Defending the Public: Police Accountability in the Courtroom

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Politicians across the country, seeking to address a growing sense of political and social alienation from communities of color and their allies, have scrambled to introduce reforms to police departments and police investigative agencies that promote accountability and transparency. Body cameras,[1] special prosecutors,[2] inspectors general,[3] and new internal accountability procedures[4] have all been broadcasted as political efforts towards reform. This Article addresses what impact these political maneuvers—which all work within the same executive branch as the police—have without routine judicial scrutiny of

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[1] *See* PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 31 (2015), http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf.

[2] *See Governor Cuomo Signs Executive Order Appointing NYS Attorney General as Special Prosecutor in Cases Where Law Enforcement Officers Are Involved in Deaths of Civilians*, N.Y. STATE, https://www.governor.ny.gov/news/governor-cuomo-signs-executive-order-appointing-nys-attorney-general-special-prosecutor-cases (last visited Apr. 22, 2016).

[3] *See About NYPD Inspector General*, NYC, http://www.nyc.gov/html/oignypd/pages/about/about.shtml (last visited Jan. 7, 2016).

[4] The New York Police Department (NYPD) announced its Risk Assessment Unit in March of 2015. *See* OFFICE OF THE INSPECTOR GEN. FOR THE NYPD, N.Y.C. DEP'T OF INVESTIGATION, USING DATA FROM LAWSUITS AND LEGAL CLAIMS INVOLVING NYPD TO IMPROVE POLICING (Apr. 2015), http://www.nyc.gov/html/oignypd/assets/downloads/pdf/2015-04-20-litigation-data-report.pdf. *See also* Shawn Cohen, Jamie Schram & Bob Fredericks, *NYPD Cops May Be Stopping Too Few Out of Fear of Discipline: Monitor*, N.Y. POST (July 9, 2015, 1:06 PM), http://nypost.com/2015/07/09/nypd-cops-may-be-stopping-too-few-out-of-fear-of-discipline-monitor/; Colleen Long, *NYPD Tracking Officer Data on Lawsuits, Complaints*, AP (July 11, 2015, 11:51 AM), http://bigstory.ap.org/article/3d421711089b4658862f34ebd181073e/nypd-tracking-officer-data-lawsuits-complaints; Benjamin Weiser, *Record Number of Claims Filed Against New York Police a Year Ago, a Report Says*, N.Y. TIMES (Aug. 27, 2015), http://www.nytimes.com/2015/08/28/nyregion/record-number-of-claims-filed-against-new-york-police-a-year-ago-report-says.html?_r=0.

misconduct in the courtroom.[5] *Without consistent and rigorous judicial review, they have none. Without defense attorneys armed with sufficient information and resources to initiate judicial review, they have none. But defense attorneys have been blocked from petitioning for judicial review by statutory laws that protect police records from public disclosure and even from disclosure to defense lawyers in court. In response to these challenges in New York, the Legal Aid Society has employed a new database to collect police accountability data to expand its opportunities to advocate for scrutiny of officers in the courtroom and in the public sphere.*[6]

[5] For a discussion on the limits of police policing themselves, see Joanna C. Schwartz, *Who Can Police the Police?*, 2016 CHI. L. F. (forthcoming 2016).

[6] It is important to note that defenders' offices across the country are often inadequately funded and are barely able to address their case loads, let alone take on a project like The Legal Aid Society's. Arguments for additional funding for defense organizations could include defenders' distinct role in pushing judicial review of police reform and therefore employing a necessary vehicle for police accountability. "We can change laws designed to govern how police, prosecutors, and judges do their jobs, but if we do not adequately support public defenders so that they can point out when the rules are broken, violations will go undetected." Jonathan Rapping, *Public Defenders Key to Reducing Mass Incarceration*, TALKPOVERTY (Oct. 28, 2015), http://talkpoverty.org/2015/10/28/public-defenders-key-reducing-mass-incarceration/.

I. INTRODUCTION

> *What we have made of our police departments [in] America, what we have ordered them to do, is a direct challenge to any usable definition of democracy. A state that allows its agents to kill, to beat, to tase, without any real sanction, has ceased to govern and has commenced to simply rule.*[7]
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> -Ta-Nehisi Coates

As residents of New York City (NYC) wait for the Department of Justice to indict Officer Daniel Pantaleo for the death of Eric Garner, we still have no information about what evidence was presented to the Richmond County Grand Jury,[8] nor do we know whether the New York Police Department (NYPD) or other NYC agencies knew of and failed to address prior substantiated misconduct by Pantaleo. More importantly, we do not know enough about the extant disciplinary systems that seemingly failed to flag, correct, and address earlier misconduct. Could New York City, through a rigorous and meaningful disciplinary system, have prevented Mr. Garner's death if it had addressed any prior misconduct? It is more so the City's culpability through systemic accountability failures, and less Pantaleo's individual aggression, that should interest the public.

In contrast, the citizens of Chicago, among other cities, when confronted with the shooting of Laquan McDonald, were able to instantly question both the officer's behavior and the strength of police disciplinary systems as they learned that the shooting officer, Jason Van Dyke, had twenty prior civilian complaints.[9] Van Dyke and Chicago officials alike shared the responsibility for McDonald's killing. In contrast to the behavior of New York Police Department Commissioner, William Bratton, the Chicago Police Commissioner resigned.[10] Would New Yorkers demand the same if we learned about

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[7] Ta-Nehisi Coates, *The Paranoid Style of American Policing*, ATLANTIC (Dec. 30, 2015), http://www.theatlantic.com/politics/archive/2015/12/illegitimacy-and-american-policing/422094/.

[8] The Legal Aid Society also petitioned for release of the grand jury minutes from the Garner grand jury. Eugene Volokh, *N.Y. Appellate Court Refuses to Order Release of Eric Garner Grand Jury Materials*, WASH. POST (July 29, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/29/n-y-appellate-court-refuses-to-order-release-of-eric-garner-grand-jury-materials/.

[9] Eliott C. McLaughlin, *Chicago Officer Had History of Complaints Before Laquan McDonald Shooting*, CNN, (Nov. 26, 2015, 5:45 PM), http://www.cnn.com/2015/11/25/us/jason-van-dyke-previous-complaints-lawsuits/.

[10] Bill Ruthhart & David Heinzmann, *Emanuel Dismisses Top Cop Garry McCarthy Amid Pressure for Change*, CHI. TRIB., (Dec. 2, 2015, 6:35 AM),

failures in our disciplinary system that hypothetically allowed an officer to have prior cases of excessive force and still be in a position to take Mr. Garner's life with a prohibited chokehold? At the moment, we do not know because New York Civil Rights Law section 50-a (hereinafter "section 50-a")[11] has been invoked to protect Daniel Pantaleo. In truth, it has only protected the NYPD and city officials from the type of scrutiny and accountability directed toward the Chicago officials.[12] This Article is about how The Legal Aid Society has tried to take this accountability gap into its own hands by litigating New York "Freedom of Information Law" (FOIL) and also by designing a smartphone app for defense attorneys based on defender-driven police accountability data.

Part II of this Article examines how, despite the strong historical role the judiciary has played in checking police misconduct, vigorous judicial review in New York has been prevented by section 50-a, which protects police records from disclosure to defense attorneys[13] and the public.[14] Section 50-a undermines the role of judicial review as a "check" on an executive officer's powers and impedes the constitutional rights of the accused to effectively confront witnesses. An accused's constitutional rights to confrontation, fair trial, and due process have been effectively trumped by a statutorily created right that shields from review anything New York police departments label "personnel records," including, some argue, disciplinary records. This is despite the fact that numerous state and federal courts have rejected the argument that officers have a constitutional right to privacy in records of their on-duty conduct.[15]

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http://www.chicagotribune.com/news/local/politics/ct-chicago-police-superintendent-garry-mccarthy-20151201-story.html.

