years, were in the top fifteen percent of overtime earners in a force of over 33,000).

99. See Tashea, *supra* note 96. As long as defense organizations and prosecutors make sure to protect and keep confidential the database information they collect and curate themselves, it should be protected against disclosure by public record requests or subpoenas from police unions or others. See Abel, *supra* note 85, at 783–87 (discussing techniques police officers have employed to access misconduct databases); see also *Coronado Police Officers Ass’n v. Carroll*, 131 Cal. Rptr. 2d 553, 555–56 (Cal. Ct. App. 2003) (concluding that a public defender’s police officer misconduct file was not subject to disclosure under California’s Public Records Act because the information did not qualify as a public record).

100. See NYC Federal Civil Rights Lawsuit Data, 2015 to June 2018, CAPSTAT, <https://capstat.nyc> [<https://perma.cc/GX36-SMNM>] (last visited Apr. 23, 2019); Winston, *supra* note 94.

101. See Mike Hayes & Kendall Taggart, *The District Attorney Says The NYPD Isn’t Telling Prosecutors Which Cops Have a History of Lying*, BUZZFEED NEWS (June 2, 2018, 5:18 PM), <https://www.buzzfeednews.com/article/mikehayes/nypd-cops-lying-discipline-disrict-attorneys-prosecutors> [<https://perma.cc/3SPY-3STF>]; see also James C. McKinley Jr., *Manhattan District Attorney Demands Access to Police Records*, N.Y. TIMES (July 8, 2018), <https://www.nytimes.com/2018/07/08/nyregion/manhattan-district-attorney-police-records.html> [<https://nyti.ms/2J91F0G>].

102. See Letter from Carey R. Dunne, Gen. Counsel, Manhattan Dist. Attorney’s Office, to Lawrence Byrne, Deputy Comm’r for Legal Matters (May 18, 2018), as reprinted in Hayes & Taggart, *supra* note 101.

103. See Yasmeen Khan, *NYPD Agrees to Reforms on Disciplinary Practices, Including Pushing for Transparency*, WNYC NEWS (Feb. 1, 2019), <https://www.wnyc.org/story/panel-concludes-nypd-must-be-far-more-transparent-how-it-disciplines-officers> [<https://perma.cc/XM5C-QPYK>]; *City Bar Urges Repeal of Civil Rights Law 50-a to Allow Public Disclosure of Police Records Relating to Police Misconduct – Thirty Two Other Organizations Also Support*, N.Y.C. BAR (Apr. 30, 2018), <https://www.nycbar.org/media-listing/media/>

Commissioner O’Neill requested an admittedly quick report from an “independent panel” of distinguished experts to address NYPD disciplinary policies and the repeal of CRL 50-a.¹⁰⁴ The Report found “a fundamental and pervasive lack of transparency into the disciplinary process and about disciplinary outcomes.”¹⁰⁵ It recommended that CRL 50-a be repealed with respect to adjudicated findings of misconduct, and the Police Commissioner wrote an editorial advocating that position.¹⁰⁶ The Report expressed concern that “false statement” cases were not being adequately investigated or prosecuted and recommended renewed efforts to monitor evidentiary rulings in suppression hearings that question an officer’s credibility, applicable findings from civil suits, and referrals from prosecutors.¹⁰⁷

The Report stopped short of recommending that “unsubstantiated” complaints should be treated as public information, as opposed to “unfounded” complaints, which are complaints shown to have no merit. This is a troubling issue. There is a legitimate concern that the public and stakeholders ought to know about officers who generate numerous serious but “unsubstantiated” complaints because that could be a strong indicator of a problem officer. After all, so many “unsubstantiated” complaints come down to an officer’s word versus a civilian’s, and it’s hard for a civilian without professional assistance to meet the preponderance of the evidence standard under those circumstances, or to retrieve prior complaints to establish a pattern of abuse. On the other hand, making “unsubstantiated” complaints public could invite civilians with a bias against an officer, but not proof, to engage in harassment. Yet, the Report did observe that in Chicago the Invisible Institute posted 240,000 police disciplinary records online within a searchable database, and there was “no increase in threats against officers or their families,” an assessment confirmed by the President of the Chicago Fraternal Order of Police.¹⁰⁸ All things considered, given the public distrust of the internal disciplinary system of police departments, it seems best to track and publicly disclose “unsubstantiated” complaints.

In short, even before CRL 50-a is repealed, New York City already has three robustly functioning police misconduct databases in each borough: Legal Aid’s public database; Legal Aid’s work-product database supplemented by additions from local defender offices;¹⁰⁹ and prosecutor work product databases consisting of their own judgments as to officer credibility that is based on information from assistant district attorneys, witnesses, and the comparatively greater access to adjudicated acts of misconduct within police entities than is available to the defense.¹¹⁰ Mechanisms

detail/city-bar-urges-repeal-of-civil-rights-law-50-a-to-allow-public-disclosure-of-police-records-relating-to-police-misconduct [https://perma.cc/UBQ8-UVTS].

104. See MARY JO WHITE ET AL., THE REPORT OF THE INDEPENDENT PANEL ON THE DISCIPLINARY SYSTEM OF THE NEW YORK CITY POLICE DEPARTMENT 1–3 (2019), <https://www.independentpanelreportnypd.net/assets/report.pdf>.

105. See *id.* at 17.

106. See *id.* at 44–46; James O’Neill, Opinion, *Let NYC See Police Records, Now: We Must Reform State Law Keeping Disciplinary Actions Secret*, N.Y. DAILY NEWS (Feb. 7, 2019, 7:10 PM), <https://www.nydailynews.com/opinion/ny-oped-let-nyc-see-police-records-now-20190207-story.html> [https://perma.cc/AV4X-UHYD].

107. See WHITE ET AL., *supra* note 104, at 53–54.

108. See *id.* at 46; see also *id.* at 45.

109. Except for information released to a defender office pursuant to protective orders that forbid distribution outside the defender office, each defender in New York (Bronx Defender, New York Defender, Brooklyn Defender, and the Queens Defender) has access to the Legal Aid work product website and contributes work product data of its own so that officers can be tracked as they change boroughs. See Lewis, *supra* note 94.

110. See George Joseph, *New York City’s DAs Keep Secret Lists of Cops with Questionable Credibility*, GOTHAMIST (Apr. 22, 2019, 9:43 AM), http://gothamist.com/2019/04/22/district_attorney_cop_lists.php [https://perma.cc/6JMK-EHZZ].

for the defense and prosecution to pool resources, share investigative information confidentially, and efficiently identify officers engaged in patterns of misconduct are easy to devise and will become increasingly important when CRL 50-a is repealed.

The “Virtuous Cycle” in Chicago. In Chicago, Jamie Kalven, a journalist for the Invisible Institute, and his colleague Craig Futterman, a University of Chicago Law School professor at the Mandel Legal Aid Clinic, worked together on a number of lawsuits seeking access to police misconduct information that culminated in *Kalven v. City of Chicago*.¹¹¹ The resulting decision provided public access to adjudicated findings going back decades.¹¹² Based on the *Kalven* decision, the Invisible Institute systematically collected publicly available misconduct data on Chicago police officers and used it to create the Citizens Police Data Project.¹¹³ The positive impact of the Invisible Institute database and the informed journalism it engendered cannot be overstated. Jason Van Dyke, the detective who shot Laquan McDonald, had a history of misconduct that should have been made transparent and resulted in discipline or discharge before the shooting.¹¹⁴ Kalven’s articles in *The Intercept*, citing community sources, also helped expose the “massive criminal enterprise” Sergeant Ronald Watts and his team ran from inside the Chicago Police Department.¹¹⁵ For “a tax,” Watts and his team protected drug dealers from police and deliberately focused police efforts on competitors; they ran their own drug trade, and planted evidence and fabricated charges against anyone who got in their way.¹¹⁶ To date, sixty-three people framed by Watts and his cohorts have had a combined eighty-two convictions overturned.¹¹⁷

Most importantly, the model of having an independent journalism entity and an academic institution work together to curate a public police misconduct database has distinct advantage in being able to identify patterns that will generate good scholarship and deepen the understanding of stakeholders and the public about the social context of the disciplinary system. For example, the Invisible Institute team was able to show soon after the database was launched that the rate of discipline for 56,459 complaints in the database was about three percent. More than half of the discipline concerned comparatively less serious behavior (wearing uniforms incorrectly,

111. 7 N.E.3d 741, 742–43 (Ill. App. Ct. 2014); see also Lydialyle Gibson, *Law Prof and Journalist Team Up to Hold Police Accountable for their Actions*, AM. BAR ASS’N J. (Sept. 1, 2016, 4:30 AM), http://www.abajournal.com/magazine/article/craig_futterman_jamie_kalven_chicago_police_accountability [https://perma.cc/NL3G-LZE6]; Jamie Kalven, *Invisible Institute Relaunches the Citizens Police Data Project*, INTERCEPT (Aug. 16, 2018, 9:00 AM), <https://theintercept.com/2018/08/16/invisible-institute-chicago-police-data> [https://perma.cc/634B-XTRQ]; Nissa Rhee, *The Transparency Crusaders*, CHI. MAG. (Feb. 13, 2017), <https://www.chicagomag.com/Chicago-Magazine/March-2017/Why-We-Love-Chicago/The-Transparency-Crusaders> [https://perma.cc/B42S-AY3V].