[11] N.Y. CIV. RIGHTS LAW § 50-a (McKinney 2016).

[12] *See infra* Part II.A.

[13] This Article interchangeably refers to criminal defense attorneys as "defense attorneys" and "defenders."

[14] N.Y. CIV. RIGHTS LAW § 50-a.

[15] *See* Wiggins v. Burge, 173 F.R.D. 226, 229 (N.D. Ill. 1997) ("Privacy interests are diminished when the party seeking protection is a public person subject to legitimate public scrutiny. Performance of police duties and investigations of their performance is a matter of great public importance.") (citation omitted) (internal quotation marks omitted); Cassidy v. Am. Broad. Cos., Inc., 377 N.E.2d 126, 132 (Ill. App. Ct. 1978) ("The conduct of a policeman on duty is legitimately and necessarily an area upon which public interest may and should be focused . . . . [T]he very status of the policeman as a public official, as above pointed out, is tantamount to an implied consent to informing the general public by all legitimate means regarding his activities in discharge of his public duties."). Recently, the South Carolina Court of Appeals expressly rejected an attempt by a sheriff's deputies to invoke a constitutional right of privacy with respect to an internal investigation into their discharge of official duties,

Part III of this Article briefly visits American colonial history to remind ourselves how the previous "ruling" government's abusive policing tactics inspired the Revolution and the Fourth Amendment. Following the historical evolution of the constitutional principles of "checks and balances" and "separation of powers," and how that framework built our modern jurisprudence for judicial review of police misconduct, the Article discusses why the courts have failed to influence police misconduct and what role section 50-a plays in preventing meaningful judicial review.

Finally, Part IV of this Article introduces the Cop Accountability Database created by The Legal Aid Society of New York City. This database was created to address the obstacles section 50-a poses to criminal defense attorneys, specifically to their ability to litigate police misconduct in the courtroom, thereby preventing judicial review. The database seeks to enhance judicial review of routine abusive executive overreach by police by giving defenders easier access to information collected from clients, daily investigations, and the wealth of collective institutional knowledge defenders already have.

II. CIVIL RIGHTS LAW SECTION 50-A: A LAW DESIGNED AS AN OBSTACLE TO PUBLIC AND JUDICIAL REVIEW OF POLICE MISCONDUCT

Defenders are prevented from presenting evidence that would prompt judicial review of police misconduct in many cases because a few states have instituted heightened scrutiny before access is allowed to police records either through FOIL requests or court-ordered subpoenas. New York's barriers to public access are paralleled by only two other states in the scope of information the government argues is exempt from disclosure.[16] New York Civil Rights Law section 50-a,

which was found to constitute "conduct unbecoming an officer," resulting in suspension without pay. Burton v. York Cty. Sheriff's Dep't, 594 S.E.2d 888, 891, 896–97 (S.C. Ct. App. 2004). Accordingly, the Tenth Circuit found that "police internal investigation files [are] not protected by the right to privacy when the documents relate[] simply to the officers' work as police officers." Stidham v. Peace Officer Standards & Training, 265 F.3d 1144, 1155 (10th Cir. 2001) (internal quotation marks omitted) (finding police officer who was subject to suspension and reprimand for on-duty conduct did not have "a legitimate expectation of privacy" because the information was not "highly personal or intimate"). "Individual expectations of confidentiality must arise from the personal quality of any materials which the state possesses." *Flanagan v. Munger,* 890 F.2d 1557, 1571 (10th Cir. 1989).

[16] See *infra* Part II.A for a discussion of the City of New York's recent interpretation of section 50-a to include summaries of substantiated on-duty misconduct. *See also* Robert Lewis, Noah Veltman & Xander Landen, *Is Police Misconduct a Secret in Your State?*, WNYC (Oct. 15, 2015), http://www.wnyc.org/story/police-misconduct-records/. Note that only two other states, California and Delaware, have laws that specifically make police personnel records "confidential." Similar to New York,

promulgated in 1976, provides that "all personnel records used to evaluate continued employment or promotion, under the control of any police agency . . . shall be considered confidential and not subject to inspection or review without the express written consent of such police officer . . . except as may be mandated by lawful court order."[17] Section 50-a was crafted in reaction to FOIL and, as discussed later in this Article, the growing powers accumulating in the judicial branch to review police misconduct.

A national movement for open government gained momentum following Cold War secrecy, Watergate, and the Nixon administration.[18] While New York's first FOIL was passed in 1974, it was not expanded until 1977 to include access to all public records, making exemptions the exception rather than the rule in order "to open the processes of government to ready review by the public and to balance that indispensable availability of public access with the interests of efficiency in governmental operations and protection of individual rights."[19] The expansion sought to "achieve the greatest magnitude of openness in government without sacrificing personal and privileged information" to "help instill in the citizens of the state greater trust and confidence in the governmental institutions which are playing an increasingly important role in our daily lives."[20] It is because of FOIL that, for example, a public train engineer's

California requires civil and criminal litigants to make *Pitchess* motions to gain access to police disciplinary records. *See* Pitchess v. Super. Ct., 522 P.2d 305 (Cal. 1974). The standard for New York under section 50-a is higher than California, which only requires "good cause" to obtain in camera review. New York litigants, in contrast, must present a good faith factual predicate to warrant judicial review for information that is "relevant and material" to the case. *Compare* N.Y. CIV. RIGHTS LAW § 50-a(2) & (3) *and* Dunnigan v. Waverly Police Dep't, 719 N.Y.S.2d 399, 400 (App. Div. 2001), *with* CAL. EVID. CODE § 1043(b)(3) (West 2016). For decades prior to 2006, California police oversight agencies, including San Francisco, Los Angeles, and Oakland, voluntarily made their police disciplinary records public. See *Frequently Asked Questions about Copley Press and SB 1019*, AM. CIV. LIBERTIES UNION N. Cal. (June 15, 2007), https://www.aclunc.org/blog/frequently-asked-questions-about-copley-press-and-sb-1019 (discussing the case of *Copley Press, Inc. v. Superior Court* 141 P.3d 288 (Cal. 2006), which extended confidentiality to records of police oversight agencies). Delaware's exemption for personnel records is limited to disclosures that would constitute an "invasion of privacy" under state and federal law, which is arguably narrower than New York's unrestricted "personnel records used to evaluate performance," yet has followed New York law in requiring a factual predicate that records are relevant prior to judicial inspection. Snowden v. State, 672 A.2d 1017, 1024 (Del. 1996) (qu*oting People v. Gissendanner,* 399 N.E.2d 924, 928 (N.Y. 1979)).

[17] N.Y. CIV. RIGHTS LAW § 50-a.

[18] *History of FOIA*, ELECTRONIC FRONTIER FOUND., https://www.eff.org/issues/transparency/history-of-foia (last visited Jan. 20, 2016).

[19] "Mem. Of Sens. Marino, Anderson, et al.," Bill Jacket L 1977, ch 933.

[20] "Letter from Sen. Marino," Bill Jacket L 1977, ch 933.

disciplinary records and the reasons he was fired are discussed openly on the radio.[21]

It is without question that police officers, more than any other government official, interact with the public in life-changing ways every day. They patrol the streets armed with numerous lethal and non-lethal weapons. They regularly initiate contact and interrupt people's daily routines with broadly defined discretion that is often unchallenged and generally only results in litigation if an arrest is made.[22] Yet at the same time the expansion of FOIL was passed in 1977, a broad exception was carved out for police records. This applied to public access requests and *especially* to subpoenas sought by defense attorneys in the context of criminal cases. This broad protection from subpoenas for police records reversed twentieth century courts' increasing power to review police misconduct that will be discussed in Part III.