112. See Gibson, *supra* note 111; Kalven, *supra* note 111.

113. See Gibson, *supra* note 111; Kalven, *supra* note 111; see also CITIZENS POLICE DATA PROJECT, <https://cpdp.co> [https://perma.cc/UBG9-XAP4] (last visited Apr. 24, 2019).

114. See Moran, *supra* note 91 (manuscript at 10).

115. See Jamie Kalven, *Code of Silence: Two Chicago Police Officers Uncovered A Massive Criminal Enterprise Within the Department. Then They Were Hung Out to Dry*, INTERCEPT (Oct. 6, 2016, 9:00 AM), <https://theintercept.com/series/code-of-silence> [https://perma.cc/HES9-V8XD]; see also Jennifer Gonnerman, *How One Woman’s Fight to Save Her Family Helped Lead to a Mass Exoneration*, NEW YORKER (May 21, 2018), <https://www.newyorker.com/magazine/2018/05/28/how-one-womans-fight-to-save-her-family-helped-lead-to-a-mass-exoneration> [https://perma.cc/Q237-E2NR].

116. See Kalven, *supra* note 115; Gonnerman, *supra* note 115.

117. See Christine Hauser, ‘A Stain on the City’: 63 People’s Convictions Tossed in Chicago Police Scandal, N.Y. TIMES (Feb. 13, 2019), <https://www.nytimes.com/2019/02/13/us/chicago-exonerations-dug-sentences.html> [https://nyti.ms/2Eag7GB]; Matt Masterson, *4 More Cleared in Latest Exonerations Tied to Former Chicago Police Sergeant*, WTTW (Feb. 13, 2019, 2:13 PM), <https://news.wttw.com/2019/02/13/4-more-cleared-latest-exonerations-tied-former-chicago-police-sergeant> [https://perma.cc/J8BQ-VVBG].

tardiness, not showing up for work, or insubordination) than for illegal searches, improper seizures, or false statements. Black officers were more likely to be disciplined than white officers and more severely. Complaints by white citizens were more likely to result in discipline. And abusive officers were a small fraction of the force—“[m]any police officers go their whole careers without a single complaint” (the average is one and a half per career). With over 12,000 officers, only ten percent of officers have ten or more complaints.¹¹⁸ Similarly, the Invisible Institute also assisted with, and served as a model for, an ambitious nationwide database just launched by *USA Today* to track the movements of officers who have been sanctioned for misconduct and fired in one jurisdiction but move on to be hired in another.¹¹⁹

In turn, prosecutors in Seattle, Philadelphia, Brooklyn, Houston, Manhattan, St. Louis, and other jurisdictions have begun creating their own police misconduct databases that rely, in part, on public records and “work product” information—social media sites of police, early access (if permitted in the jurisdiction) to ongoing investigations of officers, and a “*Brady list*” of complaints from prosecutors within an office about officers who lied or engaged in some other misconduct.¹²⁰

California Senate Bill 1421 and its Potential to Generate Databases. California, without question, had the worst laws governing the disclosure of adjudicated findings of police misconduct until this year. In California, disclosure was long governed by the *Pitchess v. Superior Court* case and related statutes.¹²¹ Both the prosecution and the defense were precluded from seeing a police officer’s personnel file and any adjudicated findings of misconduct until it was disclosed to a judge for *in camera* inspection, ordinarily just before a case went to trial, to see if there was “good cause” for disclosure.¹²² The information sought about acts of misconduct could not be more than five years old.¹²³ If granted, disclosures under a *Pitchess* motion were done under a protective order.¹²⁴ Upon completion of the case, both the prosecution and defense had to keep the misconduct information secret and were prohibited from releasing it to other lawyers in their respective offices.¹²⁵ Therefore, if the officer in question was involved in another case, yet another *Pitchess* motion had to be made by the defense or prosecution, and the entire *in camera* proceeding had to be repeated; any witnesses who were the sources of the misconduct allegations against the officer had to be contacted again if either side wanted to call them.¹²⁶

The tide turned against the absurdities of the *Pitchess* process, unpopular with the defense bar and prosecutors, after a ground-breaking article in the *Los Angeles Times*

118. See Gibson, *supra* note 111.

119. See James Pilcher et al., *Fired for a Felony, Again for Perjury. Meet the New Police Chief*, USA TODAY (Apr. 24, 2019, 9:15 PM), <https://www.usatoday.com/in-depth/news/investigations/2019/04/24/police-officers-police-chiefs-sheriffs-misconduct-criminal-records-database/2214279002> [<https://perma.cc/4F3R-5RVN>]; see also John Kelly & Mark Nichols, *Search the List of More than 30,000 Police Officers Banned by 44 States*, USA TODAY (Apr. 26, 2019, 2:24 PM), <https://www.usatoday.com/in-depth/news/investigations/2019/04/24/biggest-collection-police-accountability-records-ever-assembled/2299127002> [<https://perma.cc/R6U7-JMF5>].

120. See Joseph, *supra* note 110; Justin George & Eli Hager, *One Way to Deal With Cops Who Lie? Blacklist Them, Some DAs Say*, MARSHALL PROJECT (Jan. 17, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/01/17/one-way-to-deal-with-cops-who-lie-blacklist-them-some-das-say> [<https://perma.cc/5KCY-UKS5>].

121. 522 P.2d 305, 308–09 (Cal. 1974); CAL. EVID. CODE §§ 1043, 1045–1047 (West 2019); CAL. PENAL CODE § 832.7 (West 2017); see also Abel, *supra* note 85, at 762–67; Miguel A. Neri, *Pitchess v. Brady: The Need for Legislative Reform of California’s Confidentiality Protection for Peace-Officer Personnel Information*, 43 MCGEORGE L. REV. 301, 305–15 (2012).

122. See Abel, *supra* note 85, at 762–67; Neri, *supra* note 121, at 305–15.

123. See Neri, *supra* note 121, at 314.

124. See Abel, *supra* note 85, at 802–04.

125. See *id.*

126. See *id.*

about a secret “*Brady* list” kept by the Los Angeles County Sheriff’s Department of three hundred deputies who should not be called as witnesses because of findings of misconduct against them.¹²⁷ The malfeasance documented on the list ranged from a deputy who had put taco sauce on a shirt and falsely claimed it was blood to deputies accused of sexual misconduct.¹²⁸ When the Sheriff’s Department tried to give this *Brady* list to the Los Angeles County District Attorney’s office, the deputies union successfully moved to enjoin the disclosure on the grounds that a *Pitchess* motion was the only way such adjudicated findings of misconduct could be disclosed—even to the prosecution.¹²⁹

In reaction, State Senator Nancy Skinner¹³⁰ successfully sponsored Senate Bill 1421 (SB 1421)¹³¹ that went into effect January 1, 2019.¹³² SB 1421 redefines as “public records” three buckets of previously confidential police records so that this information can now be accessed through California’s robust Public Records Act.¹³³

The first bucket covers records “relating to an incident in which a sustained finding was made . . . of dishonesty . . . relating to the reporting, investigation, or prosecution of a crime, or directly relating to [similar misconduct by another officer,] including, but not limited to, any sustained finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence.”¹³⁴ The second bucket concerns sustained findings that an officer engaged in a “sexual assault involving a member of the public,”¹³⁵ with “sexual assault” being defined as “the commission or attempted initiation of a sexual act with a member of the public by means of force, threat, coercion, extortion, offer of leniency or other official favor.”¹³⁶ Under this definition, “the propositioning for or commission of any sexual act while on duty is considered a sexual assault.”¹³⁷ And the third bucket of information concerns records from incidents where the officer discharged his or her weapon at a person and use-of-force incidents that resulted in death or great bodily injury.¹³⁸ Records from this last bucket are subject to delay during an active criminal investigation by a district attorney or a police agency that can show “the interest in delaying disclosure clearly outweighs the public interest in disclosure.”¹³⁹ This third bucket is directed at

127. See Maya Lau et al., *Inside a Secret 2014 List of Hundreds of L.A. Deputies with Histories of Misconduct*, L.A. TIMES (Dec. 8, 2017, 5:00 AM), <https://www.latimes.com/local/la-me-sheriff-brady-list-20171208-htmistory.html> [<https://perma.cc/X3MB-8Z8A>]; see also Liam Dillon, *California Legislature Passes Major Police Transparency Measures on Internal Investigations and Body Cameras*, L.A. TIMES (Sept. 1, 2018, 3:25 PM), <https://www.latimes.com/politics/la-pol-ca-police-transparency-bill-passes-20180831-story.html> [<https://perma.cc/2PA3-HFR7>].

128. See Lau et al., *supra* note 127.

129. See *id.*; Ass’n for L.A. Deputy Sheriffs v. Superior Court, 221 Cal. Rptr. 3d 51, 448 (Cal. Ct. App. 2017).

130. Senator Skinner was supported by a strong coalition led by the ACLU of Southern California and the California News Publishers Association. See John Diaz, *When California Cops Act Against the Law*, S.F. CHRON. (Feb. 11, 2019, 1:19 PM), <https://www.sfchronicle.com/opinion/diaz/article/When-California-cops-act-against-the-law-13602923.php> [<https://perma.cc/M37R-CXKX>].

131. See *id.*; *California Passes Landmark Police Transparency and Accountability Legislation*, ACLU S. CAL. (Aug. 31, 2018), <https://www.aclusocal.org/en/press-releases/california-passes-landmark-police-transparency-and-accountability-legislation> [<https://perma.cc/H5CA-LHW3>].

132. See Alexander Brand & Christine N. Wood, *Opening Secrets*, L.A. LAW. (Feb. 2019), <https://www.lacba.org/docs/default-source/lal-magazine/2019-test-articles/february2019testarticle.pdf> [<https://perma.cc/M9XV-4298>].

133. See *id.*; ACLU S. CAL., *supra* note 131.

134. CAL. PENAL CODE § 832.7(b)(1)(C) (West 2019).

135. CAL. PENAL CODE § 832.7(b)(1)(B)(i) (West 2019).

136. CAL. PENAL CODE § 832.7(b)(1)(B)(ii) (West 2019).

137. *Id.*

138. CAL. PENAL CODE § 832.7(b)(1)(A)(i), (ii) (West 2019).

139. CAL. PENAL CODE § 832.7(b)(7)(A)(i) (West 2019).

controversial cases where officers are involved in a shooting or the use of great bodily force but do not face any charges as a result.

Most importantly, it should be noted these three buckets of records are pretty big. They include “all investigative reports; photographic, audio and video evidence; transcripts or recordings of interviews; [and] all materials compiled and presented for review to the district attorney or to any person or [adjudicative] body charged with determining whether [an officer should be charged criminally or for violating internal disciplinary rules].”¹⁴⁰

As soon as SB 1421 was passed, the ACLU, in coordination with other entities, filed public record act requests with more than four hundred police agencies for all three buckets of SB 1421 information going back decades.¹⁴¹ News organizations participating in a coalition have filed eleven hundred requests and have covered all fifty-eight counties as of March 28, 2019.¹⁴² The reaction of police unions to SB 1421 has been predictably swift, with unions moving to enjoin disclosure of all past records prior to January 1, 2019.¹⁴³ At least one jurisdiction, Inglewood, California, which had a well-known history of police misconduct, began destroying past records before the law went into effect.¹⁴⁴ So far, the unions have been losing the cases but disclosure has been stayed, with one notable exception, while they appeal.¹⁴⁵ It is clear that the issue will ultimately have to be decided by the California Supreme Court, hopefully before the end of the year.

The key question in the SB 1421 cases is not whether the police officers in the unions had any “vested” privacy right in the misconduct records that would have prevented the legislature from legislating to disclose them if they had not been previously protected by statute, nor whether there were any arguments supporting a “freestanding claim of privacy” preventing disclosure beyond the fact that the records had been previously protected by statute. Counsel for the unions conceded those issues.¹⁴⁶ Nor have the courts been required to balance “the competing public policies of protection of officer privacy interests, on one hand, versus disclosure to the public of potential police misconduct, on the other,” which is plainly a matter for the legislature.¹⁴⁷ Rather, the key question is whether SB 1421 should be classified as a statute

140. CAL. PENAL CODE § 832.7(b)(2) (West 2019); *see also* Brand & Wood, *supra* note 132.

141. *See Access to CA Police Records*, ACLU S. CAL., <https://www.aclusocal.org/en/know-your-rights/access-ca-police-records> [<https://perma.cc/V9DQ-CD7P>] (last visited Apr. 24, 2019).

142. *See* Thomas Peele et al., *Police Accountability: Statewide Media Coalition Pushing Hard to Acquire Police Records*, MERCURY NEWS (Mar. 28, 2019, 11:09 AM), <https://www.mercurynews.com/2019/03/19/police-accountability-statewide-media-coalition-pushing-hard-to-acquire-police-records> [<https://perma.cc/98TX-KV5R>].

143. *See* Annie Ma, *Cops Are Battling Journalists Over California’s New Police Transparency Law*, MOTHER JONES (Feb. 5, 2019), <https://www.motherjones.com/crime-justice/2019/02/california-police-records-transparency-lw> [<https://perma.cc/BC4J-3WSV>].

144. *See* Liam Dillon & Maya Lau, *California Police Unions Are Preparing to Battle New Transparency Law in the Courtroom*, L.A. TIMES (Jan. 9, 2019, 12:05 AM), <https://www.latimes.com/politics/la-pol-ca-police-records-law-challenges-20190109-story.html> [<https://perma.cc/4BYS-8T74>].

145. *See* Thomas Peele & Alex Emslie, *Records Police Unions Tried to Keep Secret Show East Bay Cop Suspended for Filing False Reports*, MERCURY NEWS (Mar. 28, 2019, 11:09 AM), <https://www.mercurynews.com/2019/03/19/records-police-unions-tried-to-keep-secret-show-east-bay-cop-suspended-for-filing-false-reports> [<https://perma.cc/3LL9-L3GE>]; *see also* Ben Poston & Maya Lau, *Secret Records of Police Misconduct and Shootings Must Be Released Under New Law, L.A. Judge Rules*, L.A. TIMES (Feb. 20, 2019, 5:30 PM), <https://www.latimes.com/local/lanow/la-me-police-records-los-angeles-20190219-story.html> [<https://perma.cc/YC9B-HTRB>].

146. *See* Decision Den. Prelim. Injs. at 9–10, *Walnut Creek Police Officers’ Ass’n v. City of Walnut Creek*, No. N19-0109 (Cal. Super. Ct. Feb. 8, 2019), <https://porac.org/wp-content/uploads/9-Decision-Denying-Preliminay-Injunctions.pdf> [<https://perma.cc/HD69-XLKH>].

147. *Id.* at 10.

that has “retroactive” rather than “prospective” application.¹⁴⁸ So far, the courts have ruled the application is prospective: The statute says certain records *now* being “maintained” by police agencies are “public” and subject to disclosure, it doesn’t say records being “maintained now and created only after 2018” are subject to disclosure.¹⁴⁹ Nor are there unfair retroactive consequences to any vested right or reliance interest.¹⁵⁰

Finally, one very promising development with respect to the impact of SB 1421 is the formation of a coalition of competing news organizations seeking to obtain the police misconduct data across the state, and the continually updated tracking of the disclosure of SB 1421 information.¹⁵¹ Hopefully, if the California Supreme Court ultimately rules that public record act requests can move forward under the statute, the coalition of media organizations can work together, or in conjunction with, academic institutions, to curate public police misconduct databases across the state while defenders and prosecutors create their own work-product protected databases.

Benefits and Costs. Much has been written lately in law journals about the potential benefits and costs of disclosing more information about allegations and adjudications of police misconduct, and the great weight of the commentary favors more disclosure.¹⁵² This trend in the legal literature seems to have foreshadowed dramatic developments in California (the passage of SB 1421) and indications that New York may soon take the same path.¹⁵³

Abstractly, it is difficult to make an argument that police officers have any greater right to privacy with respect to acts of misconduct in their personnel files than other professional public employees. The cautionary objections are practical and political: Transparency alone is not a panacea, and “without thinking through the instrumental goals” of individualized transparency of police disciplinary records, “there is no reason to believe that visibility alone will solve complex, institutional, and organizational problems that have plagued police departments for decades.”¹⁵⁴

148. *See id.* at 17.

149. *Id.* at 22–23.