According to a report by the Committee on Open Government in December 2014 and an in-depth series in 2015 by a New York public radio station, WNYC, "no other state provides the unique protection afforded [to police officers in New York] in [section] 50-a."[23] Why has New York become so protective of its police records, even substantiated on-duty misconduct and even in the context of a court proceeding?

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[21] Robert Lewis, Xander Landen & Noah Veltman, *New York Leads in Shielding Police Misconduct*, WNYC (Oct. 15, 2015), http://www.wnyc.org/story/new-york-leads-shielding-police-misconduct/.

[22] The NYPD interact with an estimated twenty-five million civilians over the course of one year. John Podhoretz, *The Numbers Add Up to One Fact: Cops Are a Blessing to NYC*, N.Y. POST (Dec. 31, 2014, 12:26 AM), http://nypost.com/2014/12/31/the-numbers-add-up-to-one-fact-cops-are-a-blessing-to-nyc/.

[23] COMM. ON OPEN GOV'T, STATE OF N.Y. DEP'T OF STATE, ANNUAL REPORT TO THE GOVERNOR AND STATE LEGISLATURE 3–5 (Dec. 2014), http://www.dos.ny.gov/coog/pdfs/2014AnnualReport.pdf [hereinafter N.Y. ANNUAL REPORT]; Lewis, Veltman & Landen, *supra* note 16. Police internal affairs records and citizen complaints are "mostly unavailable" from FOIL disclosure in twenty-three states, but only considered "confidential" by statute in two other states (California and Delaware). *See* Lewis, Veltman & Landen, *supra* note 16. Records are more accessible in fifteen states depending on whether severe discipline resulted from the misconduct. *Id.*; *see also* ME. REV. STAT. ANN. tit. 30-a, § 503 (2015); OKLA. STAT. ANN. tit. 51, § 24A.7(B)(4) (West 2016); UTAH CODE ANN. § 63G-2-301(3)(o)(i) (West 2007) (exempting formal charges of misconduct until and unless the charges are sustained and the action is complete). Texas's statute makes internal affairs documents relating to deadly force public. It exempts internal affairs documents that determine the officer did not engage in misconduct, and it makes public the documents where disciplinary action is decided. TEX. LOC. GOV'T CODE ANN. §§ 143.1214, 143.089 (West 2015). In twelve states, these documents are public record in most circumstances. Many state statutes are vague. *See* Jenny Rachel Macht, *Should Police Misconduct Files Be Public Record? Why Internal Affairs Investigations and Citizen Complaints Should Be Open to Public* Scrutiny, 45 CRIM. L. BULL. 1006 (2009).

The legislative history of section 50-a reveals a heavy lobbying effort by police unions and district attorneys, seeking specifically to prevent defense attorneys from impeaching officers by prior bad acts in the courtroom.[24] Prior bad acts are those that courts have said generally demonstrate "an untruthful bent or significantly reveals a willingness or disposition . . . voluntarily to place the advancement of his individual self-interest ahead of principle or of the interests of society."[25] The letters in support of the 1977 legislation, however, characterize impeachment with prior misconduct as "harassment."[26] Other than a strong letter by the New York Civil Liberties Union pointing out that the accused has a constitutional right to meaningful confrontation of witnesses, including impeachment of officers, there was very little opposition.[27]

[24] *See, e.g.*, Letter from William G. Connelie, NYPD Superintendent, to unknown recipient (June 8, 1976); Letter from Sanford D. Garelik, Chief of NYC Police for the Transit Auth., to Frank Padavan, N.Y. Sen. (Apr. 20, 1976); Letter from John Maye, Chairman of Patrolmen's Benevelent Ass'n, NYC Transit Auth. Police Dep't , to Hugh L. Carey, N.Y. Governor (June 18, 1976); Letter from Mario Merola, Dist. Att'y of Bronx Cty., to Judah Gribetz, Counsel to N.Y. Governor (June 7, 1976); Memorandum from Al Sgaglione, President of Police Conference, to unknown recipient (June 14, 1976); Letter from Thomas R. Sullivan, Dist. Att'y of Richmond Cty., to Judah Gribetz, Counsel to N.Y. Governor (June 9, 1976). All sources in this footnote are included in the 1976 N.Y. Governor's Bill Jacket, available from the Legislative Secretary to the New York Governor's Counsel.

[25] People v. Walker, 633 N.E.2d 472, 461 (N.Y. 1994).

[26] Bill Jacket L 1977, ch 933 at 6 ("This bill would afford some protection to police officers who must testify in criminal proceedings."); *Id.* at 11 ("[O]fficers are bearing the brunt of fishing expeditions by some attorneys who are subpoenaing personnel records in an attempt to attack the officer's credibility."); *Id.* at 13 ("[T]his bill is directed at purported abuses involving the indiscriminate perusal of police officers' records by defense counsel in cases wherein the police officer is a witness."); *Id.* at 19 ("I am not aware of the fears expressed by some prosecutors that these records, if available, could be misused by defense counsel in criminal litigation, in order to muddy the issues at hand."); *Id.* at 20 ("It has been brought to my attention that, often simply as a harassment tactic, defense attorneys in criminal cases have been making an unrealistically high number of requests for personnel files of police officers."); *Id.* at 21 ("In the past, counsel has sought the personnel records of police officers for unwarranted fishing expeditions."); *Id.* at 23 ("The purpose of this bill is to insulate policemen from meaningful cross-examination in cases in which they are witnesses."); *Id.* at 29 ("The purpose of the Act is to restrict a defendant's ability to subpoena the personnel files of prospective police officer/witnesses.").

[27] *See* Letter from N.Y. Civ. Liberties Union, to N.Y. State Senate (May 24, 1976). *See also* Letter from Michael R. Juviler, Counsel to the Office of Court Admin., to Judah Gribetz, Counsel to the Governor (June 8, 1976) (writing that the Office of Court Administration would take "no position"). Joseph P. Hoey, Special Deputy Attorney General and Special Prosecutor to Suffolk County, did oppose. Letter from Joseph P. Hoey, Special Deputy Att'y Gen., N.Y. Dep't of Law, to Judah Gribetz, Counsel to the Governor (June 18, 1976) ("[T]he need for public accountability of public servants is becoming painfully clear. On the Federal level, the movement towards increasing the public availability of secret law enforcement files has greatly accelerated in the past few

Court cases interpreting section 50-a fall into two separate categories: (1) public access cases interpreting disclosure requirements under the FOIL; and (2) cases applying heightened scrutiny to requests for subpoenas by attorneys during pending criminal or civil litigation.[28] In both scenarios, section 50-a presents serious obstacles to the public, to defense attorneys, and to judges, thereby blocking judicial review of police misconduct.

A. *Public Access Cases*

The last time the Court of Appeals reviewed public access to police disciplinary records under FOIL was in *In re Daily Gazette Co. v. City of Schenectady*.[29] In that case, the local daily paper of a medium-sized city, Schenectady, New York, sought the identities of eighteen officers involved in off-duty misconduct and the full file pertaining to their discipline following a drunken off-duty brawl during a bachelor party.[30] The court's holding in *Daily Gazette* expressly left room for directing disclosure in response to a "restrictive formulation" that "would not undermine the protective legislative objectives."[31] The Second Department of New York Supreme Court, Appellate Division in *Cook v. Nassau County Police Department* analyzed the tension between section 50-a and Public Officers Law section 87 (FOIL), holding that a summary of an investigation file was sufficiently "limited to the extent reasonably necessary to effectuate the purposes of Civil Rights Law § 50–a to prevent the potential use of information in the records in litigation to degrade, embarrass, harass, or impeach the integrity of the officer."[32]

Following *Cook*, the NYC Civilian Complaint Review Board (CCRB), for a time, regularly disclosed summaries of officers' records

years. The proposed legislation represents a significant step in the opposite direction."). All sources cited in this footnote are included in 1976 N.Y. Governor's Bill Jacket, available from the Legislative Secretary to the New York Governor's Counsel.