150. *Id.* at 23–31 (“Here, there is nothing whatsoever in SB 1421 that changes the legal consequences for police officers (or police agencies) of their pre-2019 conduct. SB 1421 criminalizes no conduct that was not criminal in 2018. It creates no legal claim or cause of action that did not exist in 2018. . . . It does not even change the procedures by which alleged police misconduct is to be investigated, administratively adjudicated, sued on in court, or criminally prosecuted. . . . So what has changed? Only who can find out the facts and obtain the evidence of incidents of police conduct (whether it is misconduct, as in sexual assaults, or conduct that may be lawful or unlawful, as in officer-involved shootings). Providing information to people who could not previously get it is not changing the substantive legal effect of prior acts.”)

151. *See* Lisa Fernandez, *Interactive Map: Who is Releasing Police Personnel Files Under New Law, and Who Is Not*, KTVU, <http://www.ktvu.com/news/ktvu-local-news/interactive-map-who-is-releasing-police-personnel-files-under-new-law-and-who-is-not> [<https://perma.cc/S2DV-KNQD>] (last updated Apr. 23, 2019); Peele & Emslie, *supra* note 145.

152. Compare the commentary supporting much greater transparency, Abel, *supra* note 85, at 807–08, Conti-Cook, *supra* note 91, at 190–92, Fisk & Richardson, *supra* note 90, at 797–99, Kevin M. Keenan & Samuel Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers’ Bills of Rights*, 14 B.U. PUB. INT. L.J. 185, 242 (2005), Moran, *supra* note 91 (manuscript at 47–48), Rachel Moran, *Ending the Internal Affairs Farce*, 64 BUFF. L. REV. 837, 843–44 (2016), and Katherine J. Bies, Note, *Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct*, 28 STAN. L. & POL’Y REV. 109, 112 (2017), with the literature supporting just a little more transparency, Kate Levine, *Discipline and Policing*, 68 DUKE L.J. 839, 900–05 (2019).

153. *See supra* notes 103–08, 130–40, and accompanying text.

154. Levine, *supra* note 152, at 845.

This is a useful admonition and brings to mind at least five instrumental goals that the development of public, defense, and prosecutor databases of police misconduct information can serve.

First, these databases will go a long way towards ending what is sometimes referred to as “testilying.”¹⁵⁵ By “testilying” I mean the false, talismanic incantation of events that either fit the requirements of Fourth Amendment law (such as suspects dropping contraband, having bulges of certain shapes, or making furtive movements), justify the use of physical force (such as threatening gestures, or sudden movements to pull weapons or use physical force), or even take credit for actions of a fellow officer who doesn’t want to testify.¹⁵⁶ Testilying will diminish not just because the defense or prosecution internal databases will flag suspicious patterns seen by clients, defense lawyers, or district attorneys, but because, with robust police misconduct databases, the officer only has to be caught once.¹⁵⁷ If one defense lawyer, one prosecutor, or one judge catches an officer in an unexplainable, intentional lie, the databases will ensure the officer is impeached with it consistently. Indeed, the most powerful proof of this kind is not merely a clear transcript or court opinion but videotape from a surveillance camera or a body-cam.¹⁵⁸

Secondly, these databases will help the defense bar gather the kind of proof Chief Justice Roberts believes best fits the purposes of the exclusionary rule: “As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.”¹⁵⁹ As Andrew Ferguson points out, the trick is to redesign “the same big data policing technologies built to track movements, actions, and patterns of criminal activity . . . to foster data-driven police accountability.”¹⁶⁰ The model for how this can be done lies with the successful stop and frisk litigation in New York¹⁶¹ and Philadelphia,¹⁶² as well as Section 14141 reports produced by the Civil Rights Division of DOJ during the Obama administration.¹⁶³ The key to the successful litigation in this area has

155. See, e.g., I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835, 835 (2008); Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1040 (1996); Joseph Goldstein, ‘Testilying’ by Police: A Stubborn Problem, N.Y. TIMES (Mar. 18, 2018), <https://www.nytimes.com/2018/03/18/nyregion/testilying-police-perjury-new-york.html> [<https://nyti.ms/2GE3piY>].

156. See Capers, *supra* note 155, at 835–36; Slobogin, *supra* note 155, at 1041–48; Goldstein, *supra* note 155.

157. See Moran, *supra* note 91 (manuscript at 43–44); Joseph Goldstein, *Police ‘Testilying’ Remains a Problem. Here Is How the Criminal Justice System Could Reduce It.*, N.Y. TIMES (Mar. 22, 2018), <https://www.nytimes.com/2018/03/22/nyregion/police-lying-new-york.html> [<https://nyti.ms/2uhLlCQ>].

158. See Goldstein, *supra* note 157.

159. *Herring v. United States*, 555 U.S. 135, 144 (2009); see also *Utah v. Strieff*, 136 S. Ct. 2056, 2063 (2016) (declining to invoke the exclusionary rule given the lack of evidence or data “indicat[ing] that the stop [at issue] was part of any systemic or recurrent police misconduct”).

160. Andrew Guthrie Ferguson, *The Exclusionary Rule in the Age of Blue Data*, 72 VAND. L. REV. 561, 561 (2019).

161. See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 557–63 (S.D.N.Y. 2013) (relying on statistical data to conclude that NYPD search and seizure policies violated the Fourth and Fourteenth Amendments); see also Andrew Gelman et al., *An Analysis of the New York City Police Department’s “Stop-and-Frisk” Policy in the Context of Claims of Racial Bias*, 102 J. AM. STAT. ASS’N 813, 821–22 (2007) (relying on statistical data to conclude that the NYPD seizure policies were racially biased).

162. See *Bailey v. City of Philadelphia*, No. 10-cv-05952-SD (E.D. Pa. June 21, 2011), ECF No. 14 (order approving settlement and consent decree).

163. See CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2–3 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [<https://perma.cc/W7NS-9CSB>] (finding the Ferguson Police Department’s policies to have been “geared toward aggressive enforcement,” with officers “demand[ing] compliance even when they lack[ed] legal authority”); CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 24 (2016), <https://www.justice.gov/crt/file/>

always been getting access to data, or forcing the government to collect it. Put simply, what gathering stop-data did for studies of police action on the New Jersey turnpike¹⁶⁴ and the streets of New York, Philadelphia, and Baltimore, the police misconduct databases could do for studies of wrongful arrests and searches. The data mining expertise exists at many academic institutions. They have the capabilities to do it reliably, efficiently, and for comparatively small costs.¹⁶⁵ The only entry barriers are modest investments in developing primarily defender and public databases. The benefit derived from statistically powerful and reliable challenges to bad arrests and searches is not only protection of the constitutional rights of citizens, but improved supervision and professionalization of police forces.

Third, the police misconduct databases will help identify more wrongful convictions. Just as the Brooklyn Conviction Review Unit reviewed and vacated eight convictions involving Detective Scarcella after discovering his deceptive conduct in the David Ranta case,¹⁶⁶ and just as the Conviction Integrity Unit in Chicago reviewed and vacated eighty-two convictions involving Sergeant Watts after he was convicted by federal authorities of theft of government funds,¹⁶⁷ discovering previously unknown adjudications of dishonesty or misconduct will lead to the discovery of more wrongful convictions in a jurisdiction. The principle is simple. If the officer in question was adjudicated to have engaged in acts of dishonesty on, let's say, September 1, 2000, then all cases where that officer offered material evidence of guilt after that date have to be reviewed, asking whether the newly discovered acts of dishonesty would create a reasonable probability of a new outcome. If so, the conviction should be vacated and, if appropriate, the defendant should be retried or the indictment should be dismissed. It is fair to characterize all such cases that are vacated and dismissed as "wrongful convictions" even though it might not be possible to prove that the defendants are actually innocent.

Fourth, knowing that the police officer who made an arrest has a significant history of misconduct *when charges are being brought, bail is being set, and investigative activities are launched*, will inevitably, as a matter of common sense, improve the assessment of every day cases. Yet, in most jurisdictions, the misconduct data has been hidden for decades and not readily accessible at the beginning of a case.

Fifth, the databases, as the analyses of the Invisible Institute's data demonstrates, have the potential to expose racial disparities in the way citizen complaints against police are adjudicated and the way officers themselves are disciplined. Is it only in Chicago that the complaints of white citizens are more likely to be upheld and that black officers are more likely to be disciplined? We need to know the answers to those questions based on reliable data.

In conclusion, when jurisdictions get three police misconduct databases functioning (public, defense, and prosecution) the opportunities for the defense and prosecution to

883296/download [https://perma.cc/U4CT-49ZN] (finding that the Baltimore Police Department "engages in a pattern or practice of making stops, searches, and arrests in violation of the Fourth and Fourteenth Amendments and Section 14141").

164. See David Kocieniewski & Robert Hanley, *An Inside Story Of Racial Bias And Denial; New Jersey Files Reveal Drama Behind Profiling*, N.Y. TIMES (Dec. 3, 2000), <https://www.nytimes.com/2000/12/03/nyregion/inside-story-racial-bias-denial-new-jersey-files-reveal-drama-behind-profiling.html> [https://nyti.ms/2sRzjno].

165. See Sharad Goel et al., *Combating Police Discrimination in the Age of Big Data*, 20 NEW CRIM. L. REV. 181, 182–89 (2017) (showing how a statistically sophisticated Stop-level Hit Rate (SHR) calculation can be performed on a stop and frisk data set as a way that "big data" methods can strengthen police accountability and improve police practices).

166. See Elizabeth Rosner & Lia Eustachewich, *Disgraced Cop Now Says He Can't Recall Facts in 1998 Murder Case*, N.Y. POST (Mar. 29, 2019, 8:57 PM), <https://nypost.com/2019/03/29/disgraced-cop-now-says-he-cant-recall-facts-in-1998-murder-case> [https://perma.cc/K4KK-WACG].

167. See Hauser, *supra* note 117; Masterson, *supra* note 117.

share “work product” misconduct information or witnesses with each other, informally or formally, increases. This has the potential to increase trust and break down a climate of suspicion between prosecutors, defenders, community groups, and police leadership. The blue wall of silence, the fear good cops have of bad ones, the fear victims have of coming forward, especially when crimes are committed by police, creates profound barriers to successful investigations, prosecutions, and even the presentation of meritorious criminal defense cases. Once the public sees that all three databases are truly functioning—that misconduct by named officers has actually been made public—it becomes easier to believe that the stakeholders will perform their jobs with integrity.

III. POST DECERTIFICATION STATUTES

The development of police misconduct databases, and the passage of legislation providing greater disclosure of misconduct generally, should renew interest in an important and venerable initiative: Police Standards and Training (POST) decertification statutes. Currently, forty-six states have passed POST decertification statutes.¹⁶⁸ The unimpeachable rationale behind such statutes is that just like doctors, lawyers, architects, and other professionals whose work bears so heavily on matters of life and liberty, police officers should have their licenses or certificates revoked for acts of serious misconduct.¹⁶⁹ Currently forty-three of the forty-six POST decertification states report their decertifications of police and correction officers to the National Decertification Index (NDI), which is kept by the International Association of Directors of Law Enforcement Standards and Training (IADLEST).¹⁷⁰ NDI, in turn, is funded by the Bureau of Justice Administration (BJA).¹⁷¹

President Obama’s Task Force on 21st Century Policing strongly endorsed the NDI and urged its expansion to cover all agencies within the United States and its territories but stopped well short of recommendations that Professor Roger Goldman, the leading scholar in this field, has laid out for making the decertification system truly effective.¹⁷² Goldman recommends: (1) The standard for decertification should not be conviction for a felony. Many states make that the standard.¹⁷³ Rather, a model statute for decertification should allow decertification for “gross misconduct,” such as the Missouri statute that allows decertification for “any act while on active duty or under color of law that involves moral turpitude or a reckless disregard for the safety of the public or any person.”¹⁷⁴ (2) Referral for decertification to the state POST entity can be made by someone other than the police chief in the jurisdiction.¹⁷⁵

168. Roger L. Goldman, *NDI: Tracking Interstate Movement of Decertified Police Officers*, POLICE CHIEF ONLINE (Sept. 12, 2018), <http://www.policechiefmagazine.org/ndi-tracking-decertified-police-officers/?ref=5ba4f7e2c3d68dfa72dee2195ad59dcb> [https://perma.cc/X89H-CBTP].

169. See *id.*; Candice Norwood, *Can States Tackle Police Misconduct With Certification Systems?*, ATL. MONTHLY (Apr. 9, 2017), <https://www.theatlantic.com/politics/archive/2017/04/police-misconduct-decertification/522246> [https://perma.cc/TP3T-BLSJ].

170. Goldman, *supra* note 168.

171. *Id.*

172. See PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING 29–30 (2015), <https://ric-zai-inc.com/Publications/cops-p311-pub.pdf> [https://perma.cc/3CPQ-2HAD]; see also Roger Goldman, *Importance of State Law in Police Reform*, 60 ST. LOUIS L.J. 363, 369–86 (2016) [hereinafter Goldman, *Importance of State Law*]; Roger L. Goldman, *A Model Decertification Law*, 32 ST. LOUIS U. PUB. L. REV. 147, 150–55 (2012) [hereinafter Goldman, *Model Decertification Law*].

173. Goldman, *Model Decertification Law*, *supra* note 172, at 150–51.

174. MO. REV. STAT. §§ 590.080.1(3), .070.2(3) (2018); see also Goldman, *Model Decertification Law*, *supra* note 172, at 150–53.

175. Telephone Interview with Roger Goldman, Callis Family Professor of Law Emeritus, Saint Louis University School of Law (Apr. 19, 2019); see MO. REV. STAT. §§ 590.070.2, .070.3, .080.2, .118.2 (2018).

(3) Whether to decertify an officer should not be precluded by the decision of an arbitrator to keep an officer employed over a police chief's decision to terminate, but should instead be made by an independent fact-finding entity based on the merits of a case.¹⁷⁶

Without Goldman's recommendations being adopted and strictly enforced, the decertification system will not be effective.¹⁷⁷ As of 2015, the last published full accounting of national decertifications, two states, Florida and Georgia, accounted for fifty-two percent of all decertifications.¹⁷⁸ This is deeply troubling because the conduct at issue for decertification is, at the least, some form of gross misconduct or a felony conviction.¹⁷⁹ The advent of police misconduct databases for the public, defenders, and prosecutors can finally heighten pressure on local and state police entities to decertify and fire officers who are egregious rule breakers as well as fortify the determination of law enforcement leadership nationally to create an NDI that really works. The recent efforts of *USA Today* to create a national public database that tracks disgraced officers who should already be in the NDI demonstrates the extraordinary potential of this approach. The first big story they covered featured David Cimperman, an officer who was fired for lying in a drug case, convicted of a felony after tampering with police radios in order to make untraceable calls, and disciplined for repeatedly crashing his cruiser but, amazingly, got a job as the Chief of Police in Amsterdam, Ohio, without city leaders in this small town discovering his prior misconduct. Through their investigation, *USA Today* identified thirty-two other similar situations.¹⁸⁰ Hopefully, this is just the beginning and the development of public, prosecution, and defender databases across the country will have a multiplier effect.

IV. NEW YORK'S PROSECUTION COMMISSION

Over the past decade, there has been a debate about whether prosecutorial misconduct is, as one federal appeals court judge declared, "epidemic,"¹⁸¹ or, as the National District Attorneys Association has often responded, "episodic."¹⁸² Framing the question that way has never been useful because prosecutorial misconduct is certainly more than "episodic" and there has never been any systematic data collection that would permit a definitive answer as to its prevalence, much less as to whether it is an "epidemic."¹⁸³ Cutting to the heart of the issue, New York has now attempted to

176. Telephone Interview with Roger Goldman, Callis Family Professor of Law Emeritus, Saint Louis University School of Law (Apr. 19, 2019). Generally, states have adopted three different positions regarding this issue: (1) POST cannot decertify if an arbitrator reverses the termination decision. *See, e.g.*, WASH. REV. CODE §§ 43.101.105, .155, .380(3) (2019). (2) POST is not bound by an arbitrator's decision and is able to decertify. *See* ARIZ. REV. STAT. ANN. § 41-1822 (2019); KAN. STAT. ANN. § 74-5616 (2019); MO. REV. STAT. §§ 590.070, .080, .090 (2018); VT. STAT. ANN. tit. 20, § 2355 (2019). (3) POST is unable to decertify the officer if the arbitrator finds the misconduct in question did not occur, but is free to decertify the officer if the arbitrator finds the misconduct *did* occur but that termination is not an appropriate penalty. *See* FLA. STAT. § 943.1395 (2019).

177. *See* sources cited *supra* notes 172–73, 175–76; *see also* Roger L. Goldman, Opinion, *Rogue Cops Should Not Be Recycled from One Police Department to the Next*, GUARDIAN (May 20, 2015, 7:15 AM), <https://www.theguardian.com/commentisfree/2015/may/20/rogue-cops-should-not-be-recycled-from-one-police-department-to-the-next> [<https://perma.cc/H3RN-MM8R>].

178. *See* Matthew J. Hickman, *POST Agency Certification Practices*, 2015, 3 (Apr. 5, 2016) (unpublished working paper) (on file with the author).

179. *See supra* notes 173–74 and accompanying text.

180. *See* sources cited *supra*, note 119.

181. *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, C.J., dissenting from denial of rehearing en banc) ("There is an epidemic of *Brady* violations abroad in the land."); *see* Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. viii (2015).

182. *See* Green & Yaroshefsky, *supra* note 8, at 59–60.