[28] *See infra* Part II.A–B.

[29] *In re* Daily Gazette Co. v. City of Schenectady, 710 N.E.2d 1072, 1073–74 (N.Y. 1999).

[30] *Id.*

[31] *Id.* at 1078; *see also In re* Capital Newspapers Division of the Hearst Corp. v. Burns, 496 N.E.2d 665, 669–70 (N.Y. 1986) (holding that agency was required to disclose the material requested by reporter who sought a one-month record of sick leave requests from named officer); *but see In re* Fink v. Lefkowitz, 393 N.E.2d 463, 471–72 (N.Y. 1979) (holding that agency was not required to produce specialized investigative techniques of nursing home industry that would potentially compromise pending investigations).

[32] Cook v. Nassau Cty. Police Dep't, 972 N.Y.S.2d 638, 638 (App. Div. 2013).

in response to FOIL requests, many of which came from Legal Aid Society attorneys. Yet in September 2014, following the disputed termination of former Executive Director Tracy Catapano-Fox,[33] the CCRB, citing section 50-a, stopped its practice of disclosing summaries even for cases involving substantiated on-duty misconduct.[34] This is an overly broad interpretation of section 50-a's already broad protection of police records. Even the spokesperson for the Schenectady police union distinguished off-duty from on-duty misconduct:

> [T]hey have a greater need for protection from the publicity of their off-duty conduct. We do not seek to hide all police activities behind a shroud of secrecy . . . . I think the distinction we want to make for these Schenectady officers is that this was not connected to their duties to the public.[35]

Nevertheless, the City of New York argued in *In re Luongo v. Records Access Officer* ("*Luongo I*") that *Daily Gazette* protects all police disciplinary records from disclosure.[36] Judge Alice Schlesinger granted The Legal Aid Society's request that the CCRB disclose a summary of Officer Pantaleo's substantiated on-duty misconduct and any resulting administrative penalties on two separate grounds: (1) the summary requested is not a personnel record under section 50-a; and, even assuming it is such a record, (2) the CCRB failed to established "a substantial and realistic potential of the requested material for the abusive use against the officer."[37] The City has appealed and the matter

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[33] Thomas Tracy, Joseph Stepansky & Stephen Rex Brown, *Civilian Complaint Review Board Covers Up NYPD Misconduct, Turns Blind Eye on Sexual Harassment Within Board: Suit*, DAILY NEWS (Oct. 6, 2014, 11:54 PM), http://www.nydailynews.com/news/politics/civilian-complaint-review-board-bed-nypd-suit-article-1.1965556.

[34] *See, e.g.*, Letter from Tracy Catapano-Fox, Exec. Dir., CCRB, to author (Aug. 20, 2014); Letter from Tracy Catapano-Fox, Exec. Dir., CCRB, to Jennifer Saint-Preux, Legal Aid Society (Sept. 17, 2014); Letter from Brian Krist, Assistant Deputy Exec. Dir. Of Investigations, CCRB, to Joel Schmidt, Staff Att'y, Legal Aid Society (Nov. 10, 2014); Letter from Lindsey Flook, Assistant Deputy Exec. Dir. of Investigation, CCRB, to Robin Gordon-Levitt, Staff Att'y, Legal Aid Society (Nov. 14, 2014); Letter from Lindsey Flook, Assistant Deputy Exec. Dir. of Investigation, CCRB, to Alejandra Lopez, Staff Att'y, Legal Aid Society (Oct. 29, 2014); Letter from Lindsey Flook, Assistant Deputy Exec. Dir. of Investigation, CCRB, to Diana Nevins, Staff Att'y, Legal Aid Society (Nov. 14, 2014); Letter from Lindsey Flook, Assistant Deputy Exec. Dir. of Investigation, CCRB, to Juliette Noor-Haji, Staff Att'y, Legal Aid Society (Nov. 14, 2014); Letter from Lindsey Flook, Assistant Deputy Exec. Dir. of Investigation, CCRB, to Ariel Schneller, Staff Att'y, Legal Aid Society (Nov. 14, 2014). All letters cited in this footnote are on file with author.

[35] Laura Suchowolec, *Court of Appeals Decision Rekindles Debate on Records*, DAILY GAZETTE, Apr. 11, 1999, at B-01.

[36] *In re* Luongo v. Records Access Officer, Civilian Complaint Review Bd. (Luongo I), 15 N.Y.S.3d 636, 642–43 (N.Y. Sup. Ct. 2015).

[37] *Id.* at 643–44.

is still pending.[38] In January 2016, a second judge adopted Judge Schlesinger's reasoning in another case demanding disclosure of a summary of CCRB records, finding that the "requested summary is statistical in nature and would not detail the circumstances that led to the complaints or content thereof."[39]

While the disciplinary summaries have not yet been released pending appeal, these cases have prompted attention from various editorial boards to the secrecy that the New York statute affords police officers.[40] Discussing the *Luongo I* decision, the New York Times Editorial Board pointed "to the distressing fact that New York's disclosure law gives the public far less access to information about police officers than workers in virtually any other public agency."[41] *AM New York*'s Editorial Board concurred:

> New Yorkers have a right to know when officers are accused of transgressions, and what inquiries find. It's true whether videos capture the action or not, whether citizens are dead or merely mistreated. A law that keeps such information from the public is a travesty, and must be changed.[42]

That the public has the right to access officers' on-duty misconduct records is the law in twelve states.[43] There is no evidence that officers in those states are any less safe or any less capable of testifying in court to defend their arrests than officers in New York.

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[38] *See* Ben Bedell, *Board to Appeal Cop Records in Fatal Garner Encounter*, N.Y. L. J. (Aug. 28, 2015), http://www.newyorklawjournal.com/id=1202735886020/Board-to-Appeal-Cop-Records-in-Fatal-Garner-Encounter?slreturn=20160303145717.

[39] *In re* Luongo v. Records Officer, Civilian Complaint Review Bd. (Luongo II), No. 7617/2015, slip op. at 3 (N.Y. Sup. Ct. Jan. 19, 2016) (Purificacion, J.) (citing *In re* Capital Newspapers Div. of Hearst Corp. v. Burns, 67 N.Y.2d 562 (1986) (permitting disclosure of number of days and dates on which certain named officers were absent from their scheduled employment)).

[40] *See, e.g.*, Editorial, *A Law That Hides Police Misconduct from the Public*, N.Y. TIMES (Oct. 12, 2015), http://www.nytimes.com/2015/10/12/opinion/a-law-that-hides-police-misconduct-from-the-public.html; Editorial, *Cop Misconduct Shouldn't Be Kept Secret*, NEWSDAY (Sept. 9, 2015), http://www.newsday.com/opinion/editorial/cop-misconduct-shouldn-t-be-kept-secret-1.10825198; Editorial, *Eric Garner Case Shows Why Police Secrecy Law Is Wrong*, AM N.Y. (Sept. 9, 2015), http://www.amny.com/opinion/editorial/eric-garner-case-shows-why-police-secrecy-law-is-wrong-1.10825265 [hereinafter *Eric Garner Case*]; Editorial, *Stop Hiding Police Misconduct in New York*, N.Y. TIMES (July 29, 2015), http://www.nytimes.com/2015/07/29/opinion/stop-hiding-police-misconduct-in-new-york.html?_r=0 [hereinafter *Stop Hiding*].

[41] *Stop Hiding*, *supra* note 40.

[42] *Eric Garner Case*, *supra* note 40.

[43] For a discussion about national public access laws as they pertain to police disciplinary records (and bodyworn camera footage), see Cynthia Conti-Cook, *Open Data Policing*, 104 GEO. L.J. (forthcoming 2016).