183. *See id.* at 59–70, 86–87 & n.201.

create a multi-stakeholder institution that comprehensively assesses prosecutorial misconduct as a system issue and makes its findings public in a responsible fashion.¹⁸⁴

In August 2018, following close on the heels of New York's implementation of its *Brady* order rule, Governor Andrew Cuomo signed a bill creating the nation's first state-wide commission aimed at addressing prosecutorial misconduct.¹⁸⁵ The bill setting up the commission arose organically from distress on both sides of the political aisle about unchecked prosecutorial misconduct. It was sponsored in the Senate by John A. DeFrancisco, a Republican, and in the Assembly by N. Nick Perry, a Brooklyn Democrat.¹⁸⁶ The strong bipartisan support and sponsorship the bill garnered from lawmakers across New York made it a rarity in the predictably partisan atmosphere of Albany, and its success is a testament to the current bipartisan consensus that it is time to systematically and transparently address misconduct by prosecutors.¹⁸⁷

The commission's structure is based on New York's admirable and successful effort to establish a standalone commission to regulate the conduct of judges, and its purpose is aimed not merely at punishing law breaking by prosecutors, but also fundamentally changing the "win-at-all-costs mentality" that sometimes plagues their offices.¹⁸⁸ It will be comprised of eleven experienced criminal law practitioners, endowed with broad powers to hold hearings, compel witnesses to testify, issue subpoenas, and request any records it deems relevant in order to investigate complaints and "determine whether prosecutors have engaged in unprofessional, unethical, or unlawful conduct."¹⁸⁹

A few specific features of the commission warrant emphasis. Even if no individual prosecutor is ever sanctioned by the commission, these features will nonetheless ensure that the commission plays a pivotal role in promoting transparency, cooperative action by multiple stakeholders, and public confidence in the integrity of our system. To start with, the law requires the eleven commission members to be comprised in nearly equal parts of experienced criminal defense practitioners, current, former, or retired prosecutors, and retired judges with public defense or prosecutorial backgrounds (as well as one academic "with significant criminal law experience").¹⁹⁰ In order for the commission to exercise many of its powers, the concurrence of at least six of its members is necessary, meaning that the very workings of the commission require and embody a cooperative, all stakeholder approach to criminal justice reform.¹⁹¹

184. See Clyde Rastetter, Note, *The New York Prosecutorial Conduct Commission and the Dawn of a New Era of Reform for Prosecutors*, 41 CARDOZO L. REV. DE NOVO (forthcoming 2019) (manuscript at 29–34); Andrew Strickler, *Amid Pushback, NY Bolsters New Tool to Police Prosecutors*, LAW360 (Apr. 7, 2019, 8:02 PM), <https://www.law360.com/articles/1146986> [<https://perma.cc/8D6S-HUDM>].

185. *Governor Cuomo Signs Legislation to Establish Nation's First Commission on Prosecutorial Conduct*, GOVERNOR ANDREW M. CUOMO (Aug. 20, 2018), <https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-establish-nations-first-commission-prosecutorial-conduct> [<https://perma.cc/FV9D-EFJC>]. The legislation was subsequently amended to address concerns about its constitutionality and reauthorized by Governor Cuomo in March of 2019. See Jan Ransom & Ashley Southall, *Prosecutors Sometimes Behave Badly. Now They May Be Held to Account.*, N.Y. TIMES (Apr. 5, 2019), <https://www.nytimes.com/2019/04/05/nyregion/ny-prosecutors-cuomo.html> [<https://nyti.ms/2D1hFBG>].

186. See Jesse McKinley, *A New Panel Can Investigate Prosecutors. They Plan to Sue to Block It.*, N.Y. TIMES (Aug. 23, 2018), <https://www.nytimes.com/2018/08/23/nyregion/cuomo-prosecutors-oversight-commission.html> [<https://nyti.ms/2o3hQV1>].

187. See *id.*; Strickler, *supra* note 184 (noting the "rare degree of bipartisan support" behind the bill).

188. Editorial, *Prosecutors Need a Watchdog*, N.Y. TIMES (Aug. 14, 2018), <https://www.nytimes.com/2018/08/14/opinion/new-york-prosecutors-cuomo-district-attorneys-watchdog.html> [<https://nyti.ms/2MLjshg>].

189. See Rastetter, *supra* note 184 (manuscript at 30); N.Y. JUD. LAW §§ 499-a, -c, -d (McKinney 2019).

190. N.Y. JUD. LAW § 499-c(1) (McKinney 2019).

191. *Id.* § 499-c(6); see also Ellen Yaroshfsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 UNIV. D.C. L. REV. 275, 297 (2004) ("However configured, a system of highly regarded

Secondly, unlike most state disciplinary proceedings where “secrecy is the hallmark,” and whose deterrent effect is therefore inhibited,¹⁹² records of the commission’s proceedings and its findings are required to be made publicly available upon completion of an investigation where it determines that a prosecutor should be admonished, censured, or removed from office for cause.¹⁹³ This will help ensure that any discipline meted out by the commission will actually serve as a real deterrent to other prosecutors from engaging in misconduct, and that its process is transparent to all stakeholders involved.¹⁹⁴

Finally, and perhaps most importantly, the commission’s duties include reporting annually “to the governor, the legislature and the chief judge of the court of appeals, with respect to proceedings which have been finally determined by the commission.”¹⁹⁵ These reports may also include recommendations to the legislature and the executive based on what it has uncovered during the course of its investigations, regardless of whether or not any sanction was issued.¹⁹⁶ In many ways, this feature is the commission’s saving grace in terms of a systems-wide, all stakeholders approach to transparent criminal justice reform, as it allows for the commission’s proceedings to continually spur system reform even if no individual prosecutors are ultimately sanctioned.

The District Attorneys Association of the State of New York (DAASNY) has moved to enjoin implementation of the commission on state constitutional grounds, primarily putting forth separation of powers arguments.¹⁹⁷ Without making a judgment about the merits of their arguments, one hopes whether or not DAASNY is successful, it would ultimately support a statewide all stakeholder “system” approach that is the objective of many who support the commission. The next project should be a similar all stakeholder “system” approach to the assessment of the criminal defense function.

V. ETHICAL RULES FOR PROSECUTORS, DEFENSE LAWYERS, AND JUDGES TO HELP FORENSIC SCIENCE SERVICE PROVIDERS PROTECT THE INTEGRITY OF FORENSIC SCIENCE

The 2009 National Academy of Sciences Report, *Strengthening Forensic Science in the United States: A Path Forward* (“NAS Report”) recommended the creation of a national code of ethics for all of the forensic science disciplines and encouraged professional forensic science associations to align their respective codes with the national code.¹⁹⁸ In 2016, in an effort to respond to the NAS Report and build on the work of the ASCLD/LAB Guiding Principles of Professional Responsibility, the National Commission on Forensic Science developed a “National Code of Professional

professionals independent of prosecutors’ offices is essential to a workable system of accountability. Only such a commission can assume the mantle of authority and engender the respect necessary to undertake such a task. To be a serious effort, it should be one of peer review by experienced criminal justice professionals with the power to sanction prosecutors who engage in misconduct.”)

192. Yaroshefsky, *supra* note 191, at 297.

193. N.Y. JUD. LAW § 499-f(7) (McKinney 2019).

194. *See* Yaroshefsky, *supra* note 191, at 297 (emphasizing that “[i]f discipline is to serve as a deterrent to prosecutorial misconduct, the process and its results cannot be secret”).

195. N.Y. JUD. LAW § 499-d(4) (McKinney 2019).

196. *See id.*

197. *See* Verified Am. Compl. for Declaratory and Injunctive Relief, *Soares v. New York*, No. 906409-18 (N.Y. Sup. Ct. Apr. 1, 2019), NYSCEF Doc. No. 33; Pls.’ Mem. of Law in Supp. of their Mot. for Prelim. Inj., *Soares v. New York*, No. 906409-18 (N.Y. Sup. Ct. Apr. 1, 2019), NYSCEF Doc. No. 53.

198. COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCI. CMTY., NAT’L RESEARCH COUNCIL, *STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD* 26, 214 (2009).

Responsibility for Forensic Science and Forensic Medicine Service Providers.”¹⁹⁹ Most notably and thoughtfully, the Texas Forensic Science Commission adopted its own code, modeled on the approach of the National Commission, that governs crime laboratories in Texas.²⁰⁰ However, all of these admirable efforts have encountered a stumbling block when it comes to enforcement: developing a mechanism that *requires* lawyers (prosecutors, criminal defense lawyers, civil practitioners, and judges) to work in tandem and play by the same rules.