New York legislatures have recently embraced the need to adjust section 50-a. New York State Senator Kevin Parker introduced a bill that would narrow the definition of "personnel records."[44] While the proposed amendment is subtle, it may work towards removing independent oversight agencies' records from the "personnel record" definition.[45] More directly, on March 15, 2016, Assemblyman Daniel O'Donnel introduced legislation that would repeal section 50-a because "the evolution of § 50-a has defeated [FOIL's] goal of accountability and transparency."[46]

B. *Heightened Scrutiny for Subpoenas of Police Records in Criminal and Civil Litigation*

Even more troubling than New York's strict public access protections for police records are the almost equally strict protections for police records in court. Section 50-a places the burden on the defense attorney to obtain, and not the prosecutor to disclose, impeachment material based on police disciplinary records.[47] The CCRB and NYPD also routinely oppose defense motions in criminal courts across New York City for subpoenas based on disciplinary

[44] *See* S.B. S4808, 2015-2016 Leg. Sess. (N.Y. 2015), https://www.nysenate.gov/legislation/bills/2015/s4808 ("AN ACT to amend the civil rights law, in relation to personnel records of police officers, firefighters and correction officers[.]"). This recommendation to the legislature was first made by the Committee on Open Government Annual Report, December 2014. N.Y. ANNUAL REPORT, *supra* note 23.

[45] *Luongo I* and *Luongo II* courts both found that whether CCRB records are covered under section 50-a is an open question.

[46] *See* Memorandum from N.Y. State Assemb. in Support of Assemb. B. A09332, 2015-2016 Leg. Sess. (N.Y. 2016), http://assembly.state.ny.us/leg/?default_fld=&bn=A09332&term=2015&Summary=Y&Memo=Y.

[47] *See* Jonathan Abel, *Brady's Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 778 (2015) (discussing the reversal of burdens for disclosing police records).

information to prevent[48] or limit[49] disclosure to the accused in criminal cases, also relying on section 50-a. Their arguments seek to prevent disclosure of the documents to the defense and even oppose in camera[50] review by the courts. This process directly prevents the defense from pursuing an effective cross-examination and defending its theory of the case.[51] For example, in one case the arresting officer

[48] *See* People v. Cook, 27 N.Y.S.3d 329 (N.Y. Sup. Ct. 2015) (denying defense application for CCRB and NYPD records predicated upon civil litigation against subject officers); People v. Zagaja, No. 227/2015 (N.Y. Crim. Ct. Sept. 17, 2015) (denying *Gissendanner* application predicated upon prior civil litigation involving named police officer); People v. Barrie, No. 2014KN003219 (N.Y. Crim. Ct. July 10, 2015) (denying defense application for CCRB and NYPD records of principal witness); People v. James, 46 Misc. 3d 1219(A) (N.Y. Sup. Ct. 2015) (denying defense application for CCRB records); People v. Hernandez, No. 2013KN086748 (N.Y. Crim. Ct. Oct. 22, 2014) (quashing defendant's subpoena seeking CCRB and any disciplinary records pertaining to named officer under section 50-a); People v. Rodriguez, 46 Misc.3d 1220(A) (N.Y. Sup. Ct. 2014) ("The fact that federal lawsuits were filed against the officers here is not a factual predicate warranting review of their personnel files."); Letter from Brian Krist, Assistant Deputy Exec. Dir. Of Investigations, CCRB, to Hon. Jaqueline Williams, J. of N.Y. Fam. Ct. (Jan. 29, 2016) (urging the court to issue a written decision reflecting the court's decision from the bench in *In re Monge*, No. D-64/15 (N.Y. Fam. Ct. Sept. 29, 2015), wherein the court denied a motion seeking disclosure of CCRB records). *But see* People v. Oriol, No. 2744-14 (N.Y. Crim Ct. 2015) (ordering in camera inspection based upon evidence of settled prior civil litigation alleging similar misconduct).

[49] For cases requiring limited disclosures, see, for example, People v. Fleetwood, No. 1179-2014 (N.Y. Sup. Ct. Nov. 19, 2015) (ordering the CCRB and NYPD to turn over records of substantiated misconduct of named officer for in camera review because the defendant has sufficiently demonstrated the pertinence of his past misconduct to the facts of this case and his credibility, but otherwise granting NYPD and CCRB's motion to quash); Luongo I, 15 N.Y.S.3d 636 (N.Y. Sup. Ct. 2015) (ordering production of limited statistical and dispositional information concerning substantiated complaints pursuant to FOIL) (order stayed pending appeal); People v. Wesley, No. 4362/14 (N.Y. Sup. Ct. May 7, 2015) (granting protective order shielding all but CCRB's final report and audio or video recordings concerning prior substantiated complaints against subject officer or the incident at issue from production for in camera inspection); People v. Brown, No. 2383/2014 (N.Y. Sup. Ct. May 6, 2015) (following motion to quash, issuing *Gissendanner* orders to CCRB limited in camera inspection of only CCRB's final reports and audio or video recordings concerning subject officer). *But see* People v. Bledsoe, No. 02200-2014 (N.Y. Crim. Ct. Nov. 23, 2015) (denying application seeking in camera inspection of prior substantiated complaint against subject officer when no showing had been made that it could be relevant to the facts at issue in the prosecution); People v. Calderon, 48 Misc.3d 1226(A) (N.Y. Sup. Ct. Aug. 3, 2015) (determining from the bench that, following *Wesley*, there is no material to be provided from the restricted CCRB records to the defendant in response to subpoena); People v. Cook, 27 N.Y.S.3d at 329.

[50] N.Y. CIV. RIGHTS LAW § 50-a (McKinney 2016). Section 50-a requires judges to review police personnel records in camera, or privately without either party's input, to determine what might be relevant to the case.

[51] *See, e.g.*, Kyles v. Whitley, 514 U.S. 419, 459 (1995) (information about a key informant's criminal conduct was among the evidence deemed to be Brady material, even though it was unrelated to the case); Pennsylvania v. Ritchie, 480 U.S. 39, 43

was on "force monitoring"[52] at the time of the arrest, which resulted in injuries to the accused.[53] Defense counsel theorized that the officer then arrested the accused on charges of being drunk and violent in order to cover up yet another incident of force that could further jeopardize his already tenuous career status due to multiple instances of prior force complaints. In this case, because of Legal Aid's database described in Part IV below, The Legal Aid Society knew about, and presented to the judge, prior *Brady* disclosures that confirmed that the officer was on "force monitoring" at the time of the arrest and had at least one substantiated CCRB complaint. The court still declined to sign the subpoena—blocking not only the defense attorney's ability to pursue a cover up theory with evidence of the officer's motive to protect his career but even blocking the court's own in camera review of that material.

The reason why judges are holding subpoenas of police officer misconduct to a heightened standard of scrutiny is because section 50-a requires that the accused "put[] forth in good faith [a] factual predicate which would make it reasonably likely that the file"[54] could contain "information, which, if known to the trier of fact, could very well affect the outcome of the trial."[55] Disciplinary records of a police witness are relevant and material to a criminal proceeding if their contents "carr[y] a potential for establishing the unreliability of either the criminal charge or of a witness upon whose testimony it depends."[56] As one judge remarked, this standard should not be interpreted too strictly so as to not "require the defense to know the precise contents

(1987) (defendant's *Brady* request for child abuse records "related to the immediate charges" as well as earlier records stemming from a "separate report" of defendant's abuse); Abel, *supra* note 47, at 754 (describing the case of *United States v. Agurs,* 427 U.S. 97 (1976), wherein undisclosed evidence was a murder victim's criminal record, which was not drawn from the particular case).