This problem is best illustrated by what’s known as the “duty to correct and notify.”²⁰¹ Rule 16 in the National Commission Code, which is specifically delegated to laboratory management, requires the following:

Appropriately inform affected recipients (either directly or through proper management channels) of all nonconformities or breaches of law or professional standards that adversely affect a previously issued report or testimony and make reasonable efforts to inform all relevant stakeholders, including affected professional and legal parties, victim(s) and defendant(s).²⁰²

The nonconformities and breaches of law or professional standards can include everything from laboratory personnel not running controls, “dry labbing” (not running the tests at all), and failing to disclose conflicting results, to “change of science” situations where all tests were performed as required but the underlying science is no longer considered valid or the analyst’s testimony is now considered to have exceeded the scientific limitations of the discipline.²⁰³

What should happen in these situations is easy enough to outline. The affected parties are notified and ultimately a hearing is held to see if the non-conformity or breach of ethical or professional standards is material to the outcome of the case. The great difficulty, however, as forensic science service providers properly complain, is the absence of any direct and specific ethical requirement for prosecutors, defense counsel, judges, and civil counsel to provide substantial assistance in this onerous, labor-intensive process. The cases where errors arise can be very old; the clients, the transcripts, the original lawyers, and the files of each stakeholder can be hard to find. Under ordinary circumstances, no one stakeholder in the system can effectively enforce and administer the duty to correct and notify in such cases. Each stakeholder must take on the responsibility of finding the relevant records, appointing, if necessary, new lawyers to review the matter and consult with the affected party. This

199. See NAT’L COMM’N ON FORENSIC SCI., RECOMMENDATION TO THE ATTORNEY GENERAL NATIONAL CODE OF PROFESSIONAL RESPONSIBILITY FOR FORENSIC SCIENCE AND FORENSIC MEDICINE SERVICE PROVIDERS 1–4 (2016); COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCI. CMTY., NAT’L RESEARCH COUNCIL, *supra* note 198, at 214. The Attorney General adopted several of the National Commission on Forensic Science’s recommendations on September 6, 2016. See Mem. from Loretta E. Lynch, Attorney Gen. of the U.S., to Heads of Dep’t Components, Dep’t of Justice (Sept. 6, 2016), <https://www.justice.gov/opa/file/891366/download> [<https://perma.cc/8MWD-CPEW>].

200. See 37 TEX. ADMIN. CODE § 651.219 (2019); see also NAT’L COMM’N ON FORENSIC SCI., *supra* note 199.

201. See *Misapplication of Forensic Science*, INNOCENCE PROJECT, <https://www.innocenceproject.org/causes/misapplication-forensic-science/> [<https://perma.cc/8NMX-SLSE>] (last visited May 14, 2019).

202. NAT’L COMM’N ON FORENSIC SCI., *supra* note 199, at 4. The Code defines “nonconformities” as “any aspect of laboratory work that does not conform to its established procedures.” *Id.*

Rule 8 of the Texas Code, which is also directed at laboratory management, is similar, requiring a laboratory policy that “explicitly address[es] how to inform potentially affected recipients of any non-conformances or breaches of law or ethical standards that may adversely affect either a current case or a previously issued report or testimony.” 37 TEX. ADMIN. CODE § 651.219(c)(8) (2019).

203. See, e.g., Jordan Michael Smith, *FORGET CSI: A Disaster Is Happening in America’s Crime Labs*, BUS. INSIDER (Apr. 30, 2014, 1:00 PM), <https://www.businessinsider.com/forensic-csi-crime-labs-disaster-2014-4> [<https://perma.cc/S2DE-EKMQ>] (collecting instances of misconduct in forensic laboratories across the country).

should apply whether the affected party is a criminal defendant, a victim of a crime, or a civil litigant. The best mechanisms for making this happen are bound to differ to some degree in local, state, and federal cases, but developing a clear set of ethical rules for each stakeholder—lawyers, judges, and forensic science service providers—that requires them to work together to enforce the duty to correct and notify is the best way the integrity of forensic science evidence can be preserved over time.

Two examples of how this process can work involved reviews of “composite bullet lead analysis” and microscopic hair analysis conducted by FBI examiners. In both instances, the FBI acknowledged their analysts had testified beyond the limits of science in many cases and entered into a formal agreement with the Department of Justice (DOJ), the Innocence Project, and the National Association of Criminal Defense Lawyers (NACDL).²⁰⁴ Processes were set up to find the relevant files, purchase transcripts, notify local prosecutors and judges, find the original lawyers or appoint new counsel, and review testimony to see, based on pre-ordained standards, whether agreement could be reached that the FBI’s examiners had testified beyond the limits of science.²⁰⁵ In the hair cases, the FBI agreed to perform mitochondrial DNA testing on the original hairs in question if they could be found.²⁰⁶ The DOJ also agreed to waive all objections based on procedural bars.²⁰⁷ Similar “hair reviews” are being attempted in different states.²⁰⁸ An efficient and well run “hair review” is being done in Texas by its outstanding Forensic Science Commission which has, as previously noted, a code of ethics, and has even conducted “duty to correct and notify” reviews of errors in DNA mixture interpretation.²⁰⁹

There are other areas covered by codes of ethics for forensic science service providers that are designed to protect the integrity of forensic science analysis and impartial, science based testimony. Developing explicit corresponding rules for lawyers and judges to prevent them from inducing forensic service providers to violate their code of ethics would be very helpful. A multi-disciplinary working group and advisory committee convened by the Criminal Justice Section of the American Bar Association is currently working on these matters.²¹⁰ I am hopeful this entity will make progress on this complex, but important, issue in the months ahead.

204. See *Three Freed, and FBI Continues to Review Ballistic Cases*, INNOCENCE PROJECT, <https://www.innocenceproject.org/three-freed-and-fbi-continues-to-review-ballistic-cases/> [<https://perma.cc/J4YW-3R3N>] (last visited May 14, 2019) [hereinafter INNOCENCE PROJECT, *Ballistic Cases Review*]; *Innocence Project and NACDL Announce Historic Partnership with the FBI and Department of Justice on Microscopic Hair Analysis Cases*, INNOCENCE PROJECT, <https://www.innocenceproject.org/innocence-project-and-nacdl-announce-historic-partnership-with-the-fbi-and-department-of-justice-on-microscopic-hair-analysis-cases/> [<https://perma.cc/8KKA-NAF6>] (last visited May 14, 2019) [hereinafter INNOCENCE PROJECT, *Microscopic Hair Cases Review*].

205. See Paul C. Giannelli, *Comparative Bullet Lead Analysis: An Update*, 23 CRIM. JUST. 24, 27 (2008); *Microscopic Hair Comparison Review Project*, NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, <https://www.nacdl.org/haircomparison/> [<https://perma.cc/T5UY-XCWG>] (last visited May 14, 2019).

206. See INNOCENCE PROJECT, *Microscopic Hair Cases Review*, *supra* note 204.

207. See *id.*

208. See *Microscopic Hair Comparison Review Project*, *supra* note 205.

209. See *Statement Regarding Texas Hair Microscopy Review*, TEX. FORENSIC SCI. COMM’N, <http://www.txcourts.gov/media/1440418/statement-re-texas-hair-microscopy-review.pdf> [<https://perma.cc/C8EV-9ERN>] (last visited May 14, 2019); Letter from Vincent J.M. Di Maio, Presiding Officer, Tex. Forensic Sci. Comm’n, to Tex. Criminal Justice Cmty. (Aug. 21, 2015), <http://www.txcourts.gov/media/1440411/letter-re-unintended-effects-of-fbi-database-corrections-on-assessment-of-dna-mixture-interpretation-in-texas-20150821.pdf> [<https://perma.cc/64GG-X7ZM>].

210. See *Task Forces*, AM. BAR ASS’N (Apr. 26, 2019), https://www.americanbar.org/groups/criminal_justice/committees/taskforces/ [<https://perma.cc/27CD-R5AE>].

VI. THREE NEW DEVELOPMENTS IN THE WORK OF CONVICTION INTEGRITY UNITS

I have written extensively on the development of Conviction Integrity Units (CIUs), divisions within prosecutorial offices that work to prevent, identify, and rectify wrongful convictions.²¹¹ I will avoid repeating what I've already said except to note that the initiatives discussed in this Preface follow the same principles that should guide good CIUs: cooperation among multiple stakeholders, creating an "interests of justice" orientation to fact evaluation that avoids focus on procedural bars, designing mechanisms for effective sharing of data that breaks down an adversarial framework, use of checklists, investigative protocols designed to avoid cognitive bias, and a commitment to learning from error.²¹² There are, however, three new developments in this area worth noting.

First, according to the National Registry of Exonerations, there are now forty-four CIUs, close to a three-fold increase from five years earlier, and an increase of eleven since 2017. There is also encouraging evidence that cooperation between innocence organizations (IOs) and CIUs has been remarkably successful.²¹³ In 2018, IOs and CIUs coordinated to produce forty-five exonerations; IOs set a record with involvement in eighty-six exonerations, and CIUs were involved in fifty-eight.²¹⁴ Together, the work of IOs and CIUs led to ninety-nine exonerations, two-thirds of all exonerations that occurred last year.²¹⁵ The Registry has been tracking the development of CIUs since their inception and has not hesitated to point out that a number of them were little more than "window dressing" and unlikely to produce exonerations.²¹⁶ But the proliferation of new CIUs this year, particularly those begun by self-described "progressive" prosecutors, has given the Registry reason to believe it's a positive trend that will continue.²¹⁷

Secondly, there are now efforts underway to form statewide CIUs with the assistance of state Attorney General offices.²¹⁸ This is a helpful development because it provides a way that very small offices can review cases and adopt best practices to prevent wrongful convictions.²¹⁹ There are approximately twenty-three hundred prosecutorial offices in the United States and the forty-four CIUs are primarily located in major metropolitan areas.²²⁰ The most developed and promising statewide plan was just announced in New Jersey after a comprehensive study co-chaired by former New Jersey Supreme Court Justice Virginia Long and former United States Attorney Paul Fishman.²²¹

211. See generally Barry C. Scheck, *Conviction Integrity Units Revisited*, 14 OHIO ST. J. CRIM. L. 705 (2017); Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 CARDOZO L. REV. 2215 (2010).

212. See Scheck, *Conviction Integrity Units Revisited*, *supra* note 211, at 727, 749–50.

213. See NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2018, at 2, 12 (2019), <http://www.law.umich.edu/special/exoneration/Documents/Exonerations%20in%202018.pdf> [<https://perma.cc/L2BM-7MEX>].

214. *Id.* at 2.

215. *Id.*

216. See NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2016, at 15 (2017), http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2016.pdf [<https://perma.cc/NFF4-BG2F>].

217. See NAT'L REGISTRY OF EXONERATIONS, *supra* note 213, at 12–15.

218. See, e.g., Press Release, State of N.J. Office of the Attorney Gen., AG Grewal Announces Creation of Statewide Conviction Review Unit and Statewide Cold Case Network (Apr. 11, 2019), <https://www.nj.gov/oag/newsreleases19/pr20190411a.html> [<https://perma.cc/HBD3-P3JL>].

219. See JOHN HOLLWAY, CONVICTION REVIEW UNITS: A NATIONAL PERSPECTIVE 21–22 (2016).

220. See NAT'L REGISTRY OF EXONERATIONS, *supra* note 213, at 14–15.

221. See VIRGINIA LONG & PAUL J. FISHMAN, REPORT TO THE HONORABLE GURBIR S. GREWAL, ATTORNEY GENERAL OF NEW JERSEY: PROPOSAL FOR A STATEWIDE CONVICTION REVIEW UNIT 5–7 (2019); Press Release, State of N.J. Office of the Attorney Gen., *supra* note 218.

Finally, some CIUs have expanded their mission to include reconsideration of cases involving excessive sentences.²²² Specifically, as suggested in *Twenty-One Principles for Twenty-First-Century Prosecutors*, CIUs should create “a process for reviewing and supporting clemency and pardon requests, as well as other relief for long sentences that raise concerns about proportional punishment and fairness, or that are being served by individuals who are elderly or ill and no longer pose a danger to the community.”²²³ Rachel Barkow’s new book, *Prisoners of Politics: Breaking the Cycle of Mass Incarceration*, provides powerful arguments and solid data to support this development. Barkow points out that parole and clemency should be viewed as “back-end checks” on earlier prosecutorial decisions about charging and sentencing recommendations in light of how people learn, change, and develop.²²⁴ Just as administrative agencies routinely revisit their own policies and procedures when faced with new information, prosecutors and courts should revisit long sentences. Most significantly, there is solid data showing that “long sentences themselves become criminogenic because of the barriers to reentry they create.”²²⁵

CONCLUSION: A MARSHALL PLAN FOR INDIGENT DEFENSE

All of the initiatives to protect the integrity of our convictions discussed in this Preface presume, with some justification, that prosecutors and judges have, or can fairly easily obtain, the resources to adopt these changes if they are willing. The same presumption does not apply to those who defend the indigent and it’s irresponsible not to say so forcefully. The initiatives proposed here would have a much greater chance of succeeding if the defense function approached adequate funding. Indeed, the agendas of progressive prosecutors—efforts to reform bail, responsibly accelerate re-entry, provide for early and responsible termination of parole, and diversion of the mentally ill and substance abusers out of the criminal justice system to better outcomes—will all have a much better chance of success if defenders are capable partners in the process.

Between sixty to ninety percent of defendants charged in serious criminal cases require, because they are indigent, a state provided lawyer.²²⁶ But, as John Pfaff persuasively points out, state and local governments underfund these programs, spending about two percent of what they spend on the totality of criminal justice activities on such programs, which is thirty percent less than they spend on state prosecutors. That point is concerning because prosecutors don’t have to pay much for investigative services, which are primarily provided by police, and they have comparatively greater control over their caseloads than defenders because they can, to some degree, regulate it by dropping minor cases. Although real spending on indigent defense has gone up over the 1990s and 2000s by roughly four percent, it didn’t keep pace with a forty percent increase in felony case filings during this time frame. So indigent

222. See POST-CONVICTION JUSTICE BUREAU, <http://www.brooklynda.org/post-conviction-justice-bureau/> [<https://perma.cc/6Y9L-YR59>] (last visited May 14, 2019); Eli Hager, *The DAs Who Want to Set the Guilty Free*, MARSHALL PROJECT (Mar. 20, 2018, 6:00 AM), <https://www.themarshallproject.org/2018/03/20/the-das-who-want-to-set-the-guilty-free> [<https://perma.cc/UP36-NUJ3>].

223. See EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 327 (2019).

224. See RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 147 (2019).

225. *Id.* at 147–48.

226. Tina Peng, Opinion, *I’m a Public Defender. It’s Impossible for Me to do a Good Job Representing My Clients.*, WASH. POST (Sept. 3, 2015), https://www.washingtonpost.com/opinions/our-public-defender-system-isnt-just-broken-its-unconstitutional/2015/09/03/aadf2b6c-519b-11e5-9812-92d5948a40f8_story.html [<https://perma.cc/M6HR-5BQN>].

defense is continually in crisis whereas prosecutor caseloads remain stable over time.²²⁷

What's worse, the effect of mandatory minimums and sentencing guidelines have not only created a justly condemned problem of "mass incarceration," it has produced a "trial penalty" which dramatically reduces trials, unfairly pressures the innocent to plead guilty, and undermines the cleansing benefits of an adversary system where the defense can expose bad science, corrupt police, and overreaching prosecutors.²²⁸

For all these reasons and more, the proposal John Pfaff made three years ago to create a Marshall Plan for indigent defense deserves a lot more attention than it has received from criminal justice reformers. As Pfaff points out, an annual grant of four billion dollars to state and local governments would be three times that currently spent on indigent defense, "especially if the grant was tied to pre-existing spending by local governments so they couldn't [reduce] their own spending one-for-one with the grant."²²⁹ Better still, federal spending should provide incentives for defender systems to provide "holistic" defense, an approach where "public defenders work in interdisciplinary teams to address both the immediate case and the underlying life circumstances—such as drug addiction, mental illness, or family or housing instability—that [complicate] client contact with the criminal justice system."²³⁰ A recent extensive and thorough evaluation of the effect of holistic defense on criminal justice outcomes over a ten-year period in the Bronx produced exciting findings. While holistic defense did not affect conviction rates, it decreased the likelihood of a custodial sentence by over fifteen percent and reduced the anticipated sentence length by almost twenty-five percent. During the study period, holistic defense resulted in 1.1 million fewer days of custodial punishment.²³¹

For those who want to protect the integrity of our convictions, and truly hold criminal justice stakeholders accountable in an era of criminal justice reform, a Marshall Plan for indigent defense should be near the top of the list when designing a Criminal Justice Reform Act in 2021.

227. See JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 137–38 (2017).

228. See NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 89, at 7, 9–10, 61.

229. See John Pfaff, Opinion, *A Mockery of Justice for the Poor*, N.Y. TIMES (Apr. 29, 2016), <https://www.nytimes.com/2016/04/30/opinion/a-mockery-of-justice-for-the-poor.html> [<https://nyti.ms/1TaXwqx>].

230. See James M. Anderson, *The Effects of Holistic Defense on Criminal Justice Outcomes*, 132 HARV. L. REV. 819, 820 (2019).

231. *Id.* at 822–23.