[52] NYC Comm'n to Combat Police Corruption, A Follow-Up Review of the New York City Police Department's Performance Monitoring Unit 7 (2006), http://www.nyc.gov/html/ccpc/assets/downloads/pdf/A-Follow-up-Review-of-the-NYPDs-Performance-Monitoring-Unit-April-2006.pdf ("To be placed on Chronic Force Monitoring, an officer must have been found guilty of one set of charges and specifications involving force in the previous five years or been the subject of two or more substantiated force, abuse, discourtesy, or offensive language complaints in the previous four years. For an officer to be placed on Chronic Discipline Monitoring, he must have engaged in some form of serious misconduct resulting in a disciplinary penalty including the forfeiture of at least twenty vacation or suspension days.").

[53] Pending criminal matter on file with author. Details of the case cannot be disclosed as of the time of this writing.

[54] People v. Gissendanner, 48 N.Y.2d 543, 550 (1979).

[55] *Id.* at 548.

[56] *Id.* at 550; *see also* People v. Shakur, 648 N.Y.S.2d 200, 203–04 (N.Y. Sup. Ct. 1996).

of the very file it is seeking [therefore] putting the cart before the horse."[57] This is because, "[i]n the usual case, a party seeking discovery will, of course, not know precisely what pertinent information is within a personnel record; thus, a strict reading would render the statute meaningless."[58]

But some judges, like the one described above, do interpret section 50-a strictly despite an accused's potential constitutional rights to such disclosures. Professor Jonathan Abel notes that police personnel records "[fall] into [a] doctrinal crack insofar as it is generally not related to any specific case" but still subject to disclosure by prosecutors pursuant to *Brady v. Maryland* and subsequent cases extending *Brady* to impeachment material.[59] Yet New York judges routinely bar defense attorneys from directly accessing this material with section 50-a, relying precariously on prosecutors to disclose misconduct.

Predictably, prosecutors have not proactively assumed their "duty to learn" about officer misconduct and, as a result, misconduct often goes undisclosed to the defense.[60] Across the country, prosecutors have inconsistently reacted to their duties to discover and disclose misconduct of police officers —a duty they cannot be expected to pursue given the conflict of interest in prosecutors investigating the misconduct of the officers they rely on.[61] An expectation of prosecutors to police the police is also inconsistent with the constitutional framework of checks and balances between the executive and judicial branches discussed below in Part III.

[57] People v. Jackson, 655 N.Y.S.2d 17, 18 (App. Div. 1997) (defense made a sufficient showing that the officer had been suspended on at least one prior occasion to warrant in camera inspection); *accord* Estate of McConlogue v. Cty. of Nassau, 208 A.D.2d 888, 889 (App Div. 1994) (requiring "good faith showing of some factual predicate"); Becker v. City of New York, 556 N.Y.S.2d 691, 692 (App. Div. 1990) (holding that plaintiffs were "merely required to offer, in good faith, 'some factual predicate'").

[58] Cox v. New York City Housing Auth., 482 N.Y.S.2d 5, 6–7 (App. Div. 1984) (police personnel records are relevant and material to a negligent hiring and retention claim); *see also* People v. Morales, 412 N.Y.S.2d 310, 315–16 (N.Y. Crim. Ct. 1979) (sufficient showing by defendant to warrant in camera inspection when police officer was main witness, defendant asserted officers initiated contact and independent witnesses supported that defense).

[59] *See* Abel, *supra* note 47, at 754; *see also* Kyles v. Whitley, 514 U.S. 419, 437 (1995) (announcing prosecutor's duty to learn); United States v. Bagley, 473 U.S. 667, 682 (1985) (plurality opinion) (eliminating requirement for defense to request impeachment material); Giglio v. United States, 405 U.S. 150, 154–55 (1972) (expanding *Brady* to impeachment material).

[60] Abel, *supra* note 47, at 779.

[61] *Id.*

Prosecutors nationwide have failed to create systems for accessing and disclosing police misconduct due to the joint interest of prosecutors and local police departments in "executing" criminal and penal law. This failure precisely demonstrates why the founders of the Constitution sought balance through separate branches of government.

Without reform of section 50-a and more routine judicial review, recent policing reforms, such as special prosecutors, inspector generals, or body cameras, will not be effective.[62] Section 50-a reverses the access and power courts were meant to have in order to exercise meaningful judicial review over executive overreach. The next section of this Article discusses the history of judicial review of police misconduct to demonstrate how section 50-a undermines the rule of law and destabilizes executive power by preventing judicial review.

III. RESTORING JUDICIAL REVIEW OF POLICE MISCONDUCT, THE "TRADITIONAL RESPONSIBILITY" OF THE JUDICIARY

Courts' constitutional duties under the separation of powers have historically included checking the overreach of police officers and other executive branch officials.[63] This is primarily influenced by the abusive and arbitrary policing tactics suffered during the colonial era at the hands of the royal authorities.[64] Indeed, scholars of the

[62] *See Wolf v. Colorado*, 338 U.S. 25, 31 (1949) (describing administrative and political alternatives to routine judicial review of police misconduct that could be effective if functional accountability systems and transparency were in place), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961). *See also supra* notes 1–5 regarding recent reforms.

[63] *See* Scott E. Sundby, *Everyman's Exclusionary Rule: The Exclusionary Rule and the Rule of Law (or Why Conservatives Should Embrace the Exclusionary Rule)*, 10 OHIO ST. J. CRIM. L. 393, 402 (2013).

[64] Boston lawyers James Otis Jr. and Oxenbridge Thacher argued in Massachusetts' highest court that invasive police searches were contrary to the "fundamental principles of law," and spearheaded a legal dispute over "writs of assistance." MERRILL JENSEN, THE FOUNDING OF A NATION 76–77 (Hackett Publ'g 2004) (1968). Such writs were the colonial equivalent of search warrants, and after King George II's death required customs officers in the colonies to renew applications for the writs, Boston merchants initiated legal challenges to the re-issuance of the writs for the first time in colonial history arguing both that they were overly broad on their face and that they were abusively enforced. *Id.* While they were unsuccessful in the courtroom and the writs were re-issued over their objection, John Adams, as a young lawyer observing from the gallery, referred to the event as the birthplace of "the Child of Independence." *Id.* at 1371 (quoting NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 59 (Da Capo Press 1970)). Understanding Otis's arguments opposing "writs" is "essential to understanding one reason for the colonists' growing political alienation from the home government during the Great War for Empire." ALAN ROGERS, EMPIRE AND LIBERTY 102 (1974). "[A]n article appeared in the Boston *Gazette* outlining the

American Revolution "widely accept[] that colonial disputes with royal authorities over [search warrants] contributed both to the Revolution and the Fourth Amendment's inclusion in the Bill of Rights."[65] Rather than entrust the executive branch with policing itself, the judicial branch, which "will always be the least dangerous to the political rights of the Constitution,"[66] was naturally deemed responsible for scrutinizing the misdeeds of police, "at least since the time of *Marbury v. Madison*" in the context of criminal proceedings.[67] As Professor Scott Sundby, discussing the evolution of the "exclusionary rule"[68] as a judicial remedy for constitutional violations, wrote:

> The exclusionary rule as a manifestation of the rule of law is also abundantly evident in how the Court viewed the exclusionary rule as necessary to carry out its constitutional duties under the separation of powers. The importance of the exclusionary rule in aiding the judiciary to serve its constitutional role as a check on executive and legislative overreaching was very much on the minds of the Supreme Court in recognizing the exclusionary rule.[69]

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dangers writs of assistance held for all Englishmen. If the writs were issued, the writer warned, all Americans would be enslaved. Property rights and political rights would be subject to the arbitrary interpretation of a petty government official." *Id.* at 103. The court's decision, granting these overly broad sanctioned abuses of power made "[e]very one with this writ . . . a tyrant; . . . in a legal manner." JAMES OTIS, AGAINST WRITS OF ASSISTANCE (Feb. 1761), *reproduced in* NAT'L HUMAN. INST., http://www.nhinet.org/ccs/docs/writs.htm (last visited Apr. 23, 2016). Otis's argument against writs of assistance eventually became "institutionalized" in the Fourth Amendment. J. L. Bell, *The Writs Were Ordered to be Issued*, BOSTON 1775 (Feb. 24, 2011), http://boston1775.blogspot.com/2011/02/writs-were-ordered-to-be-issued.html; *see also* J. L. Bell, *The Press Response to the Writs of Assistance Argument*, BOSTON 1775 (Feb. 25 2011), http://boston1775.blogspot.com/2011/02/press-response-to-writs-of-assistance.html.

[65] Fabio Arcila, Jr., *In the Trenches: Searches and the Misunderstood Common-Law History of Suspicion and Probable Cause*, 10 U. PA. J. CONST. L. 1, 10 (2007). *See also* Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1369 (1983) ("The framers sought to ensure that the newly formed federal government could not employ the two devices used by the British Crown that they believed jeopardized the liberty of every citizen: the general warrant and the writ of assistance.") (citation omitted).

[66] THE FEDERALIST NO. 78 (Alexander Hamilton), http://www.constitution.org/fed/federa78.htm#2.

[67] Stewart, *supra* note 65, at 1368; *id.* at 1384 (citing Marbury v Madison, 5 U.S. 137 (1803)).

[68] While the first judicial application of the Fourth Amendment in 1886 was not in the context of a criminal case, by 1925, "the annexation of the exclusionary rule to the fourth amendment-was basically complete." *Id.* at 1372–77.

[68] *Wolf v. Colorado*, 338 U.S. 25, 31 (1949).

[69] Sundby, *supra* note 63.

In *Wolf v. Colorado*, decided in 1949, the United States Supreme Court hesitated extending the exclusionary rule to the states and thereby instituting routine judicial review of all police misconduct.[70] This hesitation was grounded in the Court's general deference to the state governments' "other methods" to identify and prevent misconduct, including internal capacity to investigate and police themselves, as demanded by the democratic process and deterred by costs of damages in civil law actions.[71] The Court, however, noted the ability of such "internal discipline of the police" depended on the "eyes of an alert public opinion" and "consistent enforcement."[72] The subsequent overruling of *Wolf* in 1961 by *Mapp v. Ohio*[73] signaled the Court's recognition that state and local police departments were unable, or unwilling, to police themselves through the "other methods" discussed in *Wolf*.[74]

From 1961 to 1968, the judicial remedy of the exclusionary rule expanded. Beginning in the early 1960s through the present, courts have entertained and employed arguments grounded in cost-benefit analyses of whether excluding such evidence would deter future police misconduct.[75] Multiple judicial decisions considered how to incentivize police officers away from abusive police practices, abandoning *Wolf*'s deference to the "alternative" methods.[76] In 1968, the Supreme Court further widened the scope of the Fourth Amendment to protect citizens not only in their homes, cars, and businesses, but also during police street encounters in *Terry v. Ohio*, finding that "wherever an individual may harbor a reasonable

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[70] *Wolf*, 338 U.S. at 31.

[71] *Id.* at 31–32.

[72] *Id. at* 31. *See also* Joanna C. Schwartz, *Myths and Mechanics of Deterrence: the Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1043 (2010) (police officials do not have sufficient access to information about police misconduct described in lawsuits to respond usefully); Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 847 (2012) (stating that "[m]ost police departments ignore lawsuits").

[73] Mapp v. Ohio, 367 U.S. 643, 655 (1961) ("[W]ithout the [exclusionary] rule the assurance against unreasonable federal searches and seizures would be 'a form of words," valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom 'implicit in the concept of ordered liberty.'").

[74] Stewart, *supra* note 65, at 1388–89 (discussing the limitations of the "alternatives" to the exclusionary rule).

[75] *Id.* at 1391 (citing United States v. Calandra, 414 U.S. 338 (1974)).

[76] *Id.* at 1392 (relying on Supreme Court cases to show that the exclusionary rule has been applied differently depending on the circumstances).

'expectation of privacy,' he is entitled to be free from unreasonable government intrusion."[77] Chief Justice Warren then declared it a judge's duty to review police misconduct, calling it a "traditional responsibility," and charged that when misconduct is identified, "it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials."[78]

In addition to the application of the exclusionary rule to the states, one other significant legal development in the early 1960s promised to transform judicial review of police misconduct: the Supreme Court held that if one could not provide his own criminal attorney, the state was required to provide one for him.[79] With more people represented by counsel, one might think it would result in more police behavior being scrutinized.

How, then, have courts influenced police misconduct by judicial review? Considering the broad power courts have to review police misconduct, the strong judicial remedy of the exclusionary rule, and the uptick in attorneys scrutinizing police encounters, one might assume police misconduct quickly waned. But the opposite has happened. In New York City alone, mayoral commissions, the killing of numerous New Yorkers (the majority of whom were people of color), bar association reports, civil rights lawsuits, city council hearings, media reports, whistleblower officers, and mass protests have exposed the pervasive nature of police misconduct for the past forty years.[80] In 2005, Professor Steven Zeidman examined how "judges, court administrators and prosecutors—promote justice by actively and critically monitoring or overseeing the police," and concluded that "the dearth of jury verdicts, . . . [and] few determinations of the constitutionality of the police officers' probable cause to stop, search, and arrest" has resulted in "virtually unfettered, unchecked police activity and discretion. Once an officer makes an arrest, it is for all intents and purposes insulated from any meaningful challenge or review."[81] Indeed, only an estimated two percent of all national arrests are dismissed due to suppressed evidence.[82]

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[77] Terry v. Ohio, 392 U.S. 1, 9 (1968) (quoting Katz v. United States, 389 U.S. 347, 351 (1967)).

[78] *Id.* at 15.

[79] Gideon v. Wainwright, 372 U.S. 335, 345 (1963).

[80] Steven Zeidman, *Policing the Police: The Role of the Courts and the Prosecution*, 32 FORDHAM URB. L.J. 315, 320–22 (2005).

[81] *Id.* at 315, 321.

[82] Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 8 AM. BAR FOUND. RESEARCH J. 611, 611 (1983) (reporting that 2.35% of felony arrests in

In August 2013, in a 198-page decision, District Judge Shira Scheindlin invoked *Wolf* in holding the NYPD's stop and frisk policy unconstitutional and finding evidence of widespread constitutional violations: "'The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society.' Far too many people in New York City have been deprived of this basic freedom far too often."[83] Routine police violations spiked in 2011 with 685,724 stop-and-frisks—"a 600 percent increase since Raymond Kelly took over as NYPD Commissioner in 2002. Eighty-four percent of those stopped were Black or Latino, and [eighty-eight] percent of the people stopped were neither arrested nor received summonses."[84]

How is it that more than forty years after the U.S. Supreme Court extended the exclusionary rule to allow state judges to review police street encounters and public defenders started standing with each person accused of a crime, we still live in a society plagued by police misconduct? What stands in the way of routine judicial review having an impact on policing? Professor Zeidman named several obstacles, including the spike in low-level arrests and a reluctance to litigate the police conduct leading to those arrests, problem-solving courts and their institutionalized deference to police, judicial and prosecutorial tolerance for police perjury, lack of discovery disclosures, and institutional pressures to plea as early as arraignments.[85]

All of these obstacles certainly contribute to routine judicial review having an impact on policing, but when we consider that section 50-a was passed in 1976, on the heels of courts becoming empowered to routinely review police encounters, it is clear that law enforcement agencies and unions specifically intended to maintain secrecy surrounding police misconduct and thwart any efforts by the courts or defense attorneys to pierce their secrecy. Their efforts explicitly targeted defense attorneys' ability to confront police witnesses with evidence of prior misconduct in the courtroom, therefore bringing

California are "lost" because of exclusionary rule).

[83] Floyd v. City of New York, 959 F. Supp. 2d 540, 660 (S.D.N.Y. 2013) (quoting *Wolf v. Colorado*, 338 U.S. 25, 27 (1949)), *appeal dismissed*, No. 13-3524 (2d Cir. Sept. 25, 2013).

[84] Press Release, Ctr. for Constitutional Rights, Landmark Decision: Judge Rules NYPD Stop and Frisk Practices Unconstitutional, Racially Discriminatory (Aug. 12, 2013), https://ccrjustice.org/home/press-center/press-releases/landmark-decision-judge-rules-nypd-stop-and-frisk-practices#.

[85] Zeidman, *supra* note 80, at 316–18 (spike in low level arrests); *id.* at 321–22 (lack of litigation in misdemeanor cases); *id.* at 324–26 (judicial tolerance of police perjury); *id.* at 330 (pleas at arraignments); *id.* at 339–41 (problem solving courts); *id.* at 346–47 (discovery); *id.* at 348–49 (prosecutorial tolerance of police perjury).

that misconduct into the public eye.[86] These efforts are antithetical to the rights of the accused to confront witnesses, to a fair trial and due process, and also to the balance of powers between the judicial and executive branches as a result of the overwhelming power police unions and district attorneys hold in the legislative branch.

The remainder of this Article focuses on how The Legal Aid Society, by collecting and organizing the collective institutional knowledge of its clients, investigators, and lawyers, has created a searchable database in order to reinvigorate judicial review of police misconduct.

IV. THE LEGAL AID SOCIETY'S COP ACCOUNTABILITY DATABASE

Section 50-a's dual public access restrictions and heightened subpoena standard prevents defense attorneys from being able to provide fully effective assistance of counsel: to give clients informed advice about the weight of the case against them, the risks at trial, and the value of a plea offer. In an era when plea bargaining disposes of the majority of cases and it takes years before an accused will be able to confront police officers in court, it is even less likely that *Brady* disclosures will even surface.[87] Even if a client chooses to risk trial, New York's discovery laws allow prosecutors to withhold evidence and witnesses' names until the day of trial and attorneys *might* have an evening to prepare impeachment.[88] Faced with the reality that many of the officers dragging the Society's clients into bookings[89] have

[86] It is also worth noting that neither the courts nor the prosecutors have historically reported misconduct when it is discovered in a court process. For example, when an officer has been discovered to have violated an accused's rights, leading to the suppression of evidence, that officer's supervisor never learns of that outcome and is not able to take any corrective behavior. While an officer's arrest record has historically been counted towards promotion, whether the officer's arrests are thrown out in suppression hearings is not typically counted. At Seton Hall *Law Review*'s 2016 Symposium, *Policing the Police and Community*, there was some discussion of conversations with the local prosecutors' offices developing to improve these gaps, however there has not been anything publicly discussed.

[87] Michael Nasser Petegorsky, Note, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory* Brady *Evidence During Plea Bargaining*, 81 FORDHAM L. REV. 3599, 3602 (2013) ("In 2009, 97 percent of federal convictions and 94 percent of state convictions were obtained through guilty pleas . . . . However, a dispute remains regarding whether a defendant may challenge a guilty plea for the prosecution's suppression of material *exculpatory* evidence.").

[88] *See* John Schoeffel, *Criminal Discovery Reform in New York: A Proposal to Repeal C.P.L. Article 240 and to Enact a New C.P.L. 245*, LEGAL AID SOC'Y 2 (2009), https://www.legal-aid.org/media/156626/criminal_discovery_reform_in_new_york.pdf.

[89] Central bookings is the detention area where people are brought before arraignments in New York City.

histories of misconduct, lawyers at The Legal Aid Society began keeping handwritten lists of officers they knew had engaged in misconduct. This has now evolved into a much larger database project with potential public policy implications.

In 2014, The Legal Aid Society announced the Cop Accountability Project—anchored by a database for police misconduct—intended to serve its clients, its attorneys, and the community. For the past year, the database has expanded from excel spreadsheets to an SQL cloud-based relational database available to attorneys (in early 2016) on their mobile devices. Using police misconduct data, the Society has already won release for its clients at arraignments, had cases dismissed before trial, obtained adjournments in contemplation of dismissal (ACDs) and other favorable dispositions, and successfully impeached officers on the stand.[90] For example, in a felony case in which a police officer's search was apparently unconstitutional, one of the attorneys recognized the officer's name from the database. The Assistant District Attorney initially tried to offer a misdemeanor, but when confronted with the officer's long history of misconduct, dismissed the case.[91] As the database application rolls out onto the attorneys' smartphones this winter, the Society is looking forward to even more examples of how its attorneys can fight for police accountability in the courts.

Beyond being a resource for the Society's trial attorneys, the database assists The Legal Aid Society's Special Litigation Unit in identifying patterns of police behavior to support impact litigation. The database also supports the Society's law reform efforts by having the capacity to field complex questions about geographic, procedural, technical, and individual patterns of misconduct often asked about by local politicians, academics, reporters, and community organizations in researching local police misconduct.[92] It helps the Society truly fulfill its role as the public's defender; it not only fights for each individual client's rights in court, but for the communities' rights in impact litigation, in City Hall, and in the press.

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[90] Pending criminal matter on file with author. Details of the case cannot be disclosed as of the time of this writing.

[91] Pending criminal matter on file with author. Details of the case cannot be disclosed as of the time of this writing.

[92] *See, e.g.*, Steven Yoder, *Officers Who Rape: The Police Brutality Chiefs Ignore*, ALJAZEERA AM. (Jan. 19, 2016, 5:30 AM), http://america.aljazeera.com/articles/2016/1/19/sexual-violence-the-brutality-that-police-chiefs-ignore.html (reporting that The Legal Aid Society supplied news and lawsuits of sexual assault allegations against NYPD officers).

V. CONCLUSION

The Legal Aid Society's database dispossesses the governmental monopoly on police misconduct information and makes that information available to the people whose liberty depends on it. The philosophy behind the database agrees with the *Wolf* Court's observation in 1949 that the success of "internal discipline of the police" depends on the "eyes of an alert public opinion" and consistent enforcement.[93] The current crisis regarding public confidence in the police[94] and in the government's ability to manage law enforcement as police powers, especially as the power expands with modern-day technology, is exacerbated by laws like section 50-a. Police record secrecy undermines constitutional rights to confront officers but also courts' constitutional duties as a "separate power" to serve our democracy by checking executive power.

While defense attorneys will continue to push judges to take on their role to review and scrutinize the police in their courtrooms, we all must also push our legislators to strike the exemptions for police personnel records. What The Legal Aid Society is doing will not replace legislative reform, no matter how large its database grows. Defender-driven data, while filling a gap in access to records, is not the ultimate solution. Transparency in police records is a necessary step towards balancing the governing powers of the executive, deterring individual misconduct, and empowering communities to make informed assessments of local police department's accountability system and to truly participate in a democratic process.[95] Until then, the state, like its royal predecessor, is definitely not governing, but as Ta-Nehisi Coates observed, simply ruling.

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[93] *Wolf v. Colorado*, 338 U.S. 25, 31 (1949). *See also supra* note 72.

[94] Graham Kates, *The 'Crisis of Confidence' in Police-Community Relations*, CRIME REP. (Sept. 6, 2014, 7:58 AM) http://www.thecrimereport.org/news/inside-criminal-justice/2014-09-the-crisis-of-confidence-in-police-community-relatio; Eric T. Schneiderman, *Ending the Crisis of Confidence in Our Criminal Justice System*, HUFFPOST N.Y. (July 20, 2015), http://www.huffingtonpost.com/eric-t-schneiderman/ending-the-crisis-of-conf_b_7828304.html.

[95] See Conti-Cook, *supra* note 43, for a national survey of public access laws alongside how these laws have been altered by legislation restricting access to body camera footage.